AT&T

Exhibits

(cont)

Discussion: The Texas plan does in fact place substantial limitations on other remedies. It provides as follows:[62]

> *5.2. SWBT will pay Liquidated Damages to the CLEC according to the terms set forth in this Attachment.*
>
> ...
>
> *6.1. SWBT agrees that the 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 a CLEC. By incorporating these liquidated damages terms into an interconnection agreement, SWBT and CLEC agree that proof of damages from any "noncompliant" measure would be difficult to ascertain and, therefore, liquidated damages are a reasonable approximation of any contractual damage resulting from a non-compliant performance measure. SWBT and CLEC further agree that liquidated damages payable under this provision are not intended to be a penalty.*

The Texas plan is intended to limit additional recovery under causes of action that sound in contract. Such a provision is reasonable as a means of precluding double recovery, while at the same time allowing for recovery of damages that result from other theories of liability, such as those grounded in tort or anti-trust law.[63] The Colorado Special Master's Report generally would produce a similar result; i.e., suits under noncontractual theories will be allowed. That report provides that:[64]

> [T]*he PAP shall not limit alternative remedies available to CLECs under (1) Section 251/252 remedies that supplement the PAP (as opposed to those which overlap with the PAP) and are subjected to the procedural pre-filing requirement set out below; (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); (3) federal enforcement action under Section 271(d)(6); or (4) any applicable antitrust, tort, or consumer protection remedies.*

However, the pre-filing requirement cited in that report does appear to allow a CLEC to seek leave to file an action based in contract law where it can show a reasonable damage theory that would Qwest payments do not fully redress the competitive harm suffered by a CLEC. It is this provision that AT&T focuses on in supporting the approach recommended by the Colorado Special Master's Report.

Qwest's reply brief reflected a general commitment not to preclude noncontractual actions. Qwest cited the last sentence of QPAP Section 13.5, which provides that:

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[62] Exhibit S9-ATT-JFF-8, at pages 19 and 20.

[63] Note that there is an issue, which is to be addressed subsequently, that is related to but distinct from the narrow question at issue here, which is whether noncontractual causes of action are and should be prohibited by the QPAP. That separate question is the degree to which payments under the QPAP should offset any damages that may be awarded in such other, noncontractual proceedings.

[64] Exhibit S9-WCM-CEW-3.

> *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.*

Taken by itself, 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.*

These provisions cannot be interpreted clearly and consistently when read together. The second provision extends beyond prohibiting double recovery for the same damages; it precludes any alternative remedies, whether they encompass broader or different damages. It is essential that we not confuse two related, but distinct legal concepts: (a) the theory of liability, which identifies the conduct to which liability attaches, and (b) the nature of the damages that flow from such liability. A tort remedy, for example, might include some of the same damages recoverable in a contract action, while allowing additional types of recovery. 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. We should therefore seek here language that does 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.

Anti-trust law provides a useful example of the application of these three principles. The QPAP should allow anti-trust actions. If an anti-trust action produces a base damage award of $200,000 for direct harm for contract breach, and a tripling of that amount, the base $200,000 should be considered as duplicative of the QPAP payments, while the $400,000 adder should not.

To make the QPAP conform to these principles, all the quoted portions of Section 13.6, following the phrase "in its interconnection agreement with Qwest" should be stricken.

Qwest may replace them 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. Those limits are the bar on other contractual remedies and on double recovery (although the propriety of the latter remains to be discussed).

The Colorado Special Master's Report, as AT&T interprets it, would produce a substantially imbalanced result. That interpretation would allow a CLEC added compensation under contract theories where it could prove that its harm exceeded its payments. It would, not, however, allow Qwest to take back any of the PAP payments, even where it could show that they exceeded CLEC harm. It would be one thing to delete the Tier 1 payments altogether, requiring CLECs to show harm and to demonstrate its amount. This approach could be accompanied by moving the Tier 1 accelerated payments to Tier 2. However, it is not reasonable to allow CLECs to keep Tier 1 base payments and Tier 1 accelerated payments when it suited them, but to seek more when it did not.

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.

We are similarly not persuaded of the reasonableness of the ELI/Time Warner/XO Utah recommendation that CLECs retain the right to choose to take other remedies even after electing to take advantage of QPAP payments. It is reasonable to require CLECs to choose to take all or none of the QPAP remedies. Otherwise, we would invite debate about which specific QPAP payment elements correspond to those otherwise available remedies. The QPAP represents a comprehensive payment structure for compensating CLECs for harm. They have the right to elect all of it or none of it. It would not be reasonable to allow them to select those portions of it that are on balance more favorable than other remedies, while choosing to take other remedies in cases where they are more favorable. Qwest has no right to do so; a proper sense of balance with respect to liquidated damages should require the same of CLECs.

4. Indemnity for CLEC Payments Under State Service Quality Standards

AT&T proposed that Qwest be required to compensate CLECs for any payments that CLECs must make for failing to meet state or federal service quality rules, provided that Qwest wholesale service deficiencies cause the CLEC failures.[65] ELI/Time Warner/XO Utah noted that the issue of Qwest indemnity for CLEC payments for failing to meet state service quality standards was addressed earlier in these workshops. ELI/Time Warner/XO Utah believed that this provision, which could involve dispute and litigation, should therefore be addressed elsewhere in the SGAT, not in the QPAP. ELI/Time Warner/XO Utah sought to assure that the QPAP not preclude such indemnification.[66]

Qwest objected to an added requirement that it compensate CLECs for assessments that state commissions make against CLECs for violating state service quality standards. Qwest noted that the QPAP's liquidated damages provision contemplates full payment

[65] AT&T Initial PAP Brief at page 18.
[66] ELI/Time Warner/XO Utah Reply PAP Brief at page 11.

for harm arising from the same performance; therefore, there should not be any added payment for this element of damages. Moreover, Qwest observed, such a provision would engender litigation about whether Qwest's performance did or did not lead to the failure of a CLEC to meet retail standards.

Discussion: The merits of requiring such indemnification were fully addressed in prior workshops.[67] 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.

3. Offset Provision (Section 13.7)

Qwest changed Section 13.7 to respond to concerns about its breadth. After the change, QPAP Section 13.7 provides that:[68]

> *13.7 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 objected to this section as revised on several grounds:[69]

- That no FCC order has allowed a BOC a unilateral right to make an offset and that the right to an offset is the province of the finder of fact under common law
- That there was confusion about the intent of the language about "analogous performance."

With respect to the question of who should determine an offset entitlement, Qwest was concerned about continuing to allow a compensating reduction in PAP payments where an outside decision maker; e.g., a court, would not permit QPAP payments to offset any damages it might award. With respect to the question of analogous performance, Qwest explained that the intent of this section was to preclude the construction of the term "performance" as meaning a "standard" rather than an "activity." Qwest added the word "analogous" to make it clear that Qwest was entitled to an offset where the same Qwest wholesale service or activity, "even though it may be measured or accounted for in different manners," produced compensatory damage awards.[70]

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[67] See the *Report on Checklist Items 1, 11, 13, and 14*, issued on May 15, 2001.

[68] See Attachment I to *Qwest Corporation's Responses to Oral Questions by Mr. Antonuk at the August 14-17, 2001 Hearings*, which changed this and a number of other SGAT sections that were included in the original QPAP filing.

[69] AT&T Initial PAP Brief at pages 4 and 5.

[70] Qwest Initial PAP Brief at pages 68 and 69.

WorldCom did not object to precluding double recovery, but argued that the term "analogous performance" was too ambiguous, undefined, and likely to cause litigation, citing the fact that the Qwest witness presented to explain this provision could not define what the term meant. WorldCom asked that the phrase be stricken.[71]

ELI/Time Warner/XO Utah argued similarly to AT&T that the awarder of the damages in question, whether or not it were a commission with responsibility for administering the SGAT or interconnection agreement involved, should decide the propriety of an offset and that the offset should be only for the same performance, not analogous performance.[72] Qwest responded that the CLEC provision limiting Qwest's offset rights to an argument before the trier of fact would foment litigation.[73]

AT&T proposed the adoption of offset language from the Texas plan.[74] ELI/Time Warner/XO Utah said that the term analogous should be eliminated, and that Qwest should not have finally the right unilaterally to determine offset rights, but should be required to seek any requested offset from the "trier of fact."[75] Covad argued generally against the need for and the propriety of including an offset provision in the QPAP.[76]

Discussion:

(a) Unilateral Right to Offset: 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 issue is more accurately described as one of determining where any dispute about offsets will be resolved. AT&T would prefer that it be resolved by the authority that assesses "damages" that are similar to or parallel with payments due under the QPAP. Sometimes that will be a court and sometimes it will be a utility regulatory commission. The QPAP's dispute resolution provisions should give adequate opportunity to challenge a decision by Qwest to reduce its QPAP payments under the offset language. Adequate interest provisions would address any time-value-of-money issues associated with delays in payments while disputes get resolved.

There is little practical difference, other than who has the money while the dispute is being heard, in the case where the same commission that assessed the damages in question later would hear a dispute about the applicability of offset rights. In the first instance, that commission likely would already have considered the question of offset. The material issue arises in cases where an outside authority, such as a court, makes the damage assessment in question. In theses cases there is a meaningful difference in the contrasting approaches. 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 QPAP

[71] WorldCom Initial PAP Brief at page 18.
[72] ELI/Time Warner/XO Utah Initial PAP Brief at pages 23 and 24 and ELI/Time Warner/XO Utah Reply PAP Brief at page 11.
[73] Qwest Reply PAP Brief at page 46.
[74] AT&T Reply PAP Brief at page 25.
[75] ELI/Time Warner/XO Utah Reply PAP Brief at page 11.
[76] Covad Initial PAP Brief at page 42.

would make that decision. There can be no doubt that the decision to be made can be best made by the regulatory commission.

Qwest's language would permit it the advantage of the time value of money while any dispute is resolved. The AT&T approach would transfer that advantage to the CLEC. This issue is best resolved by assuring that any dispute resolution include provision, where deemed appropriate by the commission, for interest on awards.

(b) Same or Analogous Performance: Qwest's revised language is generally appropriate. It does limit the offset provisions to the portion of damages that represent compensatory recovery by CLECs. Tier 1 payments are already designed to provide such recovery; therefore, it is proper to preclude double recovery of damages resulting from the same incident of activity. However, Qwest's language remains 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, as we discussed under the subject *Preclusion of Other CLEC Remedies* earlier in this report, should not be precluded. Not precluding such awards in 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.

(c) Injury to Persons or Physical Property: There remains one other technical problem with the Qwest language. 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.[77] In order to preserve the effect of those sections, QPAP Section 13.7 should contain a provision stating that:

> *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.*

6. Exclusions (Section 13.3)

QPAP Section 13.3 contains a list of circumstances that excuse Qwest from Tier 1 and Tier 2 payments in the event that certain listed events occur. Qwest said that these QPAP exclusions are similar to those of the Texas PAP, under which SBC has invoked a payment excuse only once to date. Observing that the QPAP requires it to prove the

[77] *Report on Group 5 Issues: General Terms & Conditions, Section 272 and Track A*, issued on September 21, 2001.

entitlement to invoke exclusions, Qwest generally considered the CLEC-proposed changes to this section inappropriate[78]

(a) CLEC Bad Faith: AT&T wanted to strike the exclusion for bad-faith CLEC acts or omissions on the grounds that it was ambiguous.[79] ELI/Time Warner/XO Utah wanted to strike it for being unnecessary, because good faith by all parties is an implicit requirement of commercial relationships such as this one.[80] Qwest argued that this provision was appropriate to protect Qwest against actions that have the "foreseeable effect of causing Qwest to miss a performance standard."[81] ELI/Time Warner/XO Utah countered that neither a CLEC's ability to foresee Qwest's inability to respond nor the fact that a CLEC could somehow have reduced Qwest's burden in responding to CLEC requests should be determinative of whether the CLEC had exercised bad faith. Otherwise, such a standard could be used to exclude Qwest from its clear obligation to perform reasonably. ELI/Time Warner/XO Utah argued that bad faith, should it remain an exclusion, should be limited to cases where CLECs deliberately manipulated their orders with intent to cause Qwest to miss performance standards.[82]

(b) Duplicative Force Majeure Provisions: ELI/Time Warner/XO Utah also said that SGAT Section 5.7 already deals with equipment failure as a force majeure event. Qwest agreed to make changes to that section in our earlier workshops. Therefore, these CLECs argued, the QPAP should simply only refer to Section 15.7; it should not set forth a broader exclusion, which would weaken the standard set forth in the SGAT.[83] WorldCom also supported the use of the force majeure language from SGAT Section 5.7.[84] 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 provision.[85] WorldCom proposed to use the Colorado Special Master's Report language for third-party and vendor exclusions.[86]

Qwest said that a separate QPAP force majeure provision was appropriate, in order to eliminate the need for extensive cross-referencing to other SGAT provisions.[87]

(c) Resolving Disputes Over Force Majeure Events: AT&T noted that the QPAP was silent about who would determine whether Qwest had met its burden to show that non-performance under the QPAP resulted from an allowable exclusion. Qwest did say in testimony that the public service commission should decide any disputes about causation. AT&T requested the inclusion of a specific reference to commission authority to resolve such disputes.[88] SGAT Section 5.7 does not contain such a reference. WorldCom proposed detailed language to address the meeting of Qwest's burden of proof.[89]

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[78] Qwest Initial PAP Brief at page 73.
[79] AT&T Initial PAP Brief at page 6.
[80] ELI/Time Warner/XO Utah Initial PAP Brief at page 22.
[81] Qwest Initial PAP Brief at page 75.
[82] ELI/Time Warner/XO Utah Reply PAP Brief at page 13.
[83] ELI/Time Warner/XO Utah Reply PAP Brief at page 14.
[84] WorldCom Initial PAP Brief at page 16.
[85] AT&T Initial PAP Brief at page 6.
[86] WorldCom Initial PAP Brief at page 17.
[87] Qwest Initial PAP Brief at page 74.
[88] AT&T Initial PAP Brief at page 6.
[89] WorldCom Initial PAP Brief at page 7.

WorldCom also proposed that the QPAP require contemporaneous notice of a Qwest force majeure claim -- not merely a notice (which could come long after the fact) with the applicable bill credit statement.[90]

(d) Nexus Between Force Majeure Events and Qwest Performance: AT&T would add language explicitly requiring the demonstration of a nexus between an allowable force majeure event and Qwest performance, requiring further that the event render performance by Qwest "impossible." AT&T would also include language limiting any time extension on Qwest performance to the duration of the force majeure event.[91] Z-Tel proposed that any force majeure condition related to equipment failures be limited to a 72 hour duration.[92] Qwest pointed out that QPAP Section 13.3 requires that the failure of wholesale performance to be "the result of" the force majeure event.[93]

(e) Applicability of Force Majeure to Parity Measures: AT&T argued that force majeure should not be an excuse for failing to meet parity measures, because Qwest should still be able to meet the standard, which is that CLEC service be no worse. AT&T cited the Colorado Special Master's Report as supporting this conclusion. WorldCom made a similar argument.[94] Qwest said that a force majeure exclusion was appropriate for parity measures, because the extensive geographical range of Qwest's operations could cause an external event to have differential impacts on Qwest customers and CLEC customers.[95]

(f) CLEC Forecast Exclusion: WorldCom and Covad would limit the exclusion for CLEC failures to forecast to failures to provide those forecasts required by the SGAT.[96] Qwest would agree to language limiting the triggering forecasts to those "reasonably required under the SGAT or state rules to provide services or facilities."

Discussion:

(a) CLEC Bad Faith: That good faith by all parties is to be generally presumed in contractual undertakings cannot be disputed. However, this general principle may not serve to address the specific concerns that are at issue here. There is merit in an explication of the circumstances in which CLEC efforts (not that we in any measure predict them) to manipulate performance results will be to no avail. The stakes are high for all the participants in the marketplace that Congress has sought to induce; it is neither surprising nor inappropriate that the measure of those stakes in the case of this QPAP are in the several hundreds of millions of dollars annually.

The QPAP should therefore not be criticized for specifying when Qwest may be relieved of payment responsibility by virtue of such theoretically possible manipulative conduct. We should turn therefore, not to the arguments about presuming good faith, but to those that seek to define more precisely what it means in this context. ELI/Time Warner/XO Utah have properly alerted us to the fact that a CLEC should not be penalized for conducting its

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[90] WorldCom Initial PAP Brief at page 16.
[91] AT&T Initial PAP Brief at page 7.
[92] Z-Tel Initial PAP Brief at page 33.
[93] Qwest Initial PAP Brief at page75
[94] AT&T Initial PAP Brief at page 7; WorldCom Initial PAP Brief at page 16.
[95] Qwest Initial PAP Brief at page 74.
[96] WorldCom Initial PAP Brief at page 18; Covad Initial PAP Brief at page 55.

business in an otherwise reasonable way, merely because Qwest might be incapable of operating at an acceptable performance baseline, solely because that CLEC knows that Qwest suffers such an inexcusable weakness.

Having described its intent in designing the QPAP section in question, we are now forewarned about how Qwest may intend to apply it, and we are 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. Therefore, we find it necessary to state an agreement with the position of ELI/Time Warner/XO Utah that:

> *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.*

The insertion of such a provision as a new subsection following QPAP section 13.3 is therefore appropriate to assure that there is not a material dilution of the operation of the QPAP as a meaningful and significant incentive to Qwest.

(b) Duplicative Force Majeure Provisions: 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.

The more material issue is whether something about payments for non-compliant service calls for force majeure provisions that differ form those SGAT provisions that define what the underlying service obligations are in the first place. Qwest did not provide sound support for making a distinction, nor is any self-evident to us. To the contrary, if the SGAT creates an expectation of service subject to specific qualifications, there should be a strong presumption that the economic consequences for failing to meet the expectation should rest upon the same exclusions. Otherwise, we would face a question that represents an imponderable one on the record before us. That question, quite simply, is whether the performance standard or the consequence standard is the one that is too high.

(c) Resolving Disputes Over Force Majeure Events: It is appropriate to clarify the entity to whom Qwest must make and defend, against dispute if necessary, its determination that force majeure events have occurred. In examining Qwest's proposed new dispute resolution language, however,[97] we find that Qwest has in fact identified the resolver of disputes, which is the public service commission of each state. We consider that approach appropriate, with other changes that are not material here (see the *Dispute Resolution* section of this report). However, 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

[97] See the proposed QPAP Section 18.0 language proposed at page 79 of Qwest's Initial PAP Brief.

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.

(d) Nexus Between Force Majeure Events and Qwest Performance: Whether it be QPAP Section 13.3 or SGAT Section 5.7, there is already a clear requirement that a force majeure event be the cause of a failure of Qwest performance. Moreover, it is not proper to adopt the extremely high standard of impossibility of performance. It is likely in many instances that 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 and efforts to mitigate, not to accomplish the extraordinary, whatever the cost. We construe the existing language as providing so already. 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.

There is merit in the AT&T language specifying the method for calculating the impact of a force majeure event on interval measures. It should be added to clarify the method for calculating QPAP payments when force majeure event should have less than a completely excusing impact.

(e) Applicability of Force Majeure to Parity Measures: 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. We must nevertheless ask ourselves why it should be presumed that the differential effect must always work in one direction. We would answer that 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 answer in hand, we would then 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.

The Colorado Special Master, as he did in so many other cases as part of his fine efforts for the commission there, got the solution to this issue just right. Parity, although in a somewhat different sense, requires that parity measures not be subject to force majeure payment exclusions.

(f) CLEC Forecast Exclusion: Qwest's concession puts most of the problem behind us, but the QPAP continues to reach a scope that appears inappropriately wide, given the need for the document to operate reasonably free of litigation risk. Particularly troublesome is the provision about forecasts under state rules. Those rules could change over time and they 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 to be required by states in the future even constitutes a "forecast" as the term is contemplated by the SGAT and the QPAP. 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 the other material concern about Qwest's offer. By definition, the SGAT cannot be read as requiring 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 yet 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. It simply will not do to introduce a troublingly undefined and shadowy provision that might do indirectly what we seek to prohibit directly.

7. SGAT Limitation of Liability to Total Amounts Charged to CLECs

ELI/Time Warner/XO Utah noted that SGAT Section 5.8.1 limits Qwest and CLEC total liability (except for willful misconduct) to the total amount charged under the SGAT for the applicable year. As ELI/Time Warner/XO Utah note, this SGAT provision expressly does not limit QPAP payments; however, nothing provides that QPAP payments do not limit the other damages, to which this section applies.[98]

Discussion: Now that the QPAP is before these workshops, we can conclude 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.*

D. Incentive to Perform

1. Tier 2 Payment Use

AT&T urged the elimination of the QPAP Section 7.5 requirement that Tier 2 payments be limited to use for purposes that relate to the Qwest service territory.[99]

Discussion: The proper construction of the Qwest language is that the restriction applies only to payment amounts to be administered by the commission. Should the commission administer those funds the restriction is generally appropriate, given the statutory role that commissions typically have. However, even in that case, it should not be presumed that commission powers are so limited. There should also be no restriction on payments

[98] ELI/Time Warner/XO Utah Initial PAP Brief at page 25.
[99] AT&T Initial PAP Brief at page 10.

made to the general fund. Therefore, QPAP Section 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.*

While not addressed by the participants, the Colorado Special Master's Report (at Part VII) recommended a novel method for funding what may be significant administrative and dispute resolution responsibilities for the states that will receive such funds. As 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, the QPAP, federal law, and FCC regulations impose upon them. 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.

The QPAP should provide that one-fifth of the escalation portion of 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 made them, on a pro-rata basis, not less than every two years. Qwest should also be required to make an advance payment against future Tier 2 obligations in an amount reasonably determined by the participating 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 there, 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.

2. Three Month Trigger for Tier 2 Payments

The QPAP requirement that non-compliance extend to three consecutive months before Tier 2 payments would be triggered concerned a number of participants. Qwest argued that there were sound reasons why Tier 2 payments should, unlike Tier 1 payments, not begin at the first month. Qwest said that the Tier 2 payments were not compensatory to CLECs, but were designed to add to Qwest's incentives to perform. Given the lag involved in identifying continuing problems and in taking steps to meet them, Qwest

considered it appropriate to allow a three-month correction period, which it said is identical to how Tier 2 payments work in the Texas, Oklahoma, and Kansas plans.[100]

AT&T argued that payments 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.[101] The New Mexico Advocacy Staff argued that the payment lag proposed by Qwest would serve to postpone the need for Qwest to begin to address performance problems associated with Tier 2 measures.[102] AT&T said that Qwest has more than its regulatory reporting systems to advise it of any problems that it may be having in meeting obligations to CLECs. Qwest's own internal information sources, according to AT&T, should highlight areas requiring management attention earlier than three months after the fact.[103]

Discussion: 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. Escalation should then take place as provided in the QPAP, while assuring that payments do not drop back to zero until there is reached a point where there has been no occasion in the preceding 12 months during which non-compliant Tier 2 performance has occurred in two of three consecutive months.

There remains the question of whether the performance inducement for Tier 2 payments that have Tier 1 counterparts is sufficient, given the three-consecutive-month requirement for Tier 2. Qwest's principal defense of the QPAP provision at issue was two-fold: (a) the need for time to identify and resolve long-term problems, and (b) consistency with other plans that the FCC has reviewed. The time-lag issue would be resolved by the adoption of the recommended approach for triggering Tier 2 payments for measures without a Tier 1 payment counterpart. However, it does appear that the Texas plan adopts the same three-consecutive-month trigger for Tier 2 payments. Nevertheless, given the emphasis placed on Tier 2 payments as an inducement, it remains difficult to place much faith in their contribution to a performance incentive plan when they can be avoided (even under measures where there are Tier 1 payments) by concerted efforts to bring performance to minimum acceptable levels only four months each year. Such a program appears more likely to lead to frequent underperformance than it does to encouraging routine compliance. In the case of Tier 2 payments that have Tier 1 counterparts, therefore, the QPAP should trigger Tier 2 payments in the second consecutive month of non-performance, provided that the same two-out-of-three month condition (recommended immediately above for Tier 2 measures that have no Tier 1 counterpart) is met.

[100] Qwest Initial PAP Brief at page 25.
[101] AT&T Initial PAP Brief at page 11.
[102] New Mexico Advocacy Staff Initial PAP Brief at page 16.
[103] AT&T Reply PAP Brief at page 14.

3. Limiting Escalation to 6 Months

Qwest supported the QPAP's limitation of payment escalation to six months on a number of grounds:[104]

- There was no evidence that such a limit would fail to provide Qwest sufficient incentive to meet performance standards
- Continuing escalation would substantially overcompensate CLECs (the Tier 1 and Tier 2 payments combined were already equivalent to giving CLECs free wholesale service for between 7 and 15 years, Qwest said)
- Such overcompensation would remove CLEC incentives to invest in their own facilities.

AT&T, ELI/Time Warner/XO Utah, WorldCom, Z-Tel, Covad, and the New Mexico Advocacy staff were among those who argued that escalation should continue after six months, rising as necessary to succeed ultimately in inducing Qwest to perform up to standards.[105] WorldCom said that the fact that Qwest even now has been missing some standards for more than 6 months shows that the threat of 6-month escalation is not a sufficient inducement to perform adequately.[106] Z-Tel said that there is no doubt in concluding that, where performance remains below standard for six consecutive months, the payment levels were insufficient to induce compliance by Qwest. Therefore, according to Z-Tel, it follows that there should be continued escalation until performance comes up to standards. Z-Tel also suggests that there is systematic discrimination being shown if such performance continues past six months.[107]

Discussion: First, it is not so clear that continuation of poor performance past six months means that there was a methodical calculation by Qwest that the continuing costs of compliance exceeded the continuing costs of violation. It must be recalled that many of the measures at issue are not even parity measures; they are benchmark measures. There is no evidence in this record that would demonstrate with certainty that those levels of performance can be met and sustained at any cost that is within the realm of economic reason. There is certainly a common belief and expectation that they can; otherwise it is difficult to see why Qwest would have agreed to them. However, they generally relate to the provision of services about which there was relatively little experience when the measures were adopted. Thus, the correlation between long-term non-compliance and insufficiency of inducements is not so self-evidently strong as some have argued. 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. Finally, calculating comparisons of the marginal

[104] Qwest Initial PAP Brief at page 21.
[105] AT&T Initial PAP Brief at page 26; ELI/Time Warner/XO Utah Initial PAP Brief at page 13; Z-Tel Initial PAP Brief at page 18; Covad Initial PAP Brief at page 32; WorldCom Initial PAP Brief at page 7.
[106] WorldCom Initial PAP Brief at page 7.
[107] Z-Tel Initial PAP Brief at page 10.

costs of compliance versus non-compliance are not by a long shot the only reason why problems can persist for extended periods of time.

Yet, the logic of those who would extend escalation beyond six months depends profoundly upon the certainty of propositions like these, which are open to some question. At this point, it would be speculative to conclude that insufficiently increasing payments, as opposed to other factors, such as: (a) a less than optimally crafted standard, (b) a series of extenuating external circumstances, (c) buyer efforts to induce failure, (d) management's performance decisions and actions (that may have been soundly believed sufficient to improve performance, but proven inadequate only as time passed), or even other reasons, caused or contributed to a failure to provide compliant performance. The correlation that underlies CLEC requests to continue escalation is not sufficiently reliable to ground continuous payment escalation upon it.

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. This conclusion is all the more appropriate in light of three other factors:

- There are provisions for root cause analyses of continuing, substantial problems; such analyses more directly get at the issue of cause and effect than does the presumption about Qwest motive and intent that underlie the CLEC proposal
- There exists the option of ending 271 authorization where that measure is shown to be appropriate to the circumstances
- There exists the ability under non-271 sources of regulatory authority to examine the causes and consequences of structural failures or weaknesses in the facilities, management, systems, processes, activities, or resources by which regulated providers of utility services, such as Qwest, satisfy their service obligations.

4. Splitting Tier 2 Payments between CLECs and the States

Qwest said that Covad's proposal for such a split was based on a misreading of the Colorado Special Master's Report; the report's splitting provisions related to Tier 1.Y payments, not to Tier 2 payments. Colorado's Tier 1.Y corresponds to the portion of QPAP Tier 1 payments that escalate for consecutive months of non-compliant performance. As Qwest noted, the escalation portions of Tier 1 payments already go to CLECs under the QPAP here.[108]

Discussion: 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 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.

[108] Qwest Initial PAP Brief at page 28.

V. Clearly Articulated and Pre-Determined Measures

A. Measure Selection Process

The Performance Indicator Definitions (PID) document setting forth wholesale performance measures was developed through an extended collaborative process involving Qwest, CLECs, and state commission personnel under the ROC Operational Support Systems (OSS) Process. The PID's performance measures encompass the following interactions between Qwest and CLECs in the context of resale, transport, interconnection, unbundled loops, and other wholesale services:[109]

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

Qwest observed that the PEPP collaborative included extensive negotiations to determine which PID performance measures should be included in the QPAP. Qwest said that, after the completion of that PEPP collaborative negotiation process, it agreed to add two additional diagnostic measures: GA-7(Timely [Gateway] Outage Resolution) and PO-16 (Release Notifications). Qwest also agreed to include a number of other measures not addressed at the PEPP collaborative: OP-17 (LNP Disconnect Timeliness), MR-11 (LNP Trouble Reports Cleared within 24 Hours), and MR-12 (LNP Trouble Reports – Mean Time to Restore).[110]

Discussion: No participant disputed that the PEPP collaborative sought to achieve a broad set of measures to include in the QPAP's payment structure. There was also not, per se, any challenge to the breadth or comprehensiveness of the measures that were agreed to during that collaborative. The issue in dispute essentially was about whether substantial grounds existed for including additional measures. The next sections of this report discuss the merits of adding to what we conclude is generally a well articulated set of pre-determined measures and standards that span the range of carrier-to-carrier performance.

[109] Qwest Initial PAP Brief at page 3.
[110] Qwest Initial PAP Brief at page 4.

B. Adding Measures to the Payment Structure

1. Requiring Payments for Canceled Orders

ELI/Time Warner/XO Utah 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.[111]

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.[112]

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.[113]

Discussion: The QPAP should hold Qwest responsible for the consequences of its failures to perform. There is without question 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. However, 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 (the weaker the correlation, the more comforted we can be that payments made by Qwest already under the QPAP are sufficient).

These conditions have not been shown to exist here. CLECs presented no evidence to demonstrate the strength of the relationship between Qwest performance and canceled orders. In fact, they have not even presented enough evidence to demonstrate that canceled orders, whatever the reasons, are material in number. In any event, 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.

In the absence of substantial evidence, 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

[111] ELI/Time Warner/XO Utah Initial PAP Brief at page 5.
[112] Covad Initial PAP Brief at page 53.
[113] Qwest Initial PAP Brief at page 51.

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

Covad makes a sound argument about the special circumstances regarding orders "held" for lack of facilities. However, 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, Covad should address by presenting its proposal in the forum established for considering new and revised performance measures.

2. Requiring Payments for "Diagnostic" UNEs

Several CLECs noted the importance of EELs to CLECs. They observed 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 to EELs at present; the performance measures related to them are diagnostic in nature.[114] Qwest's brief 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.[115]

Line sharing and sub-loops are also currently excluded from the QPAP payment structure, because the performance measures for them are diagnostic in nature.[116] 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.[117]

Discussion: Our prior workshops have made clear the importance of EELs to CLECs. Those workshops also demonstrated that there was not, prior to those workshops, an extensive experience base with EELs until recently. The ROC OSS collaborative properly determined that EELs should be measured on a diagnostic basis for some period of time. As EEL ordering activity increases, this measure should be subjected as soon as practicable to a measurement base that will allow for its prompt addition to the payment structure of the QPAP.

As is the case for EELs, 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. Clearly, they should be included in the QPAP payment structure as soon as is practicable.

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[114] ELI/Time Warner/XO Utah Initial PAP Brief at page 10; Covad Initial PAP Brief at page 18.
[115] Qwest Reply PAP Brief at page 34.
[116] Covad Initial PAP Brief at page 18.
[117] Qwest Reply PAP Brief at page 23.

3. Cooperative Testing

Covad noted 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. Covad recommended a cooperative testing performance measure as the most effective means of minimizing trouble reports for the xDSL UNE loops that it takes from Qwest. Covad cited a decision of the Texas commission requiring that orders not be marked as complete when an xDSL loop is not provisioned correctly at the outset.[118]

Qwest said that Covad failed to raise the cooperative testing issue at the PEPP collaborative; neither was it raised when the ROC OSS collaborative designed the performance measures set forth in the PID. Given the failure of Covad to offer any substantial reason for adding it now, Qwest argued that it should be rejected.[119]

Discussion: It should not be possible to meet a service order's requirements by supplying a defective or non-conforming UNE. While such events will happen occasionally in a large-volume operation, we should not encourage it as a means of meeting installation-interval measures. Moreover, 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. What Covad has not demonstrated is the 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. Nor does the record 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.

While it stands to reason that it is better to prevent and detect problems at the earliest possible point, the failure of Covad to raise this issue earlier means that we do not have a sound basis for concluding that Covad's approach, after all other parties have been heard from, would be preferable. 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.

4. Adding PO-15 D to Address Due Date Changes

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

[118] Covad Initial PAP Brief at page 51.
[119] Qwest Initial PAP Brief at page 52.

initiated.[120] Qwest noted that this performance measure is diagnostic in nature, and that neither Covad nor any other party 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.

Discussion: Covad offered no recommendation for what the standard should be; this lack is critical, because a diagnostic measure cannot provide a payment calculation basis. We can offer no solution to the Covad concern on this record.

5. Including PO-1C Preorder Inquiry Timeouts in Tier 2

AT&T commented 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 underway, thus requiring CLEC representatives to initiate it again. AT&T testified that some time-outs occurred after about 2.5 to 3 minutes of waiting.[121]

Qwest observed that AT&T considered the failure to raise this issue as an oversight. Qwest found that position hard to understand, because the PO-1A and B payment structure is based on intervals, while PO-1C is a percent measurement, which is structurally very different and therefore not compatible for payment purposes.

Discussion: The QPAP already provides for compensation for measures PO-1A and PO-1B, which measure response times.[122] There was a logical basis for excluding this percent measurement from the duration measurements that were included in Tier 1. We believe that the QPAP's treatment of the overall measurement (which includes 1A, 1B, and 1C) reflects a proper treatment of the issue of response times for the present. We also believe 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.

Given all the circumstances, we think it is reasonable to construe the PAP Collaborative agreement as intending not to include 1C separately; moreover, we find no reason to disturb that agreement as we have interpreted it. However, 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. This caution is offered in recognition that a high number of timeout cases (which have relatively much longer durations) could make response times under 1A and 1B look artificially good.

6. Adding Change Management Measures

Covad wanted to add change management performance measures to the QPAP.[123] Qwest had already agreed that it would add two change management measures, GA-7 (Timely Outage Resolution) and PO-16 (Release Notifications). Those measures are now

[120] Covad Initial PAP Brief at page 54.
[121] AT&T Initial PAP Brief at page 11.
[122] Exhibit S9-QWE-MGW-3.
[123] Covad Initial PAP Brief at page 49.

diagnostic, but would be included as "High" Tier 2 measurements after the ROC OSS collaborative establishes benchmark measures for them. [124]

Discussion: 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.

7. Adding a Software Release Quality Measure

WorldCom argued that the propriety of adding a proposed software Release Quality Measure should be reviewed at the QPAP's first 6-month review.[125] Qwest objected to the addition of a software-release quality measurement (GA-7), which the ROC OSS Steering Committee has recently rejected adding to the PID. Qwest also said that its testimony showed that the measure duplicated others, that it would tend to discourage ILECs from introducing software updates, and that such a measure is not included in any other BOC PAPs.[126]

Discussion: 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 WorldCom'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. Should the ROC Steering Committee's recent decision remain binding and apt at that time, its reconfirmation will end the matter without material inconvenience or harm.

8. Adding a Test Bed Measurement

WorldCom 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.[127] Qwest said that it is premature to discuss WorldCom's suggested test bed measurement because: [128]

- 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 presented evidence that the proposed measure is being "vigorously disputed," and that Qwest's current proposal under discussion at the ROC OSS collaborative specifically provided that the measure would remain diagnostic until the 6-month review. Therefore, Qwest took exception to any suggestion that this measure could be considered to be close to resolution.

Discussion: We have 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,

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[124] Qwest Reply PAP Brief at page 31.
[125] WorldCom Initial PAP Brief at page 10.
[126] Qwest Reply PAP Brief at page 31.
[127] WorldCom Initial PAP Brief at page 11.
[128] Qwest Initial PAP Brief at page 50.

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.

9. Adding a Missing-Status-Notice Measure

WorldCom proposed adding to the QPAP payment structure a performance measure based on the missing status notice measure adopted in New York.[129] Qwest noted that neither WorldCom nor any other CLEC proposed this measure for inclusion during the PEPP collaborative. Moreover, the measure exists in the PID only in diagnostic form.[130] 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.[131]

Discussion: No 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.

C. Aggregating the PO-1 A and PO-1B Performance Measures

Qwest said that 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 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 intended was to aggregate each of the PO-1A measurements with their PO-1B counterparts, thus producing seven compensable QPAP measures.

Qwest said that its view is supported by agreement on the Qwest approach in Arizona, which it said came without objection by any participating CLEC there, and the inclusion of that same approach in the Colorado Special Master's Final Report, to which AT&T also did not object. Qwest also said that the agreement, which provides for escalation in payments as response times increase, is reasonable for these kinds of measurements.[132]

AT&T said that Qwest's interpretation of the agreement would allow Qwest to mask poor performance in certain transaction types.[133]

Discussion: 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:

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[129] WorldCom Initial PAP Brief at page 11.
[130] Qwest Initial PAP Brief at page 51.
[131] Qwest Reply PAP Brief at page 31.
[132] Qwest Initial PAP Brief at page 45.
[133] AT&T Reply PAP Brief at page 21.

Qwest's reply brief stated that no CLEC had taken issue with the proportionality analysis set forth by its witness in Exhibit S9-QWE-CTE-5, Slides 11 and 13.[137]

AT&T said that Qwest's response to AT&T's 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 PAP.

Discussion: 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. 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.

One source of disagreement is the AT&T belief that Qwest overcompensated. However, a number of CLECs go further. They at least implicitly argue that there is no reason not to increase the net rate of progression toward the cap, but we will defer resolution of that issue until later, in the *6-Month Plan Review Limitations* section of this report. As to the overcompensation issue, AT&T, which requested the change in the first place, failed to propose any better alternative. Therefore, given its opposition to what Qwest did to meet AT&T's 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 or the weighting decreases that Qwest offered to address AT&T's concern.

The QPAP before Qwest agreed to change certain weights was reasonable. It was also reasonable for Qwest to ask, in return for changing some payment amounts upward, for compensating reductions in others. 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. Qwest's proportionality analysis buttresses this conclusion. As a principal supporter of changed weights, AT&T found Qwest's change in to be imbalanced. No other reasonable proposal being made or accepted, the weights should return to those proposed in the QPAP that Qwest initially filed in these proceedings.

2. Eliminating the Low Weighting

ELI/Time Warner/XO Utah argued that no measure should have a low weight, all should be at least a medium, and some should move from medium to high. Covad also said that no measures should be considered low. Z-Tel suggested averaging the low and medium payment amounts to reduce the weights from three classes to two classes.[138]

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[137] Qwest Reply PAP Brief at page 24.

[138] ELI/Time Warner/XO Utah Initial PAP Brief at page 18, Covad Initial PAP Brief at page 34, Z-Tel Initial PAP Brief at page 34.

Qwest argued that CLECs presented no evidence to support a change in measurement weighting for PAP purposes. Qwest said that these changes would not improve the PAP, but would merely provide increased payments to CLECs.[139]

Discussion: 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. Finally, some of them suffer from the same balance problem that we addressed in the immediately preceding section of this report. All CLEC's might agree on increasing the payments associated with all measures. But upon imposing what we feel is a proper balancing requirement, that consensus would likely disappear as parties began to focus on making their particular needs "winners" in the process, while seeking not to suffer any "losers" of importance to their operations. We believe that the three categories of weights that came out of the PEPP collaborative process should remain.

3. LIS Trunks Weighting

AT&T said that LIS trunks should be considered as particularly high value services, which 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.[140] ELI/Time Warner/XO also considered LIS Trunks to be of high value.[141]

Qwest said 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, Qwest argued, the trunk blocking measure, N-1, would already provide payments in cases where Qwest cannot provision incremental trunks on time.[142]

Discussion: From a broad perspective, 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 notes 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. In fact, a review of the CLEC testimony makes it appear as if 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, because taking each CLEC's claim of particular importance at face value would inevitably make all measures of high weight. We continue to believe that the QPAP payment structure already reflects an adequate treatment of measure weights. No change is recommended here.

E. Collocation

The New Mexico Advocacy Staff proposed either the Michigan or the Georgia approach to determining collocation payment amounts.[143] Qwest commented that the CLECs represented during a May PEPP collaborative workshop that their proposal did reflect the

[139] Qwest Initial PAP Brief at page 27.
[140] AT&T Initial PAP Brief at page 25.
[141] ELI/Time Warner/XO Utah Initial PAP Brief at page 17.
[142] Qwest Reply PAP Brief at page 25.
[143] New Mexico Advocacy Staff Initial PAP Brief at page 25.

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.

Discussion: The 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 brief. The incorporation of the proposal already agreed to by Qwest appears to respond to the request of the staff and is in any case reasonable. There is no reason to question the QPAP's treatment of collocation payments.

F. Including Special Access Circuits

WorldCom 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.[144] ELI/Time Warner/XO Utah also considered it 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.[145] ELI/Time Warner/XO Utah said that Qwest did not dispute the evidence that comprises the key factual support for its position – evidence that:[146]

- 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.

Qwest said that 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 said that special access circuits cannot be considered a checklist item at all, according to the FCC and a number of state commissions. Qwest also 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. Qwest also objected to the notion that other states had acted substantively on the question of special access circuits. Qwest said, for example, that there is no authority for concluding that the Minnesota Commission has in fact adopted special access service standards.[147] Qwest also cited a recent Indiana Utility Regulatory Commission as denying a CLEC request to include performance metrics and penalties for special access circuits in proceedings addressing Indiana Bell (SBC-Ameritech) compliance with section 271(c). Qwest cited that decision's review of other state

[144] WorldCom Initial PAP Brief at pages 18 and 19.
[145] ELI/Time Warner/XO Utah Initial PAP Brief at page 6.
[146] ELI/Time Warner/XO Utah Reply PAP Brief at page 2.
[147] Qwest Initial PAP Brief at page 54.

decisions, none of which, according to the Indiana commission, supports inclusion of special access circuits in an examination under section 271.[148]

Qwest also responded to the claim of ELI/Time Warner/XO Utah that Qwest failed to contest the factual issues surrounding special access.[149] Qwest cited testimony from its witnesses stating that virtually all special access circuits had been purchased out of interstate tariffs.[150]

ELI/Time Warner/XO Utah argued that nothing that the FCC has said in prior contexts, focusing on the Verizon (Bell Atlantic – New York) 271 order, should be read as contrary to its request here. These participants said the ruling in the New York 271 order provided that special access circuits should not be considered in the context of a 271 review. The issue here is different to them; it is adopting a QPAP payment structure. These participants said that the structure needs to include special access circuits, in order to assure that the PAP gives meaning to Qwest parity obligations, by encouraging adequate provisioning and repair of high-capacity Qwest facilities that serve CLECs. ELI/Time Warner/XO Utah said that the FCC has not precluded PAP 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.[151]

Discussion: We have spent considerable time examining CLEC use of special access circuits to provide local exchange service. The August 20, 2001 *Unbundled Network Elements Report* in these workshops described the contest over the relevant facts and the standards under which those facts should be considered. We conclude 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.

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. That issue was addressed in the 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. The August 20, 2001 report substantially eased restrictions on the conversion of special access circuits to EELs,[152] which makes 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

[148] Qwest Reply PAP Brief at page 33.
[149] ELI/Time Warner/XO Utah Initial PAP Brief at page 9.
[150] Qwest Reply PAP Brief at page 34.
[151] ELI/Time Warner/XO Utah Reply PAP Brief at page 4.
[152] See for example the proposed resolution of the third disputed *EELs* issue (*Waiver of Termination Liability Assessments for EELs*) from the August 20, 2001 *Unbundled Network Elements Report*.

agreements, rather than, as they would effectively do here, mixing tariff and agreement and federal and state jurisdictional purchase rights and remedies.

G. Proper Measure of UNE Intervals

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. [153] Qwest responded that there is a logical relationship between SGAT Exhibit C and the PID performance measures.[154]

Discussion: This issue is similar to the one addressed as the first unresolved *Loops* issue (*Standard Loop Provisioning Intervals*) in the August 20, 2001 *Unbundled Network Elements Report* in these workshops. There is, as was discussed there, consistency 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, it is appropriate for the QPAP to apply the PID performance measures, not SGAT Exhibit C, as the payment standard.

H. Low Volume CLECs

Covad argued that Qwest designed the QPAP primarily to compensate high-volume CLECs, with the result that lower volume CLECs, such as itself, will be under-compensated.[155] 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. At the same time, some of the largest CLECs would have received disproportionately small payments.[156]

Covad also 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.[157]

Qwest objected to Covad's characterization of this aspect of the QPAP. Qwest defended this 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-miss" standard would only have come into play 8 percent

[153] Covad Initial PAP Brief at page 23.
[154] Qwest Reply PAP Brief at page 40.
[155] Covad Initial PAP Brief at page 27.
[156] Qwest Initial PAP Brief at page 30.
[157] Covad Initial PAP Brief at page 33.

of the time, which falls far short of justifying minimum payments 100 percent of the time.[158]

Discussion: 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.

Turning to the "free miss" issue, as parties termed it, 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 percent benchmark into a 100 percent one.[159] Qwest's illustration calls to mind the way that the Sun illuminates the Moon: it can get only half the job done at a time. The occult 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. 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. The SGAT should incorporate these changes.

VI. Structure to Detect and Sanction Poor Performance as It Occurs

A. 6-Month Plan Review Limitations

Section 16 of the QPAP provides the means for amending the plan. This section allows for the following changes:

- Addition, deletion, or change of measurements (based on whether there was an omission or failure to capture intended performance)
- Change of benchmark standards to parity standards (based on whether there was an omission or failure to capture intended performance)
- Changes in weighting of measurements (based on whether the volume of "data points" was different from what was expected)
- Movement of a measure from Tier 1 to Tier 2 (based on whether the volume of "data points" was different from what was expected).

The section requires any change to the QPAP to be approved by Qwest.

AT&T noted that the New York and the Texas plans allow any aspect thereof to be examined at the six-month reviews. AT&T urged this approach, in order to allow for a

[158] Qwest Initial PAP Brief at page 33.
[159] Qwest Reply PAP Brief at page 21.

consideration of the public interest. Specifically, AT&T would make all plan aspects open to review, and would rest authority for deciding to accept any changes with the state public service commissions. AT&T would also eliminate the number of data points as the sole basis for determining performance measure reclassifications.[160] AT&T would also take away Qwest veto power over QPAP changes, and allow more extensive PID review.[161]

ELI/Time Warner/XO Utah proposed that the QPAP be treated like any other SGAT or interconnection agreement provision in terms of its amendment.[162] WorldCom objected to the failure of the QPAP to permit state commissions to amend the substance of the plan and to the veto power that Qwest has under the QPAP.[163] Covad said that the plan-review provisions of the QPAP were neither appropriate nor what has been included by other BOCs.[164]

Qwest objected to an obligation to open the QPAP generally to amendment, because of its need to have certainty about the extent of the obligations it was agreeing to undertake. Qwest also said that effective administration of the plan required a substantial degree of stability in its provisions. Qwest said that the QPAP limits on the scope of the 6-month reviews reflect the same provisions included in the Texas, Kansas, and Oklahoma PAPs existing as of FCC 271 application decisions there.

Discussion: The Texas PAP is in almost all respects consistent with what Qwest has proposed. The four types of permissible changes are the same. The requirement that the BOC agree to changes in existing performance measures is also the same. One material difference is that questions related to the addition of new measures may be resolved by arbitration. The Colorado Special Master's Report sets forth similar constraints on revising the PAP under the six-month review process. Specifically, it 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
- Allow shifts in the weighting given to existing measures.

The Colorado Special Master's Report would grant state public service commissions authority to decide on the propriety of any identified changes, which the commissions would then ask Qwest to include in an amended SGAT filing. That report also recommends a separate review process (assisted by an outside expert under funding provided through Tier II payments), which would take place after three years of PAP operation, and which could examine broader changes to the PAP. That process would address:

[160] AT&T Initial PAP Brief at page 14.
[161] AT&T Initial PAP Brief at page 14.
[162] ELI/Time Warner/XO Utah Initial PAP Brief at page 27.
[163] WorldCom Initial PAP Brief at page 9.
[164] Covad Initial PAP Brief at page 37.

- An assessment of the effectiveness of the PAP
- Revisions to PAP payment amounts (based solely upon evidence of harm produced by particular wholesale performance deficiencies)
- Removal of measures from the payment structure (based on the degree to which commercial alternatives to the use of Qwest services have become available or on a demonstration that Qwest can deliver reliable wholesale performance)
- Deletion of measures no longer needed to be measured or subjected to payments
- Whether the six-month interval for routine consideration of changes remains appropriate.

There are two basic economic issues that appear to concern Qwest when it comes to QPAP changes; i.e., the matters of payment ceiling and payment trajectory. We have already addressed the question of the ceiling in the discussion of the *Total Payment Liability* section of this report. We see no reason here to change the recommendation that total financial liability remain predictable and thus fixed. The question of trajectory; i.e., how fast payments move toward the ceiling, we began to address earlier in the *Measure Weighting* section of this report. The kinds of changes to the performance measures that are in dispute would clearly affect that trajectory; providing a too liberal mechanism for changing them would be problematic. Qwest would solve that problem by requiring its agreement to all changes. In contrast, the Texas plan would use arbitration in a limited number of cases. The Texas plan's approach is more appropriate to addressing the need for and financial consequences of new performance measures that meet the QPAP's standard, which here is whether there was an omission or failure to capture intended performance.

The market of concern is young and in many cases yet to be tested by substantial experience under new ways of doing business. We should also recall that the performance measures at issue came from a process conducted under the auspices of the ROC. It is reasonable to anticipate the possibility of substantial need for new measures if we are to assure that the QPAP will continue to detect and sanction poor performance as it occurs. Because we are uncertain of the continued role of the ROC in performance measure development and administration, the Texas arbitration provision is therefore appropriate to assure that the QPAP meets the applicable standards without unduly exposing Qwest to indeterminate increases in its financial exposure.

The Colorado Special Master's Report made several creative suggestions that may provide for an effective alternative. In particular, the establishment of a mechanism for dispute resolution and PAP administration, funded through Tier 2 payments may prove quite effective and efficient when applied in a multi-state context that includes a large number of states with significant resource limitations. We have discussed that concept in the *Tier 2 Payment Use* section of this report.

The three-year PAP review process recommended in the Colorado Special Master's Report would also serve a useful purpose in examining the continuing effectiveness of the QPAP as a means of inducing compliant performance without applying payment requirements that experience may prove excessive or unnecessary. That process should also be adopted, with the understanding that its results would not be intended to open the

QPAP generally to amendment, but would serve to assist the commissions in generally determining then existing conditions and reporting to the FCC on the continuing adequacy of the QPAP to serve its intended functions.

In summary, we believe that 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, we believe that the present QPAP provisions can function effectively to respond to external changes, without creating insufficiently defined financial exposure to Qwest. Those changes are:

- 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 there are adequate assurances that Qwest's local exchange markets remain and can be expected to continue to remain open.

B. Monthly Payment Caps

Several CLECs expressed concern over the QPAP Section 13.9 provision that allows Qwest to place Tier 1 payments that exceed a monthly cap into escrow, and to ask for relief from the obligation to pay such amounts.[165]

Discussion: Except for the problem of a CLEC that first experiences deficient performance late in the year, which was addressed under the subject of *Procedural Caps* earlier in this report, 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.

C. Sticky Duration

Z-Tel stated that the best evidence of the sufficiency of payments to provide an incentive to Qwest would be actual performance under the QPAP.[166] It therefore proposed that base payment levels escalate if Qwest, after suffering an initial episode of non-compliance, should suffer a second or third episode of similar magnitude. For example, if the first episode was of two months duration (i.e., produced an obligation to make base payments escalated once for the second month) and the second was of two months duration (or greater presumably) at the end of the second episode, payments would not drop back to the base level after a following month of compliant performance. Instead they would remain at the higher two-month level as a new base for the next six months, presumably escalating from that higher level for consecutive month misses during that

[165] AT&T Initial PAP Brief at page 20; ELI/Time Warner/XO Utah Initial PAP Brief at page 24.
[166] Z-Tel Initial PAP Brief at page 20.

period. If there were to be a third two-consecutive-month miss period, then the two-month payment level would be the minimum on a permanent basis.[167]

Qwest first argued that the QPAP already contained measures that would, unlike the Texas plan, keep payments for long-term problems from dropping to initial levels based on merely one month of acceptable performance. As payments step up gradually over time, so would they step down only gradually after performance improved.[168]

Qwest argued that permanently freezing base payments at an escalated level would be inappropriate. Such a provision would create an improper presumption about the speed with which Qwest should be able to identify and correct performance problems. Qwest specifically cited the lag in producing performance results reports, which would mean that a problem could well exist for nearly two months before those reports even disclosed its existence.[169] Qwest noted that, once the payment levels stick permanently at a higher amount, Qwest could do nothing to cause the levels ever to drop, no matter how long it might provide compliant performance after correcting whatever problem caused the non-compliance.[170]

Discussion: The Z-Tel proposal is wholly inappropriate. 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 Z-Tel's amendment. We have already addressed the fallacy in Z-Tel's argument that there should be no reasonable limit to Qwest's financial exposure under the QPAP. This proposal suffers from that same flaw.

D. Low Volume Critical Values

The QPAP reflects a statistical approach that came from partial agreement at the PEPP collaborative. That agreement was to alter the default critical value from 1.65 to 1.04 for a number of small-volume measures, and to increase it to varying levels above 1.65 for progressively larger volume measures. Z-Tel and WorldCom argued at the QPAP workshop that the lower value of 1.04 should apply to all low volume measures, not just to the subset of them to which the QPAP would subject to the 1.04 value.[171]

Qwest objected to this proposal for being:[172]

- Out of step with what was agreed to by it, commission staffs, and the other CLECs at the PEPP collaborative

[167] Exhibit S10-ZTL-GSF-1 at page 14.
[168] Qwest Initial PAP Brief at page 22.
[169] Qwest Initial PAP Brief at page 23.
[170] Qwest Reply PAP Brief at page 17.
[171] Z-Tel Initial PAP Brief at page 23.
[172] Qwest Initial PAP Brief at page 41.

- Out of balance in terms of the numbers of measures to which it would apply.

Qwest said that the PEPP collaborative reached a statistical-methods agreement (which did not include Z-Tel) that was designed to balance the impact of the changes that benefited each side. According to Qwest, a key aspect of that agreement was that the parity measures subject to statistical testing would involve CLEC volumes of less than ten over 60 percent of the time. The agreement to use the 1.04 critical value (in lieu of the 1.65 value) only for certain measures would apply the lower value to the benefit of CLECs in the case of 1,519 measures.[173] In return, values higher than 1.65 would be applied to the benefit of Qwest in 1,917, or roughly the same number of parity measures.

Qwest said that the Z-Tel proposal would destroy this balance by applying the lower 1.04 value to over 10,000 tests, not the 1,519 contemplated by the agreement reached at the PEPP collaborative, leaving the number to which the higher value would be applied at 1,917. Qwest also noted that the FCC has already considered and rejected a similar CLEC argument in the Verizon New York application.[174] Qwest also said that the New Mexico Advocacy Staff has not provided any reason to support the reversal of its position on applying the 1.04 value, citing the staff's agreement to its limited application in the PEPP collaborative.[175]

Discussion: 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 Z-Tel 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 Z-Tel said in its comments, it merely provides a "rough approximation" of some (at least to us) elusive mathematical truth.[176]

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 Z-Tel 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 theory to adjust a decision reached through compromise. That is not fair. We would have to begin without the compromise solution if we are to resolve this through debates about the relative superiority of competing theories. Nobody argued in reply briefs that Qwest misread the FCC decision with respect to the application of statistical methods in prior cases. We see no reason to upset the balanced, compromise approach that met with substantial agreement at the PEPP collaborative.

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[173] LIS Trunks and undbundled dedicated interoffice transport, resale, and unbundled loops for DS-1 and DS-3.
[174] Qwest Initial PAP Brief at pages 41 and 42, citing paragraph 17 of the Bell Atlantic New York Order.
[175] Qwest Reply PAP Brief at page 29.
[176] Exhibit S10-ZTL-GSF-1 at page 12.

E. Applying the 1.04 Critical Value to 4-Wire Loops

The Q-PAP excludes 4-wire loops from the 1.04 critical value compromise, but it includes DS-1 loops. AT&T said that it is disingenuous to concede, as Qwest has, that DS-1 and 4-wire loops are analogous for setting provisioning intervals, but not for establishing QPAP payment amounts. AT&T said that it always understood the agreement reached at the PEPP collaborative to include 4-wire loops. AT&T also said that its proposal would not be difficult to administer, because AT&T would simply have it applied to all 4-wire loops, thus obviating any need to determine whether those loops were being used at the DS-1 level.

Qwest objected to AT&T's request to include 4-wire loops under those measures subject to the 1.04 critical value agreement.[177] Qwest said that 4-wire loops:

- Were clearly excluded from that agreement
- Were considered analogous to DS-1 loops (which are included in the agreement) only for the purpose of measuring intervals, not the value of the underlying service
- Are not always used at the DS-1 level, and are only so used when CLECs add electronics, a fact which Qwest neither controls nor about which Qwest even has knowledge

Discussion: The evidence shows that the agreement made 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.

[177] Qwest Initial PAP Brief at page 44.

We should underscore that this conclusion is 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's 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's amendment procedures.

F. Measures Related to Low Volume, Developing Markets

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.[178]

Z-Tel proposed to replace the $5,000 aggregate payment to all CLECs with a minimum payment of $1,000 to individual CLECs for individual measures.[179] Covad also recommended individual, rather than aggregated, payments, and questioned why only a limited number of xDSL services had been included in QPAP Section 10.[180] Covad argued that all xDSL products can be considered to be low volume by comparison with POTS voice-grade lines, thus making the inclusion of all xDSL sub-measures self evidently appropriate. Qwest objected to the Covad and Z-Tel proposal to apply the higher payments to individual CLEC volumes that fall within these limits, regardless of what aggregate CLEC volumes under the measures may be.

Qwest said that, for the February through March 2001 time frame, individual CLEC volumes for the OP and MR performance measurements were less than the 100-occurrence limit. Applying the Covad/Z-Tel proposal on such a widespread basis would change it from a market-development inducement to a preference for CLECs with small volumes operating even in mature markets.[181] Qwest also responded to the Covad recommendation to add other xDSL products. Qwest said that they are included in other parts of the QPAP, and that there are many services that CLECs could purchase for use in providing their end users with xDSL services without Qwest's knowing about it. Therefore, according to Qwest, it would take extraordinarily broad categories of unbundled loops to encompass all that could be used in providing nascent services.[182]

Discussion: The Z-Tel 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. We address this latter issue in the following *Minimum Payments* section of this report. We conclude here that Qwest's design for Section 10 is an appropriate method for providing Qwest with an added incentive to perform in developing markets. We also conclude that Qwest's designation of DSL products covered is adequate for the purposes of the section.

[178] Qwest Initial PAP Brief at page 29.
[179] Z-Tel Initial PAP Brief at pages 25 through 27.
[180] Covad Initial PAP Brief at pages 34 through 37.
[181] Qwest Initial PAP Brief at page 29.
[182] Qwest Reply PAP Brief at page 23.

G. Minimum Payments

WorldCom commented that small order counts would not produce significant payments by Qwest. WorldCom therefore recommended a $2,500 per occurrence minimum payment, with escalation based on these minimums.[183] Qwest objected to WorldCom's minimum payment proposal as not relating to small CLECs, on grounds that it would apply regardless of CLEC size or order volumes. Qwest also objected to the resulting application of the QPAP's escalation provisions to the minimum payment amounts. Qwest cited as an example the fact that WorldCom's proposal could produce a $2,500 payment for late installation of a service selling for $20 per month.[184]

WorldCom agreed that it would be appropriate to limit its proposed minimum payments to CLECs with monthly volumes of less than 100 occurrences. WorldCom continued, however, to support a minimum payment amount of $2,500 per occurrence, arguing that Qwest's apportionment of $5,000 among all qualifying CLECs and its limitations on the sub-measures qualifying for minimum payments would provide insufficient incentive to Qwest to respond to underlying problems.[185]

Discussion: The issues of minimum payments and payments for developing markets are distinct. The latter should apply on the basis of combined CLEC orders; the former, if appropriate at all, should be a function of the quantity of an individual CLEC's orders. Should the latter be appropriate, it would be because CLECs with very small order numbers suffer harm out of proportion to the number of their orders. There is logic in that theory: it takes a relatively small number of instances of noncompliance to affect a very large portion of a small CLECs business operations. 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.

Applying WorldCom'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. The QPAP should therefore 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*

[183] Exhibit 59-WCM-CEW-1, at pages 34 and 35.
[184] Qwest Initial PAP Brief at page 34.
[185] WorldCom Reply PAP Brief at page 3.

CLEC payments for the year are less than the product of the preceding calculation, Qwest shall make annual payments equal to the difference.

Thus, 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 9 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.

H. 100% Caps for Interval Measures

The QPAP contains a number of provisions that are intended to provide payments on the basis of the number of occurrences that fail to meet standards. A measure that provides an overall average quantification of the degree to which Qwest misses a standard can cause misleading results when it is applied to a per-occurrence payment structure. For example, a 3-day actual average interval for 100 events that are subject to a 2-day interval would produce a miss of 150 percent.[186] If the per-occurrence penalty were applied to this result, Qwest argues that it would produce payments for more occurrences than actually took place.[187]

Qwest also said that similar limiters exist in other PAPs:[188]

- 100 percent limiter added to the Texas PAP after 271 approval and at the first six-month review of that plan
- 100 percent limiter in the Oklahoma PAP in the Oklahoma 271 application as approved by the FCC
- 50 percent limiter in the Kansas 271 application as approved by the FCC.

Several CLECs objected to the 100 percent limiter.[189] Z-Tel said that the Qwest argument on this issue improperly seeks to introduce the number of misses into a measure that does not and cannot use the number of misses to measure performance. As Z-Tel notes, the thing being measured is the average length of an interval. Moreover, according to Z-Tel, Qwest's truncation of payments at 100 percent ignores the sound principle that what Qwest pays should increase as the divergence between its performance for itself and its performance for CLECs increases. Z-Tel said 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. AT&T commented that the FCC did not approve the Texas plan limiter at the time of 271 approval; the Texas state commission approved the cap thereafter.[190]

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[186] The formula looks like this: 100 events times 3/2 = 1.5 or 150 percent.
[187] Qwest Initial PAP Brief at page 17.
[188] Qwest Initial PAP Brief at page 18.
[189] AT&T Initial PAP Brief at page 26; ELI/Time Warner/XO Utah Initial PAP Brief at page 14; Z-Tel Initial PAP Brief at page 9.
[190] AT&T Initial PAP Brief at page 27.

Discussion: Several CLECs did correctly criticize Qwest's description of the alternate CLEC proposal as providing compensation for "phantom orders" or for more orders than CLECs had actually placed. That was not a fair criticism of the alternate proposal supported by a number of CLECs, and the use of a term that can be described as pejorative did not shed helpful light on a difficult issue.

Turning to what is more directly pertinent, Z-Tel noted in its brief that there is a difference between providing all CLEC orders on an average of 2 days versus providing them on an average of 3 days. Z-Tel is correct, but it is also correct that the QPAP somewhat recognizes this issue already. The problem, if there is one, is that the QPAP stops recognizing the difference at a certain point. The conceptual reason that the QPAP does so is sound. In order to reflect the volume of CLEC business, the QPAP must make the payment somehow volume sensitive. Otherwise, if: (a) CLEC A has 50 monthly orders, (b) CLEC B has 2,000 monthly orders, (c) the required interval to be met is 1 day on average, and (d) the average interval Qwest meets for both is 2 days, then Qwest would make the same payment to each, even though CLEC B has experienced vastly more occasions of delay, lengths of delay, or both.

Volume issues make it necessary to reflect somehow in the payment calculations the number of occurrences involved. The CLECs who oppose the QPAP's truncation 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. 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. That is what it might do in a perfect world.

No CLEC who objected to the QPAP's 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. To demonstrate, if a CLEC has 10 orders and if the average Qwest interval for serving them is 2 days, we have no way of knowing (to list but two examples out of a vast number of possible ones) whether each of the 10 was served in 2 days, or if 9 were served in 1 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.

What we have here is a need for arithmetical compromise to fit the quality of the data we have to work with under this measure. It is clear that the CLECs, despite what look like arguments for mathematical purity, in fact propose merely a different sort of impurity. There is not a factual or logical basis for believing that it comes closer to ultimate reality than does the one Qwest proposed. Notably, methods like those proposed in the QPAP here exist in other plans examined by the FCC.

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.

L. Assigning Severity Levels to Percent Measures

Z-Tel argued that the severity of the consequences of missing a standard expressed as a percentage (e.g., percent of loops installed within the required interval) differs according to what that standard is. As Z-Tel put it, there is a difference in severity between missing a 60 percent standard by 5 percent and missing a 90 percent standard by that same 5 percent amount. Z-Tel proposed a payment formula that it said would make compensation more proportional to the relative size of the "miss" involved.[191] Covad made a similar point.[192]

Qwest presented an analysis to support its claim that the Z-Tel proposal could provide exorbitant payments to CLECs. This analysis showed that Qwest would have been required to pay in excess of the 36 percent annual total cap in just the four-month period from February through May 2001, had the QPAP been fully effective at that time.[193] Qwest considered this result to be particularly extreme, given that Qwest's evidence showed that it met 92 percent of all performance standards during that period.[194] Qwest also noted that Z-Tel's witness disclaimed support for the particular formula values included in Z-Tel's comments (and based on which Qwest performed its analysis); the Z-Tel witness stated at hearings that the weighting proposal should rather be considered as conceptual in nature. Qwest's reply brief argued that the PAP already provides for increased payments as performance diverges more from the required standard. Qwest asserted that the principal difference between the QPAP and the Z-Tel proposal was not one of whether there was an increase in payments, but how fast that increase would occur.[195]

Z-Tel's reply brief argued that its witness had not retreated from Z-Tel's recommended approach, but had only recognized that the values to be used in its proposed formula could be changed to manage the degree of difference in payments that it would produce, in comparison with those of the current QPAP.[196]

Discussion: The dispute between Qwest and Z-Tel over this measure did not focus on the correctness of Z-Tel's formula in capturing the severity of misses of performance measures expressed as percentages. Rather, the problem appears 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 Z-Tel formula as proposed onto base payment amounts

[191] Z-Tel Initial PAP Brief at page 12.
[192] Covad Initial PAP Brief at page 30.
[193] Qwest Initial PAP Brief at page20.
[194] Qwest Initial PAP Brief at page21.
[195] Qwest Reply PAP Brief at page 18.
[196] Z-Tel Reply PAP Brief at page 7.

negotiated at the collaborative. Had it been clear then 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.

It is true, as Z-Tel suggests, 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, Z-Tel 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 Z-Tel seeks between payments and severity of misses, without unduly altering the total payment expectations that came out of the PEPP collaborative process.

It is not reasonable to expect the recommendation to be made here to fine-tune the QPAP's 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. In this case, the better approach is 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 Z-Tel formula.

VII. Self-Executing Mechanism

The QPAP provides for self-executing Tier 1 payments to CLECs and Tier 2 payments to states in amounts that are based on monthly performance results.[197] Qwest designed the Tier 1 payments to provide compensation to CLECS and to provide performance incentives to Qwest; the Tier 2 payments address the Qwest incentives goal.[198] The payments under the QPAP will be provided monthly and they will not require any showing of harm.[199] In each month, payments would first go to Tier 1, with any excess over those, up to 1/12th of the yearly amount, 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.[200]

A. Dispute Resolution (Section 18)

Qwest's brief 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.[201] ELI Time Warner/XO Utah said that the limitations on the QPAP sections to which

[197] Qwest Initial PAP Brief at page 5.
[198] Qwest Initial PAP Brief at page 9.
[199] Qwest Initial PAP Brief at page 12.
[200] Qwest Initial PAP Brief at pages 13 and 14.
[201] Qwest Initial PAP Brief at page 78.

dispute resolution provisions would apply begs the question of how other disputes under the QPAP get resolved. ELI Time Warner XO Utah would require all QPAP disputes to be resolved under the provisions of the SGAT or the applicable interconnection agreement.[203]

AT&T requested 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.[204]

Qwest argued that the limitation of the QPAP dispute resolution provisions to certain sections was appropriate, citing the existence of more than 170 CLECs operating in Qwest's region as reason to protect against the use of the procedures for "de minimis controversies."[205]

Discussion: Qwest has not proposed 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 parties differ. 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, although there is no reason for concluding that disputes are likely to be less numerous or more substantial when applied to the SGAT. Neither should we here preclude dispute resolution in advance on a theory of presumed immateriality.

No reason has been shown why 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).

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.

B. Payment of Interest

The QPAP did not provide for interest on late PAP 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.[205] AT&T noted this statement, but observed that Qwest had offered no provision incorporating it into the

[203] ELI Time Warner XO Utah Reply PAP Brief at page 14.
[204] AT&T Initial PAP Brief at page 9.
[205] Qwest Reply PAP Brief at page 54.
[205] Qwest Initial PAP Brief at page 39.

QPAP.[206] AT&T also recommended that each state's statutory interest rate be inserted in lieu of the one-year Treasury rate, which AT&T said was likely to be low.[207]

Discussion: Payment delayed is certainly payment partially denied after the time value of money is considered. Qwest's proposal goes only part of the way to address this 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 public benchmark leads 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. The QPAP should provide for such interest as so posted for any payments made after the date due for any reason.

C. Escrowed Payments

Covad objected to allowing Qwest to avoid current payment obligations by claiming exclusions. Covad argued that Qwest should either have to pay pending dispute resolution or to make payments to an interest-bearing escrow account.[208] Having agreed to pay interest, Qwest objected to being required to place funds in escrow pending dispute resolution.[209]

Discussion: The provision for interest, absent concerns about credit-worthiness, resolves the issue of the time value of money for the present, because there is not at present a need for concern about credit-worthiness in the case of Qwest. However, there would be no harm and some potential benefit in including a provision that would allow a party to require the other to make payments into escrow where the requesting party can show cause, perhaps on grounds similar to those provided by the Uniform Commercial Code for cases of commercial uncertainty.

D. Effective Dates

1. Initial Effective Date

AT&T and WorldCom asked that the QPAP become effective when a state public service commission issues its consultative report. The goal of this recommendation is to prevent backsliding while the FCC considers a Qwest 271 application.[210] ELI/Time Warner/XO Utah and Covad also argued for making the QPAP effective essentially immediately.[211]

Qwest proposed that the QPAP be effective state-by-state as of the date when Qwest may receive FCC 271 approval in each. 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

[206] AT&T Initial PAP Brief at page 13.
[207] AT&T Reply PAP Brief at page 16.
[208] Covad Initial PAP Brief at page 43.
[209] Qwest Initial PAP Brief at page 77.
[210] AT&T Initial PAP Brief at page28; WorldCom Initial PAP Brief at page 16.
[211] ELI/Time Warner/XO Utah Initial PAP Brief at page19; Covad Initial PAP Brief at page 6.

its application under state law, independent of section 271 considerations. Qwest said that the QPAP is self-executing; it does not even require a complaint. Qwest said that no CLEC has demonstrated that the laws of any of the nine states provide the authority necessary for a commission to compel the adoption of the QPAP as a requirement under state law.[212]

Qwest also said that there are sufficient methods for addressing Qwest performance pending FCC consideration of a 271 application. Qwest said that there already exists an opportunity for states and CLECs to supplement the record made in these workshops with evidence that is current through the date that they can present comments to the FCC.[213] Qwest also argued that it will have more than sufficient incentive not to backslide while its 271 application is pending before the FCC. Qwest also said that Covad erred in arguing that the Telecommunications Act of 1996 gives states authority to impose self-executing payment programs.[214] Qwest also objected to the Covad 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.[215]

ELI/Time Warner/XO Utah said that the issue of commission authority to order institution of the QPAP was not material, because the commission role in approving SGATs and checklist consulting to the FCC would allow it merely to withhold approval or endorsement failing Qwest's agreement to make the QPAP effective immediately. At the least, ELI/Time Warner/XO Utah said, the commissions should require monthly reports of payments that would have resulted under the QPAP, had it been in effect earlier than 271 approval.[216]

Discussion: Qwest's consent to the immediate effectiveness of the QPAP cannot be implied from any action it has taken. However, such consent is not necessary, because the issue at hand is not whether commissions can implement something like the QPAP under their own authority. The issue more accurately stated is whether the 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.

In that context, we note 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.

[212] Qwest Initial PAP Brief at page 80.
[213] Qwest Initial PAP Brief at page 84.
[214] Qwest Reply PAP Brief at page 42.
[215] Covad Initial PAP Brief at page 5.
[216] ELI/Time Warner XO Utah Reply PAP Brief at page 10.

The only circumstances cited were by the New Mexico Advocacy Staff, 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 special circumstances were cited; for example, there were no claims that Qwest's wholesale performance history to date was of a nature that would require unique or special inducements. 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.

There remains the issue of whether Qwest should report performance and presumed payment levels between now and any grant of 271 approval. That recommendation is sound. It will provide focus to the interim performance information that was of concern to the New Mexico Advocacy Staff. It will also be helpful in accommodating 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. The QPAP should therefore require Qwest to provide monthly QPAP reports as if the QPAP had become effective on October 1, 2001.

2. "Memory" at Initial Effective Date

AT&T said that when 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. Otherwise, said WorldCom, there would be insufficient incentive to Qwest and a failure to meet the FCC requirement that poor performance be sanctioned when it occurs. [217] Qwest said that this proposal is no different conceptually from one recommending the imposition of the QPAP's payment requirements before 271 approval.[218]

Discussion: 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, 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.

3. PAP Effectiveness if Qwest Exits InterLATA Market

AT&T and ELI/Time Warner/XO Utah would continue the QPAP payment obligations should Qwest exit the in-region, interLATA market.[219]

Discussion: For the same reasons that the QPAP should only be effective upon entry by Qwest into that market, it should terminate upon the end of Qwest's authority to serve that market.

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[217] AT&T Initial PAP Brief at page 24.
[218] Qwest Initial PAP Brief at page 84.
[219] AT&T Initial PAP Brief at page14; ELI/Time Warner/XO Utah Initial PAP Brief at page 21.

E. QPAP Inclusion in the SGAT and Interconnection Agreements

WorldCom said that Qwest failed to address the question of how the QPAP should be made a part of the SGAT, which requires commission consideration of the issue.[220]

Discussion: There does need to be some SGAT context for the QPAP and there should also be clarity about the scope of what a CLEC with an interconnection agreement would be required to elect. Qwest's 10-day comments on this report should address these issues.

F. Form of Payment to CLECs

The QPAP provides for QPAP payments to be made by bill credit, rather than by cash or check. Qwest argued that it would not be administratively more efficient to provide for payment by check. Qwest agreed 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.[221] Qwest also said that the QPAP already provides for the use of wire transfers in cases where a CLEC's PAP credit exceeds the amount it owes Qwest.[222]

WorldCom recommended that QPAP payments be made by monthly checks.[223] 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.[224]

Discussion: The CLEC arguments about the administrative convenience of requiring payment by the equivalent of cash were not persuasive. They 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. The QPAP provision is appropriate: it provides for a cash-equivalent transfer when there is not a sufficient CLEC amount due to offset the credit. Covad's concern about other CLEC debts is not pertinent here. 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. However, if agreement (covering different services) allows offset rights that would extend to the QPAP, the provisions of that agreement would apply. The reason is that the QPAP should not be read as overriding any other agreement except where explicitly required or otherwise reasonably necessary.

The QPAP should require Qwest to provide credit information in substantially the form of the sample it provided as Exhibit S-9-QWE-CTI-4, absent commission consent to change it.

VIII. Assurances of the Reported Data's Accuracy

Qwest recited a number of means for providing assurances that the performance data underlying QPAP payments will be reliable. Qwest cited the following:

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[220] WorldCom Initial PAP Brief at page 3.
[221] Qwest Initial PAP Brief at page 39.
[222] Qwest Reply PAP Brief at page 28.
[223] WorldCom Initial PAP Brief at page 14.
[224] Covad Initial PAP Brief at page 40

- The underlying performance measures will have been audited twice by the time that the QPAP becomes effective
- The QPAP includes a root cause analysis provision
- The QPAP includes a risk-based audit program
- CLECs may request their raw calculation data from which to verify Qwest's results, and to request audits of individual performance measures.
- The QPAP provides for audits of the Qwest financial system used to calculate CLEC credits.[225]

The following paragraphs address these related means of assuring the accuracy of the data.

A. Audit Program

Qwest said that it modeled the QPAP audit provisions after the Texas plan, and that it included the concept of risk-based auditing, as proposed in the report by The Liberty Consulting Group (Liberty) recommending the adoption of an ongoing monitoring program. Qwest's conception of a risk-based auditing program would include audits triggered by measurements that change from manual to mechanized techniques and audits of measurements that have a high degree of risk, as substantiated by Liberty's report. Such measurements will be identified by the auditor and will be scheduled for audit over a two-year cycle. Qwest sought the right to select the auditor in order to assure consistency of results and efficiency in the conduct of the audit program across its 14 state region. Qwest argued that comprehensive annual audits would waste resources, particularly in light of the fact that CLECs could initiate audits to address any concerns that may arise in the future.[226]

Qwest argued that CLEC-initiated audits should be subject to limitation and that their costs should not be chargeable to Qwest in the absence of audit findings that would raise material concerns. Qwest proposed to limit CLEC-initiated audits to two per year, with each audit covering no more than two performance measures. Qwest noted that the number of CLECs involved could produce audits of "dozens" of measures each year. Qwest also proposed that the CLEC-initiated audits be performed by the same auditor selected to perform the risk-based auditing to which Qwest agreed.[227]

Qwest also said that the QPAP's root-cause analysis provision, taken from the Texas PAP, provides a reasonable means for assuring that problems reaching an established threshold level will be examined.[228]

Qwest opposed the recommendation by WorldCom that Qwest should bear at least half of all CLEC audit costs, regardless of whether the audit finds a material deficiency. Qwest also noted that the Colorado Special Master's Final Report[229] included limitations on

[225] Qwest Initial PAP Brief at page 6.
[226] Qwest Initial PAP Brief at page 57.
[227] Qwest Initial PAP Brief at page 58.
[228] Qwest Initial PAP Brief at page 62.
[229] At pages 5 and 6.

measurements subject to routine audits.[230] Qwest also opposed the Covad recommendation[231] for audits of all "high" weighted QPAP measures that Qwest has failed regularly to meet, arguing that accuracy of the data, not degree of success in meeting the measure, is the key to deciding whether an audit is appropriate.[232] Covad argued that there is no reason to limit CLEC-requested audits; they are self-limited by the requirement that CLECs pay for them if they do not uncover material problems. Covad also argued that the standard of materiality for use in determining audit cost responsibility should be 5 percent of the amount of QPAP payments to the CLEC.[233]

Qwest argued that it should retain the internal control to manage the processes that it uses to make performance measurements. Qwest said that its change management governance process includes strict controls and that it will post to an external website material changes affecting the processes, methods, and activities related to producing performance measurements and reports. Qwest considered it inappropriate to require prior commission approval of its ability to change data gathering processes or to work around temporary problems or errors it finds in making measurements.[234]

AT&T and WorldCom proposed elimination of the restrictions on the number of special audits that CLECs could request. AT&T would also eliminate the authority of Qwest to request audits of CLEC data.[235] AT&T also considered it inappropriate to disallow overlap in CLEC-requested audits.[236] The QPAP allows Qwest the right to select the independent auditor; AT&T and WorldCom argued that this right was inconsistent with the need for independence.[237]

WorldCom's reply brief recommended two specific changes, which it said would provide for greater state public service commission control over the QPAP's operation:

- Allowing CLECs to request additional audits to be conducted by the commissions
- Allowing CLECs to conduct additional audits when they can show cause for them.[238]

WorldCom also recommended a collaborative, i.e., multi-state, audit program, and objected to any provision that would limit public service commission powers to request performance-measure audits.[239] Covad generally recommended the adoption of the auditing language of the Colorado Special Master's Report.[240]

Discussion: The issue here is one of providing 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 that will serve as a primary basis for state public service

[230] Qwest Reply PAP Brief at page 37.
[231] Covad Initial PAP Brief at page 46.
[232] Qwest Reply PAP Brief at page 38.
[233] Covad Reply PAP Brief at page 12.
[234] Qwest Initial PAP Brief at page61
[235] AT&T Initial PAP Brief at page 15; WorldCom Initial PAP Brief at page 13.
[236] AT&T Initial PAP Brief at page 16.
[237] AT&T Initial PAP Brief at page 16; WorldCom Initial PAP Brief at page 12.
[238] WorldCom Reply PAP Brief at page 5.
[239] WorldCom Initial PAP Brief at pages 12 and 14.
[240] Covad Initial PAP Brief at page 46.

commission oversight of wholesale performance. It is perhaps not helpful to approach this issue by providing a simple "thumbs up" or "thumbs down" to each specific auditing or data-testing element proposed by Qwest or CLECs. 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.

We begin by concluding that the QPAP does provide for some of the key elements of a sound program, but fails to create an effective and efficient overall program that will provide adequate assurances of the continuing accuracy of underlying performance data. It suffers from certain gaps that would make it unreasonably difficult to identify potential changes of consequence, it does not assure continuing attention to data accuracy indefinitely out into the future, 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.

Therefore, we propose the adoption of an integrated program in response to the concerns raised by many participants. It takes much from the Liberty monitoring recommendations and from the Colorado Special Master's Report, changing each to respond to constructive arguments and suggestions raised both by Qwest and the CLECs who commented on this issue. The QPAP should be amended to explicitly provide for a program incorporating the elements described in the following paragraphs.

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. It would be appropriate for the QPAP to support common efforts to provide the assurances that Qwest's measurements remain reliable. All stakeholders will suffer, should there be a need to participate in and respond to as many as 14 different ongoing testing programs, because:

- Qwest will face significant added cost and resource burdens as a result of the duplication that will be inevitable
- CLECs will face the need to address the same or closely related measurement problems in many different forums
- State commissions will face the need for a significantly greater use of their own individual resources to oversee monitoring and auditing efforts and to resolve disputes about them.

Each state needs to retain the ability to assure attention to its particular needs and circumstances. This objective can be met without unnecessary duplication of testing efforts by designing and implementing them on a common basis. A proper program should consist of the following activities:

- Providing for a transparent Qwest process for changing the systems, processes, methods, and activities by which Qwest takes measurements under established performance measures ("Qwest's measurement regimen"); i.e., allowing an opportunity for others to challenge such changes

- Adopting a programmatic approach that will provide for both pre-planned and as-needed testing of material aspects of Qwest's measurement regimen.

This two-part program recognizes the following principles:

- Qwest's measurement regimen has undergone a thorough audit and will also have to pass FCC muster before 271 approval would be granted
- All other things being equal, continuing to apply the Qwest measurement regimen will provide sufficient assurances that measured wholesale results remain sufficiently accurate
- Insofar as the Qwest measurement regimen remains static, it will be necessary to examine periodically how and how well Qwest continues to apply it
- In addition to the periodic reviews, which should be of indefinite duration (but sensitive to the findings of preceding test work) to be effective, in the short term it is appropriate to examine the areas that the performance measures audit, the ROC collaborative OSS test, and the FCC's review find to be areas of particular risk or instability
- Qwest should retain the power to make measurement processes more accurate or more efficient to perform without sacrificing accuracy
- Those changes should be at Qwest's initial discretion, but subject to sufficient visibility to allow challenges to the propriety of any changes to be made.

With respect to the transparency of changes, we should first recognize that what Qwest considers to be a material change might differ from what others believe. There should be a process for brief, regular meetings (once per quarter will suffice) between Qwest and the independent auditor (whose selection and responsibilities are more fully discussed below). These meetings should not include other parties. Their purpose should be to allow Qwest to report on and the auditor to ask questions about changes made in the Qwest measurement regimen. The meetings would then produce reports by the auditor to the commissions and, where the commissions deem it appropriate, other participants.

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 parties aware of what it considered to be significant changes to its measurement regimen. Other parties would be free to communicate with the selected auditor any concerns about such changes.

With respect to auditing and testing, Qwest has accepted the two-year planning cycle proposed by Liberty as part of its performance measures audit. 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.

The first year of each successive cycle would concentrate on areas most likely to require follow-up in the second year. Near the end of each two-year cycle, planning for the next cycle would commence. The short-term needs of the period immediately following any 271 approval can be handled, if they are not addressed as part of the completion of the ROC collaborative OSS auditing and testing process, and can be incorporated into the plans for the first cycle. Absent an unusual level of adverse findings and conclusions, it would be expected that audit work would reduce in total magnitude across the first several cycles, falling in that case to the level appropriate for a mature and well-functioning measurement regimen. The other major factor expected to influence test work magnitudes is the degree to which Qwest makes changes to its measurement regimen.

Cycle planning should be conducted under the auspices of the participating commissions, with detailed planning recommendations to be made by an outside auditor retained for two-year periods. The auditor should be selected by the participating commissions, if for no other reason, because one of the auditor's tasks will be to recommend the assignment of cost responsibility for CLEC-requested audits. Neither Qwest nor CLECs should choose auditors whose responsibilities include determining whether they should bear potentially significant audit costs. Moreover, the selected auditor must be one with whom all participants are comfortable discussing issues and concerns, which will sometimes prove material to the design of test activities. Commission selection is most likely to produce the communications climate that is most appropriate to the circumstances at issue here. Finally, we believe that assuring both the reality and the appearance of independence in the auditor's test work calls for retention by the commissions, who should be considered the clients for whom the test work is performed.

The audit planning and auditor retention work should provide for Qwest and CLEC input to the 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 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 party questioning the auditor's recommendation. Absent dispute, the auditor would carry out any CLEC-requested audits whose need the auditor accepted; the parties 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).

The states can address their individual needs during the planning process, and they can, should they choose, commission additional testing in the event that a commonly derived plan fails to meet their needs. It is not anticipated that such a unilateral approach will be often requested or required.

Payment 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. 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 will absorb any leftover amounts not capable of recompense out of Tier 2 and escalated Tier 1 payments as described above.

B. PUC Access to CLEC Raw Data

QPAP Section 14.2 authorizes Qwest, upon Commission request, to provide CLEC raw data to that commission. Qwest said it would be inefficient for commissions to follow the CLEC approach, which would be to ask the CLECs directly for the information. Qwest would agree to provide it to the commissions as confidential, subject to whatever decisions the commission later made with respect to continuing confidential treatment.[241] AT&T asked that Section 14.2 be stricken from the QPAP, because there is not provision for maintaining confidentiality.[242]

Discussion: Public service commissions have legitimate needs for the data at issue. There is no sound reason for requiring them to undertake the potentially significant burdens of seeking it 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. We have already addressed a similar issue regarding the provision of confidential CLEC data to public service commissions in connection with the thirteenth unresolved *General Terms and Conditions* issue (*Access of Qwest Personnel to Forecast Data*) in the *General Terms and Conditions, Section 272 & Track A Report* issued on September 21, 2001 in these workshops. There, we recommended language for SGAT Section 5.16.9.1.1. Similar language should 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*

[241] Qwest Initial PAP Brief at page 78.
[242] AT&T Initial PAP Brief at page 28.

notice as the Commission directs to the CLEC involved, in order to allow it to prosecute such procedures to their completion.

C. Providing CLECs Their Raw Data

AT&T recommended a deadline of two weeks from a CLEC's request for Qwest to provide a CLEC with its specific data relevant for QPAP measurement and payment purposes.[243] AT&T said that the lack of an explicit deadline could leave Qwest free to provide the data well after CLECs need it.[244] Qwest objected to AT&T's request that it be obliged to provide the data to CLECs on a firm (as opposed to a mutually agreed to) schedule. Qwest said that such a request would fail to respond adequately to the factors (e.g., timing or volume of data requested) that could materially affect the time in which it could reasonably be provided.[245]

Covad said that it requires the computer code and process information underlying CLEC data in order to reconcile its performance measurements with those of Qwest.[246]

Qwest opposed AT&T and Covad proposals involving Qwest's website for posting CLEC-specific results and data, arguing that its proposal should be considered purely voluntary because no other BOC has been obliged to offer such a capability.[247]

WorldCom asked that Qwest be required to maintain electronic access to underlying records for three years, and to keep records in an archived state for an additional three years.[248]

Discussion: 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.

The QPAP should provide retention periods for underlying records. The three years recommended by WorldCom appears at first blush to be a very long period, considering the kinds of information and the potentially vast amounts of it. However, we must recognize 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. 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. Thus, it is sufficient to require Qwest to maintain the records in a readily useable form for one year; it is sufficient if the remainder of the required records is retained in archived format.

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[243] AT&T Initial PAP Brief at page 29.
[244] AT&T Reply PAP Brief at page 21.
[245] Qwest Initial PAP Brief at page 63.
[246] Covad Reply PAP Brief at page 14.
[247] Qwest Initial PAP Brief at page 60.
[248] WorldCom Initial PAP Brief at page 14.

While the use of a web site may prove useful, there is no evidence to support a conclusion that it is the only acceptable way, or that it would even provide significant advantages over other methods. Covad's request for computer code and process information is overly broad. The QPAP, however, should include a provision providing that Qwest's distribution of CLEC-specific data must be in a form that will allow CLECs to be able to identify its nature and content, and will be in a form that will allow CLECs to undertake the same kinds of calculations performed by Qwest.

D. Late Reports

WorldCom 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.

WorldCom said that its proposal would not unduly penalize Qwest, which already has under the QPAP 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. WorldCom also noted that the Texas commission set a $5,000 per day payment for Texas alone, even though SBC also served in other states that could apply additional penalties.[249]

Z-Tel proposed a $100/day payment for each report that is late, rather than the QPAP's flat $500/day no matter how many are late.[250] Covad argued that not only late reports, but also inaccurate ones should require payments.[251] AT&T ultimately proposed the adoption of the Texas approach, which would include the higher payments noted above, and would also eliminate the grace period provided for in the QPAP. AT&T also said that CLECs are damaged by late reports, which include data that CLECs need to make timely assessments of service that they are being provided.[252]

Qwest defended the QPAP Section 14.3 per-day late report payment of $500 as providing sufficient incentive to report on time, after considering 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 10 days after the end of the QPAP's grace period.[253] Qwest noted that the CLEC proposal to apply the penalty to each report (counting unique CLEC and state reports) could produce a $4.2 million

[249] WorldCom Reply PAP Brief at page 3.
[250] Z-Tel Initial PAP Brief at page 34.
[251] Covad Initial PAP Brief at page 45.
[252] AT&T Reply PAP Brief at page 16.
[253] Qwest Initial PAP Brief at page 37.

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payment for the same 10-day example that would cost Qwest $70,000 under Section 14.3 as now written.[254]

Qwest said that WorldCom was in error in asserting that the Texas plan included the revision or data access payments. Qwest also said that the $5,000 per day payment would yield a $700,000 (10 times the QPAP amount) for a single monthly set of reports that were filed 10 days after the end of the grace period.[255] Qwest also said that the CLEC proposals provided compensation well out of proportion with the harm to them, because QPAP payments were due independently of a report's filing, and CLECs could still get access to their underlying data and request audits, regardless of whether reports arrived on time.

Discussion: There is no support in the Texas plan for the imposition of liquidated payments for reports that are inaccurate or for failures to provide underlying CLEC data. The Texas plan requires payments for reports that are late or incomplete. For each missing measure, the Texas plan would impose a penalty of one-fifth the amount for failure to file any report at all. Reports with omissions have diminished value. The one-fifth factor of the Texas report, subject to a cap equal to the daily amount for failure to file any report should be incorporated into the QPAP in order to give adequate strength to the late-report provision.

Requiring payments for inaccurate reports is troublesome. The QPAP consists of a vast number of measures; it is not realistic to expect that no report would ever contain a measure that will later require restatement. CLEC proposals provide 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, 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 that will be used to formulate audit plans.

Similarly, liquidated payments for an inability to meet deadlines for providing a CLEC with its specific data are not warranted. The auditing program should consider CLEC-specific and CLEC-aggregate data in its planning. If there is a persistent failure to provide CLEC-specific data, there will be reason to address its causes in audits, given that such a failure is all but certain to raise questions about the accuracy of the measurements that Qwest makes.

We come now to the question of payment levels. Z-Tel proposes a remedy that would produce penalties that are unreasonable on their face. The Texas payment approach bears a much closer relationship to what is reasonable. However, we do need to be mindful of the fact that Qwest, unlike SBC (which included both the old Southwestern Bell and Ameritech states) is approaching its 271-authorization process on a region-wide basis. The Texas Commission and the FCC may not yet have considered the effect of accumulating payments from the same reporting process (assuming, of course, that there

[254] Qwest Initial PAP Brief at page 38.
[255] Qwest Initial PAP Brief at page 38.

will be one or a few PAP reporting processes used by SBC). However, that does not mean that they will not be considered when the number of SBC states where 271 approvals have been granted grows.

Therefore, we consider it reasonable to examine payments in the context of the way that Qwest will make reports, which is on a 14-state consolidated basis. Assuming all 14 states, the payment levels that Qwest proposes are substantial, but there is a question about whether an inducement of that magnitude will be sufficient. The $70,000 payment that Qwest showed as an example is not much money when compared with the amount of time and effort that will be necessary to produce QPAP monthly reports. Payments at that level are sufficient to deal with small delays, but should escalate over time. Recognizing that the QPAP already includes a grace period of one week, the payments should escalate as follows:

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

Qwest remains protected against undue growth in payments by virtue of its ability to seek a waiver of late-report payments.

IX. Other Issues

A. Prohibiting QPAP Payment Recovery in Rates

AT&T argued that there should be specific language precluding QPAP recovery in rates. AT&T recommended its language, because Qwest has proposed none.[256] Qwest said that 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, noting that the New York Commission made a similar determination at the state level.[257] 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.[258]

Discussion: We believe 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.

B. No-Admissions Clause

ELI/Time Warner/XO Utah and Covad argued that measurements under the PID and payments based on them should be admissible as evidence in other proceedings; they would delete QPAP Section 13.4.1.[259]

Discussion: The objective information set forth in the performance reports is indeed strong evidence of the characteristics of Qwest's performance. The use of that

[256] AT&T Initial PAP Brief at page29; WorldCom Initial PAP Brief at page 4.
[257] Qwest Initial PAP Brief at page 72.
[258] Qwest Reply PAP Brief at page 47.
[259] ELI/Time Warner/XO Utah Initial PAP Brief at page23; Covad Initial PAP Brief at page 44.

information to show what Qwest's performance actually was should not be constrained. The QPAP does not do so. The Section 13.4.1 restrictions 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.

C. *Qwest's Responses to FCC-Initiated Changes*

Qwest cited three proposed QPAP changes that Qwest said came from informal FCC input, and that Qwest noted were not objected to or commented upon at the hearings on the QPAP:[260]

- 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.

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

D. *Specification of State Commission Powers*

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.

Discussion: Apart from the QPAP, commissions may recommend such relief for innumerable reasons other than the fact that Qwest reaches the cap. They may also recommend other relief when Qwest reaches the cap. It is self evident that this section is utterly valueless in providing commissions with any power that they do not already possess. Therefore, it could only be read as an indication that commissions approving the plan have agreed in advance that they would self limit their 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 commission action other than the ones recited in the QPAP.

[260] Qwest Initial PAP Brief at page 40.

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I. Introduction

A. Background to These Proceedings

Group consideration of a post-entry performance plan began in August 2000, with the creation of a collaborative process by the Qwest Regional Operating Committee (ROC). Eleven of the 14 state public service commissions with responsibility for regulating Qwest local exchange service invited interested parties to participate in a "ROC PEPP collaborative." The PEPP Collaborative process included five multi-day workshops, a number of conference calls from October of 2000 to May of 2001, and numerous exchanges of proposals, supporting data, and other information designed to seek the creation of a consensus plan. The PEPP Collaborative participants included staff members, AT&T, WorldCom, Z-Tel, McLeod, Eschelon, other CLECs, Southwestern Bell and Qwest.[1]

The statistical methods and the payment structure of the Texas PAP approved by the FCC served as the starting point for the PEPP collaborative. The collaborative reached agreement, however, that benchmark measures would change from a statistical approach to a direct "stare and compare" method. The PEPP collaborative also agreed to change a number of the statistical methods applicable to the parity measures. The QPAP adopted the two-tiered Texas payment approach, under which Tier 1 payments go to CLECs and Tier 2 payments go to the states. The QPAP also changed the Texas approach by adding to the payment escalation method (for consecutive months of missed performance) a corresponding stepped de-escalation process. The QPAP also eliminated the Texas plan payment caps on individual performance measures (excepting billing), restructured collocation payments, and raised Tier 1 performance measures classified as "medium" to "high."[2] The QPAP differs from the Texas plan in a number of other respects as well.

These multi-state 271 workshops have been proceeding in parallel with the activities of the PEPP collaborative. After it appeared in May of 2001 that further PEPP Collaborative efforts were in substantial doubt, the seven commissions then participating in these multi-state workshops decided that the section 271-affecting aspects of the performance assurance plan expected to be filed by Qwest (QPAP) would best be considered in these workshops. Later, the commissions of Nebraska and Washington also decided to participate in these workshops, insofar as they would address the public-interest aspects of the QPAP. Our multi-state 271 workshop scope now includes consideration of the QPAP in the 271 context.

A telephonic procedural conference ensued on August 3, 2001. We solicited participation in that conference through an e-mail invitation that was sent to the service lists being used for these workshops and for the PEPP Collaborative. There was broad participation in that procedural conference, which included state commission staffs, CLECs, and public counsel not already involved in the workshops. Most of the new participants were either involved in the PEPP Collaborative efforts, or in 271 proceedings before the Washington or Nebraska commissions; however, some either had been

[1] Qwest Initial PAP Brief at page 1.
[2] Qwest Initial PAP Brief at page 5.

inactive participants in these workshops or sought intervention in them after the decision to include QPAP consideration in our scope.

The results of that conference were used to establish a set of procedures and schedule for producing a report that would provide the nine commissions with a series of proposed conclusions and recommendations addressing the public interest issues raised by the QPAP. The procedures allowed all participants to file comments and testimony in response to the QPAP, which Qwest filed on or about July 16, 2001, and in substantially the same form with all nine commissions. Qwest was then permitted to file pre-hearing responses to those comments.

Hearings were scheduled for and held during the weeks of August 13, and August 27, 2001. Those hearings included direct, rebuttal, and sur-rebuttal testimony. In all, 11 witnesses testified during seven days of hearings. We heard testimony from Cari Inouye, Michael Williams, Karen Stewart, and Nancy Lubamersky of Qwest, George Ford of Z-Tel, John Finnegan of AT&T, Chad Warner of WorldCom, Marlon Griffing of the New Mexico Advocacy Staff, Rex Knowles of XO Utah, Tim Kagele of Time Warner, and Timothy Peters of ELI. Main briefs, due to be filed by September 13, 2001, came from the Wyoming Consumer Advocacy Staff, Washington Public Counsel, Z-Tel, Covad, ELI/Time Warner/XO Utah, New Mexico Advocacy Staff, WorldCom, AT&T and Qwest. Reply briefs, due by September 20, 2001, came from the Wyoming Consumer Advocacy Staff, Z-Tel, Covad, ELI/Time Warner/XO Utah, New Mexico Advocacy Staff, WorldCom, AT&T and Qwest.

B. Significance of PEPP Collaborative Results

The evidence here demonstrates that the PEPP Collaborative process was comprehensive, well conducted, subject to wide participation, and thorough in addressing the broad range of issues and subjects appropriate to a post-entry assurance plan of the type expected by the FCC. The participants, despite their widely diverging views and mutual impatience with each other's positions, evidently succeeded in reaching a large number of agreements. Our purpose here was not to revisit agreements already made. Neither was it to provide an open forum for introducing propositions or arguments that had not been raised before but should have been, considering the comprehensive and open nature of the PEPP Collaborative process.

We did not establish a firm rule that would preclude new or inconsistent positions or proposals; however, we did inform the parties that such positions or proposals would require a strong showing of propriety and need, lest we risk disrupting important balances reflected in provisions agreed to either unanimously or nearly so in the PEPP collaborative process. Clearly, where agreement was reached through compromise, we needed to be careful not to support an improvement in what party got without considering what had been given in return. This report largely addresses issues on their individual merits, but there are a significant number of cases where maintaining the general balance that resulted from the PEPP collaborative contributed to conclusions and recommendations.

Where a participant could show that substantial or complete agreement was reached during the efforts of the collaborative, we gave that agreement significant but not

determinative weight, when examining previously unraised proposals or positions in opposition to those taken earlier. At the time of that ruling, it appeared from the last report issued by those administering the PEPP Collaborative process[3] that there was a comprehensive and fairly complete listing of the areas where agreement was reached and of the areas where disputes remained. However, the evidence in the workshops made it clear that the collaborative process reached an abrupt end, with no ability to conclude with certainty that it had yet run its full and natural course with respect to allowing new issues to be raised. It also became clear from the evidence that the report, while clear and well prepared, did not reach the level of underlying detail that proved necessary to explore fully all of the numerous and complex subject areas involved.

There was also significant change still taking place at the close of the PEPP Collaborative efforts. As AT&T noted, the PEPP collaborative not only left many issues unresolved, but its progress was halted abruptly -- just two days after Qwest submitted a new PAP proposal. Moreover, the QPAP filed by Qwest in these proceedings contains material changes from that last one provided to the PEPP collaborative.[4]

C. *Scope of These Proceedings*

ELI/Time Warner/XO Utah argued that we should conduct separate workshops to develop detailed QPAP language, much as we have been doing with respect to the SGAT in the 271 workshops, citing the fact that even Qwest does not even know what all of the language means.[5]

Discussion: We have heard detailed evidence and argument about the QPAP's objectives, approaches, and implementation details. We consider the record sufficient to allow a reasonably full understanding of what the language of the QPAP will accomplish and how, should it be adopted. Certainly the parties commented on the document at a very fine level of detail when there were provisions of concern to them. It was clear in the rules governing this proceeding that all issues of concern were includable in comments, testimony, and argument. Certainly, the conduct of all the parties appeared to reflect an understanding of those rules. Moreover, we allowed all participants to seek from Qwest interpretations of any language considered vague, contradictory, or otherwise of concern.

The fact that no one Qwest witness could speak to the meaning of all the QPAP's provisions is testament not to its vagueness, but to its breadth and complexity. We find the record adequate to render conclusions on all material issues respecting the document's satisfaction of the relevant portion of the public interest test to which the FCC subjects 271 applications. We do not find language or drafting workshops to be necessary or appropriate.

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[3] *Post Entry Performance Plan Final Collaborative Summary*, June 5, 2001, Maxim Telecommunications Group (MTG) and the National Regulatory Research Institute (NRRI), introduced as Exhibit 89-ATT-IFP-5.

[4] AT&T Reply PAP Brief at page 2.

[5] ELI/Time Warner/XO Utah Initial PAP Brief at page 3.

II. Standard of Review

The FCC sets forth five general characteristics as part of its "zone of reasonableness" test for evaluating a section 271 performance assurance plan:[6]

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

Qwest's reply brief argued that a number of CLECs strayed far from the FCC's established "zone of reasonableness" approach. Qwest accused them of arguing instead that the QPAP should be designed to assure a competitive post-entry local market or to maximize incentives for Qwest to comply with its wholesale service obligations. Qwest argued that it would be incorrect to approach the evaluation of a PAP's adequacy from the viewpoint that more is necessarily better. Qwest urged that payments not be set at a level that would encourage CLECs to seek windfall payments, to the detriment of investment in their own facilities.[7] Qwest argued that the FCC has repeatedly found similar BOC PAP proposals to fall within this zone of reasonableness standard.[8]

In supporting the overall reasonableness of its QPAP, Qwest cited the fact that it began the PEPP collaborative with the Texas plan as a starting point, and then changed it significantly and positively to address discussions occasioned by that collaborative. Qwest cited the following specific "improvements:"[9]

- Increasing payments by omitting the Texas plan's K-Table
- Providing less forgiving de-escalation of payments when non-compliant performance should improve
- Eliminating the caps on all individual performance measurements except for billing
- Restructuring collocation payments
- Raising Tier 1 "medium" measurements to "high"

The simple test in assessing the adequacy of the QPAP should, according to Z-Tel, be whether a recommended change would improve the incentives to provide conforming service.[10] In applying this test, Z-Tel would prefer "robust" procedures to "potentially

[6] Qwest Initial PAP Brief at page 2.
[7] Qwest Reply PAP Brief at page 2.
[8] Qwest Reply PAP Brief at page 3.
[9] Qwest Reply PAP Brief at page 3.
[10] Z-Tel Initial PAP Brief at page 6.

adequate" ones. Z-Tel said that the "only" appropriate standard to apply in examining CLEC-proposed changes to the QPAP is whether the changes would improve the goal of giving Qwest adequate incentive not to discriminate against CLECs, and that caps on payment levels are antithetical to creating such incentives.

Discussion: When Z-Tel says: "...the "only" appropriate standard to apply in examining CLEC-proposed changes to the QPAP is whether the changes would improve the goal of giving Qwest adequate incentive not to discriminate against CLECs...", Z-Tel overstates the case. While the logic behind their argument is economically sound, the FCC faces other constraints and public objectives other than this alone. In fact, the FCC has endorsed caps because in its judgment, caps are a reasonable compromise. The FCC has ruled that payment level caps are a necessary compromise for the development of workable PAP plans. Therefore, our task is not necessarily to decide how to increase incentives, our task is rather to design a workable plan that provides sufficient incentives to meet policy objectives. It is necessary to examine whether the options that Qwest and the participating CLECs have proposed will satisfy the requirements of the FCC and the public policy objectives which the Utah Public Service Commission must work toward as well.

Blind adherence to every aspect of approved plans is certainly not required, because this is a relatively new area of inquiry, even for the FCC. And, in view of the fact that the New York Public Service Commission has had to rewrite and raise certain penalty caps after the fact because of continued and grievous non-compliance on the part of the BOC indicates that perhaps a more strident level of penalty should be considered. It remains true that each plan addressed heretofore by the FCC, and the one before us, contains unique elements. Some give more to CLECs in some areas, and some give the BOC greater advantages in others. All presumably reflect the kind of balancing that results from cooperative efforts to develop them. As the CLECs have stated articulately and persuasively here, arguments that QPAP burdens on Qwest are equal to or greater than those of some other plan in some respect must be tempered by recognition of those areas where the QPAP eases burdens that BOCs elsewhere are bound to carry. The ultimate decision on the QPAP's sufficiency, as the FCC addresses the matter, should be one that takes into account the following considerations:

- Does it comport with the cornerstone elements common to previous plans existing under approved 271 applications
- Do the gives and takes that distinguish it from those other plans balance out on a net basis
- Does the plan provide adequate compensation for actual harm for which CLECs could reasonably expect to be compensated if their relationship with Qwest were more typical of commercial arrangements of similar size, complexity, and mutual risk and opportunity
- In the final analysis, will the plan (considering not just those elements designed to compensate CLECs for harm) provide sufficient incentive for Qwest to "continue to satisfy the requirements of Section 271 after entering the long distance market," as the FCC put it in paragraph 275 of the SBC Kansas/Oklahoma Order, after it may receive 271 approval

- Will the plan provide that incentive in a manner that does not place any more strain than is necessary on the sound principle that damages should bear a reasonable relationship to harm caused
- Do the incentive aspects of the plan (i.e., those that go beyond compensating CLECs for actual harm) impose a price on in-region, InterLATA entry that it would be irrational for a BOC to pay for the privilege of such entry, recognizing that it is the expected value of potential payments that matters, not some theoretical maximum payment which is likely to never be realized
- Does the plan adequately respond to any unique circumstances proven by the evidence to be applicable here
- Are there administrative or procedural details in the plan that are not sufficiently functional, and that can be repaired without a major shift in balance

III. Summary of Recommended QPAP Changes

The following list summarizes the changes that this report recommends be made to the QPAP to make it sufficient to meet the applicable public policy.

Provisions for Changing the Cap
The hard 36 percent cap as proposed by Qwest is generally consistent with what exists in some other plans now in effect after FCC 271 approvals. However, in view of the fact that the New York Public Service Commission has found it necessary to readdress this issue in its existing PAP and increase that cap to 44% because of repeated non-compliance of the BOC, the lack of more substantial experience with PAP operation across the country suggests the propriety of allowing a balanced and limited span of variability in response to actual experience. As a result, the Utah staff recommends that the initial cap be set at 44% (as explained below). Further, if Qwest exceeds the 44% cap by at least 4 percentage points for any consecutive one 12-month period, the QPAP should provide for an increase of up to 4 percent in the cap, upon order of a state commission after notice and hearing.

Foreclosing Recovery for CLEC Harm Occurring Late in the Year
If the yearly cap is met before a CLEC is harmed, it will not get any recovery at all under the proposed QPAP, even though CLECs suffering harm earlier receive both base and escalated payments. The QPAP should be changed to create a mechanism that equalizes compensation to CLECs and the states under those circumstances. See the discussion under the *Procedural Caps* section of this report.

Allowing CLEC Recovery of Non-Contractual Damages in Other Proceedings
In seeking to preclude double recovery of damages and the ability to recover damages under other actions, the QPAP goes too far. It should be changed in a manner that will make it more clear that CLECs will be able to: (a) institute actions not based on contractual theories of liability and (b) avoid QPAP offsets for the portions of damages that was not awarded to compensate for contractual measures of damages. See the discussion under the *Preclusion of Other CLEC Remedies* section of this report.

Offsetting QPAP Payment Liabilities by Other Awards
The language of QPAP Section 13.7 requires change in order to assure that Qwest is not entitled to reduce QPAP payments on account of damage awards for injury to persons or physical property, even in cases where those awards arise from actions or omissions in providing wholesale service to CLECs. The language also needs to be changed in order not to undercut the ability of CLECs to recover non-contractual damages awarded in other allowed causes of action, as the preceding issue addresses in more detail. See the *Offset Provision (Section 13.7)* section of this report. A change to SGAT Section 5.8.1 is also required to prevent an inappropriate limit from being placed on Qwest's liability for injury to persons or physical property. (See the *SGAT Limitation of Liability to Total Amounts Charged to CLECs* section of this report.

Excluding Qwest Payment Responsibilities in the Case of CLEC Bad Faith
It is appropriate that the QPAP set forth explicit provisions about CLEC bad faith. Nevertheless, QPAP Section 13.3 needs to be amended to avoid excusing Qwest performance in cases that do not actually constitute bad faith, but merely CLEC foresight regarding an inability of Qwest to perform as required. See the *Exclusions (Section 13.3)* section of this report.

Differing SGAT and QPAP Force Majeure Provisions
The QPAP and the SGAT include separate and somewhat different force majeure provisions. There having been no good reason offered to justify the difference, we should mitigate the potential for controversy and litigation by applying to the QPAP the SGAT's provision, which has been established to be suitable. See the *Exclusions (Section 13.3)* section of this report.

Timing of Force Majeure Event Notices
It should not be possible for Qwest to defer force majeure event declarations until after it knows whether it is in jeopardy of meeting monthly performance standards. It should be required to provide CLECs with notice of such events within 72 hours of the time that they occur or that it could first have been reasonably expected to learn of them. Such a provision will allow CLECs timely notice of the need to validate such declarations while events are fresh. It will also preclude reconstructions of past events to identify performance-excusing conditions. See the *Exclusions (Section 13.3)* section of this report.

Impact of Force Majeure Events on Interval Measures
AT&T proposed changes to the force majeure language, in order to assure that the performance excuse is appropriately limited to the time during which such an event disrupted performance. That language should be included in the QPAP in order to assure that Qwest's performance excuse is limited. See the *Exclusions (Section 13.3)* section of this report.

Applying Force Majeure Provisions to Parity Measures
It is arbitrary for the QPAP to provide that force majeure events be permitted to excuse performance under measures where parity between wholesale and retail services is the standard. The QPAP should not include force majeure events among the excuses for meeting parity measures, because such a provision gives Qwest a highly unbalanced right

to excuse substandard performance. See the *Exclusions (Section 13.3)* Section of this report.

CLEC Failures to Forecast as a Qwest Performance Excuse

The Utah rules identify those CLEC forecasts that are necessary and appropriate for Qwest to require in order for it to be able to provide adequate service. It would not be sound to excuse Qwest performance for failure to provide any other type of forecast. The QPAP should be changed to limit performance excuses to failures by CLECs to provide forecasts as required by the Utah rules or interconnection agreement under which they interact with Qwest. See the *Exclusions (Section 13.3)* section of this report.

Tier 2 Payment Use

It is neither necessary nor appropriate to impose a QPAP limit on the use of Tier 2 payments. The QPAP should be changed to ease the use restrictions. See the *Tier 2 Payment Use* section of this report.

Funding Commission Qwest/CLEC Oversight Activities

It may be beneficial for Qwest, CLECs, and the state commissions to adopt and operate under a common system for administering responsibilities and resolving disputes involving wholesale service. Experience with arbitrations, UNE price dockets, SGATs, 271 reviews, as well as the likelihood of substantial disputes in the future indicates that it will take significant state resources to fulfill commission responsibilities. The Congress and the FCC expect states to carry out much of the regulatory and administrative responsibility under the federal act, but have not funded those activities.

It is appropriate to make a portion of Tier 2 escalated payments available for supporting administration and dispute resolution activities. One third of Tier 2 payments and one-fifth of Tier 1 payments could be made to a special fund for these purposes. See the *Tier 2 Payment Use* section of this report.

Three-Month Trigger for Tier 2 Payments

The QPAP does not provide for Tier 2 payments to begin for any measure unless Qwest has failed to meet it for three consecutive months. This standard allows Qwest to avoid payment by performing in only one month of every three, thereby setting a loose a standard of performance. Some Tier 2 measures have Tier 1 counterparts, which also create payment risk for Qwest. For those that do not, Qwest's Tier 2 payment responsibility should begin in the same manner as the Tier 1 payments. For those Tier 2 measures already subject to Tier 1 payments, the trigger should be the second month of non-performance. See the *Three-Month Trigger for Tier 2 Payments* section of this report.

Changing the Weights of Some QPAP Measures

The QPAP provides for three classes of measures; the higher the weight class the higher the payment required in the event of non-performance. CLECs requested that a number of measure weights be increased, because they considered those measures to relate to services that had relatively higher value than was reflected by the QPAP's assigned weight class. Qwest agreed, but argued for compensating reductions in other weights, in order to keep payments in proportion to the value of services, as measured by the prices charged for them.

The CLECs did not express approval of Qwest's rebalanced weights; they argued instead for acceptance of higher weights without reducing any others. We found that approach to be unbalanced and inappropriate. Qwest made a change to address CLEC concerns; CLECs said that the change did not meet those concerns and at least one CLEC said that the change actually moved in the wrong direction entirely. Therefore, the weights Qwest agreed to change should return to the weights proposed in the QPAP filed originally in these workshops. See the *Changing Measure Weights* section of this report.

Collocation

Qwest agreed to a changed collocation proposal, which it said was based upon the approach adopted in Michigan. Qwest should include the appropriate language in the QPAP. See the *Collocation* section of this report.

Rounding Problems with Small Order Volumes

If a standard is 90% and order volumes are five, then Qwest must perform without flaw to meet the monthly standard. Qwest would solve the problem by in effect allowing "one-miss" per month performance to be considered as compliant. This approach unduly disadvantages CLECs with small volumes. Qwest could perform under standard in every month of the year without making payments. The QPAP should be changed to adopt a much more balanced process. Qwest should calculate the yearly rolling average performance. In any month where that average was less than the standard, payments should begin with the first miss. Moreover, from that month forward, escalation should apply in each successive month where the standard is not met through strict application of the monthly formula (e.g., if in the next month Qwest misses 1 out of 8 opportunities on a 90% measure, escalation should apply). See the *Low Volume CLECs* section of this report.

Limits on QPAP Amendments

In order to give Qwest a reasonable degree of certainty about the exposures to which it will be subjected, the QPAP in general constrains appropriately the ability to amend it. However, the limits go further than is necessary to accomplish this objective, with the result that the QPAP is at undue risk of becoming nonfunctional in a marketplace that may be expected to remain dynamic. It requires amendment in several ways to accommodate change without disturbing the overall level of certainty Qwest rightfully expects under the circumstances. The QPAP should: (a) apply normal SGAT dispute resolution procedures to disagreements over the proposed addition of new measures to the QPAP payment structure, (b) support a Tier 2 payment funded (backed up if necessary by a small, capped portion of Tier 1 escalated payments), multi-state dispute resolution and administrative structure, and (c) provide for biennial reviews that will provide an assessment of the QPAP's continuing effectiveness. See the *6-Month Plan Review Limitations* section of this report.

Minimum Payments

Substandard Qwest performance can have particularly harsh consequences for small CLECs. The QPAP should assure that the yearly amount it pays to CLECs with small annual order volumes is sufficient to address this problem. The QPAP should be amended to include an annual minimum payment calculation. Qwest should multiply the amount of $2,000 by the number of months in the year that it failed to meet one or more Tier 1 performance measures for CLECs with annual order volumes of less than 1,200.

Qwest should then subtract from this amount all payments made or to be made to the CLEC for the same year. Qwest should then make up any shortfall between the minimum payment calculation and those actual payments. See the *Minimum Payments* section of this report.

Dispute Resolution

Qwest offered a QPAP amendment that would make SGAT dispute resolution procedures available only for selected QPAP sections. This proposal left unanswered how other disputes about the SGAT should be resolved. Some mechanism covering those other sections is necessary; there is no reason to question the adequacy of the SGAT's general dispute resolution procedures for addressing all disputes about how the QPAP should be interpreted. The QPAP should be changed to make the SGAT dispute resolution procedures applicable to all disputes regarding interpretation and application of the QPAP. See the *Dispute Resolution* section of this report.

Assuring Continuing Data Accuracy

The QPAP needs to be changed to provide for a more structured process for making changes to performance measurement calculation methods more transparent and for planning and conducting tests and examinations (collectively referred to as "audits" by the participants) to assure continuing data accuracy. The program for meeting these needs should be planned and implemented by the state commissions acting in concert, with the assistance of such outside auditing and other expertise as they determine appropriate and which they select after consultation with all interested parties. Portions of the Tier 2 payments, backstopped, if necessary, by a capped portion of Tier 1 payment escalation amounts, should fund that program. See the *Audit Program* section of this report.

PUC Access to CLEC Data

Public service commissions should not be required to undertake cumbersome, time-consuming processes for asking CLECs to provide such data about their service as Qwest already maintains. However, the QPAP should be changed to assure that Qwest supports the preservation of the confidentiality of such data by providing it only upon commission order and only after initiating the procedures necessary to maintain confidentiality. See the *PUC Access to CLEC Data* section of this report.

Retention Period for CLEC Data

The QPAP should adopt specific provisions that will obligate Qwest to retain CLEC data for specific periods and in certain forms. There should also be a provision allowing recalculation of QPAP payments for three years. See the *Providing CLECs Their Raw Data* section of this report.

Late Reports

The QPAP fails to provide a payment for incomplete reports. An incomplete report is the same as a late report for the excluded measures; therefore, the QPAP should be changed to provide a payment for reports that are not complete. Also, the QPAP late report payments adequately address very short delays, but should be changed to provide for

escalation in the case of more significant delays. See the *Late Reports* section of this report.

Payment of Interest
The QPAP does not provide for interest on delayed payments. Qwest agreed to an interest factor, but would set it at the one-year U. S. Treasury rate. The parties to this agreement cannot borrow at that rate; the Commission set a cost of money in the last US West rate case, the staff recommends that rate be used to calculate all interest payments required under the revised QPAP. See the *Payment of Interest* section of this report.

Performance Reports Pending 271 Approval
We recommended against making the QPAP effective prior to 271 FCC application date. However, we believe that there should be an obligation to provide for the immediate initiation of monthly reports of what payment obligations would have been as of the revised QPAP were in operation starting October 1, 2001. See the *Initial Effective Date* section of this report.

Incorporating the QPAP into SGAT and Interconnection Agreements
For the sake of clarity, Qwest's 10-day comments to this report should address in more detail how the QPAP will be incorporated into the SGAT, and should specify the SGAT sections that would accompany QPAP election for incorporation into an existing interconnection agreement. See the *QPAP Inclusion in the SGAT and Interconnection Agreements* section of this report.

Billing Credit Format
Qwest presented a sample billing credit format at the workshops in order to demonstrate that CLECs would be able to identify the sources of credits given. The QPAP should require Qwest to provide credit information in substantially the form of that sample, absent commission consent to change it. See the *Form of Payments to CLECs* section of this report.

Uncontested Qwest Changes to the QPAP
Qwest made several QPAP changes, which it said were initiated by FCC concerns. No participant objected to them; they should be incorporated. See the *Qwest's Response to FCC-Initiated Changes* section of this report.

State Commission Powers
No party raised the issue; however, we were concerned that the QPAP says that state commissions may recommend to the FCC that Qwest be prohibited from taking on new in-region long distance customers in the event that the cap is reached. Because commissions can already do so without allowance from the QPAP and because this specification of a limited power may be read as constraining commission options otherwise available under law, this provision should be eliminated. See the *Specification of Commission Powers* section of this report.

IV. Meaningful and Significant Incentive

A. *Total Payment Liability*

1. The 36% Upped to 44% Net Revenues Standard

Qwest has proposed to place at risk each year a total of $306 million, which represents 36% of Qwest's 1999 ARMIS return for local services in the nine states combined. The ARMIS return is measured as total operating revenue less operating expenses and operating taxes. Qwest agreed to remove from this total a downward adjustment for "Commission Rate Orders." The effect of this change is to increase in several states the amount at risk, as compared with what would have been the case without such an adjustment.

Even though the New York Public Service Commission has found it necessary to raise the amount at risk in that state to 44% after having initially placed the incentive factor at 36%, Qwest has continued to argue that the FCC has found this 36% measure of net revenue a "meaningful incentive" to maintain adequate performance in 271 orders in New York, Texas, Kansas, and Oklahoma.[11] The 36 percent factor represents $306 million for the nine states, which compares to the following amounts already approved:[12]

Table 1: Total Amounts at Risk in Other BOC PAPs

State	Kansas	Massachusetts	New York	Oklahoma	Texas
Amount	$45 million	$155 million	$269 million	$44 million	$289 million

Qwest cited the Colorado Special Master's Report addressing Qwest's performance assurance plan in that state as supporting a similar cap of 36% of 1999 Colorado ARMIS net return.[13] The plan discussed in that report uses a somewhat different structure, as compared with the QPAP being considered here. Both have three segments, but they are described differently. The following table shows a simplified comparison of the two plans.

Table 2: Comparison of QPAP and Colorado Special Master's Report Payments

PLAN	QPAP	Colorado
Base Payments to CLECs	Tier 1	Tier 1.X
Escalated Payments to CLECs	Included in Tier 1	Tier 1.Y
Payments to States	Tier 2	Tier II

[11] Qwest Initial PAP Brief at page3.
[12] Qwest Initial PAP Brief at page 11.
[13] Qwest Initial PAP Brief at page 12, citing section III.D. of the report.

Both Qwest and many of the participating CLECs made liberal reference to the Colorado Special Master's Report; each claimed that it supported their positions on the question of caps on total payments. The Colorado report describes Tier 1.X payments as providing compensatory payments to CLECs, and as being designed to make them whole. The Colorado report analogized them to liquidated damages. That report, which was issued during the first half of this year, recommended that parties claiming damages to be different from the rough approximations adopted in the report make submissions documenting the kinds of payments and amounts that would better reflect actual harm. Interestingly, despite this report's invitation and the passage of significant time between its issuance and the hearings in these workshops, no such submissions have been made.[14] However, the Utah staff believes that the raising of the cap to 44% after the failure of an initial 36% cap in New York to provide adequate BOC incentive speaks for itself.

The Colorado Special Master's Report described its Tier 1.Y payments as creating an incentive for Qwest, by escalating payments in cases where deficient performance continued for successive months. The Colorado report would provide for payment of only a portion of the Tier 1.Y payments to CLECs, recognizing that this payment segment, while it may serve in part to compensate CLECs for additional harm, is also intended to deter inadequate performance. It serves this latter purpose by imposing on Qwest payment obligations that exceed the amount of harm caused to CLECs. The Colorado Special Master's Report then described Tier II payments, which were designed to require Qwest payments for failing to meet standards that were either aggregate (i.e., not CLEC-specific) in nature, or that related more to general support of competition as a whole. The report recommended the following monthly payment cap calculation method:

- Determine the amount equal to $1/12^{th}$ of the annual cap, which becomes the monthly cap
- Apply all Tier 1.X amounts against the monthly amount, but pay them even if they exceed that amount
- Pay Tier I.Y and II payments to the extent that the monthly cap was not exceeded by Tier 1.X payments
- Carry forward any unpaid Tier 1.Y and II payments until they can be paid from monthly amounts remaining after payment of Tier 1.X amounts.
- Allow the public service commission to increase the annual cap (and therefore the monthly amounts derived thereunder) in the event that Qwest should reach the cap for two consecutive years or owe $1/3^{rd}$ of the cap at the end of each of two consecutive months.

ELI/Time Warner/XO Utah argued against the QPAP's adoption of the 36% cap, citing several grounds, which included:[15]

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[14] Final Report and Recommendation by the Special Master *In the Matter of the Investigation into Alternative Approaches for a Qwest Corporation Performance Assurance Plan in Colorado*, Docket No. 01I-041T (Colorado Special Master's Report), provided as Exhibit S9-WCM-CEW-3. See pages 12 through 16 for a discussion of the structure of the payments proposed in that report.

[15] ELI/Time Warner/XO Utah Initial PAP Brief at page 12.

- That this figure was not comparable to the caps in the PAPs of other BOCS, because the QPAP is much more favorable to Qwest in other respects
- That the 36% figure is less than Qwest's profits from intrastate service in Washington and Utah, which would allow Qwest to continue profiting from local exchange service even after making payments at the cap.

ELI/Time Warner/XO Utah said that a small market share in the in-region, InterLATA market (i.e., less even than the 25% that Verizon initially captured in New York), would justify surrendering 36% of its other net revenues to protect its local exchange market from competition.[16]

AT&T argued that Qwest's reliance upon the FCC's acceptance of the 36% total payout in other proceedings was misplaced. AT&T said that Qwest's commitment to the 36% amount was undercut by many other self-serving changes Qwest had made in other material provisions of the plans accepted in those proceedings, citing specifically the following QPAP provisions:[17]

- Broad offset provisions
- Broad exclusion provisions
- Limits on use of dispute resolution procedures
- Tier 2 payment limitations
- Lower late report payments
- Six-month PAP review limitations
- Narrow audit provisions

Discussion: The FCC seems to consider that 36% of net interstate revenues is sufficient to provide an adequate incentive in some contexts. The Colorado Special Master's Report, issued after the input of many of the same CLECs participating here, applied that same basic standard to the Qwest region. Qwest presented evidence to support the economic significance of a sum based on that calculation. The participating CLECs had full opportunity to present evidence that would show that the particular facts about Qwest or their own services already being taken and to be taken from Qwest raise considerations or concerns not already addressed by the FCC in those other cases. Instead, we heard only more general objections to the use of a 36% standard.

Were we the first to consider this issue, such general objections might have carried more weight. Qwest correctly noted a central gap in what a number of participants argued on the question of the adequacy of the 36% cap. While criticizing the sufficiency of the payments provided by QPAP, they failed to answer the fundamental question raised by such an attack, i.e., how much would be sufficient.[18]

We are cognizant of the provident caution sounded by AT&T and ELI/Time Warner/XO Utah; i.e., that we not look in isolation at this standard. The FCC certainly had in mind

[16] ELI/Time Warner/XO Utah Initial PAP Brief at page 7.
[17] AT&T Reply PAP Brief at page 7.
[18] Qwest Reply PAP Brief at page 11.

the entire contents of the PAPs before it when deciding whether the 36% standard was sufficient to create a meaningful and significant incentive to other BOCs asking for the same relief as Qwest seeks here. Our conclusion, however, is based on the information coming from New York where the 44% updated cap was found necessary after having found a lesser cap inadequate. The conclusion we reach here is that we can and should learn from the efforts and recalculations of other state commissions, especially that of New York, and find that the 36% cap may not be an appropriate starting point. We also recommend that any cap set may be reexamined by the Utah Public Service Commission as can all of the other QPAP provisions affecting Qwest's incentive to perform.

2. Procedural Caps

AT&T and Z-Tel supported the adoption of a procedural rather than an absolute or "hard" cap.[19] WorldCom supported this approach, citing that a procedural cap makes it more difficult, as compared with a hard cap, for Qwest to make a calculating decision whether it is more economical to continue bearing the costs of non-compliance, rather than to bring its performance up to standard. WorldCom also observed that a procedural cap would give state regulators the power to modify the plan where circumstances would warrant a change.[20] AT&T also argued that a hard cap would operate to deny a CLEC full compensation in cases where the cap was reached before an individual CLEC suffered substandard performance. For example, under the QPAP, if Qwest reached the cap in October, but in that same month first failed to meet standards in the case of CLEC "X", CLEC X would be entitled to no payments at all.[21]

Discussion: There was an overabundance of ultimately unimportant urgings about whether this QPAP is voluntary or not. Whatever its nature, the issue before us is not changed. That issue is whether the participating commissions should tell the FCC that they think the QPAP sufficient to satisfy the public interest. Despite the confusion engendered by that debate, however, one cornerstone conclusion is extremely clear: Qwest offers it as the toll it is willing to pay to cross the bridge to in-region, InterLATA competition. Just as CLECs have the opportunity to decide whether the costs of entering the local exchange market are too great, so should Qwest have a similar ability before exercising its end of the Telecommunications Act of 1996 "bargain." The FCC and the states have gone a long way to providing a reasonable degree of economic assurance (as far as any business in an essentially free economy has a right to ask) about the costs of using incumbent facilities to enter that market.

Providing that assurance in reasonable measure is proper, because the Congress, as events have shown us, has asked CLECs to take large financial, operating, and customer-perception risks if they want to compete with the BOCs who are entrenched in their individual local exchange markets. There should be a compensating kind of certainty for the BOCs as they face similar business decisions about the markets of other carriers. A procedural cap that leaves others free to escalate without limit the risk that Qwest must take in entering the in-region InterLATA market makes a decision to enter the market much more speculative than it need or should be.

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[19] AT&T Initial PAP Brief at page 19; Z-Tel Initial PAP Brief at page 19.
[20] WorldCom Initial PAP Brief at page 8.
[21] AT&T Initial PAP Brief at page 20.

Our concern in this regard does not arise from the fact that the "others" who will make such escalation decisions are public service commissions; our faith in their ability to make such decisions carefully and wisely does not underlie this conclusion. However, the concerns of those who make the decisions, which include not only Qwest, but those who provide the company with capital, must also be taken into account. We should ask three questions and we must rely upon the answers to all in order to decide this issue:

- How much would we undercut the purposes and goals of the QPAP by failing to incorporate the economic "opener" that a procedural cap represents
- How likely will it be that CLECs will be under-compensated or that Qwest will be making a calculated decision to under-perform, should the caps be reached
- How much should we concern ourselves that a decision not to enter the in-region, interLATA market may follow.

The answer to the first question is that there will be no material weakening of the QPAP, given the other methods and processes available to redress an inability of Qwest to stay below the cap. These things include root-cause analyses, other enforcement proceedings, and the ability to revisit InterLATA authority itself. In light of that last power, we see the particular value of caps at all as assuring that: (a) Qwest not benefit from the delay it would take to exercise that power, and (b) that there be no reward in walking just this side of the line at which the exercise of that power becomes a real risk. A cap high enough to provide assurances in those two regards should be sufficient.

The answer to the second question is that there is not a basis in the record before us to conclude that a failure to properly control performance is at the root of continuing, high PAP payments. The analysis underlying this conclusion is set forth under the subject of *Limiting Escalation to Six Months*, which is addressed later in this report.

The answer to the third question is that the risk, while perhaps not "clear and present," is not immaterial. The FCC has made it clear that validly authorized in-region, interLATA market entry serves the public interest. Our own view is that the public benefits of true competition in the local exchange market are disproportionately much greater, but that relative disparity does not render unimportant the goal of increasing competition in other markets.

However, the above conclusions relate to the existence of a cap in general, not to a specific level. So while the finds are of use in evaluating the necessity of a cap in general, they provide little or no help in evaluating the proper level of the cap in particular.

Too much reliance has been placed on the Colorado Special Master's Report as supporting a procedural cap. It does unarguably provide for one, but it proposes very difficult standards for triggering a review. It requires one of two conditions to be met:

- Exceeding the annual cap for two years running
- Producing payments for two consecutive months at amounts that, when annualized, equate to twice or four times the annual cap amount.[22]

[22] The language of page 17 of that report may suggest that the annualized amount be equal to twice the annual cap amount, or perhaps even some other amount; in any case, the transitory nature of observations

Should the cap be exceeded for two years running, other provisions and mechanisms should already have come into play to address and respond to the underlying problems. As to the two-month trigger, it would take results that, while producing substantial penalties in their own right, could well even out across the remaining 12 months of the year. Therefore, the Colorado report offers little guidance to this analysis.

More intriguing is the WorldCom proposal to set as a procedural cap the 44% of net local revenue established by the New York Public Service Commission in post-271 proceedings to address the now well-known problems that arose after Verizon (Bell Atlantic-New York) received 271 approval from the FCC.[23] The New York Commission raised the level to 44% in response to problems observed, after 271 approval. We can perhaps learn from the miscalculations of New York, which is now further along in the 271 process concerning backsliding, and take note that the 36% cap initially set by the New York Commission is no longer to be considered reasonable. We find that the incorporating of a 44% cap has significant merit. The escalated cap would apply only if Qwest had miserable failures for many repeated measurements periods and significant volumes of failure. If Qwest provides the expected service, the escalated cap (or even the 36% cap currently proposed by Qwest) would never apply and would only be of theoretical interest. As noted in the general QPAP design below, we recommend an escalated final cap of 48% (see cap movement principle below).

The WorldCom proposal is, while not offered in that form by WorldCom, a targeted and measured increase, as opposed to the unlimited one generally proposed by CLECs here. Such an increase would moderate the uncertainty, discussed below, that an unlimited re-opener would place upon Qwest. Signaling the amount of an increase in exposure, accompanied by clear and complete statement of the conditions that cause it can better serve to provide appropriate incentives without making business entry decisions unduly speculative.

Because we have yet to accumulate substantial experience under a broad range of PAPs across the country, we consider it prudent to consider the possibility of allowing movement of the cap within a reasonably confined range and for a defined set of circumstances. Coming experience will tell us much more about whether a 36% cap or a 44% cap is or is not appropriate; but if we err, we choose to err on the side of caution. Take just four of what are probably numerous examples of how our knowledge will increase in the next several years:

- Qwest performance baselines will become more established
- Root cause analyses will identify the actual causes of persistent, substandard performance
- What needs to be measured and how those measurements should be used will be enriched by growing competition
- The trend in local market penetration by CLECs will tell us whether 1999 remains an appropriate year to use as the foundation for setting total financial exposure.

about amounts determined for 12-month periods that can be drawn across 1/6th of such periods still applies, as is discussed immediately below.

[23] WorldCom Initial PAP Brief at page 8.

We believe that the combination of factors such as these could support upward movement of the 44% limit. Therefore, we recommend the inclusion of the following Cap Movement Principles in the QPAP:

A maximum increase in the cap of up to 4 percentage points shall occur upon order by the state commission that it is appropriate to do so in cases where the current cap has been exceeded for any consecutive period of 12 months, provided that:

> *a. the commission shall determine that 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.*

Without such a proposal as shown above, in years where the cap may be exceeded, the QPAP could otherwise operate severely and unfairly against CLECs who suffer disproportionately from Qwest under performance late in the year. 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 monthly cap is reached, each CLEC that would normally be due a Tier 1 payment shall receive a promise of payment (debt) from Qwest that shall accumulate interest until such time as Qwest pays it. Likewise, the State of Utah shall also receive a promise of payment for any Tier 2 payments that would normally be due it. These debt instruments will also bear interest. At the beginning of any payment period (monthly), Qwest shall repay as much outstanding debt as the monthly cap allows before applying payments to current penalties. Qwest may at its discretion pay amounts in excess of the monthly cap to avoid interest charges.

Given that this proposal addresses the issues raised against a completely open-ended cap, and given that the proposal addresses the concern that any hard cap rewards bad behavior, we recommend that the essence of this proposal be adopted.

3. Qwest's Marginal Cost of Compliance

A number of participants supported the argument of the New Mexico Advocacy Staff that one sound way to examine the propriety of a firm payment cap would be to compare: (a) Qwest's marginal cost of complying with the performance standards against (b) the payments to which it would be exposed for not complying. As the New Mexico Staff's brief put it:[24]

[24] New Mexico Advocacy Staff Initial PAP Brief at page 15.

> *A cap such as the annual cap proposed by Qwest permits Qwest to calculate the net cost of discriminatory service to CLECs and weigh that cost against potential gains to Qwest of poor service to competitors.*

Z-Tel said that there is a "substantial risk" that Qwest will decide that paying 36% of its 1999 measured revenues is preferable to keeping its local market open.[25]

Qwest argued that there is no evidence to show that its marginal cost of compliance is greater than 36% of its net revenues. Moreover, Qwest said that the FCC has rejected the notion that such a balancing is appropriate in the first place. Qwest added that, even were it appropriate to use as a benchmark, the calculation of marginal cost is not straightforward, because Qwest would face enforcement risks beyond the monetary payments imposed under the PAP, were it to reach maximum payment levels.[26] Qwest also argued that any such analysis would have to consider not just a single year's payments. The reasoning was that Qwest would have an incentive to make very high cost investments that would produce benefits for numerous years, because those investments would reduce recurring QPAP payments in every year that the investment (e.g., additional trucks or network facilities) yielded benefits. In other words, in terms of examining Qwest's incentives, it would be necessary to look not only at one year's payback (e.g., reduced QPAP payments), but rather to value the stream of annual reductions that would result from an investment.

Discussion: There is certainly theoretical appeal in the marginal cost analysis that the New Mexico Advocacy Staff's witness explained. However, there are a number of insurmountable problems in applying it:

- As its proponent stated, neither he, Qwest, nor any other party presented evidence of what Qwest's marginal costs of compliance were, thus making the equation he espoused impossible to perform from this record, and perhaps at all
- Were there such evidence, there would remain the need, again as the witness agreed, to add to the calculation the expected values of other risks faced by Qwest, such as revocation of section 271 approval, or parallel enforcement proceedings
- Long-term investments by Qwest would reduce payments for a number of years; therefore, the necessary equation could not be performed by a simple comparison of a single year's costs and reduced QPAP payments.

Thus, while the proffered equation had theoretical appeal, it was ultimately not a solution here, because there was no evidence to enable its use. Moreover, it is unlikely that an attempt to gather evidence and to use it in an analytical model would yield particularly reliable results anyway, given the subjective nature of the other applicable risks and the judgments that would be necessary to value on a present basis the multi-year benefits that long-term investments would yield. We believe that the New Mexico Advocacy Staff witness's thoughtful and candid testimony recognized these unfortunate limitations.

[25] Z-Tel Reply PAP Brief at page 11.
[26] Qwest Initial PAP Brief at page14.

4. Continuing Propriety of a Cap Based on 1999 Net Revenues

ELI/Time Warner/XO Utah also criticized the freezing of the cap amounts that would result from continuing to use 1999 net revenues into the future.[27]

Discussion: This argument appears to rest upon the implicit premise that net intrastate operating revenue will continue to increase despite growth in competition for local exchange business. This premise is quite speculative. All other things being equal, the effects of access line growth would have to exceed those that result from loss of market share to CLECs. Moreover, it is not at all clear that all other things will remain equal. Many examples demonstrate the uncertainty:

- Local-exchange business retention strategies may produce broadly-based price concessions that lower per-access line net revenues
- If there is cross-subsidization in certain elements of local-exchange service, current tariff prices that contain a premium above costs may not remain sustainable as competition increases[28]
- Financial, accounting, and operational restructuring of interstate versus intrastate services, which are by no means unlikely in the fluid marketplace and regulatory environments now existing, may alter materially how intrastate return is calculated and how much it ends up being in the future.

There are probably a number of additional examples. These, however, are sufficient to demonstrate that there is no reason to conclude that the ongoing use of 1999 net intrastate revenues is more likely to increase or decrease Qwest's net financial exposure. On the whole, it appears preferable to rely upon the firm dollar amounts that the QPAP provides for, as opposed to taking a ratcheting risk of unknown direction and unknowable magnitude.

5. Likely Payments in Low Volume States

The New Mexico Advocacy Staff questioned the importance to be placed on the total cap amount in its state – arguing that very low CLEC local-exchange-service business volumes would make it impossible to generate payments at or near the New Mexico limit.[29] Qwest responded that its burden is not to produce CLEC business volume, but to respond to the orders that it receives. [30]

Discussion: The New Mexico Advocacy Staff argument, assuming its underlying factual basis to be sound, does not bear directly on the sufficiency of the cap. If low CLEC order volumes comprise the reason that the cap would not be reached, then a higher hard cap or a procedural cap would be unresponsive. Those higher triggers would not be met either. In the circumstances postulated, the issues become whether the PAP will: (a) adequately compensate CLECs with low order volumes, and (b) induce Qwest not to provide

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[27] ELI/Time Warner/XO Utah Reply PAP Brief at page 7.

[28] While similar to the first example, this one distinguishes itself by its application to a specific and narrower range of services that may be affected particularly because of historical regulatory pricing decisions.

[29] New Mexico Advocacy Staff Initial PAP Brief at page 25.

[30] Qwest Reply PAP Brief at page 15.

substandard service in a state with low overall order volumes. The QPAP does contain a provision for minimum payments, which will be discussed below. Such a provision is the direct way to address the New Mexico Advocacy Staff concern about how low order volumes might dilute the compensatory and incentive goals of the QPAP.

6. Deductibility of Payments

WorldCom questioned whether we should find comfort in the cap's adequacy in light of the fact that Qwest may be able to deduct payments for income tax purposes.[31] Qwest noted that the likely consequence of adopting WorldCom's suggestion, i.e., to declare the payments penalties in order to make them non-deductible by Qwest, would be that the CLECs receiving them would not have to declare them as income.[32]

Discussion: It should probably come as no surprise that parties who have described much of their opponents' positions as bald-face attempts to move payments in a self-serving direction, should bring the Internal Revenue Service into the argument. However, we consider it safe to presume that the prior plans considered by the FCC were also conceived in the shadow of our ever-watchful federal government revenuers. We see no reason unique to Qwest that would justify a tax-netting factor here. Neither, by the way, do we see any reason why the nomenclature of the QPAP, as opposed to the substance of the payments contemplated, would put the hounds off the scent in any case. We have confidence that what the thing is, as opposed to what those interested in the result call it, is the more material fact bearing on the question of taxability. Either way, it is our intent that Qwest should not be advantaged in their paying of penalties as a result of poor performance and then balancing the effect through tax write-offs, in that the incentive for Qwest to avoid these penalties would be significantly reduced.

B. Magnitude of QPAP Payout Levels

Total economic exposure addresses only part of the broader issue of the sufficiency of payments under the QPAP to provide a meaningful and significant incentive to Qwest. Equally material is the question of what level of event-specific payments apply. A total exposure of even much more that 44% of net intrastate revenues might not deter substandard performance, if payments per event of non-compliance are so low that:

- They do not compensate CLECs, as a baseline consideration, for the harm that poor performance causes them
- Their accumulation is at so slow a rate as to make it improbable that they will rise to economically significant levels, no matter how bad performance becomes
- They fail to communicate to Qwest that compliance is preferable to defiance.

Qwest presented an analysis of the payments that the QPAP would have produced for the months of February through May 2001, on the basis of the assumption that the QPAP had been in effect for at least six months prior to that February. The calculations to which Qwest testified showed that payments would have been ***CONFIDENTIAL*** and would

[31] WorldCom Initial PAP Brief at page 4.
[32] Qwest Reply PAP Brief at page 27.

have produced the equivalent of ***CONFIDENTIAL*** free years of service for CLECs. Qwest considered these payment levels to be very substantial in light of the fact that Qwest measured its overall performance level under the applicable performance measures at 92% 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.[33]

Qwest also presented analyses of the combined Tier 1 and Tier 2 payments it would have made for the 2001 months of February through May for unbundled loops and coordinated cuts. Qwest's analysis showed that its QPAP payments for those measures would have exceeded the total revenue it would have received for the services measured by them.[34]

Qwest addressed as well the "significance" of payments for individual occurrences where it failed to meet the standards for which the QPAP requires payment. Qwest said that the individual payments were significant in their own right, but it was also necessary to recognize that the same order or activity could produce multiple payments.[35] Thus, even if there were concern that the payments set for an individual measure were insufficient to compensate CLECs for damages, Qwest felt that the QPAP's provision of multiple payment opportunities for the same activity or closely related activities would assuage it.

CLECs broadly attacked this analysis, asserting, for example that:

- AT&T was among the CLECs who said that the fact Qwest would still have been paying substantial amounts even after escalation of payments for six-months (see the discussion of payment escalation under the subject *Limiting Escalation to Six Months* below) shows the inadequacy of the payment structure[36]

- ATT testified to a calculation that there was only a one in 96 billion chance that Qwest's claimed 10 separate payments would occur for a single activity or set of related activities[37]

- AT&T also argued that the Qwest analysis of sample payouts for the February-March 2001 period should have assumed that the QPAP began in February, which would have eliminated the accelerated payments and reduced the sample payouts by over 60%

- Qwest escalated payment amounts for misses for more than six months, but the QPAP limits escalation in payments to only six consecutive months[38]

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[33] Qwest Initial PAP Brief at pages 7 and 8.
[34] Qwest Initial PAP Brief at page 9.
[35] Exhibit S9-QWE-CTI-5, page 6.
[36] AT&T Initial PAP Brief at page 23.
[37] AT&T Initial PAP Brief at page23; WorldCom Initial PAP Brief at page 6, citing the fact that Qwest's purported combination of payments was "statistically unlikely;" Covad Initial PAP Brief at page 16, terming the maximum $750 payment cited by Qwest as difficult to get.
[38] Covad Initial PAP Brief at page 11.

- The total payment amounts shown by Qwest were paltry when compared with its third-quarter projected total revenue[39]

The New Mexico Advocacy Staff said, as was addressed above under the discussion of *The 36% of Net Revenues Standard*, that the proper inquiry was not the size of the payments provided to CLECs, but Qwest's marginal costs of not complying with the standards, which the staff's testimony presented as the alternative course of action that the QPAP should seek to discourage.[40]

Qwest responded that the calculations showed the effects of full implementation, and therefore did account for escalation properly.[41] Qwest also argued that no CLEC had presented any evidence to show that the sample payout levels testified to by Qwest failed to fully compensate CLECs for their damages.[42] Qwest also said that CLECs did not support a more direct assessment of their losses; they declined to provide to Qwest information that would have allowed such an exercise.[43]

AT&T responded to the claim that there was no CLEC evidence of damages. An AT&T brief contained an extensive list of qualitative factual assertions about areas of damage. The brief did not cite to the portions of the transcript where evidence in support of those assertions could be found.[44]

Discussion: The arguments made against the relevance or the accuracy of Qwest's calculations were inapplicable or incorrect. First, the argument that the Qwest payout calculations show the ineffectiveness of the QPAP as a motivator of compliant performance is illogical. The presumed payments were, of course, not actually made. They were modeled for an historical period of time during which payments were not required. Not having been payable or paid, they obviously could not have motivated performance as they might have had they been payable.

Second, AT&T's statistical calculation of the probability of multiple payments from single or related activities was flawed, because it failed to recognize a central aspect of Qwest's argument, which was that the variables affecting payment levels are not independent; i.e., the same failing that causes one measure to be missed can cause another to be missed. AT&T's strict multiplication of probabilities can only be applied to

[39] Covad Initial PAP Brief at page 12.
[40] AT&T Initial PAP Brief at page 22.
[41] Qwest Reply PAP Brief at page 7.
[42] Qwest Reply PAP Brief at page 6.
[43] Qwest Reply PAP Brief at page 8.
[44] AT&T Reply PAP Brief at page 4. Footnote 9 of that brief indicated that AT&T was prohibited from exploring additional areas of cost. That statement is disingenuous. First, AT&T was not prohibiting from bringing any evidence into these proceedings in proper order. The objection sustained was to a question that went well beyond the bounds of the rebuttal testimony to which AT&T's witness was responding. By that time AT&T had already passed on two fully unconstrained opportunities to tell us what its additional costs were. It was merely denied an opportunity to go beyond the clear and pre-established bounds of questioning to get into new subjects. Moreover, a review of the transcript indicates that the question sought yet more qualitative, not quantitative, evidence. See the August 29, 2001 transcript, starting at page 51.

independent variables.[45] AT&T's simple exercise could be very far from the mark in this case, where the variables are not all independent. Even if we do not reach the maximum coincidence of payment opportunities from the same or related activities, we can nevertheless accept as established the fact that causally linked payment opportunities and resultant increases in payment levels are proper to assume.

Third, it is curious for AT&T to argue that Qwest's sample calculations should not have assumed that the QPAP had been in existence for at least six months. AT&T, among others, has placed strong emphasis on the need for escalating QPAP payments. It is not consistent to argue that payments need to be escalated to provide a proper inducement, yet to suggest that the effects of that escalation should be ignored when assessing whether payments are sufficient to provide the inducement being sought. The QPAP will start only once; we can presume that it would continue indefinitely in the event of 271 approval. It cannot be true that the best way to assess the operation of an ongoing plan is to examine its inception period, where that inception period will not allow for the full display and impacts of features that will be ongoing.

Fourth, the record does not show that Qwest increased payments beyond the six-months of escalation that is provided for in the QPAP. The evidence shows that the Qwest analysis accounted for escalation, where appropriate, up to and including, but not in excess of six months.

Fifth, how the QPAP payments relate to consolidated Qwest net income does not bear upon the issue addressed in the analysis or the issue before us. There was no proposal for payments that are a function of revenue sources that have nothing to do with local exchange service; moreover, none would be appropriate. The proper base for assessing overall exposure is, as the FCC appears repeatedly to have accepted, intrastate net revenue. Moreover, at the overall level of performance Qwest reached in serving CLECs during the period in question, it is not clear why Covad would suggest that significantly higher payments would have been anticipated. Surely Covad would not argue that payments not be made a function of performance to CLECs, but rather a parent's consolidated income.

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

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[45] For example, assume that: (a) it must be cloudy and less than 32 degrees for snow to happen, (b) the random chance of clouds for a given locale is 20 percent, (c) the random chance of temperatures below 32 degrees for a given day is 10 percent, (d) it snows 50 percent of the time that such conditions are met, and (e) we want to know the odds that it will snow on any given day at that locale. If we calculate the odds of snowfall as if these variables were independent, then the chance of snow is 0.2 times 0.1 times 0.5, which equals 1 percent. However, we can note that clouds affect temperature; therefore, there is a greater coincidence between cloudiness and temperature than the previous arithmetic would suggest. Let us suppose that it is more often sunny in the summer in this locale, and that it is in fact cloudy on 75 percent of the days when the temperature is less than 32 degrees. We would now more accurately calculate the odds of snowfall on cloudy days of less than 32 degrees as being six times more likely; the arithmetic follows: 0.75 times 0.1 times 0.5, which equals 6 percent. Obviously, if we are dealing with more than two linked variables among many, the effects of accurately depicting the linkages with arithmetical accuracy would be much more dramatic.

C. Compensation for CLEC Damages

1. Relevance of Compensation as a QPAP Goal

Z-Tel discounted substantially the relevance of the goal of compensating CLECs for damages incurred as a result of non-compliant Qwest wholesale performance. In fact, Z-Tel said that the point of a performance assurance plan is to create incentives to detect and sanction poor wholesale performance, not to compensate CLECs for harm. Apart from the question of whether the QPAP should address CLEC compensation at all, Z-Tel also argued that it is not appropriate to subject such compensation to a liquidated damages test, because Qwest has not shown that the legal standard applicable in deciding the propriety of allowing liquidated damages has not been met here.[46] In support of its position with respect to the insignificance of the question of damages in connection with the QPAP, Z-Tel asserted that the FCC has not yet faced an application that specifically requires CLECs to waive their other contractual claims and other rights of action.[47]

Discussion: Many participants disputed the centrality of actual CLEC harm to the question of determining payment levels to CLECs, but none so strongly as Z-Tel. All of the other participants at least implicitly made the sufficiency of the QPAP to compensate CLECs for harm they suffered a matter of interest to these proceedings. The FCC does couch its test in terms of incentives, but an elementary legal principle in the field of remedies is the public interest in holding contract parties, tort feasors, and other culpable perpetrators of injury responsible for the damages they cause to induce them to behave in ways that will avoid such harm. There certainly exist, in some cases, additional remedies not related directly to harm but designed to provide strong incentives to avoid certain forms of conduct. Punitive damages are one example; the escalation of Tier 1 payments (in part) here and the Tier 2 payments here are others. However, the existence of those added remedies does not signify that the award of compensatory damages at law or equity has no relationship to the inducement of publicly acceptable behavior.

Moreover, even if the case were otherwise, there is sound reason for addressing the recovery of traditional damages together with the inducement features of a QPAP. Quite obviously, if one were to ask how much it takes to cause a BOC to act in manners considered acceptable, it would be incongruous to ignore substantial payments that are reasonably certain to be ordered by other authorities for the same behaviors or activities.

Despite the common sense of the matter, there does remain the question raised by Z-Tel's suggestion that one cannot read prior FCC decisions as embodying the belief that those PAPs going before this one contain a significant CLEC compensatory element. The Michigan Public Service Commission Opinion and Order on the Ameritech Michigan PAP,[48] which the Commission noted was based on the Texas plan, for example, did the following:

- Talked about the plan's "remedies" for "violations" [page 4]
- Called the Tier 1 payments "liquidated damages" [page 5]

[46] Z-Tel Initial PAP Brief at page 27.
[47] Z-Tel Initial PAP Brief at page 33.
[48] Provided as WorldCom Exhibit S9-WCM-CEW-7.

- Responded to CLEC arguments that Tier 1 payments would not "adequately compensate them for the harm they suffer" in some cases [page 5]

The Texas PAP[49] that was part of the 271 application approved by the FCC says the following about damages:

- The BOC will pay CLECs 'liquidated damages" [Section 5.2]
- The parties agree that damages are liquidated because proof of them would be difficult to ascertain and because the provisions of the PAP reasonably approximate contractual damages [Section 6.1]
- The only remedies explicitly preserved for CLECs are "noncontractual" ones [Section 6.1]

Even the joint CLEC performance incentive plan submitted to Qwest recognizes the compensatory nature of material portions of Qwest payments.[50] Page 1 talks about a "system of self-enforcing consequences for discriminatory ILEC performance" and about the inability of CLECs to rely upon the "extensive delays inherent in the adjudication and appeals process." Page 4 talks about the need to minimize litigation and regulatory delays associated with imposing "financial consequences." Page 6 expresses the joint CLEC view that "Tier I provides a form on non-exclusive liquidated damages payable to individual CLECs."

History demonstrates that state public service commissions, the FCC, and other CLECs all recognize the compensatory nature and the liquidated damages elements of performance assurance plans. Z-Tel itself suggested on several occasions that, should certain of its QPAP adjustment proposals be viewed as overcompensating CLECs, the added payments could be transferred to Tier 2. Were the sole purpose of the QPAP unrelated to compensating CLECs or limiting their outside damage recovery opportunities, it is not clear why Z-Tel was proposing that any compensation at all go to CLECs, in whatever tier it be placed. We can be reasonably comfortable that even Z-Tel accepts at some level the CLEC-compensatory nature of the QPAP.

It is appropriate for the QPAP to address the question of compensating CLECs for contractual damages, and it is appropriate that the QPAP liquidate such damages, given the difficulty in measuring them precisely, and given that the QPAP payments approximate such damages. A central feature of this QPAP, like others before it, is its ability to replace costly and protracted litigation and its uncertain results with a system that is more appropriate to creating and maintaining an efficient and balanced commercial relationship. If the intention of the FCC for a PAP were otherwise, we might well wonder just what litigation and uncertainty would be avoided. Nearly all of it would loom under Z-Tel's approach, yet we know avoiding such clouds to be a central purpose of performance assurance plans.

[49] Exhibits S9-ATT-JFF-7 and 8.
[50] Exhibit S9-ATT-JFF-9.

2. Evidence of Harm to CLECs

Covad said that a cap would necessarily leave CLECs less than whole for the harm that they suffer from Qwest conduct. Covad did not present any quantitative evidence that would correlate the harm it suffers either with the amounts it would receive under the QPAP, or with the 36% revenue cap.[51]

WorldCom objected to the CLEC lost-profits analysis presented by Qwest because it was based on a one-line business analog service rate. WorldCom said that Qwest's analysis failed to include the loss of profits that would come to CLECs when other services were bundled or when customers had more than one line. WorldCom also argued that Qwest failed to consider customer acquisition, local-service-request, maintenance and repair, or coordinated-cut costs in its analysis. WorldCom also said that the commissions could consider Qwest's labor rates as surrogates for CLEC costs in assessing damage resulting from poor Qwest performance.[52]

AT&T noted that intangible CLEC losses were "impossible to quantify;" therefore, they should not be limited.[53] Qwest said that Covad failed to support its argument that Tier 1 payments did not compensate it sufficiently; as Qwest noted,[54] there was no Covad accounting of the tangible or intangible costs or damages it suffered through substandard performance from Qwest. Qwest argued further that no CLEC presented any evidence that would verify any customer loss due to Qwest's performance or that would address the frequency with which they would lose customers for such reasons. Qwest also said that there was no CLEC evidence about the expenses or investments that they incurred due to poor Qwest performance.[55]

Discussion: There certainly was extensive criticism of Qwest's attempt to relate QPAP payments to the level of damage or harm suffered by CLECs as a result of poor Qwest performance. However, Qwest was correct in arguing that CLECs did not present substantial evidence to show what their damages had been or would be. Covad presented no such evidence. AT&T, in fact, appeared to say that a quantified assessment of all CLEC damages could not be undertaken by anyone, because of the inability to quantify intangible damages at all.

This AT&T argument actually supports liquidating such damages, as opposed to merely abdicating the responsibility to prove an "unprovable" to some other decision maker. Because such damages will prove no easier to quantify after the fact or by some other trier of fact, we should address them here; they fit precisely the kinds of liquidation needs for which such damage provisions are intended. It may not often be admitted candidly, but if judges and juries in the civil system were better at pondering the magnitude of damages of this type, we would not need liquidated damages clauses. We conclude that such a clause is indeed appropriate here, given the nature of the harm and the disagreement not only about how to measure it, but also about whether it can be measured at all.

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[51] Covad Initial PAP Brief at page 29.
[52] WorldCom Initial PAP Brief at pages 5 and 6.
[53] AT&T Initial PAP Brief at page 23.
[54] Qwest Reply PAP Brief at page 10.
[55] Qwest Initial PAP Brief at page 10.

The question therefore remains whether the QPAP payments represent a reasonable approximation of the harm that CLECs suffer. Qwest's principal evidence of consequence on that question was not lost CLEC profits, or a direct analysis of CLEC costs. Rather it was an approximate equation of service price with service value. Lost CLEC profits, while comprising another line of Qwest evidence, was not alone, or in our judgment, even weighty. The CLEC community is, we suspect, probably nearly unanimous in arguing that Qwest's UNE prices substantially exceed its economic costs. In light of that consensus, it would be curious to argue that price is not, in fact, a very generous representation of value.

Turning then to the lost profits analysis, we first noted that, while criticizing Qwest for not addressing a variety of charges, WorldCom failed to present an analysis seeking to quantify harm. Moreover, it would appear that Qwest's analysis did implicitly consider all CLEC costs by translating QPAP non-recurring-charge payments into equivalent months of service. If there is a more direct way of considering these payments, neither WorldCom nor any other participant has chosen to provide even a gross quantitative measure of it. Certainly, it has not been shown to be sound merely to layer a refund of those payments on top of the QPAP payments proposed by Qwest. What else we might constructively do with the WorldCom evidence is not at all clear. Covad similarly failed to provide its own evidence of lost profits, choosing to stand on a criticism of Qwest's method.

We found Qwest's analysis to be largely based not on its own knowledge, but upon what another party said about CLEC profits. It was not compelling testimony and it had only marginal weight in our analysis. In its complete absence, we would conclude that the suitability of the QPAP payment levels as an approximation of CLEC damages was sufficient. Thus, the CLEC criticisms, which in any event did little to change the weight to be given to Qwest's evidence, would have made little difference even had they been better developed. We might have faced another situation had CLECs chosen to present their own quantification of lost profit and other harm for comparison to the QPAP payments. The record clearly would have benefited from CLEC presentations of a structured and comprehensive attempt to measure their harm. Uniformly, however, they chose not to do so.

3. Preclusion of Other CLEC Remedies

Sections 13.5 and 13.6 of the QPAP treat Tier 1 payments as liquidated damages, which are designed to provide, for CLECs that opt into the QPAP, an exclusive remedy to compensate for damages resulting from Qwest service in fulfilling its wholesale performance obligations. Qwest said that Sections 6.1 of the Texas, Oklahoma, and Kansas plans make the same provision. In return for the right to such payments without the necessity to prove harm, Qwest in return would secure what it considers a commonly provided consideration; i.e., that other damages arising from the same, or analogous performance will be waived.[56]

ELI/Time Warner/XO Utah said that one of the distinguishing features of the QPAP from other PAPs that have formed part of 271 applications that the FCC approved is Qwest's

[56] Qwest Initial PAP Brief at page 66.

insistence that CLECs waive other remedies for recovery of damages.[57] ELI/Time Warner/XO Utah argued that a CLEC should not be foreclosed from opting to take other remedies, such as those available under state public service commission rules, even where it has chosen to avail itself of QPAP remedies.[58]

AT&T proposed the approach of the Colorado Special Master for addressing other remedies. AT&T described that approach as allowing CLECs to seek contract remedies even after accepting PAP payments, in those cases where CLECs could demonstrate to an arbitrator or mediator a reasonable damage theory that would show that the PAP payments it has received were not fully compensatory.[59] Qwest did agree that the QPAP would not preclude CLEC claims based on non-contractual causes of action, nor would it limit federal enforcement action under section 271(d)(6). However, Qwest did say that the offset provision of the QPAP (Section 13.7) would apply to non-contractual remedies.[60]

Discussion: The Texas plan does in fact place substantial limitations on other remedies. It provides as follows:[61]

> *5.2. SWBT will pay Liquidated Damages to the CLEC according to the terms set forth in this Attachment.*
>
> ...
>
> *6.1. SWBT agrees that the 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 a CLEC. By incorporating these liquidated damages terms into an interconnection agreement, SWBT and CLEC agree that proof of damages from any "noncompliant" measure would be difficult to ascertain and, therefore, liquidated damages are a reasonable approximation of any contractual damage resulting from a non-compliant performance measure. SWBT and CLEC further agree that liquidated damages payable under this provision are not intended to be a penalty.*

The Texas plan is intended to limit additional recovery under causes of action that sound in contract. Such a provision is reasonable as a means of precluding double recovery, while at the same time allowing for recovery of damages that result from other theories of liability, such as those grounded in tort or anti-trust law.[62] The Colorado Special Master's Report generally would produce a similar result; i.e., suits under non-contractual theories will be allowed. That report provides that:[63]

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[57] ELI/Time Warner/XO Utah Initial PAP Brief at page 12.
[58] ELI/Time Warner/XO Utah Initial PAP Brief at page 23.
[59] AT&T Reply PAP Brief at page 9.
[60] Qwest Initial PAP Brief at page 68.
[61] Exhibit S9-ATT-JFF-8, at pages 19 and 20.
[62] Note that there is an issue, which is to be addressed subsequently, that is related to but distinct from the narrow question at issue here, which is whether noncontractual causes of action are and should be prohibited by the QPAP. That separate question is the degree to which payments under the QPAP should offset any damages that may be awarded in such other, noncontractual proceedings.
[63] Exhibit S9-WCM-CEW-3.

> [T]*he PAP shall not limit alternative remedies available to CLECs under (1) Section 251/252 remedies that supplement the PAP (as opposed to those which overlap with the PAP) and are subjected to the procedural pre-filing requirement set out below; (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); (3) federal enforcement action under Section 271(d)(6); or (4) any applicable antitrust, tort, or consumer protection remedies.*

However, the pre-filing requirement cited in that report does appear to allow a CLEC to seek leave to file an action based in contract law where it can show a reasonable damage theory that would Qwest payments do not fully redress the competitive harm suffered by a CLEC. It is this provision that AT&T focuses on in supporting the approach recommended by the Colorado Special Master's Report.

Qwest's reply brief reflected a general commitment not to preclude noncontractual actions. Qwest cited the last sentence of QPAP Section 13.5, which provides that:

> *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.*

Taken by itself, 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.*

These provisions cannot be interpreted clearly and consistently when read together. The second provision extends beyond prohibiting double recovery for the same damages; it precludes any alternative remedies, whether they encompass broader or different damages. It is essential that we not confuse two related, but distinct legal concepts: (a) the theory of liability, which identifies the conduct to which liability attaches, and (b) the nature of the damages that flow from such liability. A tort remedy, for example, might include some of the same damages recoverable in a contract action, while allowing additional types of recovery. 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. We should therefore seek here language that does 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.

Anti-trust law provides a useful example of the application of these three principles. The QPAP should allow anti-trust actions. If an anti-trust action produces a base damage award of $200,000 for direct harm for contract breach, and a tripling of that amount, the base $200,000 should be considered as duplicative of the QPAP payments, while the $400,000 adder should not.

To make the QPAP conform to these principles, all the quoted portions of Section 13.6, following the phrase "in its interconnection agreement with Qwest" should be stricken. Qwest may replace them 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. Those limits are the bar on other contractual remedies and on double recovery (although the propriety of the latter remains to be discussed).

The Colorado Special Master's Report, as AT&T interprets it, would produce a substantially imbalanced result. That interpretation would allow a CLEC added compensation under contract theories where it could prove that its harm exceeded its payments. It would, not, however, allow Qwest to take back any of the PAP payments, even where it could show that they exceeded CLEC harm. It would be one thing to delete the Tier 1 payments altogether, requiring CLECs to show harm and to demonstrate its amount. This approach could be accompanied by moving the Tier 1 accelerated payments to Tier 2. However, it is not reasonable to allow CLECs to keep Tier 1 base payments and Tier 1 accelerated payments when it suited them, but to seek more when it did not.

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.

We are similarly not persuaded of the reasonableness of the ELI/Time Warner/XO Utah recommendation that CLECs retain the right to choose to take other remedies even after electing to take advantage of QPAP payments. It is reasonable to require CLECs to choose to take all or none of the QPAP remedies. Otherwise, we would invite debate about which specific QPAP payment elements correspond to those otherwise available remedies. The QPAP represents a comprehensive payment structure for compensating CLECs for harm. They have the right to elect all of it or none of it. It would not be reasonable to allow them to select those portions of it that are on balance more favorable than other remedies, while choosing to take other remedies in cases where they are more

favorable. Qwest has no right to do so; a proper sense of balance with respect to liquidated damages should require the same of CLECs.

4. Indemnity for CLEC Payments Under State Service Quality Standards

AT&T proposed that Qwest be required to compensate CLECs for any payments that CLECs must make for failing to meet state or federal service quality rules, provided that Qwest wholesale service deficiencies cause the CLEC failures.[64] ELI/Time Warner/XO Utah noted that the issue of Qwest indemnity for CLEC payments for failing to meet state service quality standards was addressed earlier in these workshops. ELI/Time Warner/XO Utah believed that this provision, which could involve dispute and litigation, should therefore be addressed elsewhere in the SGAT, not in the QPAP. ELI/Time Warner/XO Utah sought to assure that the QPAP not preclude such indemnification.[65]

Qwest objected to an added requirement that it compensate CLECs for assessments that state commissions make against CLECs for violating state service quality standards. Qwest noted that the QPAP's liquidated damages provision contemplates full payment for harm arising from the same performance; therefore, there should not be any added payment for this element of damages. Moreover, Qwest observed, such a provision would engender litigation about whether Qwest's performance did or did not lead to the failure of a CLEC to meet retail standards.

Discussion: The merits of requiring such indemnification were fully addressed in prior workshops.[66] Given that Utah has specific service quality rules that do impose possible penalties on carriers, the one-size fits all (nine states) approach is not merited. If a CLEC can demonstrate that the specific Qwest failure in question caused them to be physically incapable of meeting a Utah service standard that resulted in the CLEC being fined, and if at such time Qwest has an opportunity to respond, and the Commission finds in the CLEC's favor, then the Commission may order that the fine be assessed against Qwest without altering any payment obligations arising out of the QPAP provisions.

5. Offset Provision (Section 13.7)

Qwest changed Section 13.7 to respond to concerns about its breadth. After the change, QPAP Section 13.7 provides that:[67]

> *13.7 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*

[64] AT&T Initial PAP Brief at page 18.
[65] ELI/Time Warner/XO Utah Reply PAP Brief at page 11.
[66] See the *Report on Checklist Items 1, 11, 13, and 14*, issued on May 15, 2001.
[67] See Attachment I to *Qwest Corporation's Responses to Oral Questions by Mr. Antonuk at the August 14-17, 2001 Hearings*, which changed this and a number of other SGAT sections that were included in the original QPAP filing.

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 objected to this section as revised on several grounds:[68]

- That no FCC order has allowed a BOC a unilateral right to make an offset and that the right to an offset is the province of the finder of fact under common law
- That there was confusion about the intent of the language about "analogous performance."

With respect to the question of who should determine an offset entitlement, Qwest was concerned about continuing to allow a compensating reduction in PAP payments where an outside decision maker; e.g., a court, would not permit QPAP payments to offset any damages it might award. With respect to the question of analogous performance, Qwest explained that the intent of this section was to preclude the construction of the term "performance" as meaning a "standard" rather than an "activity." Qwest added the word "analogous" to make it clear that Qwest was entitled to an offset where the same Qwest wholesale service or activity, "even though it may be measured or accounted for in different manners," produced compensatory damage awards.[69]

WorldCom did not object to precluding double recovery, but argued that the term "analogous performance" was too ambiguous, undefined, and likely to cause litigation, citing the fact that the Qwest witness presented to explain this provision could not define what the term meant. WorldCom asked that the phrase be stricken.[70]

ELI/Time Warner/XO Utah argued similarly to AT&T that the awarder of the damages in question, whether or not it were a commission with responsibility for administering the SGAT or interconnection agreement involved, should decide the propriety of an offset and that the offset should be only for the same performance, not analogous performance.[71] Qwest responded that the CLEC provision limiting Qwest's offset rights to an argument before the trier of fact would foment litigation.[72]

AT&T proposed the adoption of offset language from the Texas plan.[73] ELI/Time Warner/XO Utah said that the term analogous should be eliminated, and that Qwest should not have finally the right unilaterally to determine offset rights, but should be required to seek any requested offset from the "trier of fact."[74] Covad argued generally against the need for and the propriety of including an offset provision in the QPAP.[75]

Discussion:

[68] AT&T Initial PAP Brief at pages 4 and 5.
[69] Qwest Initial PAP Brief at pages 68 and 69.
[70] WorldCom Initial PAP Brief at page 18.
[71] ELI/Time Warner/XO Utah Initial PAP Brief at pages 23 and 24 and ELI/Time Warner/XO Utah Reply PAP Brief at page 11.
[72] Qwest Reply PAP Brief at page 46.
[73] AT&T Reply PAP Brief at page 25.
[74] ELI/Time Warner/XO Utah Reply PAP Brief at page 11.
[75] Covad Initial PAP Brief at page 42.

(a) Unilateral Right to Offset: In general, the state level rules which may lead to payments that Qwest wishes to have counted toward an offset arise out of state level concerns that have to do with service quality to the end user, or to the ILEC wholesale customer. While somewhat related to the backsliding incentive concerns inherent in the role of a PAP, they are distinct. If Qwest engages in behavior that generates state level payments, that activity should be considered in a distinct forum and accounting system different from the payments generated by the QPAP. There should be no right to offset included in the QPAP. If Qwest desires, it may petition the Utah Commission for a change in the Utah rules that would provide an offset. At that time, the Commission could consider all of the public policy aspects of the proposed change. Until such time as a Utah level investigation or hearing is conducted, the case for offsets has not been made, and none should be allowed.

(b) Injury to Persons or Physical Property: There remains one other technical problem with the Qwest language. 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.[76] In order to preserve the effect of those sections, QPAP Section 13.7 should contain a provision stating that:

> *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.*

6. Exclusions (Section 13.3)

QPAP Section 13.3 contains a list of circumstances that excuse Qwest from Tier 1 and Tier 2 payments in the event that certain listed events occur. Qwest said that these QPAP exclusions are similar to those of the Texas PAP, under which SBC has invoked a payment excuse only once to date. Observing that the QPAP requires it to prove the entitlement to invoke exclusions, Qwest generally considered the CLEC-proposed changes to this section inappropriate.[77]

(a) CLEC Bad Faith: AT&T wanted to strike the exclusion for bad-faith CLEC acts or omissions on the grounds that it was ambiguous.[78] ELI/Time Warner/XO Utah wanted to strike it for being unnecessary, because good faith by all parties is an implicit requirement of commercial relationships such as this one.[79] Qwest argued that this provision was appropriate to protect Qwest against actions that have the "foreseeable effect of causing Qwest to miss a performance standard."[80] ELI/Time Warner/XO Utah countered that neither a CLEC's ability to foresee Qwest's inability to respond nor the fact that a CLEC could somehow have reduced Qwest's burden in responding to CLEC requests should be determinative of whether the CLEC had exercised bad faith.

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[76] *Report on Group 5 Issues: General Terms & Conditions, Section 272 and Track A*, issued on September 21, 2001.
[77] Qwest Initial PAP Brief at page 73.
[78] AT&T Initial PAP Brief at page 6.
[79] ELI/Time Warner/XO Utah Initial PAP Brief at page 22.
[80] Qwest Initial PAP Brief at page 75.

Otherwise, such a standard could be used to exclude Qwest from its clear obligation to perform reasonably. ELI/Time Warner/XO Utah argued that bad faith, should it remain an exclusion, should be limited to cases where CLECs deliberately manipulated their orders with intent to cause Qwest to miss performance standards.[81]

(b) Duplicative Force Majeure Provisions: ELI/Time Warner/XO Utah also said that SGAT Section 5.7 already deals with equipment failure as a force majeure event. Qwest agreed to make changes to that section in our earlier workshops. Therefore, these CLECs argued, the QPAP should simply only refer to Section 15.7; it should not set forth a broader exclusion, which would weaken the standard set forth in the SGAT.[82] WorldCom also supported the use of the force majeure language from SGAT Section 5.7.[83] 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 provision.[84] WorldCom proposed to use the Colorado Special Master's Report language for third-party and vendor exclusions.[85]

Qwest said that a separate QPAP force majeure provision was appropriate, in order to eliminate the need for extensive cross-referencing to other SGAT provisions.[86]

(c) Resolving Disputes Over Force Majeure Events: AT&T noted that the QPAP was silent about who would determine whether Qwest had met its burden to show that non-performance under the QPAP resulted from an allowable exclusion. Qwest did say in testimony that the public service commission should decide any disputes about causation. AT&T requested the inclusion of a specific reference to commission authority to resolve such disputes.[87] SGAT Section 5.7 does not contain such a reference. WorldCom proposed detailed language to address the meeting of Qwest's burden of proof.[88] WorldCom also proposed that the QPAP require contemporaneous notice of a Qwest force majeure claim -- not merely a notice (which could come long after the fact) with the applicable bill credit statement.[89]

(d) Nexus Between Force Majeure Events and Qwest Performance: AT&T would add language explicitly requiring the demonstration of a nexus between an allowable force majeure event and Qwest performance, requiring further that the event render performance by Qwest "impossible." AT&T would also include language limiting any time extension on Qwest performance to the duration of the force majeure event.[90] Z-Tel proposed that any force majeure condition related to equipment failures be limited to a 72

[81] ELI/Time Warner/XO Utah Reply PAP Brief at page 13.
[82] ELI/Time Warner/XO Utah Reply PAP Brief at page 14.
[83] WorldCom Initial PAP Brief at page 16.
[84] AT&T Initial PAP Brief at page 6.
[85] WorldCom Initial PAP Brief at page 17.
[86] Qwest Initial PAP Brief at page 74.
[87] AT&T Initial PAP Brief at page 6.
[88] WorldCom Initial PAP Brief at page 7.
[89] WorldCom Initial PAP Brief at page 16.
[90] AT&T Initial PAP Brief at page 7.

hour duration.[91] Qwest pointed out that QPAP Section 13.3 requires that the failure of wholesale performance to be "the result of" the force majeure event.[92]

(e) Applicability of Force Majeure to Parity Measures: AT&T argued that force majeure should not be an excuse for failing to meet parity measures, because Qwest should still be able to meet the standard, which is that CLEC service be no worse. AT&T cited the Colorado Special Master's Report as supporting this conclusion. WorldCom made a similar argument.[93] Qwest said that a force majeure exclusion was appropriate for parity measures, because the extensive geographical range of Qwest's operations could cause an external event to have differential impacts on Qwest customers and CLEC customers.[94]

(f) CLEC Forecast Exclusion: WorldCom and Covad would limit the exclusion for CLEC failures to forecast to failures to provide those forecasts required by the SGAT.[95] Qwest would agree to language limiting the triggering forecasts to those "reasonably required under the SGAT or state rules to provide services or facilities."

Discussion:

(a) CLEC Bad Faith: That good faith by all parties is to be generally presumed in contractual undertakings cannot be disputed. However, this general principle may not serve to address the specific concerns that are at issue here. There is merit in an explication of the circumstances in which CLEC efforts (not that we in any measure predict them) to manipulate performance results will be to no avail. The stakes are high for all the participants in the marketplace that Congress has sought to induce; it is neither surprising nor inappropriate that the measure of those stakes in the case of this Utah QPAP are in the several millions of dollars annually.

The QPAP should therefore not be criticized for specifying when Qwest may be relieved of payment responsibility by virtue of such theoretically possible manipulative conduct. We should turn therefore, not to the arguments about presuming good faith, but to those that seek to define more precisely what it means in this context. ELI/Time Warner/XO Utah have properly alerted us to the fact that a CLEC should not be penalized for conducting its business in an otherwise reasonable way, merely because Qwest might be incapable of operating at an acceptable performance baseline, solely because that CLEC knows that Qwest suffers such an inexcusable weakness.

Having described its intent in designing the QPAP section in question, we are now forewarned about how Qwest may intend to apply it, and we are 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. Therefore, we find it necessary to state an agreement with the position of ELI/Time Warner/XO Utah that:

> *Notwithstanding any other provision of this QPAP, it shall not excuse performance that Qwest could reasonably have been expected to deliver*

[91] Z-Tel Initial PAP Brief at page 33.
[92] Qwest Initial PAP Brief at page75
[93] AT&T Initial PAP Brief at page 7; WorldCom Initial PAP Brief at page 16.
[94] Qwest Initial PAP Brief at page 74.
[95] WorldCom Initial PAP Brief at page 18; Covad Initial PAP Brief at page 55.

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.

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

(b) Duplicative Force Majeure Provisions: 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.

The more material issue is whether something about payments for non-compliant service calls for force majeure provisions that differ from those SGAT provisions that define what the underlying service obligations are in the first place. Qwest did not provide sound support for making a distinction, nor is any self-evident to us. To the contrary, if the SGAT creates an expectation of service subject to specific qualifications, there should be a strong presumption that the economic consequences for failing to meet the expectation should rest upon the same exclusions. Otherwise, we would face a question that represents an imponderable one on the record before us. That question, quite simply, is whether the performance standard or the consequence standard is the one that is too high.

(c) Resolving Disputes Over Force Majeure Events: It is appropriate to clarify the entity to whom Qwest must make and defend, against dispute if necessary, its determination that force majeure events have occurred. In examining Qwest's proposed new dispute resolution language, however,[96] we find that Qwest has in fact identified the resolver of disputes, which is the public service commission of each state. We consider that approach appropriate, with other changes that are not material here (see the *Dispute Resolution* section of this report). However, 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.

(d) Nexus Between Force Majeure Events and Qwest Performance: Whether it be QPAP Section 13.3 or SGAT Section 5.7, there is already a clear requirement that a force majeure event be the cause of a failure of Qwest performance. Moreover, it is not proper to adopt the extremely high standard of impossibility of performance. It is likely in many instances that 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 and efforts to mitigate, not to accomplish the

[96] See the proposed QPAP Section 18.0 language proposed at page 79 of Qwest's Initial PAP Brief.

extraordinary, whatever the cost. We construe the existing language as providing so already. 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.

There is merit in the AT&T language specifying the method for calculating the impact of a force majeure event on interval measures. It should be added to clarify the method for calculating QPAP payments when force a majeure event should have less than a completely excusing impact.

(e) Applicability of Force Majeure to Parity Measures: 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. We must nevertheless ask ourselves why it should be presumed that the differential effect must always work in one direction. We would answer that 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 answer in hand, we would then 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.

The Colorado Special Master, as he did in so many other cases as part of his fine efforts for the commission there, got the solution to this issue just right. Parity, although in a somewhat different sense, requires that parity measures not be subject to force majeure payment exclusions.

(f) CLEC Forecast Exclusion: While for the general (nine state) QPAP Qwest's concession puts most of the problem behind us, the QPAP continues to reach a scope that appears inappropriately wide, given the need for the document to operate reasonably free of litigation risk. Particularly troublesome is the provision about forecasts under state rules. Since Utah has specific forecasting procedures, we recommend that the QPAP make explicit that the application of these rules is not altered in any way by the QPAP provisions. Further, the QPAP must acknowledge (as the Commission's Order on Workshop 2 explained) that the forecasts required of Utha CLECs must be consistent with the Utah rules, or must not be the mechanism by which any penalties redound to the CLECs.

This change will deal as well with the other material concern about Qwest's offer. By definition, the SGAT cannot be read as requiring 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 yet 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. It simply will not do to introduce a troublingly undefined and shadowy provision that might do indirectly what we seek to prohibit directly.

7. SGAT Limitation of Liability to Total Amounts Charged to CLECs

ELI/Time Warner/XO Utah noted that SGAT Section 5.8.1 limits Qwest and CLEC total liability (except for willful misconduct) to the total amount charged under the SGAT for the applicable year. As ELI/Time Warner/XO Utah note, this SGAT provision expressly does not limit QPAP payments; however, nothing provides that QPAP payments do not limit the other damages, to which this section applies.[97]

Discussion: Now that the QPAP is before these workshops, we can conclude 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.*

D. Incentive to Perform

1. Tier 2 Payment Use

AT&T urged the elimination of the QPAP Section 7.5 requirement that Tier 2 payments be limited to use for purposes that relate to the Qwest service territory.[98]

Discussion: The proper construction of the Qwest language is that the restriction applies only to payment amounts to be administered by the Commission. Should the Commission administer those funds the restriction is not necessarily appropriate. It should not be presumed that Commission powers are so limited. There should also be no restriction on payments made to the general fund. Therefore, QPAP Section 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.*

While not addressed by the participants, the Colorado Special Master's Report (at Part VII) recommended a novel method for funding what may be significant administrative and dispute resolution responsibilities for the states that will receive such funds. As these

[97] ELI/Time Warner/XO Utah Initial PAP Brief at page 25.
[98] AT&T Initial PAP Brief at page 10.

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, the QPAP, federal law, and FCC regulations impose upon them. 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.

The QPAP should provide that up to 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. Qwest should also be required to make an advance payment against future Tier 2 obligations in an amount reasonably determined by the participating 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 there, 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.

2. Three Month Trigger for Tier 2 Payments

The QPAP requirement that non-compliance extend to three consecutive months before Tier 2 payments would be triggered concerned a number of participants. Qwest argued that there were sound reasons why Tier 2 payments should, unlike Tier 1 payments, not begin at the first month. Qwest said that the Tier 2 payments were not compensatory to CLECs, but were designed to add to Qwest's incentives to perform. Given the lag involved in identifying continuing problems and in taking steps to meet them, Qwest considered it appropriate to allow a three-month correction period, which it said is identical to how Tier 2 payments work in the Texas, Oklahoma, and Kansas plans.[99]

AT&T argued that payments 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.[100] The New Mexico Advocacy Staff argued that the payment lag proposed by Qwest would serve to postpone the need for Qwest to begin to address performance problems associated with Tier 2 measures.[101] AT&T said that Qwest has more than its regulatory reporting systems to advise it of any problems that it may be having in meeting obligations to CLECs. Qwest's own internal information sources, according to AT&T, should highlight areas requiring management attention earlier than three months after the fact.[102]

[99] Qwest Initial PAP Brief at page 25.
[100] AT&T Initial PAP Brief at page 11.
[101] New Mexico Advocacy Staff Initial PAP Brief at page 16.
[102] AT&T Reply PAP Brief at page 14.

Discussion: A point that is missed by the parties is that the State has an interest in having Qwest perform adequately. The State of Utah has as legislative policy: The promotion of competition in the telecommunications market place. To have a blanket policy that the Tier 2 payments do not start until many months of poor performance have occurred provides poor incentives to Qwest. For measures that do not have a Tier 1 counterpart, one compliant month out of every three absolutely is not considered adequate for those measures. Therefore, for these measures Tier 2 payments will begin just as the Tier 1 payments do. Any escalation should then take place as provided in the proposed QPAP, while assuring that payments do not drop back to zero until there is reached a point where there has been no occasion in the preceding 12 months during which non-compliant Tier 2 performance has occurred.

There remains the question of whether the performance inducement for Tier 2 payments that have Tier 1 counterparts is sufficient, given the three-consecutive-month requirement for Tier 2. Qwest's principal defense of the QPAP provision at issue was two-fold: (a) the need for time to identify and resolve long-term problems, and (b) consistency with other plans that the FCC has reviewed. The time-lag issue would be resolved by the adoption of the recommended approach for triggering Tier 2 payments for measures without a Tier 1 payment counterpart. However, it does appear that the Texas plan adopts the same three-consecutive-month trigger for Tier 2 payments. Nevertheless, given the emphasis placed on Tier 2 payments as an inducement, it remains difficult to place much faith in their contribution to a performance incentive plan when they can be avoided (even under measures where there are Tier 1 payments) by concerted efforts to bring performance to minimum acceptable levels only four months each year. Such a program appears more likely to lead to frequent underperformance than it does to encouraging routine compliance. In the case of Tier 2 payments that have Tier 1 counterparts, therefore, the QPAP should trigger Tier 2 payments in the second consecutive month of non-performance.

3. Limiting Escalation to 6 Months

Qwest supported the QPAP's limitation of payment escalation to six months on a number of grounds:[103]

- There was no evidence that such a limit would fail to provide Qwest sufficient incentive to meet performance standards
- Continuing escalation would substantially overcompensate CLECs (the Tier 1 and Tier 2 payments combined were already equivalent to giving CLECs free wholesale service for between 7 and 15 years, Qwest said)
- Such overcompensation would remove CLEC incentives to invest in their own facilities.

AT&T, ELI/Time Warner/XO Utah, WorldCom, Z-Tel, Covad, and the New Mexico Advocacy staff were among those who argued that escalation should continue after six months, rising as necessary to succeed ultimately in inducing Qwest to perform up to

[103] Qwest Initial PAP Brief at page 21.

[illegible] WorldCom said that the fact that Qwest even now has been missing some [illegible] for more than 6 months shows that the threat of 6-month escalation is not a sufficient incentive to perform adequately.[104] Z-Tel said that there is no doubt in [illegible] that, where performance remains below standard for six consecutive months, the payment levels were insufficient to induce compliance by Qwest. Therefore, according to Z-Tel, it follows that there should be continued escalation until performance comes up to standard. Z-Tel also suggests that there is systematic discrimination being [illegible] of such performance continues past six months.[105]

Discussion: First, it may not be self-evidently clear that continuation of poor performance past six months means that there was a methodical calculation by Qwest that the continuing costs of compliance exceeded the continuing costs of violation. However, it is absolutely clear that a significant problem of either economic incentive or technical difficulty must exist. Since all of the measures involved in the proposed QPAP are subsidiary to the ongoing ROC-OSS testing effort, it is clear that Qwest should be able to meet all of them. Because the ROC-OSS testing is "military style," Qwest will have already demonstrated its ability to meet each one of the measures prior to any application for interLATA relief. Further, there is certainly a common belief and expectation that Qwest can meet all of these measures; otherwise, it is difficult to see why Qwest would have agreed to them. Qwest, in effect, is arguing that the inability to meet a performance standard problem after six months translates into the belief that the standard is not [illegible]. However, as noted above, the assumed successful completion of the ROC-OSS test erases all validity for this line of argument.

We decline to recommend a six-month cut-off on escalation. We note that Qwest is always free to petition the Commission for relief and to change some standard in the QPAP if future evidence substantiates that initial miscalculations caused inappropriate standards to be designed in the first instance.

4. Splitting Tier 2 Payments between CLECs and the States

Qwest said that Covad's proposal for such a split was based on a misreading of the Colorado Special Master's Report; the report's splitting provisions related to Tier 1.Y payments, not to Tier 2 payments. Colorado's Tier 1.Y corresponds to the portion of QPAP Tier 1 payments that escalate for consecutive months of non-compliant performance. As Qwest noted, the escalation portions of Tier 1 payments already go to CLECs under the QPAP here.[107]

Discussion: 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 271 application previously addressed by the FCC. Regardless of whether any other plan supporting this approach, the two tiers of payment are fundamentally for different

[illegible] AT&T Initial PAP Brief at page 26; ELI/Time Warner/XO Utah Initial PAP Brief at page 13; Z-Tel Initial PAP Brief at page 15; Covad Initial PAP Brief at page 32; WorldCom Initial PAP Brief at page 7.
[illegible] WorldCom Initial PAP Brief at page 7.
[illegible] Z-Tel Initial PAP Brief at page 10.
[illegible] Qwest Initial PAP Brief at page 35.

purposes; splitting payments reduces the effectiveness of the two tiers in achieving correct public policy. 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.

V. Clearly Articulated and Pre-Determined Measures

A. Measure Selection Process

The Performance Indicator Definitions (PID) document setting forth wholesale performance measures was developed through an extended collaborative process involving Qwest, CLECs, and state commission personnel under the ROC Operational Support Systems (OSS) Process. The PID's performance measures encompass the following interactions between Qwest and CLECs in the context of resale, transport, interconnection, unbundled loops, and other wholesale services:[108]

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

Qwest observed that the PEPP collaborative included extensive negotiations to determine which PID performance measures should be included in the QPAP. Qwest said that, after the completion of that PEPP collaborative negotiation process, it agreed to add two additional diagnostic measures: GA-7(Timely [Gateway] Outage Resolution) and PO-16 (Release Notifications). Qwest also agreed to include a number of other measures not addressed at the PEPP collaborative: OP-17 (LNP Disconnect Timeliness), MR-11 (LNP Trouble Reports Cleared within 24 Hours), and MR-12 (LNP Trouble Reports – Mean Time to Restore).[109]

Discussion: No participant disputed that the PEPP collaborative sought to achieve a broad set of measures to include in the QPAP's payment structure. There was also not, per se, any challenge to the breadth or comprehensiveness of the measures that were agreed to during that collaborative. The issue in dispute essentially was about whether substantial grounds existed for including additional measures. The next sections of this report discuss the merits of adding to what we conclude is generally a well articulated set

[108] Qwest Initial PAP Brief at page 3.
[109] Qwest Initial PAP Brief at page 4.

of pre-determined measures and standards that span the range of carrier-to-carrier performance.

B. Adding Measures to the Payment Structure

1. Requiring Payments for Canceled Orders

ELI/Time Warner/XO Utah 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.[110]

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.[111]

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.[112]

Discussion: The QPAP should hold Qwest responsible for the consequences of its failures to perform. There is without question 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. However, 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 (the weaker the correlation, the more comforted we can be that payments made by Qwest already under the QPAP are sufficient).

These conditions have not been shown to exist here. CLECs presented no evidence to demonstrate the strength of the relationship between Qwest performance and canceled orders. In fact, they have not even presented enough evidence to demonstrate that canceled orders, whatever the reasons, are material in number. In any event, 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.

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[110] ELI/Time Warner/XO Utah Initial PAP Brief at page 5.
[111] Covad Initial PAP Brief at page 53.
[112] Qwest Initial PAP Brief at page 51.

In the absence of substantial evidence, 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 canceled. The record available to us allows a conclusion that the QPAP will already serve to compensate CLECs adequately for delays in processing orders, whether or not those orders are ultimately filled.

Covad makes a sound argument about the special circumstances regarding orders "held" for lack of facilities. However, 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, Covad should address by presenting its proposal in the forum established for considering new and revised performance measures.

2. Requiring Payments for "Diagnostic" UNEs

Several CLECs noted the importance of EELs to CLECs. They observed 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 to EELs at present: the performance measures related to them are diagnostic in nature.[113] Qwest's brief 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.[114]

Line sharing and sub-loops are also currently excluded from the QPAP payment structure, because the performance measures for them are diagnostic in nature.[115] 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.[116]

Discussion: Our prior workshops have made clear the importance of EELs to CLECs. Those workshops also demonstrated that there was not, prior to these workshops, an extensive experience base with EELs until recently. The ROC OSS collaborative properly determined that EELs should be measured on a diagnostic basis for some period of time. As EEL ordering activity increases, this measure should be subjected as soon as practicable to a measurement base that will allow for its prompt addition to the payment structure of the QPAP.

As is the case for EELs, 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. Clearly, they should be included in the QPAP payment structure as soon as is practicable.

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[113] ELI/Time Warner/XO Utah Initial PAP Brief at page 10; Covad Initial PAP Brief at page 18.
[114] Qwest Reply PAP Brief at page 34.
[115] Covad Initial PAP Brief at page 18.
[116] Qwest Reply PAP Brief at page 23.

3. Cooperative Testing

Covad noted 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. Covad recommended a cooperative testing performance measure as the most effective means of minimizing trouble reports for the xDSL UNE loops that it takes from Qwest. Covad cited a decision of the Texas commission requiring that orders not be marked as complete when an xDSL loop is not provisioned correctly at the outset.[117]

Qwest said that Covad failed to raise the cooperative testing issue at the PEPP collaborative; neither was it raised when the ROC OSS collaborative designed the performance measures set forth in the PID. Given the failure of Covad to offer any substantial reason for adding it now, Qwest argued that it should be rejected.[118]

Discussion: It should not be possible to meet a service order's requirements by supplying a defective or non-conforming UNE. While such events will happen occasionally in a large-volume operation, we should not encourage it as a means of meeting installation-interval measures. Moreover, 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. What Covad has not demonstrated is the 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. Nor does the record 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.

While it stands to reason that it is better to prevent and detect problems at the earliest possible point, the failure of Covad to raise this issue earlier means that we do not have a sound basis for concluding that Covad's approach, after all other parties have been heard from, would be preferable. 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.

4. Adding PO-15 D to Address Due Date Changes

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

[117] Covad Initial PAP Brief at page 51.
[118] Qwest Initial PAP Brief at page 52.

initiated.[119] Qwest noted that this performance measure is diagnostic in nature, and that neither Covad nor any other party 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.

Discussion: Covad offered no recommendation for what the standard should be; this lack is critical, because a diagnostic measure cannot provide a payment calculation basis. We can offer no solution to the Covad concern on this record.

5. Including PO-1C Preorder Inquiry Timeouts in Tier 2

AT&T commented 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 underway, thus requiring CLEC representatives to initiate it again. AT&T testified that some time-outs occurred after about 2.5 to 3 minutes of waiting.[120]

Qwest observed that AT&T considered the failure to raise this issue as an oversight. Qwest found that position hard to understand, because the PO-1A and B payment structure is based on intervals, while PO-1C is a percent measurement, which is structurally very different and therefore not compatible for payment purposes.

Discussion: The QPAP already provides for compensation for measures PO-1A and PO-1B, which measure response times.[121] There was a logical basis for excluding this percent measurement from the duration measurements that were included in Tier 1. We believe that the QPAP's treatment of the overall measurement (which includes 1A, 1B, and 1C) reflects a proper treatment of the issue of response times for the present. We also believe 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.

Given all the circumstances, we think it is reasonable to construe the PAP Collaborative agreement as intending not to include 1C separately; moreover, we find no reason to disturb that agreement as we have interpreted it. However, 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. This caution is offered in recognition that a high number of timeout cases (which have relatively much longer durations) could make response times under 1A and 1B look artificially good.

6. Adding Change Management Measures

Covad wanted to add change management performance measures to the QPAP.[122] Qwest had already agreed that it would add two change management measures, GA-7 (Timely

[119] Covad Initial PAP Brief at page 54.
[120] AT&T Initial PAP Brief at page 11.
[121] Exhibit S9-QWE-MGW-3.
[122] Covad Initial PAP Brief at page 49.

Outage Resolution) and PO-16 (Release Notifications). Those measures are now diagnostic, but would be included as "High" Tier 2 measurements after the ROC OSS collaborative establishes benchmark measures for them.[123]

Discussion: 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.

7. Adding a Software Release Quality Measure

WorldCom argued that the propriety of adding a proposed software Release Quality Measure should be reviewed at the QPAP's first 6-month review.[124] Qwest objected to the addition of a software-release quality measurement (GA-7), which the ROC OSS Steering Committee has recently rejected adding to the PID. Qwest also said that its testimony showed that the measure duplicated others, that it would tend to discourage ILECs from introducing software updates, and that such a measure is not included in any other BOC PAPs.[125]

Discussion: 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 WorldCom'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. Should the ROC Steering Committee's recent decision remain binding and apt at that time, its reconfirmation will end the matter without material inconvenience or harm.

8. Adding a Test Bed Measurement

WorldCom 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.[126] Qwest said that it is premature to discuss WorldCom's suggested test bed measurement because:[127]

- 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 presented evidence that the proposed measure is being "vigorously disputed," and that Qwest's current proposal under discussion at the ROC OSS collaborative specifically provided that the measure would remain diagnostic until the 6-month review. Therefore, Qwest took exception to any suggestion that this measure could be considered to be close to resolution.

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[123] Qwest Reply PAP Brief at page 31.
[124] WorldCom Initial PAP Brief at page 10.
[125] Qwest Reply PAP Brief at page 31.
[126] WorldCom Initial PAP Brief at page 11.
[127] Qwest Initial PAP Brief at page 50.

Discussion: We have 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.

9. Adding a Missing-Status-Notice Measure

WorldCom proposed adding to the QPAP payment structure a performance measure based on the missing status notice measure adopted in New York.[128] Qwest noted that neither WorldCom nor any other CLEC proposed this measure for inclusion during the PEPP collaborative. Moreover, the measure exists in the PID only in diagnostic form.[129] 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.[130]

Discussion: No 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.

C. Aggregating the PO-1 A and PO-1B Performance Measures

Qwest said that 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 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 intended was to aggregate each of the PO-1A measurements with their PO-1B counterparts, thus producing seven compensable QPAP measures.

Qwest said that its view is supported by agreement on the Qwest approach in Arizona, which it said came without objection by any participating CLEC there, and the inclusion of that same approach in the Colorado Special Master's Final Report, to which AT&T also did not object. Qwest also said that the agreement, which provides for escalation in payments as response times increase, is reasonable for these kinds of measurements.[131]

AT&T said that Qwest's interpretation of the agreement would allow Qwest to mask poor performance in certain transaction types.[132]

Discussion: 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

[128] WorldCom Initial PAP Brief at page 11.
[129] Qwest Initial PAP Brief at page 51.
[130] Qwest Reply PAP Brief at page 31.
[131] Qwest Initial PAP Brief at page 45.
[132] AT&T Reply PAP Brief at page 21.

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

The longest standard for any of them is 25 seconds; the shortest is 10 seconds.[133] 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 would produce a maximum monthly exposure of $1,470,000. The recommended AT&T exposure appears 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. For each system, what is at issue are small response-time variances; the maximum penalty is reached after a delay of 10 seconds. These two systems are likely to produce delays for largely independent reasons.

The evidence shows that the agreement reached was on the terms represented by Qwest; moreover, those terms establish significant and more balanced payment responsibilities for failure to meet standards.

D. Measure Weighting

1. Changing Measure Weights

Some CLECs requested that the weighting (and therefore the QPAP payment amounts) be increased for certain high capacity loop (DS1 and DS3) measures. Qwest agreed to do so, but it then dropped the weighting and corresponding payment amounts for other services, such as residence resale, to compensate. AT&T argued that it was appropriate to increase the high capacity measures, but not to decrease any others in response.[134]

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

[133] Exhibit S9-QWE-MGW-3.
[134] AT&T Initial PAP Brief at page 25; ELI/Time Warner/XO Utah Initial PAP Brief at page 15.

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.[135] Qwest's reply brief stated that no CLEC had taken issue with the proportionality analysis set forth by its witness in Exhibit S9-QWE-CTE-5, Slides 11 and 13.[136]

AT&T said that Qwest's response to AT&T's 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 PAP.

Discussion: 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. 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.

One source of disagreement is the AT&T belief that Qwest overcompensated. However, a number of CLECs go further. They at least implicitly argue that there is no reason not to increase the net rate of progression toward the cap, but we will defer resolution of that issue until later, in the *6-Month Plan Review Limitations* section of this report. As to the overcompensation issue, AT&T, which requested the change in the first place, failed to propose any better alternative. Therefore, given its opposition to what Qwest did to meet AT&T's 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 or the weighting decreases that Qwest offered to address AT&T's concern.

The QPAP before Qwest agreed to change certain weights was reasonable. It was also reasonable for Qwest to ask, in return for changing some payment amounts upward, for compensating reductions in others. 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. Qwest's proportionality analysis buttresses this conclusion. As a principal supporter of changed weights, AT&T found Qwest's change in to be imbalanced. No other reasonable proposal being made or accepted, the weights should return to those proposed in the QPAP that Qwest initially filed in these proceedings.

2. Eliminating the Low Weighting

ELI/Time Warner/XO Utah argued that no measure should have a low weight, all should be at least a medium, and some should move from medium to high. Covad also said that

[135] Qwest Initial PAP Brief at page 35.
[136] Qwest Reply PAP Brief at page 24.

no measures should be considered low. Z-Tel suggested averaging the low and medium payment amounts to reduce the weights from three classes to two classes.[137]

Qwest argued that CLECs presented no evidence to support a change in measurement weighting for PAP purposes. Qwest said that these changes would not improve the PAP, but would merely provide increased payments to CLECs.[138]

Discussion: 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. Finally, some of them suffer from the same balance problem that we addressed in the immediately preceding section of this report. All CLECs might agree on increasing the payments associated with all measures. But upon imposing what we feel is a proper balancing requirement, that consensus would likely disappear as parties began to focus on making their particular needs "winners" in the process, while seeking not to suffer any "losers" of importance to their operations. We believe that the three categories of weights that came out of the PEPP collaborative process should remain.

3. LIS Trunks Weighting

AT&T said that LIS trunks should be considered as particularly high value services, which 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.[139] ELI/Time Warner/XO also considered LIS Trunks to be of high value.[140]

Qwest said 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, Qwest argued, the trunk blocking measure, N-1, would already provide payments in cases where Qwest cannot provision incremental trunks on time.[141]

Discussion: From a broad perspective, 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 notes 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. In fact, a review of the CLEC testimony makes it appear as if 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, because taking each CLEC's claim of particular importance at face value would inevitably make all measures of high weight. We continue to believe that the QPAP payment structure already reflects an adequate treatment of measure weights. No change is recommended here.

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[137] ELI/Time Warner/XO Utah Initial PAP Brief at page 18. Covad Initial PAP Brief at page 34. Z-Tel Initial PAP Brief at page 34.
[138] Qwest Initial PAP Brief at page 27.
[139] AT&T Initial PAP Brief at page 25.
[140] ELI/Time Warner/XO Utah Initial PAP Brief at page 17.
[141] Qwest Reply PAP Brief at page 25.

E. Collocation

The New Mexico Advocacy Staff proposed either the Michigan or the Georgia approach to determining collocation payment amounts.[142] Qwest commented that the CLECs represented during a May PEPP collaborative workshop that their 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.

Discussion: The 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 brief. The incorporation of the proposal already agreed to by Qwest appears to respond to the request of the staff and is in any case reasonable. There is no reason to question the QPAP's treatment of collocation payments.

We recommend that a provision be included in the QPAP that explicitly states that a CLEC's general opting into the QPAP does not override their rights in Utah with respect to collocation intervals.

F. Including Special Access Circuits

WorldCom 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.[143] ELI/Time Warner/XO Utah also considered it 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.[144] ELI/Time Warner/XO Utah said that Qwest did not dispute the evidence that comprises the key factual support for its position – evidence that:[145]

- 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.

Qwest said that 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 said that special access circuits cannot be considered a checklist item at all, according to the FCC and a number of state commissions. Qwest also 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

[142] New Mexico Advocacy Staff Initial PAP Brief at page 23.
[143] WorldCom Initial PAP Brief at pages 18 and 19.
[144] ELI/Time Warner/XO Utah Initial PAP Brief at page 6.
[145] ELI/Time Warner/XO Utah Reply PAP Brief at page 2.

as supporting the exclusion of special access from PAP or other section 271 consideration. Qwest also objected to the notion that other states had acted substantively on the question of special access circuits. Qwest said, for example, that there is no authority for concluding that the Minnesota Commission has in fact adopted special access service standards.[146] Qwest also cited a recent Indiana Utility Regulatory Commission as denying a CLEC request to include performance metrics and penalties for special access circuits in proceedings addressing Indiana Bell (SBC-Ameritech) compliance with section 271(c). Qwest cited that decision's review of other state decisions, none of which, according to the Indiana commission, supports inclusion of special access circuits in an examination under section 271.[147]

Qwest also responded to the claim of ELI/Time Warner/XO Utah that Qwest failed to contest the factual issues surrounding special access.[148] Qwest cited testimony from its witnesses stating that virtually all special access circuits had been purchased out of interstate tariffs.[149]

ELI/Time Warner/XO Utah argued that nothing that the FCC has said in prior contexts, focusing on the Verizon (Bell Atlantic – New York) 271 order, should be read as contrary to its request here. These participants said the ruling in the New York 271 order provided that special access circuits should not be considered in the context of a 271 review. The issue here is different to them; it is adopting a QPAP payment structure. These participants said that the structure needs to include special access circuits, in order to assure that the PAP gives meaning to Qwest parity obligations, by encouraging adequate provisioning and repair of high-capacity Qwest facilities that serve CLECs. ELI/Time Warner/XO Utah said that the FCC has not precluded PAP 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.[150]

Discussion: We have spent considerable time examining CLEC use of special access circuits to provide local exchange service. The August 20, 2001 *Unbundled Network Elements Report* in these workshops described the contest over the relevant facts and the standards under which those facts should be considered. We conclude 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.

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. That issue was addressed in the prior

[146] Qwest Initial PAP Brief at page 54.
[147] Qwest Reply PAP Brief at page 33.
[148] ELI/Time Warner/XO Utah Initial PAP Brief at page 9.
[149] Qwest Reply PAP Brief at page 34.
[150] ELI/Time Warner/XO Utah Reply PAP Brief at page 4.

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. The August 20, 2001 report substantially eased restrictions on the conversion of special access circuits to EELs,[151] which makes 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.

G. Proper Measure of UNE Intervals

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.[152] Qwest responded that there is a logical relationship between SGAT Exhibit C and the PID performance measures.[153]

Discussion: This issue is similar to the one addressed as the first unresolved *Loops* issue (*Standard Loop Provisioning Intervals*) in the August 20, 2001 *Unbundled Network Elements Report* in these workshops. There is, as was discussed there, consistency 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, it is appropriate for the QPAP to apply the PID performance measures, not SGAT Exhibit C, as the payment standard.

H. Low Volume CLECs

Covad argued that Qwest designed the QPAP primarily to compensate high-volume CLECs, with the result that lower volume CLECs, such as itself, will be under-compensated.[154] 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. At the same time, some of the largest CLECs would have received disproportionately small payments.[155]

Covad also 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.[156]

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[151] See for example the proposed resolution of the third disputed *EELs* issue (*Waiver of Termination Liability Assessments for EELs*) from the August 20, 2001 *Unbundled Network Elements Report*.
[152] Covad Initial PAP Brief at page 23.
[153] Qwest Reply PAP Brief at page 40.
[154] Covad Initial PAP Brief at page 27.
[155] Qwest Initial PAP Brief at page 30.
[156] Covad Initial PAP Brief at page 33.

Qwest objected to Covad's characterization of this aspect of the QPAP. Qwest defended this 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%, i.e., four out of five. Qwest said its analysis of the February to May 2001 period showed that the so-called "one-miss" standard would only have come into play 8% of the time, which falls far short of justifying minimum payments 100% of the time.[157]

Discussion: 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.

Turning to the "free miss" issue, as parties termed it, 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.[158] Qwest's illustration calls to mind the way that the Sun illuminates the Moon: it can get only half the job done at a time. The occult side of Qwest's point about the problem of rounding "up" is that rounding "down" turns a 90% standard to an 80% one. 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. The SGAT should incorporate these changes.

VI. Structure to Detect and Sanction Poor Performance as It Occurs

A. 6-Month Plan Review Limitations

Section 16 of the QPAP provides the means for amending the plan. This section allows for the following changes:

- Addition, deletion, or change of measurements (based on whether there was an omission or failure to capture intended performance)
- Change of benchmark standards to parity standards (based on whether there was an omission or failure to capture intended performance)
- Changes in weighting of measurements (based on whether the volume of "data points" was different from what was expected)

[157] Qwest Initial PAP Brief at page 33.
[158] Qwest Reply PAP Brief at page 21.

- Movement of a measure from Tier 1 to Tier 2 (based on whether the volume of "data points" was different from what was expected).

The section requires any change to the QPAP to be approved by Qwest.

AT&T noted that the New York and the Texas plans allow any aspect thereof to be examined at the six-month reviews. AT&T urged this approach, in order to allow for a consideration of the public interest. Specifically, AT&T would make all plan aspects open to review, and would rest authority for deciding to accept any changes with the state public service commissions. AT&T would also eliminate the number of data points as the sole basis for determining performance measure reclassifications.[159] AT&T would also take away Qwest veto power over QPAP changes, and allow more extensive PID review.[160]

ELI/Time Warner/XO Utah proposed that the QPAP be treated like any other SGAT or interconnection agreement provision in terms of its amendment.[161] WorldCom objected to the failure of the QPAP to permit state commissions to amend the substance of the plan and to the veto power that Qwest has under the QPAP.[162] Covad said that the plan-review provisions of the QPAP were neither appropriate nor what has been included by other BOCs.[163]

Qwest objected to an obligation to open the QPAP generally to amendment, because of its need to have certainty about the extent of the obligations it was agreeing to undertake. Qwest also said that effective administration of the plan required a substantial degree of stability in its provisions. Qwest said that the QPAP limits on the scope of the 6-month reviews reflect the same provisions included in the Texas, Kansas, and Oklahoma PAPs existing as of FCC 271 application decisions there.

Discussion: The Texas PAP is in almost all respects consistent with what Qwest has proposed. The four types of permissible changes are the same. The requirement that the BOC agree to changes in existing performance measures is also the same. One material difference is that questions related to the addition of new measures may be resolved by arbitration. The Colorado Special Master's Report sets forth similar constraints on revising the PAP under the six-month review process. Specifically, it 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
- Allow shifts in the weighting given to existing measures.

[159] AT&T Initial PAP Brief at page 14.
[160] AT&T Initial PAP Brief at page 14.
[161] ELI/Time Warner/XO Utah Initial PAP Brief at page 27.
[162] WorldCom Initial PAP Brief at page 9.
[163] Covad Initial PAP Brief at page 37.

The Colorado Special Master's Report would grant state public service commissions authority to decide on the propriety of any identified changes, which the commissions would then ask Qwest to include in an amended SGAT filing. That report also recommends a separate review process (assisted by an outside expert under funding provided through Tier II payments), which would take place after three years of PAP operation, and which could examine broader changes to the PAP. That process would address:

- An assessment of the effectiveness of the PAP
- Revisions to PAP payment amounts (based solely upon evidence of harm produced by particular wholesale performance deficiencies)
- Removal of measures from the payment structure (based on the degree to which commercial alternatives to the use of Qwest services have become available or on a demonstration that Qwest can deliver reliable wholesale performance)
- Deletion of measures no longer needed to be measured or subjected to payments
- Whether the six-month interval for routine consideration of changes remains appropriate.

There are two basic economic issues that appear to concern Qwest when it comes to QPAP changes; i.e., the matters of payment ceiling and payment trajectory. We have already addressed the question of the ceiling in the discussion of the *Total Payment Liability* section of this report. We see no reason here to change the recommendation that total financial liability remain predictable. The question of trajectory; i.e., how fast payments move toward the ceiling, we began to address earlier in the *Measure Weighting* section of this report. The kinds of changes to the performance measures that are in dispute would clearly affect that trajectory; providing a too liberal mechanism for changing them would be problematic. Qwest would solve that problem by requiring its agreement to all changes. In contrast, the Texas plan would use arbitration in a limited number of cases. The Texas plan's approach is more appropriate to addressing the need for and financial consequences of new performance measures that meet the QPAP's standard, which here is whether there was an omission or failure to capture intended performance.

The market of concern is young and in many cases yet to be tested by substantial experience under new ways of doing business. We should also recall that the performance measures at issue came from a process conducted under the auspices of the ROC. It is reasonable to anticipate the possibility of substantial need for new measures if we are to assure that the QPAP will continue to detect and sanction poor performance as it occurs. Because we are uncertain of the continued role of the ROC in performance measure development and administration, the Texas arbitration provision is therefore appropriate to assure that the QPAP meets the applicable standards without unduly exposing Qwest to indeterminate increases in its financial exposure.

The Colorado Special Master's Report made several creative suggestions that may provide for an effective alternative. In particular, the establishment of a mechanism for dispute resolution and PAP administration, funded through Tier 2 payments may prove quite effective and efficient when applied in a multi-state context that includes a large

number of states with significant resource limitations. We have discussed that concept in the *Tier 2 Payment Use* section of this report.

The three-year PAP review process recommended in the Colorado Special Master's Report would also serve a useful purpose in examining the continuing effectiveness of the QPAP as a means of inducing compliant performance without applying payment requirements that experience may prove excessive or unnecessary. That process should also be adopted, with the understanding that its results would not be intended to open the QPAP generally to amendment, but would serve to assist the commissions in generally determining then existing conditions and reporting to the FCC on the continuing adequacy of the QPAP to serve its intended functions.

In summary, we believe that 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, we believe that the present QPAP provisions can function effectively to respond to external changes, without creating insufficiently defined financial exposure to Qwest. Those changes are:

- 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 there are adequate assurances that Qwest's local exchange markets remain and can be expected to continue to remain open.
- In all events, the Utah Public Service Commission will be the ultimate decision maker in the decision making process to proposed QPAP changes.

B. Monthly Payment Caps

Several CLECs expressed concern over the QPAP Section 13.9 provision that allows Qwest to place Tier 1 payments that exceed a monthly cap into escrow, and to ask for relief from the obligation to pay such amounts.[164]

Discussion: In the *Procedural Caps* section earlier in this report, we recommended that a monthly cap be used, and a debt instrument be used by Qwest to the CLEC involved and to the State of Utah for Tier 2 payments in excess of the cap. We agree that an escrow account may be used, but Qwest must continue to pay interest until all debts are paid in full.

[164] AT&T Initial PAP Brief at page 20; ELI/Time Warner/XO Utah Initial PAP Brief at page 24.

C. Sticky Duration

Z-Tel stated that the best evidence of the sufficiency of payments to provide an incentive to Qwest would be actual performance under the QPAP.[165] It therefore proposed that base payment levels escalate if Qwest, after suffering an initial episode of non-compliance, should suffer a second or third episode of similar magnitude. For example, if the first episode was of two months duration (i.e., produced an obligation to make base payments escalated once for the second month) and the second was of two months duration (or greater presumably) at the end of the second episode, payments would not drop back to the base level after a following month of compliant performance. Instead they would remain at the higher two-month level as a new base for the next six months, presumably escalating from that higher level for consecutive month misses during that period. If there were to be a third two-consecutive-month miss period, then the two-month payment level would be the minimum on a permanent basis.[166]

Qwest first argued that the QPAP already contained measures that would, unlike the Texas plan, keep payments for long-term problems from dropping to initial levels based on merely one month of acceptable performance. As payments step up gradually over time, so would they step down only gradually after performance improved.[167]

Qwest argued that permanently freezing base payments at an escalated level would be inappropriate. Such a provision would create an improper presumption about the speed with which Qwest should be able to identify and correct performance problems. Qwest specifically cited the lag in producing performance results reports, which would mean that a problem could well exist for nearly two months before those reports even disclosed its existence.[168] Qwest noted that, once the payment levels stick permanently at a higher amount, Qwest could do nothing to cause the levels ever to drop, no matter how long it might provide compliant performance after correcting whatever problem caused the non-compliance.[169]

Discussion: The Z-Tel proposal is inappropriate. 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 Z-Tel's amendment. We have already addressed the fallacy in Z-Tel's argument that there should be no reasonable limit to Qwest's financial exposure under the QPAP. This proposal suffers from that same flaw.

[165] Z-Tel Initial PAP Brief at page 20.
[166] Exhibit S10-ZTL-GSF-1 at page 14.
[167] Qwest Initial PAP Brief at page 22.
[168] Qwest Initial PAP Brief at page 23.
[169] Qwest Reply PAP Brief at page 17.

D. Low Volume Critical Values

The QPAP reflects a statistical approach that came from partial agreement at the PEPP collaborative. That agreement was to alter the default critical value from 1.65 to 1.04 for a number of small-volume measures, and to increase it to varying levels above 1.65 for progressively larger volume measures. Z-Tel and WorldCom argued at the QPAP workshop that the lower value of 1.04 should apply to all low volume measures, not just to the subset of them to which the QPAP would subject to the 1.04 value.[170]

Qwest objected to this proposal for being:[171]

- Out of step with what was agreed to by it, commission staffs, and the other CLECs at the PEPP collaborative
- Out of balance in terms of the numbers of measures to which it would apply.

Qwest said that the PEPP collaborative reached a statistical-methods agreement (which did not include Z-Tel) that was designed to balance the impact of the changes that benefited each side. According to Qwest, a key aspect of that agreement was that the parity measures subject to statistical testing would involve CLEC volumes of less than ten over 60 percent of the time. The agreement to use the 1.04 critical value (in lieu of the 1.65 value) only for certain measures would apply the lower value to the benefit of CLECs in the case of 1,519 measures.[172] In return, values higher than 1.65 would be applied to the benefit of Qwest in 1,917, or roughly the same number of parity measures.

Qwest said that the Z-Tel proposal would destroy this balance by applying the lower 1.04 value to over 10,000 tests, not the 1,519 contemplated by the agreement reached at the PEPP collaborative, leaving the number to which the higher value would be applied at 1,917. Qwest also noted that the FCC has already considered and rejected a similar CLEC argument in the Verizon New York application.[173] Qwest also said that the New Mexico Advocacy Staff has not provided any reason to support the reversal of its position on applying the 1.04 value, citing the staff's agreement to its limited application in the PEPP collaborative.[174]

Discussion: 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 Z-Tel 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 Z-Tel said in its comments, it merely provides a "rough approximation" of some (at least to us) elusive mathematical truth.[175]

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[170] Z-Tel Initial PAP Brief at page 23.
[171] Qwest Initial PAP Brief at page 41.
[172] LIS Trunks and unbundled dedicated interoffice transport, resale, and unbundled loops for DS-1 and DS-3.
[173] Qwest Initial PAP Brief at pages 41 and 42, citing paragraph 17 of the Bell Atlantic New York Order.
[174] Qwest Reply PAP Brief at page 29.
[175] Exhibit 510-ZTL-GSF-1 at page 12.

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 Z-Tel 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 theory to adjust a decision reached through compromise. That is not fair. We would have to begin without the compromise solution if we are to resolve this through debates about the relative superiority of competing theories. Nobody argued in reply briefs that Qwest misread the FCC decision with respect to the application of statistical methods in prior cases. We see no reason to upset the balanced, compromise approach that met with substantial agreement at the PEPP collaborative.

E. Applying the 1.04 Critical Value to 4-Wire Loops

The Q-PAP excludes 4-wire loops from the 1.04 critical value compromise, but it includes DS-1 loops. AT&T said that it is disingenuous to concede, as Qwest has, that DS-1 and 4-wire loops are analogous for setting provisioning intervals, but not for establishing QPAP payment amounts. AT&T said that it always understood the agreement reached at the PEPP collaborative to include 4-wire loops. AT&T also said that its proposal would not be difficult to administer, because AT&T would simply have it applied to all 4-wire loops, thus obviating any need to determine whether those loops were being used at the DS-1 level.

Qwest objected to AT&T's request to include 4-wire loops under those measures subject to the 1.04 critical value agreement.[176] Qwest said that 4-wire loops:

- Were clearly excluded from that agreement
- Were considered analogous to DS-1 loops (which are included in the agreement) only for the purpose of measuring intervals, not the value of the underlying service
- Are not always used at the DS-1 level, and are only so used when CLECs add electronics, a fact which Qwest neither controls nor about which Qwest even has knowledge

Discussion: The evidence shows that the agreement made 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.

[176] Qwest Initial PAP Brief at page 44.

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.

We should underscore that this conclusion is 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's 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's amendment procedures.

F. Measures Related to Low Volume, Developing Markets

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.[177]

Z-Tel proposed to replace the $5,000 aggregate payment to all CLECs with a minimum payment of $1,000 to individual CLECs for individual measures.[178] Covad also recommended individual, rather than aggregated, payments, and questioned why only a limited number of xDSL services had been included in QPAP Section 10.[179] Covad argued that all xDSL products can be considered to be low volume by comparison with POTS/voice-grade lines, thus making the inclusion of all xDSL sub-measures self evidently appropriate. Qwest objected to the Covad and Z-Tel proposal to apply the higher payments to individual CLEC volumes that fall within these limits, regardless of what aggregate CLEC volumes under the measures may be.

Qwest said that, for the February through March 2001 time frame, individual CLEC volumes for the OP and MR performance measurements were less than the 100-occurrence limit. Applying the Covad/Z-Tel proposal on such a widespread basis would change it from a market-development inducement to a preference for CLECs with small volumes operating even in mature markets.[180] Qwest also responded to the Covad recommendation to add other xDSL products. Qwest said that they are included in other

[177] Qwest Initial PAP Brief at page 29.
[178] Z-Tel Initial PAP Brief at pages 25 through 27.
[179] Covad Initial PAP Brief at pages 34 through 37.
[180] Qwest Initial PAP Brief at page 29.

parts of the QPAP, and that there are many services that CLECs could purchase for use in providing their end users with xDSL services without Qwest's knowing about it. Therefore, according to Qwest, it would take extraordinarily broad categories of unbundled loops to encompass all that could be used in providing nascent services.[181]

Discussion: The Z-Tel 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. We address this latter issue in the following *Minimum Payments* section of this report. We conclude here that Qwest's design for Section 10 is an appropriate method for providing Qwest with an added incentive to perform in developing markets. We also conclude that Qwest's designation of DSL products covered is adequate for the purposes of the section.

G. Minimum Payments

WorldCom commented that small order counts would not produce significant payments by Qwest. WorldCom therefore recommended a $2,500 per occurrence minimum payment, with escalation based on these minimums.[182] Qwest objected to WorldCom's minimum payment proposal as not relating to small CLECs, on grounds that it would apply regardless of CLEC size or order volumes. Qwest also objected to the resulting application of the QPAP's escalation provisions to the minimum payment amounts. Qwest cited as an example the fact that WorldCom's proposal could produce a $2,500 payment for late installation of a service selling for $20 per month.[183]

WorldCom agreed that it would be appropriate to limit its proposed minimum payments to CLECs with monthly volumes of less than 100 occurrences. WorldCom continued, however, to support a minimum payment amount of $2,500 per occurrence, arguing that Qwest's apportionment of $5,000 among all qualifying CLECs and its limitations on the sub-measures qualifying for minimum payments would provide insufficient incentive to Qwest to respond to underlying problems.[184]

Discussion: The issues of minimum payments and payments for developing markets are distinct. The latter should apply on the basis of combined CLEC orders; the former, if appropriate at all, should be a function of the quantity of an individual CLEC's orders. Should the latter be appropriate, it would be because CLECs with very small order numbers suffer harm out of proportion to the number of their orders. There is logic in that theory; it takes a relatively small number of instances of noncompliance to affect a very large portion of a small CLECs business operations. 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

[181] Qwest Reply PAP Brief at page 23.
[182] Exhibit S9-WCM-CEW-1, at pages 34 and 35.
[183] Qwest Initial PAP Brief at page 34.
[184] WorldCom Reply PAP Brief at page 3.

minimum payment that is a function of the number of months in which Qwest fails to meet performance standards.

Applying WorldCom'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. The QPAP should therefore 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.*

Thus, 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 9 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.

H. 100% Caps for Interval Measures

The QPAP contains a number of provisions that are intended to provide payments on the basis of the number of occurrences that fail to meet standards. A measure that provides an overall average quantification of the degree to which Qwest misses a standard can cause misleading results when it is applied to a per-occurrence payment structure. For example, a 3-day actual average interval for 100 events that are subject to a 2-day interval would produce a miss of 150%.[185] If the per-occurrence penalty were applied to this result, Qwest argues that it would produce payments for more occurrences than actually took place.[186]

Qwest also said that similar limiters exist in other PAPs:[187]

- 100% limiter added to the Texas PAP after 271 approval and at the first six-month review of that plan
- 100% limiter in the Oklahoma PAP in the Oklahoma 271 application as approved by the FCC

[185] The formula looks like this: 100 events times 3/2 = 1.5 or 150%.
[186] Qwest Initial PAP Brief at page 17.
[187] Qwest Initial PAP Brief at page 18.

- 50% limiter in the Kansas 271 application as approved by the FCC.

Several CLECs objected to the 100% limiter.[188] Z-Tel said that the Qwest argument on this issue improperly seeks to introduce the number of misses into a measure that does not and cannot use the number of misses to measure performance. As Z-Tel notes, the thing being measured is the average length of an interval. Moreover, according to Z-Tel, Qwest's truncation of payments at 100% ignores the sound principle that what Qwest pays should increase as the divergence between its performance for itself and its performance for CLECs increases. Z-Tel said 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. AT&T commented that the FCC did not approve the Texas plan limiter at the time of 271 approval; the Texas state commission approved the cap thereafter.[189]

Discussion: Several CLECs did correctly criticize Qwest's description of the alternate CLEC proposal as providing compensation for "phantom orders" or for more orders than CLECs had actually placed. That was not a fair criticism of the alternate proposal supported by a number of CLECs, and the use of a term that can be described as pejorative did not shed helpful light on a difficult issue.

Turning to what is more directly pertinent, Z-Tel noted in its brief that there is a difference between providing all CLEC orders on an average of 2 days versus providing them on an average of 3 days. Z-Tel is correct, but it is also correct that the QPAP somewhat recognizes this issue already. The problem, if there is one, is that the QPAP stops recognizing the difference at a certain point. The conceptual reason that the QPAP does so is sound. In order to reflect the volume of CLEC business, the QPAP must make the payment somehow volume sensitive. Otherwise, if: (a) CLEC A has 50 monthly orders, (b) CLEC B has 2,000 monthly orders, (c) the required interval to be met is 1 day on average, and (d) the average interval Qwest meets for both is 2 days, then Qwest would make the same payment to each, even though CLEC B has experienced vastly more occasions of delay, lengths of delay, or both.

Volume issues make it necessary to reflect somehow in the payment calculations the number of occurrences involved. The CLECs who oppose the QPAP's truncation 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. 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. That is what it might do in a perfect world.

No CLEC who objected to the QPAP's 100% 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. To demonstrate, if a CLEC has 10 orders and if the average Qwest interval for serving them

[188] AT&T Initial PAP Brief at page 26; ELI/Time Warner/XO Utah Initial PAP Brief at page 14; Z-Tel Initial PAP Brief at page 9.
[189] AT&T Initial PAP Brief at page 27.

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is 2 days, we have no way of knowing (to list but two examples out of a vast number of possible ones) whether each of the 10 was served in 2 days, or if 9 were served in 1 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.

What we have here is a need for arithmetical compromise to fit the quality of the data we have to work with under this measure. It is clear that the CLECs, despite what look like arguments for mathematical purity, in fact propose merely a different sort of impurity. There is not a factual or logical basis for believing that it comes closer to ultimate reality than does the one Qwest proposed. Notably, methods like those proposed in the QPAP here exist in other plans examined by the FCC.

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.

I. Assigning Severity Levels to Percent Measures

Z-Tel argued that the severity of the consequences of missing a standard expressed as a percentage (e.g., percent of loops installed within the required interval) differs according to what that standard is. As Z-Tel put it, there is a difference in severity between missing a 60% standard by 5% and missing a 90% standard by that same 5% amount. Z-Tel proposed a payment formula that it said would make compensation more proportional to the relative size of the "miss" involved.[190] Covad made a similar point.[191]

Qwest presented an analysis to support its claim that the Z-Tel proposal could provide exorbitant payments to CLECs. This analysis showed that Qwest would have been required to pay in excess of the 36% annual total cap in just the four-month period from February through May 2001, had the QPAP been fully effective at that time.[192] Qwest considered this result to be particularly extreme, given that Qwest's evidence showed that it met 92% of all performance standards during that period.[193] Qwest also noted that Z-Tel's witness disclaimed support for the particular formula values included in Z-Tel's comments (and based on which Qwest performed its analysis; the Z-Tel witness stated at hearings that the weighting proposal should rather be considered as conceptual in nature. Qwest's reply brief argued that the PAP already provides for increased payments as performance diverges more from the required standard. Qwest asserted the principal

[190] Z-Tel Initial PAP Brief at page 12.
[191] Covad Initial PAP Brief at page 30.
[192] Qwest Initial PAP Brief at page20.
[193] Qwest Initial PAP Brief at page21.

difference between the QPAP and the Z-Tel proposal was not one of whether there was an increase in payments, but rather how fast that increase would occur.[194]

Z-Tel's reply brief argued that its witness had not retreated from Z-Tel's recommended approach, but had only recognized that the values to be used in its proposed formula could be changed to manage the degree of difference in payments that it would produce, in comparison with those of the current QPAP.[195]

Discussion: The dispute between Qwest and Z-Tel over this measure did not focus on the correctness of Z-Tel's formula in capturing the severity of misses of performance measures expressed as percentages. Rather, the problem appears 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 Z-Tel formula as proposed onto base payment amounts negotiated at the collaborative. Had it been clear then 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.

It is true, as Z-Tel suggests, 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, Z-Tel 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 Z-Tel seeks between payments and severity of misses, without unduly altering the total payment expectations that came out of the PEPP collaborative process.

It is not reasonable to expect the recommendation to be made here to fine-tune the QPAP's 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. In this case, the better approach is 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 Z-Tel formula.

VII. Self-Executing Mechanism

The QPAP provides for self-executing Tier 1 payments to CLECs and Tier 2 payments to states in amounts that are based on monthly performance results.[196] Qwest designed the Tier 1 payments to provide compensation to CLECS and to provide performance

[194] Qwest Reply PAP Brief at page 18.
[195] Z-Tel Reply PAP Brief at page 7.
[196] Qwest Initial PAP Brief at page 5.

incentives to Qwest; the Tier 2 payments address the Qwest incentives goal.[197] The payments under the QPAP will be provided monthly and they will not require any showing of harm.[198] In each month, payments would first go to Tier 1, with any excess over those, up to 1/12th of the yearly amount, 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.[199] We note that the cap and the payments must be Utah specific.

A. *Dispute Resolution (Section 18)*

Qwest's brief 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.[200] ELI/Time Warner/XO Utah said 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. ELI/Time Warner/XO Utah would require all QPAP disputes to be resolved under the provisions of the SGAT or the applicable interconnection agreement.[201]

AT&T requested 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.[202]

Qwest argued that the limitation of the QPAP dispute resolution provisions to certain sections was appropriate, citing the existence of more than 170 CLECs operating in Qwest's region as reason to protect against the use of the procedures for "de minimis controversies."[203]

Discussion: Qwest has not proposed 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 parties differ. 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, although there is no reason for concluding that disputes are likely to be less numerous or more substantial when applied to the SGAT. Neither should we here preclude dispute resolution in advance on a theory of presumed immateriality.

No reason has been shown why 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

[197] Qwest Initial PAP Brief at page 9.
[198] Qwest Initial PAP Brief at page 12.
[199] Qwest Initial PAP Brief at pages 13 and 14.
[200] Qwest Initial PAP Brief at page 78.
[201] ELI/Time Warner/XO Utah Reply PAP Brief at page 14.
[202] AT&T Initial PAP Brief at page 9.
[203] Qwest Reply PAP Brief at page 54.

of their interconnection agreements (i.e., the unique dispute resolution provisions of interconnection agreements should not apply).

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.

B. Payment of Interest

The proposed QPAP did not provide for interest on late QPAP payments, or on payments that end up being deferred to a later period. 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.[204] AT&T noted this statement, but observed that Qwest had offered no provision incorporating it into the QPAP.[205] AT&T also recommended that each state's statutory interest rate be inserted in lieu of the one-year Treasury rate, which AT&T said was likely to be low.[206]

Discussion: Payment delayed is certainly payment partially denied after the time value of money is considered. Qwest's proposal goes only part of the way to address this 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. The Utah Commission set a cost of money for Qwest (US West) in the "last" rate case (1997). This rate shall be used for the purposes described in this section. The QPAP should provide for such interest on any payments received by the CLECs or State after the date due for any reason.

C. Escrowed Payments

Covad objected to allowing Qwest to avoid current payment obligations by claiming exclusions. Covad argued that Qwest should either have to pay pending dispute resolution or to make payments to an interest-bearing escrow account.[207] Having agreed to pay interest, Qwest objected to being required to place funds in escrow pending dispute resolution.[208]

Discussion: The provision for interest, absent concerns about credit-worthiness, resolves the issue of the time value of money for the present, because there is not at present a need for concern about credit-worthiness in the case of Qwest. However, there would be no harm and some potential benefit in including a provision that would allow a party to require the other to make payments into escrow where the requesting party can show cause, perhaps on grounds similar to those provided by the Uniform Commercial Code for cases of commercial uncertainty.

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[204] Qwest Initial PAP Brief at page 39.
[205] AT&T Initial PAP Brief at page 13.
[206] AT&T Reply PAP Brief at page 16.
[207] Covad Initial PAP Brief at page 43.
[208] Qwest Initial PAP Brief at page 77.

D. Effective Dates

1. Initial Effective Date

AT&T and WorldCom asked that the QPAP become effective when a state public service commission issues its consultative report. The goal of this recommendation is to prevent backsliding while the FCC considers a Qwest 271 application.[209] ELI/Time Warner/XO Utah and Covad also argued for making the QPAP effective essentially immediately.[210]

Qwest proposed that the QPAP be effective state-by-state as of the date when Qwest may receive FCC 271 approval in each. 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 said that the QPAP is self-executing; it does not even require a complaint. Qwest said that no CLEC has demonstrated that the laws of any of the nine states provide the authority necessary for a commission to compel the adoption of the QPAP as a requirement under state law.[211]

Qwest also said that there are sufficient methods for addressing Qwest performance pending FCC consideration of a 271 application. Qwest said that there already exists an opportunity for states and CLECs to supplement the record made in these workshops with evidence that is current through the date that they can present comments to the FCC.[212] Qwest also argued that it will have more than sufficient incentive not to backslide while its 271 application is pending before the FCC. Qwest also said that Covad erred in arguing that the Telecommunications Act of 1996 gives states authority to impose self-executing payment programs.[213] Qwest also objected to the Covad 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.[214]

ELI/Time Warner/XO Utah said that the issue of commission authority to order institution of the QPAP was not material, because the commission role in approving SGATs and checklist consulting to the FCC would allow it merely to withhold approval or endorsement failing Qwest's agreement to make the QPAP effective immediately. At the least, ELI/Time Warner/XO Utah said, the commissions should require monthly reports of payments that would have resulted under the QPAP, had it been in effect earlier than 271 approval.[215]

Discussion: Qwest's consent to the immediate effectiveness of the QPAP cannot be implied from any action it has taken. However, such consent is not necessary, because the issue at hand is not whether commissions can implement something like the QPAP

[209] AT&T Initial PAP Brief at page 28; WorldCom Initial PAP Brief at page 19.
[210] ELI/Time Warner/XO Utah Initial PAP Brief at page 19; Covad Initial PAP Brief at page 6.
[211] Qwest Initial PAP Brief at page 80.
[212] Qwest Initial PAP Brief at page 84.
[213] Qwest Reply PAP Brief at page 42.
[214] Covad Initial PAP Brief at page 5.
[215] ELI/Time Warner/XO Utah Reply PAP Brief at page 10.

under their own authority. The issue more accurately stated is whether the 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.

In that context, we note 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 Qwest applies to the FCC or when the QPAP proposes, absent special circumstances.

The only circumstances cited were by the New Mexico Advocacy Staff, 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 special circumstances were cited: for example, there were no claims that Qwest's wholesale performance history to date was of a nature that would require unique or special inducements. This risk can be mitigated by requiring Qwest to make the QPAP effective contemporaneous with its FCC application.

There remains the issue of whether Qwest should report performance and presumed payment levels between now and any grant of 271 approval. That recommendation is sound. It will provide focus to the interim performance information that was of concern to the New Mexico Advocacy Staff. It will also be helpful in accommodating 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. The QPAP should therefore require Qwest to provide monthly QPAP reports as if the QPAP had become effective on October 1, 2001.

2. "Memory" at Initial Effective Date

AT&T said that when 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. Otherwise, said WorldCom, there would be insufficient incentive to Qwest and a failure to meet the FCC requirement that poor performance be sanctioned when it occurs. [216] Qwest said that this proposal is no different conceptually from one recommending the imposition of the QPAP's payment requirements before 271 approval.[217]

Discussion: Having decided that the QPAP should be limited to performance post-dating section 271 application and that other remedies apply before that time, and thereafter for CLECs not opting into the QPAP for compensation purposes, 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

[216] AT&T Initial PAP Brief at page 24.
[217] Qwest Initial PAP Brief at page 84.

question whatever remedies are applicable under their existing interconnection agreements.

3. PAP Effectiveness if Qwest Exits InterLATA Market

AT&T and ELI/Time Warner/XO Utah would continue the QPAP payment obligations should Qwest exit the in-region, interLATA market.[218]

Discussion: For the same reasons that the QPAP should only be effective upon entry by Qwest into that market, it should terminate upon the end of Qwest's authority to serve that market.

E. QPAP Inclusion in the SGAT and Interconnection Agreements

WorldCom said that Qwest failed to address the question of how the QPAP should be made a part of the SGAT, which requires commission consideration of the issue.[219]

Discussion: There does need to be some SGAT context for the QPAP and there should also be clarity about the scope of what a CLEC with an interconnection agreement would be required to elect. Qwest's 10-day comments on this report should address these issues.

F. Form of Payment to CLECs

The QPAP provides for QPAP payments to be made by bill credit, rather than by cash or check. Qwest argued that it would not be administratively more efficient to provide for payment by check. Qwest agreed 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.[220] Qwest also said that the QPAP already provides for the use of wire transfers in cases where a CLEC's PAP credit exceeds the amount it owes Qwest.[221]

WorldCom recommended that QPAP payments be made by monthly checks.[222] 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.[223]

Discussion: The CLEC arguments about the administrative convenience of requiring payment by the equivalent of cash were not persuasive. They 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. The QPAP provision is appropriate; it provides for a cash-equivalent transfer when there is not a sufficient CLEC amount due to offset the credit. Covad's concern about other CLEC debts is not pertinent here. 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. However, if

[218] AT&T Initial PAP Brief at page14; ELI/Time Warner/XO Utah Initial PAP Brief at page 21.
[219] WorldCom Initial PAP Brief at page 3.
[220] Qwest Initial PAP Brief at page 39.
[221] Qwest Reply PAP Brief at page 28.
[222] WorldCom Initial PAP Brief at page 14.
[223] Covad Initial PAP Brief at page 40

agreement (covering different services) allows offset rights that would extend to the QPAP, the provisions of that agreement would apply. The reason is that the QPAP should not be read as overriding any other agreement except where explicitly required or otherwise reasonably necessary.

However, Qwest must make the credit in a timely manner. Interest may need to be calculated as part of the bill credit amount (but not part of the capped amount) if the billing due date does not match the QPAP due date. We invite the parties to address this issue in their 10 day comments.

The QPAP should require Qwest to provide credit information in substantially the form of the sample it provided as Exhibit S-9-QWE-CTI-4, absent commission consent to change it.

VIII. Assurances of the Reported Data's Accuracy

Qwest recited a number of means for providing assurances that the performance data underlying QPAP payments will be reliable. Qwest cited the following:

- The underlying performance measures will have been audited twice by the time that the QPAP becomes effective
- The QPAP includes a root cause analysis provision
- The QPAP includes a risk-based audit program
- CLECs may request their raw calculation data from which to verify Qwest's results, and to request audits of individual performance measures.
- The QPAP provides for audits of the Qwest financial system used to calculate CLEC credits.[224]

The following paragraphs address these related means of assuring the accuracy of the data.

A. Audit Program

Qwest said that it modeled the QPAP audit provisions after the Texas plan, and that it included the concept of risk-based auditing, as proposed in the report by The Liberty Consulting Group (Liberty) recommending the adoption of an ongoing monitoring program. Qwest's conception of a risk-based auditing program would include audits triggered by measurements that change from manual to mechanized techniques and audits of measurements that have a high degree of risk, as substantiated by Liberty's report. Such measurements will be identified by the auditor and will be scheduled for audit over a two-year cycle. Qwest sought the right to select the auditor in order to assure consistency of results and efficiency in the conduct of the audit program across its 14 state region. Qwest argued that comprehensive annual audits would waste resources.

[224] Qwest Initial PAP Brief at page 6.

particularly in light of the fact that CLECs could initiate audits to address any concerns that may arise in the future.[225]

Qwest argued that CLEC-initiated audits should be subject to limitation and that their costs should not be chargeable to Qwest in the absence of audit findings that would raise material concerns. Qwest proposed to limit CLEC-initiated audits to two per year, with each audit covering no more than two performance measures. Qwest noted that the number of CLECs involved could produce audits of "dozens" of measures each year. Qwest also proposed that the CLEC-initiated audits be performed by the same auditor selected to perform the risk-based auditing to which Qwest agreed.[226]

Qwest also said that the QPAP's root-cause analysis provision, taken from the Texas PAP, provides a reasonable means for assuring that problems reaching an established threshold level will be examined.[227]

Qwest opposed the recommendation by WorldCom that Qwest should bear at least half of all CLEC audit costs, regardless of whether the audit finds a material deficiency. Qwest also noted that the Colorado Special Master's Final Report[228] included limitations on measurements subject to routine audits.[229] Qwest also opposed the Covad recommendation[230] for audits of all "high" weighted QPAP measures that Qwest has failed regularly to meet, arguing that accuracy of the data, not degree of success in meeting the measure, is the key to deciding whether an audit is appropriate.[231] Covad argued that there is no reason to limit CLEC-requested audits; they are self-limited by the requirement that CLECs pay for them if they do not uncover material problems. Covad also argued that the standard of materiality for use in determining audit cost responsibility should be 5% of the amount of QPAP payments to the CLEC.[232]

Qwest argued that it should retain the internal control to manage the processes that it uses to make performance measurements. Qwest said that its change management governance process includes strict controls and that it will post to an external website material changes affecting the processes, methods, and activities related to producing performance measurements and reports. Qwest considered it inappropriate to require prior commission approval of its ability to change data gathering processes or to work around temporary problems or errors it finds in making measurements.[233]

AT&T and WorldCom proposed elimination of the restrictions on the number of special audits that CLECs could request. AT&T would also eliminate the authority of Qwest to request audits of CLEC data.[234] AT&T also considered it inappropriate to disallow overlap in CLEC-requested audits.[235] The QPAP allows Qwest the right to select the

[225] Qwest Initial PAP Brief at page 57.
[226] Qwest Initial PAP Brief at page 58.
[227] Qwest Initial PAP Brief at page 62.
[228] At pages 5 and 6.
[229] Qwest Reply PAP Brief at page 37.
[230] Covad Initial PAP Brief at page 46.
[231] Qwest Reply PAP Brief at page 38.
[232] Covad Reply PAP Brief at page 12.
[233] Qwest Initial PAP Brief at page61
[234] AT&T Initial PAP Brief at page 15; WorldCom Initial PAP Brief at page 13.
[235] AT&T Initial PAP Brief at page 16.

independent auditor; AT&T and WorldCom argued that this right was inconsistent with the need for independence.[236]

WorldCom's reply brief recommended two specific changes, which it said would provide for greater state public service commission control over the QPAP's operation:

- Allowing CLECs to request additional audits to be conducted by the commissions
- Allowing CLECs to conduct additional audits when they can show cause for them.[237]

WorldCom also recommended a collaborative, i.e., multi-state, audit program, and objected to any provision that would limit public service commission powers to request performance-measure audits.[238] Covad generally recommended the adoption of the auditing language of the Colorado Special Master's Report.[239]

Discussion: The issue here is one of providing 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 that will serve as a primary basis for state public service commission oversight of wholesale performance. It is perhaps not helpful to approach this issue by providing a simple "thumbs up" or "thumbs down" to each specific auditing or data-testing element proposed by Qwest or CLECs. 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.

We begin by concluding that the QPAP does provide for some of the key elements of a sound program, but fails to create an effective and efficient overall program that will provide adequate assurances of the continuing accuracy of underlying performance data. It suffers from certain gaps that would make it unreasonably difficult to identify potential changes of consequence, it does not assure continuing attention to data accuracy indefinitely out into the future, 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.

Therefore, we propose the adoption of an integrated program in response to the concerns raised by many participants. It takes much from the Liberty monitoring recommendations and from the Colorado Special Master's Report, changing each to respond to constructive arguments and suggestions raised both by Qwest and the CLECs who commented on this issue. The QPAP should be amended to explicitly provide for a program incorporating the elements described in the following paragraphs.

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. It would be appropriate for the QPAP to support common efforts to provide the assurances that Qwest's measurements remain reliable. All stakeholders will suffer,

[236] AT&T Initial PAP Brief at page 16; WorldCom Initial PAP Brief at page 12.
[237] WorldCom Reply PAP Brief at page 5.
[238] WorldCom Initial PAP Brief at pages 12 and 14.
[239] Covad Initial PAP Brief at page 46.

should there be a need to participate in and respond to as many as 14 different ongoing testing programs, because:

- Qwest will face significant added cost and resource burdens as a result of the duplication that will be inevitable
- CLECs will face the need to address the same or closely related measurement problems in many different forums
- State commissions will face the need for a significantly greater use of their own individual resources to oversee monitoring and auditing efforts and to resolve disputes about them.

Each state needs to retain the ability to assure attention to its particular needs and circumstances. This objective can be met without unnecessary duplication of testing efforts by designing and implementing them on a common basis. A proper program should consist of the following activities:

- Providing for a transparent Qwest process for changing the systems, processes, methods, and activities by which Qwest takes measurements under established performance measures ("Qwest's measurement regimen"); i.e., allowing an opportunity for others to challenge such changes
- Adopting a programmatic approach that will provide for both pre-planned and as-needed testing of material aspects of Qwest's measurement regimen.

This two-part program recognizes the following principles:

- Qwest's measurement regimen has undergone a thorough audit and will also have to pass FCC muster before 271 approval would be granted
- All other things being equal, continuing to apply the Qwest measurement regimen will provide sufficient assurances that measured wholesale results remain sufficiently accurate
- Insofar as the Qwest measurement regimen remains static, it will be necessary to examine periodically how and how well Qwest continues to apply it
- In addition to the periodic reviews, which should be of indefinite duration (but sensitive to the findings of preceding test work) to be effective, in the short term it is appropriate to examine the areas that the performance measures audit, the ROC collaborative OSS test, and the FCC's review find to be areas of particular risk or instability
- Qwest should retain the power to make measurement processes more accurate or more efficient to perform without sacrificing accuracy
- Those changes should be at Qwest's initial discretion, but subject to sufficient visibility to allow challenges to the propriety of any changes to be made.

With respect to the transparency of changes, we should first recognize that what Qwest considers to be a material change might differ from what others believe. There should be a process for brief, regular meetings (once per quarter will suffice) between Qwest and the independent auditor (whose selection and responsibilities are more fully discussed

basis. These meetings should not include other parties. Their purpose should be to allow Qwest to report on and the auditor to ask questions about changes made in the Qwest measurement regimen. The meetings would then produce reports by the auditor to the commissions and, where the commissions deem it appropriate, other participants.

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 parties aware of what it considered to be significant changes to its measurement regimen. Other parties would be free to communicate with the selected auditor any concerns about such changes.

With respect to auditing and testing, Qwest has accepted the two-year planning cycle proposed by Liberty as part of its performance measures audit. 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.

The first year of each successive cycle would concentrate on areas most likely to require follow-up in the second year. Near the end of each two-year cycle, planning for the next cycle would commence. The short-term needs of the period immediately following any 271 approval can be handled, if they are not addressed as part of the completion of the ROC collaborative OSS auditing and testing process, and can be incorporated into the plans for the first cycle. Absent an unusual level of adverse findings and conclusions, it would be expected that audit work would reduce in total magnitude across the first several cycles, falling in that case to the level appropriate for a mature and well-functioning measurement regimen. The other major factor expected to influence test work magnitudes is the degree to which Qwest makes changes to its measurement regimen.

Cycle planning should be conducted under the auspices of the participating commissions, with detailed planning recommendations to be made by an outside auditor retained for two-year periods. The auditor should be selected by the participating commissions, if for no other reason, because one of the auditor's tasks will be to recommend the assignment of cost responsibility for CLEC-requested audits. Neither Qwest nor CLECs should choose auditors whose responsibilities include determining whether they should bear potentially significant audit costs. Moreover, the selected auditor must be one with whom all participants are comfortable discussing issues and concerns, which will sometimes prove material to the design of test activities. Commission selection is most likely to produce the communications climate that is most appropriate to the circumstances at issue here. Finally, we believe that assuring both the reality and the appearance of independence in the auditor's test work calls for retention by the commissions, who should be considered the clients for whom the test work is performed.

The audit planning and auditor retention work should provide for Qwest and CLEC input to the 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 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 party questioning the auditor's recommendation. Absent dispute, the auditor would carry out any CLEC-requested audits whose need the auditor accepted; the parties 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).

The states can address their individual needs during the planning process, and they can, should they choose, commission additional testing in the event that a commonly derived plan fails to meet their needs. It is not anticipated that such a unilateral approach will be often requested or required.

Payment 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. 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 will absorb any leftover amounts not capable of recompense out of Tier 2 and escalated Tier 1 payments as described above.

B. PSC Access to CLEC Raw Data

QPAP Section 14.2 authorizes Qwest, upon Commission request, to provide CLEC raw data to that commission. Qwest said it would be inefficient for commissions to follow the CLEC approach, which would be to ask the CLECs directly for the information. Qwest would agree to provide it to the commissions as confidential, subject to whatever decisions the commission later made with respect to continuing confidential treatment.[240]

[240] Qwest Initial PAP Brief at page 78.

AT&T asked that Section 14.2 be stricken from the QPAP, because there is not provision for maintaining confidentiality.[241]

Discussion: Public service commissions have legitimate needs for the data at issue. There is no sound reason for requiring them to undertake the potentially significant burdens of seeking it 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. We have already addressed a similar issue regarding the provision of confidential CLEC data to public service commissions in connection with the thirteenth unresolved *General Terms and Conditions* issue (*Access of Qwest Personnel to Forecast Data*) in the *General Terms and Conditions, Section 272 & Track A Report* issued on September 21, 2001 in these workshops. There, we recommended language for SGAT Section 5.16.9.1.1. Similar language should 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.*

C. *Providing CLECs Their Raw Data*

AT&T recommended a deadline of two weeks from a CLEC's request for Qwest to provide a CLEC with its specific data relevant for QPAP measurement and payment purposes.[242] AT&T said that the lack of an explicit deadline could leave Qwest free to provide the data well after CLECs need it.[243] Qwest objected to AT&T's request that it be obliged to provide the data to CLECs on a firm (as opposed to a mutually agreed to) schedule. Qwest said that such a request would fail to respond adequately to the factors (e.g., timing or volume of data requested) that could materially affect the time in which it could reasonably be provided.[244]

Covad said that it requires the computer code and process information underlying CLEC data in order to reconcile its performance measurements with those of Qwest.[245]

Qwest opposed AT&T and Covad proposals involving Qwest's website for posting CLEC-specific results and data, arguing that its proposal should be considered purely voluntary because no other BOC has been obliged to offer such a capability.[246]

WorldCom asked that Qwest be required to maintain electronic access to underlying records for three years, and to keep records in an archived state for an additional three years.[247]

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[241] AT&T Initial PAP Brief at page 28.
[242] AT&T Initial PAP Brief at page 29.
[243] AT&T Reply PAP Brief at page 21.
[244] Qwest Initial PAP Brief at page 63.
[245] Covad Reply PAP Brief at page 14.
[246] Qwest Initial PAP Brief at page 60.

Discussion: 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.

The QPAP should provide retention periods for underlying records. The three years recommended by WorldCom appears at first blush to be a very long period, considering the kinds of information and the potentially vast amounts of it. However, we must recognize 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. 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. Thus, it is sufficient to require Qwest to maintain the records in a readily useable form for one year; it is sufficient if the remainder of the required records is retained in archived format.

While the use of a web site may prove useful, there is no evidence to support a conclusion that it is the only acceptable way, or that it would even provide significant advantages over other methods. Covad's request for computer code and process information is overly broad. The QPAP, however, should include a provision providing that Qwest's distribution of CLEC-specific data must be in a form that will allow CLECs to be able to identify its nature and content, and will be in a form that will allow CLECs to undertake the same kinds of calculations performed by Qwest.

D. Late Reports

WorldCom 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.

WorldCom said that its proposal would not unduly penalize Qwest, which already has under the QPAP 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. WorldCom also noted that the Texas commission set a $5,000 per day payment for Texas alone, even though SBC also served in other states that could apply additional penalties.[248]

[247] WorldCom Initial PAP Brief at page 14.
[248] WorldCom Reply PAP Brief at page 3.

Z-Tel proposed a $100/day payment for each report that is late, rather than the QPAP's flat $500/day no matter how many are late.[249] Covad argued that not only late reports, but also inaccurate ones should require payments.[250] AT&T ultimately proposed the adoption of the Texas approach, which would include the higher payments noted above, and would also eliminate the grace period provided for in the QPAP. AT&T also said that CLECs are damaged by late reports, which include data that CLECs need to make timely assessments of service that they are being provided.[251]

Qwest defended the QPAP Section 14.3 per-day late report payment of $500 as providing sufficient incentive to report on time, after considering 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 10 days after the end of the QPAP's grace period.[252] Qwest noted 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 10-day example that would cost Qwest $70,000 under Section 14.3 as now written.[253]

Qwest said that WorldCom was in error in asserting that the Texas plan included the revision or data access payments. Qwest also said that the $5,000 per day payment would yield a $700,000 (10 times the QPAP amount) for a single monthly set of reports that were filed 10 days after the end of the grace period.[254] Qwest also said that the CLEC proposals provided compensation well out of proportion with the harm to them, because QPAP payments were due independently of a report's filing, and CLECs could still get access to their underlying data and request audits, regardless of whether reports arrived on time.

Discussion: There is no support in the Texas plan for the imposition of liquidated payments for reports that are inaccurate or for failures to provide underlying CLEC data. The Texas plan requires payments for reports that are late or incomplete. For each missing measure, the Texas plan would impose a penalty of one-fifth the amount for failure to file any report at all. Reports with omissions have diminished value. The one-fifth factor of the Texas report, subject to a cap equal to the daily amount for failure to file any report should be incorporated into the QPAP in order to give adequate strength to the late-report provision.

Requiring payments for inaccurate reports is troublesome. The QPAP consists of a vast number of measures; it is not realistic to expect that no report would ever contain a measure that will later require restatement. CLEC proposals provide 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.

[249] Z-Tel Initial PAP Brief at page 34.
[250] Covad Initial PAP Brief at page 45.
[251] AT&T Reply PAP Brief at page 16.
[252] Qwest Initial PAP Brief at page 37.
[253] Qwest Initial PAP Brief at page 38.
[254] Qwest Initial PAP Brief at page 38.

Moreover, 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 that will be used to formulate audit plans.

Similarly, liquidated payments for an inability to meet deadlines for providing a CLEC with its specific data are not warranted. The auditing program should consider CLEC-specific and CLEC-aggregate data in its planning. If there is a persistent failure to provide CLEC-specific data, there will be reason to address its causes in audits, given that such a failure is all but certain to raise questions about the accuracy of the measurements that Qwest makes.

We come now to the question of payment levels. Z-Tel proposes a remedy that would produce penalties that are unreasonable on their face. The Texas payment approach bears a much closer relationship to what is reasonable. The $500 payment that Qwest proposes is not much money when compared with the amount of time and effort that will be necessary to produce QPAP monthly reports. Payments at that level may be sufficient to deal with small delays, but should escalate over time. Recognizing that the QPAP already includes a grace period of one week, the payments should escalate as follows:

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

Qwest remains protected against undue growth in payments by virtue of its ability to seek a waiver of late-report payments.

IX. Other Issues

A. Prohibiting QPAP Payment Recovery in Rates

AT&T argued that there should be specific language precluding QPAP recovery in rates. AT&T recommended its language, because Qwest has proposed none.[255] Qwest said that 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, noting that the New York Commission made a similar determination at the state level.[256] 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.[257]

Discussion: We believe 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.

[255] AT&T Initial PAP Brief at page29; WorldCom Initial PAP Brief at page 4.
[256] Qwest Initial PAP Brief at page 72.
[257] Qwest Reply PAP Brief at page 47.

B. No-Admissions Clause

ELI/Time Warner/XO Utah and Covad argued that measurements under the PID and payments based on them should be admissible as evidence in other proceedings; they would delete QPAP Section 13.4.1.[258]

Discussion: The objective information set forth in the performance reports is indeed strong evidence of the characteristics of Qwest's performance. The use of that information to show what Qwest's performance actually was should not be constrained. The QPAP does not do so. The Section 13.4.1 restrictions 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.

C. Qwest's Responses to FCC-Initiated Changes

Qwest cited three proposed QPAP changes that Qwest said came from informal FCC input, and that Qwest noted were not objected to or commented upon at the hearings on the QPAP:[259]

- 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.

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

D. Specification of State Commission Powers

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.

Discussion: Apart from the QPAP, commissions may recommend such relief for innumerable reasons other than the fact that Qwest reaches the cap. They may also recommend other relief when Qwest reaches the cap. It is self evident that this section is utterly valueless in providing commissions with any power that they do not already possess. Therefore, it could only be read as an indication that commissions approving the plan have agreed in advance that they would self limit their 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 commission action other than the ones recited in the QPAP.

[258] ELI/Time Warner/XO Utah Initial PAP Brief at page23; Covad Initial PAP Brief at page 44.
[259] Qwest Initial PAP Brief at page 40.

BEFORE THE PUBLIC SERVICE COMMISSION OF WYOMING

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

FIRST ORDER ON GROUP 5A ISSUES
(Issued January 30, 2001)

This matter is now before the Wyoming Public Service Commission ("Commission") for consideration of the Group 5A issues concerning the public interest and the Qwest Performance Assurance Plan (QPAP). The federal Telecommunications Act of 1996, at 47 U.S.C. § 271, sets forth some specific criteria for the nature of the access and interconnection Qwest Corporation (Qwest) must offer to competitors before it is allowed into the in-region interLATA market in Wyoming. We must also determine the extent to which Qwest's Statement of Generally Available Terms (SGAT) for Wyoming provides for the development of a competitive telecommunications market in Wyoming under Sections 251 and 252 (d) and (f) of the federal Act. Overriding considerations in this portion of the proceeding are focused on the broad issues of how Qwest should be expected to perform in a post-271 environment and whether granting it the authority to offer in-region originating interLATA services serves the public interest. The Commission, having reviewed the Workshop Report materials filed in this portion of the proceeding and the written comments and arguments of the parties, having heard oral arguments in open hearing, having reviewed applicable telecommunications utility law and its files concerning this case and the participants, and being otherwise fully advised in the premises, HEREBY FINDS AND CONCLUDES:

1. On October 22, 2001, the consultant retained by the states participating in the Qwest Section 271 multi-state compliance proceeding (the "Consultant"), with the assistance of state commission staff members, issued his Report on Qwest's Performance Assurance Plan and on the same day issued his Public Interest Report (when referred to collectively, the Workshop Reports) giving recommendations to the participating commissions on the disposition of Group 5A issues in this case.

2. To provide for the full and fair consideration of the Group 5A issues, the Commission, on November 6, 2001, issued its Order Providing for Separate Consideration of Group 5 and Group 5A Issues, and Setting Oral Arguments and Deliberations on Group 5 and Group 5A Issues.

3. Pursuant to due notice, the Commission held oral arguments on Group 5A workshop issues beginning at 9:00 a.m. on December 10, 2001, in the Commission's hearing room in Cheyenne, Wyoming. Qwest and the Consumer Advocate Staff appeared through counsel and participated to the extent they deemed necessary in the proceedings. QSI Consulting participated in the proceeding as consultants and advisors to the Commission.

4. The Commission's deliberation in this portion of the case was held on January 18, 2002 at 2:00 pm, at the Commission's hearing room in Cheyenne, Wyoming, pursuant to its Second Order Rescheduling Deliberations on Group 5A Issues. At the deliberation, the Commission directed the preparation of this order consistent therewith.

The Qwest Performance Assurance Plan

5. The QPAP is intended to provide assurances that Qwest will live up to its obligations under Section 271 if it is allowed to enter the in-region originating interLATA market. We understand from the Federal Communications Commission that it clearly does not expect that all post-entry performance plans, like the QPAP, will be identical:

> "We recognize that states may create plans that ultimately vary in their strengths and weaknesses as tools for post-section 271 authority monitoring and enforcement. We also recognize that the development of performance measures and appropriate remedies is an evolutionary process that requires changes to both measures and remedies over time. We anticipate that state commissions will continue to build on their own work and the work of other states in order for such measures and remedies to most accurately reflect commercial performance in the local marketplace." (Verizon Pennsylvania Order, FCC 01-029, released Sept. 19, 2001, paragraph 128.)

The FCC has also developed a simple and logical set of criteria for evaluating the QPAP and similar plans on a rational and consistent basis. Plans should contain:

- Meaningful and significant incentive to comply with designated performance standards;
- Clearly articulated and predetermined measures and standards encompassing a range of carrier-to-carrier performance;
- Reasonable structure designed to detect and sanction poor performance when and if it occurs;

- A self executing mechanism that does not open the door unreasonably to litigation and appeal; and

- Reasonable assurance that the reported data are accurate.

6. After a review of the Workshop Report on the Qwest QPAP, the transcript of the oral arguments presented to us and other material in the record of this proceeding, including multi-state material, we find that the QPAP in its latest iteration generally satisfies the evaluation criteria for such plans; and we accept and adopt the Workshop Report on the QPAP, except as specifically discussed below. Regarding the nature of the QPAP, it is Exhibit K to the Qwest Wyoming SGAT; and it is designed to give a measure of assurance that Qwest will be adequately motivated to sustain an acceptable level of market openness and fair dealing with competing local service providers after, and if, Section 271 approval is ultimately granted to it. The QPAP is heavily enmeshed in federal and state telecommunications law and public policy and is not, either by itself or as a part of the SGAT, capable of being analyzed merely as a simple contract.

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

8. The Workshop Report on the QPAP proposes that some Tier 2 payments, those which go to the states rather than individual companies, begin after a three-month period of non-compliant performance. The Workshop Report analysis also bases Tier 2 payment liability in part on whether or not the prohibited

behavior has a Tier 1 counterpart. Here, the most important decisional criterion is that the QPAP should "detect and sanction poor performance when and if it occurs." Therefore, if certain poor performance violates the QPAP, the penalty should attach at once rather than after a period of time has elapsed. We do not believe that a "backdated" penalty is created when prohibited behavior is allowed to continue over a period of time before it is penalized. The proper approach here, if there were any objection to Tier 2 payments, would be to object to the characterization of the behavior as prohibited or to object to the level of penalty payment associated with it. We will discuss a QPAP modification process below. We note here our conclusion that Tier 2 payments should be made to the Wyoming Universal Service Fund for the benefit of all Wyoming telecommunications subscribers, whether or not they reside in Qwest service areas. Although the "penalty" value for Qwest would appear to be lessened by this use of the funds, it is appropriate and the beneficiaries are the consumers themselves rather than the companies providing the service.

9. The Workshop Report advocates that payments under the QPAP be allowed to escalate during the period of noncompliance by Qwest to increase the motivation for Qwest to change its behavior. However, the Workshop Report also suggests that the escalation stop after six months, and Qwest supports this additional limitation on its potential QPAP liability. (Workshop Report on the QPAP, p. 44.) We do not believe it is the role of the QPAP to set a price on noncompliance but to encourage it not to happen or to correct such noncompliant behavior if it occurs. Therefore, we do not believe that an arbitrary limit on escalation of payments is warranted or demonstrated to be necessary. Qwest has argued, testified and shown us documentary evidence that it is either meeting its performance indicators or working hard to do so in the future. If this is true, the likelihood of payments under the QPAP is relatively low and should be considered by Qwest as a manageable financial risk largely under its own control. Additionally, we have not been provided with cogent reasons why there should be a limit on the escalation of payments or that a limit of six months is somehow compelled by the facts of the case. We therefore will allow the escalation of QPAP payments without a time limit.

10. The Workshop Report on the QPAP advocates that payment levels should de-escalate after a certain period of corrected performance. The argument seems to be that lowering payment levels should be considered a reward for good behavior by Qwest. We disagree. The actual reward for good behavior should be not having to make payments under the QPAP because Qwest's performance complies with it. The idea of encouraging good behavior and then lessening the payment for bad behavior as a reward for an interim period of good behavior is a perverse incentive. We therefore decide that escalated penalties should be "sticky." That is, once a payment has escalated to a level at which Qwest complies with a provision of the QPAP, that particular payment should remain at that level. Again, compliance should be rewarded and this is the better way to encourage this behavior. The QPAP should not lend itself to a "cost-benefit" analysis under which

the price of noncompliance might be weighed and found by Qwest to be an acceptable cost of doing business.

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

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

13. The QPAP wisely provides that it should be reviewed every six months but has wisely restricts the issues which can be discussed and least wisely gives Qwest the power to veto any changes. Our directions in this order make adequate provision for the initial functioning of the QPAP, but we realize that there is much

can't seem to know about the future behavior of the dynamic and volatile telecommunications markets. Qwest's reaction to this problem was, *inter alia*, to give itself an inability and give itself veto power over changes in the QPAP. We do not believe that this is the best course of action. The Commission has only the public interest to look after and is not a partisan force in the process. We have also developed considerable familiarity and experience with the issues so ably presented by the parties to the Wyoming and multi-state Section 271 process. The better model for modification of the QPAP is a proceeding before the Commission which preserves the due process and other rights of the parties and retains the Commission's ability to act in the public interest regarding this document. Reviews of the plan should be made by the Commission in light of Wyoming-specific issues and the subjects which may be addressed should not be circumscribed. This will function as a protection for all parties. For example, if it appears later that competitive local exchange carriers are abusing Qwest under the QPAP or that credits should, *in the light of actual Wyoming experience*, be placed on Qwest's potential obligations, this can be done at that later time. Review should be periodic and the six month interval suffices, but parties should be able to come before the Commission at any time if a serious problem arises. At once, this answers the question of whether Qwest should have to endure unbearable burdens under the QPAP and the question posed by the Consumer Advocate Staff regarding how to plan for a competitive future with so many unknowns and a lack of a Qwest track record on the subject. This ability to bring the document back before the Commission for public proceedings to reform it, in whole or in part, will also help to adjust for situations unique to the Wyoming market, the availability of technological solutions to problems or otherwise in which a lack of performance by Qwest should not be penalized at all because the company is not at fault. This is the type of protection that should be afforded rather than allowing the document to be inflexible. We do not believe that it would be realistic for Qwest to be required to develop a track record before it moves into its desired long distance market, but we also believe that we must therefore make adequate provision so that the QPAP remains a viable tool for the fair encouragement of local service competition -- goals shared by the federal Act and the Wyoming Telecommunications Act of 1995.

14. Because the QPAP is designed to promote good behavior by Qwest in its local markets as the quid pro quo for allowing it to enter the in-region interLATA originating long distance market, we do not believe that it should go into effect until Qwest obtains this authority from the FCC.

The Public Interest

15. 47 U.S.C. § 271(d)(3) lists the findings which the FCC would have to make in order to grant Qwest's request for Section 271 relief once it is filed. 47 U.S.C. § 271(d)(3)(C) requires a finding that "the requested authorization is consistent with the public convenience and necessity." Because this criterion is stated separately from the Section 271 competitive checklist and the other specific

things Qwest must prove under the federal Act, it must therefore be read as a separate requirement. We agree with the FCC that this public interest criterion allows a general review of all of the facts and circumstances in the case to see whether the intent that local markets be fairly opened to competition is likely to be frustrated. Qwest does not, in our opinion, have the burden of raising and disproving every possible problem imaginable. Their burden is to provide the demonstrations required by the federal Act, but they need only to rebut any allegations by others as to special problems or circumstances which might warrant not granting the recommendation sought by Qwest here. In general, we agree with the comments of the Consultant in the Workshop Report that Qwest has satisfied the generalized public interest requirement of the federal Act; but this agreement is conditional. It is based in part on the existence of a QPAP consistent with our findings and conclusions above. Our agreement on the public interest issue is also conditioned on a satisfactory showing in the Regional Oversight Committee's independent Operational Support System test and the emergence therefrom of Performance Indicator Definitions (PIDs) satisfactorily identifying and covering the necessary performance by Qwest to show that there are "clearly articulated and predetermined measures and standards encompassing a range of carrier-to-carrier performance."

16. Regarding the public interest issues concerning Unbundled Network Element (UNE) prices and intrastate access charges brought up by the Workshop Report on public interest issues, we agree with the Report that these issues are best left to the states. We also note that the pricing provisions of the Wyoming Telecommunications Act of 1995 have mooted, in Wyoming and at least for the time being, many of the questions raised about overpriced access and the unrealistic relationship of UNE prices to local service prices which exist in some other states.

Further Proceeding on Group 5A Issues

17. The changes which we have directed hereinabove require numerous revisions to various parts of the QPAP to comply with our directives and to remove language rendered superfluous. We will not therefore try to rewrite the QPAP but direct that Qwest do so, starting with its November 6, 2001, draft version of the "Exhibit K" QPAP, and incorporating all of the changes required by this order. Qwest shall thereafter file the revised QPAP with the Commission and serve copies on all parties to the Wyoming proceeding on or before February 28, 2002. With this filing it must also submit conforming changes necessary to bring the SGAT into harmony with the revised QPAP. The Commission will thereafter hold a public hearing on the revised QPAP beginning at 9:00 a.m. on Monday, March 18, 2002, at its hearing room at 2515 Warren Avenue, Suite 300, Cheyenne, Wyoming.

18. Our findings and conclusions hereinabove are supported by the substantial evidence in the record of this proceeding, including evidence adduced in the multi-state proceeding.

NOW THEREFORE, IT IS HEREBY ORDERED THAT:

1. Qwest shall promptly file a changed QPAP conforming to the directives hereinabove and the same shall be considered in public hearing, all at the times stipulated hereinabove.

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

3. This order is effective immediately.

MADE and ENTERED at Cheyenne, Wyoming, on January 30, 2002.

PUBLIC SERVICE COMMISSION OF WYOMING

STEVE ELLENBECKER, Chairman

STEVE FURTNEY, Deputy Chair

KRISTIN H. LEE, Commissioner

(SEAL)
Attest:

STEPHEN G. OXLEY, Secretary and Chief Counsel

Service Date: February 4, 2002

DEPARTMENT OF PUBLIC SERVICE REGULATION
BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MONTANA

* * * * *

IN THE MATTER OF the Investigation into Qwest Corporation's Compliance with Section 271 of the Telecommunications Act of 1996	))))	UTILITY DIVISION DOCKET NO. D2000.5.70

PRELIMINARY REPORT ON QWEST'S PERFORMANCE ASSURANCE PLAN AND REQUEST FOR COMMENTS ON FINDINGS

Introduction

This report contains the Commission's preliminary findings as to whether Qwest's performance assurance plan (QPAP) is sufficient to ensure the local phone service market in Montana will remain open after Qwest obtains Section 271 approval from the Federal Communications Commission (FCC). Evaluation of the QPAP is one part of the Commission's analysis of Qwest's compliance with the public interest requirements of Section 271.

In its orders regarding Section 271 applications, the FCC clearly indicates that a successful 271 application must have mechanisms in place to ensure that the efforts the regional Bell companies like Qwest have taken to open up their local service markets are maintained after they win Section 271 approval. Companies that have obtained 271 approval to date have demonstrated anti-backsliding measures are in place to assure future compliance by implementing a performance assurance plan. The FCC identifies five key characteristics it looks for when evaluating whether a performance assurance plan satisfies the public interest. According to the FCC, a plan should contain:[1]

- Potential liability that provides a meaningful and significant incentive to comply with the plan's performance standards;

[1] *Bell Atlantic New York Order* 15 FCC Rcd at 4166-67, para. 433.

Service Date: February 4, 2002

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BEFORE THE PUBLIC SERVICE COMMISSION
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- Potential liability that provides a meaningful and significant incentive to comply with the plan's performance standards;

[1] *Bell Atlantic New York Order* 15 FCC Rcd at 4166-67, para. 433.

- Clearly articulated, pre-determined measures and standards that encompass a comprehensive range of carrier-to-carrier performance;
- A reasonable structure that is designed to detect and sanction poor performance when it occurs;
- A self-executing mechanism that does not open the door unreasonably to litigation and appeal; and
- Reasonable assurance that the reported data are accurate.

Qwest's performance assurance plan was addressed by the participants in written comments, in two separate in-person workshops in August 2001, and in briefs. John Antonuk, the consultant hired by the nine states participating in the QPAP proceeding to conduct the workshops, issued his *Report on Qwest's Performance Assurance Plan* on October 22, 2001. Antonuk was hired to conduct these workshops after the predecessor post-entry performance plan (PEPP) collaborative process had ended without Qwest and competitive local exchange carriers (CLECs) achieving a consensus plan. In his *Report*, Antonuk reviewed the issues raised by the participants and made recommendations regarding the QPAP for Commission consideration. Participants in the Montana PSC docket that filed comments in response to Antonuk's *Report* were Qwest, AT&T, Covad Communications, Montana Consumer Counsel (MCC) and WorldCom. On November 8, 2001, the Commission received Qwest's replacement filing commenting on Antonuk's *Report*, including a redline version of its June 29, 2001 QPAP. The redline version identifies Qwest's clarifications and modifications of certain Antonuk resolutions, and where Qwest agrees with his *Report*. This redline version of the QPAP is posted on the Commission's internet website at this location: http://psc.state.mt.us/tcom/tcom.htm.

This preliminary report summarizes Antonuk's *Report* as well as the comments filed on the *Report*. Participants to this proceeding are invited to comment on the preliminary findings in this report. The Commission respectfully requests each commenting party to connect clearly its comments consistent with the structure and outline of issues in this report. Comments must be filed with the Commission by February 25, 2002. The Commission will then review those comments and reach a final decision on whether the QPAP satisfies the public interest test in Montana.

SUMMARY OF ANTONUK'S REPORT, PARTICIPANTS' COMMENTS, AND COMMISSION PRELIMINARY FINDINGS

There are many recommendations made by Antonuk in his *Report* that are uncontested by the participants in this proceeding. Unless otherwise addressed in this preliminary report, the Commission adopts those recommendations.

The more general comments of the parties include the following. In its comments WorldCom concurs in the exceptions AT&T takes to the report and joins in the arguments AT&T raises to support WorldCom's positions taken herein. The MCC filed comments that take exception to several aspects of the Antonuk's *Report.* Covad asserts that the sole criterion by which to measure the QPAP is by whether it "fosters competition in the local exchange market." Achieving this goal depends on a finding that Qwest's entry into the long distance market is in the public interest. In regards to this Montana PAP, the public interest test is met only when a mechanism is in place to ensure that the local market is irreversibly open to competition and that wholesale service quality will not deteriorate after Qwest receives 271 relief. As incumbents lack the incentive to help competitors, Covad adds that the FCC strongly encourages monitoring of post-entry wholesale service performance by a PAP and the ultimate question Commission must address is whether to accept Antonuk's resolutions or adopt positions advanced by others.

The structure of this report mirrors the organization of Antonuk's *Report* and groups issues raised by the participants under five sections. Each section corresponds to the five QPAP characteristics outlined by the FCC in its orders on performance assurance plans.

I. MEANINGFUL & SIGNIFICANT INCENTIVE

A. Total payment liability.

1. 36% of intrastate net revenues standard. Antonuk agreed with Qwest that the appropriate amount of revenue to place at risk each year under the QPAP is 36% of Qwest's 1999 net intrastate revenues as reported to the FCC on its ARMIS return. For Montana, the 36% standard results in Qwest having $16 million at risk each year under the QPAP. Antonuk reasons that the FCC has

approved this amount as it provides a meaningful incentive to provide adequate performance in its 271 orders in other states. He finds the 36% standard an appropriate starting point, to be examined again in the context of all the other QPAP provisions affecting Qwest's incentive to perform.

Covad comments

Covad opposes a 36% hard cap because it will under compensate CLECs, is inconsistent with the purpose of a performance assurance plan, is not in the public interest and should be rejected. Annual caps may under compensate CLECs. The "injustice of undercompensation" is underscored by the fact that CLECs receive no compensation for the numerous orders that are cancelled when Qwest's service quality is deficient. As the cap serves only to limit Qwest's exposure to penalties, it is counter-intuitive as caps are only reached when penalties are insufficient incentive for Qwest to provide adequate service quality. Based on a recent Colorado Commission order, Covad recommends changes to the QPAP. As the Colorado Commission ordered, there should be a soft, procedural, cap and instead of a 36% procedural cap, Covad recommends New York's 44% cap. Covad notes the Utah Commission Staff's observation that the New York Commission raised the cap to 44% "after the failure of an initial 36% cap."

Commission preliminary finding: Because the amount of any proposed cap is inseparable from the below issue of procedural versus absolute caps, the Commission's finding follows the latter discussion.

2. Procedural cap vs. absolute cap. Instead of either a procedural cap (which can rise if Qwest's performance under the plan is so bad that its payments exceed the amount of the cap) or an absolute cap (which could not be raised no matter what), Antonuk prefers a "sliding" cap that has the following attributes:

- The Commission could order the 36% cap to increase by no more than 4 percentage points when the cap is exceeded by 4 percent or more for any 24-month consecutive period, if:
  - the Commission finds Qwest could have stayed under the cap through its reasonable and prudent efforts, and
  - that finding has been made after the Commission reviews the results of root-cause analyses and has provided Qwest the opportunity to be heard.

- The Commission could order the cap to decrease by no more than 4 percentage points when Qwest's total payment liability is 8 or more percentage points (i.e., 26% or less) below the cap amount for 24 consecutive months, if:
  - the Commission finds the performance results occurred because of an adequate Qwest commitment to provide adequate service, and
  - that finding is made after all interested parties have an opportunity to be heard.

- The sliding cap applies to the next 24-month period beginning at the completion of the first 24-month period, provided that the maximum cap increase is 8 percentage points and the maximum cap decrease is 6 points.

Qwest comments

Whereas it deviates from the "hard 36% annual cap", Qwest finds Antonuk's approach reasonable and amends the QPAP (Section 12.2) to allow the cap to range between 44% and 30%.

AT&T comments

AT&T objects to Antonuk's "sliding cap" proposal because: (1) it provides for a 4% increase to the cap only after CLECs have been denied payments due to the

cap for 2 years, during which time Qwest could exceed the cap for months at a time with impunity; (2) the FCC has never authorized a plan where total liability was less than 36% of net intrastate revenues, yet Antonuk's proposal allows the cap to decrease down to 32%; (3) the sliding cap proposal was not advocated or requested by any party, including Qwest. AT&T recommends as better solutions to the cap issue either the Utah Staff proposal or the Colorado approach. The Utah Staff proposal raises the cap to 44% of net intrastate revenues as the New York commission did, and provides for up to a 4-percentage-point increase in the cap if Qwest exceeds the cap for 12 straight months. In Colorado, according to AT&T, there is no cap on Tier 1 payments (to CLECs) but Tier 2 payments (to states) are subject to a procedural cap. The Colorado commission may raise the cap if Qwest's payment liability equals or exceeds the annual cap for two consecutive years or if two consecutive months' worth of payments equal or exceed one-third of the annual cap. AT&T notes that Bell South's recent 271 applications to the FCC for Georgia and Louisiana included performance plans that, in Georgia, puts 44% of Bell South's 1999 intrastate net revenues at risk and, in Louisiana, does not limit Bell South's payment liability (although it includes a procedural cap of 20% of 1998 net revenues).

MCC comments

MCC finds unnecessary the raising and lowering of caps as resolved in the Report, the so-called "sliding scale", and instead favors Qwest's 36 % cap proposal. MCC finds the cap reasonable for several reasons: (1) the incentive risk is substantial and will likely encourage service and performance at parity to what Qwest's retail customers receive, (2) sliding caps are potentially harmful and should be changed based on evidence explaining why performance declines and (3) a changed cap may trigger less acceptable performance for the majority of Qwest's retail customers.

Covad comments

Adjusting the cap upward or downward is not acceptable to Covad.

Commission preliminary finding: The Commission is presented with four different options regarding the annual cap on total payment liability. The key benefits and drawbacks of each option are explained below:

1. Antonuk's proposal for a "sliding cap."

Antonuk determines that, because there is not much experience anywhere yet with performance assurance plans, it would be prudent to allow movement of the cap – up or down --- within a confined range in certain defined circumstances. Qwest prefers the hard 36% cap, but agreed to incorporate Antonuk's proposal instead. AT&T, Covad and MCC objected to the sliding cap proposal for the reasons identified above. Chief objections are that the FCC has never approved a plan that allows the cap to decrease below 36% and that the proposal allows too much time to pass between Qwest's noncompliant performance in excess of the cap and implementation of a higher cap. Essentially, this is a procedural cap with undesirable attributes.

2. "Hard" cap of 36% of net intrastate revenues.

The FCC has found the 36% standard sufficient to create a meaningful and significant incentive to perform for other Bell operating companies seeking 271 relief. MCC recommends the hard 36% cap. AT&T and Covad object to a hard cap because it could result in Qwest not providing compensation to CLECs who had been harmed by Qwest's noncompliant performance.

3. AT&T and Covad also argued that the cap amount should be set at 44% rather than 36%.

4. "Procedural" cap of 36% of net intrastate revenues.

Antonuk found that a procedural cap exposes Qwest to unknown risk. He reasons that, just as CLECs are able to decide whether the costs of entering the competitive local market are too high, so should Qwest. A procedural cap reduces Qwest's ability to determine its payment liability exposure under the QPAP. Qwest and MCC do not support a procedural cap. AT&T and Covad support the Colorado approach to a procedural cap.

Of the above options the Commission finds that a 36% procedural cap is preferable to the other options. The Commission invites comments on how to implement a 36% procedural cap. Comments should address the criteria by which the cap would rise and, if so, how high it may rise.

3. Tier 1 percentage equalization when cap is reached. If the cap is reached in any year, a problem may occur due to the operation of a cap: while CLECs who incur noncompliant service from Qwest up to that point receive compensation, CLECs who incur noncompliant service after the cap is reached receive no compensation. To address this problem, Antonuk recommends the following method of equalization at the end of each year when the cap is reached:

a. The amount by which any month's total payments exceed $1/12^{th}$ of the annual cap shall be apportioned between Tier 1 and Tier 2 according to the percentage that each Tier bears of the total payments for the year to date. Antonuk refers to the results of this calculation as the "tracking account."

b. Tier 1 excess will be debited against ensuing payments that are due to each CLEC by applying to the year-to-date payments received by each a percentage that generates the required total Tier 1 amount.

c. The tracking amount will be apportioned among all CLECs so as to provide each one with payments equal in percentage to its total year-to-date Tier 1 payment calculations.

d. This calculation begins in the first month that payments are expected to exceed the annual cap and continues in each month of that year. Qwest will recover any debited amounts by reducing payments due from any CLEC for that month and any succeeding months as necessary.

Qwest comments

Qwest does not oppose Tier 1 equalization. Qwest incorporates Antonuk's language into the QPAP (12.3) but with some changes it views necessary to clarify the operation of the complex process. Because QPAP monthly payments may fall below or exceed the monthly cap, accounts must be balanced using year-to-date payments and a cumulative monthly cap.

Commission preliminary finding: The Commission finds merit in Antonuk's recommendation to equalize payments to CLECs. Because Qwest modified Antonuk's recommendation, the Commission invites comments on how Qwest proposes to implement Antonuk's recommendation. (See QPAP Section 12.3.)

4. Qwest's marginal costs of compliance. Because he found no evidence to enable its use, Antonuk rejects the New Mexico Staff's proposal that the proper inquiry is not the size of the payments to CLECs, but Qwest's marginal costs of noncompliance.

5. Continuing propriety of a cap based on 1999 net revenues. Antonuk rejects ELI/Time Warner/XO Utah's proposal to not always base the cap on 1999 net revenues. Antonuk reasons it is preferable to rely upon the firm amount represented by the 1999 net revenues than it would be to accept the uncertainty of the amount of the cap fluctuating up or down.

Covad comments

Covad disputes Antonuk's decision to always base caps on 1999 net revenues and prefers a more recent -- year 2000 ARMIS – basis. Covad's principal reason is the inability of 1999 data to capture post Qwest-US West merger efficiencies and economies. Covad concludes that the source data must be reviewed regularly to ensure Qwest's total exposure "remains constant."

Commission preliminary finding: The Commission agrees with Covad that the cap amount should be revised yearly to reflect the company's most recently reported amount of net intrastate revenues.

6. Likely payments in low-volume states. Antonuk addresses New Mexico Staff's concern that the QPAP will not provide Qwest with sufficient incentive to provide compliant service in states with low order volumes by noting that the QPAP will provide for minimum payments.

7. Deductibility of payments. Antonuk dismisses WorldCom's concern that Qwest may be able to deduct QPAP payments for income tax purposes because the QPAP in this respect is no different than other performance assurance plans considered by the FCC.

Commission preliminary finding: The Commission sees a relation between the income tax deductions Qwest may take for QPAP payments and the earlier issue of Qwest's total payment liability. Qwest appears to assert that if a 36% cap is combined with 1999 ARMIS net revenues, it faces about a $16

million dollar exposure in Montana. However, the net impact of such a penalty is less due to Qwest's apparent right to tax offsets for Tier 1 and Tier 2 payments.[2] If payments to CLECs or to a state are offsets to tax obligations, then while the purpose of such payments is, in part, achieved, unless the consequence on Qwest of such payments was designed to account for tax effects, the objective is not achieved.[3] This, in part, is one reason a 36% hard cap is favored less than a procedural cap. The Commission is interested in further explanation on how the tax offsets are shared between state and federal tax obligations, by how much Montana tax revenue might decrease with the offset and if there is a rollover provision in the tax code that permits Tier 1 and/or Tier 2 payments to offset tax obligations in years subsequent to the year in which the payments were actually made.

B. Magnitude of payout levels.

Antonuk rejects CLEC claims that the QPAP payout levels are too low. He finds the payout information that Qwest submits to demonstrate that Qwest's cost of noncompliance is significant and substantial under the QPAP.

C. Issues related to compensation for CLEC damages.

1. Relevance of compensation as a QPAP goal. Antonuk rejects arguments (Z-Tel's and others') that the purpose of a PAP is to create incentives to detect and sanction poor performance, not to compensate CLECs for harm, and that the payments to CLECs are not liquidated damages. Antonuk adds that the FCC couches its test in terms of incentives, but an elementary legal principle in the field of remedies is the public interest in holding parties responsible for the damages they cause to induce them to behave in ways to avoid such harm.

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[2] See Qwest's response to data request PSC -144.

[3] See Qwest's response to data request PSC -146.

Antonuk concludes it is appropriate for the QPAP to address the issue of CLEC compensation for contractual damages, and it is appropriate that the QPAP liquidate such damages.

AT&T comments

AT&T objects to Antonuk's position that the QPAP is a liquidated damages contract. AT&T argues the QPAP is similar to a commercial liquidated damages contract, but there are important differences, such as: the QPAP's main purpose is to ensure that Qwest continues to deliver compliant service to CLECs; Qwest offers the QPAP in order to meet the public interest requirements of Section 271; the QPAP contemplates substantial governmental intervention and control; the SGAT (which includes the QPAP) is mandated by the federal Telecommunications Act; Qwest is required by law to negotiate in good faith; and states receive payments under the QPAP absent any contractual relationship with Qwest.

Covad comments

Covad asserts that the SGAT into which the QPAP is folded is not an "ordinary commercial contract" but rather a "hybrid" contract.

Commission preliminary finding: The Commission finds that, while the QPAP is similar to a typical commercial liquidated damages contract between two parties, it also serves other purposes such as those identified in AT&T's comments.

2. Evidence of harm to CLECs. Antonuk finds Qwest to argue correctly that CLECs did not provide evidence in this proceeding to show what their damages had been or would be.

AT&T comments

AT&T claims that once Antonuk decided the QPAP is a liquidated damages contract, as opposed to being similar to one, he then took the CLECs to task for

failing to quantify their damages. AT&T argues this is a burden placed on it inappropriately by Antonuk, but even so, claims it was prohibited in this proceeding from providing evidence of damages it suffers when Qwest's service is noncompliant. According to AT&T, examples of damages include the costs of unutilized or underutilized AT&T personnel, equipment and marketing due to Qwest's failure to provide service to AT&T, goodwill costs, and customer service cancellations, including possible cancellations of other services such as cable, wireless, toll and cable modem. AT&T argues it is not possible to quantify CLEC damages.

Commission preliminary finding: No finding or comment is necessary.

3. Preclusion of other CLEC remedies. Sections 13.5 and 13.6 of the QPAP treat Tier 1 payments as liquidated damages which are designed to provide an exclusive remedy to compensate CLECs for damages resulting from Qwest's poor service. In return for the right to such payments without having to prove harm, Qwest would secure the assurance that other damages arising from the same performance will be waived. Qwest also asserts that the offset provision of the QPAP (Section 13.7) would apply to non-contractual remedies. CLECs disagree, arguing they should not be foreclosed from seeking other remedies. Qwest's reply brief commits to not preclude non-contractual legal and regulatory claims, but Antonuk finds Sections 13.5 and 13.6 unclear and inconsistent when taken together. Antonuk adds that the same need exists to ensure that from any such recovery there is deducted in one way or another the contract damages amount for which the QPAP should provide. To remedy the inconsistency, and to make clear that the QPAP allows CLECs to recover noncontractual damages, Antonuk strikes most of Section 13.6, replacing the stricken language with a provision requiring a CLEC to elect either (a) the remedies otherwise available by law, or (b) those available under the QPAP and other remedies as limited by the QPAP. Thus, CLECs may select all or none of the QPAP remedies. CLECs electing QPAP

remedies are not precluded from seeking recovery under noncontractual theories of liability those parts of damages that are not recoverable under contractual theories of liability (e.g., federal enforcement under 271(d)(6), antitrust, tort and consumer protection remedies).

Qwest comments

Qwest does not oppose Antonuk's preclusion of other CLEC remedies and asserts that its modified QPAP (13.6) incorporates Antonuk's "three-factor" test concerning alternative remedies. Qwest, however, modifies the QPAP further to clarify that payments under PSC rules and orders will be considered contractual. Qwest's clarifications assume that PSC rules and orders regarding wholesale service quality issues are also contractual as they relate to interconnection agreements.

AT&T comments

AT&T strenuously objects to Antonuk's recommended revisions as providing Qwest the ability to put CLECs out of business without fear of significant financial harm to itself. AT&T disagrees with Antonuk's findings that restrict CLEC remedies to only those available under the QPAP. AT&T argues that Antonuk's position is legally inappropriate and raises public policy concerns. AT&T claims that, if Antonuk's approach is adopted, alternative CLEC remedies for damages are essentially eliminated in a way never contemplated by the FCC or any other state commissions. AT&T proposes instead the findings of the Colorado PUC regarding remedies, which allow CLECs the ability to sue to recover extraordinary losses due to Qwest's poor performance. AT&T recommends the Commission adopt the Colorado commission's language regarding preclusion of CLEC remedies (CPAP 16.6).

Covad comments

Covad asserts Antonuk's conclusions are fatally flawed as they ignore the fact the QPAP will be incorporated into the SGAT as well as the fact that damages not

compensated under the QPAP should be recoverable. Covad recommends rejecting his conclusions and accepting the Colorado PUC's approach. That approach finds, in part, that concerns about backsliding justify the risk that Qwest may overcompensate CLECs on occasions for damages while preserving the rights of CLECs to sue when under compensated. In turn, the Colorado PUC finds appropriate a provision that permits the assertion of "contractual theories of relief" where extraordinary losses are sustained as a result of Qwest's poor service quality.

Commission preliminary finding: The Commission rejects as unreasonable Antonuk's recommendation, which would preclude CLECs opting into the QPAP from seeking other remedies when they sustain extraordinary losses as a result of Qwest's noncompliant performance. The Commission adopts the recommendation of AT&T and Covad and directs Qwest to replace the third and final sentence of Montana QPAP Section 13.6 (11/6/2001 version) with the following slightly revised language recommended by the Colorado PUC at CPAP section 16.6:

> ***Tier 1 payments are in the nature of liquidated damages. Before a CLEC shall be able to file an action seeking contract damages that flow from an alleged failure to perform in an area specifically measured and regulated by the QPAP, CLEC must first seek permission through the Dispute Resolution Process set forth in SGAT Section 5.18 to proceed with the action. This permission shall be granted only if CLEC can present a reasonable theory of damages for non-conforming performance at issue and evidence of real world economic harm that, as applied over the preceding six months, establishes that the actual payments collected for non-conforming performance in the relevant area do not redress the extent of the competitive harm. If CLEC can make this showing, it shall be permitted to proceed with this action. If the CLEC cannot make this showing, the action shall be barred. To the extent that CLEC's contract action relates to an area of performance not addressed by the QPAP, no such procedural requirement shall apply.***

The Commission agrees with Antonuk's finding that CLECs electing QPAP remedies are not precluded from seeking recovery under noncontractual theories of liability those parts of damages that are not recoverable under contractual theories of liability (e.g., federal enforcement under 271(d)(6), antitrust, tort and consumer protection remedies).

4. Indemnity for CLEC payments under state service quality standards. Antonuk rejects AT&T's proposal that Qwest compensate CLECs for any payments they must make for failure to meet state or federal service quality rules, provided that Qwest wholesale service deficiencies cause CLEC failures. This issue was addressed in prior workshops (indemnity for CLEC payments under state service quality standards) where such indemnification was similarly rejected.

5. Offset provision (Section 13.7) AT&T objects to Qwest's provision that allows it to reduce damages a court or regulatory agency orders it to pay a CLEC by the amount of QPAP payments to that CLEC, if the damages are based on the "same or analogous" wholesale performance. As regards the issue of Qwest's right to an offset, Antonuk finds that this issue is really about where to resolve disputes that concern offsets. He finds the QPAP dispute resolution process to provide parties an opportunity to challenge any Qwest decision to reduce QPAP payments under the offset language. He includes in the QPAP a provision for interest on awards so that Qwest does not have a time-value-of-money advantage while resolving disputes. As regards disputes about the "same or analogous performance" provision, he finds the Qwest revised language generally appropriate as it limits the offset provisions to the portion of damages that represent compensatory recovery by CLECs. In finding the term "analogous" too vague he prefers the phrase "same underlying activity or omission for which Tier 1 assessments are made under this QPAP." While the QPAP has nothing to do with compensation for physical property or personal injury damages, to preserve the effect of other SGAT provisions that do, he revises Section 13.7 to prohibit

offsets against CLEC payments that relate to third-party physical damage to property or personal injury.

Qwest comments

Qwest incorporates into the QPAP (13.7) changes Antonuk recommends.

AT&T comments

AT&T agrees that CLECs are not entitled to double recovery for the same damages. However, AT&T claims that the offset issue is one that should be argued in court if a CLEC decides to sue in order to recover alleged losses and that the issue should be decided by the finder of fact in that forum. AT&T points out that neither the Texas nor Colorado performance assurance plans include provisions such as this one that allows Qwest to offset payments won by CLECs using alternative remedies. AT&T notes that Qwest will have the opportunity to argue the appropriateness of offset in court. AT&T rejects Antonuk's reasoning that Qwest is not actually able to use this provision to offset legal judgments obtained against Qwest by a CLEC because the CLEC is free to use the dispute resolution procedure in the SGAT to pursue its claim in front of the state commission. AT&T recommends the Commission reject Antonuk's finding regarding the offset provision and instead adopt the offset language of the Texas or Colorado commissions, or that recommended by the Utah Staff.

Covad comments

Covad asserts that while Antonuk foists the responsibility and cost to determine the appropriateness of offsets onto CLECs, Covad prefers having the entity (PSC or court) that renders damage awards to make offset decisions.

Commission preliminary finding: The Commission rejects Antonuk's recommendation that permits Qwest to offset damages a court or other agency orders it to pay a CLEC by the amount of QPAP payments to that CLEC when the damages are based on the same wholesale performance.

The Commission does not believe double recovery by a CLEC for the same poor performance is proper, but finds that the appropriate entity to determine whether an award to a CLEC should be offset is not Qwest, but is the same court or adjudicatory body that awarded the damages to the CLEC. Similarly, that entity will also decide whether the performance at issue is the same performance as that which was compensated under the QPAP. Qwest is directed to replace the first two sentences of QPAP Section 13.7 (11/6/2001 version) with the following Colorado CPAP recommended language:

> *If for any reason a CLEC agreeing to this QPAP is awarded compensation for the same harm for which it received payments under the QPAP, the court or other adjudicatory body hearing such claim may offset the damages resulting from such claim against payments made for the same harm.*

The Commission agrees with Antonuk's reasoning that prohibits offsets against CLEC payments related to third-party physical damages or personal injury. Therefore, no change to the final sentence of QPAP Section 13.7 is necessary.

6. Exclusions (Section 13.3).

This section of the QPAP lists cases that excuse Qwest from Tier 1 and Tier 2 payments. Antonuk's *Report* discusses six such exclusions.

a. Bad faith. Antonuk finds this exclusion should stay in the QPAP because CLECs should not receive QPAP payments as a result of their manipulative conduct. However, he adds a provision to Section 13.3 so that Qwest does not use this exclusion to excuse its own failure to deliver performance it should reasonably be expected to provide just because the CLEC knows of Qwest's weakness.

b. Duplicative force majeure provisions. Given that the SGAT provides for service obligations, Antonuk rejects Qwest's argument that the QPAP requires its own separate and different force majeure provision.

c. Resolving disputes over force majeure events. Antonuk agrees with Qwest's view that the PSC resolve disputes of whether force majeure events occurred. The QPAP should require Qwest to notify the PSC of its force majeure claims within 72 hours of learning of them, or after it reasonably should have learned of them.

d. Nexus between force majeure events and Qwest performance. Antonuk accepts the QPAP's existing language, but recommends adding AT&T's language specifying the method for calculating the impact of a force majeure event on interval measures (and payments). Qwest's burden will be to not only show a force majeure event occurred, but to demonstrate its relation to failed performance.

e. Applicability of force majeure to parity measures. Antonuk finds that parity performance measures should not be subject to force majeure payment exclusions.

f. CLEC forecast exclusion. Antonuk finds the language of this provision is too broad and he recommends limiting the exclusion to failure to provide forecasts that are "explicitly required by the SGAT." He does not allow forecast exclusions stemming from state rules.

Qwest comments

Qwest states to incorporate language into the QPAP (see 13.3.2 and 13.3) in accordance with all of Antonuk's findings regarding exclusions.

7. SGAT limitation of liability to total amounts charged to CLECs. Antonuk finds that the payments referred to in SGAT Section 5.8.1 and in the QPAP are mutually exclusive: Qwest's liability for property damage and personal injury should not be limited by QPAP payments, and vice versa. He recommends that Section 5.8.1 should be revised to include this provision: "payments pursuant to the QPAP should not be counted against the limit provided for in this SGAT section."

Qwest comments

Qwest states to have revised the QPAP and adds that it will file to revise the SGAT (5.8.1).

D. Incentive to perform.

1. Tier 2 payment use (Section 7.5). AT&T would eliminate the section that requires using Tier 2 payments for purposes that relate to the Qwest service territory. Antonuk prefers language that allows a PSC to direct the use of the money, within the limits of state law. He also recommends that the QPAP include a funding mechanism to first use Tier 2 payments to support state commission activities that relate to wholesale telecom service issues, but also to use a portion of Tier 1 payments, if necessary, to support those activities. This mechanism operates as follows: 1/3 of Tier 2 payments and 1/5 of Tier 1 escalation payments would go to the fund for the states that participate in a multistate administration effort for (a) administrative activities, (b) dispute resolution, and (c) other wholesale telecom service activities that the participating PUCs decide are best carried out on a multistate basis. Any unused Tier 1 payments would be returned to CLECs who made them, on a prorated basis, at least every two years. To fund the activities on an interim basis Antonuk would require Qwest to make an advance payment against future Tier 2 obligations.

Qwest comments

Qwest modifies QPAP (7.5) and further clarifies that it will pay Tier 2 funds unless the Commission directs it to deposit the funds into "another source provided for under state law." However, Qwest adds it will make such payments provided the Commission identifies a state fund that exists by the time Tier 2 payments are due under the QPAP. Otherwise, Qwest will make deposits to the state's general fund. Also, in regard to Tier 2 payment use, Qwest includes four new QPAP sections (11.3, 11.3.1, 11.3.2 and 11.3.3) to establish the source and use of a funds set aside for the "Special Fund." Somewhat ambiguously, Qwest adds that "At least initially, the participating states are those which provide a positive recommendation based on the attached QPAP." Qwest asserts it is necessary for Commissions to pre-designate individuals the Commission authorizes to disburse such funds for legitimate purposes (QPAP section 15.0).

AT&T comments

AT&T objects to Antonuk's proposal that 1/5th of CLECs' Tier 1 escalation payments be used to support a fund for multistate oversight of the QPAP. AT&T argues the proposal is inappropriate because it was not discussed by the participants in this proceeding and because CLECs already pay state taxes and regulatory fees to support regulatory commissions, and should not be expected to remit to the states a portion of their payments for poor service.

Covad comments

Covad would constrain PSC uses to exclude ones that benefit Qwest. Covad finds it "incongruous" to compel Qwest's payments to be used for purposes by which it benefits and may, in fact, create a perverse incentive on the part of Qwest to provide wholesale service to CLECs.

Commission preliminary finding: The Commission rejects Antonuk's proposal to divert a portion of CLECs' Tier 1 escalation payments to a fund to be used by the Commission in its efforts regarding QPAP oversight and wholesale service quality. The Commission intends at this time to fund its

QPAP oversight activities through the use of Tier 2 payments. If Tier 2 payments prove to be insufficient to cover the cost of QPAP oversight, the Commission reserves the right to revisit this issue.

The Commission supports Antonuk's recommendation that Montana and other state commissions in Qwest's service area join together to participate in a multistate QPAP oversight effort. The Commission will contact other state commissions to determine their interest and, if there is interest, will work with these states to develop a plan for going forward with this proposal.

Regarding the use of Tier 2 funds, the Commission agrees with Antonuk's recommendation that the QPAP include a provision that allows the Commission to direct the use of Tier 2 payments, within the limits of state law. In keeping with this finding, the Commission directs Qwest to keep the first sentence of QPAP Section 7.5 as it appears in the 11/6/2001 version of the QPAP, but to delete the remainder of this provision.

2. 3-month trigger for Tier 2 payments. Antonuk finds that in any 12-month rolling period in which there occurs two non-compliant months out of any consecutive three months, payments for Tier 2 measures without a Tier 1 obligation should begin after one more month of noncompliance, with escalation as laid out in the QPAP. In the case of Tier 2 measures that are also Tier 1, the Tier 2 payments will begin in the second consecutive month of noncompliance, provided that the same "two-out-of-three month condition" is met.

Qwest comments

Qwest agrees to incorporate Antonuk's changes to the QPAP (9.1.2).

AT&T comments

AT&T requests clarification of Antonuk's recommendation here because, as AT&T interprets the QPAP, there is no provision for escalation of Tier 2 payments.

Commission preliminary finding: Like AT&T, the Commission does not find a provision in the QPAP for escalation of Tier 2 payments to the states. The Commission otherwise concurs with Antonuk's recommendation. Participants are invited to provide the Commission with any clarifying information.

3. Limiting escalation to 6 months. Qwest favors limiting escalation to six months while CLECs (AT&T, ELI/Time Warner/XO Utah, WorldCom, Z-Tel, and Covad) and the New Mexico Advocacy would not limit escalation. Antonuk rejects the CLECs' and New Mexico Advocacy staff's proposal for several reasons. First, he asserts it is not clear that poor performance past six months means Qwest methodically calculated that the continuing costs of compliance exceeds the continuing costs of violation. He adds that many of the measures at issue are not parity measures but rather benchmark measures and this record does not demonstrate with certainty that those levels of performance can be met and sustained at any cost within the realm of economic reason. However, they generally relate to services about which little experience existed when the measures were adopted. Thus, the correlation between long-term non-compliance and insufficiency of inducements is not self evident as some have argued. If non-compliance continues for six months in the face of stiff financial consequences, one of the issues that would bear consideration is the achievability of the established benchmark. Second, parity measures, while based on a substantiated and common belief that there are no material differences between serving retail and wholesale customers, cannot be said to rest upon an absolute certainty that growing experience with the CLEC community will not show otherwise. Third, calculated comparisons of the marginal costs of compliance versus non-compliance are not the only reason problems can persist. Antonuk finds the logic

of extended escalation to depend profoundly upon the certainty of propositions like these. He finds it speculative to conclude that insufficiently increasing payments, as opposed to other factors, such as: (a) a less than optimally crafted standard, (b) a series of extenuating external circumstances, (c) buyer efforts to induce failure, (d) management's performance decisions and actions (that may have been soundly believed sufficient to improve performance, but proven inadequate only as time passed), or even other reasons, cause or contribute to a failure to provide compliant performance.

Antonuk concludes that if it can be shown that six months of escalation creates payment levels judged to be far enough in excess of both the value of CLECs and the costs of calculating decisions to continue to under perform, then a six-month cutoff of escalation is reasonable. This conclusion is appropriate in light of three other factors: (1) there are provisions for root cause analysis of continuing problems; (2) there exists the option of ending 271 authorization where that measure is shown to be appropriate to the circumstances and (3) there exists the ability under non-271 sources of regulatory authority to examine the causes and consequences of structural failures or weaknesses in the facilities, management, systems, processes, activities, or resources by which regulated providers of utility services, such as Qwest, satisfy their service obligations.

AT&T comments

AT&T disagrees with Antonuk's finding and points out that both the Colorado commission and the Utah Staff rejected limits on payment escalation. AT&T claims that Qwest's argument that unlimited payment escalation would overcompensate CLECs misses the point because the purpose of payment escalation is to balance CLEC compensation for their losses and to ensure the penalty is higher than the amount Qwest is willing to absorb as a cost of doing business. AT&T cited the Colorado commission's reasoning that continuing escalation of payments for continuous poor performance should help prevent the

possibility that Qwest might evaluate whether it would rather absorb QPAP penalties and deter competition or avoid penalties and comply with the law.

Covad comments

Covad finds Antonuk's criticisms of CLECs for speculating inconsistent with his speculation that poor performance beyond six months is beyond Qwest's control. Covad reasons that because military-style testing demonstrates Qwest's ability to meet all PIDs prior to interLATA relief, Qwest should not be able argue, as Antonuk reasons, that poor performance beyond six months is due to circumstances beyond its control. Covad argues that limiting payment escalation to 6 months would merely allow Qwest to discriminate against CLECs for extended periods of time. Covad notes the Colorado Commission's Special Master's Final Report that requires escalation beyond six months and recommends adopting such an approach.

Commission preliminary finding: The Commission rejects Antonuk's recommendation for a six-month limitation on Tier 1 payment escalation for the reasons identified by AT&T and Covad: (1) to deter Qwest from providing poor service to CLECs for extended periods of time; and (2) to help to ensure Qwest's payment for noncompliance is higher than the amount Qwest is willing to absorb as a cost of doing business. Participants are invited to propose changes to QPAP Section 6.2.2 (and Table 2 therein) to reflect the escalation increments for noncompliant months after the 6th month.

4. Splitting Tier 2 payments between CLECs and the states. Because it was not done in the Colorado PAP as Covad asserts, and no other 271 PAP approved by the FCC does so, Antonuk rejects Covad's proposal to divide Tier 2 payments between the states and CLECs. Antonuk finds that Tier 1 payments already provide adequate compensation to CLECs.

II. CLEARLY ARTICULATED AND PRE-DETERMINED MEASURES

A. Measure selection process. Antonuk explains how the Performance Indicator Definitions (PIDs) were developed and how they are incorporated into the QPAP.

B. Adding measures to the payment structure.

1. Requiring payments for cancelled orders. Antonuk rejects the CLECs' proposal that the QPAP should provide for payments when CLEC customers cancel orders after Qwest misses a due date.

2. Requiring payments for "diagnostic" PIDs. Antonuk finds that EELs, line sharing and sub-loops should be included in the QPAP payment structure as soon as practicable. He notes that firm benchmarks or parity standards will have to be adopted first.

Covad comments

Covad asserts the Report's conclusion should be revised to provide that when PIDs convert from being diagnostic to either a benchmark or a parity standard that the QPAP will include them as of the date Section 271 relief is granted.

Commission preliminary finding: The Commission concurs with Antonuk's resolution and only adds that its recent emerging services final report on line sharing and subloop unbundling expresses the same view. Line sharing now has a penalty provision. Additionally, the Commission agrees with Covad that PIDs that are currently labeled "diagnostic" be included in the QPAP as soon as they are converted to benchmark or parity standards.

3. Cooperative testing. Antonuk rejects Covad's proposal for a cooperative testing performance measure that minimizes CLEC trouble reports for xDSL UNE

loops they order from Qwest. (Covad said Qwest has not complied with its agreement to perform acceptance testing in cooperation with Covad for all xDSL loops that Covad leases; cooperative testing would turn up defective loops before Covad has to submit trouble reports to Qwest after installation.) Antonuk said Covad should raise the issue in whatever forum is created to identify, discuss and resolve performance measure issues.

4. Adding a new PID -- PO-15D -- to address due date changes. Antonuk rejects this Covad proposal because Covad did not propose a standard for this currently diagnostic measure and, therefore, there is no basis for payment calculation under the QPAP.

5. Including PO-1C preorder inquiry timeouts in Tier 1. Antonuk rejects this AT&T proposal because the QPAP already provides compensation for preorder response time measures, that Antonuk believes is adequate for now. He finds that, if the ROC-OSS test finds a large enough number of timeouts to cause concern about the impact on the preorder response times, then the issue should be revisited.

6. Adding change management measures. Antonuk finds it appropriate to add the two change management measures that Qwest agreed to include in the QPAP (GA-7, timely outage resolution, and PO-16, release notifications). They are diagnostic now and after benchmarks are established by the ROC-OSS collaborative they will be added as "high" Tier 2 measurements.

7. Adding a software release quality measure. Antonuk recommends that WorldCom's proposed RQ-3 PID, that measures the quality of Qwest's software releases by determining the number of releases that require amendment, suspension or retraction within 14 days of implementation, be considered for inclusion on the agenda for the first 6-month review of the QPAP.

8. Adding a test bed measurement. As it is a measure under development Antonuk finds it premature to decide whether WorldCom's proposed PO-19 (test environment responsiveness) should be included in the QPAP.

9. Adding a missing-status-notice measure. Antonuk rejects WorldCom's proposal to add a performance measure to track missing status notices in anticipation of Qwest experiencing a problem (like Verizon did in NY) of failing to provide these notices.

C. Aggregating the PO-1A (pre-order IMA-GUI response times) and PO-1B (pre-order EDI response times) performance measures. Antonuk agrees with Qwest that an agreement was reached in the PEPP collaborative to collapse the 7 individual transaction measurements contained in each of these PIDs into two for purposes of the QPAP, and he supports that agreement.

D. Measure weighting.

1. Changing measure weights. Antonuk recommends adopting the measure weighting initially proposed in the QPAP and not adopting either the weighting increases sought by CLECs for certain "high-value" services (collocation, LIS trunks, UDIT, unbundled loops, resold DS-1 and DS-3) or the weighting decreases Qwest sought in return (residence & business resale, 2-wire loops, analog loops).

2. Eliminating low weighting. Antonuk rejects CLECs' proposals to eliminate the "low" weighting designation altogether.

3. LIS trunks weighting. Antonuk rejects AT&T's proposal to increase the weighting of LIS trunk measures.

Qwest comments

Qwest's comments summarize the content of Antonuk's Report and proffer no changes on measure weights.

E. Collocation payment amounts.

As evidence demonstrates that Qwest accepts the proposal proffered by the CLECs in the ROC-PEPP collaborative and that the proposal reflects the Michigan approach in regard to collocation payments, Antonuk rejects the New Mexico Staff's suggestion that the QPAP reflect either the Michigan or Georgia approach to determining collocation payment amounts. The incorporation of this proposal in the QPAP responds to the New Mexico Staff's concern.

Qwest comments

Qwest incorporates the "days late" collocation payment proposal into the QPAP (at 6.3).

F. Including special access circuits.

WorldCom requests inclusion of special access circuits in the performance measures while ELI/Time Warner/Xo considered payments important due to CLEC use of special access to provide local exchange service. Qwest asserts there is agreement by the ROC-OSS collaborative to drop special access circuits from discussions. Because the evidence demonstrates that most special access circuits at issue here were provided under Qwest's interstate FCC tariffs, Antonuk concludes that such circuits do not merit QPAP inclusion as PID performance measures as requested by ELI/Time Warner/XO Utah and WorldCom. Unless inappropriate barriers exist and that have the practical effect of requiring tariff purchases where interconnection purchases should be available, Antonuk reasons that the FCC should address failures to meet tariff requirements.

WorldCom comments

WorldCom asserts that Antonuk's Report errs in reasoning that because CLECs purchase the majority of special access trunks from federal tariffs, CLECs should seek remedies at the FCC. WorldCom asserts that because the FCC has long held it will consider discriminatory and anticompetitive RBOC conduct as part of the public interest test states should address such alleged conduct as part of 271 authority that addresses backsliding; this may occur concurrent with FCC efforts. WorldCom adds that inclusion of special access is under consideration in Texas. WorldCom also notes, that only 10 percent of traversing traffic need be interstate for a CLEC to order federally tariffed special access. WorldCom adds that the New York PSC found special access services critical to business in their state. WorldCom mentions how other states' actions consider special access in performance reporting. As for service quality, there is no federal-state conflict, there are no federal service quality standards and neither Congress nor the FCC has taken regulatory actions on "intrastate access" service quality. WorldCom concludes that it is appropriate for the Commission to approve reasonable performance measures for special access.

Commission preliminary finding: Based on WorldCom's comments, the Commission finds that it is premature to make a preliminary decision based on Antonuk's *Report* and WorldCom's comments Instead, merit exists in receiving comments on WorldCom's suggestions and on Colorado's recent resolution. The Commission invites comment on how the Colorado Commission resolved the same issue (see Colorado Commission, Decision No. R01-997-I, Docket No. 011-041T, Issue No. 54, Issues September 26, 2001, at pages 79-82), and why that resolution is not relevant here. Comments should also address the relevance of FCC-regulated special access rates vis-à-vis this Commission's deregulation of special access except for IXC facilities connecting a POP and an ILEC's CO.

G. Proper measure of UNE intervals.

Antonuk rejects Covad's argument to base QPAP payments on the service intervals of SGAT Exhibit C (the standard interval guide) instead of the PID-established intervals. His rejection stems from his finding that there is, as was discussed in the UNE workshop, consistency between the PID and Exhibit C.

H. Insufficient compensation for low-volume CLECs.

Antonuk rejects Covad's argument that the QPAP's design primarily compensates high-volume CLECs at the expense of low-volume ones. He finds that Qwest provides credible and unrebutted evidence that the QPAP would not serve to under-compensate smaller volume CLECs. Second, in regards to Covad's objection to the QPAP provision that gives Qwest a "free miss" each month in the case of CLEC's with small order volumes, Antonuk also finds that a yearly rolling average will correct the "rounding down" problem of this provision; however, as a yearly rolling average does not solve the issue of escalating payments for consecutive-month misses, escalation that apples in any month where any miss occurs for low-volume CLECs where the annual calculation shows Qwest violated the applicable requirement will solve that problem. He concludes that the QPAP should incorporate these changes.

Qwest comments

Qwest implements the Antonuk's decision into the QPAP (Section 2.4) but makes minor adjustments to Antonuk's calculation to determine missed performance measures for benchmark standards where low CLEC volumes are such that a 100% performance result would be required to meet the standard. Whereas Antonuk concludes that Qwest use 12 months of performance results to determine if the miss in the current month should be counted, Qwest seeks to clarify the language such that it will use the current month's results, plus a sufficient number of prior consecutive month's performance data so that a 100% performance result would not be required to meet the standard.

Commission preliminary finding: The Commission invites comment on the language submitted by Qwest as described above.

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

A. 6-month plan review limitations (Section 16).

The QPAP (Section 16) provides for the occasions when the QPAP may be amended. Antonuk finds Qwest's QPAP to limit reviews similarly to how the Texas PAP and the Colorado PAP limits reviews. AT&T had noted that the New York and Texas plans allow any aspect to be examined at six-month intervals and urged the same in consideration of the public interest. Qwest objects to opening the QPAP generally to amendments. Antonuk reviews what revisions the Colorado Special Master's Report allows at 6 month and at 3 year intervals. The purpose of the latter review is to determine the PAP's effectiveness at "inducing compliant performance." He finds this process should be adopted (*Report*, p. 61). Antonuk reasons that due to uncertainty on the continued role of the ROC in performance measure development and administration, the Texas arbitration provision is therefore appropriate to assure that the QPAP meets the applicable standards without unduly exposing Qwest to indeterminate increases in its financial exposure. He also recommends three changes to the QPAP review section:

1. Instead of allowing Qwest to veto recommendations, provide for normal SGAT dispute resolution procedures in the event that there is disagreement with a six-month review process recommendation regarding the addition of new measures to the QPAP payment structure.

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

3. Provide for biennial reviews of the QPAP's continuing effectiveness for the purpose of allowing state commissions to regularly report to the FCC on the

degree to which there are adequate assurances that Qwest's local exchange markets remain open.

Qwest comments

Qwest adds language to the QPAP (16.1) to allow arbitration to resolve disputes over the addition of new measures arising out of the six-month review: this is as provided for in the SGAT. Qwest amends the QPAP to allow six-month reviews to be conducted collaboratively (16.1). As Antonuk's Report recommends a two-year review, Qwest amends the QPAP (16.2) to read in part: "Two years after the effective date of the first FCC 271 approval of the PAP, the participating Commissions may conduct a joint review by a independent third party to examine the continuing effectiveness of the PAP as a means of inducing compliant performance."

AT&T comments

AT&T claims Antonuk did not provide a definitive solution to the issue of who controls the 6-month review process. AT&T objects to the existing 6-month review provisions that give Qwest control over whether any changes will be made or even addressed. AT&T seeks instead to shift control of the 6-month review process away from Qwest and recommends the approaches of the Colorado commission and of Utah Staff, both of which clearly provide that the state commission is the decision-maker when it comes to QPAP changes being addressed in the 6-month review process.

The MCC agrees with a two-year review cycle over the long term but if performance measures and penalties are to be updated successfully, MCC prefers an annual review for each of the first three years of the PAP and a thorough review upon three years' effectiveness.

Commission preliminary finding: The QPAP calls for reviews every six months for the purposes of determining: (1) whether performance measurements should be added, deleted or modified; (2) whether to change benchmark standards to parity standards; and whether to modify the weighting and/or tiers assigned to

measurements. A major review by an independent third party of the continuing effectiveness of the QPAP is scheduled for two years after the QPAP takes effect. In addition, there is a provision that provides that the QPAP will be available to CLECs until Qwest eliminates its Section 272 affiliate, at which time the Commission and Qwest will review the continuing necessity of the QPAP. The same provision calls for the QPAP to be rescinded if Qwest exits the interLATA market. The Commission addresses each of Antonuk's recommendations for changes to the QPAP review section below:

Limitations on reviews (Section 16.1): Antonuk approves the Qwest QPAP language regarding limitations of the 6-month reviews to performance-measure related issues. The Commission generally agrees with Antonuk's recommendation, but finds the Commission should retain the discretion to add other topics related to performance measurements and criteria for measurement reclassification to the 6-month reviews just in case it becomes necessary to respond to circumstances that may arise as experience is gained with the operation of the QPAP. The Commission directs Qwest to revise Section 16.1 to add the following provision to this section:

> *The Commission retains the right to add topics and criteria other than those specifically listed here.*

Dispute resolution (Section 16.1): Antonuk recommended turning to the SGAT dispute resolution procedure at SGAT section 5.18.3 when parties participating in the 6-month review cannot agree whether new performance measures should be added to the QPAP. The SGAT dispute resolution procedure focuses on the use of formal arbitration to settle disputes. Antonuk's reasoning for this recommendation centered on the uncertainty of a continued role in performance measure administration by the Regional Oversight Committee acting on behalf of the state commissions. Antonuk preferred, and proposed, that state commissions set up a joint, multistate dispute resolution process. The Commission supports the recommendation that a multistate process be established and funded and will work toward that end. However, underlying this support for a multistate dispute

resolution process is the Commission's finding that it is the Commission's responsibility to ensure the effectiveness of the QPAP and to resolve disputes arising out of it. For that reason, the Commission rejects Antonuk's recommendation that disputes resulting from the QPAP review process be handled pursuant to the SGAT dispute resolution procedure. Rather, unless and until a multistate dispute resolution process is established, the Commission finds that the Commission will resolve disputes arising out of the QPAP reviews.

Biennial reviews of the QPAP: Antonuk recommended the Commission review the QPAP's continuing effectiveness every two years instead of after three years. MCC recommended an annual review in order to update performance measurements and penalties, with a thorough review after three years. The Commission adopts Antonuk's recommendation for a thorough review every two years because the 6-month reviews will provide sufficient opportunity to address MCC's concern regarding updates related to performance measurements.

Other issues in Section 16 not addressed by Antonuk:

References to multistate reviews: The language in the 11/6/2001 version of the QPAP (Section 16.1) refers to multistate joint QPAP reviews. Because it is not known at this time whether such a multistate process will be established, the Commission finds the language should be revised to refer only to this Commission. A new provision should be added to state that nothing in the QPAP prohibits the Commission from joining a multistate effort to conduct QPAP reviews and developing a process whereby the multistate group would have the authority to act on the Commission's behalf.

Initial 6-month review: The first sentence of Section 16.1 provides that the first 6-month review will occur six months after Qwest obtains Section 271 approval from the FCC for the one of the nine states that participated in the multistate QPAP workshops. This language appears to contemplate a multistate review process that

is not yet in place. The Commission finds this language should be modified to provide for the first 6-month review to occur six months after the date Qwest obtains Section 271 approval from the FCC in Montana, unless the Commission agrees to a different date as a result of establishment of a multistate QPAP review process.

Qwest's agreement to changes: Section 16.1 continues to require that Qwest agree to any QPAP changes, except for the addition of new performance measures where disputes will be resolved elsewhere. Antonuk seemed to reject that position and Qwest indicated in its comments it had incorporated Antonuk's findings. The Commission finds that QPAP changes are subject to Commission approval and do not require Qwest's agreement.

B. Monthly payment caps (Section 13.9).

Antonuk agrees with CLECs that Qwest should not be allowed to place Tier 1 payments, that exceed a monthly cap, into escrow and found there is no basis to relieve Qwest of its obligation to pay amounts up to the annual cap.

C. Sticky duration (permanently freezing base QPAP payments at an escalated level).

Antonuk rejects Z-Tel's proposal for sticky duration as inappropriate, disingenuous, and draconian.

D. Low volume critical values.

Antonuk rejects Z-Tel's and WorldCom's proposal to apply the lower critical value of 1.04 to all low volume measures and not just the subset of them that was agreed to by compromise of most of the parties in the PEPP collaborative. (The PEPP agreement had

decreased the default critical value from 1.65 to 1.04 for certain low-volume measures and increased it to varying levels above 1.65 for progressively larger volume measures.)

E. Applying the 1.04 critical value to 4-wire loops.

Antonuk rejects AT&T's inclusion of assertion that 4-wire loops were supposed to be included as part of the 1.04 critical value compromise in the PEPP collaborative. He finds insufficient evidence to support AT&T's argument or to conclude that there is a very high rate of use of 4-wire loops for delivering high-value services; however, he finds that if, during a QPAP review proceeding, there is evidence that more than 75% of 4-wire loops are used for high-value services, the issue should be reconsidered.

F. Measures related to low-volume, developing markets (Section 10).

Antonuk rejects Z-Tel's proposal to replace the $5,000 per month aggregate payment to all CLECs with a minimum payment of $1,000 to individual CLECs for individual measures. (The QPAP provides for minimum payments of at least $5000 per month for noncompliant service in cases where aggregate CLEC volumes range between 11 and 99 orders.) Antonuk also rejects Covad's suggestion that all xDSL products be included in this higher-payment scheme for low-volume, developing markets.

G. Minimum payments.

Antonuk revises the QPAP to require annual payments to CLECs of $2,000 for each month in the year in which Qwest missed any measure applicable to low-order-volume CLECs (annual order volume of 1200 or less), less what was paid in QPAP payments to such CLEC. (For example, if Qwest paid a qualifying CLEC $5,000 in QPAP payments, but there were 9 months in the year in which Qwest failed to meet a Tier 1 measure for that CLEC, the added amount that Qwest must pay at the end of the year to that CLEC would be 9 x $2,000 - $5,000 = $13,000.) Antonuk concludes that minimum payments

should not be applied on a per measure basis. His proposed minimum payment calculation must be performed at the end of each year.

Qwest comments

Although Qwest vigorously disagrees with the need for any additional payment opportunities for small CLECs it agrees to Antonuk's making an annual minimum payment based on the number of months in which Qwest fails to meet performance standards and revises the QPAP (6.4) accordingly.

Commission preliminary finding: The Commission seeks comment on Qwest's revisions to the QPAP.

H. 100% caps for interval measures.

Antonuk rejects CLEC proposals to eliminate the QPAP provisions that cap payments at 100% on interval measures. (For example, a 3-day actual average interval for 100 events that are subject to a 2-day interval would produce a miss of 150%, but under the QPAP, the miss would be capped at 100%.)

AT&T comments

AT&T claims that Antonuk misunderstood the CLEC position on this issue as being that the per-occurrence scheme when applied to interval measurements should measure the number of individual misses and then assign a severity level to each miss. Based on this misunderstanding, according to AT&T, Antonuk then criticizes the CLECs for their failure to provide evidence about the number and severity of Qwest misses on interval measures. AT&T agrees with Z-Tel's argument that it is inappropriate to try to introduce the number of misses into an interval measure that does not use the number of misses to measure performance, but instead relies on the time interval taken by Qwest to provide service. AT&T comments that CLECs and Qwest all recognize that very poor Qwest performance to CLECs and the use of the per-occurrence QPAP scheme can result in the number of payment occurrences exceeding the number of CLEC orders in a month.

AT&T states the issue is whether the payment occurrences should be capped at the number of CLEC orders. Qwest says they should, because it would not make sense to pay CLECs on more orders than they actually submitted in a month. AT&T says no, because the worse Qwest's performance is, the more Qwest should pay. AT&T reiterates its argument that the 100% cap on interval measures protects Qwest against its own poor performance to CLECs.

Commission preliminary finding: The Commission adopts Antonuk's recommendation.

I. Assigning severity levels to percent measures.

Antonuk rejects Z-Tel's proposed payment formula that bases QPAP compensation on percent measures more proportional to the relative size of the "miss" involved. He found Qwest's QPAP adequate for now, but notes proposals like this one could be addressed fully in future QPAP review and amendments proceedings.

IV. SELF-EXECUTING MECHANISM

A. Dispute resolution (Section 18).

Antonuk rejects Qwest's proposal to add a dispute resolution provision specifically applicable to the QPAP that applies the general SGAT dispute resolution provisions to disputes arising only under certain QPAP sections. He found that the general SGAT dispute resolution sections apply as well to the QPAP section of the SGAT.

Qwest comments

Qwest states to incorporate Antonuk's recommended dispute resolution language into the QPAP (6.4).

Commission preliminary finding: Antonuk recommends, and Qwest has implemented, language that requires use of the SGAT dispute resolution procedure at section 5.18, which focuses on formal arbitration, to resolve disputes over the meaning of QPAP provisions and how they should be applied. The Commission rejects this recommendation because it is the Commission's responsibility to oversee and administer the operation of the QPAP. Therefore, dispute resolution concerning the meaning and application of QPAP provisions appropriately reside with the Commission.

B. Payment of interest.

Antonuk finds that the QPAP should provide for interest on late QPAP payments at the prime rate published daily.

Qwest comments

Qwest includes in the QPAP (11.1) the use of the "prime rate" to reflect the time value of money.

AT&T comments

AT&T recommends that the interest rate on late payments be whatever was set by the state commission in a Qwest rate case. (In the last Qwest general rate case, Docket 88.12.15, Order 5398a, the Montana PSC set Qwest's rate of return on equity at 12%.)

Commission preliminary finding: The Commission finds Antonuk's recommendation to be reasonable and adopts it.

C. Escrowed payments.

Antonuk includes in the QPAP provisions for one party to the QPAP to require the other party to make payments into escrow where the requesting party can show cause, perhaps

on grounds similar to those provided by the Uniform Commercial Code for cases of commercial uncertainty.

D. Effective dates.

1. Initial effective date. Antonuk agrees with Qwest that the QPAP effective date should be when Qwest gains 271 entry approval in a state and he revises the QPAP to require Qwest to provide monthly QPAP reports as if the QPAP became effective on October 1, 2001.

Qwest comments

Qwest is unopposed to providing reports for information reasons, but it finds unnecessarily complicated the requirement that it report information as if the QPAP were effective on October 1, 2001. Since no CLEC has opted into the QPAP, Qwest intends to provide Tier 2 reports and aggregate Tier 1 reports to Commissions and parties in this QPAP proceeding beginning with November 2001 payment reports and continuing until Qwest gains (271) approval from "the state."

AT&T comments

AT&T changes its position from the workshops, where it argued for implementation of the QPAP upon approval by the state commission, to agreement with the Utah Staff which has recommended QPAP implementation at the time Qwest files its Section 271 application at the FCC.

MCC comments

Just as the Colorado hearing examiner recommends effectiveness after 271 authority but that Qwest be required to generate "mock reports" in the interim for PUC staff review, the MCC holds that while the Report fails to mention when to implement the plan it should be immediate.

Commission preliminary finding: The Commission agrees with Antonuk's recommendation that the QPAP become effective on the date Qwest's application for 271 approval in Montana is approved by the FCC, but that Qwest immediately begin filing with the Commission and CLECs monthly "mock reports," with no monetary penalties attached, as if the QPAP (reflecting this Commission's findings) was in operation now. In this way, the Commission and CLECs will gain useful information about the operation of the QPAP prior to its actual implementation.

2. "Memory" at effective date. Antonuk rejects AT&T's proposal that when the QPAP becomes effective, Qwest should begin payments as if it had been in effect since the PSC action to approve it. As for his reasoning, Antonuk adds that the very reason cited by the FCC in support of the adoption of a PAP is the need for assurance that local exchange markets will remain open after Qwest receives the power to provide in-region interLATA service.

AT&T comments

AT&T disagrees with Antonuk's finding on this issue and calls it "illogical, inexplicable and ILEC-biased."[4] *AT&T points out that, under Antonuk's proposal, if Qwest is providing substandard service in the months prior to QPAP implementation, it will be wiped off the books once the QPAP becomes effective.*

MCC comments

The mock reports should not serve as memory once Qwest receives 271 entry authority.

Commission preliminary finding: The Commission agrees with Antonuk, Qwest and MCC that Qwest will have a clean slate as of the date of QPAP effectiveness.

[4] *AT&T's Exceptions to the Liberty Consulting Group's QPAP Report* (November 7, 2001), p. 41.

3. QPAP effectiveness if Qwest exits interLATA market. Antonuk rejects the proposal made by AT&T and ELI/Time Warner/XO Utah that the QPAP would continue to operate even if Qwest exited the in-region interLATA market.

Commission preliminary finding: To restate the effect of Qwest's intent as reflected in Antonuk's resolution: if interLATA entry is profitable, Qwest will make Tier 1 payments to CLECs and Tier 2 payments to a state, but if Qwest finds interLATA entry unprofitable, it will exit the interLATA market and cease making Tier 1 and 2 payments for any discriminatory service it provides to CLECs. The Commission seeks comment on why Qwest's right to cease making Tier 1 and, or, Tier 2 payments is consistent with congressional intent in The Telecommunications Act of 1996. The Commission seeks comment on whether any state recommendations to the FCC and any recent FCC approved 271 filings prohibit a RBOC from terminating its performance assurance plan concurrent with the RBOC's independent decision, or FCC requirement, to exit the interLATA market.

E. QPAP inclusion in SGAT and interconnection agreements.

Antonuk agrees with WorldCom that Qwest must address the question of how the QPAP should be made a part of the SGAT. He also asserts that there Qwest should clarify the scope of what a CLEC with an interconnection agreement would be required to elect. He directs Qwest to address these issues in its comments on his *Report*.

Qwest comments

Qwest asserts the QPAP will be included as Attachment K to the SGAT. Qwest adds that if a CLEC wishes to opt into the QPAP, it must do so through an amendment to its interconnection agreement which must include at a minimum, both Attachment K and Attachment B in lieu of other contractual standards and remedies. Additional elections depend on the specifics of the interconnection agreement.

Commission preliminary finding: The Commission requests participants to comment on Qwest's proposal for the method by which CLECs will opt into the QPAP. In addition, the Commission finds that a second sentence should be added to this provision (13.2) as follows:

> ***CLECs may seek amendments to their interconnection agreements to include the QPAP as soon as the Commission approves the QPAP, with the understanding that monetary penalties will not apply until the date Qwest receives Section 271 approval from the FCC.***

F. Form of payment to CLECs.

Antonuk rejects WorldCom's suggestion that Qwest make QPAP payments by cash or check; he accepts Qwest's provision that makes payments bill credits. A cash-equivalent transfer is required by Antonuk when there is insufficient amount due CLEC to offset the credit. Antonuk declined to address Covad's request for no offset if payments are due for unrelated debts of CLECs. He also asserts that the QPAP require Qwest to provide credit information in substantially the same format Qwest provides (Exh S-9-QWE-CTI-4).

Qwest comments

Qwest asserts to include a provision committing Qwest to provide payment information substantially similar to that which parties were apprised of (see QPAP 11.2).

Commission preliminary finding: The Commission invites participants' comments on the language submitted by Qwest at Section 11.2.

V. ASSURANCES OF REPORTED DATA'S ACCURACY

Qwest cites the following as assurances that the performance data underlying the QPAP will be reliable: (1) measures will be audited twice by the time the QPAP is effective; (2) the QPAP includes a root-cause analysis provision; (3) the QPAP includes a risk-based audit program; (4) CLECs may request raw data from Qwest in order to verify data and may request audits of

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individual performance measures; and, (5) the QPAP provides for audits of Qwest's financial systems used to calculate CLEC payments.

A. Audit program.

Ammann expects that states will jointly oversee the QPAP auditing function, with each state retaining the ability to make sure its particular needs and circumstances are addressed. His recommendations regarding the adoption of an integrated audit program includes the following QPAP amendments:

* Providing for a transparent Qwest process for changing the systems, processes, methods and activities of Qwest's measurement regimen and allowing an opportunity for others to challenge such changes.

* The independent auditor should meet quarterly with Qwest to learn of changes made in Qwest's measurement regimen. The auditor would then assess the materiality and propriety of any changes and reports to commissions. Other parties would make the auditor aware of their concerns about changes.

* The QPAP should adopt a programmatic approach that allows both pre-planned and as-needed testing of Qwest's measurement regimen.

* Approval of Qwest's acceptance of a two-year planning cycle to be conducted under the auspices of the participating commissions with detailed planning recommendations to be made by an outside auditor selected by the commissions and retained for two-year periods.

* A recommendation that the auditor also determine the need for individual audits proposed by CLECs that are not otherwise addressed in the current cycle plan.

- Allowing states to perform additional auditing if the joint approach is not sufficient.

- Using Tier 2 payments to states to pay audit program costs. Qwest should fund the costs of the first 2-year cycle in advance, with the amount to be refunded once Tier 2 payments accumulate. If Tier 2 payments aren't enough to pay for program, then half of the cost will come from Tier 1 escalated payments and half from Qwest.

Qwest comments

Qwest submits the following comments and QPAP revisions on the "Audit Program." (1)While Qwest asserts to include Antonuk's required audit provisions in the QPAP, Qwest includes other "key concepts" that Antonuk excludes. (2) Qwest adds to the QPAP a section (15.1.3) requiring that the independent auditor coordinate audits to avoid duplication and to not impede Qwest's ability to meet other requirements in the QPAP. (3) Qwest is hopeful that states participate in a common audit, and prefers requiring common audits. (4) Qwest adds it is imperative that audit plans and operations not impede Qwest's day-to-day performance under the QPAP regime. (5) Qwest expresses concern with how disputes arising from audits will be processed. As regards CLEC proposed audits, Qwest asserts that Antonuk did not propose a "materiality decision criteria" and notes to add such criteria as the basis for an audit: small discrepancies alone are(sic) not (word and emphasis added)a reasonable basis for an audit. (6) Qwest asserts to add a provision disallowing audits during the pendency of dispute resolutions. (7) Last, and arguably consistent with QPAP 14.4, Qwest adds a provision that a CLEC may not propose auditing data older than three years (see QPAP 15.3).

Commission preliminary finding: For resource and efficiency reasons, the Commission agrees with Antonuk's recommendation that state commissions should jointly oversee the QPAP auditing function in a manner that allows each participating state to act independently on issues where it might differ from the other states. If such a joint regulatory oversight group is formed by some or all of

the Qwest states in order to conduct their QPAP review and auditing responsibilities, the Montana Commission likely will participate. However, QPAP Section 15 (concerning the audit program) is currently written as if there is a multistate oversight regime already in place and, therefore, does not take into account the possibility that states will not form a joint oversight body and the Commission will conduct its QPAP audit responsibilities on its own. Other provisions of Section 15 inappropriately dictate the method by which the multistate commission oversight group will resolve audit-related disputes and appeals of disputes. Additionally, the current Section 15 contains provisions that limit the Commission's discretion to determine the procedure, scope, timing and conduct of audits. The Commission revises Section 15.1 through 15.4 below to address these concerns.

15.1 Audits of the PAP shall be conducted ~~in a two-year cycle~~ under the auspices of the ~~participating Commissions~~ Commission in accordance with a detailed audit plan developed by an independent auditor and approved by the Commission ~~retained for a two-year period~~. The ~~participating Commissions~~ Commission shall select the independent auditor with input from Qwest and the CLECs.

~~15.1.1 The participating Commissions shall form an oversight committee of Commissioners who will choose the independent auditor and approve the audit plan. Any disputes as to the choice of auditor or the scope of the audit shall be resolved through a vote of the chairs of the participating commissions pursuant to Section 15.1.4.~~

15.1.2 The initial audit plan shall be conducted over two years, with audit periods subsequent to the initial audit to be determined by the Commission. The Commission will determine the scope of and procedure for the audit plan, which, at a minimum, will identify the specific performance measurements to be audited, the specific tests to be conducted, and the entity to conduct them. The initial audit plan will give priority to auditing the higher risk areas identified in the OSS report. ~~The two-year cycle will examine risks likely to exist across that period and the past history of testing, in order to determine what combination of high and more moderate areas of risk should be examined during the two-year cycle. The first year of a two-year cycle will concentrate on areas most likely to require follow-up in the second year.~~

15.1.3 The Commission will attempt to coordinate its audit plan ~~shall be coordinated~~ with other audit plans that may be conducted by other state

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15.1.3 The Commission will attempt to coordinate its audit plan ~~shall be coordinated~~ with other audit plans that may be conducted by other state

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commissions so as to avoid duplication. The audit shall be conducted so as not to ~~shall not~~ impede Qwest's ability to comply with the other provisions of the PAP and should be of a nature and scope that it can be conducted in accordance with the reasonable course of Qwest's business operations.

15.1.4 Any dispute arising out of the audit plan, the conduct of the audit, or audit results shall be resolved by the Commission ~~oversight committee of Commissioners~~. ~~Decisions of the oversight committee of Commissioners may be appealed to a committee of the chairs of the participating Commissions.~~

15.2 Qwest may not make CLEC-affecting changes to the performance measurement and reporting system without Commission approval. Qwest may make non-CLEC-affecting changes to its management processes to enhance their accuracy and efficiency ~~more accurate or more efficient to perform without sacrificing accuracy~~. These changes are at Qwest's discretion, but will be reported to the independent auditor in quarterly meetings in which the auditor may ask questions about changes made in the Qwest ~~measurement regimen~~ management processes. The meetings, which will be limited to Qwest and the independent auditor, will 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 ~~participating~~ Commissions and, where the Commissions deems it appropriate, to other participants. The Commission may review in the QPAP review process the propriety of any discretionary changes made by Qwest pursuant to this section.

15.3 In the event of a disagreement between Qwest and CLEC as to any issue regarding the accuracy of integrity of data collected, generated, and reported pursuant to the PAP, Qwest and the CLEC shall first consult with one another and attempt in good faith to resolve the issue. If an issue is not resolved within 45 days after a request for consultation, CLEC and Qwest may, upon a demonstration of good cause (e.g., evidence of material errors or discrepancies), request an independent audit to be conducted, at the initiating party's expense. The independent auditor will assess the need for an audit based upon whether there exists a material deficiency in the data or whether there exists an issue not otherwise addressed by the audit plan for the current cycle. The Commission will resolve any dispute by ~~The dispute resolution provision of section 18.0 is available to~~ any party questioning the independent auditor's decision to conduct or not conduct a CLEC requested audit and the audit findings, should such an audit be conducted. Audit findings will include: (a) general applicability of findings and conclusions (i.e., relevance to CLECs or jurisdictions other than the ones causing test initiation), (b) magnitude of any payment adjustments required and, (c) whether cost responsibility should be shifted based upon the materiality and clarity of any Qwest non-conformance with measurement requirements (no pre-determined variance is appropriate, but should be based

on the auditor's professional judgment). CLEC may not request an audit of data more than three years from the later of the provision of a monthly credit statement or payment due date.

15.4 Expenses for the audit of the QPAP and any other related expenses, except that which may be assigned under section 15.3, shall be paid first from the Tier 2 funds in the Special Fund. ~~The remainder of the audit expenses will be paid one-half from Tier 1 funds in the Special Fund and one-half by Qwest.~~ If Tier 2 funds are not sufficient to cover audit costs, the Commission will develop an additional funding method to include contributions from CLECs' Tier 1 payments and from Qwest.

B. PSC access to CLEC raw data (Section 14.2).

Antonuk rejects AT&T's suggestion that this provision, that allows a PSC to request CLEC specific raw data from Qwest, be eliminated. Antonuk recommends adding QPAP language related to confidentiality concerns.

C. Providing CLECs their raw data.

Antonuk finds that upon request Qwest should provide raw data to CLECs as soon as possible. He declines to set a deadline. He finds that the QPAP should require Qwest to allow payments to be recalculated retroactively for 3 years and it should require Qwest to retain sufficient records to demonstrate fully the basis for its calculations for long enough to meet this potential recalculation obligation. Thus, Antonuk finds it sufficient that Qwest maintain records in a readily usable form for one year while remaining records are retained in an archived format. He finds that the QPAP should require Qwest to distribute CLEC-specific data in a form that will allow CLECs to understand and verify them.

Qwest comments

Qwest states to include in the QPAP (14.2) a provision that modifies slightly that recommended by Antonuk. As for the provision of raw data to CLECs, Qwest incorporates into the QPAP (14.4) a requirement that documents be retained.

Commission preliminary finding: The Commission agrees with Antonuk's recommendations, but asks participants to comment on the relevant QPAP language submitted by Qwest.

D. Penalties for late and/or inaccurate QPAP reports.

Antonuk recommends revising the QPAP to impose a penalty if Qwest neglects to file QPAP information on a measure of 1/5th the amount for failure to file a QPAP report at all (subject to a cap equal to the daily amount for failure to file any report). He finds that the best way to deal with report accuracy is to include the issue when formulating audit plans. For late QPAP reports, he finds that Qwest should pay $500/day for a report filed in the second week after it's due, $1000/day in the third week and $2000/day for anything later than that. (The QPAP allows Qwest to request a waiver of late report payments.)

Qwest comments

Qwest includes in the QPAP (14.3) payment obligations consistent with Antonuk's Report.

VI. OTHER ISSUES

A. Prohibiting QPAP payment recovery in rates.

Antonuk rejects AT&T's proposal adding that the FCC and state PSCs can decide the issue.

AT&T comments

AT&T continues to argue that the Commission should mandate that Qwest may not recover QPAP costs from ratepayers. In addition, AT&T proposes language for a new provision to be added to the QPAP that explicitly prohibits Qwest from including QPAP

payments as expenses in any Qwest revenue requirement or reflecting them in increased rates to CLECs.

Commission preliminary finding: As for the recovery of QPAP payments in rates, the Commission agrees with Antonuk as to jurisdiction and finds that no such recovery is allowed in rates this Commission regulates.

B. No-admissions clause (Section 13.4.1).

Antonuk finds that the QPAP restriction in this section does not constrain the use of the information contained within QPAP reports so there is no need to delete the clause.

C. Qwest's responses to FCC-initiated changes.

Qwest proposed 3 QPAP changes that were prompted by informal suggestions from the FCC: (1) eliminating 2 families of OP-3 submeasurements so that no missed order would go uncompensated; (2) removing the adjustment for two commission's rate orders (not Montana); (3) making two changes in the statistical values used to test Tier 2 parity. No one objected to these proposals so Antonuk adopted them.

Qwest comments

Qwest asserts to make appropriate deletions to the QPAP (7.2, but also see Attachment, footnote c and Attachment 3).

D. Specification of state commission powers (Section 12.3).

This section allows a state commission to recommend to the FCC that Qwest's 271 authority be revoked in the event Qwest reaches the annual cap. As it does not add to any power Commission do not already have, Antonuk eliminates this provision as it might be construed to limit a commission's authority to respond to circumstances that may arise other than in the QPAP.

Qwest comments

Qwest strikes from the QPAP Section 12.3 cited here.

Commission preliminary finding: The Commission agrees with Antonuk's resolution.

E. Issue deferred to QPAP from Final Report on Checklist Item # 4 – Unbundled Loops

Qwest's delays in making these loops available and the impact on competition led to the following conclusion in the Commission's preliminary report:

> *Issue 4 – Commission Preliminary Finding*
>
> *The Commission agrees with the facilitator's findings regarding the need for expeditious provision of infrequently ordered unbundled services. The Commission considers the fact that comparatively few of these loops were ordered does not necessarily indicate the losses to competition that may have occurred. The Commission will consider whether this issue should be added to the post-entry performance plan considerations.* (p. 43).

In its comments, Qwest argues that it is unnecessary to consider infrequently ordered services in QPAP because of the special request process (SRP) already approved by the facilitator. The Commission's final report finds:

> *[i]t is clear from many sources that Qwest has made substantial improvements in its provisioning of wholesale service and technical support for CLEC wholesale ordering activities including for the specific UNEs at issue here. The Commission's concern was over the time it appears to have taken for new or infrequent services to be provisioned and provisioned correctly by Qwest and the possible impact this may have on competition, especially the competition represented by smaller companies which may be more likely to be active over a sustained period in Montana. Once a product or service is well-developed and part of the performance measures there are means in the QPAP for monitoring performance and parity. The Commission agrees with Qwest that the procedures detailed in Exhibit F (of the SGAT) concerning the special request process go far to alleviating the Commission's concern over the impact of provisioning in the case of infrequently ordered UNEs. In addition, as a consequence of the CLEC Forum held January 9, 2002, parties have agreed to discuss and make proposals concerning processes on how Qwest and small CLEC's can improve interaction. The Commission defers final closure of this issue pending the outcome of those discussions.*

The Commission invites comments on what it might do to facilitate better interaction between companies and therefore competition over the long-term in Montana. If the Commission should develop an expedited complaint procedure to resolve wholesale service disputes, what might it look like? If the Commission sponsors meetings, perhaps modeled on the CLEC Forum where parties can discuss issues and possibly resolve them prior to going to a complaint or dispute process, should they be, for example, annual or quarterly? How long would this need to go on e.g., one year after Qwest receives 271 approval, or two years?

QPAP LANGUAGE ISSUES NOT ADDRESSED IN ANTONUK'S REPORT

The Commission has reviewed the QPAP language in the current 11/6/2001 version and makes the following preliminary findings.

Section 2.1.1: This provision should be modified to reflect the finding that Tier 2 payments will be paid by Qwest into an interest-bearing escrow account set up by Qwest to hold the Montana Special Fund monies, and will not be paid to the state general fund. Every year, the Commission will determine whether the money in the Special Fund exceeds the amount of money the Commission expects to spend to perform its QPAP-related activities. If there is an amount in excess of what the Commission determines is necessary, the Commission will direct Qwest as to its disposition. (The Commission's direction will be to deposit the excess in the state general fund.)

Section 7.5: Everything after the first sentence should be deleted. The text to be deleted refers to the circumstance that would occur if the Commission was statutorily unable to direct the use of Tier 2 payments.

Section 10.3: Delete this provision entirely. The scope of the 6-month reviews is addressed in Section 16.

Section 11.3: Revise as follows:

A Special Fund shall be created for the purpose of funding the Commission's auditing, administration and oversight of the QPAP ~~(a) payment of an independent auditor and audit costs as specified in section 15.0, (b) payment of an independent arbitrator to resolve disputes arising out of the six-month review as described in section 16.0, and (c) payment of other expenses incurred by the participating Commissions in the regional administration of the QPAP~~. Nothing in this section prohibits the Commission from joining with other state commissions in a multistate effort to conduct and develop a method for joint funding for some or all of these activities.

Sections 11.3.1 and 11.3.2: These provisions should be revised to reflect the current circumstances where this Commission will be acting on its own in its QPAP oversight activities, rather than participating in a multistate effort.

Section 13.1: This provision should state that the QPAP will be effective on the date Qwest receives section 271 approval from the FCC for Montana.

The Commission requests participants to review closely the language in the 11/6/2001 QPAP, as well as any language changes recommended by the Commission in this report. Participants should include in their comments on this report any concerns they have as to whether the language conforms to this Commission's findings, and propose substitute language where appropriate.

BY THE MONTANA PUBLIC SERVICE COMMISSION

GARY FELAND, Chairman

JAY STOVALL, Vice Chairman

BOB ANDERSON, Commissioner

MATT BRAINARD, Commissioner

BOB ROWE, Commissioner

ATTEST:

Rhonda J. Simmons
Commission Secretary

(SEAL)

Decision No. R01-997-I

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

DOCKET NO. 01I-041T

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

COLORADO PERFORMANCE ASSURANCE PLAN

Mailed Date: September 26, 2001

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I. BACKGROUND

1. The Telecommunications Act of 1996 (Act) seeks to foster competition in local telephone markets. Because the existing monopoly holders--incumbent local exchange carriers (ILECs)--are not naturally inclined to abdicate their monopoly positions by helping their competitors,[1] the Act contains a variety of incentives and enforcement mechanisms to achieve this

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[1] *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

end. One of the foremost incentives is the promise that an ILEC will be allowed to offer in-region, interLATA service (long distance) upon proving either: a) it has entered into an interconnection agreement with a competing facilities-based CLEC or b) it offers a standing Statement of Generally Available Terms and Conditions (SGAT) that fulfills the fourteen checklist items set forth in § 271(c)(2)(B) of the Act.[2]

2. Even after the ILEC demonstrates to the Federal Communications Commission (FCC) that it meets these requirements, the FCC must also agree that provision of long distance service is in the public interest.[3] The FCC requires a plan for identifying and penalizing any anti-competitive behavior that may take place after the ILEC has entered the long distance market. The Act directs the FCC to correct any ILEC behavior that subsequently falls short of the Act's § 271 requirements, either by issuing an order, imposing a penalty or revoking the right to provide long distance service.[4] This corrective action implies ongoing monitoring of ILEC behavior, either by a federal or state commission or by the ILEC's competition. However, in other states' § 271 proceedings,

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the local monopolists is such that they would have every incentive to guard access to their networks against would-be competitors").

[2] 47 USC §§ 271(c)(1), (c)(2)(B) (1996).

[3] 47 USC § 271(d)(3)(C).

[4] 47 USC § 271(d)(6).

parties have expressed concern with the effectiveness of this monitoring.[5] In response, the Department of Justice advises ILECs to provide detailed performance measurements to ensure that the market is "irreversibly" open to competition and to assure that wholesale performance does not deteriorate.[6] The FCC considers the presence of a Performance Assurance Plan (PAP) that contains self-executing penalties in response to any discriminatory wholesale service as "probative evidence" that an ILEC's market is irreversibly open and that § 271 approval is consistent with the public interest requirement.[7]

3. The FCC has given only very general guidance about the mechanics of aPAP. The FCC has said that the PAP must not be the single mechanism to guard against anti-competitive behavior by the ILECs.[8] Other bodies of law, state and Federal mechanisms and private interconnection agreements serve to

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[5] *In the Matter of 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, CC Docket 99-295, at ¶ 446 (December 22, 1999) (Bell Atlantic New York Order).

[6] *In the Matter of Application By BellSouth, et al., Pursuant to section 271 of the Communications Act of 1934, as amended, to Provide In-Region InterLATA Services in South Carolina*, Memorandum Opinion and Order, CC Docket 97-208, at ¶ 36 (December 24, 1997) (BellSouth South Carolina Order) ("Moreover, the Department of Justice found that BellSouth had failed to demonstrate that the local market would remain open to competition because it had not instituted performance measurements needed to ensure nondiscriminatory performance in the delivery of service to new entrants").

[7] Bell Atlantic New York Order at ¶ 429.

[8] *Id.* at ¶ 430.

bolster the ILECs' incentive to comply with the Act.[9] With this in mind, the FCC has defined some general characteristics to which a PAP should adhere:

- Potential liability that provides a meaningful and significant incentive to comply with the designated performance standards;
- Clearly-articulated, pre-determined measures and standards, which encompass a comprehensive range of carrier-to-carrier performance;
- A reasonable structure that is designed to detect and sanction poor performance when it occurs;
- A self-executing mechanism that does not leave the door open unreasonably to litigation and appeal; and,
- Reasonable assurances that the reported data are accurate.[10]

4. The Colorado Performance Assurance Plan (CPAP or Plan) meets these five requirements. The full terms and conditions of the CPAP are set forth as recommended SGAT language in attachment A to this Order.

5. First, Qwest's annual liability for capped payments is $100 million. This figure is approximately 14% of Qwest's annual local services revenues.[11] This is approximately

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[9] *Id.*

[10] *Id.* at ¶ 433.

[11] This figure is based on the FCC's Automated Reporting Management Information System (ARMIS) data.

the same proportion as New York's, Texas' and other states' approved plans.[12] Furthermore, many penalties, such as the high priority compensatory payments (Tier 1A and 1B) and penalties for compromising the integrity of the Plan[13], are not capped at all.

6. Second, the CPAP is built on detailed Performance Indicator Definitions (PIDs) that include detailed disaggregation requirements, business rules, and standard performance levels. The FCC strongly recommends a collaborative process for establishing appropriate performance indicators.[14] The Regional Oversight Committee's (ROC)[15] process by which these PIDs were designed fulfills this objective.

7. Third, the Plan entails monthly monitoring of these PIDs. The PIDs will be compared to either Qwest's retail performance or a benchmark performance level, whichever is appropriate. The mode of comparison balances the strength of

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[12] *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, Memorandum Opinion and Order*, CC Docket 00-65, at n. 1235 (June 30, 2000) (SBC Texas Order).

[13] The exception is the penalty for billing measure, Tier 1C, which is capped at $5,000 per measure and has a total per-measure cap of $30,000 for escalated penalties.

[14] Bell Atlantic New York Order at ¶ 54.

[15] The Regional Oversight Committee (ROC) is comprised of the fourteen state Public Utilities Commissions in Qwest's region.

the statistical analysis used in other states (the modified z-test) with the simplicity of "stare-and-compare" analysis for some higher priority PIDs. Both mechanisms will accurately detect non-compliant performance and bring this behavior to light.

8. Fourth, when the mode of analysis shows that Qwest's performance has fallen below either retail parity or a standard benchmark, payments will accrue automatically. These payments will escalate with the number of occurrences, the severity and the duration of the non-compliance. Furthermore, the Plan provides for an Independent Monitor and contains a dispute resolution process, which includes collaboration requirements and arbitration in the case of any disagreements. Finally, the Plan outlines a screening process to ensure that the parties do not bring frivolous or frequent lawsuits against one another.

9. Fifth, the Plan calls for annual audits, CLEC-initiated mini-audits and the possibility for additional Commission-initiated audits. There are also provisions for the CLECs to request access to raw data and a requirement for Qwest actively to participate in assisting the CLECs with data reconciliation. Furthermore, the Plan includes both limitations on Qwest's ability unilaterally to modify the performance monitoring and reporting system and mechanisms to include any

changed aspects of the system and processes in the annual audits.

10. Beyond these five requirements, the FCC conferred significant discretion to the states. A key emphasis is that a state's plan be flexible enough to adapt to changes in the telecommunications industry, as well as the local market.[16] In fact, the FCC has said that "plans may vary in their strengths and weaknesses, and there is no one way to demonstrate assurance."[17] The FCC has stated that plans should fall into a "zone of reasonableness."[18]

11. The CPAP falls well into that "zone of reasonableness." The Plan builds upon the New York and Texas plans and adds to this foundation six intense months of state-specific customization. This effort included the Staff of this Commission, counsel for the Commission, a Special Master, a research assistant, and all interested parties. The process included approximately 20 meetings with the parties and approximately 35 substantive filings. Additionally, the Commission considered input from the multi-state collaborative performance plan effort. This Order is the culmination of this

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[16] *Id.* at ¶ 438.

[17] SBC Texas Order at ¶ 423.

[18] *Id.*

work. Attachment A contains the Commission's recommended SGAT language.

12. Pursuant to Decision No. R01-624-I Qwest submitted a compliance filing (*Qwest Proposed CPAP SGAT*) that contains proposed SGAT language for the CPAP. On July 16, 2001 comments on the *Final Report and Order* and *Qwest Proposed CPAP SGAT* were filed by AT&T, see AT&T's Comments Regarding the Special Master's Report and Qwest Proposed Statement of Generally Accepted Terms and Conditions Language (*AT&T Comments*); Colorado Office of Consumer Counsel, see Comments of the Colorado Office of Consumer Counsel on the Draft SGAT Language Consistent With the *Final Report and Recommendation* of the Special Master (*OCC Comments*); Covad see Comments Covad Communications Company on *Final Report and Recommendation* (*Covad Comments*); Qwest, see Qwest Corporation's Comments on the Recommendation of the Special Master and Recommended Performance Assurance Plan (*Qwest Comments*); WorldCom, see WorldCom's Comments on the Final Report Issued By the Special Master Addressing Qwest's Performance Assurance Plan; and XO Colorado and Time Warner Telecom of Colorado, see Comments of XO Colorado, LLC. and Time Warner Telecom of Colorado, LLC on *Final Report and Recommendation* (*XO Colorado and Time Warner Telecom Comments*). On July 20, 2001 Qwest filed performance measures definitions for new PIDs required by the *Final Report and Order*,

see Qwest's Filing of CPAP Performance Measures (*Qwest Proposed New PIDs*). AT&T also filed comments on the new PIDs, see *AT&T's* Comments On Disputed Performance Measurement Issues (*AT&T Proposed New PIDs*). Decision No. R01-769-I requested supplemental comments on select CPAP topics. Supplemental comments were filed by AT&T, see AT&T's Additional Comments Regarding Colorado's Performance Assurance Plan Final Report; Covad, see Covad Communications Company's Supplemental Comments on the *Final Report and Recommendation*; Qwest, see Qwest Corporation's Supplemental Comments Regarding Performance Assurance Plan (*Qwest Supplemental Comments*); and WorldCom, see WorldCom's Supplemental Comments on the Final Report Issued By the Special Master Addressing Qwest's Performance Assurance Plan (*WorldCom Supplemental Comments*). This order contains resolutions of the issues raised by the parties in the final two rounds of comments.

13. This Order is not compulsory, but rather hortatory. If Qwest implements the CPAP by adopting the attached recommended SGAT language -- and assuming all other conditions have been met -- I will recommend to this Commission that it recommend to the FCC that Qwest's entry into the long distance market is consistent with the public interest requirement of 42 U.S.C. § 271(d)(2)(B). On the other hand, if Qwest declines to adopt this version of the CPAP, I will advise

this Commission to withhold a recommendation of § 271 compliance.

II. PROCEDURAL POSTURE AND BACKGROUND

A. Issue 1:

Covad, WorldCom and AT&T argue that the self-executing remedies must take effect before Qwest receives § 271 approval. These parties claim that, because similar requirements are imposed on Qwest via § 251 of the Act, the penalties are justified regardless of the § 271 application status. They maintain that, absent the incentives of the CPAP, Qwest will not provide the non-discriminatory service to which the CLECs are entitled. *Covad Comments* at 1-3; *WorldCom Comments Attachment A* at 4-6; *AT&T Comments* at 11-12; *Qwest Proposed CPAP SGAT* § 16.1; *Final Report and Recommendation* at 2.

1. Decision

The CPAP will go into effect on the mailed date of this decision, but monetary penalties will not be assessed until and unless Qwest's § 271 application is approved.

2. Discussion

a. The Act offers ILECs the prospect of entering the interLATA long distance market as an incentive to comply with § 271 of the Act. Because this incentive abates upon § 271 approval,[19] the FCC has applauded other ILECs' PAPs, which help ensure ongoing performance.[20] Although some states

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[19] Although under 47 USC § 271(d)(6), the FCC is entitled to take measures against Qwest after § 271 approval, the proactive analysis of the ILEC's behavior that occurs as part of the 271 approval process will be over.

[20] Bell Atlantic New York Order at ¶¶ 429, 446.

have implemented the payment mechanisms before § 271 approval, this Commission believes that implementing the "stick" of the CPAP penalties prior to § 271 approval is unnecessarily redundant with the "carrot" of interLATA market entry. Consequently, penalties will not take effect until the FCC grants Qwest this approval. The first set of payments that Qwest must make will be the payments based on the first full month's performance after § 271 approval is granted by the FCC.

b. On the other hand, implementing the CPAP "*sans* penalties" prior to § 271 approval will serve as an effective "dress rehearsal," during which time Qwest and the CLECs can work through latent ambiguities, misinterpretations, system glitches and procedural details. Another benefit of pre-271 approval implementation is insight into the anticipated penalty levels. The reports will reveal whether a particular pattern of ILEC behavior generates a reasonable level of penalties. This Commission reserves the right to alter the penalty levels and other aspects of the plan as warranted by the pre-271 reports and to require Qwest to implement these changes.

c. To achieve the objective of the "pre-271 reporting" period, Qwest must fully implement the CPAP, as set forth in Attachment A, 30 days from the issuance of this Order. The first report will be due on the last business day of the month after that. Qwest asserts that this amount of time

should be adequate fully to implement and test the Performance Monitoring and Reporting System. This initial implementation need not include the new Performance Indicator Definitions (PIDs) that the Commission adds in this Order, but must include all of the ROC PIDs included in the Operations Support Systems (OSS) test. Qwest will have 120 days from the issuance of this Order fully to implement the new PIDs contained in this Order.

B. Issue 2

Covad maintains that, regardless of whether the penalties are implemented prior to § 271 approval, when the plan goes into effect post-271, the penalty levels should be ratcheted up to reflect historical poor performance. Covad *Comments* at 3.

1. Decision

After § 271 approval, the payment levels will be calculated based on a "clean-slate." Prior poor performance will not be used to step up penalties.

2. Discussion

As stated above, prior to § 271 approval, Qwest's behavior will theoretically be governed by its motivation to enter the interLATA market, and post-271, Qwest's behavior will largely be governed by the incentives of the QPAP. Creating an overlap in these incentives, even to the extent that prior performance will affect the penalties assessed after market entry, is theoretically unnecessary. Primarily for this reason, but also for simplicity, and because the parameters of the QPAP

may be in flux during the pre-271 reporting period anyway, the CPAP will begin with a "clean-slate" after § 271 approval.

C. Issue 3

WorldCom requests that reports produced before § 271 approval be distributed to all relevant parties rather than being available only to the Commission. ***WorldCom Comments Attachment A at 6; Final Report and Recommendation at 2.***

1. Decision

Reports generated prior to § 271 approval will be distributed to all relevant parties and to the Commission via the same distribution mechanism that will be in effect post-271.

2. Discussion

a. The pre-271 reporting period serves several objectives. First, it will provide an opportunity for Qwest to perfect its systems and processes and to anticipate its level of future liability. Second, the exercise will allow CLECs, the Independent Monitor, and Staff to better understand the information and to implement their own report evaluation processes. Third, it will begin to reveal to the Commission whether the parameters of the plan are sufficient; for instance, the variance factors, the critical values, the minimum and per occurrence penalty levels. Since all parties have a relevant interest in the pre-271 reporting period, all relevant parties will be able to participate in the dress rehearsal, even to the extent that CLECs may request the underlying data from Qwest.

b. The scope of the pre-271 reporting period stops short of the mini-audit process, however. In lieu of the mini-audit, a CLEC is entitled to present Qwest with a prepared list of questions regarding the data, and Qwest must either respond in writing to the questions or schedule a meeting with the CLEC, at Qwest's option. To the extent that issues are not resolved, the issues may be raised at a Commission CPAP meeting. The purpose of these meetings is to review the CPAP issues before the penalties kick in. The schedule, format and scope of the meetings will be announced when the CPAP goes into effect prior to § 271 approval.

D. Issue 4

WorldCom and AT&T emphasize that Qwest's participation in the plan is not "voluntary," but that it is a mandatory enforcement mechanism for § 251 compliance both before and after § 271 approval. *WorldCom Comments* Attachment A at 5; *AT&T Comments* at 22. Qwest, on the other hand, asserts that its voluntary adoption of the CPAP is a factor that will be considered during the § 271 approval process, and thus implies that it may choose not to implement the CPAP if it ceases to pursue § 271 approval. *Qwest Comments* at 2; *Qwest Proposed CPAP SGAT* § § 1.1, 19.0; *Final Report and Recommendation* at 3-4.

1. Decision

Qwest's choice to provide this CPAP in its SGAT is only voluntary to the extent that pursuing § 271 approval is voluntary. After Qwest receives § 271 approval, the CPAP will become mandatory.

2. Discussion

a. Qwest alludes to the voluntary nature of the CPAP in sections 1.1 and 19.0 of the proposed SGAT language. Ultimately, Qwest's submission of the CPAP is voluntary; however, this Commission will require Qwest to deploy the CPAP as set forth in Attachment A prior to lending the Commission's recommendation for § 271 approval to the FCC.[21] The origin of this Commission's strong encouragement of the CPAP is the FCC's claim that proper measures to prevent backsliding are a critical component of the public interest requirement of § 271 approval,[22] and in all successful § 271 applications so far, a PAP has served as this preventive measure. As stated in the *Final Report and Recommendation*, Qwest's future choice of whether to offer interLATA service after § 271 approval will not affect its obligation to participate in the CPAP since the primary incentive to adhere to § 271 requirements will have disappeared.

b. Apparently, some of the parties equate

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[21] *Bell Atlantic New York Order* at ¶ 433 ("Although the [FCC] strongly encourages state performance monitoring and post-entry enforcement, we have never required BOC applicants to demonstrate that they are subject to such mechanisms as a condition of section 271 approval. The [FCC] has, however, stated that the fact that a BOC will be subject to performance monitoring and enforcement mechanisms would constitute probative evidence that the BOC will continue to meet its section 271 obligations..."); *Id.* at ¶ 51 ("[W]e view the state's...role to be one similar to that of an 'expert witness'...[W]e may conclude that the evidence submitted by a state commission is more persuasive than that submitted by the Department of Justice, particularly if the state has conducted a rigorous analysis of the evidence.").

[22] *Id.* at ¶ 429.

participation in the CPAP with adherence to § 251 requirements, but the two are simply not the same. Clearly, Qwest is obligated to conform to § 251 whether it is attempting to gain § 271 approval or not and whether it is participating in the CPAP or not. The difference is in the monitoring and enforcement mechanism. With the § 271/CPAP approach, Qwest is motivated by rewards and penalties. Outside of this structure, Qwest is still obligated to adhere to the statute. If another party believes that Qwest is not complying with § 251, it is free to complain to this Commission via Commission Rule 723-1-61, to complain to the FCC, or to bring a lawsuit under antitrust[23] or another cause of action. In sum, if Qwest chooses not to pursue § 271 approval, it is not obligated to institute the CPAP.

c. Qwest argues, in its supplemental comments, that this Commission does not have authority to implement a self-executing set of remedies such as the CPAP. Strictly speaking, this may be true. Nevertheless, based on experience in Texas and New York, the CPAP can be analogized to the terms of a consent decree. A consent decree might contain terms outside the bounds of traditional legal remedies, yet in exchange for settlement of a lawsuit, the parties agree to abide

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[23] *Pace, Goldwasser v. Ameritech*, 222 F.3d 390 (7th Cir. 2000).

by those "extra-legal" terms. Here Qwest agrees to include the CPAP in the SGAT - in essence a detailed arbitration and remedies clause - in exchange for long distance authorization. Nonetheless, while Qwest's arguments are compelling, I will not further engage this debate. I reserve that analysis in the unlikely event that Qwest chooses to stop pursuing § 271 approval and the Commission decides to implement the CPAP anyway.

E. Issue 5

WorldCom and AT&T object to Qwest's proposal not to make Tier 1 penalty payments to CLEC until the Commission has approved an Interconnection Agreement between the CLEC and Qwest which adopts the CPAP. They say that CLECs should not be required to "opt-in" to the CPAP. *WorldCom Comments Attachment A* at 5; *AT&T Comments* at 17-18; *Qwest Proposed CPAP SGAT* § 16.1; *Final Report and Recommendation* at 19.

1. Decision

CLECs are not required to incorporate the CPAP into their new or existing ICAs prior to its effectiveness, but if a CLEC wishes to receive the benefits of the CPAP, it must obtain Commission approval of an ICA which incorporates the CPAP section of the SGAT or amend its existing ICA for inclusion of the CPAP.

Discussion

a. In order to obtain this Commission's recommendation for § 271 approval, Qwest must adopt the attached SGAT language incorporating the CPAP terms. The *Final Report*

and Recommendation envisioned that the CPAP would be embodied in a stand-alone section of Qwest's SGAT. The CPAP would then be available to CLECs to opt-in, similar to any other stand-alone SGAT provision, for incorporation into an existing ICA between Qwest and a CLEC. The *Final Report and Recommendation* does not require Qwest to offer the terms of the CPAP outside of an ICA as suggested by AT&T's proposed language. Because Commission rule 4 CCR 723-44 requires that an ICA be approved by this Commission before the ICA is effective, Qwest will not be required, as proposed by WorldCom to make the CPAP and its penalties available to CLECs before an ICA incorporating the CPAP is approved. A CLEC may adopt the CPAP even if it has not adopted the SGAT in its entirety.

III. PROCEDURAL ARCHITECTURE OF CPAP

Auditing of Performance Measures

A. Issue 6

Qwest contends that it should be able to choose the annual auditor, with certain constraints. *Qwest Comments* at 15; Qwest *Proposed CPAP SGAT* § 14.7; *Final Report and Recommendation* at 4-5.

1. Decision

Qwest may not unilaterally choose the auditor; however, the Commission will consider external factors, such as regional auditing activity, in selecting the auditor.

2. Discussion

The Commission will consider input from Qwest as well as the other parties when selecting the auditor. No party will have unilateral control, but the Commission will strive to select an auditor that is most fair to all parties.

B. Issue 7

Qwest argues that it must have the flexibility to improve upon its data collection and storage techniques without being hindered by a lengthy approval process. Qwest agrees to provide notice to all interested parties any time it changes a PID or a report. *Qwest Comments* at 14. Covad contends that *all* changes to the CPAP measurement and reporting systems must be reported to the interested parties, rather than only the CLEC-affecting changes. *Covad Comments* at 5; *Qwest Proposed CPAP SGAT* §§ 14.1, 14.2, 14.3; *Final Report and Recommendation* at 5.

1. Decision

Qwest must obtain approval for any CLEC-affecting changes to a PID or reporting process. Qwest may make non-CLEC-affecting changes without approval, but must implement a reliable method of recording and describing *all* changes to notify CLECs and the Commission and so that the changes may be included in the annual audit.

2. Discussion

a. When determining the extent to which Qwest may change the performance measurement or reporting system, the Commission balances two competing priorities. First, Qwest must have flexibility to improve upon its internal systems and

processes. Second, Qwest must not unilaterally make any change that compromises the integrity of the CPAP or affects CLECs.

b. Regarding the first priority, any company that manages complex databases and generates external information based on these data understands the need for caution in maintaining the data, data structures and related code. At the same time, these components often need to be modified to accommodate system improvements. These changes may be as innocuous as changing the indices on a table, or may be as substantive as modifying the data themselves.

c. For any sort of change to the data or to the systems that use the data to generate reports, the change falls into one of two categories: either it does not affect the performance measurement reporting or it does affect the performance measurement reporting. Further, the changes that affect the performance measurement reporting comprise a spectrum. At one end of the spectrum, the changes might be purely cosmetic, and at the other end of the spectrum, the changes might affect the penalties that are due.

d. As a starting point, Qwest must thoroughly document *any* change, no matter how small, that it makes to the performance measurement or reporting system as well as the underlying data, data extraction processes and codes tables. This change log must be available to the CLECs and the

Commission via Qwest's CPAP web site. The log must contain a detailed description of the change (in plain English), the effects of the change, the reasons for the change, the dates of notification and of implementation, and whether the change received Commission approval. The purpose for this extensive change-reporting and documentation requirement is twofold. First, CLECs, the Commission and the Independent Monitor will have visibility into changes to investigate suspicious results; and, second, the auditor will use the change log to help determine the scope of the audit. In fact, the requirement for an accurate change-reporting mechanism is so crucial that any lapse of performance by Qwest will be penalized by a $2500 fine per omitted or inaccurate change. This penalty will go to the Special Fund and does not count against the cap.

e. Next, Qwest must obtain Commission approval prior to implementing any change to the performance measurements or reporting system, the underlying data, data extraction processes and codes tables if that change will affect the CLECs. Then Qwest must actively notify the affected CLECs in addition to listing the change on the web site. Qwest is responsible for determining whether the change will affect the CLECs and for seeking approval. If a CLEC believes that a change materially affected it but was not properly approved, the CLEC may raise the issue via the dispute resolution process. If the

Independent Monitor determines that Qwest did not obtain necessary approval or did not notify all affected CLECs, Qwest will be fined $1000 per affected CLEC, payable to each affected CLEC. This penalty does not count against the cap.

f. The Independent Monitor is responsible for designing the process surrounding raising the issue and after making a recommendation to the Commission. If the Change Management Process (CMP) has been redesigned and adopted by the parties, then Qwest is required to follow the CMP procedures for notification, prioritization and implementation of the CLEC-affecting changes to the CPAP monitoring and reporting systems.[24] If not, the Independent Monitor may establish procedures for coordination and notification of CLEC-affecting changes.

C. Issue 8

The OCC emphasizes that Qwest must report each data exclusion, rather than aggregating the exclusions. OCC *Comments* at 5; *Qwest Proposed CPAP SGAT § 14.4; Final Report and Recommendation* at 5.

1. Decision

Qwest may aggregate data exclusions for the purposes of reporting the exclusions on the website. The detail behind the exclusions must be available upon auditor, Independent Monitor, Commission, or CLEC request.

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[24] The CMP was formerly known as the CICMP, or Co-provider Industry Change Management Process.

2. Discussion

a. Although the number of exclusions will certainly vary, it is conceivable that the amount of data excluded may make the information too cumbersome to be distributed easily via website. Also, posting this information on a website would require security measures that protected individual CLEC's confidential information. The Commission will only require Qwest to make the relevant exclusion data available to Independent Monitor, Commission or individual CLEC upon request.

D. Issue 9

WorldCom maintains that the annual audit should be thorough and comprehensive rather than selective. Furthermore, WorldCom contends that auditing the PIDs that generate the *most* penalties is backwards - the PIDs that are not generating penalties should be the ones audited. *WorldCom Comments Attachment A at 8; Qwest Proposed CPAP* §CAT § 14.6; *Final Report and Recommendation* at 5.

1. Decision

The annual audit may be selective. The scope of the audit defined by this report is a minimum scope, and the scope may be increased at the discretion of the independent monitor and/or the auditor. The scope of the audit may be decreased by the six-month revision process or an order of the Commission.

2. **Discussion**

a. The scope of the audit must balance two competing goals. First, the audit must ensure that Qwest is creating accurate reports and paying appropriate penalties; and, second, the audit must not be any more intrusive or cumbersome than necessary to achieve the first goal. The Commission believes that Special Master Weiser's recommendation appropriately balances these two goals.

b. The recommendation regarding auditing PIDs that generate higher penalties, rather than PIDs that generate lower penalties, will also be adopted. Although it is understandable that CLECs would wish for the audit to raise penalties rather than lower penalties, and that there is a greater chance of penalties being raised if the lowest paying PIDs are the ones being audited, this is not a sound basis for argument. Some of the PIDs may currently, or at least soon, reflect obsolete or little-used services. It makes no sense to audit these. Lower payments are not necessarily a reflection of good performance. As a result, the audit will initially include the PIDs with the higher payments. If the auditor deems it appropriate, perhaps various high-volume PIDs can be included whether or not they are generating high payments.

E. Issue 10

WorldCom argues that the mini-audit process should be

changed in one of two ways: either the CLEC and Qwest should split the cost of the mini-audit or the CLEC should be able to request an audit as often as it pleases. *WorldCom Comments Attachment A* at 10. Covad argues that a CLEC should not be penalized if an innocent mistake causes it to request an unnecessary mini-audit. *Covad Comments* at 8; *Qwest Proposed CPAP SGAT* § 14.11; *Final Report and Recommendation* at 6.

1. Decision

If the mini-audit uncovers any discrepancy in Qwest's reporting and payment calculations for a CLEC, that CLEC is not barred from requesting future mini-audits. If the mini-audit uncovers *no* discrepancy, the CLEC is barred from requesting future mini-audits for *six* months.

2. Discussion

a. The Special Master recommended the fee shift and the 12-month moratorium based on the 10% threshold as mechanisms for discouraging useless audits. The overriding objective of both is to ensure that the CLEC and Qwest work together to reconcile the data questions prior to deploying additional resources for an audit. Some parties argue, however, that the fee shift already motivates CLECs to refrain from initiating gratuitous audits and that the 12-month moratorium is excessive. Another concern is that the 12-month restraint might have the unintended consequence of motivating Qwest to encourage these audits rather than working in cooperation with the CLEC to discern the causes of misunderstanding. The useless audit,

then, would be a sort of inoculation against future audits. Moreover, the CLEC is already paying for the audit. The audit does not generate much additional income and even brings the risk that, since Qwest undercalculated the penalty, the CLEC already has incentive to avoid useless audits. Finally, any error correction in the CCPAP reports is beneficial to some degree, especially in the long run, so legitimate audits should not be overly-discouraged.

b. Because these arguments are persuasive, I include lighter consequences for unproductive mini-audits in the CPAP than the Special Master recommended. If an audit fails to reveal any changes to Qwest's payment calculations, the CLEC is prohibited from initiating any mini-audits in the following six months. However, the CLEC may use the dispute resolution process to avoid this moratorium if it can prove that Qwest did not work in good faith to resolve data questions prior to the initiation of the mini-audit.

F. Issue 11

Covad argues that the 10% variance threshold that legitimizes a mini-audit should be 5% at the most. *Covad Comments* **at 6-7. AT&T asserts that the 10% threshold should be eliminated and that, if Qwest was found to have underpaid at all, Qwest must also pay $2500 to the special Fund.** *Qwest Proposed CPAP* **§ 14.11;** *Final Report and Recommendation* **at 5.**

1. **Decision**

The variance threshold will remain at 10%. Qwest will not be required to make an additional penalty payment to the Special Fund.

2. **Clarification**

The 10% threshold applies to the overall results of the CLEC-initiated audit. If the CLEC initiates a mini-audit for a single month on three PIDs, then the 10% threshold will apply to the aggregate penalty that is at stake for these PIDs for that month.

3. **Discussion**

a. Ideally, parties would share costs of the audits in proportion to the severity of the incorrect penalty calculations. In this ideal world, Qwest would pay 100% of all audit *costs and expenses* if it miscalculated the penalty by 100% or more, and Qwest would pay none of the audit costs if the penalty calculations were previously correct. Because this sliding scale is difficult to implement, and since the internal expenses of conducting an audit are extensive, the 10% threshold is an acceptable substitute. The threshold avoids the hazard of marginally productive audits, in return for the fact that Qwest is never reimbursed for *internal expenses* incurred in the course of unsuccessful audits. This approach also shifts the fee in a

simpler way than a sliding scale would. This threshold may be changed at a later date if it is found to be inappropriate.

b. Qwest will not be subject to any additional penalties for underestimating payments other than the additional penalties set forth in section III-C of the Special Master's *Final Report and Recommendation.*

G. Issue 12

Qwest wishes to add a timeline to the mini-audit process during which the parties must work together to resolve any discrepancies prior to the mini-audit. *Qwest Comments* at 16; *Qwest Proposed CPAP SGAT* § 14.11; *Final Report and Recommendation* at 5.

1. Decision

A timeline for data reconciliation is not necessary, but a reminder that the parties must work together in good faith is in order.

2. Discussion

Setting a fixed timeline for data reconciliation is unnecessary in light of the requirement that the parties work together in good faith. The goal of the data reconciliation process is to ensure that a CLEC only initiates audits based on miscalculated payments, and not based on data misinterpretations. Setting a timeline for this process may motivate Qwest to stall or may lead the CLEC to initiate audits prematurely. Instead of a fixed timeline or predefined process, Qwest must respond to the CLEC requests in a timely fashion and

provide the proper expertise to the CLEC during the reconciliation period. If Qwest does not do this, and the CLEC initiates a superfluous audit, the CLEC may thereafter shift the cost of the audit to Qwest via the dispute resolution process.

H. Issue 13

Qwest maintains that it should not be subject to multiple mini-audits at the same time. *Qwest Comments* at 17; *Qwest Proposed CPAP SGAT* § 14.11; *Final Report and Recommendation* at 5.

1. Decision

Qwest may be subject to multiple mini-audits at the same time, but it may request the Independent Monitor to consolidate efforts when appropriate.

2. Discussion

Limiting the number of concurrent CLEC mini-audits would artificially limit Qwest's liability in the case of inaccurate reporting. If Qwest wishes to reduce the number of mini-audits, it should strive to reconcile data and payment issues prior to the point at which the CLEC initiates the audit. Since this approach is not feasible in all circumstances, the Independent Monitor may facilitate the consolidation of overlapping audits and/or work with other state commissions to identify opportunities for results-sharing.

I. Issue 14

WorldCom and Covad request that Qwest provide explanations of the underlying calculations for the penalties rather

than simply providing the final penalty amount. WorldCom *Comments Attachment A at 12, 13; Covad Comments at 12; Qwest Proposed CPAP SGAT § 12.3, 13.3; Final Report and Recommendation at 7.*

1. Decision

Qwest must provide the information that forms the basis for calculation along with the final payment amount.

2. Discussion

a. It is foreseeable that the payment calculation will be quite complex. For example, a CLEC's payment may include some combination of interest charges, minimum payment levels, waivers, and additional penalties assessed on audited reports. Given the potential complexity, Qwest must provide enough information for the CLEC fully to understand how the final number was derived. This information will enable the CLEC to double check the calculations and will reduce the number of follow-up inquiries.

b. One other factor bears mention: a CLEC may question a payment calculation just as a CLEC would question reporting data. The CLEC may request raw data used for calculations and ask for Qwest's assistance in reconciling the information. Furthermore, the payment calculation will be subject to audit just as the reports are.

J. Issue 15

WorldCom and Covad do not believe that Qwest should be relieved of additional penalties in the case that Qwest

corrects the penalty calculation before initiation of an audit. *WorldCom Comments* Attachment A at 12; *Covad Comments* at 11-12; *Qwest Proposed CPAP SGAT* § 13.6; *Final Report and Recommendation* at 8.

1. Decision

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

2. Discussion

a. When Qwest self-corrects the penalty levels prior to an audit, any late payments are subject to interest at twice Commission-prescribed deposit rate on the late portion of the payment. This is already an additional penalty since Qwest is only entitled to recover the deposit rate when it overpays. Furthermore, as stated above, an overarching goal is to avoid unnecessary audits. Therefore, the disincentive for commencing an audit should be stronger than correcting inaccurate penalties prior to an audit.

START

OF

RETAKE

corrects the penalty calculation before initiation of an audit. *WorldCom Comments Attachment A at 12; Covad Comments at 11-12; Qwest Proposed CPAP SGAT § 13.6; Final Report and Recommendation at 8.*

1. Decision

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

2. Discussion

a. When Qwest self-corrects the penalty levels prior to an audit, any late payments are subject to interest at twice Commission-prescribed deposit rate on the late portion of the payment. This is already an additional penalty since Qwest is only entitled to recover the deposit rate when it overpays. Furthermore, as stated above, an overarching goal is to avoid unnecessary audits. Therefore, the disincentive for commencing an audit should be stronger than correcting inaccurate penalties prior to an audit.

END

OF

RETAKE

b. On the other hand, if Qwest continually forces the CLECs to "henpeck" Qwest to obtain proper results so that a pattern develops, there will be additional penalties. Furthermore, if Qwest alters a penalty amount after a report is generated, this change must be reported to the Independent Monitor so that the auditor can be considered when the auditor decides the scope of the next annual audit.

K. Issue 16

WorldCom wishes to clarify that the late penalty charges apply to Tier 2 payments as well as Tier 1 payments. *WorldCom Comments Attachment A* at 12; *Qwest Proposed CPAP SGAT* § 12.4; *Final Report and Recommendation* at 8.

1. Decision

Late fee payments apply to Tier 1 and Tier 2 payments.

2. Discussion

Late penalties as described in section II.C of the Special Master's *Final Report and Recommendation* apply to Tier 2 as well as Tier 1 penalties. The only difference is that all Tier 2 payments and penalties will be paid into the Special Fund rather than to the CLEC.

L. Issue 17

Covad argues that the late fees should be calculated against the entire monthly amount owed rather than just the additional amount owed. *Covad Comments* at 11; *Qwest Proposed CPAP SGAT* § 12.4; *Final Report and Recommendation* at 8.

1. **Decision**

Late fees are calculated based on the late portion of the payment rather than the entire payment.

2. **Discussion**

Interest charges generally only apply to outstanding balances. It would be illogical to assess interest on money already paid (on-time) to a CLEC. Additional penalties are addressed elsewhere in section 12.0.

M. Issue 18

Covad claims the imposition of the per day penalty where a $25,000 bill is adjusted upwards 25% or more discriminates between CLECs with larger volumes of orders and CLECs with smaller order volumes. *Covad Comments* at 12; *Qwest Proposed CPAP SGAT* § 13.5; *Final Report and Recommendation* at 8.

1. **Decision**

Since the $500/day penalty is paid to the Special Fund, this penalty does not discriminate against smaller CLECs.

2. **Discussion**

Late reporting does not materially harm the CLECs other than delaying their ability to plan on incoming funds. As a result, all penalties for late reports will go directly to the Special Fund. The condition that imposes late report penalties in the situation in which Qwest adjusts a $25,000 payment upwards 25% or more is a special disincentive to counteract Qwest's potential incentive for delaying the reporting of these

large payments. Since this penalty is intended to motivate Qwest to pay large payments on time, and since it doesn't discriminate against any CLECs, this payment to the Special Fund stands. The late-reporting penalty does not count against the cap.

N. Issue 19

AT&T argues that the $500/day penalty for late reporting is per report, and not absolute. It further maintains that the penalty should be raised to $2500 per report. *AT&T Comments* at 13; *Qwest Proposed CPAP SGAT* § 13.3; *Final Report and Recommendation* at 8.

1. Decision

The $500/day penalty is a flat per-day penalty with no multiplier per report or per CLEC.

2. Discussion

The purpose of the daily late reporting fee is to motivate Qwest to turn in its reports on time. As stated above, however, the material impact on an individual CLEC is much lower if the report is late as compared to the situation in which a payment is late. As a result, the $500/day charge is a flat charge to Qwest. If Qwest is late with all CLEC reports, or if Qwest is only late with one CLEC's report, the penalty will be the same. The late-reporting penalty does not count against the cap.

O. Issue 20

AT&T believes that self-adjustments by Qwest should trigger

audits. ***AT&T Comments*** **at 13-14;** ***Qwest Proposed CPAP SGAT*** **§ 13.6;** ***Final Report and Recommendation*** **at 8.**

1. Decision

Refer to Issue 9 above: Auditor has discretion to add or remove components of audit.

2. Discussion

Refer to Issue 9 above: Auditor has discretion to add or remove components of audit.

P. Issue 21

Qwest argues that it is unfair to require additional penalties after an audit forces a payment adjustment. ***Qwest Comments*** **at 15;** ***Qwest Proposed CPAP SGAT*** **§ 13.4;** ***Final Report and Recommendation*** **at 8.**

1. Decision

It is appropriate for Qwest to pay a penalty when an audit forces a payment adjustment.

2. Discussion

As stated above, an audit should be a mechanism of last resort for the parties. Qwest must be properly motivated to resolve issues with the CLECs prior to an audit. If the parties do indeed commence an audit, and as a result, Qwest must modify the results, it is appropriate for Qwest to pay a penalty on the adjusted amount. This threat of a penalty will hopefully motivate Qwest to re-examine thoroughly the reports and address the CLECs' issues prior to resorting to the audit process. The penalty does not count against the cap.

Form of Payment

Q. Issue 22

AT&T points out that the Form of Payment section in the *Final Report and Recommendation* should refer to all of Tier 1 rather than simply Tier 1X. *AT&T Comments* at 11; *Final Report and Recommendation* at 8.

1. Decision

AT&T is correct in pointing out that *the Final Report and Recommendation* should refer to all Tier 1 payments to CLECs rather than only Tier 1X.

2. Discussion

Tier 1X and 1Y payments are equivalent except that half of Tier 1Y goes to the Special Fund. Consequently, Tier 1X and 1Y payments should be treated similarly under the payment mechanism.

R. Issue 23

Covad and WorldCom would like the payments in cash rather than bill credits. *Covad Comments* at 12; *WorldCom Comments Attachment A* at 13; *Qwest Proposed CPAP SGAT § 12.2*; *Final Report and Recommendation* at 8.

1. Decision

Payments will be made in cash rather than in the form of bill credits.

2. Discussion

The parties' arguments regarding the merits of cash payments are persuasive. First of all, bill credits are complex to administer. If, for example, the payment amount

exceeds the CLEC's wholesale bill for that month, then Qwest will need to make a supplemental cash payment: two forms of payment to a single CLEC in a single month. Also, if Qwest and the CLEC were in the midst of a billing dispute, the CPAP payment would need to be made in cash anyway. Furthermore, bill credits require billing system modifications that may lead to errors or confusion, and that will be difficult to test during the CPAP pre-271 reporting period. Overall, cash payments are simpler and more straightforward for all the parties involved, and thus are superior to bill credits.

S. Issue 24

Covad asserts that Qwest must be obligated to make the CPAP payments independent of any billing dispute between parties. *Covad Comments* at 13; *Final Report and Recommendation* at 8.

1. Decision

This issue refers to the CLEC concern that, if payments are in the form of bill credits, a billing dispute may affect the credits to that bill (*i.e.*, CLECs did not want the credit to apply toward the disputed amount). Since payments will be in the form of cash, this issue is moot.

The Report's Philosophy on Use of Statistical Methodologies

T. Issue 25

WorldCom argues that all PIDs with a sample size of 1-10 should be evaluated with a critical value of 1.04. *WorldCom Comments Attachment A* at 15-16; *Qwest Proposed CPAP SGAT* § 5.1; *Final Report and Recommendation* at 9.

1. **Decision**

The modified z-test will be used for Tier 1B and 1C submeasures when the CLEC sample size is ≥ 30. The critical value of all PIDs with a sample size of 30 - 150 will remain at 1.645, as demonstrated in the critical value table. A permutation test will be applied for CLEC sample size < 30. The value of α will be set at .05, except for individual month testing involving LIS Trunks and Unbundled Dedicated Interoffice Transport, Resale, and Unbundled Loops at DS-1 and DS-3 rates. For these submeasures, when the CLEC sample size is 1-10. Then the value of α will be 0.15 .

2. **Discussion**

a. During the ROC collaborative process, AT&T, Qwest and New Edge agreed on this critical value table. This agreement attests to the fairness of this table as a starting point for the CPAP. Furthermore, a critical value of 1.645 is derived from a confidence level of 95%: the risk of Type I errors (mistakenly finding Qwest's nondiscriminatory behavior discriminatory) equal 5%. If, however, these critical values yield an excess of Type II errors (where Qwest's discriminatory

behavior is found nondiscriminatory), then these critical values are subject to adjustment.[25]

U. Issue 26

AT&T argues that a comparison of Qwest's treatment of a CLEC in a particular month against Qwest's performance over the prior six months does not represent a parity evaluation. *AT&T Comments* at 5. WorldCom, however, argues that parity measures are a bad idea entirely because they compare wholesale performance to Qwest's poor retail performance. *WorldCom Comments Attachment A* at 17-18; *Qwest Proposed CPAP SGAT* § 6.1; *Final Report and Recommendation* at 10.

1. Decision

A six-month average is an effective method of evaluating parity performance measures.

2. Discussion

a. The FCC has not given much guidance to the states regarding statistical evaluation of identifying discriminatory service. This lack of guidance seems to be intentional, with the objective of encouraging state experimentation. Accordingly, this Commission has significant latitude in designing a PAP that identifies discriminatory service. The method outlined in the *Final Report and Recommendation* achieves a balance between providing

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[25] As one raises the confidence level (and lower the Type I errors), the Type II errors go up. Qwest obviously wishes to raise the confidence level as high as possible, while the CLECs wish to lower the confidence level to minimize the risk of Type II errors.

predictability of service to the CLECs while identifying service levels that are below Qwest's retail service levels. The parameters of the Tier 1A approach provide the flexibility to ensure that the standard performance levels are fair. The " variance factors" may be adjusted during a six month review if the CPAP is clearly generating unfair results.

b. As the parties are undoubtedly aware, the Act calls for "nondiscriminatory" service. The parity evaluation ensures that this Commission is not requiring Qwest to provide service that is superior to the service which it provides itself. The parity approach has been adopted by all other states' PAPs and is not open to debate.

V. Issue 27

AT&T and WorldCom believe that the proposed variance factors permit Qwest's performance to degrade much too far before it is deemed that Qwest's performance is at a level where Tier 1A penalties are incurred. *AT&T Comments* at 5; *WorldCom Comments Attachment A* at 18; *Qwest Proposed CPAP SGAT* § 6.1; *Final Report and Recommendation* at 10-11.

1. Decision

The variance factors set forth in the *Final Report and Recommendation* are a valid starting point and are subject to adjustment during a six-month review if necessary.

2. Discussion

a. The Special Master derived the variance factors from what the similar "slack" would be if the modified

z-test and a critical value of 1.645 were implemented. The variance factors are larger for lower sample sizes because lower sample sizes are inherently less indicative of a pattern of behavior and are subject to larger anomalies than larger sample sizes.

b. AT&T and WorldCom argue that the variance factors are too high. Both parties cite examples in their original comments that purportedly show an extremely high variance without the imposition of penalties. These examples, however, are based on assumptions and are limited to a few in number. When the parties were given an opportunity to expand their evidence in the supplemental comments, they neither offered an alternative proposal, nor expanded their evidence against the proposed variance factors. As a result, the Special Master's variance table will be the starting point for the CPAP. During the pre-271 reporting period, and at the six month reviews after approval, the parties will be given the opportunity to show that both the variance factors and the critical z values are ineffective, and the Commission (with the help of the Independent Monitor) will consider whether to alter the values.

c. These tables are the key to the CPAP's flexibility. The variance table, for example, could either force Qwest to maintain a constantly upward trend of service (if

the slack factors were 0) or allow Qwest to provide a constantly downward trend (if the variance factors are too high). The Commission's goal is to achieve parity, and of course, ultimately competition where competition is appropriate. To achieve this end, the Commission will strive to ensure that the Plan is fair and that all parameters of the Plan are set accordingly.

W. Issue 28

AT&T and WorldCom argue that the variance factors should be smaller for smaller sample sizes rather than larger with smaller sample sizes. *AT&T Comments* at 7; *WorldCom Comments Attachment A* at 18; *Qwest Proposed CPAP SGAT* § 6.1; *Final Report and Recommendation* at 10-11.

1. Decision

The variance factors should be larger for smaller sample sizes.

2. Discussion

The results derived from small sample sizes are more often affected by a single anomalous result. To allow for occasional results that are out of the ordinary range, are truly anomalous, and are not indicative of a trend, the variances for smaller sample sizes are larger than for larger sample sizes that have a tendency to stabilize due to the normalizing effect. The variances will ideally allow for anomalies, yet identify trends of discriminatory performance. If the variances do not

achieve this objective, they may be changed as described in Issue 27.

X. Issue 29

AT&T maintains that allowing Qwest to "miss one" any time there is a sample size of 10 or less is overly generous to Qwest. *AT&T Comments* at 7-8; *Qwest Proposed CPAP SGAT* § 6.2; *Final Report and Recommendation* at 11.

1. Decision

Allowing Qwest to "miss one" occurrence is an acceptable safeguard for unexpected performance variances.

2. Discussion

The "miss one" principle is an attempt to allow for anomalous results, and an avoidance of requiring "perfect" performance. If this clause were omitted from the CPAP, then anytime a CLEC had very low sample sizes, Qwest's performance would have be perfect to be deemed non-discriminatory. This aspect of the plan will be evaluated at the first six-month review. If Qwest is consistently taking advantage of this allowance and, as a result, missing a high percentage of samples, then the requirement can be modified.

Y. Issue 30

AT&T points out that α needs to be established. *AT&T Comments* at 4; *Qwest Proposed CPAP SGAT* § 4.4.

1. Decision

Alpha (α) is 0.05 unless otherwise stated. See discussion on Issue 25.

2. Discussion

Alpha (α) is the probability of falsely finding that Qwest is providing service out of parity when, in fact, it is in parity (Type I error). The difference between 1 and α is commonly referred to as the confidence level, and the z critical value is derived from tables based on the confidence level. Since the z value of 1.645 (which is used for small sample sizes) is derived from a confidence level of 95%, it follows that α = 5% (or 0.05).[26]

IV. PAYMENT STRUCTURE AND PHILOSOPHY BEHIND CPAP

Tier 1: Compensatory (Tier 1X) Payments

A. Issue 31

WorldCom believes that minimum payments should apply to any CLEC with small measurement pools because, although the harm might be higher for a fledgling CLEC, the harm is also elevated for the new services of a larger CLEC. *WorldCom Comments Attachment A* at 21. Qwest maintains that the number of lines in service in Colorado is not the proper evaluation of whether a CLEC should benefit from minimum payments. Instead, Qwest argues the proper measure is the amount of time the CLEC has been in business. *Qwest Comments* at 9; *Qwest Proposed CPAP SGAT §§ 9.1, 9.2; Final Report and Recommendation* at 13.

1. Decision

Minimum payments will apply only to small CLECs. Number of lines is an appropriate indicator of a small CLEC.

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[26] Bell Atlantic New York Order at Appendix B, Statistical Methodology, nn.22, 25.

Small CLECs will be defined as those having ≤ 100,000 lines.

2. Discussion

a. Small CLECs are favored under the minimum penalty method because these CLECs lose a higher percentage of their business when they lose a customer or must compensate a customer for poor service. In theory, these small CLECs may not have the market presence, name recognition or leverage that the larger CLECs have so that poor service may be more likely seriously to damage a small company or to drive it out of business. Larger companies may leverage more marketing and support resources to help rectify problems caused by the ILEC. Although it is true that both companies suffer, the risk of sending a small CLEC out of business altogether is larger than the risk of putting a large CLEC out of business.

b. Qwest proposes minimum payments in the case of *newer* CLECs as opposed to *smaller* CLECs, implying that some CLECs may be small by choice, but still be well-entrenched in their market. This alternative is attractive on the surface, but brings many more complications than the number of lines criterion. For instance, the date from which a company's existence is measured could be a contentious topic if it was spun off from another company or merged from multiple companies. On the other hand, the number of lines is reported to the Commission on the company's annual report.

c. On another note, the parties should keep in mind that the minimum payment only applies when Qwest only misses a Tier 1A measure by *one* or *two* occurrences (occurrences are calculated according to the formulas set forth in IIIA of the *Final Report and Recommendation*). In these cases, the payment increases from $225 or $450 to $600. Misses beyond that will be irrelevant since the minimum payment will have been met. The minimum payment for Tier 1B measures is only relevant when Qwest misses by *one*, *two* or *three* occurrences. Otherwise, the payment will already have made the minimum of $300. Also, only interval measures should ever yield a single occurrence since one miss is always allowed.[27] If, despite these considerations, it appears that the minimum payment provision is consistently increasing a given CLEC's penalty amount by a sizeable percentage, the minimum penalty amount and/or the criterion by which it is assessed may be evaluated.

B. Issue 32

WorldCom contends that per-occurrence plans do not open the market as quickly as plans with large, fixed penalties. *WorldCom Comments Attachment A* at 21; *Qwest Proposed CPAP SGAT* § 7.1; *Final Report and Recommendation* at 13).

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[27] The calculation for the number of occurrences missed for an interval measure is ((CLEC Result - Standard)/Standard) * CLEC Volume). Since this formula implicitly considers severity, it is possible that a slight difference between CLEC result and standard will result in one "occurrence" even though more samples actually fell short of parity performance.

1. **Decision**

Per occurrence plans are an appropriate balance of compensating for damages and opening the market.

2. **Discussion**

a. The Plan contains a combination of compensatory and punitive payments. This approach attempts to be fair to the CLECs by reimbursing them for injuries caused by Qwest, and to provide sufficient financial motivation for Qwest to comply with § 271 requirements. Unfortunately, the penalty level that will reimburse damage to a CLEC is sometimes less than the penalty level that Qwest is willing to sustain before improving performance. In this case where Qwest's cost of improving performance is greater than CLEC damage, it would be more economically efficient for Qwest to continue providing poor performance and to pay the CLEC for the damage caused. Economic efficiency, however, is not the sole objective of the Act. Instead, the Act flatly requires nondiscriminatory wholesale service. As a result, when compensatory payments are not high enough to motivate Qwest to improve service, the payments are ratcheted up each month until Qwest does comply. This escalating payment structure is the best way to elicit the lowest payments from Qwest and still achieve compliance.

b. WorldCom's assertion that higher penalties will provoke faster compliance is undoubtedly true. However,

the next question has to be just how fast the compliance must occur and just how high the payments must be to satisfy this goal. The payment levels could be set considerably higher than the Plan sets forth, but the risk of over-penalizing rises with the payment levels. Since the minimum payments necessary to elicit compliance vary for each PID, and since these payment levels are currently unknown, the best approach is to implement the escalating payment system currently set forth and to monitor Qwest's responsiveness to ongoing penalties. If time shows Qwest consistently delays its compliance for many months, this Commission will initiate a root-cause analysis investigation and may increase the penalties and escalation factors, if appropriate.

C. Issue 33

Qwest argues that a single order should not generate minimum payment under more than one PID. Instead, Qwest advocates grouping the penalties that stem from a single order into a family. *Qwest Comments* at 8.

1. Decision

A single order may generate minimum payment under multiple PIDs.

2. Discussion

a. Qwest argues that, since it is able to discriminate against a CLEC in a variety of ways with only a

single order as ammunition, it should only be subject to a single minimum payment per order. I disagree.

b. The purpose of the CPAP is to assure Qwest's ongoing provision of service to the CLECs at parity to the service it provides itself. Qwest is obliged to make its systems, procedures and personnel work toward the goal of continuous service at or above the required level. To encourage this behavior, the CPAP must, should, and will encompass payments for each PID not met, regardless of whether one or many orders are involved. A failure to comply is a failure to comply.

c. Qwest's sample scenario in which it violates seven PIDs for a single order would seem to justify seven minimum payments. The bottom line is that the PIDs were designed knowing that they measured various functional areas and that a given order might involve more than one PID. Changing such a fundamental quality of the PIDs after so much work, effort and compromise is not justified at this point.

d. Furthermore, since the monetary penalties are meant to reimburse a CLEC for actual damage, it is conceivable that each breach of performance would generate a new set of costs for the CLEC - that is, if the customer hangs around long enough to continue receiving such bad service.

D. Issue 34

Covad argues that the proper basis for setting penalty levels is the value of a customer or the cost of acquiring a customer rather than the estimate of harm from a particular incident. *Covad Comments* at 14-15; *Qwest Proposed CPAP SGAT* § 7.3; *Final Report and Recommendation* at 13.

1. Decision

Estimate of harm is the appropriate penalty measure.

2. Discussion

Covad's argument that penalties should be based on the value of a customer is not persuasive. Although it is true that the value of a customer might be more stable than an incident-based penalty amount, a model based on customer value would have at least as many unknown variables as an incident-based scheme. First, a customer-value based model would need to incorporate some type of multiplier to account for the percentage of times that a particular violation of a particular severity leads to a lost customer. Second, the model would need to consider the amount of resources expended by the CLEC in trying to retain the customer. Third, the value of a customer varies according to differing services, volumes and duration. None of this information was included in Covad's comments. Accordingly, the CPAP will implement an incident-based payment structure.

E. Issue 35

Alternatively, Covad argues that, if the penalty levels are set according to actual cost to a CLEC, they are woefully low. *Covad Comments* at 15-16; *Qwest Proposed CPAP SGAT* § 7.3; *Final Report and Recommendation* at 13.

1. Decision

The Special Master's recommended payment levels will serve as the starting point for the CPAP.

2. Discussion

a. The Special Master worked to extract from the parties concrete information regarding the appropriate penalty levels. In response, AT&T and WorldCom have done an effective job of proving the difficulty of designing a "bottom-up" penalty scheme that attempts to compensate parties for damages (as opposed to a "top-down" approach that serves to apply a predetermined amount of penalties to the ILEC for misbehavior). Unfortunately, however, AT&T and WorldCom have not proposed an alternative scheme of any detail, beyond referring to other states' plans. On the other hand, Qwest has shown that the proposed payment levels have the potential of generating very large payments to the CLECs.

b. As an initial matter, I find that the Special Master's proposed payment levels are an adequate compromise between the positions of the parties and a sufficient starting point for the CPAP. If this payment structure does not

generate payments that are sufficiently meaningful to Qwest, the Commission, with input from the Independent Monitor, will modify the payment levels as deemed appropriate.

Incentive-Based (Tier 1Y) Payments

F. Issue 36

WorldCom does not believe that the duration function should automatically exclude the severity factor calculation in Tier 1X. *WorldCom Comments Attachment A* at 24; *Qwest Proposed CPAP SGAT* § 7.4, 8.2; *Final Report and Recommendation* at 15.

1. Decision

Each month, Qwest will pay the CLEC the proper additional penalty based on that current month's severity. This severity will not be multiplied by the step-wise escalation, however.

2. Discussion

a. There are two separate and distinct multipliers that can increase Qwest's monthly payment to a CLEC. One is based on severity, and one is based on duration. The proper approach is to keep the factors separate. Each month, an additional penalty may be assessed if the performance was beyond a given severity. That additional penalty will be calculated based on the current month's *base* penalty amount. Each month, an additional penalty will also be assessed for ongoing poor performance. That additional penalty will be a factor of the number of consecutive months missed.

b. WorldCom's proposal to incorporate severity into the duration multiplier inappropriately commingles these two factors. Furthermore, the argument that Qwest would be getting relief from its severe poor performance is not valid since Qwest is being penalized for that severe performance on a monthly basis, regardless of duration multipliers.

G. Issue 37

WorldCom also argues that the entire penalty escalation should go to the CLEC rather than just half. *WorldCom Comments Attachment A* at 24. Qwest, on the other hand, argues that paying the CLECs half of the Tier 1Y payments is a windfall to the CLECs and their portion should be limited to 35%. *Qwest Comments* at 5; *Qwest Proposed CPAP SGAT* § 8.3; *Final Report and Recommendation* at 15.

1. Decision

Fifty percent of the payment escalation amounts will go to the CLEC and 50% will go to the Special Fund.

2. Discussion

Depending on their interests, the parties either argue that CLECs should get more or less of the escalated penalties. Either way, the proportion would be an educated guess at best. A valid starting point for the plan is to send 50% of escalated payments to the Special Fund and 50% to the CLEC. The CLEC will then be getting increased penalties to cover the increased risk to its reputation and customer service quality, while Qwest will also be penalized an additional amount to deter the ongoing behavior.

H. Issue 38

Qwest asserts that the payment escalation should freeze after six months. At this point, it says, the payments are more than sufficiently high to motivate Qwest to perform. *Qwest Comments* at 4-5; *Qwest Proposed CPAP SGAT* § 8.2; *Final Report and Recommendation* at 15.

1. Decision

Payment escalation will not freeze after six months.

2. Discussion

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.

I. Issue 39

Covad believes that if Qwest is penalized on an ongoing basis for any given PID, Qwest should be required to initiate a root-cause analysis. *Covad Comments* at 15; *Final Report and Recommendation* at 15.

1. Decision

The Independent Monitor, at his/her own discretion, may require Qwest to initiate root-cause analysis.

2. Discussion

The Independent Monitor will have latitude in initiating a root-cause analysis. If Qwest continues to miss penalties, the Independent Monitor may suspect that Qwest is behaving strategically. In this case, the Independent Monitor may request information from Qwest regarding the cause of the discriminatory performance as well as the anticipated rectification approach and timeline. This process is not mandatory.

Caps on Payments

J. Issue 40

WorldCom strongly disapproves of any firm monetary cap on penalties - either overall or per measurement. *WorldCom Comments Attachment A* at 25-26. Qwest, on the other hand, maintains that Tier 1X payments as well as penalties assessed according to other interconnection agreements should be subject to the cap. *Qwest Comments* at 10; *Qwest Proposed CPAP SGAT* § 11.0; *Final Report and Recommendation* at 16-17.

CONTINUATION

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1. Decision

The caps proposed in the *Final Report and Recommendation* are reasonable and will be included in the CPAP.

2. Discussion

a. The caps proposed in the *Final Report and Recommendation* are quite reasonable. Even though the *Report* proposes capping the monthly payment amount, there are two, quite sizeable, exceptions to this rule. First, Tier 1X payments are not capped. Second, Tier 1Y and Tier 2 payments that exceed the monthly cap are deferred until a subsequent month when payments would have been below the cap. There is a third exception, the size of which cannot be predicted: payments made as a result of Qwest's failure to comply with the requirements for the structural integrity of the CPAP (e.g., failure to make payments on time, to report on time, and to document changes) are not capped and are excluded from the cap. These factors soften the cap and represent a reasonable compromise.

b. The only Tier 1X caps are per measure caps on Tier 1C payments. Since these measures have the least business impact, they have been designated a lower priority than other Tier 1X measures; however, since they are typically very high volume, they have the potential for generating high payments. This conflict is resolved by setting appropriate per

measure caps as described in the *Final Report and Recommendation*.

c. Qwest's request to include other payment mechanisms in the cap is denied. The CPAP has been designed with the other enforcement mechanisms in mind. If Qwest wishes to limit its liability, it is free to negotiate other performance remedy plans with the CLECs. Further, Qwest always has the alternative of improving performance to avoid payments.

3. Clarification

Different parties seem to have interpreted the last three sentences in the first paragraph of section IIID of the *Final Report and Recommendation* in different ways. These sentences describe the way that the cap will limit Qwest's Tier 1Y and Tier 2 payments. Let me attempt to clarify this language:

Qwest's cap on annual payments is $100 million. The monthly cap is equal to 1/12 of this annual cap. If the Tier 1X payments *alone* do *not* exceed the monthly cap, *but* the Tier 1X, Tier 1Y and Tier 2 payments *combined* exceed the monthly cap, Qwest will pay the entire 1X payments and will pay Tier 1Y and Tier 2 payments until the cap is reached. The amount of the Tier 1Y and Tier 2 payments that is over the cap is deferred. If the Tier 1X payments *alone* exceed the monthly cap, Qwest will still pay the entire Tier 1X payments, but *all* Tier 1Y and Tier

2 payments will be deferred. In a month when Qwest's total payment is below the monthly cap, any deferred payments plus interest will be due, but only to the extent that the deferred payments do not cause the total monthly payment to exceed the monthly cap. In the event all Tier 1Y and Tier 2 payments cannot be made in any month due to the cap, Qwest will pay Tier 1Y payments first (up to the cap) and then, from the remaining money, pay Tier 2 payments (up to the cap).

K. Issue 41

WorldCom believes that a procedural cap would be useful. ***WorldCom Comments Attachment A*** **at 25-26;** ***Qwest Proposed CPAP SGAT*** **§ 11.3;** ***Final Report and Recommendation*** **at 17.**

1. Decision

There is already a procedural cap in the *Final Report and Recommendation*.

2. Discussion

The *Final Report and Recommendation* describes a procedural cap in the second paragraph of section IIID. This procedural cap is superior to a strict annual procedural cap because it allows a faster response to high payments - two months as opposed to a year - and fosters analysis of annual trends.

V. LEGAL OPERATION OF CPAP

A. Issue 42

Qwest argues that the payments defined in the CPAP are liquidated damages and thus foreclose any supplemental damages from overlapping contract actions. *Qwest Comments* at 11-12. Covad is concerned about the procedural obstacles that must be overcome prior to filing suit regarding an issue that overlaps with the CPAP. *Covad Comments* at 17. AT&T maintains that a CLEC should not be limited in bringing related contractual actions in any way. *AT&T Comments* at 19-20; *Qwest Proposed CPAP SGAT* § 16.6; *Final Report and Recommendation* at 19, 27.

1. Decision

CLECs will be able to sue for additional contract damages, as discussed in the *Final Report and Recommendation*.

2. Discussion

a. CLECs' ability to sue for additional contract damages is a safeguard against extraordinary losses that CLECs might suffer as a result of Qwest's poor performance. While the CPAP payment structure will be periodically evaluated and adjusted to reflect fair compensation and average losses incurred by CLECs, there may still be occasions in which poor performance results in an unusually high CLEC loss. The SGAT language should allow for the CLECs to recover these losses via court action if there is a valid cause of action.

b. Qwest argues that it is not fair for the CLECs to receive liquidated damages, but still retain the right to fight for more damages in court. It argues that the two

should be mutually exclusive. The validity of this concern is tempered by two factors.

c. First, it is true that, in an ordinary commercial contract, parties would not have the ability to supplement liquidated damages. The SGAT, though, is not an ordinary commercial contract. Rather, it is a regulatory hybrid of a contract and a tool for furthering public policy. This Commission has the authority to ensure that Qwest's interconnection agreements with CLECs promote competition and adhere to the Act. This Commission also has the authority to levy fines on Qwest for providing poor retail and wholesale service. These principles, combined with the broad concern about post-271 backsliding, justify the risk that occasionally Qwest may overcompensate the CLECs for their damages, while preserving the right of the CLECs to sue when they are under compensated. This 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.

d. Second, the CLECs' ability to bring suit is procedurally limited.. CLECs are deterred from bringing frivolous suits until they can navigate the dispute resolution process. Some parties are concerned that this hurdle will chill lawsuits. Chilling frivolous lawsuits is exactly the purpose of

this procedure. Since the CPAP will already be in place, Qwest should not be pestered with groundless lawsuits. Non-frivolous lawsuits will not be deterred if the parties expend the proper resources to show the validity of the cause of action.

e. As for the concern that the parties will have to waste valuable resources on the dispute resolution process, it seems that the majority of this work will significantly overlap with the work that would be incurred in trial preparation, so there will be significant opportunity for reuse.

B. Issue 43

Qwest maintains that Tier 2 payments should not overlap with payments to the State for the same service. *Qwest Comments* at 13.

1. Decision

Tier 2 payments shall not overlap with payments under the Commission's service quality rules, 4 CCR 723- 43, for the same service.

2. Discussion

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

indeed duplicated service quality rule's payments. Otherwise the money and interest will go to the Tier 2 Special Fund.

C. Issue 44

Covad questions the Commission's legal authority to obligate the parties to waive remedies that overlap with the CPAP. *Covad Comments* at 17; *Qwest Proposed CPAP SGAT* § 16.4; *Final Report and Recommendation* at 19.

1. Decision

The CLECs waive the remedies that overlap with the CPAP by adopting the CPAP as a contract.

2. Discussion

The process by which the parties will undertake the CPAP is as follows. First, the Commission will recommend SGAT language to Qwest. Next, if Qwest wants this Commission's § 271 recommendation, Qwest will adopt the recommended CPAP SGAT language. Finally, if the CLECs wish, they may opt-in to the CPAP by adopting the CPAP SGAT language wholesale. Obviously, the Commission is not forcing the parties to forego any legal rights. The CLECs have their choice of remedies. They are not entitled to multiple remedies for the same discriminatory behavior. The Commission's role is simply not to force Qwest to implement SGAT provisions that create redundant obligations under multiple frameworks.

VI. CPAP REVISION PROCESS

A. Issue 45

WorldCom believes that no topic regarding the CPAP should be completely "off-limits," but rather that a party should be able to petition for review of these "firm" aspects of the plan. *WorldCom Comments Attachment A* at 35; *Qwest Proposed CPAP SGAT* § 18.1; *Final Report and Recommendation* at 23.

1. Decision

A party should be able to petition for review of "firm" aspects of the CPAP.

2. Discussion

a. When Qwest implements the CPAP, some aspects will undoubtedly be more flexible than other aspects. For example, it will probably be easier to adjust a per measure base payment amount than it will be to vary the calculation by which overall payments are calculated. The increased difficulty is a result of systems programming and user training factors. Furthermore, if the Plan does not have a chance adequately to stabilize, there is a risk of "thrashing" in which the Plan is constantly being "improved," yet the improvements and their consequences are not well coordinated, are isolated, or are not thought out.

b. The Commission wishes to balance the difficulty of changing "firm" aspects of the CPAP with the need for flexibility. Also, the Commission wishes to avoid hearing

arguments that the parties will undoubtedly raise repeatedly just for the sake of argument rather than for the purpose of concretely improving the Plan. On the other hand, since the CPAP does not closely follow any other state's working PAP, it is possible that some aspects of the CPAP will be less effective than others. The parties should be entitled to raise *valid* concerns regarding these areas. However, the Commission will be disinclined to make any fundamental changes to the Plan unless there is a clear need and benefit, and the Commission will not appreciate hearing the same arguments rehashed time and again with no new supporting evidence.

B. Issue 46

Qwest is concerned that there is no firm sunset of the plan. Qwest would like for the three-year review to include an evaluation of whether private business agreements are sufficiently pervasive to supplant the CPAP. *Qwest Comments* at 20; *Qwest Supplemental Comments* at 12-13. AT&T and WorldCom argue that there should not be a sunset provision in the plan. *AT&T Supplemental Comments* at 2; *WorldCom Supplemental Comments* at 2; *Final Report and Recommendation* at 23.

1. Decision

The three-year review will evaluate the plan to determine which aspects may be phased-out. The entire plan will automatically sunset six years after § 271 approval, with the exception of Tier 1A payments, which shall persist indefinitely until suspended by the Commission or superceded by a new CPAP.

2. Discussion

a. The CPAP is a temporary mechanism to ensure that Qwest's performance does not backslide after it is allowed to enter long distance markets. After the plan has been in full-effect with payments made for six years, the market should have stabilized; there should be available alternatives to Qwest's resale and unbundled access products; and Qwest and CLECs will likely have adopted customized performance agreements. The Commission is optimistic that all of these factors will obviate the need for the CPAP. The six-year review (conducted at 5 ½ years after § 271 approval) will evaluate the appropriateness of complete phase out and set concrete dates and processes by which any remaining facets of the plan will then be eliminated.

b. Despite this six-year review, this entire plan, with the exception of Tier 1A payments, will sunset by its terms six years after the plan goes into effect. At that time, the Commission may revive this CPAP wholesale, may sunset the entire plan, including Tier 1A payments, or may allow more traditional contract and arbitration remedies to take the CPAP's place.[28]

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[28] This inquiry will bring the issue of the CPAP's voluntary or mandatory nature to the fore. It will likewise require that the Commission answer the question of its authority to require a CPAP. I nonetheless prefer setting the presumption that the CPAP will end and then have to be revived or

C. Issue 47

Qwest argues that payments made under private performance plans should contribute toward the cap. Otherwise, it says, private performance plans will never proliferate. *Qwest Comments* at 20; *Final Report and Recommendation* at 16-17.

1. **Decision**

Payments made under private performance plans will not contribute toward the cap.

2. **Discussion**

Payments made under private agreements will not count toward the cap because private agreements will then have the power to affect the amount of money paid to the Special Fund from Tier 1Y and Tier 2 payments. Also, the private agreements will most likely replace Tier 1X payments, and these are not capped anyway. Finally, if Qwest is concerned about its larger potential liability with the advent of private agreements, it should undertake to provide non-discriminatory service and hence avoid the payments altogether.

VII. DISPUTE RESOLUTION PROCESS

A. Issue 48

Qwest advocates using a contract ALJ and existing Colorado statutory procedures for dispute resolution. *Qwest Comments* at 17; *Qwest Proposed CPAP SGAT* §§ 17.0 et seq.; *Final*

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revised, over the contrary presumption that would have it persist indefinitely. If, after six years, competition in the local exchange market is no more advanced than it is now, then there are problems in the market that surely go beyond the performance assurance plan's capability to address or to remedy.

Report and Recommendation at 24.

1. **Decision**

The Commission will hire an Independent Monitor to resolve disputes, ambiguities, and questions regarding the CPAP.

2. **Discussion**

a. The responsibilities of the Independent Monitor will range from informal question answering and interpretation of the Plan to formal dispute resolution and arbitration.** Because of the range of responsibilities, the position is unique: a sort of hybrid of Staff, arbitrator and ALJ. For this reason, the Commission declines to peg the Independent Monitor into an ALJ title.

b. Furthermore, none of the existing Commission rules meet the CPAP needs. The formal dispute resolution rules require too much overhead for the simple clarifications and explanations needed for the CPAP; the informal dispute resolution rules lead to resolution by the Commission; the expedited dispute resolution rules also require a formal procedure. The expedited complaint process most closely conforms to the CPAP needs, but it is overly-formal for a first-round of decision making. Also, those rules are intended to be a last

** Note, however, that even simple question-answering or interpretation will be filed publicly.

resort, to be used *after* the parties use the processes set forth in any interconnection agreements. On the whole, the process set forth in the *Final Report and Recommendation* is appropriate and can be later followed up with the process set forth in the Commission Rules (*see, e.g.*, 4 CCR 723-1-61).

B. Issue 49

Qwest also asks to change the VP-VP negotiating process so that the two companies have longer to come to a resolution after the executives meet. *Qwest Comments* at 17; *Qwest Proposed CPAP SGAT* § 17.8; *Final Report and Recommendation* at 25.

1. Decision

The VP-VP negotiation requires the following: The CPAP's dispute resolution process shall not be resorted to, unless and until, the problem is raised at the VP-VP level two weeks *before* a complaint is filed *and* the complainant submits a statement, including specific facts, that the complainant engaged (or attempted to engage) in good faith negotiations to resolve the disagreement and that, despite these negotiations, the parties failed to resolve the issue.

2. Discussion

The CPAP will implement the language set forth above. This serves as a clarification and embellishment. It is a combination of the specifics offered in the *Final Report and Recommendation* and the process set forth in the expedited dispute resolution rule at 4 CCR 723-1-61(k)(1)(c).

C. Issue 50

AT&T worries that the dispute resolution procedures and risk of associated penalties will have a chilling effect on disputes. *AT&T Comments* at 21; *Qwest Proposed CPAP SGAT* §§ 17.11, 17.12; *Final Report and Recommendation* at 26.

1. Decision

The dispute resolution procedures and risk of associated penalties are meant to have a chilling effect on *frivolous* disputes.

2. Discussion

As discussed above, one of the goals of the CPAP is to encourage the parties to work through their disagreements voluntarily. Parties who bring frivolous complaints and suits will be penalized. Parties who have non-frivolous claims need not worry about the penalties.

VIII. MISCELLANEOUS ISSUES

A. Issue 51

Qwest wishes to include a paragraph in the CPAP SGAT that says Qwest's performance under the CPAP shall not be used as an admission against Qwest or as evidence that Qwest is liable or culpable for violation of any state or federal law. *Qwest Comments* at 19; *Qwest Proposed CPAP SGAT* § 16.2.

1. Decision

2. Qwest is entitled to include language in the CPAP that will limit its liability and culpability for the enforcement terms and payments in the CPAP. These terms and payments will not be considered as an admission against interest or an admission of liability in any legal, regulatory, or other

proceeding relating in whole or in part to the same performance. Discussion

Although the *information* contained on the performance reports *may* be entered into evidence in a subsequent proceeding involving Qwest's performance, *payment* information is not appropriate for that forum. While the statistical methodologies and payment calculations represent the Commission's best effort to implement an automatic detection system for discrimination, any automated system will not necessarily take into account all factors that a court of law might consider. The payment information should not be used automatically to incriminate Qwest under other state and federal obligations.

B. Issue 52

Covad suggests new change management PIDs to address timely and accurate notice to all CLECs. Qwest and AT&T jointly propose new PIDs for change management (PO-16, GA-7, and PO-18) and the provisioning of LNP (OP-17, MR-11, and MR-12). AT&T individually proposes a new change management PID (RQ-3). WorldCom individually proposes a new change management PID . *Covad Comments* at 9-10; *Qwest Proposed New PIDs* at 1-5 and Attachment A; *AT&T Proposed New PIDs* at 2-12 and Attachments 1-2; *WorldCom Supplemental Comments* at 4-5 and Attachment; *Qwest Supplemental Comments* at 14-15; *Final Report and Recommendation* at 30.

1. Decision

The new PIDs agreed upon by the parties are accepted. The CPAP shall incorporate the proposed PO-16; GA-7; and PO-18 change management PIDs. The CPAP shall incorporate

the proposed OP-17, MR-11, and MR-12 PIDs measuring the provisioning of LNP. Qwest is allowed 60 days after it begins pre-271 reporting to report on these new PIDs.

2. Discussion

a. The *Final Report and Recommendation* specifies standards for, and requires development of, three change management PIDs. Qwest and AT&T jointly propose the three required change management PIDs (PO-16, GA-7, and PO-18). At the time that the new PIDs were proposed, Qwest and AT&T did not agree on whether unrecoverable data loss should be accounted for in GA-7. The parties have since agreed on language dealing with the data loss issue. WorldCom supports these proposed change management PIDs. Covad makes several suggestions on what change management PIDs ought to address. Covad did not develop or propose any specific PIDs. Covad also does not comment on any of the change management PIDs that are proposed. It appears that the change management PIDs proposed by Qwest and AT&T address some of Covad's suggestions. If additional change management PIDs are developed, those new PIDs shall be considered at the first six-month review.

b. The *Final Report and Recommendation* specifies that the parties develop submeasures for MR-5 and MR-6 to measure effectiveness in situations in which the number porting/disconnect process left a customer without service.

Instead of submeasures for MR-5 and MR-6, Qwest and AT&T jointly proposed two new PIDs, MR-11 and MR-12. WorldCom supports these proposed LNP PIDs. These proposed PIDs satisfy the requirement.

c. The *Final Report and Recommendation* also suggests development of a PID to address premature disconnection of a customer that is switching providers. Qwest and AT&T jointly proposed OP-17, and the parties have since agreed upon the standard for this measure. WorldCom supports this proposed LNP PID. The proposed OP-17 PID satisfies the requirement.

d. The Release Quality Implementation of Changes per Qwest Documentation and Specifications (RQ-3) measure proposed by AT&T and supported by WorldCom will not be incorporated at this time in the CPAP. Also, the Software Validation measure individually proposed by WorldCom will not be incorporated. Both measures are proposed by the parties to address the quality of Qwest's software releases. Qwest specifically opposes incorporation of RQ-3 and argues that GA-7 addresses problems associated with new software releases. PIDs measuring software quality need to be carefully weighed against the possibility that software releases may be unnecessarily delayed in an attempt to achieve perfection. To allow more time to weigh these proposed measures, they shall be considered at the first sixth-month review.

C. Issue 53

Qwest suggests that the change in definition of existing PID PO-6 should be incorporated in the CPAP and that a new standard should be established. ***Qwest Supplemental Comments*** **at 15-16.**

1. Decision

The change in definition shall be incorporated in the CPAP. A new standard shall also be incorporated since the existing standard was based on the previous definition of PO-6. Qwest shall immediately inform the Commission in writing of the new standard when agreement on the new standard is reached by the ROC OSS collaborative.

2. Discussion

Changing the definition for an existing ROC-developed PID is in accordance with the direction provided by the Special Master as long as the ROC collaborative has reached agreement on the changes to the PID. In this case it also makes sense to change the standard.

D. Issue 54

XO Colorado, Time Warner Telecom and WorldCom argue that special access services should be included and disaggregated in the ordering, provisioning, maintenance and repair PIDs. ***XO Colorado and Time Warner Telecom Comments*** **at 1-20;** ***WorldCom Comments Attachment B*** **at 3-15.**

1. Decision

Qwest shall include disaggregated special access information in PIDs PO-5, PO-9, OP-3, OP-4, OP-6, OP-8, MR-3,

MR-5, MR-6, MR-7, and MR-9 in its monthly performance reports. Penalties shall not be assessed for these orders, however. Instead, Qwest will provide the information necessary to compare its own retail service to the service provided to CLECs.

2. Discussion

a. There are two competing views regarding the inclusion of special access services in the CPAP. On one hand, one might broadly argue that the purpose of the CPAP is to ensure that the ILEC provides adequate service to allow the CLECs to compete effectively. On the other hand, one might narrowly argue that the CPAP's purpose is to ensure that the ILEC provides non-discriminatory service in unbundled network elements, resale and collocation.

b. The FCC has provided little guidance. The Act states that the ILEC must continue to "meet the conditions required for ... approval."[30] The DOJ evaluates whether a local market is "fully and irreversibly open."[31] Neither source is particularly helpful in resolving this issue.

c. I prefer the narrower argument. Fundamentally, this CPAP is a temporary mechanism designed to ensure that the local telephone market is conducive to

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[30] 47 USC § 271 (d)(6)(A).

[31] BellSouth South Carolina Order at 14.

competitive entry.[32] The purpose of the CPAP is not to ensure that Qwest provides satisfactory service to all CLECs at all times, rather the purpose is to ensure that Qwest's wholesale service does not backslide after § 271 approval. Consistent with this view, PIDs should be targeted to the same § 271 requirements that Qwest had to fulfill to obtain approval in the first place. Then, as Qwest demonstrates regular acceptable service, as private agreements for performance monitoring are reached, and as competition grows, the CPAP will be phased out of existence. The inclination of the hearing commissioner is to keep the scope of the CPAP narrow rather than broad - the goal is to shrink the Plan rather than to expand it.

d. Furthermore, although the XO/Time Warner Telecom brief argues that the CLECs are forced to order special access circuits instead of functionally equivalent and cheaper unbundled network elements, the CLECs are really only locked into their existing special access lines until their contracts expire, at which time the circuits may be converted to UNEs. At that point in time, the CLECs will be able to decide whether it is more economically efficient to order UNEs or special access circuits. Performance will obviously be one of the factors in the decision whether or not to convert. Also, XO and Time

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[32] *See supra*, Issue 46.

Warner Telecom correctly point out that Qwest will not build facilities to accommodate UNE orders. If there are no available facilities, then Qwest will only provide these facilities for a special access order, which is more expensive. Based on the viable alternatives to special access, and Qwest's valid declination to build facilities for UNE orders, the special access orders are not an essential wholesale requirement under § 251 or § 271 and do not belong in the CPAP.

e. On the other hand, the Commission cannot deny that special access services are currently an important part of some CLECs' offerings. Also, after the Texas Public Utilities Commission conducted an investigation into special access services, it ordered Southwestern Bell Texas (SWBT) to include special access services as another level of disaggregation for UNE measurements. In light of these two factors, Qwest shall include special access as a level of disaggregation in the PIDs listed above. For these purposes, "special access" shall be defined as any circuits (DS0, DS1, DS3, OCN) ordered under the special access tariff by a CLEC in lieu of a UNE.[33]

f. Although these data shall be included in the reports, and the reports shall compare the special access

[33] This is a narrower definition than WorldCom proposes.

service to retail special access, no payments will be assessed. At the first six-month review, this Commission shall decide whether to include these orders in the number of "occurrences." Qwest shall begin reporting on these data 120 days after the issuance of this Order. (Qwest is allowed 60 extra days after the commencement of pre-271 reporting since this is a change to a PID.

IX. ORDER

A. It is Ordered That:

1. Before receiving a favorable recommendation of § 271 compliance, Qwest will implement the CPAP consistent with this Order and Attachment A hereto. Attachment A contains the actual SGAT language to be implemented for this Commission favorably to recommend § 271 compliance.

2. Any necessary Motions to Modify this Order shall be filed within 10 days of the mailed date of this Order. Responses to the same shall be filed five days thereafter. Service of motions and responses shall be in accordance with previous procedural orders.

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

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

Hearing Commissioner

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ATTACHMENT A
COLORADO PERFORMANCE ASSURANCE PLAN
RECOMMENDED SGAT LANGUAGE

1.0 Introduction

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

2.0 Plan Structure

2.1 The CPAP is a tiered remedy plan. Qwest shall be subject to self-executing payments to CLEC for Tier 1 submeasures, identified in Appendix A, which generate both Tier 1X and 50% of Tier 1Y payments (described in sections 7.0 and 8.0). Qwest shall be subject to self-executing payments to the Tier 2 Special Fund for the following: (1) Tier 2 submeasures (identified in Appendix A), (2) 50% of Tier 1Y payments, and (3) payments for missing Tier 1A or Tier 1B submeasures by more than 50% (described in section 10.3).

3.0 Performance Measurements

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

4.0 Statistical Methodology

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

4.2 For parity submeasures, Qwest uses a statistical test, namely the "Modified z-test," for evaluating the difference between two means (i.e., Qwest and CLEC service or repair intervals) or two percentages (e.g., Qwest and CLEC proportions) to determine whether a parity condition exists between the results for Qwest and CLEC. The modified z-test shall be applicable if the CLEC sample size is greater than or equal to 30 for a given submeasure. For testing submeasures for which the sample size is less than 30, Qwest will use a permutation test to determine the statistical significance of the difference between Qwest and CLEC results.
The formula for determining parity using the z-test is:

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

Where:

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

M_{QWEST} = Qwest average or proportion

M_{CLEC} = CLEC average or proportion

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

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

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

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

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

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

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

If the fraction is greater than α (alpha), the significance level of the test, the hypothesis of no difference is not rejected, and the test is passed. Alpha = 0.05. For individual month testing for performance measurements involving LIS trunks and DS-1 and DS-3 that are Unbundled Dedicated Interoffice Transport, Resale, or

Unbundled Loops (performance measurements: OP-3D/E, OP-4D/E, OP-5, OP-6-4/5, MR-5A/B, MR-7D/E, and MR-8) with sample sizes of 1-10, alpha = 0 .15.

5.0 Critical Z-Value

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

TABLE 1: CRITICAL Z-VALUE

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

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

6.0 Tier 1A Parity Calculations

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

TABLE 2: VARIANCE FACTORS

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

CLEC volumes	MR5-LIS	MR5-UBL[2]	MR6-LIS	MR6-UBL	MR7[3]	MR-8[3]	FO-6B	NI-1[4]
1-5	18	20	180	300	20	20	14	0.65
6-15	16	16	180	240	16	16	12	0.64
16-22	15	15	150	230	15	15	10	0.62
23-30	14	14	130	210	14	14	9	0.61
31-40	13	12	110	160	13	13	8	0.60
41-60	11	10	90	150	10	10	7	0.58
61-90	9	8	70	140	8	8	6	0.55
91-150	7	6	60	130	6	6	5	0.49
151-300	5	4	50	120	4	4	4	0.31
301-500	4	3	40	110	3	3	3	0.29
501-1000	3	2	30	100	2	2	2	0.17
1001-1500	2	1	25	50	1	1	1	0.11
1501-2000	1	0.5	10	25	0.5	0.5	0.5	0.05
2000+	0	0	0	0	0	0	0	0
Measure Type	%	%	Mins	Mins	%	%	%	%
Modification	Subtract	Subtract	Add	Add	Add	Add	Subtract	Add

[1] Except Analog, 2-wire non-loaded, and ADSL qualified loops.
[2] MR-5 UBL's variance table also applies for MR5-UBL calculations.
[3] MR-7 & 8's column applies both for LIS trunks and Unbundled Loops (UBL).
[4] On NI-1, the variance table only applies in instances where the parity comparison applies – i.e., Qwest's blocking rates exceed 1%, as the appropriate comparison for that measurement is the retail analog or a 1% standard, whichever is higher.

6.2 For any performance submeasure where the CLEC volume is ten or below, Qwest shall be allowed to miss one occurrence before being subject to any payments for non-conforming performance. That is, if CLEC volume is ≤ 10 and the number of occurrences is ≤ 1 there is no payment made.

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

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

For percentage submeasures, the CPAP uses the following formula:

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

For interval submeasures, the CPAP uses the following formula:

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

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

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

TABLE 3: PER OCCURRENCE PAYMENT AMOUNTS

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

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

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

The severity multiplier for each measure is obtained by calculating the difference between the CLEC result and the standard performance for that measure, and then looking up the multiplier on Table 4. For Tier 1A, the standard performance is the average of prior six month retail performance with the variance calculation. For Tier 1B and 1C, the standard performance is the current month retail performance. For PIDs that do not have retail equivalents, the benchmark targets shall be used.

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

TABLE 4

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

*calculated in days or hours, depending on measure

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

8.0 Tier 1Y: Calculation of Payments

8.1 Qwest's non-conforming performance for Tier 1 submeasures shall be subject to escalating per occurrence payments. For Billing measures in Tier 1C, duration escalation is subject to a $5,000 per measure cap in month one, increasing by a maximum of $5,000 per month to a maximum per measure cap of $30,000. The

duration function does not include the severity factor calculated in Tier 1X when doubling (or tripling, etc.) the base payment.

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

8.3 Tier 1Y payments shall be divided between the CLEC and the Tier 2 Special Fund. Fifty percent (50%) of Tier 1Y payments shall be paid to the CLEC and 50% of Tier 1Y payments shall be paid to the Special Fund a set forth in section 10.4.

9.0 Minimum Payments to CLEC

9.1 For smaller CLECs, there is a minimum per measure payment for Tier 1A of $600 and Tier 1B of $300. If the otherwise applicable payment is below this amount, the minimum payment shall apply. If the measure is one which falls into Tier 1A for some products, and Tier 1B for other products, and if any of the violations incurred that month for that measure were in Tier 1A, then the Tier 1A minimum payment shall apply rather than the 1B payment. In the case of no payment owed, the minimum payment would not apply.

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

10.0 Tier 2 Payments to the Special Fund

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

10.2 Fifty percent of the Tier 1Y payments shall be considered Tier 2 payments and made to the Tier 2 Special Fund.

10.3 When an individual submeasure in either Tier 1A or Tier 1B, using CLEC aggregate results, is missed by at least 50% of the applicable standard for two or more consecutive months, Qwest shall pay to the Tier 2 Special Fund $25,000 for each Tier 1A submeasure and $8,000 for each Tier 1B submeasure.

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

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

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

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

11.0 Cap on Tier 1 and Tier 2 Payments

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

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

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

> If the total payments (Tier 1X, 1Y, 2) do not exceed the cap, Qwest shall make all payments.
>
> If the total payments (Tier 1X, 1Y, 2) do exceed the cap, Qwest shall pay all Tier 1X payments (even if they alone exceed the cap). Other than Tier 1X and payments specified in section 11.2, Qwest shall not make payments in excess

of the monthly cap. The balance in excess of the cap shall roll forward and be paid when Qwest's total monthly penalties are below the cap, whenever that time should occur (even if that should take longer than a year).

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

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

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

12.0 Timing and Form of Payment

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

12.2 All payments shall be in cash.

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

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

13.0 Reporting

13.1 Beginning 60 days after the Commission's adoption of this CPAP, Qwest will provide the Commission and CLECs opting into the CPAP with a monthly report of Qwest's performance for the PIDs. Qwest will collect, analyze, and report performance data for these measurements. Qwest will store such data in easy-to-

access electronic form for three years after they have been produced and for an additional three years in an archived format. Any failure to follow these requirements shall be treated as a violation of the CPAP integrity requirements discussed in sections 17.5 and 17.8.

13.2 Qwest shall deliver the individual monthly report to CLEC and the aggregate State report to the Commission via email on or before the last business day of each month following the relevant performance period.

13.3 In the case of late reporting, Qwest shall make a payment of $500 per calendar day to the Special Fund. This amount represents the total payment for missing a reporting deadline, rather than a payment per report.

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

13.5 If as a result of an inaccurate report, any bill over $25,000 is adjusted upwards by 25% or more, Qwest shall incur a late reporting payment as set forth in section 13.3. This payment shall begin from the day the report filing date and shall continue until the day the discrepancy is resolved.

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

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

13.8 If a given Qwest-CLEC data reconciliation process forces Qwest to adjust its payment upwards three months in a row, Qwest must pay the additional amount and an additional penalty to Tier 1Y as if the discrepancy was revealed by an audit (see section 14.0) for that third month and for each consecutive month that the CLEC reveals additional payments via data reconciliation.

13.9 If a given Qwest-CLEC data reconciliation process forces Qwest to adjust its payment upward five times in a calendar year, Qwest must pay the additional amount and an additional penalty to Tier 1Y as if the discrepancy was revealed by an audit

for that fifth month and for all other months in that calendar year that the CLEC reveals additional payments via data reconciliation.

14.0 Audits of Performance Results

14.1 Qwest shall carefully document any and all changes that Qwest makes to the Performance Measurement And Reporting System. This change log shall be displayed on the CPAP web site. The Performance Measurement And Reporting System is defined to include at least: the data collection programs, the underlying data and data structures (including codes tables), the data extraction programs, the report generation programs, the underlying calculations, the report formatting, and the report distribution software. This change log shall contain, at a minimum, a detailed description of the change (in plain English), the effects of the change, the reason for the change, the dates of notification and of implementation, and whether the change received Commission approval.

14.2 Qwest shall be allowed to change the software and data structure that underlies the Performance Measurement And Reporting System in ways that are transparent to the CLECs, but shall promptly record these changes on the change log so that they may factor into the process by which the scope of the audit is determined. Omitted or inaccurate changes shall result in Qwest being required to pay a $2500 fine, plus interest at the Commission prescribed deposit rate accrued from the time the change took effect. The payment shall go to the Tier 2 Special Fund.

14.3 Qwest shall obtain approval for any CLEC-affecting changes to the Performance Measurement and Reporting System. If a redesigned Change Management Process (CMP) process is formally in place and approved by the industry, Qwest shall follow the change management processes thus set forth. If a redesigned CMP process is not in place, Qwest will be allowed to obtain approval for the change from the CLECs via the Independent Monitor. The Independent Monitor shall then be responsible for guiding the change management process. If Qwest fails to obtain approval for any CLEC-affecting change, it shall pay a $1000 fine for each affected CLEC. This fine shall be paid directly to the affected CLECs.

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

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

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

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

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

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

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

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

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

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

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

15.0 Waiver of Payments

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

(1) Force majeure, as defined Qwest's retail tariffs (as to benchmark standards, but not as to parity submeasures)

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

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

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

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

16.0 Limitations

16.1 The payments imposed by the CPAP shall not become available in Colorado until the first day of the second month after Qwest receives section 271 authority for the State of Colorado. Each CLEC shall have the option of electing the CPAP *in toto* as set forth in this CPAP SGAT or negotiating an alternative regime with Qwest. The CLECs need not adopt the *Interconnection, Unbundled Network Elements, Ancillary Services, and Resale SGAT* in its entirety in order to adopt the CPAP SGAT. Qwest will not be liable for Tier 1 payments to CLEC until the Commission has approved an interconnection agreement between the CLEC and Qwest which adopts the provisions of this CPAP.
16.2 Qwest's agreement to implement these enforcement terms, and specifically its agreement to make any payments hereunder, will not be considered as an admission against interest or an admission of liability in any legal, regulatory, or other proceeding relating in whole or in part to the same performance. CLEC may not use (1) the existence of this enforcement plan or (2) Qwest's Tier 1 or Tier 2 payments as evidence that Qwest has discriminated in the provision of any facilities or services under Sections 251 or 252 or has violated any state or federal law or regulation. Qwest's conduct underlying its performance measures, however, is not made inadmissible by this SGAT term. By accepting this performance remedy plan, CLEC agrees that Qwest's performance with respect to this remedy plan may not be used as an admission of liability or culpability for a violation of any state or federal law or regulation. (Nothing herein is intended to preclude Qwest from introducing evidence of any Tier 1 payments under these provisions for the purpose of precluding additional payments or offsetting any payments against any other damages or payments a CLEC might recover.) The terms of this paragraph do not apply to any

proceeding before the Commission or the FCC to determine whether Qwest has met or continues to meet the requirements of section 271 of the Act.

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

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

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

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

16.7 If for any reason CLEC agreeing to this CPAP is awarded compensation for the same harm for which it received payments under the CPAP, the court or other adjudicatory body hearing such claim may offset the damages resulting from such claim against payments made for the same harm.

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

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

17.0 Dispute Resolution Process

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

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

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

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

17.5 The Independent Monitor shall be responsible, at least initially, for the following functions, which may be modified by the Commission as it deems appropriate, with input from the parties. The Independent Monitor shall resolve all challenges to the accuracy of any performance measurements or reports, as evaluated through the auditing process in section 14.0, as well as any disputes over the CPAP integrity requirements (that is, the rules that enable the CPAP to function, such as data collection and retention requirements, maintaining the PIDs as approved, and so forth). The Independent Monitor shall evaluate all allegations that Qwest has misinterpreted, wrongly applied, or violated the relevant business rules that govern the applicable payments to be made pursuant to the CPAP. For example, for disputes about whether particular CLEC actions qualify as exclusions from a measure, where such disputes were not settled by the Qwest-CLEC data reconciliation process or an audit, the Independent Monitor shall be authorized to decide what payments should have been made. The Independent Monitor shall also entertain challenges to disqualify the auditor based upon gross neglect of duties, incompetence, or a significant conflict of interest. The Independent Monitor shall

approve or deny permission for a CLEC to bring an overlapping lawsuit for contractual remedies. Finally, the Independent Monitor shall assess any additional penalties under this plan, such as penalties for bringing frivolous disputes.

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

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

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

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

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

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

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

18.0 Reviews and Termination

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

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

18.3 After the Commission staff person submits a report to the Commission on any suggested changes, parties shall have two weeks to file exceptions to that report. The Commission will rule within four weeks of receiving the parties' exceptions on what changes, if any, should be instituted.

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

18.5 The six-month CPAP review process shall focus on refining, shifting the relative weighing 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.

18.6 Parties may suggest more fundamental changes to the plan; but, unless the suggestion is highly exigent, the suggestion shall either be declined or deferred until the three-year review.

18.7 If CLEC or Qwest repeatedly or blatantly suggests modifications to the plan solely for its own benefit, and not for the effectiveness of the plan itself, that Party may be subject to sanctions at the discretion of the Commission.

18.8 If Qwest or CLEC wishes to modify a PID outside of the six-month review process set forth in this plan, the change must be approved by the Independent Monitor and then also approved by the Commission. The Independent Monitor and the Commission shall be more likely to approve the change if it has been approved by another forum such as the ROC or CMP (if PIDs are ultimately included within the scope of CMP). PID changes that have not been approved by one of these two forums or their future equivalent shall be unlikely to be approved outside of the six-month review process or the three-year review.

18.9 Thirty (30) months after § 271 approval, the Commission shall initiate a comprehensive review of the CPAP (the "Three Year Review") with the assistance of an outside, independent expert. Such expert shall be paid from the Special Fund. The Three Year Review shall:

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

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

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

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

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

19.0 Voluntary Performance Assurance Plan

19.1 This CPAP represents Qwest's voluntary offer to provide performance assurance. No changes shall be made without Qwest's consent.

APPENDIX A

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

TIER 1A

INTERCONNECTION

Trunk Blocking

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

Provisioning

For LIS Trunks:

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

Maintenance and Repair

For LIS Trunks:

MR-5A	*All Troubles Cleared within 4 Hours (Percent)*
MR-5B	*All Troubles Cleared within 4 Hours (Percent)*
MR-6D	*Mean Time to Restore (Hours:Minutes)*

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

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

SWITCHING CUSTOMERS

For Unbundled Loops:

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

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

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

COLLOCATION

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

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

ACCESS TO LOCAL LOOPS

Pre-Order

For Unbundled Loops:

PO-5A-1(b)	IMA Electronic LSRs	*FOCs On Time (Percent)*
PO-5A-2(b)	EDI Electronic LSRs	*FOCs On Time (Percent)*
PO-5B-1(b)	IMA Electronic/Manual LSRs	*FOCs On Time (Percent)*
PO-5B-2(b)	EDI Electronic/Manual LSRs	*FOCs On Time (Percent)*
PO-5C-(c)	Fax Manual LSRs	*FOCs On Time (Percent)*
PO-9B		*Timely Jeopardy Notices (Percent)*

Provisioning

For Unbundled Analog Loops:

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

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

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

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

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

For Unbundled DS1-Capable Loops:

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

For Unbundled ISDN-Capable Loops:

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

For Unbundled ADSL-Qualified Loops:

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

For Unbundled Loops of DS3 and Higher:

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

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

For Sub-Loop Unbundling:

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

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

For Unbundled Loop Conditioning:

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

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

For Line Sharing/Line Splitting:

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

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

Maintenance and Repair

For Unbundled Analog Loops:

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

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

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

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

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

For Unbundled DS1-Capable Loops:

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

For Unbundled ISDN-Capable Loops:

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

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

For Unbundled ADSL-Qualified Loops:

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

For Unbundled Loops of DS3 and Higher:

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

For Sub-Loop Unbundling:

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

For the MR-3, MR-6, MR-7, and MR-8 measures, the relevant analog product shall be ISDN-BRI.

For Line Sharing/Line Splitting:

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

For the MR-3, MR-6, MR-7, and MR-8 measures, the relevant analog product shall be Qwest's DSL service, which is also provisioned and treated on a line shared basis.

TIER 1B

Pre-Order

For LSR:

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

For Resale and UNE-P:

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

For LNP:

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

For LIS Trunks:

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

For Billing:

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

For Non-Designed Services:

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

For Unbundled Loops:

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

Provisioning

For Residential Single Line Service:

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

For Business Single Line Service:

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

For Centrex:

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

For Centrex 21:

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

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

For PBX Trunks:

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

For Basic ISDN:

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

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

For UNE-P (POTS):

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

For Qwest DSL:

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

For Primary ISDN:

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

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

For DS0:

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

For DS1:

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

For DS3 and Higher:

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

For Frame Relay:

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

For UDIT – DS1 Level:

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

For UDIT – Above DS1 Level:

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

For E911/911 Trunks:

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

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

Maintenance and Repair

For Residential Single Line Service:

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

For Business Single Line Service:

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

For Centrex:

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

For Centrex 21:

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

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

For PBX Trunks:

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

For Basic ISDN:

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

For UNE-P (POTS):

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

For Qwest DSL:

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

For Primary ISDN:

MR-3D	*All Troubles Cleared within 24 Hours (Percent)*
MR-3E	*All Troubles Cleared within 24 Hours (Percent)*

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

For DS0:

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

For DS1:

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

For DS3 and Higher:

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

For Frame Relay:

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

For UDIT – DS1 Level:

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

For UDIT – Above DS1 Level:

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

For E911/911 Trunks:

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

TIER 1C

Billing

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

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

TIER 2

Continuing Non-Conforming Performance

See Section 10.3.

Work Completion Timeliness

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

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

Performance	Monthly Payment
1-1.49 hrs	$10,000
1.5-1.99 hrs	$15,000
2-2.49 hrs	$20,000
2.5-2.99 hrs	$25,000
3-3.49 hrs	$30,000

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

Regionwide Wholesale Support Systems

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

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

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

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

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

	>5 sec to 10 sec	$10,000
	> 10 sec	$15,000
OP-2/MR-2	1% or less	$1,000
	>1% to 3%	$5,000
	>3% to 5%	$10,000
	>5%	$15,000

Handling of Local Service Requests

PO-10 *LSR Accountability (Percent)*

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

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

Electronic Flow Through Rates

For Resale:

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

For Unbundled Loops:

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

For LNP:

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

For UNE-P (POTS):

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

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

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

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

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

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

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

Change Management Requirements

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

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

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

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

PO-18(CPAP) *Interface Versions Availability (Percent)*

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

Decision No. R01-1142-I

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

DOCKET NO. 01I-041T

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

DECISION ON MOTIONS FOR MODIFICATION AND CLARIFICATION OF THE COLORADO PERFORMANCE ASSURANCE PLAN

Mailed Date: November 5, 2001

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I. BACKGROUND

A. The Colorado Performance Assurance Plan (CPAP), Decision No. R01-997-I (CPAP Order) in Docket No. 01I-041T, is among the prerequisites for this Commission to endorse Qwest Corporation's (Qwest) § 271 application to the Federal Communications Commission (FCC). The CPAP Order, mailed on September 26, 2001, allowed parties to file Motions to Modify the CPAP and responses to the same.

B. Qwest, AT&T Communications of the Mountain States (AT&T), WorldCom, Inc., on behalf of its regulated subsidiaries (WorldCom), Time Warner Telecom of Colorado LLC (Time Warner) and XO Colorado, Inc. (XO), jointly, and the Colorado Office of Consumer Counsel (OCC) filed motions to modify the CPAP and responses to the same.

C. Qwest filed its Response to the motions to modify one day late and moved for leave to late-file. No party responded to this motion.

D. Qwest Corporation moved for leave to supplement record on October 25, 2001, and attached its supplement. WorldCom, Time Warner and XO objected to the supplement. Qwest's Motion for Leave to Supplement Record is denied.

E. This Decision addresses the Requests for Modification raised by the respective parties. The Decision follows a similar format as the CPAP Order: a brief synopsis of the requested modification is given, and a synopsis of the decision. Next, there is a recitation of the arguments in support of and against the modification, and my reasoning for the accepting or denying the requested modification.

II. INTRODUCTION

A. The CPAP in its substance and execution largely tracks with the Final Report and Recommendation of the Special Master. The participants in this docket display general agreement on the structure and principles of the CPAP.

B. By this stage, the issues participants seek to modify are not "big picture," fundamental elements of the CPAP. Rather, the Motions to Modify seek interstitial changes to the CPAP, or clarification of how it will function. This Order

modifies and clarifies the CPAP where warranted. Fundamentally, however, this Order reaffirms the integrity of the initial recommended CPAP from the Special Master, as modified by Decision No. R01-997I. This final recommended CPAP, embodied in the SGAT language of Attachment A, represents this Commission's best effort - with ample input from all parties - to ensure that Qwest performs its interconnection and unbundling obligations under the Act after receiving in-region, interLATA authority under § 271.

C. Based on the outcome of requested modifications, new recommended SGAT language accompanies this Decision as Attachment A. This now becomes the operative SGAT language Qwest must adopt before I will recommend to this Commission that it certify § 271 compliance.

III. ~~I~~ISSUE-BY-ISSUE DISCUSSION

A. Request 1:

Qwest seeks modification of the effective date of the CPAP. *Qwest Motion* at 2-4; *Decision* at 16. WorldCom and AT&T contend that implementing the CPAP pre-§ 271 approval would provide the necessary experience to address the effectiveness of and to refine the CPAP, if required. *WorldCom Response* at 2-3. *AT&T Response* at 3-4.

1. Decision

a. The CPAP will not take effect until § 271 approval is granted by the FCC. I grant the requested

modification. Mock reports will still be required pre-§ 271 approval.

b. The effective date will be specified in the Recommended SGAT language as follows:

18.0 Effective Date, Reviews and Termination

18.1 The effective date of the CPAP will be the date on which Qwest obtains § 271 approval from the FCC for Colorado.

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

2. Discussion

a. Qwest argues that the CPAP should require mock reports only and that it would be untimely and unproductive for other provisions of the CPAP to go into effect before § 271 approval from the FCC. Qwest acknowledges that monetary penalties will not be assessed until Qwest's § 271 application is granted and does not object to providing mock reports pre-§ 271 approval. Qwest objects to any other provisions of the CPAP becoming effective before § 271 approval. Qwest contends that it cannot know what the CPAP requirements are until the Commission acts on the parties' motions for modification. Qwest further contends that a number of ongoing activities that result in changes and improvements to Qwest's processes would be impeded if provisions of the CPAP, other than the mock reporting, are allowed to go into effect pre-§ 271 approval.

Qwest requests the effective date be changed to the date of the § 271 approval by the FCC so that Qwest is not subject to the provisions of the CPAP, except the requirement to provide mock reports.

b. WorldCom suggests that Qwest follow the requirements of Decision No. R01-997-I, unless and until that decision is modified. AT&T indicates that the requirements of the CPAP will be known when there is a Final Order on the CPAP. WorldCom contends that a six-month review occurring before § 271 approval could address the effectiveness of data collection and reporting and would demonstrate the penalties Qwest would have paid if the CPAP was fully operational. AT&T asserts that implementation of the CPAP pre-§ 271 approval will allow for the CPAP to be corrected if it is not running smoothly. Both WorldCom and AT&T recommend the effective date should remain unchanged.

c. There is no principled reason to prefer one CPAP start date over another. Starting the CPAP now, as the CPAP Order decided, allows the six-month review process to start earlier and gets the parties' attention directed to the CPAP's practical functioning. These are salutary things. It likewise moves up the annual audit of the Performance Measurement and Reporting System. Whether accelerating these dates is a good thing or not for a given constituency - Qwest or CLECs - really

depends on what one thinks the anticipated results from the six month review and annual audit will be.

d. For instance, if CLECs anticipate the audit and review will lead to more exacting standards being applied to Qwest, then they will prefer starting the clock on these audit functions earlier; vice-versa for Qwest. However, if one anticipates the opposite will happen, the CLECs will move to postpone and Qwest will want to hasten the CPAP's review periods. Right now, of course, neither assumption can be made. Therefore, parties should be indifferent to when the CPAP starts, except insofar they believe the current CPAP "misses the mark" and needs to be modified.

e. On the Goldilocks scale, I believe that the CPAP is neither too hard nor too soft, but just right. Therefore, I have no inherent preference for starting the CPAP clock sooner or later.[1] But there are some reasons that support a delay in the CPAP's effective date.

f. Postponing the CPAP's effect until § 271 approval allows a longer lead time for parties to become familiar with the workings of the CPAP and allows the mock reporting, arguably the most important aspect to be worked out

[1] Indeed, it makes no apparent sense to me why Qwest would necessarily want to postpone the CPAP's start date. If the CPAP's flaws that are Qwest-harming become apparent before monetary penalties kick-in, then I would think that Qwest would prefer to get the review clock underway sooner.

in this "trial run," to receive exclusive focus. A final reason for postponing the CPAP is that there is simply too much going on right now in this proceeding for the CPAP to get the attention it needs.

g. Qwest's legal objection to the CPAP also warrants some comment. Qwest asserts that there can be no CPAP until it is formally made a part of the Qwest SGAT by Qwest putting it there. This is a not an insignificant objection to the possible start date of the CPAP. In light of this Commission's view that the source of its authority to require the CPAP and its extra-state-jurisdictional remedies derives from the CPAP's "voluntary" nature, then there is no authority for the CPAP to begin working until Qwest has incorporated it in the SGAT.

h. But the legal objection is not ultimately correct. For one, the CPAP language could be fashioned to acknowledge work done prior to its actual adoption in the SGAT. Qwest is also required to file a complete SGAT, including the CPAP, on or before November 30, 2001. Therefore, the CPAP could be made effective by the terms of the SGAT by November 30, 2001.

i. The practical difficulties, however, drive me to postpone the CPAP's effective date. I do not think that Colorado Commission Staff -- among others -- can devote the time and attention to the CPAP to be ready for the six month

review by February 26, 2002.[2] I also believe that the CPAP is too important to take a back seat to the probable frenzy of work that will accompany the filing of a § 271 application with the FCC. Therefore, I think that all parties will be better off if the CPAP's full-effectiveness is postponed until Qwest is actually granted § 271 authority.

j. Mock reporting will still begin before full CPAP implementation. The first mock report is due on the last business day of the month after Qwest files the complete SGAT. The remainder of the CPAP's aspects, and the associated dates for reviews and audits, will not begin until § 271 approval. New CPAP language reflecting this change is contained in Attachment A.

B. Request 2

Qwest requests modification of § 14.1 to identify changes that can be made by Qwest to the Performance Measurement and Reporting System without obtaining approval. *Qwest Motion* at 4-7 and Attachment B. *Decision* at 25-28. *Recommended SGAT* at §§ 14.1, 14.2, and 14.3. *AT&T Response* at 4-5. *WorldCom Response* at 3-4.

1. Decision

a. SGAT §§ 14.3 and 18.9 shall be refashioned to provide more clarity on what and how CLEC-affecting changes may be made by Qwest.

---

[2] Indeed, recent schedules for the PCC OSS test indicate that the KPMG Final Report may not be "final" before this date!

b. Specifically, language will be added to the Recommended SGAT as follows:

14.3 Qwest shall obtain approval ~~for~~ from the Commission, or from the Change Management Process forum, or other industry forum prior to implementing any CLEC-affecting changes to the performance measurement and reporting system. ~~If a redesigned Change Management Process (CMP) process is formally in place and approved by the industry, Qwest shall follow the change management processes thus set forth. If a redesigned CMP process is not in place, Qwest will be allowed to obtain approval for the change from the CLECs via the Independent Monitor. The Independent Monitor shall then be responsible for guiding the change management process.~~ Any CLEC-affecting change to the CPAP, including the PIDs, the underlying data collection, reporting, and payment calculations must go through one of two processes. Either:

> Qwest can bring these changes to an industry forum, such as the Change Management Process (CMP), for discussion. If agreement is reached, then Qwest will file the change with the Commission, in a compliance-type filing. The Commission will not issue a decision on these items, but they will simply be incorporated into the CPAP; or
>
> Qwest will make an application-like filing with the Independent Monitor for changes that have not been agreed to at an industry forum either because agreement could not be reached, or because Qwest did not present the change to the forum. Parties will be allowed to comment and a record will be established. The Independent Monitor will then issue a formal decision on whether the change will be allowed as part of the CPAP.

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

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

2. **Discussion**

c. Qwest argues that the recommended SGAT language would restrict Qwest from changing the Performance Measurement and Reporting System to correct for inaccuracies in reporting without either obtaining approval or incurring

penalties. Qwest further argues that any changes made to its data gathering, calculation and reporting systems could be interpreted to be CLEC-affecting requiring Commission approval. Qwest contends that it has no way of avoiding fines if it discovers a change is required in the underlying data to self-correct an inaccurate report. A fine of $1,000 per affected CLEC would be imposed for making any non-approved change in underlying data. A fine might be imposed for not making a change to underlying data if an audit revealed an inaccurate report. Qwest asserts that having to obtain approval before making this type of CLEC-affecting change would restrict its ability to conduct business and meet regulatory requirements. Qwest requests § 14.1 of the recommended SGAT be modified to state that Qwest may make changes to the underlying data collection and gathering process implementing its measurement or reporting systems so long as the performance measurements are implemented as required. Alternatively, if § 14.1 is not modified to remove the restriction, Qwest requests a list to be added to the SGAT language that would specify changes that would not be considered CLEC-affecting.

d. AT&T asserts that a payment-affecting change should require Commission approval. WorldCom and AT&T contend that Qwest should not be allowed to make changes without approval, which would allow CLECs an opportunity for input.

They request changes not be made to the recommended SGAT language for the CPAP.

e. I have some sympathy for the concerns Qwest brings up here. This is a difficult balance between retaining Qwest's ability reasonably to make changes to its processes and CLECs need for certainty and advance notice of the same. Where the equipoise lies between these concerns is unclear and probably varies from situation to situation.

f. The best solution I can come up with is simply to set a process in place to handle these changes. The process I adopt for the CPAP is as follows:

(1) Any CLEC-affecting change to the CPAP, including the PIDs, the underlying data collection, reporting, and payment calculations must go through one of two processes. Either:

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

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

This should give Qwest more latitude to make necessary, even CLEC-affecting, changes without having to seek pre-clearance for every change.

g. The next issue is the murky definition of "CLEC-affecting." I am not opposed to a list of "safe harbor" changes that Qwest can make without being CLEC-affecting. However, I hesitate to endorse the Qwest list of "safe harbor" changes without CLEC input. For now, the general principle will have to do: Qwest cannot make CLEC-affecting changes without pre-vetting it through the CMP (or a related body), or the Independent Monitor.

h. Over time, with actual experience of the CPAP, I would anticipate the contours of "CLEC-affecting" changes can and will be better defined, to both Qwest's and the CLECs benefit. Until then, it will be left to the Independent Monitor to referee when impermissible CLEC-affecting changes take place. I do not foresee this becoming the black hole of liability that Qwest fears. For one, the prudent judgment of the Independent Monitor should avoid needlessly onerous interpretations of "CLEC-affecting." Second, a liability-averse Qwest will err toward pre-vetting any contemplated changes through the CMP (or a related body) or Independent Monitor. After experience with the type and variety of changes that might be made, some reasonable commercial understanding should

eventually take root between the parties about what changes can and cannot be unilaterally made by Qwest.[3]

C. Request 3

Qwest urges the Commission to impose a one year moratorium on a CLEC requesting a mini-audit if the auditor does not identify any non-conformance in the previous mini-audit.. *Qwest Motion* at 7-11. *Decision* at 30-32. *Recommended SGAT* at §§ 14.11, 14.12, and 14.13. *AT&T Response* at 5-7. *WorldCom Response* at 4-5.

1. Decision

The duty of good faith and fair dealing always exists between parties' dealing with one another. *See* 47 U.S.C. § 251(c)(1), 47 C.F.R. §§ 51.301(a), (b). The remainder of the mini-audit procedures will remain in place. Qwest's suggested change to CPAP § 14.11 is accepted and is as follows:

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

2. Discussion

a. Qwest argues that the six month moratorium on a CLEC's requesting a mini-audit if the auditor does not identify any non-conformance in the previous mini-audit is too lenient. Qwest also argues that CLECs should be required to work in good faith with respect to data reconciliation. Qwest contends that the mini-audit requirements of the CPAP are more

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[3] I would expect that a similar accommodation might take place over time with the level of detail and the extent of the change log that Qwest must keep. *See* Decision No. R01-997-I, ¶¶ III.B.2.d. at pp. 26-27. The Commission begins with the presumption that a maximum degree of information should be kept and shared. If commercial experience demonstrates otherwise—for instance, that the minutely detailed change logs are of no value—then by all means the CPAP requirement should be revised.

stringent than those envisioned by the Special Master and the mini-audit requirements of performance assurance plans approved by the FCC and other state regulators. Qwest requests that the recommended SGAT language be changed to the language in the Special Master's Final Report and Recommendation. Qwest also requests changing the "or" in § 14.11 to "and." Qwest argues that a CLEC should not be able to request a mini-audit on an issue that, while not raised, was determined to be suspect during data reconciliation.

b. AT&T and WorldCom contend the CPAP limitations on mini-audits are adequate and would prevent frivolous requests for audit. AT&T asserts that the CPAP is not more stringent than other approved plans. Both parties state that the language on this matter should not be changed.

c. The current CPAP mini-audit provisions, §§ 14.0 *et seq.*, represent a reasonable balance between CLECs deserving accurate performance data and unduly burdening Qwest with costly and unnecessary audits. Actual experience with the mini-audit process will have to bear out the truth or falsity of Qwest's concerns of its over-use to no good end. The mini-audit process and moratorium represents a first cut at striking a balance. I do nonetheless agree with Qwest's proposed change to § 14.11 to require that CLECs raise the mini-audit topic issue during data reconciliation.

CONTINUATION

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d. This specific concern leads to some general comments on the parties' requested modifications. In many cases, the party requesting modification recites a parade of horribles that might occur unless the CPAP is altered. Fears of abuses by parties, exploitation of open-ended provisions, or structural flaws that will result in drastic over- or under-enforcement are a few of the reasons alleged for modifying the current CPAP. To be sure, some of the concerns seem plausible, but at this point they remain hypothetical. Because of the lack of record evidence concerning actual commercial harm, the CPAP remains a best, informed guess at getting the incentives right for competitive entry in Colorado. At many levels, however, it remains a guess. The CPAP will have to be fine-tuned based on actual experience with its functioning. If some of the alleged horribles cited by parties here do come true, the Commission will not hesitate to make appropriate changes at the six-month review.

e. Qwest's mini-audit concerns are a case-in-point of hypothetical, but plausible, concerns that may require CPAP revision if those concerns bear out. If, indeed, CLECs, collectively or singly, use the mini-audit process to inflict countless, marginally effective mini-audits on Qwest, then I would expect two things to happen: first, the Independent Monitor would shut down this manifest abuse of process; second,

the Commission would revise the CPAP at the six-month review to prohibit abuse of the mini-audit procedures. But this is the realm of speculation.

D. Request 4

Qwest requests that it be allowed, at a minimum, to apply bill credits to CLECs who are more than 30 days past due on any non-disputed charges. Qwest *Motion* at 11-13. *Decision* at 42-43. *Recommended SGAT* at § 12.2. *AT&T Response* at 7-8. *WorldCom Response* at 5-6.

1. Decision

a. Qwest shall continue to be obligated to make payments in cash, but shall be able to apply bill credits against CLECs who are more than 90 days past due for non-disputed charges.

b. The language for the recommended SGAT shall be as follows:

12.2 All payments shall be in cash. Qwest shall be able to offset cash payments to CLEC with a bill credit applied against any non-disputed charges that are more than 90 days past due.

2. Discussion

a. Qwest contends that it should not be required to pay cash for penalties. Qwest argues that bill credits instead of cash payment for penalties provide incentive to CLECs to pay their bills on time. Qwest requests modification of the requirement to make cash payments. Qwest requests that it be allowed, at a minimum, to apply bill credits

to CLECs who are more than 30 days past due on any non-disputed charges.

b. AT&T and WorldCom assert that penalty amounts awarded under CPAP should not be a solution to any bill collection problems Qwest is experiencing. Both parties suggest that Qwest should take appropriate collections or dispute resolution action to collect on unpaid CLEC bills. WorldCom also notes that Commission rules do not specify when a wholesale bill is considered to be past due. WorldCom and AT&T oppose any modification of the cash payment requirement for penalties.

c. I adopted the cash payment system to make CPAP payments straightforward and to keep them from getting tangled up in billing disputes. I still believe that cash payments are superior. Nevertheless, the CPAP and CLECs' payment of wholesale bills are not wholly unrelated. For instance, unpaid CLEC bills should presumably be reflected in wholesale rates, as Qwest is entitled to recover a premium in those rates for its risk of loss. Likewise, Qwest is not obligated to debt-finance CLECs through unpaid bills on the one hand, while paying them CPAP penalties on the other. I therefore will allow Qwest to credit CPAP penalties for bills that are more than 90 days past due.

d. WorldCom's objection that there is Commission rule prescribing when a payment is past due

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to CLECs who are more than 30 days past due on any non-disputed charges.

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d. WorldCom's objection that there is no Commission rule prescribing when a payment is past due is

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unavailing. I refuse to believe that conventions on when payments are due for wholesale services do not already exist. I would particularly expect an entity like WorldCom that has relations to ILECs in its IXC capacity to have evolved bill payment due date conventions. These conventions will supply the relevant metric for when payments are more than 90 days past due.

E. Request 5

Qwest asserts that payment escalation for non-conformance must be limited. (Qwest does not request any specific change.) *Qwest Motion* at 13-17. *Decision* at 60-61. *Recommended SGAT* at § 8.2. *AT&T Response* at 8-11. *WorldCom Response* at 6-7.

1. Decision

I decline to modify the current payment escalation process.

2. Discussion

a. Qwest asserts that the CPAP provision allowing the Independent Monitor to perform a root-cause analysis of repeated nonconformance better accomplishes the same objective as unlimited escalating payments. Qwest speculates that unlimited escalating payments allow CLECs unlimited financial opportunities because poorly-defined PIDs could be gamed by CLECs.

b. AT&T contends that Qwest has made an argument for the CPAP to become effective pre-§ 271 approval

because there would be an opportunity to refine the PIDs before penalties go into effect. AT&T also contends that, as experience has been gained through the ROC OSS testing process, Qwest has had opportunities to refine the PIDs. AT&T argues that, if the PIDs are considered to be adequate for measuring performance to receive § 271 approval, then the PIDs should be considered adequate for performance assurance purposes. AT&T and WorldCom assert that the CPAP contains adequate deterrents to prevent CLECs from gaming the plan. AT&T and WorldCom conclude the unlimited payment escalation provision should not be changed.

c. Qwest cites two perils from the CPAP's current escalation process: one, poorly-defined PIDs can result in transfer payments from Qwest to CLECs that serves an deterrent function and misallocates resources; two, the ability of CLECs to game flawed PIDS.

d. Qwest's concerns do not necessarily lack merit, but they are wholly hypothetical. If actual experience with the CPAP reveals "bad PIDs" resulting in escalation payments wholly disproportionate to the commercial harm to CLECs, this Commission will not hesitate to make appropriate changes to the CPAP.

F. Request 6

Qwest requests modification to eliminate any rollover of

payment amounts that exceed the $100 million annual cap to future years. Qwest also requests modification to limit assessment of penalties not specified in the CPAP. *Qwest Motion* at 17-19. *Decision* at 61-64. *Recommended SGAT* at §§ 11.2 and 11.3. *AT&T Response* at 11-12. *WorldCom Response* at 7.

1. Decision

I decline to modify the "rolling forward" feature of the plan.

2. Discussion

a. Qwest contends that its future liability should be limited. Qwest argues that the CPAP requirement to carry forward deferred penalty payments into the next year is at odds with the $100 million annual cap provision. Qwest contends that other performance assurance plans approved by the FCC adopt caps on liability. Qwest requests the recommended SGAT language for the CPAP be modified to make clear that rollover of deferred amounts expires at the end of each calendar year. Qwest also seeks modification of § 11.2 to remove language which Qwest asserts implies that the Independent Monitor has authority to assess penalties not specified in the CPAP.

b. AT&T contends that the cap and deferred penalty payment provisions in the CPAP balance Qwest's desire to cap its monetary requirement against AT&T's desire to receive full penalty payment. AT&T opposes Qwest's request for modification of the recommended SGAT language on this matter.

WorldCom and AT&T disagree with Qwest's interpretation of § 11.3 and oppose Qwest's proposed change.

c. The CPAP's primary thrust is to limit Qwest's not insubstantial incentive to breach its interconnection and unbundling obligations. Likewise, the CPAP aims to compensate CLECs for harm suffered when Qwest does breach its obligations under the Act. The $100 million cap on CPAP payments represents a retreat from these two principles.

d. The cap is a concession to Qwest's need for some upward limit on its potential post-§ 271 liability and predictability as to its potential liability. Nevertheless, the cap also represents an opportunity for Qwest efficiently to breach its obligations to CLECs, as well as for CLECs to be systematically undercompensated for Qwest's breaches of the SGAT.

e. Because the deterrence and remunerative goals of the CPAP take precedence over the predictability goals of Qwest, it makes sense to "roll-over" Qwest's liability under the CPAP into future years. That way, the incentives to breach ICAs with impunity - which would become manifold when the cap is approached - are limited.

f. Finally, the language in § 11.2 that Qwest objects to cannot reasonably be construed to authorize the Independent Monitor to assess non-CPAP specified penalties.

G. Request 7

Qwest requests limitation of CLECs' pursuit of additional contract damages. *Qwest Motion* at 19-21. *Decision* at 65-67. *Recommended SGAT* at § 16.6. *AT&T Response* at 12. *WorldCom Response* at 8-9.

1. Decision

An offset clause will be added to the CPAP as follows:

16.6 Tier 1X payments . . . . action. Any damages awarded through this action shall be offset with payments made under this CPAP. If the CLEC cannot make this showing, the action shall be barred. To the extent that CLEC's contract action relates to an area of performance not addressed by the CPAP, no such procedural requirement shall apply.

2. Discussion

a. Qwest argues that the possibility of an offset to liquidated damages does not mitigate harm to Qwest or the possibility of windfall opportunities to CLECs. Qwest contends that Tier 1 payments are liquidated damages in other FCC-approved performance assurance plans. Qwest asserts that CLECs should be prohibited from arguing to a court that payments received under the CPAP were not for the same harm. Qwest requests modification of the offset provision in the CPAP to mandate that any damages awarded be offset by CPAP payments. Specifically, Qwest requests the CPAP read: "any damages awarded in a future action shall be offset with payments under the CPAP for, at a minimum, the previous six months."

b. AT&T asserts that no other FCC-approved performance assurance plan requires the offset that Qwest is

seeking in its request to modify. WorldCom contends that the determination of offset properly belongs in the courts to be determined on a case-by-case basis. AT&T argues that the CPAP contains the proper definition of offset.

c. I agree with Qwest that an offset clause should be added to the CPAP. I cannot imagine that a court would not offset any liability payments from the CPAP from a court-ordered remedy, but it might as well be made explicit.

d. Offset is also consistent with the theory of the CPAP. The CPAP is meant to be self-executing way for CLECs to be compensated for harm suffered when Qwest breaches its contractual obligations to CLECs to interconnect and to unbundle Qwest's network under the Act. Damages awarded by a court for the same damage would duplicate the work of the CPAP. Therefore, § 16.6 will be modified to reflect Qwest's right to offset.

H. Request 8

Qwest seeks to limit Commission modification of CPAP. *Qwest Motion* at 21-25. *Decision* at 69-70. *Recommended SGAT* at § 19.1. *AT&T Response* at 12-13. *WorldCom Response* at 9-11.

1. Decision

The Commission shall retain the ability unilaterally to modify the CPAP. The second sentence in § 19.1 will be deleted. Section 19.1 shall read as follows:

~~19.1~~ This CPAP represents Qwest's voluntary offer to provide performance assurance. ~~No changes shall be made without Qwest's consent.~~

2. Discussion

a. Qwest argues that the Commission should not be allowed unilaterally to modify the CPAP because the Commission has no legal authority to do so. Qwest argues that § 19.1 of the CPAP requires that the Commission obtain Qwest's consent before a change can be made to the CPAP. Because the CPAP also includes provisions that would allow the Commission discretion to modify the CPAP, Qwest is concerned that the CPAP does not provide the legal certainty it seeks to be assured that the terms it agrees to are known and cannot be changed unilaterally.

b. AT&T believes the Commission does have authority to determine the public interest of the CPAP. AT&T asserts that it would be inappropriate for Qwest to control changes to the CPAP because there would be no incentive post-§ 271 approval for Qwest to maintain the integrity of the CPAP. WorldCom notes that the FCC has stated that performance assurance plans are not to be static, and that state Commissions must be committed to periodic review and modification of the plans based on input from both the RBOC and the CLECs. WorldCom further notes that the Commission has been granted the authority under the Act unilaterally to order changes to the CPAP.

WorldCom contends that Qwest's concerns are mitigated by the Decision No. R01-997-I statement that "the Commission will be disinclined to make any fundamental changes to the CPAP unless there is a clear need and benefit."

c. This is a tricky issue because it ultimately turns on an issue that this Commission has sedulously avoided: namely, where does this Commission derive its authority to mandate the CPAP on Qwest. In the CPAP Order, I equated the CPAP to a detailed arbitration clause in a commercial contract and a consent decree. Thus, the CPAP derives its enforceability from the contract terms itself, not from some enforcement authority under state or federal law.

d. Therefore, the Commission's authority to modify the CPAP comes from the CPAP itself. Indeed, by "voluntarily" adopting the CPAP, Qwest confers to the Commission the ability to make changes to the same. This grant of CPAP-changing authority is not so strange either. Open contract terms - subject to later negotiation or decision by a neutral third-party - are quite common. The Uniform Commercial Code has a provision dealing with open price terms. U.C.C. § 2-305; § 4-2-305, C.R.S.; *see generally*, Mark P. Gergen, *The Use of Open Terms in Contract*, 92 Colum. L. Rev. 997 (1992). Open contract terms are used when uncertainty confronts contracting

parties on a going-forward basis.[4] *Id.* Given the CPAP is only a first cut at getting the parties respective incentives right, there is certainly the need for open terms and self-revising mechanisms within the plan to tailor the plan to the commercial realities experienced in the Colorado local exchange market.

e. *Otter Tail Power Co. v. United States*, 410 U.S. 366, 93 S.Ct. 1022 (1973), gives further support to the Commission's unilateral right to revise the CPAP, even when the CPAP's terms go beyond the Commission's traditional jurisdiction. In *Otter Tail*, an antitrust court's remedy enabled the Federal Power Commission to evaluate and enforce a filed tariff that called for the wholesale wheeling of power, even though the FPC lacked authority to mandate such a step under its traditional jurisdiction. *See* Id. at 375-76 (1973). Similarly here, the Commission is being empowered by Qwest's CPAP tariff to revise the enforcement regime in ways that go beyond traditional state jurisdiction.

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[4] Open contract terms have been criticized for shifting costs to the judicial system that should otherwise have been privately borne and negotiated. *See*, Richard A. Posner, *Economic Analysis of Law*, § 4.2 at p. 109 (Aspen: 1998). Here, the open contract term - the self-revising aspects of the CPAP - are costs properly socialized to the Commission for two reasons: first, there is uncertainty as to the going-forward incentives of the CPAP with a concomitant need for a neutral third-party fairly to adjust the CPAP to the uncertainty; second, an Interconnection Agreement or the SGAT is not merely a contract, but is also an expression of public policy as embodied in 47 U.S.C. §§ 251, 252, 271, and subject to state Commission approval under 47 U.S.C. § 252(e)(1). Therefore, this Commission's ongoing superintending over the CPAP is both unremarkable as a matter of contract law and required as a matter of competition policy under the Act.

f. Granting the Commission unilateral authority to revise the CPAP is the only sensible course. If Qwest retained veto rights over CPAP changes through, say, an aggressive reading of CPAP § 19.1, then the CPAP revision process would become a ratchet toward Qwest-favorable terms. This would not solve the problem of Qwest's incentive to breach.

g. The option of leaving the "firm" parts of the CPAP intact is also not right. The CPAP is informed by a great deal of input from all parties, but it is far from perfect at capturing the forward-looking incentives and plans of Qwest and the CLECs. The CPAP will possibly under- and over-enforce the Act. The Commission - as well as the parties - need a self-revising mechanism within the CPAP.

h. I can understand the desire of Qwest for some certainty as to its potential liability under the CPAP. But Qwest's assumptions strangely seem to cut only toward the CPAP becoming more exacting, with more penalties being added through the revision process. This is not an accurate assumption. The CPAP revisions will attempt to correct both over- and under-enforcement problems.

I. Request 9

Qwest requests elimination of the requirement to monitor and report special access information. ***Qwest Motion*** **at 25-32.** ***Decision*** **at 79-83.** ***AT&T Response*** **at 13.** ***WorldCom Response*** **at 11-14.** ***XO and Time Warner Joint Response.***

1. **Decision**

I decline to modify the special access requirements.

2. **Discussion**

a. Qwest objects to the CPAP requirement to monitor and report special access information. Qwest argues that, because special access does not have to be addressed to determine checklist compliance for § 271 approval, there should be no requirement for special access in the CPAP. Qwest further argues that special access services are primarily ordered under the federal tariff and, therefore, Colorado is preempted applying provisioning standards to Qwest's special access service. Qwest asserts that special access facilities used by CLECs in the provisioning of local exchange service can be converted to UNEs which are covered by the CPAP. Qwest indicates that it is investigating, but is not sure it could implement, CPAP submeasures for special access within the specified 120 days. Qwest requests the requirement to monitor and report special access submeasures be eliminated.

b. XO and Time Warner argue that CLECs rely heavily on special access in order to provide local exchange service. XO and Time Warner assert that reality dictates use of special access instead of UNEs. This unavailability of alternatives to special access supports the monitoring and

reporting. WorldCom points out that special access is ordered from the federal tariff because only 10 percent of all traffic traversing such a circuit needs to be interstate. Any intrastate traffic that traverses a circuit is jurisdictional to this Commission. AT&T, WorldCom, XO, and Time Warner cite several decisions made by other jurisdictions establishing requirements to measure special access. These CLECs support requirements to monitor and report special access submeasures.

c. I decline to make the modification requested by Qwest. Special access shall remain part of the CPAP reporting requirement.

d. Time Warner and XO have made out a convincing factual case that the special access metrics should be included in CPAP reporting. The high capacity loops ordered through the special access tariff are an important component for CLECs seeking to enter the Colorado local exchange market with their own facilities.

e. Bringing Special Access performance metrics into the sunshine, without any attendant penalties, may by itself ensure that Qwest's performance for special access is adequate. At this time, the Commission has no particular inclination to take the next step and include special access in the CPAP penalty scheme. So long as Qwest's special access provisioning is brought to light through CPAP reporting and

remains adequate, I would anticipate that reporting alone will be adequate.

f. Finally, I am not convinced by Qwest's jurisdictional argument. That special access is from the federal tariff does not mean it cannot be part of the CPAP. Qwest is surely right that § 271 is aimed at opening the local exchange market. Indeed, § 271 only looks to opening the local exchange market. That said, XO and Time Warner have made a plausible factual case that special access is being used to enter the local exchange market.

g. The crux of Qwest's jurisdictional argument is beside the point. Monitoring and reporting of special access will be required. This is Qwest's tariffed offering to CLECs. It makes no difference whether that tariff offering includes jurisdictionally uniform performance guarantees.

J. Request 10

Qwest requests modification of the responsibilities of the Independent Monitor. *Qwest Motion* at 32-35. *Recommended SGAT* at § 17.2. *AT&T Response* at 13-15. *WorldCom Response* at 15.

1. Decision

The Independent Monitor will remain unchanged.

2. Discussion

a. Qwest objects to the role of the Independent Monitor. Qwest argues that the need for a fair and independent

hearing requires either a wholly independent arbitrator or an independent avenue of judicial review for decisions made by the Independent Monitor. Qwest raises concern about potential conflict of interest because the Independent Monitor, appointed only by the Commission, will be compensated from penalties assessed by the Independent Monitor, which will be paid to the Special Fund. Qwest requests modification of the process of appointing the Independent Monitor to ensure his independence from the Commission. Qwest further seeks modification of the Independent Monitor's responsibilities to include evaluating whether Qwest has established that a payment should be waived and to exclude the provision to assess any additional penalties under the CPAP.

b. AT&T asserts the CPAP is similar to a contract and as such should limit or exclude judicial review. AT&T and WorldCom question Qwest's concern about conflict of interest because Qwest paid for the Special Master and also paid for consultants and facilitators throughout the § 271 process. AT&T recommends that Qwest's arguments regarding the Independent Monitor should not be well taken.

c. Qwest's arguments about the Independent Monitor are not well-taken, and the Independent Monitor aspects of the CPAP shall not be changed. AT&T and WorldCom no doubt took delight in pointing out Qwest's own petard-hoisting

rhetoric about supposed conflicts of interest, although AT&T knows all too well about carelessly tossing conflict of interest charges. *See* Decision No. R01-222-I, Docket No 01-041T (March 9, 2001).

d. In fact, I believe that the Independent Monitor represents a signal leap forward in ILEC-CLEC dispute resolution. Unlike state commissions or the FCC, where I believe the public choice hazards are much greater, the Independent Monitor represents a clear step toward a normalized commercial arbitration relationship between Qwest and CLECs. As in a "normal" commercial context, the use of an independent arbitrator allows the parties to hire expert decision-makers that timely resolve disputes. The private law model that the Indpendent Monitor points toward should be embraced by all parties as delivering greater certainty, expedition, and impartiality.

e. The Independent Monitor's independence will likewise be honored by this Commission. While the Commission retains appellate-like authority over the Independent Monitor, I would anticipate that this Commission and its successors will be inclined to defer to the Independent Monitor's determinations. A prudential deference toward the Independent Monitor's determinations is necessary for the office of Independent Monitor to succeed. Though not explicit in the CPAP, I would

expect this Commission to defer to the Independent Monitor's determinations consistent with deferential standards applied to arbitration decisions. *See* §§ 13-22-201 *et seq.*, C.R.S.; 9 U.S.C. §§ 1 *et seq.*

f. To the extent that the Independent Monitor represents a shift from the realm of pure policymaking, as often happens when the Commission is involved, to contract law-applying, as the Independent Monitor will be doing, this can only increase certainty for all parties.

K. Request 11

Qwest seeks deletion of several portions of the Recommended SGAT language for the CPAP. *Qwest Motion* at 36-37. *Recommended SGAT* at §§ 4.3, 11.4, 13.2, 13.5, 13.7, 13.8, 13.9, 14.3, 14.4, 14.6, 14.9, 14.13, 16.9, 17.5, and 18.8. *AT&T Response* at 15-17. *WorldCom Response* at 15-16.

1. Decision

The unsolicited changes incorporated in the recommended SGAT language shall remain.

2. Discussion

a. Qwest argues that changes should not have been made to its proposed SGAT language for the CPAP unless the changes were sought by a CLEC. Qwest argues that unsolicited changes incorporated in the recommended SGAT language for the CPAP upset the balance represented in the CPAP. Qwest notes such changes were made without any discussion in Decision No. R01-997-I as to the reason for the change. Qwest seeks deletion

of changes in §§ 4.3, 11.4, 13.2, 13.5, 13.7, 13.8, 13.9, 14.3, 14.4, 14.6, 14.9, 14.13, 16.9, 17.5, and 18.8.

b. AT&T counters that the Hearing Commissioner acted on matters of public interest and, therefore, had the authority to make the changes incorporated in the recommended SGAT language for the CPAP. AT&T points out that the sections that were changed dealt with subjects which were and are in dispute between Qwest and the CLECs. WorldCom contends that the Hearing Commissioner is permitted to use his independent thinking and judgment to take action in a proceeding, even if the action was not advocated by any party. AT&T asserts that Qwest's requested deletions should not be adopted.

c. This gets back to the "voluntary" nature of the CPAP. Qwest can file whatever SGAT language it wants and call it a performance assurance plan. The only language I will endorse for § 271 purposes is attached to this Order.

L. Request 12

Qwest seeks clarification of the payment amounts required by the recommended SGAT in§§ 13.4, 13.5, and 13.6. *Qwest Motion* at 37-38. *Recommended SGAT* at §§ 13.4, 13.5, and 13.6. *AT&T Response* at 17-18.

1. Decision

These payments are cumulative.

Recommended SGAT language:

13.3 In the case of late reporting, Qwest shall make a payment of $500 per calendar day to the Special Fund. This amount represents the total payment for missing a

reporting deadline, rather than a payment per report. This payment shall begin on the report due date and continue until the report is actually distributed.

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

2. Discussion

a. Qwest requests clarification that the provisions of §§ 13.4, 13.5, and 13.6 are not cumulative. If more than one provision is applicable, the more specific provision shall govern.

b. AT&T argues that Qwest is attempting to lessen its liability when it does not file timely or accurate reports. AT&T suggests Qwest's request for clarification should not be entertained.

c. The payments are cumulative because they are for different violations. The clarification will be made so there is no ambiguity as to the cumulative and separate nature of §§ 13.4, 13.5 and 13.6.

M. Request 13

Qwest requests clarification of the six-month average calculations used for Tier 1A measurements. *Qwest Motion* at 37. *Recommended SGAT* at §§ 6.1 and 7.4.

1. Decision

The six-month average will be done on a rolling basis.

2. Discussion

a. The Special Master recommended a six-month fixed average. This average would require Qwest to calculate twice a year the six-month fixed average. The Special Master adopted this method for ease of administration.

b. In contrast, I adopted and reaffirm here the use of a rolling average. This means that Qwest will derive the averages on a rolling, monthly basis. The rolling average will require monthly calculations, but will be more accurate. I believe that this requirement will not be administratively burdensome. A properly programmed spreadsheet should make this calculation easy to perform on a monthly basis.

N. Request 14

Qwest requests clarification that the results for PO-2A-1 and PO-2A-2 will be aggregated for purposes of calculating any penalty payment. ***Qwest Motion*** **at 38-39.** ***Recommended SGAT*** **at Appendix A.** ***AT&T Response*** **at 18.**

1. Decision

Clarification language shall be added to the recommended SGAT language as follows:

Electronic Flow Through Rates

For Resale:

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

For Unbundled Loops:

~~PO-2A~~	~~Flow-through LSRs~~	~~Electronic Flow-through (Percent)~~

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

For LNP:

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

For UNE-P (POTS):

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

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

2. Discussion

a. Qwest requests addition of a clarification sentence to the Electronic Flow Through Rates section of Appendix A of the recommended SGAT language for the CPAP. The additional language Qwest proposes is: "For the purpose of calculating the payment, PO-2A and PO-2B shall each include all applicable LSRs received through both EDI and GUI."

b. AT&T disagrees with Qwest's proposed language. AT&T contends that flow through results for EDI are currently much worse than for IMA-GUI. AT&T argues that combining the flow through results for IMA-GUI and EDI would

permit Qwest to mask poor performance of the EDI. AT&T proposes that the CPAP language should be clarified to state that each submeasure, PO-2A-1, PO-2A-2, PO-2B-1 and PO-2B-2, should be reported separately.

c. The Final Report and Recommendation states that for electronic flow through rates both EDI and GUI performance will be aggregated. In its compliance filing of SGAT language, Qwest did not capture this provision. Because there is already a disagreement between Qwest and AT&T on this matter, the language will be clarified as noted in the decision above.

O. Request 15

Qwest requests clarification that escalation of per occurrence payments applies to Tier 1X. *Qwest Motion* at 39-40. *Recommended SGAT* at § 8.2.

1. Decision

Escalation of per occurrence payments does apply to Tier 1X. The requested modification is granted as follows:

8.2 The second continuous month of non-conforming performance for a particular submeasure will require the total per occurrence payment before severity to be multiplied by two. On the third continuous month, the total per occurrence payment before severity will be multiplied by three. The escalation . . . .

2. Discussion

a. Qwest asserts that the recommended SGAT language is not clear on the amounts to be paid to Tier 1X and Tier 1Y if per occurrence payments are escalated. To clarify the application of the escalation provision, Qwest requests

addition of language to § 8.2 of the Recommended SGAT language for the CPAP.

b. I agree that the language of CPAP § 8.2 needs to be clarified. The new language in § 8.2 makes the modification requested by Qwest.

P. Request 16

Qwest seeks clarification that OP-6A and OP-6B will be treated as a single measure for purposes of calculating any penalty payment. *Qwest Motion* at 40. *Recommended SGAT* at Appendix A. *AT&T Response* at 18.

1. Decision

Clarification language shall be added to the recommended SGAT language as follows:

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

2. Discussion

a. Qwest points out that the recommended SGAT language for the CPAP does not capture the Final Report and Recommendation proposal to treat OP-6 as a single measure.

b. The recommended SGAT language does not adequately state that OP-6 will be treated as a single measure. The language will be changed as noted in the decision above.

Q. Request 17

Qwest requests correction of a typo in Appendix A of the Recommended SGAT. *Qwest Motion* at 40. *Recommended SGAT* at Appendix A.

1. Decision

The typo shall be corrected as follows:

For Unbundled Loops:

PO-5A-1(b)	IMA Electronic LSRs	*FOCs On Time (Percent)*
PO-5A-2(b)	EDI Electronic LSRs	*FOCs On Time (Percent)*
PO-5B-1(b)	IMA Electronic/Manual LSRs	*FOCs On Time (Percent)*
PO-5B-2(b)	EDI Electronic/Manual LSRs	*FOCs On Time (Percent)*
PO-5C-(6b)	Fax Manual LSRs	*FOCs On Time (Percent)*
PO-9B		*Timely Jeopardy Notices (Percent)*

R. Request 18

The Office of Consumer Counsel (OCC) requests that it be deemed a "relevant party" for purposes of receiving reports, suggesting modifications to and enforcement of the CPAP. *OCC Motion* at 1. *Decision* at 18. Qwest contends that the OCC is not entitled to receive CPAP information but may request it from the Commission under the confidentiality rules, 4 CCR 723-16.4.4. *Qwest Response* at 16.

1. Decision

OCC will be a relevant party for receiving monthly reports and providing input into the modification and enforcement of the plan. SGAT § 13.2 will be changed as follows:

13.2 Qwest shall deliver the individual monthly report to CLEC and the aggregate State report to the Commission and the Office of Consumer Counsel via email on or before the last business day of each month following the relevant performance period.

2. Discussion

a. The OCC cites to the CPAP Decision at page 18 which states, "Reports generated prior to § 271 approval will

be distributed to all relevant parties and to the Commission via the same distribution mechanism that will be in effect post-§ 271." The OCC would like it to be clear that it is a "relevant party" for purposes of receiving pre- and post-§ 271 reports, suggesting modifications to and enforcement of the CPAP. The OCC states that it has been actively participating in this docket as well as Docket Nos. 97I-198T and 99A-577T. The OCC further states that it has a statutory duty to represent residential, small business and agricultural customers who may be affected by the CPAP reports and parameters of the CPAP.

b. In its response, Qwest states that nothing in the statutory obligations or duties of the OCC entitle it to the payment information that Qwest would be obligated to provide under the CPAP. In addition, Qwest states that any information provided to the individual CLECs will contain confidential information about individual CLEC's orders, which is protected from disclosure. It is Qwest's position that the OCC may request information from the Commission to the extent allowed under the confidentiality rules, 4 C.C.R. 723-16.4.4.

c. The OCC should be considered a relevant party to receive aggregate reports. The OCC shall need to work through the Commission's confidentiality rules to obtain CLEC-specific confidentiality information.

S. Request 19

The OCC requests modification to the language in § 10.7 to prevent the use of remaining Tier 2 Special Fund monies to benefit Qwest directly *or indirectly*. *OCC Motion at 2. Recommended SGAT at § 10.7.*

1. Decision

This requested modification is not necessary.

2. Discussion

a. Section 10.7 of the recommended SGAT currently reads: "Upon implementation of the CPAP, the Commission shall decide how to use the remainder of this fund. The uses shall be competitively-neutral efforts in the telecommunications field that do not benefit Qwest directly." The OCC would like language added to this section to read "do not benefit Qwest directly or indirectly." The OCC states that Qwest should in no way, directly or indirectly, benefit from the payments made into the Tier 2 fund. These are monies that would not be present but for Qwest's non-compliance with the CPAP and § 271. The law does not permit a breaching party to benefit from its transgressions, and it should not be allowed in this instance either.

b. The general principle embodied in CPAP § 10.7 is adequate.

T. Request 20

The OCC requests clarification on the process the Commission will use to determine how to use any remaining

Tier 2 Special Fund monies and for allowing input from other interested parties. *OCC Motion* at 2. *Recommended SGAT* at § 10.7.

1. Decision

I decline to adopt a process for how to use left-over Special Fund monies at this time.

2. Discussion

a. The OCC requests the Commission clarify the process the Commission will use to determine how to use any remaining dollars from the Special Fund and consider allowing input from other interested parties. The OCC's position is that since this money is designed to capture the competitive harms in the market-place as a whole, the Commission should include a process whereby interested parties may participate and submit recommendations for competitively neutral efforts in the telecommunications filed that do not benefit Qwest directly or indirectly.

b. The general principle of CPAP § 10.7 is enough at this time and encompasses the OCC's concerns in any event.

U. Request 21

The OCC urges the Commission to add a section to the SGAT that explicitly prohibits Qwest from recovering any Tier 1 and Tier 2 penalties from its ratepayers. *OCC Motion* at 3. *Recommended SGAT* at § 11.0. Qwest states this provision is unnecessary as the FCC has already stated that 271 payments may not be charged to ratepayers. *Qwest Response* at 19.

1. Decision

No modification is necessary. The FCC has already spoken on this.

2. Discussion

a. The OCC believes that it is the Commission's intent that Qwest shareholders, and not ratepayers, be liable for any CPAP penalties; but the OCC would prefer explicit language in the CPAP SGAT. The OCC suggests that § 11.0 may be the most appropriate place to include language to this affect.

b. Qwest asserts that this language is unnecessary and would simply restate the FCC's already clearly articulated position. In the *Bell Atlantic New York Order*, the FCC stated that § 271 payments may not be charged to ratepayers.It would be inappropriate and unnecessary to add a provision to the CPAP reiterating the FCC's settled policy on this issue. In addition, Qwest states that the SGAT is a contract between two companies for interconnection and wholesale services, not a statement of retail ratemaking policy.

c. I agree with Qwest that the FCC's statements on this matter are dispositive. There is no need to include this language in the SGAT, particularly since it has no effect on the rights and obligations between Qwest and a CLEC.

V. Request 22

The OCC requests clarification regarding who will pay to

hire an expert for the Three Year Review if no funds are available in the Special Fund. *OCC Motion* at 3. *Recommended SGAT* at § 18.9.

1. Decision

Similar to the Independent Monitor and Auditor, Qwest will advance the funds for the expert if necessary. CPAP § 18.9 shall be modified for clarification as follows:

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

2. Discussion

a. Section 18.9 of the recommended SGAT states that the Special Fund will pay for the Commission to hire an expert to assist with the Three Year Review. The OCC requests clarification regarding who will pay to hire an expert for the Three Year Review if no or insufficient funds are available in the Special Fund.

b. CPAP § 18.9 will be changed to account for this circumstance. Qwest will advance the funds, if necessary.

W. Request 23

The OCC requests clarification on why § 19.1 still states that the CPAP is Qwest's voluntary offer to provide performance assurance. Such a statement is either redundant or incorrect. Therefore, the OCC requests that the second sentence in § 19.1 be stricken. *OCC Motion* at 4. *Recommended SGAT* at § 19.1. AT&T and WorldCom agree that this second sentence of 19.1 should be stricken because it is in conflict with §§ 17.5, 17.7 and 18.0. *AT&T Motion* at

8-10. WorldCom Motion at 8.

1. Decision

See Decision Request 8.

2. Discussion

a. The OCC believes that § 19.0 should be stricken from the SGAT language. Specifically, the second sentence in this section should be deleted. It reads: "No changes shall be made without Qwest's consent." Further, the OCC contends that the Hearing Commissioner has equated the CPAP to a consent decree, stating, "A consent decree might contain terms outside the bounds of traditional legal remedies, yet in exchange for settlement of a lawsuit, the parties agree to abide by those 'extra-legal' terms. Here Qwest agrees to include the CPAP in the SGAT - in essence a detailed arbitration and remedies clause - in exchange for long distance authority." The OCC believes that § 19.1 is contradictory to this position and to other statements in the SGAT language.

b. AT&T agrees with the OCC's interpretation of this § 19.1. AT&T states that § 16.9 of the CPAP SGAT language reads: "The Commission shall have the right to modify this plan at any time as appropriate." There is no statement in this section that such changes are subject to Qwest's approval. AT&T goes on to cite other examples from the CPAP SGAT language that state when the Commission will potentially make changes to the

CPAP. Like the OCC, AT&T recommends striking the second sentence in § 19.1.

c. WorldCom also commented on this issue in its Motion to Modify and agrees with the OCC and AT&T that the second sentence in § 19.1 should be deleted.

X. Request 24

AT&T requests that "Tier 1X" be included in § 11.1 of the SGAT to clarify that there is not a cap on Tier 1X payments. *AT&T Motion* at 3. *Recommended SGAT* at § 11.1.

1. Decision

This modification is not necessary because § 11.3 already addresses the issue.

2. Discussion

a. AT&T contends that the CPAP Decision and recommended SGAT language repeatedly statethat there is no cap on Tier 1X payments. Specifically, the CPAP Decision states at pages 61-62 that Tier 1X payments would continue to be paid even if Qwest reached the cap on Tier 1Y and Tier 2 payments. Further, in § 11.3 of the recommended SGAT, it indicates: "If the total payments (Tier 1X, 1Y, 2) do exceed the cap, Qwest shall pay all Tier 1X payments (even if they alone exceed the cap)." AT&T would like clarification, therefore, on the language in § 11.1 that states, "there shall be an annual cap of $100 million on payments for performance under this CPAP. The cap shall apply to Tier 1X, Tier 1Y and Tier 2 payments as

explained in § 11.3." AT&T requests that "Tier 1X" should be stricken from § 11.1.

b. Section 11.3 already answers AT&T's concern.

Y. Request 25

AT&T requests clarification on whether interest payments are included in the annual cap. *AT&T Motion* at 3. *Recommended SGAT* at § 11.2.

1. Decision

Interest payments are not included in the cap. CPAP § 11.2 will be modified to make this clear.

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

2. Discussion

a. AT&T seeks clarification on several sections of the Recommended SGAT, namely §§ 12.4, 13.6 and 13.7, that deal with interest payments on penalties. AT&T questions whether the interest payments called for in the CPAP would count toward the CPAP cap. Section 11.2 does not expressly identify interest payments as falling outside the cap. It is AT&T's assumption that since these payments are typically made due to Qwest's failure accurately to report or to pay timely amounts due under the CPAP, the interest payments will not count toward the cap.

b. AT&T is correct that interest payments do not count against the cap. CPAP § 11.2 shall be modified as set forth above.

Z. Request 26

AT&T requests clarifying language in § 11.3 regarding the carry-over of Tier 1Y and Tier 2 payments when they exceed the monthly cap. *AT&T Motion* at 3-4. *Recommended SGAT* at § 11.3.

1. Decision

CPAP § 11.3 will be modified as follows to adopt AT&T's language:

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

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

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

In a month when Qwest's total payment is below the monthly cap, any deferred payments plus interest will be due, but only to the extent that the deferred payments do not cause the total monthly payment to exceed the monthly cap. In the event all Tier 1Y and Tier 2 payments cannot be made in any month due to the cap, Qwest will pay Tier 1Y payments first (up to the cap) and then, from the remaining money, pay Tier 2 payments (up to the cap).

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

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

2. Discussion

a. AT&T asserts that it would be helpful if CPAP § 11.3 could be amended to include the CPAP Decision language that clarifies the carry-over of Tier 1Y and Tier 2 payments that exceed the monthly cap. AT&T recommends the following language be added to the end of that section:

> In a month when Qwest's total payment is below the monthly cap, any deferred payments plus interest will be due, but only to the extent that the deferred payments do not cause the total monthly payment to exceed the monthly cap. In the event all Tier 1Y and Tier 2 payments cannot be made in any month due to the cap, Qwest will pay Tier 1Y payments first (up to the cap) and then, from the remaining money, pay Tier 2 payments (up to the cap).

b. AT&T's suggested language helps clarify § 11.3 and is adopted.

AA. Request 27

AT&T requests clarification on whether Qwest will include carry-over amounts in the monthly reports it prepares for the CPAP. *AT&T Motion* at 4.

1. Decision

a. Qwest should keep a running record of carry-over amounts on monthly reports.

b. SGAT § 13.1 is modified to reflect this requirement, as follows:

13.1 Beginning 60 days after the Commission's adoption of this CPAP, Qwest will provide the Commission and CLECs opting into the CPAP with a monthly report of Qwest's performance for the PIDs. These reports shall contain any carry-over payment amounts and calculations as well as the current month's information. Qwest will collect, analyze,

and report performance data for these measurements. Qwest will store such data in easy-to-access electronic form for three years after they have been produced and for an additional three years in an archived format. Any failure to follow these requirements shall be treated as a violation of the CPAP integrity requirements discussed in sections 17.5 and 17.8.

2. Discussion

a. AT&T's expects that any payment amounts carried-over to subsequent months due to reaching the monthly cap will be contained in the monthly reports Qwest prepares under CPAP § 13. AT&T would like the Commission to clarify this point.

b. The carry-over amounts will be included in the CPAP § 13 reports.

BB. Request 28

AT&T requests that CLEC may request the raw data used for payment calculations and seek Qwest's assistance in reconciling the information. Qwest shall comply with all such reasonable requests. *AT&T Motion* at 5. *Recommended SGAT* at § 12.3. Qwest states this requested provision is unnecessary and would exacerbate the already onerous penalty provisions of the CPAP. *Qwest response* at 4.

1. Decision

I decline to make the requested modification.

2. Discussion

a. AT&T asserts that the CPAP Decision makes it clear that CLECs may request raw data Qwest used in its calculations and that Qwest must cooperate with the CLEC in reconciling such data. AT&T proposes additional language for

the end of § 12.3 of the CPAP SGAT to clearly state this obligation.

~~a.~~ b. Qwest contends that AT&T's additional proposed language is unnecessary and would exacerbate the already onerous penalty provisions of the CPAP. Qwest states that it is developing a bill format that will provide a breakdown of the various payment amounts and that CLECs can use in combination with the performance reports to verify that Qwest's calculations are correct. Qwest contends that a similar prototype was developed for the multistate QPAP and was provided to the same CLECs participating in this proceeding. No CLEC objected to the format. Further, Qwest states that the format summarizes the total payment amount for each PID and contains a detailed breakdown of the inputs used to calculate the payment amount. The CLEC will have all the pertinent information to replicate the calculations. Also, the CLEC will be able to initiate data reconciliation and, if appropriate, an audit.

~~b.~~ c. I agree with Qwest that the language is unnecessary. AT&T's concerns fall into the hypothetical yet plausible concern category. If actual experience with the CPAP indicated a change is necessary, it can be explored during the six-month review.

CC. Request 29

AT&T requests clarification on the definition of "an additional penalty to Tier 1Y as if the discrepancy was revealed by an audit." AT&T believes that this refers to the $100,000 penalty contained in § 17.12. *AT&T Motion* at 5. *Recommended SGAT* at §§ 13.8, 13.9 and 17.12. Qwest believes that these penalty provisions should be deleted entirely. *Qwest Motion* at 37 and *Qwest Response* at 8-13.

1. Decision

a. AT&T misunderstands the interrelation between §§ 13.8, 13.9 and 17.12.

b. The reference in § 13.8 will be made more accurate to clarify this misunderstanding.

13.8 If a given Qwest-CLEC data reconciliation process forces Qwest to adjust its payment upwards three months in a row, Qwest must pay the additional amount and an additional penalty to Tier 1Y as if the discrepancy was revealed by an audit (see section 14.~~0~~12) for that third month and for each consecutive month that the CLEC reveals additional payments via data reconciliation.

2. Discussion

a. AT&T notes that the CPAP § 13.8 and 13.9 make reference to "an additional penalty to Tier 1Y as if the discrepancy was revealed by an audit (see § 14.0)..." This penalty is undefined, according to AT&T. AT&T believes this reference is meant to direct the reader to CPAP § 17.12 regarding the $100,000 penalty for willful misconduct. AT&T contends that an explicit cross-reference to § 17.12 would be helpful.

b. Qwest asserts that AT&T is mistaken in it interpretation of §§ 13.8 and 13.9. Qwest maintains, as stated in its Motion, that these sections are entirely new and should be deleted in their entirety. However, Qwest states, that while the reference to § 14.0 could have been more precise, namely to § 14.12, the intent is clear: § 14.0 relates to audits and § 14.12 in particular, states that where a mini-audit reveals a discrepancy, Qwest must "pay any applicable payments under the late payment rules." The late payment rules are contained in § 12.4 and provide for double interest on any late payment.

c. AT&T reaches on this one -- too far. The CPAP will be modified to change the reference from § 14.0 to § 14.12 to avoid misunderstanding such as the one under which AT&T labors.

DD. Request 30

AT&T requests clarification on whether the Commission intends to require that any changes to the performance measurement or reporting system, the underlying data, data extraction processes or code tables affecting CLECs be approved by the Commission prior to implementation. AT&T *Motion* at 5.

1. Decision

See Decision Request 2.

2. **Discussion**

a. AT&T asserts that the CPAP Decision states that: "Qwest must obtain Commission approval prior to implementing any change to the performance measurement or reporting system, the underlying data, data extraction processes and code tables if that change will affect the CLECs." This kind of change is addressed in the CPAP SGAT language at § 14.3. However, AT&T asserts that this language makes no reference to Commission approval for such changes. If the Commission intends to approve all such changes after it has gone through the Change Management Process or a procedure established by the Independent Monitor, AT&T contends it would be helpful to add a clarifying statement to that effect in CPAP § 14.3. AT&T suggests that this additional statement read as follows: "Upon completion of either the foregoing processes, Qwest shall submit such change to the Commission for approval."

b. The decision on Request 2 resolves this issue.

EE. Request 31

If Qwest implements a CLEC-affecting change without proper approval, AT&T wants to know what happens to that unapproved change. AT&T suggests the change should be voided. *AT&T Motion* at 5-6. *Recommended SGAT* at § 14.3. Qwest states this suggestion should be rejected because it would result in over-deterrence and lead to wasted efforts and resources. *Qwest Response* at 15.

1. Decision

The unapproved change shall not automatically be voided.

2. Discussion

a. CPAP § 14.3 states that, if Qwest makes a CLEC-affecting change without approval, then it shall pay a $1000 fine to each affected CLEC. AT&T inquires as to what happens to the unapproved change. AT&T believes it would be appropriate for such a change to be voided and for Qwest to be required to follow the appropriate processes to implement the change. AT&T suggests language for § 14.3 to clarify this intent.

b. Qwest asserts that this proposal from AT&T should be rejected because it would result in over-deterrence and lead to wasted efforts and resources. As Qwest discussed in its Motion, the CLEC-affecting standard is vague and puts Qwest in the untenable position of either having: 1) to guess whether a particular change is CLEC-affecting at the risk of incurring hefty penalties ($1,000 per affected CLEC), if the Commission reaches a different judgment; or, 2) having to request approval for virtually any change, which will be time-consuming and could result in Qwest being out of compliance if approval for necessary changes is not quickly received. Qwest asserts that AT&T's suggestion to "void" the unapproved changes exacerbates

the problem. Even if the change is appropriate, Qwest could be required to recalculate its results and payment amounts after the eventual Commission approval, and that would subject Qwest to inaccuracy and late reporting penalties. Qwest states that there is no need to reach such a punitive and inefficient result.

c. I am persuaded by Qwest's response that the CPAP should not adopt a blanket-rule of negating the change. The payment remedy should be an adequate remedy and deterrent to Qwest's making unapproved CLEC-affecting changes. Moreover, the Independent Monitor should deal with these changes on a case-by-case basis rather than prophylactically with a negation rule.

FF. Request 32

AT&T requests the inclusion of language in the SGAT that allows the Independent Monitor or the auditor to broaden the scope of the audit. *AT&T Motion* at 6. *CPAP Order* at 22 and 40. *Recommended SGAT* at § 14.6. Qwest states that to allow the Independent Monitor or the auditor to expand the audit would expose Qwest to potentially onerous and unproductive audits. *Qwest Response* at 14.

1. Decision

Independent Monitor or auditor will not be able to broaden the scope. No modification will be made.

2. Discussion

a. AT&T asserts that two places in the CPAP Order contain language regarding the fact that the scope of the audit may be broadened at the discretion of the Independent

Monitor or the Auditor. CPAP SGAT § 14.6 identifies a minimum set of items that are encompassed by the audit, but does not state that the Independent Monitor and auditor each have the discretion to broaden the scope of the audit. AT&T suggests language be added to § 14.6 to clarify this intent.

b. Qwest counters that AT&T's attempt to eviscerate the standard for audits in § 14.6 should be rejected. Qwest asserts that the recommended CPAP appropriately spells out a concrete standard for the scope of the audit and that this balancing of the scope had its genesis in important policy considerations. In particular, Qwest looks to page 29 of the CPAP Order where it states: "the audit must not be any more intrusive or cumbersome than necessary to achieve" the goal of "accurate reports and pay[ment] [of] appropriate penalties."

c. I agree with Qwest and will hold the CLECs to a "pleading rule" in defining the scope of their audits.

GG. Request 33

AT&T requests additional language be included in the SGAT to clarify that the Independent Monitor may require Qwest to perform a root-cause analysis for repeatedly failing to meet the performance requirements under any given PID. *AT&T Motion* at 7. *Recommended SGAT* at § 17.5.

1. Decision

Independent Monitor will be able to make Qwest perform a root-cause analysis for repeated poor performance. Section 17.5 will be modified as follows:

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

2. Discussion

a. CPAP § 17.5 identifies the initial functions to be performed by the Independent Monitor. AT&T states that, while this list includes several areas of responsibility, it appears to omit an area identified in the CPAP Order on page 60. AT&T wants the Independent Monitor to be able to require Qwest to perform a root-cause analysis when Qwest is penalized on an ongoing basis from any given PID. AT&T proposes language for § 17.5 to clarify this responsibility: "When Qwest is repeatedly penalized for failing to meet the performance requirements under any given PID, the Independent Monitor shall have the authority to require Qwest to perform a root-cause analysis."

b. I agree with AT&T that the Independent Monitor should be empowered to order Qwest to undertake root

cause analysis for repeatedly poor performance. This seems an appropriate and necessary superintending function for the Independent Monitor to have.

HH. Request 34

AT&T proposes additional language to clarify that the six-month review is not limited to the PIDs but rather can have a broader definition. *AT&T Motion* at 8. *Recommended SGAT* at § 18.5. Qwest states that this requested language should be rejected because it disagrees with the Hearing Commissioner's decision to permit the analysis of the "firm" aspects of the plan. *Qwest response* at 17.

1. Decision

a. The six-month review may go beyond PID definitions and may modify "firm" aspects of the plan.

b. The phrase recommended by AT&T will be included in § 18.5 as follows:

18.5 The six-month CPAP review process shall focus on refining, shifting the relative weighing of, deleting, and adding new PIDs; however, such review is not limited to these areas. After the Commission considers such changes through the six-month process, , it shall determine what set of changes should be embodied in an amended SGAT that Qwest will file in order to effectuate these changes.

2. Discussion

a. AT&T states that the CPAP Order, page 68, states that a party may petition for review of the "firm" aspects of the CPAP. This indicates, to AT&T, that a broad review, if appropriate, is available. The recommended SGAT language at § 18.5 states that the focus of the six-month review is the PIDs. AT&T asserts that a phrase should be added to this section to avoid having this language read to imply that other

aspects of the CPAP are off-limits for this review. AT&T proposes: "however, such review is not limited to these areas."

b. Qwest counters that this suggestion by AT&T should be rejected. Qwest disagrees with my decision to permit the possibility of opening "firm aspects of the plan -- and AT&T's proposed language only expands that inappropriate approach and ensures that the six month review as envisioned by the Recommended CPAP will be a wholesale revision of the CPAP."

c. Firm aspects of the CPAP may be reviewed during the six-month review. Such review follows from the nature of the CPAP, and is necessary for the CPAP to remain vital.

d. That said, the six-month reviews will not be an opportunity to reopen and reargue each and every firm element of the CPAP. To the contrary, there is a strong presumption that the "firm" aspects of the CPAP will continue without change. Before the Commission revises a "firm" aspect of the plan, there will have to be clear and convincing evidence of the need to do so.

e. For instance, the Special Master noted that: "[u]nfortunately, no parties have carefully documented the payments necessary to address different types of harms...and thus the Tier IX payments reflect merely a very rough and unrefined approximation of what compensation is owed." *Final Report and*

Recommendation at p. 12. Thus, I could anticipate parties trying to better quantify the commercial harm caused by Qwest's falling short on its performance obligations. By the same token, I would anticipate Qwest will be vigilant to instances of over-enforcement, where the CPAP might unwittingly create arbitrage opportunities for CLECs.

f. It should also be emphasized that general grievances about the CPAP will not constitute clear and convincing evidence warranting its change. Parties arguing to change the CPAP during the six-month review will need to come forward with specific, credible information of the CPAP's in- or over-sufficiency.

~~H.~~g. I recognize the reliance interests that are and will be built up in regard to the CPAP. These reliance interests will not be trifled with by the Commission during the six month reviews. However, as I have noted before, the CPAP is, at best, an informed guess about setting the proper incentives for keeping the Colorado local exchange market open. Actual experience with the CPAP will inform the Commission where it may be over- or under-enforcing the obligations of the Act. Where this experience demonstrates the clear and convincing need for changes to the CPAP, they will be enacted.

II. Request 35

WorldCom requests clarification regarding the penalties

that are excluded from the $100 million cap. More specifically, WorldCom requests the addition of exclusion language for the late reporting penalty, the penalty omitting or inaccurately reporting changes to software and data structure of the CPAP, and the penalty for not obtaining approval for CLEC-affecting changes. *WorldCom Motion* at 1-2. *Recommended SGAT* at § 13.3, 14.2 and 14.3.

1. Decision

I agree that WorldCom's suggested language helps clarify what penalties are excluded. The following language will be added to the CPAP SGAT:.

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

14.2 Qwest shall be allowed to change the software and data structure that underlies the performance measurement and reporting system in ways that are transparent to the CLECS, but shall promptly record these changes on the change log so that they may factor into the process by which the scope of the audit is determined. Omitted or inaccurate changes shall result in Qwest being required to pay a $2500 fine, plus interest at the commission prescribed deposit rate accrued from the time the change took effect. The payment shall go to the Tier 2 Special Fund and does not count against the cap described in Section 11.1.

14.3 Qwest shall obtain approval for any CLEC-affecting changes to the performance measurement and reporting system. If a redesigned Change Management Process (CMP) process is formally in place and approved by the industry, Qwest shall follow the change management processes thus set forth. If a redesigned CMP process is not in place, Qwest will be allowed to obtain approval for the change from the CLECS via the independent monitor. The independent monitor shall then be responsible for guiding the change management process. If Qwest fails to obtain approval for any CLEC-affecting change, it shall pay a $1000 fine for each affected CLEC. This fine shall be paid directly to the affected CLECS which payment does not count against the cap described in Section 11.1.

2. Discussion

a. WorldCom asserts that, in many sections of the recommended SGAT, the language provides for penalties that are excluded from the $100 million cap. For example, any

penalties imposed directly by the CPAP for failure to report, failure to report timely, or failure to report accurately are excluded from the cap. The plan further states that, if the Independent Monitor determines that Qwest did not obtain necessary approval or did not notify all affected CLECs, Qwest will be fined $1000 per affected CLEC, payable to each affected CLEC. However, in §§ 13.3, 14.2 and 14.3 there is no specific language that states whether payments under these sections count or do not count against the cap. WorldCom suggests language in each of these sections that makes that intent explicit.

b. The suggested language helps clarify what penalties count against the cap and what penalties do not. §§ 13.3, 14.2 and 14.3, in Attachment A, now make clear that these penalties do not count against the cap.

JJ. Request 36

WorldCom requests that the Hearing Commissioner wait the results of the technical conference to determine if any further changes to the PIDs are necessary for the CPAP. *WorldCom Motion* at 3-4. Qwest states in its response that there is no reason to reopen the issues on which PIDs are included in the plan. *Qwest Response* at 19.

1. Decision

This request to modify is denied.

2. Discussion

a. WorldCom states that the CPAP is built on detailed Performance Indicator Definitions both from the PAP and

process and ordered by this Commission. On October 17, 2001 a technical conference was held to address, inter alia, the PIDs, including background information on the development and publishing of the PIDs; relevant Colorado-specific measures; and the potential need for additional Colorado-specific PIDs. WorldCom suggests that the Hearing Commissioner should wait until after the technical conference to determine the final list of PIDs that should be incorporated into the CPAP.

b. Qwest responds that this suggestion by WorldCom is simply one more attempt to have one more run at persuading the Hearing Commissioner to include additional PIDs in the plan and that it should be rejected. Qwest states that the parties have fully briefed the issues related to which PIDs should be included in the plan, and there is no reason to reopen those issues.

c. The CPAP needs finality. Excepting the modifications in this Order, that finality came from Decision No. R01-997-I. The next opportunity to take up the PIDs will come at the six-month review.

KK. Request 37

WorldCom requests clarification on the Hearing Commissioner's phrase "all other conditions have been met" in reference to his recommendation to the Commission that it recommend to the FCC that Qwest's entry into the long distance market is consistent with the public interest requirement of U.S.C. § 271 (d)(2)(B). WorldCom Motion at 4. *CPAP Order* at page 14.

1. **Decision**

This Commission will perform all FCC-required analysis in making its recommendation under 42 U.S.C. § 271(d)(2)(B).

2. **Discussion**

a. The CPAP Order, page 14, states that if Qwest implements the CPAP by adopting the attached recommended SGAT language -- and assuming all other conditions have been met -- I will recommend to this Commission that it recommend to the FCC that Qwest's entry into the long distance market is consistent with the public interest requirement of 42 U.S.C. § 271 (d)(2)(B). WorldCom assumes that the Hearing Commissioner's reference to "all other conditions have been met" is not limited to the § 271 14 point checklist items, but also includes issues related to the general terms and conditions of the SGAT as well as evidence presented in the public interest workshops. WorldCom seeks clarification of this ruling, specifically that Qwest could incorporate the CPAP into its SGAT and still fail the public interest requirements because of evidence presented in the public interest workshops.

b. This Commission's recommendation to the FCC will include all relevant analysis for compliance with § 271.

LL. Request 38

WorldCom requests language be added to the SGAT itself in §

20.0 that includes some of the salient provision of the CPAP. *WorldCom Motion* at 5-6. Qwest responds that it will provide a cross-reference in § 20, but that no other language is necessary or advisable. *Qwest Response* at 18-19.

1. Decision

I agree that just adding a cross-reference is advisable.

2. Discussion

a. WorldCom states that Qwest should be directed to reference the CPAP in § 20 of its SGAT and attach the CPAP as an exhibit to the SGAT. WorldCom proposes specific language for § 20 that includes some of the salient provisions from the CPAP.

b. Qwest counters that, at the appropriate time, it will file an amended SGAT with a provision in § 20 cross-referencing the CPAP contained in Exhibit K. Qwest states that no additional language is necessary or advisable. To put any substantive language in § 20 would be redundant with the CPAP and thus create confusion.

c. The addition of a cross-reference to § 20 makes sense. Any additional language, however, would be superfluous and create the possibility of confusion. The SGAT § 20.0 shall be amended to cross-reference the CPAP Exhibit.

MM. Request 39

WorldCom requests that the Commission allow an offending

CLEC to request mini-audits during the six-month moratorium by demonstrating to the Independent Monitor "good cause" for allowing such a mini-audit. *WorldCom Motion* at 6-7. Qwest responds that this request should be rejected because the provision is already generous to the CLECs. *Qwest Response* at 14.

1. Decision

The mini-audit rights will remain as-is.

2. Discussion

a. The CPAP Order states that, if a mini-audit fails to reveal any changes to Qwest's payment calculations, the CLEC is prohibited from initiating any mini-audits in the following six months. WorldCom asserts that the Commission should allow an offending CLEC to request mini-audits during the six-month moratorium by demonstrating to the Independent Monitor "good cause" for allowing such a mini-audit.

b. Qwest asserts that this recommendation should be rejected. Qwest states in its response that the moratorium recommended by the Hearing Commissioner is already substantially more generous to the CLECs than the provision recommended by the Special Master. The Hearing Commissioner has permitted CLECs to continue to seek data reconciliation and to use the dispute resolution process to seek a mini-audit if Qwest fails to act in good faith in a data reconciliation. Qwest argues that the point of the moratorium is to deter CLECs from requesting frivolous mini-audits. If WorldCom's proposal is

adopted the moratorium will not be a moratorium at all and thus will have no deterrent effect on CLECs.

c. The existence of the mini-audit process acknowledges the need for CLECs to make sure they have accurate information from Qwest. The moratorium provision for frivolous mini-audits recognizes the inherent moral hazard to granting CLECs this unilateral right. I am satisfied with the current balance these respective provisions strike.

NN. Request 40

WorldCom request that the exception of *force majeure* be defined as already contained in the SGAT at § 5.7. *WorldCom Motion* at 7. Qwest believes the most straightforward approach is a stand-alone provision for *force majeure* without any cross-reference back to the SGAT. *Qwest Response* at 16-17.

1. Decision

The language from SGAT § 5.7 will be cross-referenced in CPAP § 15.1 as follows:

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

Force majeure, as defined ~~Qwest's retail tariffs~~ in SGAT § 5.7 as to benchmark standards, but not as to parity submeasures;

2. Discussion

a. WorldCom states that under § 15.1 of the recommended SGAT, Qwest may seek a waiver of the obligation to make payments pursuant to this CPAP by seeking an exception from

the Independent Auditor on certain grounds, including *force majeure*. WorldCom asserts that, rather than referring to a *force majeure* provision defined in Qwest's tariffs, the Commission should rely upon the *force majeure* provision already contained in the SGAT at § 5.7. This language was developed in the § 271 workshop process, and the parties reached consensus. WorldCom states it would be logical to cross-reference the *force majeure* language in the SGAT and that it is readily available to CLECs.

b. Qwest believes that the most straightforward approach to the CPAP is a stand-alone provision. Such a stand-alone provision would eliminate the need for any cross-referencing and would allow the CPAP to function as a self-contained document. Qwest states that given the large, self-executing payments in the CPAP, it would be inappropriate to subject Qwest to an overly-narrow force majeure clause. The proposed *force majeure* language identifies issues that legitimately affect Qwest's ability to meet service obligations and affect the fairness of making the significant self-executing payments.

c. The language from SGAT § 5.7 will be cross-referenced in the CPAP. SGAT § 5.7 *force majeure* language has already been agreed-to by the parties.It would seem only to new

confusion to have different force majeure definitions in the main SGAT and the CPAP.

OO. Request 41

Opt-in does not require approval, just requires need to report to Commission per other Commission rules. CPAP Order at 23.

1. Decision

I raise this issue sua sponte as an advisory matter. CLECs that want to opt-in to the CPAP need not apply for approval. A CLEC can simply notice opt-in through a CSR 7?P-44-6.

PP. Request 42

Qwest shall include two appendices to the SGAT CPAP exhibit. The first appendix, A, shall be the list of submeasures included in the CPAP. The second appendix, B, shall be the Performance Indicator Definitions (PIDs) for all submeasures in the Plan.

1. Decision

For CPAP PIDs already contained in the Qwest SGAT Exhibit B reserved for the Service Performance Indicators, Qwest does not need to duplicate PIDs contained in SGAT Exhibit B, but shall provide a list with the appropriate cross-reference to CPAP Appendix B. For PIDs that are specific to the CPAP, Qwest must include the actual PID in Appendix B.

IV. ORDER

A. It is Ordered That:

1. Before receiving a favorable recommendation on § 271 compliance, Qwest will implement the CMP consistent with this Order and Attachment A, including Appendices A and B, hereto. Attachment A contains the actual CMP language to be implemented for this Commission favorably to recommend § 271 compliance. The recommended CMP language in Attachment A reflects decisions from the original CMP Order, as well as any modifications ordered here.

2. Qwest Corporation's Motion for Leave to File Response to Motions to Modify CMP Decision One Day Late on October 17, 2001 is granted. Qwest's Response to Motions to Modify was considered in this Order.

3. Qwest's Motion for Leave to Supplement Record is denied.

4. Qwest shall file the first CMP audit report on or before the last business day of the month following the November 30, 2001, CMP filing.

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

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

Acting Commissioners

COLORADO PERFORMANCE ASSURANCE PLAN
RECOMMENDED SGAT LANGUAGE

1.0 Introduction

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

2.0 Plan Structure

2.1 The CPAP is a tiered remedy plan. Qwest shall be subject to self-executing payments to CLEC for Tier 1 submeasures, identified in Appendix A, which generate both Tier 1X and 50% of Tier 1Y payments (described in sections 7.0 and 8.0). Qwest shall be subject to self-executing payments to the Tier 2 Special Fund for the following: (i) Tier 2 submeasures identified in Appendix A, (ii) 50% of Tier 1Y payments, and (iii) payments for missing Tier 1A or Tier 1B submeasures by more than 50% (described in section 10.3).

3.0 Performance Measurements

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

4.0 Statistical Methodology

4.1 Qwest will be in conformance with benchmark submeasures when the monthly performance result equals or exceeds the benchmark. If a higher value means better performance, and when the monthly performance result equals or is less than the benchmark if a lower value means better performance.

4.2 For parity submeasures, Qwest uses a statistical test, namely the "Modified z test," for evaluating the difference between two means (i.e., Qwest and CLEC service or repair intervals) or two percentages (e.g., Qwest and CLEC percentages) to determine whether a parity condition exists between the results for Qwest and CLEC. The modified z-test shall be applicable if the CLEC sample size is greater than or equal to 30 for a given submeasure. For testing submeasures for which the sample size is less than 30, Qwest will use a permutation test to determine the statistical significance of the difference between Qwest and CLEC results.
The formula for determining parity using the z-test is:

$$z = \frac{\text{Diff}}{\text{Sigma}}$$

Where:

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

M_{QWEST} = Qwest average or proportion

M_{CLEC} = CLEC average or proportion

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

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

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

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

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

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

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

If the fraction is greater than α (alpha), the significance level of the test, the hypothesis of no difference is not rejected, and the test is passed. Alpha = 0.05. For individual month testing for performance measurements involving LIS trunks and DS-1 and DS-3 that are Unbundled Dedicated Interoffice Transport, Resale, or Unbundled Loops (performance measurements: OP-3D/E, OP-4D/E, OP-5, OP-6-4/5, MR-5A/B, MR-7D/E, and MR-8) with sample sizes of 1-10, alpha = 0 .15.

5.0 Critical Z-Value

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

TABLE 1: CRITICAL Z-VALUE

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

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

6.0 Tier 1A Parity Calculations

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

TABLE 2: VARIANCE FACTORS

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

CLEC volumes	MR5-LIS	MR5-UBL[2]	MR6-LIS	MR6-UBL	MR7[3]	MR-8[3]	PO-9b	NI-1[4]
1-5	18	20	180	300	20	20	14	0.64
6-15	16	16	180	240	16	16	12	0.64
16-22	15	15	150	220	15	15	10	0.64
23-30	14	14	130	200	14	14	9	0.64
31-40	13	12	110	160	12	12	8	0.64
41-60	11	10	90	150	10	10	7	0.64
61-90	9	8	70	140	8	8	6	0.53
91-150	7	6	60	130	6	6	5	0.42
151-300	5	4	50	120	4	4	4	0.31
301-500	4	3	40	110	3	3	3	0.23
501-1000	3	2	30	100	2	2	2	0.17
1001-1500	2	1	20	50	1	1	1	0.11
1501-2000	1	0.5	10	25	0.5	0.5	0.5	0.05
2000+	0	0	0	0	0	0	0	0
Measure Type Modification	% Subtract	% Subtract	Mins Add	Mins Add	% Add	% Add	% Subtract	% Add

[1] Except Analog, 2-wire non-loaded, and ADSL qualified loops.
[2] MR-5 UBL's variance table also applies for MR3-UBL calculations.
[3] MR-7 & 8's column applies both for LIS trunks and Unbundled Loops (UBL)
[4] On NI-1, the variance table only applies in instances where the parity comparison applies – i.e., Qwest's blocking rates exceed 1%, as the appropriate comparison for that measurements is the retail analog or a 1% standard, whichever is higher.

6.2 For any performance submeasure where the CLEC volume is ten or below, Qwest shall be allowed to miss one occurrence before being subject to any payments for non-conforming performance. That is, if CLEC volume is ≤ 10 and the number of occurrences is ≤ 1 there is no payment made.

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

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

For percentage submeasures, the CPAP uses the following formula:

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

For interval submeasures, the CPAP uses the following formula:

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

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

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

TABLE 3: PER OCCURRENCE PAYMENT AMOUNTS

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

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

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

The severity multiplier for each measure is obtained by calculating the difference between the CLEC result and the standard performance for that measure, and then looking up the multiplier on Table 4. For Tier 1A, the standard performance is the average of prior six month retail performance with the variance calculation. For Tier 1B and 1C, the standard performance is the current month retail performance. For PIDs that do not have retail equivalents, the benchmark targets shall be used.

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

TABLE 4

For Percentage measures		For Interval Measures	
Between	Multiplier	CLEC Performance*	Multiplier
0-4.99%	1	$1 < x < 2$	1.1
5%-9.99%	1.1	$2 \leq x < 3$	1.2
10-14.99%	1.2	$3 \leq x < 4$	1.3
15-19.99%	1.3	$4 \leq x < 5$	1.4
20-24.99%	1.4	$5 \leq x < 6$	1.5

25-29.99%	1.5	6 ≤ x < 7	1.6
30-34.99%	1.6	7 ≤ x < 8	1.7
35-39.99%	1.7	8 ≤ x < 9	1.8
40-44.99%	1.8	9 ≤ x < 10	1.9
45-49.99%	1.9	10 ≤ x < 11	2.0
50-54.99%	2.0	11 ≤ x < 12	2.1
55-59.99%	2.1	12 ≤ x < 13	2.2
60-64.99%	2.2	13 ≤ x < 14	2.3
65-69.99%	2.3	14 ≤ x < 15	2.4
70-74.99%	2.4	15 ≤ x < 16	2.5
75-79.99%	2.5	.	.
80-84.99%	2.6	.	.
85-89.99%	2.7	.	.
90-94.99%	2.8	39 ≤ x < 40	4.9
95%-100%	2.9	40 or over	5

*calculated in days or hours, depending on measure

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

8.0 Tier 1Y: Calculation of Payments

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

8.2 The second continuous month of non-conforming performance for a particular submeasure will require the total per occurrence payment before severity to be multiplied by two. On the third continuous month, the total per occurrence payment before severity will be multiplied by three. The escalation will proceed along these lines until Qwest's wholesale performance meets the relevant standard. At that point (i.e., on the first acceptable month of performance following non-conforming

performance), Qwest's per occurrence payment shall "step down" to the next level. If Qwest's next month's performance does not meet the applicable standard for the same submeasure, the payment would remain at the stepped down level and would then step up again if the non-conforming performance continued the following month. Alternatively, if Qwest's performance for the submeasure continued to conform to the standard, the per occurrence payment would step down each month until it reached the original per occurrence payment.

9.3 Tier 1Y payments shall be divided between the CLEC and the Tier 2 Special Fund. Fifty percent (50%) of Tier 1Y payments shall be paid to the CLEC and 50% of Tier 1Y payments shall be paid to the Special Fund a set forth in section 10.4.

9.0 Minimum Payments to CLEC

9.1 For smaller CLECs, there is a minimum per measure payment for Tier 1A of $600 and Tier 1B of $300. If the otherwise applicable payment is below this amount, the minimum payment shall apply. If the measure is one which falls into Tier 1A for some products, and Tier 1B for other products, and if any of the violations incurred that month for that measure were in Tier 1A, then the Tier 1A minimum payment shall apply rather than the 1B payment. In the case of no payment owed, the minimum payment would not apply.

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

10.0 Tier 2 Payments to the Special Fund

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

10.2 Fifty percent of the Tier 1Y payments shall be considered Tier 2 payments and made to the Tier 2 Special Fund.

10.3 When an individual submeasure in either Tier 1A or Tier 1B, using CLEC aggregate results, is missed by at least 50% of the applicable standard for two or more consecutive months, Qwest shall pay to the Tier 2 Special Fund $25,000 for each Tier 1A submeasure and $8,000 for each Tier 1B submeasure.

10.4 All Tier 2 payments (including the 50% of the Tier 1Y payments, any special payments assessed by the Monitor, and the 50% share of payments for inaccurate

reporting not self-corrected by Qwest) shall be paid into a special fund that Qwest shall keep in an interest-accruing bank account ("Tier 2 Special Fund" or "Special Fund").

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

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

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

11.6 Cap on Tier 1 and Tier 2 Payments

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

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

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

> If the total payments (Tier 1X, 1Y, 2) do not exceed the cap, Qwest shall make all payments.
>
> If the total payments (Tier 1X, 1Y, 2) do exceed the cap, Qwest shall pay all Tier 1X payments (even if they alone exceed the cap). Other than Tier 1X and payments specified in section 11.2, Qwest shall not make payments in excess of the monthly cap. The balance in excess of the cap shall roll forward and be paid when Qwest's total monthly penalties are below the cap, whenever that time should occur (even if that should take longer than a year).
>
> In a month when Qwest's total payment is below the monthly cap, any deferred payments plus interest will be due, but only to the extent that the deferred payments do not cause the total monthly payment to exceed the

monthly cap. In the event all Tier 1Y and Tier 2 payments cannot be made in any month due to the cap, Qwest will pay Tier 1Y payments first (up to the cap) and then, from the remaining money, pay Tier 2 payments (up to the cap).

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

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

12.6 If Qwest payments equal or exceed the annual cap for two years in a row or 150% of the annual cap in a combination of two consecutive months, the Commission shall have the authority to open a proceeding to request Qwest to explain the non-conforming performance and show that it did not result from Qwest's failure to avoid reasonably foreseeable risks. If the Commission concludes that Qwest failed to act in a prudent manner to avoid reasonably foreseeable consequences, the Commission may raise the cap to the amount which Qwest would have paid in the higher of the prior two years, ask the FCC to halt Qwest's long distance marketing authority for a particular interval, levy a fine, and/or take other appropriate action.

12.0 Timing and Form of Payment

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

12.2 All payments shall be in cash. Qwest shall be able to offset cash payment to CLEC with a bill credit applied against any non-disputed charges that are more than 60 days past due.

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

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

13.0 Reporting

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

13.2 Qwest shall deliver the individual monthly report to CLEC and the aggregate state report to the Commission and the Office of Consumer Counsel via email on or before the last business day of each month following the relevant performance period.

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

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

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

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

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

13.8 If a given Qwest-CLEC data reconciliation process forces Qwest to adjust its payment upwards three months in a row, Qwest must pay the additional amount and

an additional penalty to Tier 1Y as if the discrepancy was revealed by an audit (see section 14.12) for that third month and for each consecutive month that the CLEC reveals additional payments via data reconciliation.

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

14.0 Audits of Performance Results

14.1 Qwest shall carefully document any and all changes that Qwest makes to the Performance Measurement And Reporting System. This change log shall be displayed on the CPAP web site. The Performance Measurement And Reporting System is defined to include at least: the data collection programs, the underlying data and data structures (including codes tables), the data extraction programs, the report generation programs, the underlying calculations, the report formatting, and the report distribution software. This change log shall contain, at a minimum, a detailed description of the change (in plain English), the effects of the change, the reason for the change, the dates of notification and of implementation, and whether the change received Commission approval.

14.2 Qwest shall be allowed to change the software and data structure that underly the Performance Measurement And Reporting System in ways that are transparent to the CLECs, but shall promptly record these changes on the change log so that they may factor into the process by which the scope of the audit is determined. Omitted or inaccurate changes shall result in Qwest being required to pay a $2500 fine, plus interest at the Commission prescribed deposit rate accrued from the time the change took effect. The payment shall go to the Tier 2 Special Fund and does not count against the cap described in Section 11.1.

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

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

Qwest will make an application-like filing with the Independent Monitor for changes that have not been agreed to at an industry forum either

because agreement couldn't be reached, or Qwest did not present the change to the forum. Parties will be allowed to comment and a record will be established. The Independent Monitor will then issue a formal decision on whether the change will be allowed as part of the CPAP.

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

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

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

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

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

14.8 The auditor shall be chosen by the Commission, with input from Qwest, CLECs, and other interested persons. The auditor shall perform all of the auditing functions described above for the first three years. Any interested person may petition the Independent Monitor to disqualify the auditor based upon gross neglect of

delay, incompetence, or a significant conflict of interest. The auditor shall respond to the petition within a reasonable time. The Independent Monitor shall then be authorized, in its discretion, to open a proceeding to consider the petition for disqualification.

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

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

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

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

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

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

15.0 Waiver of Payments

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

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

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

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

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

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

16.0 Limitations

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

interconnection agreement between the CLEC and Qwest which adopts the provisions of this CPAP.

16.3 Qwest's agreement to implement these enforcement terms, and specifically its agreement to make any payments hereunder, will not be considered as an admission against interest or an admission of liability in any legal, regulatory, or other proceeding relating in whole or in part to the same performance. CLEC may not use (1) the existence of this enforcement plan or (2) Qwest's Tier 1 or Tier 2 payments as evidence that Qwest has discriminated in the provision of any facilities or services under Sections 251 or 252 or has violated any state or federal law or regulation. Qwest's conduct underlying its performance measures, however, is not made inadmissible by this SGAT term. By accepting this performance remedy plan, CLEC agrees that Qwest's performance with respect to this remedy plan may not be used as an admission of liability or culpability for a violation of any state or federal law or regulation. (Nothing herein is intended to preclude Qwest from introducing evidence of any Tier 1 payments under these provisions for the purpose of precluding additional payments or offsetting any payments against any other damages or payments a CLEC might recover.) The terms of this paragraph do not apply to any proceeding before the Commission or the FCC to determine whether Qwest has met or continues to meet the requirements of section 271 of the Act.

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

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

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

16.6 Tier 1X payments are in the nature of liquidated damages. Before CLEC shall be able to file an action seeking contract damages that flow from an alleged failure to perform in an area specifically measured and regulated by the CPAP, CLEC must first seek permission through the Dispute Resolution Process set forth in section 17.0 to proceed with the action. This permission shall be granted only if CLEC can present a reasonable theory of damages for the non-conforming performance at issue and evidence of real world economic harm that, as applied over the preceding six months, establishes that the actual payments collected for non-conforming

performance in the relevant area do not redress the extent of the competitive harm. If CLEC can make this showing, it shall be permitted to proceed with this action. Any damages awarded through this action shall be offset with payments made under this CPAP. If the CLEC cannot make this showing, the action shall be barred. To the extent the CLEC's contract action relates to an area of performance not addressed by the CPAP, no such procedural requirement shall apply.

16.7 If for any reason CLEC agreeing to this CPAP is awarded compensation for the same harm for which it received payments under the CPAP, the court or other adjudicatory body hearing such claim may offset the damages resulting from such claim against payments made for the same harm.

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

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

17.0 Dispute Resolution Process

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

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

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

17.4 If the Independent Monitor position is vacant at any time, the parties shall file actions with the Chief ALJ, who shall then be responsible for fulfilling the duties of the Independent Monitor or designating another ALJ to do so. If the Commission decides during the CPAP Revision Process that it wishes to assign some or all of the

Independent Monitor's duties to either the Commission ALJs or to Commission staff persons, it shall be free to do so and the contract with the Monitor shall so provide.

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

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

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

¶ 9 In lieu of how the expedited resolution procedure would be modified (at least as an initial matter), the PAP's dispute resolution process shall not be resorted to unless and until the problem is raised at the VP-VP level two weeks before a dispute is submitted to the Independent Monitor. Then, the complainant must give the Independent Monitor a statement including specific facts that the complainant engaged (or attempted to engage) in good faith negotiations to resolve the

disagreement that, and despite these negotiations, the parties failed to resolve the [illegible]

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

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

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

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

[illegible] Effective Date, Reviews and Termination

[illegible] The effective date of the CPAP will be the date on which Qwest obtains § 271 approval from the FCC for Colorado.

[illegible] Reviews of the CPAP occur every six months, commencing with the effective date of the CPAP. Under the six-month CPAP review process, a Commission staff person shall submit a report to the Commission at the five month mark to recommend

a series of changes, if any, to the CPAP, noting which of those were agreed to by all parties and which were contested.

13.3 In order to prepare the report, the relevant Commission staff person (along with any technical advisor the Commission may choose to retain and pay from the Special Fund) shall request feedback on possible changes and meet with parties (individually or together) and the Independent Monitor beginning no later than 30 days into the relevant cycle.

13.4 After the Commission staff person submits a report to the Commission on any suggested changes, parties shall have two weeks to file exceptions to that report. The Commission will rule within four weeks of receiving the parties' exceptions on what changes, if any, should be instituted.

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

13.6 The six-month CPAP review process shall focus on refining, shifting the relative weighting of, deleting, and adding new PIDs; however, such review is not limited to these areas. After the Commission considers such changes through the six-month process, it shall determine what set of changes should be embodied in an amended SGAT that Qwest will file in order to effectuate these changes.

13.7 Parties may suggest more fundamental changes to the plan; but, unless the suggestion is highly exigent, the suggestion shall either be declined or deferred until the three-year review.

13.8 If CLEC or Qwest repeatedly or blatantly suggests modifications to the plan solely for its own benefit, and not for the effectiveness of the plan itself, that Party may be subject to sanctions at the discretion of the Commission.

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

13.10 Thirty (30) months after § 271 approval, the Commission shall initiate a comprehensive review of the CPAP (the "Three Year Review") with the assistance of an outside, independent expert. Such expert shall be paid from the Special Fund.

When there are insufficient funds in the Special Fund for this purpose, Qwest shall advance the funds. The Three Year Review shall:

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

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

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

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

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

19.0 Voluntary Performance Assurance Plan

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

APPENDIX A

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

TIER 1A

INTERCONNECTION

Trunk Blocking

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

Provisioning

For LIS Trunks:

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

Maintenance and Repair

For LIS Trunks:

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

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

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

SWITCHING CUSTOMERS

For Unbundled Loops:

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

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

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

COLLOCATION

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

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

40+	$300	40+	$1000

ACCESS TO LOCAL LOOPS

Pre-Order

For Unbundled Loops:

PO-5A-1(b)	IMA Electronic LSRs	*FOCs On Time (Percent)*
PO-5A-2(b)	EDI Electronic LSRs	*FOCs On Time (Percent)*
PO-5B-1(b)	IMA Electronic/Manual LSRs	*FOCs On Time (Percent)*
PO-5B-2(b)	EDI Electronic/Manual LSRs	*FOCs On Time (Percent)*
PO-5C-(b)	Fax Manual LSRs	*FOCs On Time (Percent)*
PO-9B		*Timely Jeopardy Notices (Percent)*

Provisioning

For Unbundled Analog Loops:

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

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

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

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

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

For Unbundled DS1-Capable Loops:

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

For Unbundled ISDN-Capable Loops:

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

For Unbundled ADSL-Qualified Loops:

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

For Unbundled Loops of DS3 and Higher:

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

CONTINUATION

[6]

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

For Sub-Loop Unbundling:

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

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

For Unbundled Loop Conditioning:

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

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

For Line Sharing/Line Splitting:

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

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

Maintenance and Repair

For Unbundled Analog Loops:

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

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

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

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

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

For Unbundled DS1-Capable Loops:

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

For Unbundled ISDN-Capable Loops:

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

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

For Unbundled ADSL-Qualified Loops:

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

For Unbundled Loops of DS3 and Higher:

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

For Sub-Loop Unbundling:

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

For the MR-3, MR-6, MR-7, and MR-8 measures, the relevant analog product shall be ISDN-BRI.

For Line Sharing/Line Splitting:

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

For the MR-3, MR-6, MR-7, and MR-8 measures, the relevant analog product shall be Qwest's DSL service, which is also provisioned and treated on a line shared basis.

TIER 1B

Pre-Order

For LSR:

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

For Resale and UNE-P:

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

For LNP:

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

For LIS Trunks:

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

For Billing:

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

For Non-Designed Services:

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

For Unbundled Loops:

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

Provisioning

For Residential Single Line Service:

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

For Business Single Line Service:

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

For Centrex:

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

For Centrex 21:

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

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

For PBX Trunks:

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

For Basic ISDN:

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

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

For UNE-P (POTS):

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

For Qwest DSL:

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

For Primary ISDN:

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

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

For DS0:

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

For DS1:

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

For DS3 and Higher:

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

For Frame Relay:

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

For UDIT – DS1 Level:

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

For UDIT – Above DS1 Level:

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

For E911/911 Trunks:

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

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

Maintenance and Repair

For Residential Single Line Service:

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

For Business Single Line Service:

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

For Centrex:

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

For Centrex 21:

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

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

For PBX Trunks:

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

For Basic ISDN:

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

For UNE-P (POTS):

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

For Qwest DSL:

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

For Primary ISDN:

MR-3D	*All Troubles Cleared within 24 Hours (Percent)*

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

For DS0:

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

For DS1:

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

For DS3 and Higher:

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

For Frame Relay:

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

For UDIT – DS1 Level:

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

For UDIT – Above DS1 Level:

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

For E911/911 Trunks:

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

TIER 1C

Billing

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

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

TIER 2

Continuing Non-Conforming Performance

See Section 10.3.

Work Completion Timeliness

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

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

Performance	Monthly Payment
1-1.49 hrs	$10,000
1.5-1.99 hrs	$15,000
2-2.49 hrs	$20,000

2.5-2.99 hrs	$25,000
3-3.49 hrs	$30,000
3.5-3.99 hrs	$35,000
4-4.49 hrs	$40,000
4.5-4.99	$45,000
5+	$50,000

Regionwide Wholesale Support Systems

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

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

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

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

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

PO-1	2 sec or less	$1,000
	>2 sec to 5 sec	$5,000
	>5 sec to 10 sec	$10,000
	> 10 sec	$15,000
OP-2/MR-2	1% or less	$1,000
	>1% to 3%	$5,000
	>3% to 5%	$10,000
	>5%	$15,000

Handling of Local Service Requests

PO-10 *LSR Accountability (Percent)*

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

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

Electronic Flow Through Rates

For Resale:

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

For Unbundled Loops:

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

For LNP:

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

For UNE-P (POTS):

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

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

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

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

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

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

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

Change Management Requirements

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

For failing to notify competitors of the first announcement on time, Qwest shall pay a payment of $200/per day. For failing to notify competitors of subsequent release dates

(i.e., the final requirements and final release notes), Qwest shall pay a payment of $50/day.

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

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

PO-18(CPAP) *Interface Versions Availability (Percent)*

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

APPENDIX B

(PERFORMANCE INDICATOR DEFINITIONS – TO BE SUPPLIED BY QWEST)

SUPPLEMENTAL REPORT AND RECOMMENDATION OF THE SPECIAL MASTER TO THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

DOCKET NO. 01I-041T

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

As requested by the Hearing Commissioner, I asked for briefing from and held a series of meetings with all interested parties as part of a limited remand to refine the proposed Colorado Performance Assurance Plan (PAP or Plan). Through this process, I worked towards a greater understanding of the four issues specified in the Hearing Commissioner's Order and identified a series of other implementation issues that warrant the Hearing Commissioner's attention. This Supplemental Report and Recommendation thus reflects my effort to develop a rough consensus and a sound approach on each of these issues. The six parts to this report address (I) Requirements for Data Management Processes; (II) Change Management Requirements; (III) Assorted Implementation Issues; (IV) The Escalation Function; (V) The "Special Access Issue"; and (VI) The Changeability of the PAP.

I. Requirements for Processes Used to Generate Data Measurement, Collection, and Reporting

The PAP's ability to ensure non-discriminatory wholesale performance relies on an effective "measurement system." By "measurement system," I mean all of the functions and processes necessary to enable Qwest to collect, manage, and report data regarding the wholesale performance governed by the PAP as well as the relevant retail performance results that are used to provide a parity measure -- i.e., those that set the standard for non-discriminatory performance. To that end, Liberty Consulting conducted an audit to ensure that Qwest's measurement system can collect and report reliably the relevant data as of the date of the audit's completion. Consequently, any changes to Qwest's measurement system after the audit's completion have the potential to alter its reliability, particularly because some changes may alter Qwest's measurement system such that a later audit could not reconstruct what reports would have been generated under the old (that is, an unchanged) model.

In considering the appropriate regulatory oversight of Qwest's measurement system, the Commission must be mindful not to restrict unnecessarily Qwest's flexibility in managing ongoing system development. As an initial matter, it bears mention that the method that Qwest uses to collect data is, by definition, internal to Qwest and does not

impose any direct burden on CLECs. To the extent that changes would be "CLEC-affecting," as defined by any Commission-approved change management rules, those changes should be addressed under the approach outlined in Part II. As for internal systems changes, however, Qwest shall need, from time-to-time, to modify its measurement system in any number of ways that will enhance its efficiency. If the Commission were to oversee all such changes through a "pre-clearance procedure," that could impede the efficiency and effectiveness of Qwest's measurement system. Nonetheless, for the reasons noted above, it is clear that the Commission must maintain some oversight to ensure that Qwest's system is reliable.

Under the language presently used in the PAP, Qwest must seek approval for any changes to its measurement system that are "CLEC affecting."[1] In challenging this approach, Qwest suggests that the concept of "CLEC affecting" leaves open substantial questions as to the extent of its flexibility to change its measurement system. To address this concern and to ensure an effective measurement system, I suggest a two-pronged approach. Under the first prong, which governs system changes for which the relevant performance data can be replicated under the old approach (i.e., the *status quo ante*), Qwest should not be subject to any pre-clearance requirement. Rather, Qwest shall be required merely to note all changes on a publicly available website. In addition, the Commission-approved auditor shall, at the appropriate interval, evaluate all changes made to Qwest's measurement system to decide which, if any, should be scrutinized through a process that entails a reconstruction of the data that would have been reported under the prior approach.

Under the second prong, for changes that would alter Qwest's measurement system in a manner whereby the relevant data could not be reconstructed under the prior approach (i.e., a fundamental change to its measurement system), I recommend a two-step procedure. First, before making any proposed "fundamental changes," Qwest shall be required to notify the auditor and request an evaluation of the proposed change. If the auditor concludes that the change would not threaten the integrity of the data collection process, it shall inform the Commission accordingly. Upon receiving the auditor's conclusion that a proposed change is acceptable, the Commission shall have 15 days to take action to prevent Qwest from making such a change and to decide on a process for resolving the issue. If the Commission takes no action on the issue, Qwest shall be free to make the proposed change. If the auditor concludes that the change would be averse to the integrity of the data collection process, Qwest shall be prohibited from making the proposed change.

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[1] In particular, Section 14.1 provides that:

> Qwest shall not make any competitor-affecting changes in its performance measurements and reporting system unless changes are made in the six month review process as described in section 18. Qwest may make changes to the underlying data collection and gathering process implementing its measurement or reporting systems so long as the performance measurements are implemented as required. If Qwest makes such changes, it will document material changes on a website developed for the purpose of reporting its results.

With respect to the regulatory oversight of Qwest's measurement system, I recommend several important consequences for failing to follow the procedures set out above. First, if Qwest makes a fundamental change to its data management processes without following the procedure set forth herein, it should be liable to the Special Fund in the amount of $100,000. Second, if Qwest, for whatever reason, cannot produce reliable performance data, it shall be up to the Independent Monitor to determine, as best can be concluded, what payments are due based upon the data collected by the affected CLECs, along with any appropriate interest or late payment obligations. Finally, any failure by Qwest to document accurately on its website non-fundamental changes to its measurement system shall result in a $2500 fine.[2] (Note: This requirement of notifying CLECs via postings on its website of all changes related to performance measurement and reporting applies whether or not the specific change is transparent – say, results in a different looking report – to the CLECs.) The fines related to performance measurement requirements shall be payable to the Special Fund and shall not count against the cap.

II. Regulatory Oversight over Change Management and "CLEC-Affecting Changes"

As presently written, the language in the PAP's Sections 14.1, 14.2 and 14.3 do not clearly distinguish between and treat separately the regulatory oversight afforded to changes to Qwest's measurement system and changes that affect CLECs' access to Qwest's wholesale systems. On the former, the appropriate regulatory treatment should be the procedure set out in Part I above. For the latter, the PAP currently provides only that all unapproved changes to Qwest's wholesale systems that are "CLEC affecting" shall result in a $1000 fine per incident.

By all accounts, the current PAP regime of "one fine size fits all" approach for change management oversight is inadequate. Qwest might, for example, make without approval certain process changes that are "CLEC affecting," but impose minimal harm on CLECs (say, because there is an easy and quick "work around" solution). On the other hand, again without approval, Qwest might also make certain changes to its processes or its system's interfaces that would result in all CLEC orders for maintenance and repair being rejected for a particular period of time. In the first case, a $1000 penalty to each affected CLEC would be a windfall; in the second, it might well fail to compensate competitors for what would be a large set of dissatisfied customers.

The purpose of instituting a payment regime for failing to follow change management requirements is both to ensure reliable performance of Qwest's change management responsibilities and to compensate CLECs who are affected by a Qwest failure to do so. At present, there is no Commission-approved change management regime that can provide further definition for and sub-categorization of what types of "CLEC affecting" change management requirements could trigger different levels of penalties. In theory, there should be some symmetry between the levels of notice and

[2] Section 14.1 specifies that this change log "must contain, at a minimum, a detailed description of the change (in plain English), the effects of the change, the reasons for the change, the dates of notification and of implementation, and whether the change received Commission approval."

opportunity to comment requirements for certain types of changes – say, those requiring systems changes on the CLEC side – and the level of penalties associated with the failure to follow prescribed requirements.

Once the Commission develops and approves a definition and classification regime for "CLEC-affecting" changes in the change management context, it should modify the PAP accordingly. In so doing, it should alter the penalty regime set out in Section 14.3 to ensure that it is better tailored to its dual role in ensuring adherence to the change management rules and providing a rough approximation for any CLEC harm for Qwest's failure to do so. This alteration should include a tiered system of fines. My understanding is that Qwest accepts this premise in principle, with only the exact amounts left to be worked out. If necessary, this alteration can occur at a six-month review. In making these changes, it will be important to ensure that the existing change management obligations – as embodied in PO-16 (release notification), GA-7 (software quality) and PO-18 (versioning) – do not, taken together with the payment obligation for failing to follow the change management rules, result in more than one payment for the same harm.

III. Assorted Implementation Issues

In consulting with the various parties to this proceeding, a number of implementation issues rose to the fore. In each case, the issue arose because a party other than Qwest raised it or I raised the issue in conversations with Qwest. In cases where I raised new issues with Qwest, I attempted to later discuss with other interested parties the desirability – and, in some cases, the necessity – of addressing these issues. To the extent that it is necessary to state so explicitly, I concluded that these issues are within the scope of those that I can recommend changes on my own initiative to the Commission (i.e., even if not raised by a CLEC as an initial matter). For the most part, these issues are largely ministerial and are unlikely to give rise to controversy. This Part sets forth each such matter in turn, explaining the nature of the issue and the proposed resolution.

A. Variance Factors and the "One Free Miss" Rule

Upon close examination, it became clear that several areas of wholesale performance governed by Tier 1A of the PAP could be readily improved. The first such area, as AT&T pointed out, is that the current variance table uses two rules where one could do. In particular, the current table includes lower than otherwise appropriate variance amounts on the understanding that Qwest was permitted "one free miss" before it would be required to pay CLECs for deficient performance. To be sure, the "one free miss" rule makes sense for performance measures that rely on a benchmark to set the standard for performance, but is redundant for parity measures where the variable table itself provides for the necessary "slack factor."

To address this problem, I recommend that the Commission remove the one free rule from the PAP -- i.e., from its use in Tier 1A, 1B, and 1C (except where used in association with performance measures where a benchmark sets the standard) -- and adjust the variance table as follows:

(1) LIS trunks (OP-3) – 21% to 25% (1-5); 17% to 18% (6-15)
(2) LIS trunks (OP-4) – 15% to 18% (1-5); 11% to 12% (6-15)
(3) LIS trunks (OP-6) – 20% to 24% (1-5)
(4) LIS trunks (MR-5) – 18% to 22% (1-5)
(5) LIS trunks (MR-6) – 180 to 220 (1-5)

(6) PO-9b – 14 to 20 (1-5).

(7) NI-1 -- leave alone existing variance table.

(8) UBL (OP-3) – 18% to 25% (1-5); 15.5% to 18% (6-15)
(9) UBL (OP-4) – 10% to 14% (1-5); 8.5% to 10% (6-15)
(10) UBL (OP-6) – 20% to 28% (1-5); 16% to18% (6-15)
(11) UBL (MR-5) – 20% to 28% (1-5); 16% to 18% (6-15)
(12) UBL (MR-6) – 300 to 500 (1-5); 240 to 300 (6–15)
(13) UBL (MR-7) – 20% to 28% (1-5); 16% to 18% (6 –15)
(14) UBL (MR-8) – 20% to 28% (1-5); 16% to 18% (6 –15)

B. Missing Variance Factors

As became evident upon close examination, the current Plan is missing variance factors for several parity measures contained in Tier 1A. This highlights a long-term and a short-term problem. The long-term problem is how to address the inclusion of new variance factors as new Tier 1A PIDs are added. For the most simple solution, I recommend that where a variance factor has yet to be calculated (or where there is not sufficient data to use in developing one), the relevant Tier 1A measures should rely on the same statistical methodology used for Tier 1B and 1C (i.e., that contained within Sections 4 and 5 of the Plan). The short-term concern is how to address the currently missing variance factors. To address this point, I recommend the following steps:

(1) For NP-1 (NXX Code Activation) – For this measure (and this measure alone), the Plan should rely on the "one free miss" rule. Consequently, the first failure will not result in any penalty, but each one afterwards would constitute a "miss" for purposes of triggering payments.

(2) For OP-5 (new installation service quality) – This measure should use the same variance table as used for PO-9b.

(3) MR-11 should use the following variance table:

	1-5	6-15	16-23	23-30	31-40	41-60	61-90	91-150	151-300	301-500	501-1000	1001-1500	1501-2000	2000+
% subtract	16	9	7	6	5	4	3	2	2	1.5	1	.75	.5	0

(4) MR-12 should use the following variance table:

	1-5	6-15	16-23	23-30	31-40	41-60	61-90	91-150	151-300	301-500	501-1000	1001-1500	1501-2000	2000+
mins add	600	300	250	200	175	150	125	100	75	50	40	25	15	0

(5) OP-5-Line Sharing should use the following variance table:

	1-5	6-15	16-23	23-30	31-40	41-60	61-90	91-150	151-300	301-500	501-1000	1001-1500	1501-2000	2000+
% add	22	17	13	11	10	8	7	5	4	3	2	1.5	1.25	1

(6) OP-6-Line Sharing should use the following variance table:

	1-5	6-15	16-23	23-30	31-40	41-60	61-90	91-150	151-300	301-500	501-1000	1001-1500	1501-2000	2000+
days add	12	6	5	4	3	3	2	2	1	1	.7	.6	.5	.25

(7) MR-3-Line Sharing should use the following variance table:

	1-5	6-15	16-23	23-30	31-40	41-60	61-90	91-150	151-300	301-500	501-1000	1001-1500	1501-2000	2000+
% subtract	22	12	9	8	6	5	4	4	3	2	1.5	1	.75	.5

(8) MR-6-Line Sharing should use the following variance table:

	1-5	6-15	16-23	23-30	31-40	41-60	61-90	91-150	151-300	301-500	501-1000	1001-1500	1501-2000	2000+
mins add	500	400	300	250	200	175	150	125	120	90	60	30	25	20

(9) MR-7-Line Sharing should use the following variance table:

	1-5	6-15	16-23	23-30	31-40	41-60	61-90	91-150	151-300	301-500	501-1000	1001-1500	1501-2000	2000+
% add	25	18	14	12	10	8	7	5	4	3	2	1.5	1.25	1

C. *Other Variance Issues*

In evaluating the modifications proposed above, it bears notice that the substitution of the variance table for the statistical methodology is not a perfect step. The benefits of the variance table approach are that they afford smaller CLECs in particular the luxury of a more "user-friendly" regime that is more transparent, predictable, and will enable them to plan on levels of performance or certain payments. The costs, however, stem both from the novelty of this approach as well as the fact that it is fixed and thus not as dynamic as the statistical methodology used elsewhere in the Plan.

To address the lack of dynamism in the variance table method, I recommend that the Plan include a provision that calls for a "shadow method" of calculating payments for small sample sizes (1-30) based on the permutation test used for such cases in Tier 1B (as set out in Section 4.3.1 (which cross-references the critical values from Section 5.1)). In practice, this means that the CLECs will be provided with the results for both the variance factor method as well as the shadow one and will receive payments based upon whichever one is more beneficial to them. Finally, in a step to guard against the lack of predictability for Qwest that results from these changes, Section 10.3 (which governs the special severity for Tier 1A) should be amended to provide for payments on the lower of the amount generated by the old variance factor method (with the one free miss rule) – i.e., the ones set out in the Commission's earlier orders – or the new variance factors as set forth herein.

D. Language Clarification

To ensure that the language adopted in the PAP does not become subject to future misunderstandings, I propose the following refinements of the existing version. In so doing, I have underlined the proposed additions.

(1) In Section 4.1, it should read "Qwest will be in conformance with Tier 1A, Tier 1B, Tier 1C, and Tier 2 benchmark submeasures . . ."

(2) In Section 4.2, it should read "For Tier 1B and 1C parity submeasures, Qwest uses a statistical test . . . between the results for Qwest and CLEC. For the purpose of this section, the Qwest results will be the Qwest monthly retail results as specified in the performance indicator definitions filed with the CPAP as approved by the Colorado Public Utilities Commission. The modified z-test shall be applicable . . . "

(3) Under Section 5, add the following Section 5.2:

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

(4) In Section 6.1, the following line should be added after the first sentence:

"The average retail performance over the prior six months shall be calculated by summing the six individual monthly numerator values and dividing that amount by the sum of the six individual monthly denominator values."

(5) In Section 6, the following should be added as 6.3:

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

(6) In Section 7.1, make the following additions:

For interval submeasures, the CPAP uses the following formula:

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

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

(7) In Section 13.6, which addresses the ability of Qwest to self-correct performance data in advance of audits, the PAP should include language that makes clear that the relevant audits are ones that "focus on the relevant measurements in question." This clarification will ensure that to the extent that an audit is going on – as may sometimes be the case – it will not preclude Qwest from revising the reported data without incurring the fines set out in 13.4 and 13.5 if the audit is focused on a different area of performance measurement.

E. Computation Issue Regarding The Combination of Zone 1 and Zone 2

My original Report and Recommendation called for a disaggregation of performance data to the greatest extent possible. As such, the relevant wholesale performance focused on the geographic categories of zone 1 and zone 2 separately. Similarly, the PAP developed by the multi-state facilitator also adopted a geographically disaggregated approach. This approach stemmed, in large part, from the suggestion by rural-based carriers (e.g., New Edge) that there might be a "compensation effect" -- i.e., that by combining rural and urban performance, "good" urban performance could compensate for "bad" rural performance. The current version of the CPAP, however, does not require geographic disaggregation.[3]

The current approach of aggregating the performance across geographic zones may well reflect a sound model. In particular, it is quite possible that the affected rural carriers would be better off with a geographically aggregated approach on the theory that any "compensation" effect will be outweighed by the fact that the lower sample sizes resulting from disaggregration will mitigate against recovery by raising the threshold before a CLEC is eligible to recover any payments. At this point, however, the ultimate interplay of these two factors is uncertain. As such, I recommend that the PAP follow the suggestion of the rural-based CLECs and the model set out in the multi-state PAP if, for no other reason, than Qwest only need develop a single model for this issue.

To address this issue, the Commission should add the following language to the last paragraph of section 4.3:

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

With this change, the last sentence of section 5.1 (which addresses the same issue) can now be struck. Finally, section 7.5 should be modified as follows:

For purposes of severity and duration penalties (Tier 1Y), a "measure" shall be at the most granular level of ~~product reporting~~ disaggregation, except where otherwise specified. For purposes of statistical comparison and occurrence calculation, a measure

[3] In particular, Section 5.1 calls for Qwest to combine, for purposes of statistical testing, results reported separately for zone 1 and 2. Similarly, Section 7.5 calls for statistical testing, calculation of occurrences, and application of severity and duration to focus at the product level of disaggregation, i.e., not to focus on geographic disaggregation where available.

shall be at the most granular level of ~~product reporting~~ disaggregation, except where otherwise specified.

In offering this recommendation, I want to highlight the importance of making possible subsequent refinements. In particular, it is noteworthy that, for certain Performance Indicator Definitions (PIDs) specified in Section 4.3, Qwest shall combine the zone submeasures on account of the small sample sizes for those PIDs. As should be evident, there is nothing talismanic about the particular measures chosen for such treatment and this list can most certainly be expanded if warranted. More generally, should the compensation effect prove illusory and/or the smaller sample size issue prove formidable, the Commission can – and should – revisit this issue at a six-month review by combining the geographic zones for all submeasures. Similarly, as noted in Section 7.5, the Commission should also consider combining other relevant submeasures – say, for very similar products – if that step proves warranted as a means of creating more meaningful, but still accurate, sample sizes.

F. Unnecessary Measures

In Appendix A, both PO-3A-2 (LSR Rejection Notice Interval – IMA -- Auto) and PO-3B-2 (LSR Rejection Notice Interval – EDI -- Auto) are listed as ones to be included in the PAP under Tier 1B. These measures, as currently reported by Qwest, are calculated on a 14 state basis. As contemplated in my original Report and Recommendation, these measures were not ones that needed to be included in the PAP. After all, unlike PO-3A-1 and PO-3B-1, these measures focus on automated processes that are far less likely to result in deficient performance. As such, they should be excluded from the PAP. To the extent that they later become an area of concern, they could be included at a later date.

G. The Establishment of The Special Fund

To ensure that the administration of the Special Fund contemplated by the PAP (specifically Section 10.4) works as intended, the Commission should designate a specific employee to direct Qwest on how to manage the escrow fund set up for this purpose. Similarly, the Commission should work with Qwest to set up an auditing procedure to ensure the integrity of this fund and the disbursement process. In this procedure, which might be embodied in a memorandum of understanding, the Commission should also make clear that the expenses associated with this fund and any tax liability resulting on interest accrued would be paid from the fund.

H. Miscellaneous Administrative Issues

There are a number of administrative issues that warrant clarification or refinement. First, with respect to the reports listing CLEC-specific performance results (as contemplated by Section 13.2), the Commission should order Qwest to file such reports upon request by Commission staff so that Qwest can share information with them that would otherwise be confidential and proprietary to the individual CLECs. Second, with respect to the reporting of the necessary payments, Qwest should be permitted to provide CLECs with this information via secure websites, which avoid some of the

difficulties that may be encountered with electronic mail.[4] Third, Qwest should be authorized to use wire transfers – as opposed to checks – to make disbursements when so directed by the Commission.

I. The Legal Operation of the PAP

Sections 16.6 and 16.7 of the PAP contain two points worth clarifying. First, with respect to Section 16.6 -- which governs the showing necessary to bring an action outside the PAP (i.e., for a violation of an interconnection agreement) on a matter addressed, at least in part, by the PAP -- the relevant payments for this purpose should be both the amount paid to the CLEC under Tier 1X payments *and* its share of any Tier 1Y payments. The current language only focuses on Tier 1X payments even though both they and the CLECs' share of Tier 1Y payments compensate CLECs for their incurred harms. Accordingly, the relevant Tier 1X payments as well as any associated Tier 1Y payments made to the CLECs should provide the amount that would be offset in the event of a related dispute. Finally, with regard to the offset provision (as addressed in Section 16.7), it merits mention that only the relevant finder of fact – and not Qwest in its unilateral discretion – can judge what amount, if any, of PAP payments should be offset from any judgment for a CLEC in a related action.

J. The Addition of New Measures for EELs

In a final fine-tuning step, the PAP also should be amended in the near future to include some obligations related to Qwest's wholesale performance related to the Enhanced Extended Loop (EEL) product. In particular, the Regional Oversight Committee's Technical Advisory Committee (ROC TAG) determined that the following set of measures should be included: OP-3, OP-4, OP-5, OP-6, OP-15, MR-5, MR-6, MR-7, MR-8. Notably, this list does not include any measures from the pre-ordering category. Thus, unless Qwest provides a compelling reason to the contrary, the Commission should provide for some such oversight; in particular, using PO-5 and PO9 for this purpose would appear to be appropriate. In so doing, I recommend that all such measures – i.e., the ones agreed upon in the ROC TAG as well as PO-5 and PO-9 -- be introduced into Tier 1.A, as EELs represent essentially a form of an "extended loop" that saves CLECs the difficulty of collocating in a separate central office to gain access to local loops. Finally, while I acknowledge the desirability of developing an appropriate set of variance factors for EEL measures, the statistical methodology that would be provided for loops as contemplated in Sections 4 and 5 can suffice until one is developed.

IV. Escalation

In this proceeding, Qwest argued that the lack of any cap on the escalation function creates the possibility for some adverse, unintended consequences. In particular,

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[4] To achieve this change, section 13.2 of the CPAP should be changed along the following lines:

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

Qwest points to two possible results: a windfall for CLECs who would recover far in excess of any actual harm to them and a continuing, and increasing, liability from PIDs that are ill-defined. On the first issue, Qwest raises a valid point that warrants the addition of a rule that any continuing escalation after twelve months should be contributed entirely to the Special Fund. This change reflects the principle that, roughly speaking, the twelve-month level of escalated (i.e., the Tier 1Y) payments as divided 50/50 between the CLECs and the Special Fund will fully compensate the CLECs for any harm that will occur for continuing, deficient performance. Moreover, requiring that escalation payments continue to be made under the PAP will ensure that it retains its full deterrence commitment to provide a sufficient incentive for Qwest to address any continuing deficient performance.

The concern about escalation payments resulting from ill-defined PIDs requires a different approach. As an initial matter, it merits attention – as will be emphasized further below – that PIDs should not be instituted without an appropriate opportunity for careful development. While not a categorical rule, the sound practice for introducing PIDs should be to work through a collaborative forum (such as the Regional Oversight Committee's (ROC) Technical Advisory Group (TAG)) before bringing a proposed PID addition (or change) to the Commission. Moreover, the preferred approach should also be to introduce new PIDs as "diagnostic" measures, allowing for some reporting of actual data before determining the relevant standard and appropriate penalties. Even with these precautions, however, it is still possible that ill-defined PIDs could lead to unwarranted payments.

Ultimately, the possibility of some unwarranted escalation payments as a feature of the PAP underscores the importance of careful and attentive six-month reviews. In practice, any faulty PIDs can and should be corrected at such intervals. By not providing a prophylactic safeguard against escalating payments, the PAP actually increases the incentive for Qwest to ensure that this process works as intended and refines PIDs as an ongoing matter. Moreover, to introduce such a prophylactic safeguard (as requested by Qwest) would interfere with the continuing escalation of payments that might be necessary to provide the sufficient incentive to deter continuing deficient performance that would otherwise be acceptable as "a cost of doing business."

To minimize the deleterious consequences resulting from possibly ill-defined PIDs, I propose two slight modifications to the PAP. First, to the extent that a PID continues to trigger an escalating payment past six months, the Colorado Commission should automatically examine this measure as part of a six-month review to consider whether it reflects continuing deficient performance or some quirk resulting from a poorly defined measure. Second, as an accommodation to the possibility that some PIDs may escalate unnecessarily, I recommend the slight change that once an escalated payment reaches the nine-month mark, the PAP should provide for an accelerated step down method. In particular, I recommend that after at least nine months or more of continuing deficient performance, three consecutive months of acceptable performance should bring the base penalty level to that of the six-month mark: after three more

consecutive months of acceptable performance (for a total of six consecutive months of complying performance), the payment level should go back to the base amount.

V. The "Special Access" Issue

In the Hearing Commissioner's Order setting out the scope of this remand proceeding, he made clear that the principle that special access performance should be monitored is decided, with only the matter of implementation to be developed.[5] Before outlining my recommendations as to how the Commission could proceed to require Qwest to measure and report on its performance as to pre-ordering, ordering, provisioning, and repair and maintenance of special access lines, it is important to clarify the nature of this issue. Thus, I have divided this issue up into four sections: (A) Background; (B) Quintessential Cases for Regulatory Oversight; (C) Overview Considerations; and (D) Two Possible Regulatory Responses.

A. Background

In my original Report and Recommendation, I noted that the use of special access circuits by local competitors raises an important and thorny issue for state agencies to investigate. This issue is particularly complicated because it involves a series of factual permutations and complicated legal issues, which makes it dangerous to rely simply on the broad category of the "special access issue." Nonetheless, because these issues all relate to the question of whether – and, if so, how – this Commission should oversee Qwest's performance as to a "retail service" provided under an interstate tariff, this Commission (as others) has understandably framed this issue under a single, and broad, category. Moreover, despite the various factual permutations, the essential issue for present purposes is whether – and if so why – the Colorado Commission should monitor the performance of a retail service (i.e., a "private line" or "special access" connection) that provides the identical functionality to a combination of an unbundled dedicated interoffice transport (UDIT) circuit and a local loop.

The current status of and appropriate regulatory treatment for special access services remains a much disputed issue. At least from a pricing perspective, the Federal Communications Commission (FCC) continues to relax its regulatory oversight, allowing the incumbent providers additional flexibility in setting the relevant rates, terms, and conditions. *See WorldCom, Inc. v. FCC*, 238 F.3d 449, 460 (D.C. Cir. 2001) (noting trend). But from a performance perspective, the FCC has recently moved in the opposite direction, asking whether some monitoring and/or penalty requirements would be appropriate. *See* Notice of Proposed Rulemaking, *Performance Measurements and Standards for Interstate Special Access Services*, 16 FCC Rcd 20896 (2001) (available at

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[5] In particular, the Hearing Commissioner stated that, with regard to special access, the matter is:

> remanded for the limited purpose of making the CPAP language more practicable, or devising solutions for monitoring Qwest's special access services performance . . . while accommodating Qwest's concerns on how that will be implemented. The remand is not for the purpose of removing these features from the CPAP.

Scheduling Order, Decision No. R02-41-I, at 3 (January 10, 2002).

http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-01-339A1.pdf). In so doing, the FCC specifically asked how any such enforcement regime could be superintended by state agencies pursuant to a federal delegation of regulatory authority. *See id.* at para 11.

For simplicity purposes, there are two basic reasons that might conceivably justify the Colorado Commission's regulatory oversight of special access performance. The first reason, and the one pressed most vigorously last spring, is that discrimination in special access performance would occur in the wake of Qwest's entry into the interLATA long distance (LD) market. To ensure that Qwest's entry into the LD market is truly in the public interest, this concern, as advanced by some parties, warrants state regulatory oversight of special access as a condition of support for Qwest's Section 271 application. The second reason for overseeing special access reflects the marketplace reality that, for whatever reason, local entrants are using special access in lieu of unbundled network elements – in particular, the combination of an unbundled dedicated interoffice transport (UDIT) circuit and a local loop, the so-called "Enhanced Extended Loop" or "EEL."[6] As I understand it, the Hearing Commissioner embraced the second, but not the first, reason for investigating the nature of the special access market through the imposition of some monitoring regime.

B. Quintessential Cases for State Regulatory Oversight

Under the broad category of state oversight of special access where such circuits are used to provide local services, there are two quintessential scenarios that might warrant state regulatory attention as part of facilitating local competition. Although the parties to this proceeding have yet to distinguish clearly between these scenarios, it is important to analyze them separately. The first scenario involves providers who would like to use unbundled network elements (UNEs) to substitute for special access services used for both local and long distance service. Because special access services are regulated as a "retail" service, the price differential between these services and their UNE counterparts can be quite substantial so there is a formidable economic incentive to rely on or convert to UNEs in providing long distance service to retail customers.

In an effort to strike a compromise that would substantially protect the ILECs' special access revenues, the FCC instituted a set of rules that govern when CLECs can use UNEs – in particular, the Enhanced Extended Loop ("EEL") -- to serve customers to whom they provide long distance (or access) services. *See AT&T Corp. v. F.C.C*, 220 F.3d 607, 628-30 (D.C. Cir. 2000) (describing issue). Without getting into the specifics of the various limitations, it suffices to say that they limit the ability of competitors to use UNEs to provide access services except where the competitor self-certifies that it uses the UNEs to provide a significant amount of local service in addition to any access service. *See In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, 15 F.C.C. Rcd. 1760, 1760 ¶ 2 (1999), *clarified, In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, 15 F.C.C. Rcd. 9587, 9598 para. 21 (2000) (setting out three "safe harbor" scenarios); *see also In The Matter of Net2000 Communications, Inc.*

[6] Qwest's product description for this offering can be found at www.qwest.com/wholesale/pcat/eel.html.

v. *Verizon, Inc.*, 2002 WL 21765, FCC 01-381 (January 9, 2002) (applying rules).[7] In line with these rules, Qwest's Statement of Generally Available Terms and Conditions includes a section that sets out the relevant preconditions for using an EEL to provide, among other things, access services to an end user. *See* Qwest SGAT, Section 9.23.3.7.2.

A second class of CLECs who are using special access circuits in lieu of UNEs are those who began using such circuits because of difficulties in provisioning UNEs and/or who purchase such circuits under a multistate, long term, and bulk contract. In particular, Time Warner Telecom (TWT) suggests that this reason explains its reliance on special access circuits to serve customers purchasing local services – i.e., those provided under tariffs filed with the Colorado Commission (and not the FCC). Put in economic terms, TWT explains that its reliance on special access reflects a version of the "lock-in effect" whereby decisions made under certain circumstances – i.e., where UNEs were not available in a stable environment – led it to adopt and continue certain practices that would not be rational were it to make these choices as an original matter today. *See* CARL SHAPIRO & HAL R. VARIAN, INFORMATION RULES 103-134 (1998) (explaining "lock-in" concept); *see also Eastman Kodak Co. v. Image Technical Servs., Inc.*, 504 U.S. 451, 465-78 (1992) (incorporating concept into antitrust law). (Apparently, TWT entered into a long-term and region-wide contract with Qwest that provides for special pricing for special access services so long as certain prerequisites are met.) Consequently, TWT's request for regulatory oversight of special access can also be understood as – and indeed recast as – a request for a "fresh look" and a "hold harmless" remedy that would enable it to begin ordering UNEs in Colorado. Implementing this principle would require that Qwest cooperate (or be ordered to cooperate) in provisioning and servicing the facilities in question as UNEs even if ordered via the access service request (ASR) interface (as it does for interconnection trunks). In addition, it would require that, by treating these facilities as UNEs in Colorado, TWT would not suffer adverse treatment in other states within Qwest's region as a result of not being able to comply with its region-wide contract with Qwest.

C. Overview Considerations

Before moving on to my proposed approach for implementing the Hearing Commissioner's Remand Order, let me offer three observations. First, with regard to the general issue of using special access in lieu of EELs, the question for any state commission is whether there are non-trivial amounts of special access used for local purposes that warrant regulatory oversight. At this point, the issue is unknown and, given the lack of measurement and reporting on this issue, unknowable. Conceivably, however, a state commission could decide that where a carrier relied on some minimum level of special access circuits for local service – say, using at least 10% of a circuit for this purpose – the state commission could impose some oversight regime to ensure that the incumbent provider's wholesale performance as to these circuits were non-discriminatory. In so doing, the state commission would necessarily conclude that the

[7] The Federal Communication Commission opened a subsequent rulemaking to re-examine the appropriate regulatory treatment of EELs, but has yet to take any action. *See Comments Sought on Use of Unbundled Network Elements to Provide Exchange Access Service*, 2001 WL 55611, 16 FCC Rcd 2261 (Jan 24, 2001).

rules governing the conversion of special access circuits to EELs were not "talismanic" and did not automatically apply to the performance oversight context.

The second observation is that the two quintessential cases outlined above for overseeing special access performance both could be resolved or at least ameliorated through business-to-business negotiations. As for the "lock-in concern" voiced by Time Warner Telecom, this issue could be addressed by cooperation from Qwest that would ensure that TWT could convert its current reliance on special access circuits to UNEs as well as order UNEs in the future without jeopardizing its current operating environment, including the terms of its region-wide contract. As for the "EEL restrictions issue," raised most notably by WorldCom, it is quite plausible that negotiations that would facilitate some amount of conversion of existing customers would address, at least in part, WorldCom's concern that the EEL restrictions both preclude it from benefiting from both UNE pricing and UNE performance oversight. Given that WorldCom suggests that the restrictions imposed on the use of EELs for both local and long distance are, in some cases, infeasible or very difficult to implement in practice, some reasonable cooperation would appear to be highly preferable to continued regulatory disputes on this matter.

Finally, given Qwest's protest that this issue does not warrant attention as part of the Commission's Section 271 process and investigation into local competition, it merits mention why this issue is even relevant for examination. In short, Qwest's provisioning of certain UNEs related to transport – in particular, the ordering of EELs and UDITs – appears to be at very low volumes.[8] At a minimum, these low volumes suggest that there may be some reliance on special access for purposes of providing local services – a point underscored by the two scenarios outlined above.

D. Possible Regulatory Responses

In terms of a regulatory approach to address this issue, the first step – as the Hearing Commissioner recognized – is to begin to understand the scope of the matter. At present, there is little sunlight on to what extent carriers are actually using special access for local purposes and whether Qwest's special access services are provided on a non-discriminatory basis to rival carriers as opposed to retail customers (and, by extension, to its Section 272 affiliate in the wake of its long distance entry). As I mentioned in my initial report, this lack of sunlight could be a good thing to the extent that it also reflects a "structural parity" situation – i.e., that Qwest lacks the necessary information to be able to discriminate between its customers. But the affected local entrants who purchase special access clearly reject this scenario, so the Hearing Commissioner's decision to push ahead with the institution of a monitoring regime is understandable.

In devising an appropriate approach for monitoring special access services used for local competition, it is important to underscore that this decision does not mean that special access services have become part of the PAP. Rather, this decision reflects an effort to gather the necessary information to determine, at a later date, whether it would

[8] *See Qwest Performance Results for Colorado* 159 (January 16, 2002), *available at* http://www.qwest.com/wholesale/downloads/2002/020118/CO_271_Jan01-Dec01_Exhibit_Checklist-Final.pdf.

be appropriate to institute any PIDs, payments, and other steps (including audits to the extent that some self-reporting scheme is relied on) necessary to address the issue as part of the PAP. The current challenge is thus to institute a means of gathering the necessary data, which will demonstrate the scope of the alleged problem as well as the feasibility of measuring the relevant information, and will suggest what challenges, if any, arise as part of an effort to monitor special access services.

In terms of instituting a set of measures designed to measure Qwest's performance as to special access services used for local services, the critical challenge is to identify orders by customers who intend to use such circuits for a nontrivial amount of local service. Depending on how the Commission defines the scope of the problem – say, for only those used primarily for local services or those used to a nontrivial degree (e.g., 10%) – it will unearth a greater or lesser use of special access circuits for local services. As the current effort is investigative in nature, I shall assume that the Commission will take the broader approach. In either event, the methodology suggested below could be used for either approach.

Once the Commission defines the type of special access services eligible for monitoring oversight, it shall need to set forth the scope of any measurement and reporting obligations imposed on Qwest. In particular, Qwest shall need to develop the capability to measure its performance on the relevant pre-ordering, ordering, provisioning, and maintenance and repair functions for those CLECs who self-report that they are using special access for the requisite amount of local services. As discussed in this proceeding, there are two means that appear adequate to enable CLECs to self-certify that they are using special access circuits for local purposes: (1) the use of a project field that would be made available in both Qwest's ordering and maintenance and repair systems or (2) the use of different Access Carrier Name Abbreviation (ACNA) codes for carriers' use of special access for long distance and local services respectively. (Under the first approach, however, the CLECs would need to be responsible for entering the relevant field into both the ordering and the maintenance and repair systems, as Qwest's systems for those functions do not connect.) Under either approach, Qwest would be required to measure its performance for the relevant areas for: (1) carriers using special access, at least in some part, for local services; (2) its retail customers (and section 272 affiliate); and (3) carriers using special access for long distance distances (at least to a very great degree). The institution of a measurement system under either of the means set out above should establish both the degree to which the first category of special access usage (i.e., in lieu of UNEs to a nontrivial degree) exists as well as whether there are any significant differences in performance between this category and the second (i.e., for customers who are not competitors)

Unfortunately, the time available pursuant to this remand did not afford me an opportunity to develop fully all of the applicable rules to guide the implementation of the necessary measures for special access. It did become clear, however, that not all of the measures contemplated by the Commission could be translated to the special access context. Of the measures that the Hearing Commissioner suggested be established (i.e., ones along the lines used for PIDs PO-5, PO-9, OP-3, OP-4, OP-6, OP-8, MR-3, MR-5,

MR-6, MR-7 and MR-9), there are good reasons for dropping OP-8, MR-3 and MR-9 from this list. In particular, OP-8 relates to number portability. MR-3 only applies to design services and MR-9 is not generally included in the PAP. But rather than simply eliminating those from that list, it makes even more sense to peg the appropriate measurement scheme to the PIDs used for EELs, which are an analogous service to special access. In particular, the relevant set of measures for EELs are: OP-3, OP-4, OP-5, OP-6, OP-15, MR-5, MR-6, MR-7 and MR-8. And, as noted above, PO-5 and PO-9 should be included in the set of performance measures used for EELs, unless there is a compelling reason for not doing so.

Within these contours, there are still a number of implementation details to be worked out (including a choice between one of the options set out above – i.e., reliance on a project field or ACNA codes). To develop a fully detailed implementation plan, I recommend that the Hearing Commissioner either ask for a joint submission of one or engage in a baseball-type arbitration so that he can adopt one -- provided, of course, that he does not conclude that a business-to-business agreement has not substantially addressed the concerns raised in one or both of the two quintessential cases set out above

VI. The Changeability of the CPAP and The Nature of the Six Month Review

As all who took part in the development of this PAP can attest, this undertaking reflects an in-depth examination into what framework can best guide performance measurement, reporting, and payment schedules for wholesale performance in Colorado. As such, I am deeply skeptical that, with respect to the core precepts of the plan, any changes made at six-month reviews can improve the Plan in these areas. In this respect, I recommend treating the core aspects of the Plan as presumptively fixed until a more careful three-year review can examine them with a similar level of care to that which went into creating the Plan in the first place. This approach also has the virtue of assuring all parties, in particular Qwest, as to what to expect from the Plan in the upcoming years. In addressing this issue, I first outline a set of structural safeguards to keep the Plan's basic framework in place and I then discuss the importance of maintaining the PAP as a dynamic regime.

A. Structural Safeguards Relating to Changeability

The presumptively unchangeable aspects of the Plan that should be "off the table" for discussion at the six month reviews fall into one of six categories. First, the statistical methodology used to assess what constitutes a miss for purposes of payment should not be revisited until the three-year review. (The exception to this point is the addition of new Tier 1.A measures where a variance table must be added. To the greatest degree possible, new variance tables should follow the method employ to create the existing ones.) Second, the rules regarding the cap (including the financial collar provision outlined below) and the duration of the PAP should be "off the table" for discussion. (In this instance, there is a second reason for "tabling" the issue: if they were open to change, the assurances provided by the cap regime and the limited duration of the PAP would be nullified.) Third, the entire structure for the payment regime, including the tier system, the base amounts, the system for escalating payments (and severity), and all

specified payment amounts and fines, should not be open for discussion. (Note: To the extent that the Commission needs to add Tier II measures, the payment amounts for those measures would need to be determined by the Commission and the Commission would retain the authority to set those amounts. Similarly, to the extent that the refined payment schedule for violations of change management requirements is not developed before then, this topic would also be up for discussion at a six-month review.) Fourth, the legal operation of the PAP should not be on the agenda for discussion. Fifth, the Independent Monitor's operation should not be subject to change, with the exception that the Commission could decide to assign this function to an Administrative Law Judge (ALJ) if it so chose. Sixth and finally, any proposal that does not relate directly to measuring and/or providing payments for non-discriminatory wholesale performance should be "off the table." In particular, this means that any efforts that might be undertaken to assure improved performance, but which are not integral to the PAP – i.e., proposals for structural separation or to require Qwest to build certain OSS interfaces -- should be evaluated in other proceedings.

A second and related justification for narrowing the scope of the six-month reviews relates to the Commission's authority under the PAP and Qwest's concerns about limiting the scope of its potential liability under the PAP. At bottom, Qwest's decision to file the relevant terms and provisions for the PAP reflects a voluntary undertaking that, once made, enables the Commission to enforce all commitments therein regardless of whether the Commission would otherwise enjoy the legal authority to order such commitments.[9] As the Hearing Commissioner put it, "the CPAP derives its enforceability from the contract terms itself, not from some enforcement authority under state or federal law." Decision No. R01-1142-I at 29. Consequently, the filing of the initial PAP sets forth a framework that empowers the Commission to enforce its terms and – where anticipated by the foundational framework itself – to modify its terms.[10] As such, the filing of the PAP does not constitute any waiver by Qwest as to challenges related to subsequent changes (even though Qwest cannot later challenge the terms of its initial filing).

The legal authority perspective complements nicely the agenda-setting perspective. As I envision it, the compressed time period for and the value of resolving issues with a minimum of disagreement and potential judicial review will lead the Commission not to raise issues that are "off the table." To the extent that the Commission attempts to order a change of an "off-the-table" topic without Qwest's consent, CLECs should not be entitled to take advantage of and Qwest should not subject to any such obligations until a final, non-appealable order from any judicial challenge to such an order is upheld. Put differently, the PAP should contemplate that the effect of any such change should be stayed during the course of any judicial challenge to it.

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[9] As the Hearing Commissioner noted, this scenario is familiar to regulatory lawyers, as it reflects the approach taken by the Federal Power Commission as outlined in the *Otter Tail* case. *See* Decision No. R01-1142-I at 30 (discussing *Otter Tail Power Co. v. United States*, 410 U.S. 366 (1973)).

[10] This regime of authority for enforcement and modification can be understood, as the Hearing Commissioner explained, as analogous to the use of "open contract terms." *See* Decision No. R01-1142-I at 29 (discussing issue and citing, among other authorities, U.C.C. § 2-305; § 4-2-305, C.R.S.; *see generally*, Mark P. Gergen, *The Use of Open Terms in Contract*, 92 Colum. L. Rev. 997 (1992)).

In its pleadings, Qwest emphasizes that the ability of the Commission to make changes at the six-month reviews – even in the "on the table" category – creates the potential for unbounded increased financial liability. To address this concern, the PAP should include a financial "collar" that would limit the potential for increased liability. In particular, this collar should require that Qwest calculate separately the liability owed to it under the prior regime (i.e., under the Plan before the changes made at a six-month review) as well as those owed under the revised PAP. If the revised PAP would require, as calculated on the relevant six-month basis, more than a 10% increase in total liability, Qwest should be authorized to scale down the payments to the affected CLECs (and to the Special Fund). Any CLEC affected by this mitigation of payments should then be eligible to have the "payments above the collar" paid to it from the Special Fund. (This issue highlights why it is import that the Commission develop its own internal guidelines for prioritizing how this Fund will be used.)

The collar will work as follows: To the extent that a revised PAP calls for payments above the collar, the prior regime (i.e., the old PAP) shall remain as the benchmark for purposes of setting a collar for the next six-month period. Only once a revised PAP triggers a total payment amount that is below the collar can a revised PAP become the new benchmark for setting a future collar. This approach has two central advantages. First, it allows some dynamism in the baseline – i.e., it does not require the continuation of the calculation scheme for the initial PAP, some of whose PIDs may no longer be reported after subsequent revisions to the PAP. Second, it assures Qwest that only a revised regime that is within the collared amount can set a new baseline.

Qwest's concerns about the Commission's use of six-month reviews as a "blank check" for creating new legal liabilities that are otherwise unlawful underscores the importance of understanding the framework for judicial review of later imposed PAP obligations. At bottom, PAP obligations are provisions of an interconnection agreement that are approved by this Commission under its authority pursuant to the federal Telecom Act. *See* 42 U.S.C. Secs. 251, 252. To the extent that a company undertakes voluntarily certain terms and conditions that competitors and the Commission accept, those obligations are not subject to judicial review. In the event that the Commission (or competitors) would like to impose terms relating to wholesale performance, the legality and appropriateness of those terms are subject to federal court review under the provisions of the Telecom Act that deal with the formation of interconnection connection agreement obligations. *See* 42 U.S.C. Secs. 251, 252; *see also US West Communications, Inc. v. Hix*, 57 F.Supp.2d 1112, 1121-22 (D. Colo. 1999) (upholding the imposition of a liquidated damages provision designed to provide "new entrants ... with a meaningful opportunity to compete in local exchange markets.") (internal quotation and citation omitted).[11]

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[11] At present, there is an ongoing dispute as to whether the enforcement of these obligations is to be had in federal or state court. *Compare, e.g.*, Starpower Communications Petition for Preemption of Jurisdiction of the Virginia State Corporation Commission, 15 F.C.C.R. 11,277, 11,278, 11,281 (2000) (concluding that Act provides federal authority to adjudicate interconnection agreement violations) with Bell Atl. Md., Inc. v. MCI Worldcom, Inc., 240 F.3d 279, 308-09 (4th Cir. 2001) (concluding that Congress conferred very

To the extent that the Commission imposes new obligations on Qwest as part of a six-month review, those obligations are subject to federal court review under Section 252 of the Telecom Act.[12] This review would ensure that the new interconnection agreement obligations conform to the standards of the Telecom Act. To require Qwest to waive its challenges to both the existing set of known obligations and to any future and unknown ones would be unsound as it would preclude Qwest from ever challenging and testing the scope of this Commission's authority to institute a performance oversight regime.[13]

B. The Nature of the PAP's Dynamism

In evaluating any possible limits on the Commission's authority to revise the PAP, I need to underscore the importance of viewing the PAP as a dynamic regime. From Qwest's perspective, the cost of allowing the six-month reviews to discuss all items not specifically enumerated as "off the table" creates the scenario of a possible "runaway train." Consequently, it would prefer an operating environment in which only predetermined "on the table" items are fit for discussion, with the possible addition of allowing other items that meet a legal standard – say, those changes necessary to ensure the continued sound operation of the PAP – as also open for discussion. But either a very detailed categorically-based limitation or a standard-based limitation will create possible grounds for quarrelling over what is even on the agenda.

The biggest challenge for the six-month reviews will be focusing intently and effectively on the PAP as an evolving regime. Unfortunately, I agree with the Hearing Commissioner that the Commission's institutional bias against any change will serve as a heavy status quo counterweight to even the most appropriate changes. To the extent that the Commission is inclined to use the PAP as a "runaway train," I do not believe that the type of limitations proposed by Qwest would stop it. Qwest's most effective limitations are ultimately the structural safeguard of the financial collar and the ability to challenge Commission actions in federal court, including the assurance of a stay on any attempt to make "off the table" changes at the six-month reviews.

I would be remiss not to discuss what topics are clearly "on the table." Put simply, any subject not deemed "off the table" is one that can be entertained during the six-month review. As a practical matter, however, the vast majority of the items that should be – and are likely – to be discussed at the six-month reviews are proposed

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limited federal jurisdiction under Act, and "otherwise it intended for the right of review to be exercised in state courts"). Presumably, this dispute shall be decided by the Supreme Court's decisions this term in the companion cases of Mathias v. WorldCom Technologies, Inc., 121 S.Ct. 1224 (2001) and U.S. v. Public Service Com'n of Maryland, 121 S.Ct. 2548 (2001).

[12] This review would, for example, afford Qwest an opportunity to challenge the imposition of obligations that Qwest believes are beyond the scope of the Commission's authority to mandate under either federal or state law. In particular, Qwest suggests that the imposition of any obligations relating to its delivery of "special access services" – an area not presently in the PAP – might well be subject to such a challenge.

[13] As I have explained, I believe that the Colorado Commission enjoys wide latitude under federal law to create and enforce interconnection agreement obligations, but I also recognize that the issue is not free of controversy. *See* Philip J. Weiser, *Cooperative Federalism, Federal Common Law, and The Enforcement of the Telecom Act*, 66 N.Y.U. L. REV. 1692 (2001).

additions, subtractions, reclassifications, and modifications of the existing set of PIDs. But other issues may arise as well. By way of example, Qwest suggests that there are important reasons to think that the auditing regime should be open for discussion. In particular, it may well become sensible to transition this system into a region-wide approach that would provide an equivalent level of assurance to that set out in the PAP. As part of or separate from this transition, Qwest also maintains that that the fines levied on Qwest for failing to report accurately – as based on a strict liability standard with no forgiveness for non-material errors -- may be too onerous and will lead to difficult debates about what inaccuracies are relevant and should trigger the sanctions. To the extent that the Commission gains a greater real world understanding of how this system works and identifies these or other shortcomings, it may need to examine whether any refinements would be appropriate at a six-month review.

In understanding the PAP's changeability, it merits notice that the three-year and six-year reviews will play critical roles in keeping the PAP up to date. In both cases, the Commission will have an important obligation to ensure that it takes a thorough look – presumably with the aid of a consultant – at the underpinnings and nature of the PAP. Among other things, this review will afford the Commission an opportunity to take any steps necessary to revisit the basic framework of the PAP as well as to refine the payment amounts in order to bring them into line with any evidence of the actual marketplace harm that results from the deficient performance at issue. At the three-year review, the Commission will not be able to require – at least under any authority granted by the PAP itself – Qwest to undertake any new obligations. Rather, the Commission will be able to give Qwest the option of filing the new, recommended regime or living under the old one. To the extent that Qwest does not agree to file the new one, the Commission can proceed to order it (or an aspect of it), subject to judicial review without the special stay guarantee provided to "off the table" changes.

At the six-year review, the Commission would go through a similar exercise to that undertaken at year three, but more fundamentally, the PAP appears to envision that the Commission would finally have to face the question of what authority it enjoys to impose parts of the PAP other than those set out in Tier 1A. To be precise, the Plan appears slightly ambiguous on this point, with executory language pointing in opposite directions. Under Section 18.11 of the Plan, "[o]nly Tier 1A submeasures and payments will continue beyond six years, and these Tier 1A submeasures and payments shall continue until the Commission orders otherwise." Later in that provision, however, it provides that the Commission may, at the six-year review, "revive this CPAP wholesale, sunset the entire plan, including Tier 1A payments, or allow more traditional contract and arbitration remedies to take the CPAP's place." In his September 26th Order, the Hearing Commissioner suggested two alternate readings of these two provisions: (1) that the presumption should be that the plan will sunset (with the exception of Tier 1A); or (2) that the Commission will need to "answer the question of its authority to require a CPAP." In The Matter Of The Investigation Into Alternative Approaches For A Qwest Corporation Performance Assurance Plan In Colorado, Docket No. 01T-041T, Decision No. R01-997-I, at 70 n.28 (September 26, 2001).

I will not issue a recommendation on the nature of the six-year review, but instead will merely recommend that the Commission clarify its intended resolution of this issue. It appears to me that the Hearing Commissioner envisioned that Qwest's initial filing of the PAP entailed a voluntary undertaking to leave Tier 1A in place until the Commission decided otherwise, but that the other payment provisions of the plan would sunset unless the Commission decided to require Qwest to adhere to them. This understanding would allow the Commission to keep in place Tier 1A as a result of Qwest's initial voluntary undertaking, but would require it to rely on its own authority for the imposition of any additional payment schedule. Of course, as part of Tier 1A, all other provisions of the PAP, including the six-month reviews, auditing scheme, Independent Monitor, etc. would remain in place as necessary parts of continuing the Tier 1A regime. Similarly, the Commission's wholesale performance measurement and reporting regime – which precede this PAP and presumably will be brought into alignment with it – will remain in effect until and unless the Commission decides otherwise.

Finally, I want to stress two critical points related to the PAP's dynamism. First, the PAP not only will form a critical regulatory tool for the Commission, but it will also set a default regime against which CLECs and Qwest can negotiate their own agreement for ensuring non-discriminatory performance. Ideally, this process will enable Qwest and CLECs to focus on what is actually more important than the assurances provided in this PAP, thereby making changes that are, as economists put it, *pareto optimal* – i.e., will make each party better off. (As to such privately negotiated substitutes for the PAP, it is important to recognize that the CLECs and Qwest cannot negotiate away – even as to the performance related to the particular CLEC – the Special Fund's share of the Tier 1Y payments.)

Second, I must emphasize the practical significance of supporting the continuance of the ROC TAG or some industry forum along those lines.[14] In short, such a forum should provide Qwest and its competitors an opportunity to work out, in a constructively facilitated environment, what may well be the lion's share of the changes necessary to keep the PAP effective. To the extent that Colorado participates in such a forum, and I strongly encourage it to do so, the Special Fund provides a reserve for contributing to any administrative costs of this valuable part of maintaining the PAP. Significantly, the ROC TAG's approved changes would not automatically be incorporated into the Colorado PAP, but changes recommended by this body would warrant a close look by the Commission. (Allowing changes to be automatic would risk running afoul of the prohibitions on agency delegation of unreviewable authority to a private body.) On this point, it bears mention that Qwest will have an opportunity to file the most recent version of its PIDs (based on recent changes made by the ROC TAG) along with its final SGAT, provided that this Commission enjoys an opportunity to consider and ratify such changes.

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[14] The ROC TAG appears to have just such a role in mind in asking for comments on how it should proceed in a post-Section 271 environment. *See* Request for Comments on Long Terms PID Administration (January 28, 2002) ("The TAG has determined that some level of on-going PID administration is required to support performance reporting and that the scope, form, and structure should be determined on a collaborative basis prior to the end of the OSS test and dissolution of the TAG. It is anticipated that this approach will provide for seamless PID administration going forward.").

CONCLUSION

Once again, I must commend all of the parties and the Commission staff that assisted me in this limited remand. The spirit of honest intellectual engagement, discussion, and reasonableness that pervaded this proceeding sets out an important model for how the PAP can provide a critical regulatory framework for the Colorado telecommunications marketplace. As a result, I believe that the changes set out above represent a "rough consensus" and will improve an already impressive piece of public policy. In short, the PAP can provide both a new substantive model for regulation as well as a procedural model that brings regulation closer to sound principles of contract law and economic reality. I am grateful for the opportunity to have been a part of such an effort.

Respectfully Submitted,

Philip J. Weiser
February 15, 2002

Exhibit K
PERFORMANCE ASSURANCE PLAN

1.0 Introduction

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

2.0 Plan Structure

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

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

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

2.3 Qwest shall be in conformance with the parity standard when service Qwest provides to CLEC is equivalent to that which it provides to its retail customers. The PAP relies upon statistical scoring to determine whether any difference between CLEC and Qwest performance results is significant, that is, not attributable to simple random variation. Statistical parity shall exist when performance results for CLEC and for Qwest retail analogue result in a z-value that is no greater than the critical z-values listed in the Critical Z-Statistical Table in section 5.0

2.4 For performance measurements that have no Qwest retail analogue, agreed upon benchmarks shall be used. Benchmarks shall be evaluated using a "stare and compare" method. For example, if the benchmark is for a particular performance measurement is 95% or better, Qwest performance results must be at least 95% to meet the benchmark. 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~~ a benchmark standard and low CLEC volumes are such that a 100% performance result would be required to meet the standard and has not

been attained. In such a situation, the next month's performance results that meets or fails the benchmark standard will be made using performance results for the month in question, plus a sufficient number of consecutive months so that 100% performance result would not be required to meet the standard. For purposes of section 6.2, a meets or fail determined by this procedure shall count as a single month. It is known that 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, (80% multiplied by 8 = 0.8) is rounded to 1, one miss would be permitted, and the effective benchmark would be 88% (1 minus 1/8).

3.0 Performance Measurements

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

4.0 Statistical Measurement

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

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

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

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

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

Where:

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

M_{QWEST} = Qwest average or proportion

M_{CLEC} = CLEC average or proportion

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

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

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

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

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

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

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

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

If the fraction is greater than α, the significance level of the test, the hypothesis of no difference is not rejected, and the test is passed. The result will be 1.5 when the critical z value is 1.645 and .15 when the critical z value is 1.04.

5.0 Critical Z-Value

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

TABLE 1: CRITICAL Z-VALUE

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

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

6.0 Tier 1 Payments to CLEC

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

6.1.1 Determination of Non-Conforming Measurements: The number of performance measurements that are determined to be non-conforming and, therefore, eligible for Tier 1 payments, are limited according to the critical z-value shown in Table 1, section 5.0. The critical z-values are the statistical standard that determines for each CLEC performance measurement whether Qwest has met parity. The critical z-value is selected from Table 1 according to the monthly CLEC volume for the performance measurement. For instance, if the CLEC sample size for that month is 100, the critical z-value is 1.645 for the statistical testing of that parity performance measurement.

6.2 Determination of the Amount of Payment: Tier 1 payments to CLEC, except as provided for in sections 6.3 and 10.0, are calculated and paid monthly based on the number of performance measurements exceeding the critical z-value. Payments will be made on either a per occurrence or per measurement basis, depending upon the performance measurement, using the dollar amounts specified in Table 2 below. The dollar amounts vary depending upon whether the performance measurement is designated High, Medium, or Low and

escalate depending upon the number of consecutive months for which Qwest has not met the standard for the particular measurement.

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

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

TABLE 2: TIER-1 PAYMENTS TO CLEC

Per Occurrence						
Measurement Group	Month 1	Month 2	Month 3	Month 4	Month 5	Month 6 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 Measurement 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

6.3 For collocation, 4 P-2 and 6 P-4 performance measurements shall be relied upon for delineation of collocation business rules. For purposes of calculating Tier 1 payments, collocation jobs and collocation feasibility studies that are later than the due date will have a per day payment applied according to Table 3. The per day payment will be applied to any collocation job in which the feasibility study is provided or the collocation installation is

~~calculated~~ for the ~~applicable~~ state. The calculation of this payment amount will be ~~performed~~ by applying the per-day payment amounts as specified in Table 3. Thus, for days 1 through 10, the payment is ~~$150~~ per day. For days 11 through 20, the payment is ~~$300~~ per day and so on.

TABLE 3: TIER-1 COLLOCATION PAYMENTS TO CLECS

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

~~7.2 A true-up payment calculation shall be performed at the end of each year for each CLEC with annual order volumes of no more than 1,200. The payment shall be calculated by multiplying $2,500 by the number of months in which at least one payment was made to the CLEC, to the extent that the actual CLEC payment for the year is less than the product of the preceding calculation. Qwest shall make an additional payment equal to the difference.~~

7.0 Tier 2 Payments to the State

7.1 Payments to the State shall be limited to the performance measurements designated in section 7.4 for Tier 2 per measurement payments and in Attachment 1 for per occurrence payments and which have at least 10 data points each month for the period payments are being calculated. Similar to the Tier 1 structure, Tier 2 measurements are categorized as High, Medium, and Low and the amount of payments for non-conformance varies according to this categorization.

7.2 Determination of Non-Conforming Measurements: The determination of non-conformance will be based upon the aggregate of all CLEC data for each Tier 2 performance measurement. Non-conforming service is defined in section 4.2 (for parity measurements) and 4.3 (for benchmark measurements), except that a 1.645 critical z-value shall be used for all parity measurements but MR-2 and OP-2. ~~The 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 5.41.~~ The critical z-value is the statistical standard that determines for each performance measurement whether Qwest has met parity.

7.3 Determination of the Amount of Payment: Except as provided in section 7.4, Tier 2 payments are calculated and paid monthly based on the number of performance measurements ~~failing~~ parity or benchmark standards ~~exceeding the critical z-value~~ for a third three consecutive months, 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. Payment will be made

on either a per occurrence or per measurement basis, whichever is applicable to the performance measurement, using the dollar amounts specified in Table 4 or Table 5 below. Except as provided in section 7.4, the dollar amounts vary depending upon whether the performance measurement is designated High, Medium, or Low.

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

TABLE 4: TIER-2 PAYMENTS TO STATE FUNDS

Per Occurrence

Measurement Group	
High	$500
Medium	$300
Low	$200

Per Measurement/Cap

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

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

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

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

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

Measurement	Performance	State Payment	14 State Payment
GA-1,2,3,4,6	1% or lower	$1,000	$14,000
	>1% to 3%	$10,000	$140,000

	>3% to 5%	$20,000	$280,000
	>5%	$30,000	$420,000
PO-1	3 sec. or less	$1,000	$14,000
	>3 sec. to 5 sec.	$5,000	$70,000
	>5 sec. to 10 sec.	$10,000	$140,000
	>10 sec.	$15,000	$210,000
OP-3/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

7.5 **Payment of Tier 2 Funds:** Payments to a state fund shall be used for any purpose determined by the Commission that is allowed under state law that relates to the Qwest performance that was the subject of the state Commission. If the Commission is not authorized by state law to receive or administer Tier 2 payments, under a state law, the payments shall be made to the state general fund or to such other source as may be appropriate under state law.

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

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

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

8.2.1 Performance Measurements that are Averages or Means:

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

8.2.1.2 **Step 2:** The percentage differences between the actual averages and the calculated averages shall be calculated. The calculation is % diff = (CLEC result – Calculated Value)/Calculated Value. The percent difference shall be capped at a maximum of 100%. In all calculations of percent differences in sections 8.0 and 9.0, the calculated percent difference is capped at 100%.

8.2.1.2 Step 2: For each performance measurement, the total number of data points shall be multiplied by the percentage calculated in the previous step and the per occurrence dollar amount from the Tier 1 Payment Table shall determine the payment to the CLEC for each non-conforming performance measurement.

8.2.2 Performance Measurements that are Percentages:

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

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

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

8.2.3 Performance Measurements that are Ratios or Proportions:

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

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

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

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

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

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

9.1 Aggregate Statistical / Value Step 1: Qwest shall identify the total number of Tier 2 parity performance measurements that measure the service provided by Qwest to all

for the month in question shall be determined. The statistical hypothesis procedures described in [illegible] critical z-value shall be used for all [illegible] for the purpose of determining the critical z-value, each disaggregated segment of a performance measurement is treated as a separate performance measurement. The critical z-value to be applied is determined by the [illegible] volume of each level of disaggregation in each measurement.

8.2.2 Step 2: For each performance measurement for which Owest's performance in that month is worse than the critical z-value, Owest's performance in that month shall be identified using the critical z-values from Step 1 as follows:

8.2.2.1 For Tier 2 payments for performance measurements listed on Attachment 1 shall be made as the critical z-value the following shall be determined. For Tier 2 measurements that are not Tier 1 measurements, it shall be determined whether Qwest missed the performance standard for three consecutive months or if any two out of three consecutive months by the [illegible] percent, for two consecutive months. For Tier 2 measurements that are Tier 1 measurements, it shall be determined whether Qwest missed the performance standard for three consecutive months or if any two out of three consecutive months for the 12 month period in the current month. If any of these conditions are met and there are at least 10 data points for the measurement in each month, a Tier 2 payment will be calculated and paid as described below and will continue in each succeeding month until Qwest's performance meets the applicable standard. Step 1: For each performance measurement that is determined to be non-conforming, it shall be determined whether the non-conformance has occurred for three consecutive months and whether there are at least 10 data points for each month. If the non-conformance meets these conditions, a Tier 2 payment will be calculated and paid as described below and will continue in each succeeding month until Qwest's performance meets the applicable standard.

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

8.2.1 Performance Measurements that are Averages or Means:

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

8.2.1.2 Step 2: The percentage difference between the actual averages and the calculated averages for each month shall be calculated . The calculation for parity measurements is % diff = (actual average – calculated average)/calculated average. The percent difference shall be capped at a maximum of 100%. In all calculations of percent differences in section 8.0 and section 9.0, the calculated percent difference is capped at 100%.

8.2.1.3 Step 3: For each performance measurement, the total number of data points each month shall be multiplied by the percentage calculated in the previous step. The average for three months (rounded to the nearest integer) shall be calculated and multiplied by the result

of the per occurrence dollar amount taken from the Tier 2 Payment Table to determine the payment to the State for each non-conforming performance measurement.

9.3 Performance Measurements that are Percentages:

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

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

9.3.1.3 Step 3: For each performance measurement, the total number of data points for each month shall be multiplied by the difference in percentage calculated in the previous step. The average for three months shall be calculated (rounded to the nearest integer) and multiplied by the result of the per occurrence dollar amounts taken from the Tier 2 Payment Table to determine the payment to the State.

9.4 Performance Measurements that are Ratios or Proportions:

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

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

9.4.1.2 Step 3: For each performance measurement, the total number of data points shall be multiplied by the difference calculated in the previous step for each month. The average for three months shall be calculated (rounded to the nearest integer) and multiplied by the result of the per occurrence dollar amounts taken from the Tier 2 Payment Table to determine the payment to the State.

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

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

10.0 Low Volume, Developing Markets

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

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

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

11.0 Payment

11.1 Payments to CLEC or the State, except as provided in section 11.3, shall be made one month following the due date of the performance measurement report for the month for which payment is being made. Qwest will pay interest on any late payment and underpayment at the prime rate as published in the Wall Street Journal. On any overpayment, Qwest is allowed to offset future payments by the amount of the overpayment plus interest at the prime rate.

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

11.3 A payment pool shall be created for the purpose of (a) payment of an independent auditor and administrator as provided in section 15.0, (b) payment of an independent arbitrator as provided in section 16.0, and (c) [illegible]

Payment of other expenses incurred by the participating Commissions in the regional administration of the PAP.

12.3.1 Qwest shall establish the Special Fund as an interest bearing escrow account upon the first FCC section 271 approval of the PAP applicable to a participating state Commission. Qwest shall be authorized to withhold and deposit into the Special Fund one-fifth of all Tier 1 payments for CLECs that exceed the month 1 payment amounts in Table 2 and one-third of all Tier 2 payments. The cost of the escrow account will be paid for from account funds.

12.3.2 Commissions participating in the Special Fund shall appoint a person designated to administer and authorize disbursement of funds. All claims against the fund shall be presented to the Commissions' designates and shall be the responsibility of the participating Commissions. Disbursements from the Special Fund shall first be from Tier 2 funds and second from Tier 1 funds. Not less than every two years, Tier 1 funds that are not needed to meet the continuing obligations of the Special Fund shall be returned on a pro-rata basis to CLECs.

12.3.3 Qwest shall advance funds, not to exceed $200,000, to meet initial claims against the Special Fund to the extent Tier 1 and Tier 2 contributions are insufficient. Qwest shall be allowed to recover any such advances plus interest at the rate that the escrow account would have earned.

12.0 Cap on Tier 1 and Tier 2 Payments

12.1 There shall be a cap on the total payments made by Qwest for a 12 month period beginning with the effective date of the PAP ~~calendar year~~ for the State of Montana. The annual cap for the State of Montana shall be $16,000,000 (36% of the 1999 ARMIS Net Return), subject to any applicable adjustment permitted pursuant to section 12.2 ~~amounts by state are shown in Attachment 1~~. CLEC agrees that this amount constitutes a maximum annual cap that shall apply to the aggregate total of Tier 1 liquidated damages, including any such damages paid pursuant to this Agreement, any other interconnection agreement, or any other payments made for the same underlying activity or omission ~~or analogous performance~~ under any other contract, order or rule) and Tier 2 assessments or payments made by Qwest for the same underlying activity or omission ~~or analogous performance~~ under any other ~~similar~~ contract, order or rule.

12.2 ~~The 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 the 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.~~ The 36% annual cap may be increased to 44% or decreased to 30% of 1999 ARMIS Net Return as follows:

12.2.1 An increase in the cap of a maximum of 4 percentage points at any one time (but not to exceed the cap amount) shall occur upon order by the Commission if the cap has been exceeded for any consecutive period of 24 months by that same 4 percent or more, provided that: (a) the Commission has determined that the preponderance of the evidence shows Qwest could have remained beneath the cap through reasonable and prudent effort, and (b) the Commission has made that determination after having available to it on the record the results of audits and root cause analyses, and provided an opportunity for Qwest to be heard.

12.2.2 A decrease in the cap of a maximum of 4 percentage points at any one time shall occur upon order by the Commission after performance for any consecutive period of 24 months in which total payments are 8 or more percentage points below the cap amount, provided that: (a) the Commission has determined that the preponderance of the evidence shows the performance results underlying those payments results from an inadequate Qwest commitment to meeting its responsibilities to provide adequate wholesale service and to keeping open its local markets and (b) the Commission shall have made that determination after providing all interested parties an opportunity to be heard.

12.2.3 The provisions of 12.2.1 and 12.2.2 shall be in effect for the next 24 month period beginning with the end of the 24 month period upon which the Commission's order is based.

12.3 If the annual 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 annual cap, the percentage equalization shall take place as follows:

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

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

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

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

~~12.3 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

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

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

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

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

13.3.2 Nothing in this plan or in the PAP shall not excuse performance that Qwest would otherwise be required to render by assuming that it had designed, implemented, staffed, provisioned, and otherwise prepared for reasonably required [illegible] and provisioning requests made by CLECs.

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

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

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

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

13.6 This PAP contains a comprehensive set of performance measurements, statistical methodologies, and payment mechanisms that are designed to function together, and only together, as an integrated whole. To elect the PAP, CLEC must adopt the PAP in its entirety, in its interconnection agreement with Qwest. By electing remedies under the PAP, CLEC [illegible] claim of damages 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 [illegible] 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). [illegible] to the PAP, the PAP shall replace any other service standards and or [illegible] liquidated damages contained in the contract for the same underlying activity [illegible].

13.7 If for any reason CLEC agreeing to this PAP is awarded compensation for the same ~~underlying act(s) or omission or analogous wholesale performance~~ for which Tier 1 ~~assessments~~ are made under this PAP ~~covered by this PAP~~, Qwest may offset the award with amounts paid under this PAP or offset 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.

13.8 Qwest shall not be liable for both Tier 2 payments under the PAP and assessments, sanctions, or other payments for the same ~~underlying act(s) or omission or analogous performance~~ pursuant to any Commission order or service quality rules.

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

14.0 Reporting

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

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

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

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

15.0 Integrated Audit Programs/Investigations of Performance Results

15.1 Audits of the PAP shall be conducted on a two-year cycle under the direction of the participating Commissions in accordance with a detailed audit plan developed by an independent auditor retained for a two-year period. The participating Commissions shall select the independent auditor with input from Qwest and CLECs.

15.1.2 The participating Commissions shall form an oversight committee of Commissioners who will choose the independent auditor and approve the audit plan. Any disputes as to the choice of auditor or the scope of the audit shall be resolved through a vote of the chairs of the participating commissions pursuant to Section 15.1.5.

15.1.3 The audit plan shall be conducted over two years. The audit plan will identify the specific performance measurements to be audited, the specific tests to be conducted, and the entity to conduct them. The audit plan will give priority to auditing the higher risk areas identified in the OSS report. The two-year cycle will examine risks likely to exist during that period and the past history of testing, in order to determine what combination of high and more moderate areas of risk should be examined during the two-year cycle. The first year of a two-year cycle will concentrate on areas most likely to require follow-up in the second year.

15.1.4 The audit plan shall be coordinated with other audit plans that may be conducted by other state commissions so as to avoid duplication, shall not impede Qwest's ability to comply with the other provisions of the PAP and should be a nature and scope that it can be conducted with the reasonable course of Qwest's business operations.

15.1.5 Any dispute arising out of the audit plan, the conduct of the audit, or audit results shall be resolved by the oversight committee of Commissioners. Decisions of the oversight committee of Commissioners may be appealed to a committee of the chairs of the participating Commissions.

15.2 Qwest may make management processes more accurate or more efficient to perform without sacrificing accuracy. These changes are at Qwest's discretion but will be reported to the independent auditor in quarterly meetings in which the auditor may ask questions about changes made in the Qwest measurement regimen. The meetings, which will be limited to Qwest and the independent auditor, will permit an independent assessment of the reasonableness and propriety of any Qwest changes, including, where necessary, testing of the changes made by the independent auditor. The information gathered by the independent auditor may be the basis for reports by the independent auditor to the participating Commissions and, where the commissions deem it appropriate, to other participants.

15.3 In the event of a disagreement between Qwest and CLECs 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, a 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 requesting 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 in the

audit plan for the current cycle. The dispute resolution provisions of section 15.5 are available to any party questioning the independent auditor's decision to conduct or not conduct a CLEC contract audit and the audit findings should such an audit be conducted. No audit may be initiated until dispute resolution is completed. 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 (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 previous 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 15.5, shall be paid first from the Tier 2 funds in the Special Fund. The remainder of audit expenses will be paid one half from Tier 1 funds in the Special Fund and one half by Qwest.

15.4 Qwest will create a separate financial system which will take performance results as input 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 audits will be chosen and paid for by Qwest. Alternatively, the Commission may choose to conduct this audit itself. The necessity of any subsequent audits of the financial system shall be considered on the six month PAP review, 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 full credit to CLEC and make additional payments to the State for the amount underpaid. In the event Qwest overpaid, future bill credits to CLEC 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 applicable monthly rate.

15.5 In the event of a disagreement between Qwest and CLEC as to any issue regarding the accuracy or integrity of data collected, generated, and reported pursuant to the PAP, Qwest and the CLEC shall first consult with one another and attempt in good faith to resolve the issue. If an issue is not resolved within 45 days after a request for consultation, CLEC and Qwest may, upon a demonstration of good cause (e.g., evidence of material errors or discrepancies) request an independent audit to be conducted at the requesting 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.

15.6 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 requesting the audit. In the event CLEC is found to be responsible for the deficiency, any overpayment made to CLEC as a result of the deficiency shall be refunded to Qwest with interest and any affected portion of future payments will be suspended until CLEC corrects the deficiency. In the event that Qwest is found to be responsible for the

~~determination, Qwest will pay CLEC the amount that would have been due under the PAP, plus the applicable interest.~~

~~15.4 Section 4.1.1 of Qwest's PAP requires that Tier 2 credits per calendar year for the entire region be capped at the Qwest in-region state. Each state will be limited to the same Tier 2 performance measurements per state. For purposes of these provisions, a performance measurement is a PID, e.g. 43-2. Installation Commitment. Not withstanding that Qwest shall not be required to establish more than 3 states at one time by the region assigned as the in-region state, notwithstanding who has initiated the state and notwithstanding the provisions in this paragraph. The provisions shall continue to govern states regarding performance measurements. Qwest agrees to inform Commission staff and all CLECs of the results of an audit.~~

15.5 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.

16.0 Reviews

16.1 Every six (6) months, beginning six months after the effective date of the first Section 271 approval by the FCC of one of the states that participated in the multi-state QPAP review proceeding, Qwest, CLECs, and the Commissions of those state shall participate in a common review of the performance measurements to determine whether measurements should be added, deleted, or modified; whether the applicable benchmark standards should be modified or replaced by parity standards; and whether to move a classification of a measurement to High, Medium, or Low or Tier 1 to Tier 2. The criterion for reclassification of a measurement shall be whether the actual volume of data points was less or greater than anticipated. Criteria for review of performance measurements, other than for possible reclassification, shall be whether there exists an omission or failure to capture intended performance, and whether there is duplication of another measurement. The first six-month period will begin upon the FCC's approval of Qwest's 271 application for that particular state. Changes shall not be made without Qwest's 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 that of an arbitrator shall be paid from the Special Fund.

[redacted]

[redacted] Qwest will make the PAP available for CLEC interconnection agreements until such time as Qwest ceases to be an ILEC affiliate. At that time, the Commission and Qwest will review the appropriateness of the PAP and whether its continuation is necessary. [redacted] that Qwest exits the interLATA market, that State PAP shall be rescinded automatically.

[redacted] Voluntary Performance Assurance Plan

[redacted] Qwest's voluntary offer to provide performance assurance. Nothing in the PAP or in the existence of non-conformance of Qwest's service performance with the standards defined in the PAP shall be construed to be, of itself, non-conformance with the Act.

[redacted] Dispute Resolution

[redacted] the meaning of the provisions of the PAP and how the terms of Qwest's obligations under the PAP, section 5.18, shall [redacted] the PAP part of the [redacted] interconnection agreement.

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

Performance Measurement		Tier 1 Payments			Tier 2 Payments		
		Low	Med	High	Low	Med	High
GATEWAY							
Trouble Outage Resolution	[illegible]						
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					
Reject Notifications	PO-16						
ORDERING AND PROVISIONING							
Installation Commitments Met	OP-3[c]			X		X	
Installation Intervals	OP-4[d]			X		X	
New Service Installation Quality	OP-5			X		X	
Delayed Days	OP-6[e]			X		X	
Number Portability Timeliness	OP-8			X		X	
Coordinated Cuts On Time – Unbundled Loops	OP-13a			X		X	
LNP Disconnect Timeliness	OP-17			X		X	
MAINTENANCE AND REPAIR							
Out of Service Cleared within 24 hours	MR-3			X			
All Troubles Cleared within 4 hours	MR-5			X			
Mean time to Restore	MR-6a,b,c			X			
Repair Repeat Report Rate	MR-7			X		X	
Trouble Rate	MR-8			X		X	
LNP Trouble Reports Cleared within 24 Hours	MR-11			X		X	
LNP Trouble Reports—Mean Time to Restore	MR-12			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	[illegible]	X					
Installation Commitment Met	[illegible]			X			
Feasibility Study Interval	[illegible]	X					
Feasibility Study Commitments Met	[illegible]	X					

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

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

~~c. OP-3 is included 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.~~

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

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

Attachment 2: Performance Measurements Subject to Per Measurement Caps

Billing

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

State of Affiliation	Loss Unit(s) Per Person	Adjustment for Employment Rate Factor	Annual Cap
Alaska	[illegible]		[illegible]
Iowa	[illegible]		[illegible]
Minnesota	[illegible]	[illegible]	[illegible]
Montana	[illegible]		[illegible]
Nebraska	[illegible]		[illegible]
New Mexico	[illegible]	[illegible]	[illegible]
North Dakota	[illegible]		[illegible]
Oregon	[illegible]	[illegible]	[illegible]
South Dakota	[illegible]		[illegible]
Utah	[illegible]		[illegible]
Washington	[illegible]		[illegible]
Wyoming	[illegible]		[illegible]

The individual state annual payment cap amounts were calculated based upon Average Loss Units (ALUs) results adjusted to reflect the full annual effect of retroactive payment orders of the respective state regulatory commissions.

The New Mexico adjustment reflects the Per Diem Commission's retroactive order to Docket No. 3017. Permanent rate will be set in Docket No. 3018 and will be retroactive to adjustment when rates are final.

ATTACHMENT 17: Performance Remedy Plan

This Attachment 17: Performance Remedy Plan sets forth the terms and conditions under which SWBT will report performance to CLEC and compare that performance to SWBT's own performance or benchmark criteria, whichever is applicable. This Attachment further provides for enforcement through liquidated damages and assessments.

1.0 SWBT agrees to provide CLEC a monthly report of performance for the performance measures listed in Appendix 1. SWBT will collect, analyze, and report performance data for these measures in accordance with SWBT's Performance Measurement Business Rules, as approved by the Texas Commission. Both the performance measures and the business rules are subject to modification in accordance with section 6.4 below regarding six month reviews. SWBT and CLEC further agree to use this two-tiered enforcement structure for performance measurements provided for in this Attachment. The Commission approved performance measurements shown in Appendix 1 hereto identify the measurements that belong to Tier-1 or Tier-2 categories, which are further identified as the High, Low and Medium groups as those terms are used below.

1.1 SWBT will not levy a separate charge for provision of the data to CLEC called for under this Attachment. Upon CLEC's request, data files of CLEC's raw data, or any subset thereof, will be transmitted to CLEC. If CLEC's request is transmitted to SWBT on or before the last day of the month for which data is sought, SWBT shall provide the data to CLEC on or before 20th day of the month pursuant to mutually acceptable format, protocol, and transmission media. If CLEC's request is transmitted to SWBT after the last day of the month for which data is sought, SWBT shall provide the data to CLEC within 20 days of receipt pursuant to mutually acceptable format, protocol, and transmission media. Notwithstanding other provisions of this Agreement, the Parties agree that such records will be deemed Proprietary Information.

2.0 SWBT and CLEC agree to use a statistical test, namely the modified "Z-test," for evaluating the difference between two means (SWBT and CLEC) or percentages, or the difference in the two proportions for purposes of this Attachment. SWBT agrees to use the modified Z-tests as outlined below as the statistical tests for the determination of parity when the result for SWBT and the CLEC are compared. The modified Z-tests are applicable if the number of data points are greater than 30 for a given measurement. In cases where benchmarks are established, the determination of compliance is through the comparison of the measured performance delivered to the CLEC and the applicable benchmark. For testing compliance for measures for which the number of data points are 29 or less, although the use of permutation tests as outlined below is appropriate, comparison of performance delivered to CLEC's with SWBT performance as described in Alternative-1 under the "Qualifications to use Z-Test" heading below is preferred.

3.0 SWBT and CLEC concur that, for purposes of this Attachment, performance for the CLEC on a particular measure will be considered in compliance with the parity

requirement when the measured results in a single month (whether in the form of means, percents, or proportions) for the same measurement, at equivalent disaggregation, for both SWBT and CLEC are used to calculate a Z-test statistic and the resulting value is no greater than the critical Z-value as reflected in the Critical Z-statistic table shown below.

Z-Test:

SWBT agrees with the following formulae for determining parity using Z-Test:

For Measurement results that are expressed as Averages or Means: $z = (DIFF) / \delta_{DIFF}$

Where;
DIFF = $M_{ILEC} - M_{CLEC}$
M_{ILEC} = ILEC Average
M_{CLEC} = CLEC Average
$\delta_{DIFF} = SQRT [\delta^2_{ILEC} (1/n_{CLEC} + 1/n_{ILEC})]$
δ^2_{ILEC} = Calculated variance for ILEC.
n_{ILEC} = number of observations or samples used in ILEC measurement
n_{CLEC} = number of observations or samples used in CLEC measurement

For Measurement results that are expressed as Percentages or Proportions:

Step 1:

$$\rho = \frac{(n_{ILEC}P_{ILEC} + n_{CLEC}P_{CLEC})}{n_{ILEC} + n_{CLEC}}$$

Step 2:

$\sigma_{PILEC-PCLEC} = sqrt[[\rho(1-\rho)]/n_{ILEC} + [\rho(1-\rho)]/n_{CLEC}]$

Step 3:

$Z = (P_{ILEC} - P_{CLEC})/\sigma_{PILEC-PCLEC}$

Where: n = Number of Observations
P = Percentage or Proportion

For Measurement results that are expressed as Rates or Ratios:

$z = (DIFF) / \delta_{DIFF}$

Where;
DIFF = $R_{ILEC} - R_{CLEC}$
$R_{ILEC} = num_{ILEC}/denom_{ILEC}$
$R_{CLEC} = num_{CLEC}/denom_{CLEC}$
$\delta_{DIFF} = SQRT [R_{ILEC} (1/denom_{CLEC} + 1/denom_{ILEC})]$

CONTINUATION

[7]

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4.0 Qualifications to use Z-Test:

The proposed Z- tests are applicable to reported measurements that contain 30 or more data points.

In calculating the difference between the performances the formula proposed above applies when a larger CLEC value indicates a higher quality of performance. In cases where a smaller CLEC value indicates a higher quality of performance the order of subtraction should be reversed (i.e., $M_{CLEC} - M_{ILEC}$, $P_{CLEC} - P_{ILEC}$, $R_{CLEC} - R_{ILEC}$).
For measurements where the applicable performance criterion is a benchmark rather than parity performance compliance will be determined by setting the denominator of the Z-test formula as one in calculating the Z-statistic.

For measurements where the performance delivered to CLEC is compared to SWBT performance and for which the number of data points are 29 or less, SWBT agrees to application of the following alternatives for compliance.

4.1 Alternative 1:

For measurements that are expressed as averages, performance delivered to a CLEC for each observation shall not exceed the ILEC averages plus the applicable critical Z-value. If the CLEC's performance is outside the ILEC average plus the critical Z-value and it is the second consecutive month, SWBT can utilize the Z-test as applicable for data sets of 30 or greater data points or the permutation test to provide evidence of parity. If SWBT uses the Z-test for data sets under 30, the CLEC can independently perform the permutation test to validate SWBT's results. SWBT will supply all data required to perform the permutation test, including the complete ILEC and CLEC data sets for the measure, to CLEC upon request. The results of the permutation test will control over the results of the Z-test analysis as applicable for data sets 30 or greater.

For measurements that are expressed as percentages, the percentage for CLEC shall not exceed ILEC percentage plus the applicable critical Z-value. If the CLEC's performance is outside the ILEC percentage plus the critical Z-value and it is the second consecutive month, SWBT can utilize the Z-test as applicable for data sets of 30or greater data points or the permutation test to provide evidence of parity. If SWBT uses the Z-test for data sets under 30, the CLEC can independently perform the permutation test to validate SWBT's results. SWBT will supply all data required to perform the permutation test, including the complete ILEC and CLEC data sets for the measure, to CLEC upon request. The results of the permutation test will control over the results of the Z-test analysis as applicable for data sets 30 or greater.

4.2 Alternative 2:

Permutation analysis will be applied to calculate the z-statistic using the following logic:

Choose a sufficiently large number T.

Pool and mix the CLEC and ILEC data sets

Randomly subdivide the pooled data sets into two pools, one the same size as the original CLEC data set (n_{CLEC}) and one reflecting the remaining data points (which is equal to the size of the original ILEC data set or n_{ILEC}).

Compute and store the Z-test score (Z_S) for this sample.

Repeat steps 3 and 4 for the remaining T-1 sample pairs to be analyzed. (If the number of possibilities is less than 1 million, include a programmatic check to prevent drawing the same pair of samples more than once).

Order the Z_S results computed and stored in step 4 from lowest to highest.

Compute the Z-test score for the original two data sets and find its rank in the ordering determined in step 6.

Repeat the steps 2-7 ten times and combine the results to determine P = (Summation of ranks in each of the 10 runs divided by 10T).

Using a cumulative standard normal distribution table, find the value Z_A such that the probability (or cumulative area under the standard normal curve) is equal to P calculated in step 8.

Compare Z_A with the desired critical value as determined from the critical Z table. If Z_A > the designated critical Z-value in the table, then the performance is non-compliant.

4.3 SWBT and CLEC will provide software and technical support as needed by Commission Staff for purposes of utilizing the permutation analysis. Any CLEC who opts into this Attachment 17 agrees to share in providing such support to Commission Staff.

5.0 Overview of Enforcement Structure

5.1 SWBT agrees with the following methodology for developing the liquidated damages and penalty assessment structure for tier-1 liquidated damages and tier-2 assessments.

5.2 SWBT will pay Liquidated Damages to the CLEC according to the terms set forth in this Attachment.

5.3 Liquidated damages apply to Tier-1 measurements identified as High, Medium, or Low on Appendix -1.

5.4 Assessments are applicable to Tier-2 measures identified as High, Medium, or Low on Appendix -1 and are payable to the Texas State Treasury.

5.5 SWBT will not be liable for the payment of either Tier 1 damages or Tier 2 assessments until the Commission approves an Interconnection Agreement between a CLEC and SWBT containing the terms of Attachment 17 of this Agreement. Tier 2 assessments will be paid on the aggregate performance for all CLECs that are operating in Texas, unless the CLEC has a payment plan that is not comparable to that in Tier 1 of this Attachment 17: Performance Remedy Plan. For purposes of this paragraph, a payment plan that is not comparable to that in Tier-1 of Attachment 17 is a plan that provides for a separate set of payments relating to performance on specified competition-affecting measures, over and above (or without) liquidated damages payments that are calculated in a fashion analogous to the method of calculation used in Tier-1 of Attachment 17. SWBT agrees that all payment plans in interconnection agreements approved by the Texas PUC as of December 16, 1999, are comparable to Tier 1 of Attachment 17 under this standard.

6.0 Procedural Safeguards and Exclusions

6.1 SWBT agrees that the 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 a CLEC. By incorporating these liquidated damages terms into an interconnection agreement, SWBT and CLEC agree that proof of damages from any "noncompliant" performance measure would be difficult to ascertain and, therefore, liquidated damages are a reasonable approximation of any contractual damage resulting from a non-compliant performance measure. SWBT and CLEC further agree that liquidated damages payable under this provision are not intended to be a penalty.

6.2 SWBT'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. SWBT and CLEC agree that CLEC may not use: (1) the existence of this enforcement plan; or (2) SWBT's payment of Tier-1 "liquidated damages" or Tier-2 "assessments" as evidence that SWBT 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. SWBT's conduct underlying its performance measures, and the performance data provided under the performance measures, however, are not made inadmissible by these terms. Any CLEC accepting this performance remedy plan agrees that SWBT'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 SWBT under these provisions is not hereby made inadmissible in any proceeding relating to the same conduct where SWBT seeks to offset the payment against any other damages a CLEC might 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. The terms of this paragraph do not apply to any proceeding before the Commission or the FCC to determine whether SWBT has met or continues to meet the requirements of section 271 of the Act.

6.3 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.

6.4 Every six months, CLEC may participate with SWBT, other CLECs, and Commission representatives to review the performance measures 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, Low, Diagnostic, Tier-1 or Tier-2. The criterion for reclassification of a measure shall be whether the actual volume of data points was lesser or greater than anticipated. Criteria for review of performance measures, 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. Performance measures for 911 may be examined at any six month review to determine whether they should be reclassified. The first six-month period will begin when an interconnection agreement including this remedy plan is adopted by a CLEC and approved by the Commission. Any changes to existing performance measures and this remedy plan shall be by mutual agreement of the parties and, if necessary, with respect to new measures and their appropriate classification, by arbitration. The current measurements and benchmarks will be in effect until modified hereunder or expiration of the interconnection agreement.

6.5 SWBT and CLEC acknowledge that no later than two years after SWBT or its affiliate receives Section 271 relief, the Commission's intention is to reduce the number of performance measures subject to damages and assessments by 50% to the extent there is a smaller number of measures that truly do capture all of the issues that are competition-affecting and customer-affecting.

6.6 CLEC and SWBT will consult with one another and attempt in good faith to resolve any issues regarding the accuracy or integrity of data collected, generated, and reported pursuant to this Attachment. In the event that CLEC requests such consultation and the issues raised by CLEC have not been resolved within 45 days after CLEC's request for consultation, then SWBT will allow CLEC to have an independent audit conducted, at CLEC's expense, of SWBT's performance measurement data collection, computing, and reporting processes. In the event the subsequent audit reinforces the problem identified during the 45 days of consultation period or if any new problem is identified, SWBT shall reimburse a CLEC any expense incurred by the CLEC for such audit. CLEC may not request more than one audit per twelve calendar months under this section. This section does not modify CLEC's audit rights under other provisions of this Agreement. SWBT

agrees to inform all CLECs of any problem identified during the audit initiated by any CLEC.

7.0 Exclusions Limited

7.1 SWBT shall not be obligated to pay liquidated damages or assessments for noncompliance with a performance measurement if, but only to the extent that, such noncompliance was the result of any of the following: a Force Majeure event; an act or omission by a CLEC that is contrary to any of its obligations under its interconnection agreement with SWBT or under the Act or Texas law; or non-SWBT problems associated with third-party systems or equipment, which could not have been avoided by SWBT in the exercise of reasonable diligence. Provided, however, the third party exclusion will not be raised more than three times within a calendar year. SWBT will not be excused from payment of liquidated damages or assessments on any other grounds, except by application of the procedural threshold provided for below. Any dispute regarding whether a SWBT performance failure is excused under this paragraph will be resolved with the Commission through a dispute resolution proceeding under Subchapter Q of its Procedural Rules or, if the parties agree, through commercial arbitration with the American Arbitration Association. SWBT will have the burden in any such proceeding to demonstrate that its noncompliance with the performance measurement was excused on one of the grounds set forth in this paragraph. If a Force Majeure event or other excusing event recognized in the first sentence of this section 7.1 only suspends SWBT's ability to timely perform an activity subject to performance measurement, the applicable time frame in which SWBT'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.

7.2 In addition to the provisions set forth herein, SWBT shall not be obligated to pay liquidated damages or assessments for noncompliance with a performance measure if the Commission finds such noncompliance was the result of an act or omission by a CLEC that is in bad faith, for example, unreasonably holding orders and/or applications and "dumping" such orders or applications in unreasonably large batches, at or near the close of a business day, on a Friday evening or prior to a holiday, or unreasonably failing to timely provide forecasts to SWBT for services or facilities when such forecasts are required to reasonably provide such services or facilities; or non-SWBT Y2K problems.

7.3 CLEC agrees that a maximum annual cap of $289 million will apply to the aggregate total of any Tier-1 liquidated damages (including any such damages paid pursuant to this Agreement or to any other Texas interconnection agreement with a CLEC) and Tier-2 Assessments or voluntary payments made by SWBT pursuant to any Texas interconnection agreement with a performance remedy plan. The annual cap will be determined by SWBT, based on the formula of 36% of Net Return as set forth at ¶ 436 and footnote 1332 of the FCC's December 22, 1999 Memorandum Opinion and Order in CC Docket No. 99-295. In no event will the annual cap be greater than $289 million per

year, or less than $225 million. Once the annual cap is established, a monthly cap will be determined by dividing the amount of the annual cap by twelve. CLEC further acknowledges that a maximum monthly cap of $24.08 million ($289 million ÷ 12) for Tier-1 liquidated damages will apply to all performance payments made by SWBT under all SWBT Texas interconnection agreements To the extent in any given month the monthly cap 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. At the end of the year, if the aggregate total of Tier-1 liquidated damages and Tier-2 Assessments under all SWBT Texas interconnection agreements equals or exceeds the annual cap, but SWBT has paid less than that amount due to the monthly cap, , SWBT shall be required to pay an amount equal to the annual cap. . In such event, Tier-1 liquidated damages shall be paid first on a pro rata basis to CLECs, and any remainder within the annual cap , shall be paid as a Tier-2 Assessment. In the event the total calculated amount of damages and assessments for the year is less than the annual cap, SWBT shall be obligated to pay ONLY the actual calculated amount of damages and assessments. . The annual cap shall be calculated on the first day of the month following the annual anniversary of Commission approval of the Texas 271 Agreement, using the most recent publicly available ARMIS data. For purposes of applying the cap, the relevant calendar year shall begin on the first day of the month following the month in which the Commission approved the Texas 271 Agreement.

7.3.1 Whenever SWBT Tier-1 payments to an individual CLEC in a given month exceed $ 3 million, or the Tier-1 payments to all CLECs Tier-1 payments in a given month exceed the monthly cap, then SWBT may commence a show cause proceeding as provided for below. Upon timely commencement of the show cause proceeding, SWBT must pay the balance of damages 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, SWBT must file with the Commission, not later than the due date of the affected damages payments, an application to show cause why it should not be required to pay any amount in excess of the procedural threshold. SWBT's application will be processed in an expedited manner under Subchapter Q of the Commission's Procedural Rules. SWBT will have the burden of proof to demonstrate why, under the circumstances, it would be unjust to require it to pay liquidated damages in excess of the applicable threshold amount. If SWBT reports non-compliant performance to a CLEC for three consecutive months on 20% or more of the measures reported to the CLEC, but SWBT has incurred no more than $ 1 million in liquidated damages obligations to the CLEC for that period under the enforcement terms set out here, then the CLEC may commence an expedited dispute resolution under this paragraph pursuant to Subchapter Q of the Commission's Procedural Rules. In any such proceeding the CLEC will have the burden of proof to demonstrate why, under the circumstances, justice requires SWBT to pay damages in excess of the amount calculated under these enforcement terms.

7.3.2 SWBT should post on its Internet website the aggregate payments of any liquidated damages or assessments.

7.4 With respect to any interconnection agreement, SWBT and any CLEC may request two expedited dispute resolution proceedings pursuant to the two preceding paragraphs before the Commission or, if the parties agree, through commercial arbitration with the American Arbitration Association (AAA); during the term of the contract without having to pay attorneys fees to the winning company. For the third proceeding and thereafter, the requesting party must pay attorneys fees, as determined by the Commission or AAA, if that party loses.

7.5 In the event the aggregate total of Tier-1 damages and Tier-2 assessments under all SWBT Texas interconnection agreements reaches the annual cap within a given year and SWBT continues to deliver non-compliant performance during the same year to any CLEC or all CLECs, the Commission may recommend to the FCC that SWBT should cease offering in-region interLATA services to new customers.

8.0 **Tier-1 Damages:**

Tier-1 liquidated damages apply to measures designated in Attachment–1 as High, Medium, or Low when SWBT delivers "non-compliant" performance as defined above.

8.1 Under the damages for Tier-1 measures, the number of measures that may be classified as "non-compliant" before a liquidated damage is applicable is limited to the K values shown below. The applicable K value is determined based upon the total number of measures with a sample size of 10 or greater that are required to be reported to a CLEC where a sufficient number of observations exist in the month to permit parity conclusions regarding a compliant or non-compliant condition. For any performance measurement, each disaggregated category for which there are a minimum of 10 data points constitutes one "measure" for purposes of calculating K value. The designated K value and the critical Z-value seek to balance random variation, Type-1 and Type-2 errors. Type-1 error is the mistake of charging an ILEC with a violation when it may not be acting in a discriminatory manner (that is, providing non-compliant performance). Type-2 error is the mistake of not identifying a violation when the ILEC is providing discriminatory or non-compliant performance.

8.2 Liquidated damages in the amount specified in the table below apply to all "non-compliant" measures in excess of the applicable "K" number of exempt measures. Liquidated damages apply on a per occurrence basis, using the amount per occurrence taken from the table below, based on the designation of the measure as High, Medium, or Low in Appendix-1 and the number of consecutive months for which SWBT has reported noncompliance for the measure. For those measures listed on Appendix-2 as "Measurements that are subject to per occurrence damages or assessments with a cap," the amount of liquidated damages in a single month shall not exceed the amount listed in the table below for the "Per measurement" category. For those measures listed on Appendix -2 as "Measurements that are subject to per measure damages or assessment," liquidated damages will apply on a per measure basis, at the amounts set forth in the table below. The methodology for determining the order of exclusion, and the number of

occurrences is addressed in "Methods of calculating the liquidated damages and penalty amounts," below.

LIQUIDATED DAMAGES TABLE FOR TIER-1 MEASURES

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

ASSESSMENT TABLE FOR TIER-2 MEASURES

Per occurrence

Measurement Group	
High	$500
Medium	$300
Low	$200

Per Measure/Cap*

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

* **For per occurrence with cap measures, the occurrence value is taken from the per occurrence table, subject to the per measure with cap amount.**

Tier-2 Assessments to the State

Assessments payable to the Texas State Treasury apply to the Tier-2 measures designated as Appendix -1 as High, Medium, or Low when SWBT performance is out of parity or does not meet the benchmarks for the aggregate of all CLEC data. Specifically, if the Z-test value is greater than the Critical Z, the performance for the reporting category is out of parity or below standard.

For those Measurements where a per occurrence assessment applies, an assessment as specified in the Assessment Table, for each occurrence is payable to the Texas State Treasury for each measure that exceeds the Critical Z-value, shown in the table below, for three consecutive months. For those Measurements listed in Appendix -2 as assessments subject to per occurrence with a cap, an assessment as shown in the Assessment Table above for each occurrence with the applicable cap is payable to the Texas State Treasury for each measure that exceeds the Critical Z-value, shown in the table below, for three consecutive months. For those Tier-2 Measurements listed in Appendix -2 as subject to a per measurement assessment an assessment amount as shown in the Assessment Table above is payable to the Texas State Treasury for each measure that exceeds the Critical Z-value, shown in the table below, for three consecutive months.

The following table will be used for determining the Critical Z-value for each measure , as well as the K values referred to below based on the total number of measures that are applicable to a CLEC in a particular month. The table can be extended to include CLECs with fewer performance measures. The Critical Z-value for Tier 2 will be calculated in the same manner as for Tier 1.[1]

Critical Z - Statistic Table

Number of Performance Measures	K Values	Critical Z-value
1	0	1.65
2	0	1.96
3	0	2.12
4	0	2.23
5	0	2.32
6	0	2.39
7	0	2.44
8	1	1.69
9	1	1.74
10-19	1	1.79
20-29	2	1.73

[1] This sentence is added to clarify the manner in which Critical-Z value is calculated.

30 - 39	3	1.68
40 - 49	3	1.81
50 - 59	4	1.75
60 - 69	5	1.7
70 - 79	6	1.68
80 - 89	6	1.74
90 - 99	7	1.71
100 - 109	8	1.68
110 - 119	9	1.7
120 - 129	10	1.72
130 - 139	12	1.68
140 - 149	13	1.69
150 - 159	14	1.7
160 - 179	17	1.7
180 - 199	20	1.7
200 - 219	26	1.7
220 - 239	32	1.7
240 - 259	38	1.72
260 - 279	44	1.72
280 - 299	49	1.73
300 - 319	55	1.75
320 - 339	60	1.77
340 and above	Calculated for Type-1 Error Probability of 5%	Calculated for Type-1 Error Probability of 5%

10.0 General Assessments:

10.1 If SWBT fails to submit performance reports by the 20th day of the month, the following assessments apply unless excused for good cause by the Commission:

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.

10.2 If SWBT alters previously reported data to a CLEC, and after discussions with SWBT the CLEC disputes such alterations, then the CLEC may ask the Commission to review the submissions and the Commission may take appropriate action. This does not apply to the limitation stated under the section titled "Exclusions Limited."

10.3 When SWBT performance creates an obligation to pay liquidated damages to a CLEC or an assessment to the State under the terms set forth herein, SWBT shall make payment in the required amount on or before the 30th day following the due date of the performance measurement report for the month in which the obligation arose (e.g., if SWBT

performance through March is such that SWBT owes liquidated damages to CLECs for March performance, or assessments to the State for January – March performance, then these payments will be due May 15, 30 days after the April 15 due date for reporting March data). For each day after the due date that SWBT fails to pay the required amount, SWBT will pay interest to the CLEC at the maximum rate permitted by law for a past due liquidated damages obligation and will pay an additional $3,000 per day to the Texas State Treasury for a past due assessment.

10.4 SWBT may not withhold payment of liquidated damages to a CLEC, for any amount up to $3,000,000 a month, unless SWBT had commenced an expedited dispute resolution proceeding on or before the payment due date, asserting one of the three permitted grounds for excusing a damages payment below the procedural threshold (Force Majeure, CLEC fault, and non-SWBT problems associated with third-party systems or equipment). In order to invoke the procedural threshold provisions allowing for escrow of damages obligations in excess of $ 3,000,000 to a single CLEC (or $ 10,000,000 to all CLECs), SWBT must pay the threshold amount to the CLEC(s), pay the balance into escrow, and commence the show cause proceeding on or before the payment due date.

10.5 CLEC will have access to monthly reports on performance measures and business rules through an Internet website that includes individual CLEC data, aggregate CLEC data, and SWBT's data.

10.6 The cap provided in Section 7.3 does not apply to assessments under Section 10 of this Attachment.

11.0 Methods of Calculating the Liquidated Damage and Assessment Amounts

The following methods apply in calculating per occurrence liquidated damage and assessments:

11.1 Tier-1 Liquidated Damages

11.1.1 *Application of K Value Exclusions*

Determine the number and type of measures with a sample size greater than 10 that are "non-compliant" for the individual CLEC for the month, applying the parity test and bench mark provisions provided for above. Sort all measures having non-compliant classification with a sample size greater than 10 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" measures designated Low on Appendix -1, starting with the measurement results having the fewest number of underlying data points greater than 10. If all Low measurement results with a non-compliant designation are excluded before "K" is exceeded, then the exclusion process proceeds with the Medium measurement results and thereafter the High measurement results. If all

Low, Medium and High measurements are excluded, then those measurements with sample sizes less than 10 may be excluded until "K" measures are reached. In each category measurement results with non-compliant designation having the fewest underlying data point are then excluded until either all non-compliant measurement results are excluded or "K" measures are excluded, whichever occurs first. For the remaining non-compliant measures that are above the K number of measures, the liquidated damages per occurrence are calculated as described further below. (Application of the K value may be illustrated by an example, if the K value is 6, and there are 7 Low measures and 1 Medium and 1 High which exceed the Critical Z-value, the 6 Low measures with the lowest number of service orders used to develop the performance measure are not used to calculate the liquidated damages, while the remaining 1 Low measure, 1 Medium measure, and 1 High measure which exceed the critical Z-value are used.) In applying the K value, the following qualifications apply to the general rule for excluding measures by progression from measures with lower transaction volumes to higher. A measure for which liquidated damages are calculated on a per measure basis will not be excluded in applying the K value unless the amount of liquidated damages payable for that measure is less than the amount of liquidated damages payable for each remaining measure. A measure for which liquidated damages are calculated on a per occurrence basis subject to a cap will be excluded in applying the K value whenever the cap is reached and the liquidated damages payable for the remaining non-compliant measures are greater than the amount of the cap.

11.1.2 Calculating Tier-1 Liquidated Damages

11.1.2.1 Measures for Which the Reporting Dimensions are Averages or Means.

Step 1: Calculate the average or the mean for the measure for the CLEC 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 measures, calculate the value that would yield the critical Z-value by adding or subtracting the critical Z-value to the benchmark as appropriate, subject to 4.0 and the Business Rules.).

Step 2: Calculate the percentage difference the between the actual average and the calculated average.

Step 3: Multiply the total number of data points by the percentage calculated in the previous step and the per occurrence dollar amount taken from the Liquidated Damages Table to determine the applicable liquidated damages for the given month for that measure.

11.1.2.2 Measures for Which the Reporting Dimensions are Percentages.

Step 1: Calculate the percentage for the measure for the CLEC 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 measures, calculate the value that would yield the critical Z-value by adding or subtracting the critical Z-value to the benchmark as appropriate, subject to 4.0 and the Business Rules.).

Step 2: Calculate the difference between the actual percentage for the CLEC and the calculated percentage.

Step 3: 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 Liquidated Damages Table to determine the applicable liquidated damages for the given month for that measure.

11.1.2.3 Measures for Which the Reporting Dimensions are Ratios or Proportions.

Step 1: Calculate the ratio for the measure for the CLEC that would yield the Critical Z-value. Use the same denominator as the one used in calculating the Z-statistic for the measure.

Step 2: Calculate the percentage difference between the actual ratio for the CLEC and the calculated ratio.

Step 3: Multiply the total number of data points by the percentage calculated in the previous step and the per occurrence dollar amount taken from the Liquidated Damages Table to determine the applicable liquidated damages for the given month for that measure.

12.1 Tier Two Liquidated Damages

12.1.1 Determine the Tier-2 measurement results, such as High, Medium, or Low that are non-compliant for three consecutive months for all CLECs, or individual CLEC if the measure is not reported for all CLECs.

If the non-compliant classification continues for three consecutive months, an additional assessment will apply in the third month and in each succeeding month as calculated below, until SWBT reports performance that meets the applicable criterion. That is, Tier-2 assessments will apply on a "rolling three month" basis, one assessment for the average number of occurrences for months 1-3, one assessment for the average number of occurrences for months 2-4, one assessment for the average number of occurrences for months 3-5, and so forth, until satisfactory performance is established.

12.1.2 Measures for Which the Reporting Dimensions are Averages or Means.

Step 1: Calculate the average or the mean for the measure for the CLEC that would yield the Critical Z-value for the third consecutive month. Use the same denominator as the one used in calculating the Z-statistic for the measure. (For benchmark measures, calculate the value that would yield the Critical Z-value by adding or subtracting the Critical Z-value to the benchmark as appropriate, subject to 4.0 and the Business Rules.).

Step 2: Calculate the percentage difference between the actual average and the calculated average for the third consecutive month.

Step 3: Multiply the total number of data points by the percentage calculated in the previous step. Calculate the average for three months and multiply the result by $500, $300, and $200 for Measures that are designated as High, Medium, and Low respectively; to determine the applicable assessment payable to the Texas State Treasury for that measure.

12.1.3 Measures for Which the Reporting Dimensions are Percentages.

Step 1: Calculate the percentage for the measure for the CLEC that would yield the Critical Z-value for the third consecutive month. Use the same denominator as the one used in calculating the Z-statistic for the measure. (For benchmark measures, calculate the value that would yield the critical Z-value by adding or subtracting the Critical Z-value to the benchmark as appropriate, subject to 4.0 and the Business Rules.).

Step 2: Calculate the difference between the actual percentage for the CLEC and the calculated percentage for each of the three non-compliant months.

Step 3: 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 and multiply the result by $500, $300, and $200 for measures that are designated as High, Medium, and Low respectively; to determine the applicable assessment for that measure.

12.1.4 Measures for Which the Reporting Dimensions are Ratios or Proportions.

Step 1: Calculate the ratio for the measure for the CLEC that would yield the Critical Z-value for the third consecutive month. Use the same denominator as the one used in calculating the Z-statistic for the measure. (For benchmark measures, calculate the value that would yield the Critical Z-value by adding or subtracting the Critical Z-value to the benchmark as appropriate, subject to 4.0 and the Business Rules.).

Step 2: Calculate the percentage difference between the actual ratio for the CLEC and the calculated ratio for each month of the non-compliant three-month period.

Step 3: Multiply the total number of service orders by the percentage calculated in the previous step for each month. Calculate the average for three months and multiply the result by $500, $300, and $200 for measures that are designated as High, Medium, and Low respectively; to determine the applicable assessment for that measure.

13.0 December 16, 1999 Amendments

13.1 The following amendments to the this Attachment 17: Performance Remedy Plan specifically address concerns raised by the Commission during its November 4, 1999 Open Meeting. These amendments are interim in nature and will expire when the results reflect three months of compliant performance as set forth below:

13.1.1. For the following amendments, any Tier 2 assessment changes will be based on results considering data from all CLECs operating in Texas regardless of whether they have opted into this Attachment 17: Performance Remedy Plan.

13.1.2 For the following amendments, any Tier 1 changes or additions will only be applicable to those CLECs that have opted into this Attachment 17: Performance Remedy Plan.

13.1.3 On an interim basis, SWBT will not apply the K exemption on each of the following measurements until SWBT demonstrates three consecutive months of compliant performance for that measurement ("compliant performance" is defined in this amendment as performance which is in parity or within the benchmark as defined by the statistical tests as described in this Attachment.) After three consecutive months of compliant performance for a measurement, this paragraph of the amendment will no longer be effective for that measurement, and application of the K exemption will resume.

13.1.3.1 PM 38-05-DF & 38-05-ST - % Missed Repair Commitments for UNE Combos-Dispatch

13.1.3.2 PM 41-03-DF, 41-03-HS & 41-03-ST - % Repeat Reports for UNE Combos

13.1.3.3 PM 55.1 (All Market Areas) - Average Installation Interval – DSL

13.1.3.4 PM 57 (All Market Areas) - Average Response Time for DSL Loop Make-up Information

13.1.3.5 PM 65-02-CW & 65-02-DF - Trouble Report Rate for 5.0dB Loop with Test Access

13.1.3.6 PM 109 - % Request Processed within Tariffed Timeliness-Collocation - This measurement will be updated based on the new Tariff intervals.

13.1.3.7 PM 70-01-HS - % Trunk Blockage – SWBT End Office to CLEC End Office-Houston

13.1.3.8 PM 78-01 (All Market Areas) - Average Interconnection Trunk Installation Interval

13.1.4 On an interim basis, SWBT will increase the per measurement cap for Tier 2 payments on the following measures until SWBT demonstrates three consecutive months of compliant performance for that measure. After three months of compliant performance for the measure, this paragraph of the amendment will no longer be effective for that measure.

13.1.4.1 PM 17 Billing Completeness – This measurement is Tier 2 "Medium" assessment, which equates to a $300 per occurrence assessment with a $30,000 CAP. For the interim period described herein, SWBT will raise this measurement to a Tier 2 "High" assessment with penalties of $500 per occurrence with a $75,000 cap.

13.1.4.2 PM 70 % Trunk Blockage – SWBT End Office to CLEC End Office – Houston. This measurement is a Tier 2 "High", which equates to a $500 per occurrence assessment with a $75,000 cap. For the interim period described herein, SWBT will raise the Tier 2 assessments to $1,500 per occurrence with a $225,000 cap.

13.1.5 The increased cap for PM 17 and PM 70 (as set out above) will take effect with November performance at which time monthly damage assessments, where applicable, will be based on September, October, and November performance.

13.1.6 For the interim period described herein, SWBT will change PM 78 Average Interconnection Trunk Installation Interval from a per occurrence damage and assessment category to a per measurement category until SWBT demonstrates three consecutive months of compliant performance for PM 78.

13.1.7 Effective with the January, 2000 performance measurements, SWBT agrees to add an interim measurement on coordinated cutovers to measure the length of time it takes to physically complete the cutover. (*See*, PM 114.1, Attachment 17, Appendix III: Performance Measurement Business Rules (Version 1.6) On an interim basis, until the first six month review process this interim measurement will not be subject to the K exemption.

13.1.8 Effective with the January, 2000 performance measurements, SWBT agrees to add an interim measurement (PM 73.1) on the percentage of held interconnection trunk orders greater than 90 calendar days. (*See*, PM 73.1 Attachment 17, Appendix III:

Performance Measurement Business Rules (Version 1.6)). On an interim basis until the first six month review process, this interim measurement will not be subject to the K exemption.

13.1.9 Notwithstanding any Attachment 17: Performance Remedy Plan provision, SWBT may, at any time, bring a complaint to the Commission pursuant to the expedited dispute resolution procedures that SWBT should not be subject to a payment pursuant to PM 73.1 and SWBT should be provided any other appropriate relief because a CLEC's action contributed to SWBT's inability to meet this measure. In the Commission's consideration of any such complaint, it will consider such issues as the CLEC's history of ordering, percent trunk utilization, forecasts, history regarding past-due orders, and whether there were other viable provisioning alternatives to address the CLEC's needs.

14.0 Advanced and Nascent Services:

14.1 In order to ensure parity and benchmark performance where CLECs order low volumes of advanced and nascent services, SWBT will make additional voluntary payments to the Texas State Treasury on those measurements listed in §14.2 below (the "Qualifying Measurements"). Such additional voluntary payments will only apply when there are more than 10 and less than 100 observations for a Qualifying Measurement on average statewide for a three month period with respect to the following order categories:

- UNE loop and port combinations;
- resold ISDN,
- ISDN UNE loop and port combinations;
- BRI loop with test access; and
- DSL loops.

14.2 The Qualifying Measurements are as follows:

Provisioning Measurements:

- PMs 29, 45, 58 - Percent SWBT Caused Missed Due Dates
- PMs 35, 46, 59 - Installation Trouble Reports Within "X" Days
- PMs 27, 43, 56 - Mean Installation Interval
- PMs 32, 49, 62 - Average Delay Days for SWBT Caused Missed Due Dates
- PM 55.1 - Average Installation Interval – DSL
- PM 57 - Average Response Time for Loop Qualification Information

Maintenance Measurements:

- PMs 38, 66 - % Missed Repair Commitments
- PMs 41, 53, 69 - % Repeat Reports

- PMs 39, 52, 67 - Mean Time to Restore
- PMs 37, 54, 65 - Trouble Report Rate

14.3 The additional voluntary payments referenced in §14.1 will be made if SWBT fails to provide parity or benchmark service for the above measurements as determined by the use of the Modified Z-test and a critical Z-value for either:

- 3 consecutive months; or
- 6 months or more in a calendar year.

14.4 The additional voluntary payments will be calculated on the rolling average of occurrences or measurements, as appropriate, where SWBT has failed to provide parity or benchmark performance for 3 consecutive months. If SWBT fails to provide parity or benchmark performance in Texas for 6 or more months in a calendar year, the voluntary payments will be calculated as if all such months were missed consecutively.

14.5 If, for the three months that are utilized to calculate the rolling average, there were 100 observations or more on average for the qualifying measurement or sub-measurement, then no additional voluntary payments will be made to the Texas State treasury. However, if during this same time frame there is an average of more than 10 but less than 100 observations for a qualifying measurement on a statewide basis, then SWBT shall calculate the additional payments to the Texas State treasury by first applying the normal Tier 2 assessment calculation methodology to that qualifying measurement, and then trebling that amount.

14.6 Any payments made hereunder shall be subject to the annual cap set forth in § 7.3.

15.0 Attached hereto, and incorporated herein by reference, are the following Appendices:

Appendix 1: Measurements Subject to Per Occurrence Damages or Assessment with a Cap and Measurements Subject to Per Measure Damages or Assessment

Appendix 2: Performance Measures Subject to Tier-1 and Tier-2 Damages Identified as High, Medium and Low

Appendix 3: Performance Measurement Business Rules (Version 1.6)

NM404

NOV 2 6 2001

BEFORE THE NEW MEXICO PUBLIC REGULATION COMMISSION

IN THE MATTER OF U S WEST COMMUNICATIONS, INC.'S SECTION 271 APPLICATION AND MOTION FOR ALTERNATIVE PROCEDURE TO MANAGE THE SECTION 271 PROCESS	UTILITY CASE NO. 3269

STAFF'S PROPOSED FINDINGS AND CONCLUSIONS AND INTERIM ORDER ON REPORT ON QWEST'S PERFORMANCE ASSURANCE PLAN

THIS MATTER comes before the Commission following written proposals submitted November 16, 2001 and oral argument before the Commission on _____, 2001. Having reviewed the written proposals and the arguments and the record concerning this matter and being otherwise fully advised, the Commission

FINDS AND CONCLUDES:

Background

1. Qwest Corporation ("Qwest", formerly known as U.S. West Communications, Inc.) made filings to initiate this case in preparation for Qwest's planned filing with the Federal Communications Commission ("FCC") of an application seeking approval under 47 U.S.C. § 271 ("Section 271").

2. Through the Telecommunications Act of 1996 (the "Act"), the United States Congress has conditioned entry by Bell Operating Companies ("BOCs") such as Qwest into the in-region interLATA long distance market on the BOC's compliance with the requirements of Section 271.

3. This interim order is one in a series of interim orders in a process for providing a state recommendation on Qwest's Section 271 application to the FCC. 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.

4. As with previous interim orders in this case, this interim order addresses only some of the Section 271 requirements. 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.

5. Shortly after the workshop hearings being held in the non-OSS multi-state process, the Facilitator, with the assistance of advisory staff from the commissions of each of the seven states, submits a report to each state commission containing the Facilitator's analysis and recommendations.

6. As indicated in its Amended Third Procedural Order, the Commission intends to act on each report issued by the Facilitator, recognizing that where necessary and appropriate, the report's recommendations are often subject to completion and Commission consideration of OSS test results and review of Qwest's proposed performance assurance plan.

7. In acting on each individual report, the Commission further recognizes that certain issues discussed in the reports are, from time to time, deferred or remain unresolved.

8. Further, the Commission recognizes that after reviewing certain issues addressed in a report, the Commission may determine that further proceedings in New Mexico are warranted.

9. In acting on each individual report, the Commission either accepts, modifies or defers action on the specific recommendations made by the Facilitator in that report and does not, by accepting, modifying or deferring action on the Facilitator's individual recommendations, intend at this time to signify any overall opinion about Qwest's compliance with all the requirements of Section 271.

10. The "Facilitator", with the assistance of commission advisory staff, has produced a Report On Qwest's Performance Assurance Plan (the "QPAP Report") issued October 22, 2001.

11. The Report covers issues relating to Qwest's proposed Performance Assurance Plan ("QPAP"), generally considered an element of the public interest analysis.

12. The FCC has stated that:

> [W]e believe that compliance with the checklist will not necessarily assure that all barriers to entry to local telecommunications market [sic] have been eliminated, or that a BOC will continue to cooperate with new entrants after receiving in-region, interLATA authority.

Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as amended, to Provide In-Region, InterLATA Services in Michigan, CC Docket No. 97-137, Memorandum Opinion and Order, FCC 97-298 (released. Aug. 19, 1997), ("Ameritech Michigan Order"), at ¶ 390.

Accordingly, as part of its public interest analysis, the FCC considers whether "conditions are such that the local market will remain open after BOC interLATA entry". Id.

13. The FCC suggested that a Section 271 applicant could alleviate its concerns about the local market remaining open if the applicant would:

> [F]or example, commit to comply with reporting requirements, performance standards, and appropriate, self-executing enforcement mechanisms, to the extent such requirements, standards and mechanisms are not included in the BOC's interconnection agreements.

Ameritech Michigan Order at Par. 399.

14. The FCC has indicated that states have great latitude in determining what kind of post-entry performance plan provides adequate and persuasive assurance that the local market in that state will remain open:

> While the details of such mechanisms developed at the state level may vary widely, we believe that we should examine certain key aspects of these plans 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.

In the Matter of Application by Bell Atlantic New York for Authorization Under Section 271 of the Telecommunications Act, CC Docket No. 99-295, Memorandum Opinion and Order, FCC 99-404 (released December 22, 1999), ("Bell Atlantic New York Order"), Par.433.

15. The FCC has provided guidance indicating that a sufficient plan should include the following "important characteristics":

- potential liability that provides a meaningful and significant incentive to comply with the designated performance standards;
- clearly articulated, pre-determined measures and standards, which encompass a comprehensive range of carrier-to-carrier performance;
- a reasonable structure that is designed to detect and sanction poor performance when it occurs;
- a self-executing mechanism that does not leave the door open unreasonably to litigation and appeal;
- and reasonable assurances that the reported data is accurate.

Bell Atlantic New York Order, Par. 433.

16. In accordance with FCC precedent, the Commission considers its evaluation of the QPAP submitted by Qwest to be critical to the Commission's public interest analysis. See e.g. Bell Atlantic New York Order, Par.429, and In the Matter of Application by Southwestern Bell for Provision of In-Region InterLATA Services in Texas, CC Docket No. 00-65, Memorandum Opinion and Order, FCC 00-238 (released June 30, 2000), ("SWBT Texas Order"), Par. 420.

The Record and Procedure

17. The following testimony and evidence was presented in the non-OSS multi-state proceeding:

*On June 26, 2001, Qwest filed its QPAP along with comments and the affidavit of Qwest witness Carl Inouye; and
*On July 26, 2201 comments, affidavits or testimony was filed by Covad, WorlCom, Z-Tel, AT&T, ASCENT, ZO, Time Warner, Eschelon, New Mexico Advocacy Staff and Washington Public Counsel.

18. Live rebuttal and sur-rebuttal testimony was also taken.

19. Hearings on all QPAP issues were held from August 14, 2001 through August 17, 2001 and from August 27, 2001 through August 29, 2001.

20. The parties filed briefs on September 13, 2001 and reply briefs on September 20, 2001.

21. The QPAP Report is organized, in large part around the five "important characteristics" identified by the FCC in the Bell Atlantic New York Order at Paragraph 433: Meaningful and Significant Incentives; Clearly Articulated and Pre-determined Measures; Structure to Detect and Sanction Poor Performance as It Occurs; a Self-

Executing Mechanism that is not Unreasonably Open to Litigation and Appeal; and Assurances of the Reported Data's Accuracy.

22. The Commission approves of the procedure employed by the Facilitator for review of the QPAP.

23. At pages 4-6 of the QPAP Report, the Facilitator sets out what he refers to as the Standard of Review.

24. The Commission agrees with this analysis only to the extent that the Facilitator correctly identifies the "important characteristics" identified by the FCC. Apart from identification of those characteristics, the Commission disagrees that the QPAP Report accurately identifies the appropriate standard of review and the Commission relies instead on the standard identified in the legal authority cited in Paragraphs 12-16 of this order.

A. Meaningful and Significant Incentives

25. The Facilitator identified 18 issues in four categories that involve analysis of whether Qwest's QPAP creates potential liability that provides a meaningful and significant incentive for Qwest to comply with the designated performance standards. These are: A) Total Payment Liability (QPAP Report, pages 12-22; B) Magnitude of QPAP Payout Levels (QPAP Report, pages 23-26); C) Compensation for CLEC Damages (QPAP Report, pages 26-41); and D) Incentive to Perform (QPAP Report, pages 41-45).

Total Payment Liability

26. There were six issues involving the sufficiency of the overall payment liability proposed in the QPAP. These are discussed at pages 12-22 of the QPAP Report.

27. The first of these six issues (The 36 percent of Net Revenues Standard, QPAP Report, pages 12-16) involves the question of whether the amount Qwest places at risk through its QPAP every year should be capped at 36 percent of Qwest's 1999 ARMIS net interstate revenues.

28. Various CLECs and Staff argued that capping Qwest's QPAP liability weakens Qwest's incentive to comply with performance standards. In addition, Staff argued that the existence of a 36 percent cap creates administrative problems that would be easily avoided in the absence of a cap. For example, a 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. Another example of a procedural problem associated with Qwest's absolute cap is that, as proposed by Qwest, we must tie Qwest's maximum exposure to a certain revenue year (in this case Qwest has selected 1999) when the QPAP will be operating in future years and revenues are likely to change. Various CLECs and Staff advocated a procedural cap instead of a fixed annual cap. Under a procedural cap, when QPAP payments resulting from Qwest performance failures reach a certain level, a review and examination by the Commission is triggered. The testimony of Dr. Marlon Griffing on behalf of Staff stated:

> Staff favors procedural caps, those that trigger a service investigation by commissions. Such caps could be set lower than 36 percent (Staff proposes 25 percent), or be triggered by continuing problems for individual performance measurements (Staff proposes six consecutive months). These caps, or perhaps more properly trigger points, would serve as diagnostic tools for Qwest, CLECs, and the commissions...Staff suggests that reaching the cap automatically result in Qwest having to cease offering in-region, interLATA service to new customers while the investigation is pending.

29. Qwest argued that its proposed absolute cap is appropriate because the FCC has found that placing 36 percent of net revenues at risk creates a meaningful incentive to maintain adequate performance in its 271 orders for the states of New York, Texas, Kansas and Oklahoma.

30. In the QPAP Report, the Facilitator appeared to agree with Qwest and appeared to rely on the FCC's previous approval of performance assurance plans placing a maximum of 36 percent of net interstate revenues at risk. The Facilitator rejected the procedural cap proposals made by the parties although he did concede that "cap movement principles" should be included in the QPAP (QPAP Report pages 18-19). He further conceded the annual cap, as proposed by Qwest, could operate severely and unfairly against CLECs who suffer disproportionately from Qwest poor performance late in the year or after the cap has been reached (QPAP Report, pages 19-20) and that we currently lack local market penetration trend information that would tell us whether 1999 remains an appropriate year to use as the foundation for setting total financial exposure (QPAP Report, page 18).

31. Staff's 10-day comments advocate rejection of the 36 percent cap as a way of ensuring that, in the event of ongoing noncompliance with performance standards, Qwest would (sooner or later) find it financially attractive to bring its compliance up to standards. Staff also argued in its 10-day comments that removal of the 36 percent cap would also eliminate the Facilitator's concern about the unfair operation of the cap to delay payments to CLECs if Qwest's poor performance occurs after the 36 percent level is already reached. Staff also noted that removal of the absolute cap would also eliminate the need to haggle over the appropriate base year upon which to base a cap.

32. The second of the six issues addressed by the Facilitator under the heading Total Payment Liability is the issue of Procedural Caps (QPAP Report, pages 16-20).

33. Under the QPAP Report heading of Procedural Caps, the Facilitator recognized that lack of experience with the various plans in operation around the country and their caps is a disadvantage. He acknowledged the problem of CLECs, otherwise entitled to payments from Qwest under the QPAP, of potentially being deprived of payments by the operation of the cap and the problem of determining what base year to use in calculating the 36 percent cap.

34. Although the Facilitator recognized the problems associated with the cap although he also supported the absolute cap that causes the problems. Instead of recommending removal of the cap, and instead of recommending implementation of procedural caps, the Facilitator suggested complex "cap movement principles" and equally complex procedures for apportioning QPAP payments among CLECs by month under the QPAP Report heading of Procedural Caps.

35. In 10-day comments, Staff indicated that the Facilitator's plan for allocating payments among CLECs was fair only to the extent that it created a procedure for CLECs to "share the pain" of not receiving the full QPAP payments they would otherwise have been entitled to. In other words, the Facilitator's proposal does not ensure that Qwest will make payments for non-performance after the cap is reached; it merely allows CLECs to share the limited amount of the pre-cap payments.

36. The third of the six issues addressed by the Facilitator under the heading Total Payment Liability is the issue of Qwest's Marginal Cost of Compliance (QPAP Report, pages 20-21).

38. Staff argued that a cap such as the annual cap proposed by Qwest permits Qwest to calculate the net cost of discriminatory service to CLECs and weigh that cost against the potential gains to Qwest of poor service to its competitors. Z-Tel argued that there is a substantial risk that Qwest will decide that paying 36 percent of its 1999 wholesale revenues is preferable to keeping its local markets open.

39. Qwest argued, among other things, that there is no evidence that its marginal cost of compliance is greater than 36 percent of its net revenues.

40. In the QPAP Report, the Facilitator indicated that there is "theoretical appeal" to the marginal cost analysis. However, he believed that, in order to use the analysis, it would be necessary to develop and present evidence of what Qwest's marginal costs of compliance are as well as to factor in the expected values of other risks and other factors.

41. In 10-day comments, Staff stated that it advocated just the opposite point, that such a study is not necessary to justify removal of the cap. Staff argued that removing the cap will allow Qwest itself to discover the limit of QPAP payments it is willing and financially able to make and to adjust its behavior accordingly.

42. The fourth of the six issues addressed by the Facilitator under the heading Total Payment Liability is the issue of the Continuing Propriety of a Cap Based on 1999 Net Revenues (QPAP Report, Pages 21-22).

43. Various CLECs criticized the freezing of the 36 percent 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 percent of any year for which revenues are greater than 1999.

43. The Facilitator considered the suggestion that Qwest's revenues are likely to increase beyond 1999 levels to be "quite speculative" and declined to adopt suggestions to revisit the base year for calculation of the 36 percent cap.

44. The fact that the FCC has approved plans containing a 36 percent cap does not mean that the states are obligated to accept 36 percent caps. The FCC has spoken most recently about the role of post-entry enforcement mechanisms such as the QPAP in the Pennsylvania 271 Order

> In prior orders, the Commission has explained that one factor it may consider, as part of its public interest analysis is whether a BOC would have adequate incentives to continue to satisfy the requirements of section 271 after entering the long distance market. Although it is not a requirement for section 271 authority that a BOC be subject to such performance assurance mechanisms, the Commission previously has stated that the existence of a satisfactory performance monitoring and enforcement mechanism would be probative evidence that the BOC will continue to meet its section 271 obligations after a grant of such authority.
>
> 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-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 actual commercial performance in the local marketplace.* (Citations omitted, emphasis added)

Verizon Pennsylvania Order, FCC 01-029, Rel. September 19, 2001, Par. 127-128.

adequately address the fact that CLECs would unjustly bear the risk of loss for poor performance by Qwest after the cap is reached, whatever the amount of the cap.

48. The Commission does not believe that the QPAP proposed for New Mexico creates potential liability that provides a meaningful and significant incentive for Qwest to comply with the designated performance standards because the absolute cap permits Qwest to avoid liability for post-cap non-compliance.

49. The Commission instructs Qwest to remove the 36 percent annual cap from its QPAP and to substitute a procedural cap that triggers a service investigation by the Commission when payments by Qwest under the QPAP reach 25 percent of Qwest's 1999 ARMIS net interstate revenues. The service investigation will serve as a diagnostic tool for Qwest, CLECs, and the Commission, as suggested by Staff's testimony. The service investigation will further create the opportunity for "changes to both measures and remedies over time" in New Mexico, as suggested by the FCC in its recent Verizon Pennsylvania Order, quoted above. The substitution of a procedural cap triggering a service investigation will address the service problems experienced by CLECs and will avoid the problem of CLECs being denied QPAP payments for service problems occurring after a 36 percent cap is reached and will eliminate any need to determine what base year should be used for calculation of the 36 percent cap.

50. Because the Commission is instructing that the 36 percent cap be removed, the Commission does not adopt the recommendations of the Facilitator for "cap assessment principles" or for apportionment of pre-cap QPAP payments among CLECs.

51. The fifth of the six issues addressed by the Facilitator under the heading Total Payment Liability is the issue of the Likely Payments in Low Volume States (QPAP Report, Page 22).

52. Staff raised the concern that low order volumes in states such as New Mexico might dilute the compensatory and incentive goals of the QPAP.

53. The Facilitator suggested that the QPAP's minimum payments provisions adequately addressed this concern.

54. The Commission approves of this suggestion.

55. The sixth of the six issues addressed by the Facilitator under the heading Total Payment Liability is the issue of the Deductibility Likely Payments in Low Volume States (QPAP Report, Page 22).

56. In the QPAP Report, the Facilitator suggested there is no need to modify the QPAP to influence the tax treatment of the payments made by Qwest under the QPAP.

57. The Commission approves of this suggestion.

Magnitude of QPAP Payout Levels

58. There was one issue involving the sufficiency of payments per event of non-compliance as opposed to the overall total exposure discussed previously. This issue is discussed at pages 23-26 of the QPAP Report.

59. There was concern that, even if Qwest's overall level of exposure under the QPAP is sufficient, payments per event of non-compliance under the QPAP must also be sufficient to compensate CLECs for poor performance, to accumulate to economically

significant levels if poor performance continues and to communicate to Qwest that compliance is preferable.

60. Qwest argued that the sufficiency of per event payments to CLECs under the QPAP was demonstrated by comparing projected payments to CLECs under the QPAP for the period between February and May 2001, assuming the QPAP has been in effect for at least six months prior to February, to the prices that CLECs pay to Qwest for wholesale service. Qwest suggested that the resulting QPAP payments would have been equivalent to years of free service to CLECs and therefore argued that the payments were sufficient.

61. The CLECs, and in particular AT&T, proffered several arguments refuting Qwest's analysis. CLECs argued that the levels of Qwest's payouts in its analysis demonstrated the inadequacy of the QPAP's payment structure because poor performance would have continued despite the escalation of payments to CLECs, that the probability of the occurrence of some of the payout scenarios illustrated by Qwest were highly improbable, that the analysis for the February-March 2001 period should have assumed that the QPAP began in February thus eliminating the accelerated payments and reduced the sample payouts by over 60 percent, that the analysis included payouts for missed of more than 6 months but that the QPAP limits escalation of payments to 6 months, and that the total payout by Qwest in its analysis in comparison to its third-quarter projected consolidated net revenues were paltry.

62. In the QPAP Report, the Facilitator refuted the CLECs arguments in on a variety of grounds. He rejected the first argument by saying the payout scenario raised by Qwest was retrospective and did not reflect a situation whereby Qwest considered the

[redacted] of the payouts due to substandard performance. He rejected the second [redacted] that the probability of the one in 96 billion chance of a single event payout [redacted] raised by AT&T does not take into account other factors which may greatly [redacted] the odds of non-compliance by Qwest for that event. He refuted the third and [redacted] by stating it was proper for Qwest to demonstrate escalation beyond 6 [redacted] as the CLECs have argued for in the QPAP to demonstrate the effect of the [redacted] on the level of payouts per event, and that the analysis showed results with and [redacted] escalation as was proper. He then rejected the final argument on the basis that [redacted] proper criteria for assessing the proper overall level of payments is intrastate net [redacted], and consolidated net revenue. The Facilitator accepted Qwest's arguments and [redacted] on this issue and did not recommend a change to the QPAP to address this [redacted].

63. The Commission agrees with that the QPAP need not be revised to address this issue, and agrees with the Facilitator for all but one issue. The Commission takes [redacted] with the Facilitator's strict rejection of AT&T's example of the probability of [redacted] payout for non-compliance in the event of the failure of a specific performance standard by Qwest. The Facilitator makes the point that the probability of Qwest failing a [redacted] standard may not occur independently of other performance measures due to [redacted] effect of an common underlying factor, thus greatly increasing the chances of [redacted] failure as calculated by AT&T. The Commission does recognize the [redacted] of AT&T's argument, and does take Qwest's assertion of the total damages [redacted] to simultaneous failure with a grain of salt. The Commission notes that the [redacted] of Qwest failing performance measures whether those failures are triggered

by a common core will be demonstrated on a real time basis once the performance data is reported to the Commission once the QPAP is in effect. The Commission believes that it will be able to assess through the reporting and 6-month review process whether or not a specific measure should be modified or payments adjusted so that the performance overall in question provides Qwest sufficient incentive to provide proper wholesale service to the CLECs, despite any arguments in regard to the probability of simultaneous failure of performance measures.

Compensation for CLEC Damages

64. There were seven issues involving the sufficiency of QPAP's compensation for CLEC damages. These are discussed at pages 26-41 of the QPAP Report.

65. The first of these seven issues (The Relevance of Compensation as a QPAP goal, QPAP Report, pages 26-28) involves the question of whether the goal of payments made by Qwest under the QPAP is compensation to CLECs for damages incurred as a result of non-compliant Qwest performance or whether the goal of QPAP payments are merely to create incentives for Qwest to perform in accordance with standards.

66. Z-Tel argued that the exclusive goal of QPAP payments is to create incentives for Qwest to perform. While Qwest argued that QPAP payments to CLECs are liquidated damages.

67. In the QPAP Report, the Facilitator agreed with Qwest, noting that other plans approved by state commissions and the FCC have treated QPAP payments as liquidated damages to CLECs.

42. The Commission agrees with this conclusion.

43. The second of the seven issues addressed by the Facilitator under the heading Compensation for CLEC Damages is the issue of Evidence of Harm to CLECs (QPAP Report, pages 28-30).

44. Various CLECs argued that QPAP payments, as proposed, do not adequately compensate CLECs for all the harms they suffer as a result of poor Qwest performance including loss of customers, loss of profits and intangibles. Qwest argued that its method of calculation of QPAP payments was to tie QPAP payments to the prices paid by CLECs, and that the prices paid for those services adequately represent the value of those services and that the CLECs had not produced evidence of other quantifiable damages.

45. In the QPAP Report, the Facilitator agreed with Qwest, noting that Qwest's method of tying service cost to service value was imperfect but superior to anything suggested by CLECs. The Facilitator noted that if any CLEC is convinced that QPAP payments will not adequately compensate them for poor performance, that CLEC will always have the right to elect to receive QPAP payments and can retain the right to seek additional damages from Qwest. The Facilitator concluded that the QPAP need not be changed to address this issue.

46. The Commission approves of this analysis and conclusion.

47. The third of the seven issues addressed by the Facilitator under the heading Compensation for CLEC Damages is the issue of Preclusion of Other CLEC Remedies (QPAP Report, pages30-33).

As framed, Qwest's proposed QPAP states that Tier 1 payments to CLEC are liquidated damages and are, for CLECs that opt in to the QPAP, the CLEC's exclusive remedy for damage to the CLEC resulting from Qwest service. CLECs argued that receiving QPAP payments as liquidated damages should not preclude them from seeking any other remedies available in law.

In the QPAP Report, the Facilitator agreed that double recovery for the same damages is inappropriate. However, he also found that the language in Section 13.6 of Qwest's proposed QPAP goes beyond merely prohibiting double recovery for the same damages and additionally precludes alternative remedies that might encompass broader or different damages. The Facilitator recommended that QPAP Section 13.6 should be removed in its entirety and replaced with a provision that requires CLECs 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 provisions prohibiting other contractual remedies and double recovery.

In its 10-day comments (replacement filing of November 9, 2001), Qwest stated that it "does not oppose the Facilitator's approach" and was willing to strike QPAP Section 13.6. However, the language substituted by Qwest goes well beyond the Facilitator's suggestion for a replacement provision. Qwest argues that payments made by Qwest under Commission rules or orders are, or should be considered, "contractual in nature and therefore precluded". Qwest argues that "rules and orders for wholesale service quality issues are ultimately contractual in nature, because they relate to service purchased under an interconnection agreement and provide the same type of compensatory recovery as a QPAP."

77. The Commission disagrees that its rules and orders are a matter of contract between Qwest and CLECs as Qwest's wholesale customers. To the contrary, 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 as Qwest purports to do in its revision of the Facilitator's section presented in Qwest's November 9, 2001 comments.

78. The Commission agrees with the Facilitator's analysis and further agrees with the QPAP changes suggested by the Facilitator. The Commission does not approve of Qwest's new suggested 13.6 and instructs Qwest to revise that language to conform with the Facilitator's suggestion, at page 33 of the QPAP Report, for a:

> single 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. Those limits are the bar on other commercial remedies and on double recovery.

79. The fourth of the seven issues addressed by the Facilitator under the heading Compensation for CLEC Damages is the issue of Indemnity for CLEC Payments Under State Service Quality Standards (QPAP Report, pages 33-34).

80. AT&T argued that Qwest should be required to compensate CLECs for payments that CLECs must make for failing to meet state or federal service quality rules where Qwest's poor performance caused the CLEC failure. Qwest opposed the proposal.

81. The Facilitator found that this issue had been sufficiently addressed in section of Qwest's proposed SGAT. He concluded that an indemnity provision was not necessary in Qwest's SGAT and was, likewise not necessary in the QPAP.

82. The Commission agrees with this analysis and conclusion.

83. The fifth of the seven issues addressed by the Facilitator under the heading Compensation for CLEC Damages is the issue of the QPAP's Offset Provision (Section 13.3 QPAP Report, page 34-36).

84. The QPAP contains an Offset Provision that provides that, if Qwest is ordered by a court or commission to pay to a CLEC damages for poor wholesale performance, Qwest is allowed to reduce the amount of the ordered payment by any QPAP payments made for the same (or analogous) performance or may reduce QPAP payments by the amount of the ordered payment.

85. CLECs argued that there is no FCC precedent permitting a unilateral right to make such an offset and also that the term "analogous wholesale performance" is vague and confusing.

86. In the QPAP Report, the facilitator suggested that the language of Section 13.3 requires change in order to assure that: a) Qwest is not entitled to reduce QPAP payments for damage awards for injury to persons or property, even where those awards arise from the provision of wholesale service to CLECs; and b) CLECs retain the ability to recover non-contractual damages awarded in other causes of action, as discussed in connection with QPAP Section 13.6. He also concluded that a change to SGAT Section 5.8.1 is also required to prevent an inappropriate limit from being placed on Qwest's liability for injury to persons or property.

87. In its filing comments, Qwest indicated that it was willing to make the changes to QPAP Section 13.3 but explained its position the suggested change to SGAT Section 5.8.1:

[illegible]

88. The Commission agrees with the Facilitator's recommendations on this issue and instructs Qwest to make the suggested changes, including the suggested change to SGAT Section 5.8.1.

89. The sixth of the seven issues addressed by the Facilitator under the heading Compensation for CLEC Damages is the issue of Exclusions (QPAP Report, pages 36-41).

90. QPAP Section 13.3 contains a list of circumstances that, if they occur, would excuse Qwest from making Tier 1 and Tier 2 payments under the QPAP. These include Force Majeure events, acts of bad faith by CLECs and third party problems that cannot be avoided by Qwest.

91. In the QPAP Report, the Facilitator recommended six changes to QPAP Section 13.3 and its subparts, including 13.3.1 and 13.3.2.

92. In its comments, Qwest has agreed to make all the recommended changes.

93. The Commission approves of the changes to Section 13.3 and its subparts and instructs Qwest to make the changes suggested at pages 37-41 of the QPAP Report.

94. The seventh of the seven issues addressed by the Facilitator under the heading Compensation for CLEC Damages is the issue of SGAT Limitation of Liability to Total Amounts Charged to CLECs (QPAP Report, page 41).

95. As discussed above, the Facilitator concluded that review of the QPAP had revealed a need to revise SGAT Section 5.8.1 to make clear that QPAP payments should not be counted against liability limit set forth in Section 5.8.1 of the SGAT.

96. The Commission agrees with this conclusion and instructs Qwest to make the recommended change to Section 5.8.1 of its SGAT.

Incentive to Perform

97. There were four issues involving the sufficiency of QPAP's creation of incentives for Qwest to perform. These are discussed at pages 41-45 of the QPAP Report.

98. The first of these four issues (Tier 2 Payment Use, QPAP Report pages 41-42) involves the question of whether Qwest should be able to specify, in the QPAP, that Tier 2 payments made to the states under the QPAP must be limited to use for purposes that relate to the Qwest service territory.

99. In the QPAP Report, the Facilitator concluded that the QPAP should not attempt to put limits on the state's use of Tier 2 payments made by Qwest under the QPAP. He recommended that Qwest should eliminate Section 7.5 of its QPAP and recommended specific replacement language.

100. In 10-day comments, Qwest indicated that it is willing to make the suggested changes to Section 7.5 of the QPAP.

101. The Commission agrees with the Facilitator's recommendation on this issue and instructs Qwest to make the suggested QPAP language changes.

102. In his review of the Tier 2 Payment Use issue, the Facilitator also recommended a QPAP provision requiring that certain QPAP payments should be paid into 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 participating commissions to be carried out on a common basis.

103. In its 10-day comments, Qwest stated that it was willing to include the Facilitator' recommendation in the QPAP.

104. The Commission approves of the Facilitator's suggestion and instructs Qwest to make the recommended changes to the QPAP.

105. The second of the four issues addressed under the heading Incentive to Perform is the issue of Three Month Trigger for Tier 2 Payments. This issue is discussed at pages 42-43 of the QPAP Report and involves the question of whether Tier 2 payments to the states should be required only after three consecutive months of non-complying performance by Qwest.

106. Various CLECs and Staff argued that Tier 2 payments should be required after a single month of non-compliant performance by Qwest because Qwest's proposed three-month trigger would permit unsatisfactory performance for two of every three months and consequently, the trigger interferes with the ability of the QPAP to provide a performance incentive. The Facilitator did not cite the argument in the QPAP Report, but Staff argued in its QPAP testimony and brief that poor performance to CLECs in the aggregate (as opposed to a specific individual CLEC) is damaging to the development of a vigorous competitive local market in New Mexico, creating a legitimate state interest in Tier 2 payments as an additional incentive.

107. Qwest agreed that the purpose of Tier 2 payments is to increase the financial incentive for Qwest to meet performance standards but disagreed that the three-month trigger weakened that incentive.

108. In the QPAP Report, the Facilitator agreed that one compliant month out of three should not be considered adequate for measures that have no corresponding Tier

1 payment. Similarly, for measures that call for both Tier 1 and Tier 2 payments, he stated:

> [G]iven the emphasis [Qwest has] placed on Tier 2 payments as an enhancement, it remains difficult to place much faith in their contribution to a performance incentive plan when they can be avoided...by concerted efforts to bring performance up to minimum levels 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

109. The Facilitator proposed changes to the QPAP's Tier 2 triggering provisions. The language of these changes is quite complex but fundamentally, the changes result in Tier 2 payments after two consecutive months of non-compliant performance.

110. In its 10-day comments, Qwest agreed to make the suggested changes.

111. The Commission agrees with Staff that State has an interest in having Qwest perform adequately because it is consistent with State policy to encourage the promotion of competition. A blanket policy that the Tier 2 payments do not start until numerous months of poor performance have occurred weakens the incentives to Qwest. The Facilitator's proposed resolution moves in the right direction but it is unnecessarily complex and does not go far enough. There is no reason to delay Tier 2 consequences, irrespective of whether a Tier 2 measure has a corresponding Tier 1 counterpart payment. It is Qwest's own claim that Tier 2 payments are intended to create a further performance incentive. Accordingly, the Commission instructs Qwest to revise its QPAP to require that Tier 2 payments shall be made for any month in which Qwest fails to meet the applicable standard.

112. The third of the four issues addressed under the heading Incentive to Perform is the issue of Limiting Escalation Payments to 6 Months. This issue is discussed in the QPAP Report at pages 44-45.

113. As Qwest has proposed it, the QPAP limits payment escalation to six months because Qwest claims that six months of escalation provides sufficient incentives and continuing escalation would overcompensate CLECs.

114. Various CLECs and Staff argued that escalation should continue, rising as necessary to succeed in inducing compliant performance.

115. In the QPAP Report, the Facilitator agreed with Qwest and concluded that the QPAP's 6-month limit on payment escalation is appropriate.

116. The Commission disagrees with the Facilitator on this issue. Continuing escalation is necessary to create the necessary incentive for Qwest to do what it takes to fix recurring performance problems. The Facilitator suggests that recurring problems might be due to poorly designed performance measures. However, the Commission first points out that this is speculation on the Facilitator's part. In addition, the Commission points out that Qwest has been involved in the process of developing the relevant performance measures and also, the ongoing ROC OSS test should be able to identify any problems with performance measures, if they do exist. Also, as the Facilitator points out 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 the problem. Accordingly, Qwest is instructed to modify the QPAP to eliminate the six-month limit on payment escalation.

117. The fourth of the four issues addressed under the heading Incentive to Perform is the issue of Splitting Tier 2 Payments between CLECs and the States. This issue is discussed in the QPAP Report at page 45.

118. Covad argued that the Colorado Special Master's Report required that Tier 2 payments should be split between CLECs and the states and suggested such a split here. Qwest disagreed, arguing that Covad had misread the Colorado Report.

119. In the QPAP Report, the Facilitator agreed with Qwest, concluded that the Colorado Report did not require such a split and further concluded that Tier 2 payments should be made to the states as currently provided in the QPAP.

120. The Commission agrees with these conclusions by the Facilitator.

B. Clearly Articulated and Pre-Determined Measures

121. The Facilitator identified 22 issues in eight categories that involve analysis of whether Qwest's QPAP is based on clearly articulated and pre-determined measures. These eight categories are: A) Measure Selection Process (QPAP Report, page 46); B) Adding Measures to the Payment Structure (QPAP Report, pages 47-52); C) Aggregating the PO-1A and PO-1B Performance Measures (QPAP Report, pages 52-53); D) Measure Weighting (QPAP Report, pages 53-55); E) Collocation (QPAP Report, page 55); F) Including Special Access Circuits (QPAP Report, pages 56-57); G) Proper Measure of DNE Intervals (QPAP Report, page 58; and H) Low Volume CLECs (QPAP Report, page 58).

Measure Selection Process

122. The Facilitator noted that no party raised any challenge to the measure selection process and stated that most disputes in this area relate to the need for additional

measures discussed 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.

123. The Commission agrees with these conclusions.

Adding Measures to the Payment Structure

124. There were nine issues involving claims that performance measures should be added to the QPAP. These are separately discussed at pages 47-52 of the QPAP Report.

125. In the QPAP Report, the Facilitator found that the various suggestions for adding measures that could trigger payments under the QPAP had varying merit but did not find that any of the suggested additions should be required at the present time. More than once, the Facilitator noted that a forum is available for the addition and revision of performance measures if it becomes necessary to add the suggested measures or if additional evidence is developed that would support adding measures.

126. The Commission agrees with these recommendations.

Aggregating the PO-1A and PO-1B Performance Measures

127. Qwest argued that the seven individual measurements under PO-1A (response time for transactions under IMA-GUI) and PO-1B (response times for the same transactions under EDI) into two measures that would be subject to QPAP compensation. Qwest argued that CLECs had agreed to this aggregation in the now defunct PEPP collaborative and also, in a separate proceeding in Arizona.

128. Various CLECs disagreed, indicating that Qwest was misrepresenting what had been discussed.

129. In the QPAP Report, the Facilitator agreed with Qwest that the parties had previously reached an agreement on aggregating the measures and concluded that the aggregation is appropriate and the QPAP should reflect the aggregation of these measures.

130. The Commission agrees with the Facilitator and approves of the Facilitator's conclusions.

Measure Weighting

131. There were three issues involving measure weighting. These are separately discussed at pages 53-55 of the QPAP Report.

132. In the QPAP Report, the Facilitator found that terms of the QPAP proposed by Qwest at the beginning of the QPAP proceeding was sufficient and no changes to that initial QPAP should be required.

133. The Commission agrees with these recommendations.

Collocation

134. In the QPAP workshop, Staff argued that Qwest should adopt either the Michigan or Georgia approach to determining collocation payment amounts. This approach adds a "days late" collocation payment schedule to the QPAP. Qwest agreed to adopt the Michigan approach.

135. In the QPAP Report, the Facilitator noted that no CLECs had objected to this approach and he concluded that Qwest's adoption of the Michigan approach for determining collocation payment amounts was reasonable.

136. The Commission approves of this conclusion and instructs Qwest to adopt the Michigan approach for determining collocation payments adding a "days late" collocation payment schedule as agreed in the QPAP workshops.

Including Special Access Circuits

137. CLECs argued that special access circuits should be included in the performance measures as one of the product disaggregations, and that the QPAP be changed to provide for payments associated with such circuits. Qwest argued that there had been agreement to drop special access circuits as a performance measure by the ROC OSS collaborative. Qwest also said that special access circuits cannot be considered a checklist item at all, according to the FCC and a number of state commissions.

138. In the QPAP Report, the Facilitator concluded that special access circuits do not merit the treatment recommended by CLECs and that remedies for failure to meet these requirements should be addressed by the FCC, not state commissions. Therefore, he did not recommend changes to the QPAP to address this issue.

139. The Commission agrees with the Facilitator.

Proper Measure of UNE Intervals

140. 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 disagreed, claiming that there is a logical relationship between SGAT Exhibit C and the PID performance measures.

141. In the QPAP Report, the Facilitator agreed with Qwest, concluding that it is appropriate for the QPAP to apply the PID performance measures, not SGAT Exhibit C, as the payment standard.

142. The Commission agrees with the Facilitator on this issue.

Low Volume CLECs

143. Covad argued that the QPAP, as designed, better compensates high-volume CLECs and under compensates lower volume CLECs. Covad pointed to the QPAP provision that it argued would provide Qwest with one free miss each month in the case of small volume CLECs. Qwest argued that this provision is necessary to balance QPAP provisions that would make perfection its performance standard for small volume CLECs, because even one miss would put Qwest below the required level of performance. Covad recommended setting minimum payments at five times the baseline amount for CLECs subjected to the free miss standard.

144. In the QPAP Report, the Facilitator credited the evidence offered by Qwest demonstrating that the QPAP would not under-compensate small volume CLECs. However, he also recommended changes to the QPAP to address the "free miss" issue, concluding that the problem can be solved by requiring 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. He recommended that the QPAP should incorporate these changes.

145. In its 10-day comments, Qwest indicated that it was willing to make changes to Section 2.4 of its QPAP that implement the "spirit" of the Facilitator's recommendation but indicates that a "minor adjustment" is necessary to avoid the functional equivalent of a 100% performance standard.

146. The Commission approves of the Facilitator's recommendation. To the extent that Qwest wishes to submit QPAP language that differs from the Facilitator's

recommendation, Qwest should do so in a separate filing, with an explanation of its changes, with an opportunity for other parties to respond, as has been the practice with SQAT changes.

C. Structure to Detect and Sanction Poor Performance as It Occurs

147. In the QPAP Report, the Facilitator identified 9 issue categories that involve analysis of whether Qwest's QPAP is structured to detect and sanction poor performance as it occurs. These are: A) 6-Month Plan Review Limitations (QPAP Report, pages 59-62); B) Monthly Payment Caps (QPAP Report, page 62); C) Sticky Duration (QPAP Report, page 62); D) Low Volume Critical Values (QPAP Report, pages 63-65); E) Applying the 1.04 Critical Value to 4-Wire Loops (QPAP Report, pages 65-66); F) Measures Related to Low Volume, Developing Markets (QPAP Report, 66-67); G) Minimum Payments, (QPAP Report, pages67-68); H) 100% Caps for Interval Measures (QPAP Report, pages 68-70); and I) Assigning Severity Levels to Percent Measures (QPAP Report pages 70-71).

6-Month Plan Review Limitations

148. Section 16 of the QPAP recites the process for amending the QPAP. As proposed by Qwest, the following 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, this section requires any change to the QPAP to be approved by Qwest.

148. All QPAP aspects should be open to review and authority for deciding to accept any QPAP changes should rest with the Commission, eliminating Qwest veto power over QPAP changes. Qwest objected to an obligation to open the QPAP generally to amendment, because of its need to have certainty about the extent of the obligations it was agreeing to undertake. Qwest also said that effective administration of the plan required a substantial degree of stability in its provisions.

149. In the QPAP Report, the Facilitator determined that the QPAP is, in almost all respects, comparable to the plan approved in Texas, including the power to make changes to existing performance measures. He noted an important difference with respect to proposed additions of new measures, however, noting that in the Texas plan, disputes are resolved by arbitration. The Facilitator noted that, like the QPAP proposed by Qwest, the plan that has been reviewed by a special master in Colorado 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. Like the QPAP, the plan reviewed in Colorado would grant state commissions authority to decide on the propriety of any identified changes, which the commissions would then ask Qwest to include in an amended SGAT filing. That report also recommends a separate review process (assisted by an outside expert under funding provided through Tier II payments), which would take place after three years of PAP operation, and which could examine broader changes to the PAP.

150. The Facilitator noted that total financial liability under the QPAP should remain predictable and fixed and therefore, providing a too liberal mechanism for changes to performance measures would be problematic. However, 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.

152. The Facilitator also approved of the three-year PAP review process recommended in Colorado. However, he indicated that process should not used to open the QPAP generally to amendment, but would serve to assist the commissions in generally determining then existing conditions and reporting to the FCC on the continuing adequacy of the QPAP to serve its intended functions.

153. Accordingly he recommended changes to the QPAP to: a) provide for neutral SGAT dispute resolution procedures in the event that there is disagreement with a three-year review process recommendation regarding proposed addition of new measures to the QPAP payment structure; b) 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; c) 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.

154. In 10-day comments, Qwest has agreed to make the recommended changes.

155. In its 10-day comments, AT&T argued that the Facilitator had misinterpreted the Colorado approach and had perceived limits in that process that do not,

In this case, AT&T attached the Colorado Plan as Exhibit B to its 10-day comments. As suggested by AT&T, the Commission notes that the Colorado review and amendment process, Section 13 and its subparts, is considerably more flexible than the plan proposed by Qwest here, even after considering the Facilitator's recommended changes. In that process, all issues of shifting the relative weighting of, deleting and adding new measures are routinely considered in the 6-month review process. The Commission determines what modified weights, additions or deletions are appropriate and Qwest is required to file an amended SGAT to reflect those Commission determined changes. Parties may suggest even fundamental changes to the plan but, unless it is established that the need for such change is "highly exigent", the matter will be deferred to the three year review. It is not true, as suggested by the Facilitator that Qwest must agree to all changes suggested in the Colorado plan review process. Rather, in the Colorado plan, the Commission retains authority to require changes in the review process but no changes to the plan overall can be made without Qwest's consent. Since the Colorado plan provides for review and change under the commission's authority and does not give Qwest veto power of individual suggested changes in the review process, this is a significant difference.

156. The Commission understands Qwest's stated need for certainty. However, CLECs are also relying on the operation of the QPAP and, if it later becomes clear that the plan, as initially developed is flawed in an important way, the Commission is concerned about the inability to revisit those matters in the QPAP being presented. The Commission notes that Qwest has repeatedly stated in this process that, because the QPAP is a part of Qwest's SGAT, the Commission has authority to administer the QPAP.

We believe that the ability to judiciously require changes to the QPAP on a showing of legitimate need is inherent in the authority to administer it. We instruct Qwest 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.

Monthly Payment Caps

157. CLECs expressed concern over QPAP Section 13.9, allowing Qwest to place Tier 1 payments that exceed a monthly cap into escrow, and to ask for relief from the obligation to pay such amounts.

158. Except for the monthly apportionment of payments to CLECs that the Facilitator recommended in his analysis of the annual cap and procedural caps, the Facilitator concluded there is no reason under the QPAP for calculating or using monthly caps. He further concluded that 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.

159. Qwest did not address this issue in its 10-day comments.

160. We agree with the Facilitator that there is no that reason under the QPAP for calculating or using monthly caps. Our conclusion in this matter is further supported by our conclusion with respect to Qwest's proposed annual cap, addressed earlier in this order. We instruct Qwest to eliminate any reference to monthly caps from the QPAP and to avoid using monthly caps.

Minimum Payments

161. WorldCom argued that small order counts would not produce significant payments by Qwest and therefore a $2,500 per occurrence minimum payment should be applied, with escalation based on these minimums. Qwest objected to WorldCom's minimum payment proposal, arguing that it would apply regardless of CLEC size or order volumes. Qwest also objected to the resulting application of the QPAP's escalation provisions to the minimum payment amounts. WorldCom agreed that it would be appropriate to limit its proposed minimum payments to CLECs with monthly volumes of less than 100 occurrences but continued to support a minimum payment amount of $2,500 per occurrence, arguing that Qwest's apportionment of $5,000 among all qualifying CLECs and its limitations on the sub-measures qualifying for minimum payments would provide insufficient incentive to Qwest to respond to underlying problems.

162. In the QPAP Report, the Facilitator recommended changes to the QPAP to address this issue. He found that the QPAP should 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.*

163. In its 10-day comments, Qwest agreed to make the suggested change.

164. The Commission approves of this recommendation and instructs Qwest to make the recommended change in its QPAP.

Remaining Issues

165. For the remaining issues addressed under the heading of Structure to Detect and Sanction Poor Performance as It Occurs, (Sticky Duration (QPAP Report, page 62); Low Volume Critical Values (QPAP Report, pages 63-65); Applying the 1.04 Critical Value to 4-Wire Loops (QPAP Report, pages 65-66); Measures Related to Low Volume, Developing Markets (QPAP Report, 66-67); 100% Caps for Interval Measures (QPAP Report, pages 68-70); and Assigning Severity Levels to Percent Measures (QPAP Report pages 70-71), the Facilitator determined that no changes to the QPAP were necessary to resolve the issues.

166. The Commission agrees with the Facilitator that no QPAP changes are necessary to address these issues.

b. Self-Executing Mechanism

167. The Facilitator identified eight issues in six categories that involve analysis of whether Qwest's QPAP is a self-executing mechanism. These six categories are: A) Dispute Resolution (QPAP Report, pages 71-72); B) Payment of Interest (QPAP Report, pages 72-73); C) Escrowed Payments (QPAP Report, page 73); D) Effective Dates (QPAP Report, pages 73-75); E) QPAP Inclusion in the SGAT and Interconnection Agreements (QPAP Report, page 76); and F) Form of Payment to CLECs (QPAP Report page 75).

Dispute Resolution

168. Qwest's brief 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 15.3. CLECs argued that all QPAP disputes should be resolved under the provisions of the SGAT or the applicable interconnection agreement. Qwest argued that the limitation of the QPAP dispute resolution provisions to certain sections was appropriate, citing the existence of more than 170 CLECs operating in Qwest's region as reason to prevent against the use of the procedures for "de minimis controversies."

169. In the QPAP Report, the Facilitator noted that Qwest simply did not propose a dispute resolution mechanism for QPAP disputes that involve QPAP sections other than those it listed. He noted that all SGAT provisions, the QPAP included, require some method for independent resolution. He recommended 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).

170. In its 10-day comments, Qwest indicated that it is willing to make the recommended change.

171. The Commission approves of the Facilitator's recommendation for dispute resolution procedures and instructs Qwest to make the requested change.

Payment of Interest

172. Initially, the QPAP did not provide for interest on late payments. In the course of the proceeding, 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 requested a specific QPAP provision reflecting this agreement and also recommended that each state's statutory interest rate be adopted in lieu of the one-year Treasury rate, which AT&T said was likely to be low.

173. In the QPAP Report, the Facilitator indicated that Qwest's proposal went only part of the way to addressing this problem and fell short because it applied the United States Government's cost of money, when the commercial value was the relevant value. He recommended that the QPAP interest rate should be the prime rate published daily by one of the numerous services or publications respected in the industry and recommended that the QPAP should provide for such interest as so posted for any payments made after the date due for any reason.

174. In 10-day comments, Qwest indicated that it is willing to make the change recommended by the Facilitator.

175. The Commission approves of the Facilitator's recommendation concerning the payment of interest and instructs Qwest to make the recommended change.

Escrowed Payments

176. Covad objected to allowing Qwest to avoid current payment obligations by claiming exclusions, arguing 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.

177. In the QPAP Report, the Facilitator agreed with Qwest that the provision for interest resolves the issue of the time value of money.

[redacted] The Commission agrees with the Facilitator that payment of interest [redacted]

[redacted]

[redacted] CLECs and Staff argued that the QPAP should become effective when the Commission issues its consultative report to the FCC to prevent backsliding while the FCC considers Qwest's 271 application. Staff argued that there is a risk of deteriorating performance because Qwest can present to the FCC a dated record of more adequate performance, while allowing more current performance to deteriorate. Qwest disagreed, arguing that the QPAP should be effective as of the date when Qwest may receive FCC 271 approval for the state.

[redacted] In the QPAP Report, the Facilitator agreed with Qwest and concluded that [redacted]

[redacted] The Commission agrees with Staff that the QPAP should become effective in New Mexico when and if the Commission makes a recommendation to the FCC that Qwest should be granted 271 approval for New Mexico. In this way, the Commission can deter backsliding during the months when Qwest's application will be pending at the FCC. The Commission instructs Qwest to modify its QPAP to reflect this effective date.

[redacted] Because of our conclusion about the effective date, there is no need to consider the issue of "memory" at effective date, discussed in he QPAP Report at page [redacted].

[redacted] Certain CLECs argued that Qwest's QPAP payment obligations should continue, even if Qwest exits the in-region, interLATA market.

[redacted]

184. In the QPAP Report, the Facilitator rejected this suggestion, concluding that the QPAP should terminate upon the end of Qwest's authority to serve the in-region interLATA market.

185. The Commission agrees with the Facilitator's conclusion that the QPAP should terminate upon the end of Qwest's authority to serve the in-region interLATA market.

Remaining Issues

186. For the remaining issues addressed under the heading of Self Executing Mechanism (QPAP Inclusion in the SGAT and Interconnection Agreements (QPAP Report, page 76) and Form of Payments to CLECs (QPAP Report, page 76), the Facilitator determined that no changes to the QPAP were necessary to resolve the issues.

187. The Commission agrees with the Facilitator that no QPAP changes are necessary to address these issues.

D. Assurances of the Reported Data's Accuracy

188. The Facilitator identified four issue categories that involve analysis of whether Qwest's QPAP provides sufficient assurances of the reported data's accuracy. These are: A) Audit Program (QPAP Report, pages 77-82; B) PUC Access to CLEC Raw Data (QPAP Report, pages 82-83); C) Providing CLECs Their Raw Data (QPAP Report, pages 83-84); and D) Late Reports (QPAP Report, pages 84-86).

Audit Program

189. In the QPAP Report, the Facilitator recognized the need for providing 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 that will serve

as a primary basis for the Commission's oversight of wholesale performance. Therefore, he concluded that a simple "thumbs up" or "thumbs down" for Qwest's auditing proposal is not sufficient. He suggested that a sound data auditing and testing program should consist of an integrated and complementary set of tools and, while Qwest's proposal contained some of these elements, it failed to create an effective and efficient overall program that will provide adequate assurances of the continuing accuracy of underlying performance data. He proposed the adoption of an integrated program in response to the concerns raised by many participants and recommended that the QPAP should be amended to explicitly provide for a program incorporating the elements he described in detail.

190. In its 10-day comments, Qwest indicated that it is willing to accept the Facilitator's comprehensive suggestions except in certain "key" areas where it has concerns.

191. The Commission approves of the Facilitator's recommendations. To the extent that Qwest wishes to submit QPAP language that differs from the Facilitator's recommendation, Qwest should do so in a separate filing, with an explanation of its changes, with an opportunity for other parties to respond, as has been the practice with SGAT changes.

PUC Access to CLEC Raw Data

192. QPAP Section 14.2 authorizes Qwest, upon Commission request, to provide CLEC raw data to the Commission. as confidential, subject to whatever decisions the commission later made with respect to continuing confidential treatment.

AT&T asked that Section 14.2 be stricken from the QPAP, because there is not provision for maintaining confidentiality.

193. In the QPAP Report, the Facilitator concluded that the Commissions has legitimate needs for the data at issue and there is no sound reason for requiring them to undertake the potentially significant burdens of seeking it from individual CLECs. Moreover, the Commission should retain its existing authority to determine what kinds of information ultimately will remain confidential. He recommended the insertion of the following language into the QPAP:

> *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.*

194. In its 10-day comments, Qwest agreed to make the change recommended by the Facilitator in the QPAP Report.

195. The Commission approves of the Facilitator's recommended QPAP change and instructs Qwest to make the recommended change.

Providing CLECs Their Raw Data

196. CLECs recommended a firm deadline Qwest to provide a CLEC with its specific data relevant for QPAP measurement and payment purposes and a required period for retaining records. Qwest objected to AT&T's request that it be obliged to provide the data to CLECs on a firm (as opposed to a mutually agreed to) schedule.

197. In the QPAP Report, the Facilitator concluded that Qwest should be obligated to provide the data as soon as it feasibly can. However, he indicated that a more

specific deadline would not respond to the need for flexibility given the size or nature of the requests that Qwest may face. He recommended that the QPAP should provide retention periods for underlying records sufficient to 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. He also determined that the QPAP should include a provision providing that Qwest's distribution of CLEC-specific data must be in a form that will allow CLECs to be able to identify its nature and content, and will be in a form that will allow CLECs to undertake the same kinds of calculations performed by Qwest.

198. In its 10-day comments, Qwest indicated that it is willing to make the recommended changes.

199. The Commission agrees with the Facilitator's recommendations and instructs Qwest to make the recommended QPAP changes.

Late Reports

200. The QPAP contains, in Section 14.3, a per-day late report payment of $500. CLECs made various different proposals for payment schedules for late, incomplete, and incorrect reports.

201. In the QPAP Report, the Facilitator concluded that the better way to deal with the accuracy of reports is to include the issue of report accuracy into the risk analysis that will be used to formulate audit plans. Similarly, he suggested that the

auditing program should consider CLEC-specific and CLEC-aggregate data in its planning. He concluded that payments should escalate as he suggested in the Report.

202. In its 10-day comments, Qwest indicated it is willing to make the recommended changes to its QPAP.

203. The Commission agrees with the Facilitator's suggestions and instructs Qwest to make the recommended QPAP changes.

Other Issues

Prohibiting QPAP Payment Recovery in Rates

204. AT&T argued that there should be specific language precluding QPAP recovery in rates. AT&T recommended its language, because Qwest has proposed none. Qwest said that 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, noting that the New York Commission made a similar determination at the state level.

205. In the QPAP Report, he indicated that no QPAP change is necessary to address this issue.

206. We agree with the Facilitator that no explicit QPAP language is necessary to reflect the fact that QPAP payments are not recoverable in rates.

No-Admissions Clause

207. CLECs argued that that measurements under the PID and payments based on them should be admissible as evidence in other proceedings and therefore they would delete QPAP Section 13.4.1.

208. In the QPAP Report, the Facilitator agreed that the objective information set forth in the performance reports is indeed strong evidence of Qwest's performance

and agreed that use of that information to show what Qwest's performance actually was should not be constrained. However, he concluded that the Section 13.4.1 of the QPAP does not do so. He concluded that the QPAP provision is narrowly drawn and reasonable.

209. The Commission agrees with the Facilitator.

Qwest's Responses to FCC-Initiated Changes

210. Qwest cited three proposed QPAP changes that Qwest said came from informal FCC input, and that Qwest noted were not objected to or commented upon at the hearings on the QPAP. These changes are set forth at page 87 of the QPAP Report.

211. In the QPAP Report, the Facilitator concluded that these changes should be incorporated into the QPAP.

212. The Commission agrees with the Facilitator's conclusion.

D. Specification of State Commission Powers

213. Section 12.3 of the QPAP 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.

214. In the QPAP Report, the Facilitator noted that apart from the QPAP, the Commission may recommend such relief for innumerable reasons other than the fact that Qwest has reached the QPAP cap. Therefore, he recommended that this provision should be stricken.

215. The Commission agrees that the Commission may recommend to the FCC that Qwest be prohibited from offering in-region interLATA services to new customers for a variety of reasons, including the pendency of a service investigation, as discussed

earlier in this Report. However, in light of our earlier ruling regarding the annual cap, we agree that this specific provision should be deleted.

216. The QPAP should not be deemed approved until the OSS tests are completed and the results reviewed and approved by Commission order.

Respectfully Submitted

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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

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the **Staff's Proposed Findings and Conclusions and Interim Order on Report on Qwest's Performance Assurance Plan** filed November 16, 2001, was mailed by first-class mail, postage prepaid to the following:

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DATED this 16th day of November, 2001.

NEW MEXICO PUBLIC REGULATION COMMISSION

LORETTA S. MARTINEZ, Legal Assistant

FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554
February 6, 2002

Ms. Caryn D. Moir
Vice President – Federal Regulatory
SBC Telecommunications, Inc.
1401 I Street, NW, Suite 400
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RE: *SBC/Ameritech Merger Order*, CC Docket No. 98-141, ASD File No. 99-49

Dear Ms. Moir:

This letter responds to SBC Communications, Inc.'s ("SBC") January 4, 2001 letter regarding performance measurements payments under the *SBC/Ameritech Merger Order*.[1] With this letter, I further explain the Common Carrier Bureau's ("Bureau") views on the method for calculating payments under the *Merger Order*.

In the *SBC/Ameritech Merger Order*, the Commission adopted the Carrier-to-Carrier Performance Plan ("Performance Plan") that requires SBC to make payments to the United States Treasury should it fail to meet certain performance standards.[2] The Performance Plan prescribes the steps SBC must follow to calculate payments.[3] Before making its first payment, SBC orally asked the Bureau for direction on eleven payment issues arising from the Performance Plan. On December 11, 2000, the Bureau provided SBC a letter setting forth how the relevant payment provisions should be interpreted.[4] On January 4, 2001, SBC indicated it disagreed with the Bureau's interpretation on four issues.[5] As explained below, based on my further review, I conclude that SBC's position on three issues is reasonable and accordingly modify my prior guidance. On one issue, I decline to modify my prior interpretation, but note that the practical impact of the issue may be dwindling.

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[1] Letter from Sandra Wagner, Vice President, Federal Regulatory, SBC, to Carol E. Mattey, Deputy Bureau Chief, Common Carrier Bureau, FCC (Jan. 4, 2001) ("*SBC January 4th Letter*"); Applications of Ameritech Corp., Transferor, and SBC Communications, Inc., Transferee, For Consent to Transfer Control of Corporations Holding Commission Licenses and Lines Pursuant to Sections 214 and 310(d) of the Communications Act and Parts 5, 22, 24, 25, 63, 90, 95, and 101 of the Commission's Rules, CC Docket 98-141, *Memorandum Opinion and Order*, 14 FCC Rcd 14712 (1999) ("*Merger Order*").

[2] *Merger Order* at Appendix C, Attachment A.

[3] *See id.*

[4] *See* Letter from Carol Mattey, Deputy Chief, Common Carrier Bureau, to Sandra Wagner, Vice President, Federal Regulatory, SBC (Dec. 11, 2000) ("*Bureau Payment Calculation Letter*").

[5] *See SBC January 4th Letter.*

1. For measurements expressed as averages, should the "performance gap" – the extent to which SBC misses the performance standard – be capped at 100% if SBC misses the performance standard by a higher percent?[6]

The Performance Plan does not, on its face, cap the difference between the level of service SBC provides to CLECs and the relevant performance standard (i.e., the "performance gap"). Accordingly, the Bureau instructed SBC to follow the formula spelled out in the *Merger Order*.[7] SBC disagrees with this guidance for two reasons. First, SBC contends that an uncapped performance gap will require the company to pay on more than the actual volume of activity. Second, SBC states that the Texas Commission subsequently imposed such a cap on the state's performance plan, and therefore the Bureau should modify its interpretation of the relevant provisions in the merger conditions.[8] As explained below, I conclude there are public policy benefits in permitting SBC to make calculations under this provision in a uniform manner with the Texas plan, and therefore I authorize SBC to cap the performance gap at 100%.

The *Merger Order* establishes a four-step method for calculating payments for this type of measurement (i.e., a measurement expressed as an average):[9]

1) SBC calculates the "ideal value," which is the minimum level of service SBC could provide CLECs without owing payments;[10]

2) SBC calculates the percentage difference between the ideal value and the service it gave CLECs (i.e., the "performance gap").[11] For example, if SBC provisions circuits to CLECs in nine days and calculates an ideal value of three days, the performance gap would be 200% (the difference of six days divided by the ideal value of three days);[12]

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[6] *See* Issue Number 3 in the *Bureau Payment Calculation Letter* at 2-3.

[7] *See Bureau Payment Calculation Letter* at 2-3.

[8] *SBC January 4th Letter* at 3.

[9] In fact, there are three steps. Because the third step has two stages, I describe the process in four steps here. Stated simply, the formula is a function to the dollar value of the measurement multiplied by the number of data points multiplied by the average quality of SBC's performance.

[10] *See Merger Order* at Appendix C, Attachment A, A-116, at "Step 1" for measurements expressed as averages or means. The "ideal value" is SBC's term. SBC calculates the ideal value by translating the "critical-z" into the units being measured by the performance measurement (e.g., days, hours, and percentages). The ideal value is based partly on the service SBC provides its own retail customers (or a benchmark standard if SBC does not provide the service on a retail basis). *See Merger Order* at Appendix C, Attachment A, A-116. For simplicity, I use a one-month example; in fact, SBC's payments are based on chronic failures of either three consecutive months or six of twelve months in a calendar year. *See Merger Order* at Appendix C, Attachment A, ¶ 9.

[11] *See Merger Order* at Appendix C, Attachment A, A-116, "Step 2." This step requires SBC to "[c]alculate the percentage difference between the actual average and the [ideal value] . . ."

[12] Stated differently, in this example it took SBC three times longer to provision CLEC circuits than its retail circuits (nine days versus three).

3) SBC multiplies the performance gap by the number of data points.[13] Continuing with the example, SBC would multiply 200% by the number of times it provisioned circuits to CLECs, e.g., 150 provisioned circuits to yield 300;[14] then

4) SBC multiplies the product of Step 3 by a fixed-dollar amount based upon the measurement's designation in the Performance Plan as "High," "Medium," or "Low."[15] In the example, SBC would multiply 300 by the pre-set dollar amount, e.g., $900 for a "Medium" measurement. SBC's final payment amount for this measurement would thus be $270,000.

SBC first argues that the performance gap calculated in the second step should be limited to 100%. To do otherwise, SBC claims, would require the company to pay on more than the actual number of data points, i.e., applying a 200% performance gap to 150 data points would cause the company to pay on 300 data points.[16] Capping the performance gap at 100% would reduce the example payment to $135,000.[17]

I find this argument unpersuasive. Failing the performance standard by a wide margin, which is often within SBC's control, creates a large performance gap. A large performance gap does not mean SBC pays on more than the actual number of data points, as SBC argues. Rather, SBC would simply be paying for a larger disparity on the specified number of occurrences.[18]

SBC also suggests that the Bureau should accept its position because the Texas Commission subsequently modified the Texas plan to cap the performance gap at 100%.[19] As SBC notes, part of the Performance Plan was modeled on the Texas plan. While the Commission was explicit that it was not bound to any future state change,[20] the fact that the Texas Commission chose to modify this aspect of the state performance plan warrants a consideration of whether there are public policy benefits in applying the calculation in the same fashion for the federal plan. The Commission is committed to the goal of

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[13] Although SBC's *January 4th Letter* uses the term "occurrences," SBC stated orally to Bureau staff that it uses "occurrences" and "data points" synonymously. SBC and the Bureau thus agree that the "total number of data points" refers to the total volume of CLEC activity for the measurement, e.g., the number of circuits provisioned to CLECs.

[14] In other words, 150 provisioned circuits times 200% to yield the number 300.

[15] *See Merger Order* at Appendix C, Attachment A, A-116 at "Step 3."

[16] *SBC January 4th Letter* at 3.

[17] In other words, 100% performance gap times 150 data points times the $900 pre-set dollar amount.

[18] *See Merger Order*, 15 FCC Rcd at 14867, ¶ 377; *see also id.* at ¶ 378 (stating that SBC's payments will vary according to the "level and significance of the discrimination detected").

[19] *SBC January 4th Letter* at 3.

[20] *Merger Order* at Appendix C, Attachment A, ¶ 4 (stating that the Bureau will decide if state changes should be made to the Performance Plan).

working closely with the states in developing and applying national performance measurements as a general matter, and I believe that objective should guide our interpretation and application of the relevant merger conditions in this instance. I conclude that administrative efficiency would be served if SBC were permitted to apply this payment calculation in a fashion that mirrors the Texas performance plan. Accordingly, SBC may follow the 100% cap approach for measurements expressed as averages under the federal performance plan.

2. Should SBC report z-scores and calculate payments for performance measurements with 10 or fewer data points?[21]

The Performance Plan does not, on its face, exclude any performance measurements from either reporting or payment based on volume. Accordingly, I stated in the *Bureau Payment Calculation Letter* that SBC should report and pay on measurements with 10 or fewer data points.[22] SBC disagrees. Specifically, SBC argues that the Performance Plan's trebling of damages for volumes between 10 and 100 suggests by implication that volumes of 10 or fewer should be excluded.[23] SBC also has orally indicated its concern that it not be required to make payments for situations in which there are so few data points that a meaningful statistical conclusion cannot be made. Second, SBC suggests that the Texas Commission's exclusion of such low volume measurements in its state plan should guide the Bureau's decision.

At the outset, I note that the business rules expressly describe in detail the types of data SBC should exclude.[24] Nowhere among these exclusions are low-volume measurements. The fact that the Performance Plan trebles damages for volumes between 10 and 100 does not mean that the Commission wished to exclude volumes of 9 or fewer, given that the Commission was clear to exclude other data. To do so would be inconsistent with the Performance Plan's goal of completely capturing SBC's performance (except for limited, explicitly stated circumstances) and, where necessary, establishing payment obligations.[25] Second, the Performance Plan already addresses low-volume situations. The Commission adopted a specific statistical test for use with measurements with "29 or fewer" observations.[26] One-time low-volume situations will not, of themselves, lead to payment; instead, SBC would only make payments in low-volume situations when it misses the established standard three months in a row (or six months in a year). This aspect of the Performance Plan should protect SBC from having to make payments for random events.

SBC states that the Texas Commission clarified the Texas plan to exclude low-volume measurements for payments to the state.[27] As noted above, however, changes at the state level are not

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[21] *See* Issue Number 9, *Bureau Payment Calculation Letter* at 4-5.

[22] *See Bureau Payment Calculation Letter* at 4-5.

[23] *See SBC January 4th Letter* at 5-6.

[24] *See Merger Order* at Appendix C, Attachment A, A-12 – A-111.

[25] *See Merger Order*, 15 FCC Rcd at 14867, ¶ 377 (stating that the goal of the Performance Plan is to ensure that quality of service to CLECs will not deteriorate as a result of the SBC/Ameritech merger).

[26] *See Merger Order* at Appendix C, Attachment A, A-112 – A-114.

[27] *SBC January 4th Letter* at 6.

automatically made to the federal Performance Plan. Moreover, as SBC concedes, the Texas Commission excluded low-volume measurements only for payments directly to the state, not for payments to CLECs.[28] This is an important distinction between the two plans. The Texas Commission is still assured that SBC has an incentive to improve performance even in low-volume situations under its plan. If we were to accept SBC's proposal to exclude low volume measurements here, there would be no such assurance under the federal plan. I therefore believe this is an instance where the benefits of applying divergent federal and state approaches could outweigh the potential administrative costs. For these reasons, I decline to modify my prior interpretation. I note, however, that the effect of this issue may, as a practical matter, be less significant in light of the increase in CLEC activity over the last year. As CLEC business increases, measurement volumes increase, and SBC should encounter fewer low-volume situations.

A. If SBC is required to make a payment for failure to meet a standard (i.e., failing to meet the monthly ideal value for that standard for three consecutive months), how should the second component of the payment calculation – the extent to which the performance standard was missed – for parity measurements expressed as averages or means be calculated for purposes of determining SBC's payment obligation?[29]

The Performance Plan states that SBC should compare the level of service SBC provides CLECs (the "actual CLEC service") for each of the three months analyzed to the ideal value for the most recent month (i.e., the third month).[30] The Bureau instructed SBC to use this methodology in the *Bureau Payment Calculation Letter*.[31] SBC nevertheless observes that the Performance Plan's approach could result in a negative performance gap and payment amount because the months are not comparable.[32]

SBC suggests that a more appropriate approach would be to compare each month's actual CLEC service to the ideal value for the same month.[33] Upon further review, I agree that SBC's suggested approach will avoid the unintended results SBC describes and is consistent with the Performance Plan's methodology for other types of measurements.[34] SBC therefore may use its proposed approach on this issue.

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[28] *Id.* Under the Texas plan, payments fall into two tiers, i.e., payments to the Texas Commission and payments to CLECs.

[29] *See* Issue Number 4, *Bureau Payment Calculation Letter* at 3.

[30] *Merger Order* at Appendix C, Attachment A, A-116 – A-117. As described above, the ideal value is the minimum service SBC could give CLECs without being liable for payments. In addition, the relevant period of analysis could be six of twelve months.

[31] *See Bureau Payment Calculation Letter* at 3.

[32] *SBC January 4th Letter* at 4. For example, assume the ideal value for September is three days. Assume further an actual CLEC service level of two days and one day for July and August, respectively. The performance gaps for July and August would be negative (two days minus three days and one day minus three days).

[33] *SBC January 4th Letter* at 3-4.

[34] *See Merger Order* at Appendix C, Attachment A, A-116 – A-117 (prescribing the month-to-month comparison for measurements expressed as percentages, ratios, and proportions).

4. In conducting parity tests, should SBC use the variance computed for ILEC-to-CLEC data in months when there are no SBC retail data?[35]

The Performance Plan is silent on this issue. In the *Bureau Payment Calculation Letter*, I stated that SBC should use the SBC retail variance of an adjacent month, preferably the next most recent month.[36] SBC disagrees, stating instead that it should instead calculate a pooled variance estimate using the SBC and CLEC results for the current month.[37] Because the Performance Plan does not directly address this issue and SBC's proposal is reasonable, I conclude SBC may use its proposed approach on this issue.

I appreciate the opportunity to work through these issues with you and your staff. If SBC disagrees with our interpretation of the *Merger Conditions*, it should file an application for review with the Commission pursuant to section 1.115 of the Commission's rules.[38]

Please do not hesitate to contact me if I can be of further assistance. You may also contact Mark Stone in the Common Carrier Bureau directly at (202) 418-0816 for further information on this matter.

Sincerely,

Carol E. Mattey
Deputy Chief, Common Carrier Bureau

cc: Al Sycles, SBC

[35] *See* Issue Number 7, *Bureau Payment Calculation Letter* at 4.

[36] *See Bureau Payment Calculation Letter* at 4.

[37] *SBC January 4th Letter* at 5.

[38] 47 C.F.R. § 1.115.

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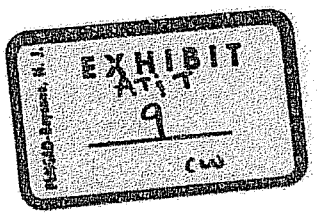
BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF SOUTH DAKOTA

IN THE MATTER OF THE INVESTIGATION INTO QWEST CORPORATION'S COMPLIANCE WITH SECTION 271(C) OF THE TELECOMMUNICATIONS ACT OF 1996	))))	Docket No. TC 01-165

AT&T'S VERIFIED COMMENTS

REGARDING PERFORMANCE DATA

MARCH 18, 2002



AT&T Communications of the Midwest, Inc. hereby submits its Verified Comments Regarding Performance Data. AT&T appreciates the opportunity to address the Commission regarding these issues.

I. ACCURACY AND RELIABILITY OF QWEST'S PERFORMANCE RESULTS

The issue of the accuracy and reliability of Qwest's performance results is still open. The performance measurement audit Liberty Consulting performed as part of the ROC OSS test was important but it did not provide a complete picture of the accuracy and reliability of Qwest's performance measurement results. One of the fundamental and general assumptions made by Liberty during the conduct of the performance measurement audit was that the raw, input data provided by Qwest were accurate. Operating under that assumption, Liberty evaluated whether Qwest could take that raw data and turn it into PID-compliant performance measurement results. There were some limited instances during the performance measurement audit where Liberty had some visibility into the capture and recording of the raw data, but for the most part Liberty assumed the data were accurate. For example, if Qwest-provided data showed an order was missed for reasons attributed to the customer, Liberty would check as to whether or not Qwest treated an order with a customer-caused miss in a manner consistent with the PID requirements. If Qwest said it was a customer-caused miss, Liberty had no way to determine if, in fact, the order was missed for Qwest reasons. Simply stated, Liberty's conclusion in the *Final Report on the Audit of Qwest's Performance Measures* (September 25, 2001) was that assuming accurate and reliable raw data, Qwest was able to turn that data into PID-compliant performance results. Liberty's performance

measurement audit did not generally test the assumption that the raw data were accurate and reliable.

There are two primary mechanisms designed to address the question of the accuracy and reliability of Qwest's raw, input data. They are the Liberty Consulting data reconciliation effort and the independent calculation of Pseudo-CLEC results by KPMG Consulting as part of ROC OSS test. Both mechanisms remain a work in progress and both have identified problems with Qwest's data accuracy. Qwest has not remedied some of those problems. Consequently, the record and evidence with respect to the accuracy and reliability of Qwest's performance results will not be complete until Liberty Consulting completes its data reconciliation efforts and KPMG completes its effort of independently calculating the Pseudo-CLEC data and then comparing its results to the Qwest produced results for the Pseudo-CLEC.

A. The Liberty Consulting Group Data Reconciliation Efforts

The Liberty data reconciliation effort remains very much a work in progress. To date, Liberty has reviewed results for the states of Arizona, Colorado, Nebraska and Washington. Data for the states of Oregon, Utah, and Minnesota is either in the process of being reviewed or has yet to be reviewed. Liberty views the results of its data reconciliation efforts to be cumulative. Liberty clearly identified the "work in progress" nature of the data reconciliation effort when it stated, "Liberty views the results of its data reconciliation work to be cumulative and that overall conclusions should be made after its work for the states of Washington and Nebraska is complete."[1] To ensure that the South

[1] Second Report on Qwest Performance Measure Data Reconciliation – Colorado, dated January 3, 2001 ("Colorado Report"). As previously mentioned, Liberty is also conducting data reconciliation work for results from the states of Minnesota, Oregon, and Utah.

Dakota Public Utilities Commission ("Commission") has the complete picture of Qwest's treatment of its raw data, the Commission should wait until after Liberty has published its last reconciliation report before reaching any final conclusions based upon Liberty's data reconciliation efforts.

As a result of the review of the Arizona, Colorado, Nebraska and Washington data, Liberty opened one exception and eleven observations to document problems with the accuracy and reliability of Qwest's performance results. To AT&T's knowledge, two of the observations are currently open. In addition, there remains the possibility that Liberty may, in the evaluation of the data for the remaining states, identify other problems with the accuracy and reliability of Qwest's performance data. As Liberty has moved from state to state in its analysis, it has confirmed the existence of issues that were uncovered in the analysis of earlier states and also uncovered new issues.

It should not be assumed that Liberty will not uncover any new data reliability or accuracy problems as it completes the analysis of additional states. The parties' experience with the Arizona and Colorado analysis demonstrate the danger of that assumption. After the Arizona analysis, Liberty issued one exception. Qwest argued at that point that there was no need to continue the analysis since everything the parties needed to know was learned in the Arizona analysis. That argument was rejected and the audit was permitted to proceed. In the next state to be analyzed, Colorado, there were nine new problems identified that resulted in the creation of nine observations. Given that there is analysis pending in four states, it would be imprudent to base any conclusions on the accuracy and reliability of Qwest's performance results on the previously concluded analysis of four states.

To ensure that the Commission has a complete record, AT&T attaches to this document as Exhibits A-E its comments on the data reconciliation efforts in Arizona, Colorado, and Nebraska.

B. The KPMG Consulting Independent Calculation of Performance Results for the Pseudo-CLEC

The Liberty data reconciliation efforts have been valuable in that they have identified areas where Qwest's data were inaccurate and/or unreliable. However, the effort was somewhat limited. The reconciliation was limited to three CLECs, four services, six performance measurements and seven states. The KPMG reconciliation effort will be much broader in scope. The KPMG effort will include a much wider range of services and will include results from all of the thirteen states participating in the ROC OSS test. Because it will look at more products and more states, it will provide insights into the accuracy and reliability of Qwest' performance results that could not be obtained in the reconciliation of a limited amount of commercial data from three CLECs.

Qwest produces CLEC-specific reports for the relevant PID results. As part of the ROC OSS test, Qwest will be producing reports for the Pseudo-CLEC. During the ROC OSS test, HP will be collecting and KPMG will be analyzing Pseudo-CLEC data for activities performed during the test. KPMG will take the raw, input data from HP and convert that data into PID-compliant performance results.

The developers of the Master Test Plan ("MTP") recognized that KPMG's independent calculation of PID-compliant performance results provided an opportunity to check the accuracy of Qwest's raw, input data as well as to confirm that Qwest continues to convert the raw, input data into PID-compliant performance results. This check can be

done by simply comparing KPMG's PID results for the Pseudo-CLEC to the Qwest PID results for the Pseudo-CLEC.

One of the MTP-required outputs that KPMG must produce is a "KPMG Consulting-produced, HP data to Qwest-HP data comparison."[2] This comparison report will provide further evidence as to the accuracy and reliability of Qwest's raw, input data and whether or not Qwest continues to turn that data into PID-compliant performance results. Any significant deviations between the KPMG- and Qwest-produced performance results should be investigated to determine if the deviation is the result of inaccurate or unreliable Qwest data.

KPMG has only just started to compare its independently calculated results for the Pseudo-CLEC to Qwest's calculated Pseudo-CLEC results. Even though it has just started the comparative analysis, KPMG has already issued two Observations that question the accuracy of Qwest's input data. In Observation 3089 KPMG found, "[i]n Test 12 and Test 14 of the MTP, KPMG Consulting is required to compare the P-CLEC data KPMG Consulting produces to the P-CLEC data Qwest produces. **KPMG Consulting has found several differences between the two datasets**."[3] (emphasis added) In Observation 3099, KPMG found, "[o]ut of 240 orders reviewed, **25 were mishandled in the calculation of the OP-4 PID**, according to KPMG Consulting's determinations. **If these determinations are correct, this issue has an impact on the accurate reporting of PID results**."[4] (emphasis added)

[2] The Regional Oversight Committee (ROC) 3rd Party Test, Qwest OSS Evaluation Project Master Test Plan, Revised Release 5.0, December 28, 2001, Sections 12.6.3 and 14.6.3.
[3] Observation 3089, First Response, March 4, 2002.
[4] Observation 3099, First Response, March 13, 2002.

The fact that KPMG is in the early stages of its comparison of KPMG- and Qwest-produced Pseudo-CLEC data and it has already identified two problems is an additional reason why it would be premature to draw any conclusion on the accuracy and reliability of Qwest's performance results data until KPMG completes its analysis and Qwest implements any fixes necessitated by negative findings in the analysis.

II. QWEST'S REPORTED PERFORMANCE MEASUREMENT RESULTS FOR SOUTH DAKOTA

A. Checklist Item # 2 Access to OSS

1. OP-7 Billing Completion Notices

As has been identified KPMG Consulting in the ROC OSS test, Qwest has been having serious problems with the completeness, accuracy and timeliness of its billing records. This problem can also be seen in Qwest's reported performance results. Qwest's PO-7A results (Billing Completion Notices sent via the IMA-GUI) show discriminatory performance in the timeliness of billing completion notices in three of the last four months of reported results.[5] Timely billing completion notices are necessary to ensure that the CLEC has the correct date upon which to start billing its customers. Untimely or missing billing completion notices can result in situations where customers get double billed for the same period of time. For the same period of time the customer can potentially receive one bill from Qwest and one bill for the CLEC. Qwest's PO-7B results (Billing Completion Notices Sent Via EDI) also show discriminatory performance

[5] Qwest Performance Results, South Dakota, February 2001 – January 2002 (Checklist Format), February 20, 2002 ("February Results Report"), p. 57.

for the transmission of billing completion notices in two of the last four months of reported results.[6]

2. BI-3A – Billing Accuracy

The ROC OSS test turned up problems with the accuracy of Qwest's billing.[7] KPMG found that Qwest was sending bills to the Pseudo-CLEC that had incorrect amounts for both recurring and non-recurring charges. The inaccuracy of Qwest's billing to CLECs is shown in the BI-3A results. Qwest's billing accuracy performance to CLECs was discriminatory in the last four months of reported data.[8] In October and November of 2001, Qwest's billing performance to CLECs was 0% accurate. In December of 2001, Qwest's performance only improved to 66.93% accuracy.

3. BI-4A – Billing Completeness

Qwest's billing problems also manifest themselves as incomplete bills. In two of the last four months, Qwest's performance to CLECs in providing timely bills was discriminatory.[9] Qwest's poor billing performance and its penchant for sending bills to CLECs that are incomplete and inaccurate should prevent this Commission from finding that Qwest has met the requirements of Checklist Item # 2.

[6] February Results Report, p. 57.
[7] See ROC OSS Test Observations 3076 and 3041 and Exceptions 3008, 3034, 3069, 3088.
[8] February Results Report, p. 69.
[9] February Results Report, p. 70.

4. OP-4 Installation Interval - No Dispatches (UNE-P)

The unbundled network element platform ("UNE-P") is one of the few services that CLECs use in significant quantities in South Dakota. A CLEC that does serve its customers with the use of the UNE-P service will generally migrate its customer from Qwest's service to the CLECs. In those cases, Qwest will almost always install the service without the need to dispatch a technician.

For this competitively significant service, Qwest has provided discriminatory service to CLECs in the last four months.[10] Over the entire four month period, Qwest took over 9% more time to install services for CLECs as compared to similarly situated retail customers. In the month with the most activity, December 01, Qwest took almost 15% longer to install services for CLECs than it did for its own retail customers.

5. MR-8 Trouble Rate (UNE-P Centrex)

Qwest's reported performance results show that Qwest is not maintaining UNE-P Centrex service as well for CLECs as it does for similarly situated retail customers. Over the last twelve months, there have been about 15,000 CLEC UNE-P Centrex lines in service in any given month.[11] Qwest's results show that the rate of troubles for CLEC UNE-P Centrex lines was higher by a statistically significant amount in all twelve months of reported results. In the latest month of reported results, January 2002, the rate of troubles on UNE-P Centrex lines was over 227% higher than for similarly situated retail customers.[12] Over the last four

[10] February Results Report, p. 73.
[11] February Results Report, p. 91.
[12] February Results Report, p. 91.

CONTINUATION

[8]

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months of reported results, the monthly rate of troubles for CLECs was as high as 3.9 times higher for CLECs than for similarly situated retail customers. The significant difference between the CLEC and retail trouble rates is evidence that Qwest's maintenance of CLEC UNE-P Centrex lines is discriminatory.

B. Checklist # 11 Local Number Portability

OP-17 Timeliness of Disconnects Associated with LNP Orders

AT&T provides the following status of Qwest's next-day disconnect activities. Qwest has submitted its new product offering to the CMP process. AT&T has sought and received clarification of this offering.[13]

With respect to the new process, AT&T believes that the new process has improved the situation and AT&T is seeing fewer premature disconnects. However, AT&T believes it is premature to reach any conclusion regarding Qwest's performance on LNP for several reasons.

First, a PID was developed for the specific purpose of assessing Qwest's new disconnect process. However, the PID that was developed, OP-17, does not fully measure the new disconnect process implemented by Qwest. The current version of OP-17 provides that the CLEC must notify Qwest by 8:00 p.m. on the due date in order to be counted as a timely CLEC-requested delay, if not, any trouble report associated with that order is excluded from the PID measure. The effective result is that any telephone number ported will be counted as a success for the purpose of OP-17 even if the CLEC calls in a trouble report after 8:00 P.M. on the due date. However, Qwest's product notification indicates that

CLECs have until noon of the day following the scheduled due date to notify Qwest to delay the disconnect. Thus, absent a notification by 8:00 p.m. of the due date, under the OP-17 PID, Qwest will count that order as success and Qwest would not be measuring whether the disconnect was made on the day after the due date or not. Thus, the PID will not produce any evidence of whether Qwest's new process is working or not.

AT&T submitted proposed revisions to OP-17 to the ROC on December 20, 2001 to correct this discrepancy and to ensure the Qwest's performance under this PID fully measures Qwest's performance on LNP disconnects. A call was held amongst the ROC participants to discuss AT&T's proposed revisions on February 28, 2001. The issue has gone to impasse and no resolution on the proposed revisions to OP-17 has been reached to date.

To the extent that Qwest provides any OP-17 results to the Commission, based upon these concerns that the OP-17 PID is not accurately measuring Qwest's new process, such Qwest results are of no value.

AT&T has compared its own internal results for premature disconnections for the state of Utah to Qwest's regional results and the number of Qwest-caused premature disconnects for Utah alone is higher than Qwest's reported total region-wide numbers. AT&T has provided these Utah results to Liberty Consulting as part of the performance measurement audit that is ongoing. Given the myriad of difficulties that have been uncovered during the audit of Qwest's processes to calculate other PID results and the discrepancies that exist between Qwest's

[4] See Exhibit F, AT&T on Local Number Portability and Exhibit G, Qwest's Change Release Notification and Exhibit H, Qwest Clarification Letter.

performance data and CLEC commercial usage data, this is a critical analysis that must be performed on Qwest's performance data before it can be relied upon.

C. Checklist Item # 14 Resale

1. Installation Commitments Met – No Dispatches (Residence Resale)

Residence resale service is one of the few services with significant quantities in the state of South Dakota. Like with UNE-P, a CLEC that does serve its customers with the use of the residential resale service will generally migrate its customer from Qwest's service to the CLECs. In those cases, Qwest will almost always install the service without the need to dispatch a technician.

Qwest's reported results show that Qwest is providing discriminatory treatment in the installation of residential resale services. Qwest does not meet its installation commitments for CLECs as frequently for CLECs as it does for its retail customers. In three of the last four months Qwest's performance to CLECs was worse by a statistically significant amount.[14]

2. MR-7 Repeat Report Rate – No Dispatches (Resale Residence)

Qwest's performance results show that CLECs experience more repeat troubles on residential resale services than similarly situated retail customers in two of the last four months of reported data.[15] The MR-7 measurement is intended to be an indicator of whether Qwest is able to repair a reported trouble right the first time. If Qwest does not repair the service right the first time, a repeat trouble report can occur within thirty days of the first trouble report. How

well Qwest does in correctly repairing troubles the first time is what the MR-7 measurement is all about. Qwest's reported results show that Qwest is not repairing CLEC residential resale services with the same attention as it does for its own retail customers.

3. MR-8 Trouble Rate (Residential Resale)

Qwest's reported results show that Qwest is doing a worse job of maintaining CLEC residential retail lines than it does for similarly situated retail customers. In three of the last four months of reported results, the rate of CLEC troubles was higher by a statistically significant amount than for similarly situated retail customers.[16] Over the last four months, the rate of CLEC troubles on residential resale service was over 20% higher than the trouble rate for similarly situated retail customers. Qwest's reported results show that Qwest is not maintaining CLEC residential resale services with the same attention as it does for its own retail customers.

4. OP-4 Installation Interval – No Dispatches (Business Resale)

Qwest's reported results show discriminatory performance in the time it takes to install business resale services when no dispatch is required. In three of the last four months and nine of the last twelve months of reported data, Qwest's performance to CLECs was worse by a statistically significant amount.[17] In December of 2001, it took Qwest nearly three times longer to install resale business services than it took to install retail business service.

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[16] February Results Report, p. 171.
[17] February Results Report, p. 177.
[18] February Results Report, p. 179.
[19] February Results Report, p. 182.

5. MR-8 Trouble Rate – (Business Resale)

Qwest's reported results show that Qwest is doing a worse job of maintaining CLEC business retail lines than it does for similarly situated retail customers. In two of the last four and three of the last five months of reported results, the rate of CLEC troubles was higher by a statistically significant amount than for similarly situated retail customers.[18] Qwest's reported results show that Qwest is not maintaining CLEC business resale services with the same attention as it does for its own retail customers.

Qwest also appears to have a problem with the quality and reliability of its DS1 resale results. The denominator of the MR-8 Trouble Rate measurement is the number of lines in service. Qwest's MR-8 results generally show a month over month increase in the number of lines in service in all twelve months of reported data.[19] The constant increase in the number of lines in service would indicate that new lines are being installed in every month. However, the performance data that shows the level of orders completed in a month does not show a steady rate of order completion. The denominator of the OP-5 New Service Installation Quality measurement provides an indication of the number of orders completed in a month. Qwest's OP-5 results for DS1 resale services show that there were only nine orders completed in the entire year of 2001. Eight of the nine orders were completed in the first six months of 2001. The low volume of completed DS1 resale orders completed in the year does not support the steady increase of lines in service indicated by the MR-8 results. AT&T suspects that

[18] February Results Report, p. 189.
[19] February Results Report, p. 263.

Qwest has made some sort of systemic error and is incorrectly including services other than resale DS1 in the MR-8 results for resale DS1.

D. E911 Issues

AT&T has recently discovered an issue with how Qwest works with its E911 database administrator. On numerous occasions, Qwest has failed to send a required message informing the database administrator that a CLEC has taken over responsibility for a customer. Qwest's failure results in an inability of the CLEC to have updated E911 information entered into the E911 database. Ultimately, Qwest's failures can result in inaccurate customer and address information in the E911 database.

Qwest recently directed that its subcontractor that maintains the E911 database change the manner in which it permits CLECs to update E911 information. The subcontractor recently changed its process and it appears to have addressed the problem. However, AT&T is still performing internal analysis to determine if indeed the process change was successful. In addition, there does not appear to be any SGAT language or interconnection agreement language that would ensure that Qwest has a legally binding obligation to maintain what appears to be a successful process. Finally, there is presently no performance measurement that would measure Qwest's performance in maintaining the new process.

III. CONCLUSION

AT&T believes that all parties would agree that the ideal state for Qwest's performance measurements results is that the results "will speak for themselves." The

Liberty data reconciliation effort to date has shown that there remain too many issues with the accuracy and reliability of Qwest's reported results such that they can "speak for themselves." In addition, Liberty Consulting may discover additional problems with the accuracy and reliability of Qwest's performance results as it completes its analysis for the remaining four states. Other problems with Qwest's data may be discovered by KPMG after it has produced its data comparison report.

The ultimate conclusions reached on the accuracy and reliability of Qwest's performance results are dependent upon the completion of the Liberty's audit activities and the ROC OSS test. There is no compelling need or tangible benefit to reaching any conclusions based upon a record and evidence that is still being developed. As it has with other Section 271 issues, AT&T requests that the Commission condition the closure of issues relating to the accuracy and reliability of Qwest's performance results on the completion of the OSS test and Liberty's data reconciliation audit.

Respectfully submitted March 18, 2002.

AT&T COMMUNICATIONS
OF THE MIDWEST, INC.

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BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF SOUTH DAKOTA

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

VERIFICATION OF JOHN F. FINNEGAN

I, John F. Finnegan, being duly sworn, state that I am a Senior Policy Witness for AT&T Corp. I hereby verify the factual assertions in AT&T's Verified Comments Regarding Performance Data as true and correct statements to the best of my knowledge and expertise.

Dated this 18th day of March 2002.

John F. Finnegan

STATE OF COLORADO)
) **ss**
CITY AND COUNTY OF DENVER)

SUBSCRIBED AND SWORN TO before me on this 18th day of March 2002 by John F. Finnegan, who certifies that the foregoing is true and correct to the best of his knowledge and belief.

Witness my hand and official seal.

Adam W. Walczak
Notary Public

My commission expires: 1/22/06

NOTARY PUBLIC
ADAM W. WALCZAK
STATE OF COLORADO

My Commission Expires 1/22/06

AT&T's Comments on Liberty's Report on Qwest Performance Measure Data Reconciliation for Arizona

Exhibit A

I. Introduction

The Liberty Consulting Group *(Liberty)* conducted an audit of Qwest's performance measures for the ROC, and issued the final report from that audit on September 25, 2001. As an extension to the audit, and through its Change Request process, the ROC requested that Liberty conduct a "data validation to resolve any debates concerning the accuracy of performance data emanating from particular ROC PIDs." (ROC Change Request #20.) Certain CLECs have expressed concerns about the accuracy of Qwest's reported performance results as they relate to service that they have been receiving. The ROC decided to conduct this data reconciliation work in order to test those concerns. Liberty's performance measures audit applied to all of the ROC states with the exception of Arizona. Nevertheless, Liberty was requested to include Arizona in the scope of its data reconciliation work. This report provides the results of Liberty's review of Arizona data.

Liberty conducted multiple discussions with state commission personnel, Qwest, and the CLECs, in order to secure their comments on the scope and objectives for this test. Liberty has determined that the objective for the data reconciliation process solicited by the ROC should be to answer the following question:

> **Does the information provided by Qwest demonstrate accuracy in Qwest's reporting of performance results under the measures defined in the PID and does any of the information provided by the participating CLECs or Qwest demonstrate inaccuracy in Qwest's reporting of performance results under the measures defined in the PID?**

[AT&T Comment – AT&T suggests that the above additional language better reflects how Liberty should conduct this data reconciliation and future audits. As Liberty originally wrote the above question and frankly their report, the issue was essentially, "Is there any evidence to prove that Qwest is wrong?" Under that question, it becomes the CLEC's burden to provide evidence to prove that Qwest is wrong. Under the question as posed by Liberty, Qwest could refuse to provide any information to support data reconciliation or an audit and that refusal would be perfectly acceptable. Under the question as posed, Qwest could refuse to cooperate in future data reconciliation efforts or audits and there could be a finding that there was no information to prove that Qwest was wrong.

In addition to the issue of whether there is any information to demonstrate that Qwest is wrong, this and future data reconciliation efforts and audits should also answer the question of whether Qwest was able to provide information to demonstrate that its performance results were accurate. As Liberty discovered during the reconciliation process, because of how Qwest collects data, the CLECs may not have the information to demonstrate that Qwest is wrong. However, that situation does not mean that Qwest is right. There should be some requirement for Qwest to demonstrate that its performance results are accurate. Further, Liberty took the position that if the PID was unclear or silent on a particular issue, Qwest's reporting was accurate unless it was clearly inconsistent with the language of the PID, even if the PID was incomplete or unclear.

[This appeared to be the conclusion even if Qwest's method was not reasonable, and/or was inconsistent with a CLEC's reasonable reading of a less-than-clear PID. Liberty should perform the job that they were hired to do; giving unsupported presumptions which favor Qwest does not accomplish this.]

The question presented is an important, but narrow one. It allowed the exclusion of activities that would have substantially expanded the scope of this test. For example, Liberty was not required to determine whether CLECs could reproduce Qwest's performance results with their own information, or what changes would be required to allow such recreation. There were also situations in which Liberty found that Qwest and a CLEC interpreted requirements differently or had different understandings of how interactions with Qwest or the information resulting from them should be treated. In those cases, Liberty did not seek to determine who was right and who was wrong, or who reflected the better practice. [AT&T Comment - This seems inconsistent with a professional audit opinion. Why did Liberty believe that the parties would not be interested in who was right, who was wrong or who reflected the better practice?] Instead, Liberty's goal was to determine whether, in consideration of the requirements of the PID, Qwest's methods practices, or processes contained material error. [AT&T Comment - Again, where the PID was silent or unclear such that both parties' differing positions could fit within the PID definition, Liberty had an obligation to conclude more than that Qwest's position was not clearly inconsistent with the PID language.] Therefore, in the case of data discrepancies, Liberty required an affirmative showing of Qwest error or omission before issuing an exception or observation. However, in order to make clear the details of its examination, Liberty has reported the cases where it found the information provided by the parties to be inconclusive.

In its comments on CR #20, AT&T described what it thought should be the process for what has been referred to as "data reconciliation," as follows:

> *1. The CLEC identifies what it believes are discrepancies between performance results it has produced and the performance results that Qwest has produced. The CLEC should identify the particular performance measurement in question and the evidence that lead the CLEC to conclude that a discrepancy exists.*
>
> *2. The auditor takes the CLECs information and confirms the existence of the discrepancy.*
>
> *3. After confirming the discrepancy, the auditor determines and identifies the source of the discrepancy.*
>
> *4. If the source of the discrepancy is the CLEC, the auditor will share its findings at a high level with the TAG. The specific details of the discrepancy shall be shared by the auditor privately with the specific CLEC.*
>
> *5. If the source of a discrepancy is Qwest and that discrepancy points to some problem with Qwest's raw data, the auditor shall create an Exception/Observation per the Exception and Observation process used in the ROC OSS test. In the Exception/Observation, the auditor will make recommendations as to whether the identified deficiency is likely to affect multiple services and/or multiple CLECs. The auditor will also identify what it believes is the period of time that Qwest may have been producing questionable performance results.*

6. After the Exception/Observation has been created, it should follow the normal process for closure as would any other Exception or Observation.

In general, the process described by AT&T reflected how the data reconciliation effort proceeded.

Three CLECs, Covad, WorldCom, and AT&T, chose to participate in data reconciliation. The participating CLECs had identified numerous discrepancies. However, some CLECs did not produce sufficient evidence to demonstrate that claimed discrepancies actually existed. In connection with this report, Liberty has separately supplied specific information about the CLECs' sources of discrepancies, as well as proprietary information concerning specific records and volumes. Liberty sought to prepare this report to inform the interested participants about the test and its results, without revealing confidential information. For example, the report generally refers to percentages of total orders instead of the actual number of orders. The specific performance measures and products that the participating CLECs wanted included in the data reconciliation, being widely known, were therefore not considered proprietary.

As an indirect result of its data reconciliation work for the state of Arizona, Liberty will be issuing one Exception Report on performance measure OP-15. The discovery of the problem described below and in the forthcoming Exception Report did not result from information provided by CLECs, but rather was the result of Liberty's review of Qwest's information during data reconciliation.

Qwest, the CLECs, and Liberty spent significant time and effort resolving the specific scope of the performance measures to be included in data reconciliation. It took considerable added effort to digest and process the information provided by CLECs and match it with data provided by Qwest. Liberty began this data reconciliation test with a significantly greater familiarity with the structure and nature of the Qwest data, with which Liberty worked extensively during earlier audit activities. Gaining a similar kind of familiarity with CLEC data structure and content formed a more significant than expected part of this test. During the course of its data reconciliation test work, Liberty was able to match a significant portion of the apparently contradictory data presented by CLECs and Qwest. This success in data matching was important, but the discrepancies remained very large even after it was completed.

This first report by Liberty on data reconciliation addresses only Arizona data. A test of data from other states is within the current scope of the work. Liberty considers important aspects of the results of Liberty's review for Arizona to apply to other states. Liberty provides recommendations in this report about how data reconciliation testing might best proceed in other states, given such applicability.

On November 19, 2001, Liberty issued a status report to each of the CLECs and Qwest on the Arizona data reconciliation. Liberty reviewed and considered comments on the limited analysis results that were included in those status reports in reaching the results presented in this report.

II. Overall Summary of Findings

This report presents more detailed, non-confidential results in later sections that are organized by CLEC. This section provides Liberty's overall conclusions, which have been formed on the basis of completing the first of the states included in the current scope of the reconciliation effort.

> **Given the way that CLECs captured data and accounted for information related to Qwest's wholesale performance measures, concerns about the accuracy of Qwest reporting are understandable.**

It is understandable that CLECs record data relevant to performance measure results in ways that best suit their own operational and management needs and their information system capabilities. They have not had substantial reason to ensure that their recording and processing of data coincide exactly with that reported by Qwest, although the potential for adoption of the QPAP in the future will make commonality much more important. Detailed data matching concerns, such as which records are included and excluded, what time-of-day clock to use, and the like, simply have not been matters of immediate concern heretofore. [AT&T Comment - If the CLEC's data reporting methodology was reasonable under a PID, and Liberty also found that Qwest's reporting was reasonable under a PID, this is likely caused by an unclear PID, or Qwest following M&P's not previously shared with the industry. Liberty should be making recommendations if PIDS need to be modified or if Liberty relied upon Qwest written information that is not available to CLECs.]

In some cases the CLECs do not have the systems required to track performance measure results at the level of detail required of Qwest, which must take measurements in strict accord with the requirements of the PID's approximately 700 sub-measures. Some CLECs even use multiple and different data management systems to support their own internal operations. For the most part, Liberty found that the participating CLECs' personnel are not familiar with all of the details of how performance data are captured, processed, and ultimately reported by Qwest.

> **The information provided by CLECs for the state of Arizona did not demonstrate that Qwest reports of its performance are materially inaccurate.** [AT&T Comment - How does Liberty define "material" inaccuracies? If Qwest's reporting is inaccurate, given the stakes that are riding on its reports, any inaccuracy may very well be material. In any event, Liberty should be reporting on "inaccuraeies" that it finds so that others can decide if the problems are material or not.]

In the course of its data reconciliation work to date, Liberty found that Qwest did make some errors that affected performance results. However, those errors were generally either (a) of the kind and at levels to be expected at the front end of the performance measurement process, where people must manually enter vast amounts of information [AT&T Comment – What does Liberty consider to be "the front end of the performance measurement process?" What was Liberty's expectation as to what error percent should be expected "where people must manually enter vast amounts of information?" How did Liberty arrive at what it considers to be an expectation of an acceptable level of errors? Did Liberty conduct any special studies or research regarding what other companies experience in the way of data entry errors in forming its expectation as to what level of data entry errors should be expected? What was the actual percent of errors that Liberty attributed to being a result of manual process errors? What is

Liberty's conclusion as to the extent of manual processing that Qwest employs in the processing of data? Does Qwest rely too much on manual processes that are prone to error?], or (b) appeared to be honest errors in judgment. [AT&T Comment – Whether the errors in judgment were "honest" or something else is irrelevant to this analysis. The issue is whether or not Qwest accurately reports performance data. What Liberty considers to be "honest" errors should be afforded no special treatment in comparison to other types of errors. AT&T expects that Liberty did not mitigate or exclude any of its findings because it considered some to be "honest errors in judgment." Whatever the source of, or reasons for, the errors, Liberty should be reporting on what those are.] The amount of these errors in relation to the total amount of information required for the performance measures [AT&T Comment – How did Liberty quantify the amount of Qwest errors that it found? What was the actual amount and percent of Qwest errors that Liberty found?] did not exceed what Liberty considers to be expected levels [AT&T Comment - What does Liberty believe to be the percent of errors that should be expected? How did Liberty arrive at that expectation?], even under a carefully operated set of measurement activities. Moreover, there was no evidence that Qwest purposely took steps to make its performance figures appear better than it actually was [AT&T Comment – As previously discussed, Qwest's intent is irrelevant. If Qwest made errors that made its performance figures appear better than they actually were, those findings should be reported and addressed regardless of whether Liberty believed the error was unintentional. In fact, Liberty should be reporting on such errors even if the effect of the errors is to underreport on positive performance results. Did Liberty mitigate, exclude or ignore Qwest errors because Liberty believed the errors were unintentionally made?]. With the exception of a programming problem associated with measure OP-15 and a failure to report a group of Firm Order Confirmations in June 2001, the errors were not systemic, [AT&T Comment – AT&T disagrees with Liberty's conclusion that Qwest errors were not systemic. AT&T believes that the Liberty finding that Qwest was excluding CLEC orders from the calculation of the OP-3 and other due date based measurement results when the CLEC supplemented the order is a systemic error that should be highlighted in an Exception and addressed by Qwest.] nor did they apply to a significant percentage of the performance measure results. [AT&T Comment – At what point would Liberty consider the errors to be significant? What was the percent of errors that Liberty found applied to the performance measurement results?]

The results of Liberty's Arizona data reconciliation work should influence decisions about the scope and methods of the remaining data reconciliation work.

Liberty has identified what it considers to be generically applicable reasons for large portions of the discrepancies between Qwest and CLEC performance data. Future data reconciliation work would be expedited if it does not have to examine for other states what Liberty expects to be very substantial amounts of data whose discrepancies have the same underlying causes. [AT&T Comment - On what basis did Liberty conclude that the same discrepancies identified in Arizona will reappear in other states? How did Liberty reach the conclusion that the same discrepancies and the same underlying causes will be found in other Qwest states? How does Liberty know that new data discrepancies will not turn up in other Qwest states? AT&T is currently investigating how UBL-Analog orders for customers in Washington but whose AT&T switch is located in Oregon should be reported and performance measured and how LIS trunks that have an AT&T switch in Oregon and a Qwest switch in Washington should be reported and related provisioning performance measured. This is a known example of a discrepancy that is not found in Arizona. In addition, during the AT&T and Qwest reconciliation discussions for Nebraska,

AT&T asked if the problem with duplicate orders showing up at the end of the month and then at the first of the next month was region wide and if it applied to all services. The partial response at that time from Qwest was that this issue would be limited to Qwest's old Northwestern Bell states because of the data source. These two examples indicate that there will be both state and region specific differences in Qwest's data collection.] The dedication of resources and the level of detail of information that is required on the part of CLECs to participate meaningfully in data reconciliation is certainly much better understood now that the Arizona work has been undertaken. CLECs need to determine whether they can commit the resources and produce the information required for the scope of work planned. [AT&T Comment – AT&T is prepared to honor the agreements that it, other CLECs, Qwest and the ROC made in reconciling data in other states. AT&T will commit the resources, produce the information required and fully participate in data reconciliation in the other states. AT&T understood from the start of this process how time-consuming it would be. Nevertheless, we considered it important enough to participate in fully. The real question may be, based on the lack of thoroughness of this report for Arizona, whether Liberty is committed to, and has the resources to dedicate to, future reconciliation proceedings.] Finally, there may be differences in the ways that Qwest performs in various parts of its region. Future reconciliation work should attempt to focus on those performance aspects that could result in differences from the Arizona findings.

III. Results of Data Reconciliation – AT&T

A. Introduction

After some discussion between the parties, it was ultimately determined that the following performance measures were to be reconciled:

- The denominator of PO-5A, B, and C combined for unbundled loops (UBL).
- The denominator of PO-5D for Local Interconnection Service (LIS) trunks.
- The numerator and denominator of OP-3D and E combined for unbundled loops and for LIS Trunks.
- The numerator and denominator of OP-4D and E combined for unbundled loops and for LIS Trunks.
- The numerator and denominator of OP-6A and OP-6B for unbundled loops and for LIS Trunks. [AT&T Comment – The below analysis does not appear to include any meaningful consideration of the OP-6A and OP-6B performance measurements for unbundled loops and LIS trunks. Based on communications between AT&T and Liberty, this portion of the Liberty data reconciliation has not been fully completed and the results are not available for review and comment. Is it Liberty's intention to complete that analysis and provide an updated report? If Liberty's intention is to provide an updated report, AT&T reserves the right to provide additional comments and to pose additional questions to Liberty.]
- The numerator and denominator of OP-13A and OP-13B for unbundled loops.
- The numerator and denominator of OP-15A and OP-15B for LIS Trunks.

For unbundled loops, the period to be reconciled is April 2001 through June 2001.

The LIS Trunks reconciliation period was from January 2001 through June 2001. Qwest stated, however, that it did not report CLEC-specific state results for LIS Trunks for OP-15 for January or February; therefore, Liberty could not reconcile data for those months. [AT&T Comment – As an initial matter, the OP-15 PID is not applicable in Arizona. However, it does appear that Liberty did some reconciliation of OP-15 results using Arizona data. While recognizing that the OP-15 PID is not applicable to Arizona results, AT&T provides comments on the evaluation of Arizona OP-15 data that Liberty did perform.

The OP-15 PID requires that Qwest report data by "CLEC aggregate, individual CLEC, Qwest retail." If Qwest stated that Qwest "did not report CLEC-specific state results for LIS trunks for OP-15 for January or February" then the admission would indicate that Qwest was not complying with the applicable PID. AT&T requests that Liberty open an Exception to formally capture that deficiency. Rather than responding to Qwest's inability to report PID compliant LIS trunk data with a conclusion that "therefore, Liberty could not reconcile data for those months" AT&T would have expected a conclusion that Qwest did not provide any information to demonstrate that AT&T's treatment of the record was incorrect; therefore AT&T's data should be considered accurate. AT&T will be providing its own LIS trunk data in individual state 271 proceedings and it would be beneficial for the states to know that AT&T's January and February LIS trunk results are reliable and Qwest's are not.] In addition, Qwest was unable to provide the

data necessary to reconcile OP-15 for LIS Trunks for May; therefore, data for that month could not be reconciled. [AT&T Comment – As previously discussed, rather than responding to Qwest's failure to provide the data necessary to reconcile OP-15 for LIS trunks for May with a conclusion that "therefore, data for that month could not be reconciled" AT&T would have expected a conclusion that Qwest did not provide any information to demonstrate that AT&T's treatment of the record was incorrect; therefore AT&T's data should be considered accurate. AT&T will be providing its own LIS trunk data in individual state 271 proceedings and it would be beneficial for the states to know that AT&T's May LIS trunk results are reliable and Qwest's are not.]

In addition, Liberty was to compare the unbundled loop trouble tickets provided by AT&T with the trouble tickets provided by Qwest. [AT&T Comment: As shown later in the report, the scope of this trouble ticket analysis was not accomplished. Liberty's analysis consisted of a 10% sample of unbundled loop trouble tickets, not an a comparison of the unbundled loops provided by AT&T.] Where Liberty had data about a trouble ticket from both parties, Liberty was to compare the repair intervals reported by the two parties. In addition, Liberty was to analyze situations identified by AT&T where AT&T found one trouble ticket, but where more than one Qwest trouble ticket applied.

Liberty received data both from Qwest and from AT&T. Liberty initially received from Qwest: (a) data files containing information on the records actually used in the measurement, and (b) those records that Qwest had excluded. Qwest provided one file for each state/product/measure combination. These data allowed Liberty to determine the records that Qwest believed should be included in each measure. Liberty could also replicate the numerators and denominators in Qwest's reported performance results.

AT&T initially provided for each state files by product containing the records it believed were relevant. AT&T also provided hardcopies of the source documents for its records (*i.e.*, UBL service orders, LIS trunk service orders, and trouble tickets). Liberty needed to know those records that AT&T believed should be included in the numerators and denominators of each measure so that Liberty could reconcile the sets of data from the two parties. Liberty therefore requested that AT&T provide this information. AT&T did so, and provided the actual data files used to calculate the performance measure results it believed to be correct.

After the scope of the reconciliation was agreed upon and after Liberty received comparable data from both parties, Liberty began its analysis by matching the parties' data files. Liberty identified records where the parties agreed (so that no reconciliation was necessary), cases where one party included a record but the other party did not, and records where both parties included the record in the denominator, but disagreed about the numerator.

Liberty then analyzed the discrepant records. If Liberty could reach a decision about how the record should be treated by using the available information, Liberty did so. If more information was required, Liberty submitted data requests to one or both parties (as agreed among the parties, Liberty copied each party on the data requests submitted to the other). Liberty was sometimes able to use the information in the analyses provided by Qwest in lieu of sending data requests to Qwest.

For each record analyzed, Liberty reached one of six conclusions, as follows:

1. Qwest and AT&T agreed on the treatment of the record

2. Qwest incorrectly included, excluded, or otherwise treated the record in the measure

3. Qwest's reporting of the record was correct

4. AT&T did not provide any additional information to demonstrate that Qwest's treatment of the record was incorrect [AT&T Comment – The fact that AT&T and Qwest's data was different indicates, as an initial matter, that AT&T believed Qwest's data was incorrect. If Liberty found the conflicting data to be inconclusive, shouldn't this go in category 6?]

5. There was no actual discrepancy between the parties, (*e.g.*, cases where some analysis is required to demonstrate that there is no discrepancy)

6. The information available on the record was inconclusive or conflicting in a way that prevented reconciliation.

7. Qwest did not provide any information to demonstrate that its treatment of the data was correct or that the CLEC's treatment of the record was incorrect.

[AT&T Comment – For reasons previously discussed, AT&T believes that a seventh conclusion should be added to the above list.]

B. Reconciliation Issues

There was little apparent agreement between the companies at the initial stages of the reconciliation. For example, for LIS Trunks, AT&T and Qwest agreed on both the numerator and denominator for OP-3 for only 9 percent of the orders under consideration. OP-4, which has an interval numerator rather than a miss/met numerator like OP-3, showed even less agreement (6 percent). After some investigation and analysis, Liberty found, by determining that some records fell into category #5 above, that there was only a slightly higher level of agreement. However, Liberty determined that only a few issues that accounted for much of the discrepancy.

Service Order Completion Date

For LIS Trunks, Liberty found that Qwest and AT&T have different operational definitions of when an order is considered to be completed. [AT&T Comment: AT&T and Qwest have different opinions on which date should be reflected as the Due Date for performance measurement purposes. Both parties agree that the order is completed at final test and turn up. However, Qwest's portion of the interconnection trunk, the Qwest provided LIS trunk portion is completed prior to the final test and turn up and the difference of opinion is whether or not the Due Date is measured when Qwest completes its portion of the interconnection trunk or when AT&T completes its portion.] In most instances, AT&T views the order as completed earlier than Qwest does. AT&T believes the order is completed when a first test is done, but Qwest does not consider it completed until an additional test is completed as well. For many orders a due date is established; i.e., the date by which both parties expect to complete the order. [AT&T Comment: Liberty is not correctly capturing AT&T's position. Both AT&T and Qwest agree on when the order is completed, it is at Test and Turn up. The due date established in the order is for Qwest's completion of its LIS trunk portion of the interconnection trunk. It is not the date by which both parties expect to complete the order. And the completion date should not be interchanged with the performance measurement due date.] When a test is successfully

completed on that due date, AT&T considers the order completed. [AT&T Comment: For measurement purposes, AT&T considers the order completed, on successful completion of the acceptance test. AT&T acknowledges that there is a final test and turn up of the trunk through AT&T and Qwest's switches that occurs and that is the date AT&T considers the order completed for operational purposes.] AT&T therefore includes the order in the relevant performance measures as completed on the date of that test. [AT&T Comment: AT&T considers Qwest's performance to be measurable against the date of acceptance of Qwest's LIS trunk portion of the interconnection trunk, which AT&T believes is the due date defined in the PID.] However, Qwest believes another test is necessary; *i.e.*, a test for which AT&T is often not ready on the due date. [AT&T Comment: This continues to incorrectly capture AT&T's position. This statement implies that AT&T does not believe another test is necessary. On the contrary, AT&T contacts Qwest to complete the final test and turn up. AT&T is not disagreeing with the final test and turn up concept. In fact that requirement is set forth in the SGAT.] Accordingly, Qwest classifies the order completion as having been missed for customer reasons, and therefore excludes it from many measure results. This disagreement about the meaning of order completion accounts for significant numbers of discrepancies between the parties. For example, it accounts for a third of the LIS trunk denominator discrepancies between the parties for OP-3 for the months of January to June. [AT&T Comment: This entire paragraph mischaracterizes AT&T's position on the Due Date vs Completion Date interpretation and should be completely restructured to be accurate.]

Both AT&T and Qwest have reasonable justifications for their definitions of order completion. [AT&T Comment: Liberty continues to interchange order completion with Due Date as identified in the PID. This error must be corrected in order to resolve the differences in understanding.] Their difference is an operational one, which cannot be resolved in either party's favor by referring to the language of the PID. Liberty did not consider this test as including a Liberty determination of which company applied the better or most correct operational interpretation. Rather, Liberty sought to determine whether Qwest's approach was out of conformity with the PID. Liberty concluded that Qwest's definition and use of a service order completion date could not be judged to be out of conformance with the PID. [AT&T Comment - Qwest's interpretation of the completion date resulted in approximately 80% of the AT&T LIS trunk orders being excluded for reasons of "customer not ready." A definition that results in excluding that many orders would point towards a conclusion that the definition is unreasonable. Qwest's current process for testing LIS trunks and its definition of completion date make it inevitable that the order will be coded as customer not ready.

In testing a LIS trunk order there are three important steps. The first step is acceptance testing. In acceptance testing the CLEC and Qwest jointly test the service. The due date provided on FOCs for LIS trunk installation is the acceptance test date. Unless Qwest completes its work early, Qwest will not permit acceptance testing prior to the FOC date. After acceptance testing, the CLEC performs the second step of its own network and service testing. Qwest has no role in this testing. Finally, the third step is that Qwest and the CLEC conduct joint test and turn up of the service. For purposes of measuring performance, Qwest defines an order as being completed after the third step, test and turn up, has been completed. For purposes of measuring performance, AT&T defines Qwest's portion of an order as being completed after the first step, acceptance testing.

In order to avoid having a LIS trunk order deemed as "customer not ready" the second and third steps in the LIS trunk testing process must occur without problem and be completed on the same

day as acceptance testing. As evident by the fact that Qwest has excluded approximately 80% of the LIS trunk orders, this is quite difficult to achieve in practice. AT&T believes it used the more reasonable and more PID-compliant definition of completion date. For a further explanation please see AT&T Response to the November 9 Qwest Provided Explanation, PID Due Date Explanation. For ease of reference, a copy of that response is attached to these comments.]

The parties' differing interpretations of the term *completion date* [AT&T comment: It is the interpretation of the PID Due Date, not the order completion date.] appears to be limited to LIS trunk orders. Liberty did not find that this difference affected results for loops. However, it is possible that a similar difference could cause differing results for other products.

Data Processing Error

Liberty's analysis of LIS Trunks disclosed that many orders being reported in OP-15 did not appear to be Qwest "misses," even according to Qwest's own data. The cause of the problem was a data transfer error. The Detailed Data Set that Qwest uses for the OP-15 measure incorporates data from the Integrated Data Repository (IDR) Pending data source. One extremely important piece of this data is the miss code, which determines whether the order will be included in OP-15, and whether it will be included in OP-15A or OP-15B. LIS Trunks constitute a designed service; therefore, they have three-digit miss codes. Misses for customer reasons begin with the letter "C." For example, C01 is the miss code for the category of "Customer Not Ready." During the data transfer step, the third digit of the miss code was often (although not always) being truncated. The Wholesale Regulatory Reporting program looks up the code in a miss code table in order to determine how the order should be handled. If it fails to find the code, it establishes Qwest as the default cause of the miss. Therefore, all of the LIS trunk orders showing two digit miss codes were being reported as Qwest misses, even though not all of them were. Qwest has stated that it knew about the problem, and has already fixed it, but the performance reports for the months being reconciled, and the data provided by Qwest that generated them, contained this error. Liberty will issue an Exception Report addressing this issue. The problem occurred in about half of the LIS Trunk service orders. [AT&T Comment: What is the impact on Qwest's OP-15 performance results reports? For what period of time does the error exist? What months of data are affected?]

This problem could exist (for the period being reconciled) for designed services other than LIS Trunks. Accordingly, an investigation would be appropriate to determine exactly the full range of products affected, and the months involved. [AT&T Comment – What is Liberty's opinion as to how this investigation would be conducted?]

Use of Reference Date

Several performance measures use the number of orders completed in the reporting period as the denominator. Qwest's service order database does not contain a real-time picture of service order activity. Liberty's review during the performance measures audit showed that records are updated close to the time of the activity involved, such as completion; however, there is usually a lag of a couple of days. If the performance measures used only the report month, Qwest could miss a substantial amount of activity. [AT&T Comment – There should be no question of "if the performance measures use only the report month; the PID clearly requires the performance measures to use only the report month. For example, the OP-3 PID measurement requires that, "[a]ll inward orders (Change, New, and Transfer order types) assigned a due date by Qwest and **which are completed/closed during the reporting period** are measured." (PID Version 3.0,

May 31, 2001, emphasis added) The reporting period is defined as "one month." (PID Version 3.0, May 31, 2001, OP-3 PID) Completion is defined as "[t]he time in the order process when the service has been provisioned and service is available." (PID Version 3.0, May 31, 2001) Consequently, if the reporting month is September and the September results include some orders completed in August and do not include some orders that were completed in September, Qwest would be non-compliant with the PID. It appears that Liberty found Qwest to be non-compliant with all of the PIDs that require reporting of orders completed in the reporting month. AT&T requests that Liberty create an Exception to document this finding.

In its below comments, Liberty attempts to explain away Qwest's non-compliant reporting of results by stating that "Qwest solved this potential problem by calculating measures for records in which the database reference date is the reporting month." As an initial matter, the terms "reference date," "database reference date" or any like term cannot be found in the PID. AT&T requests that Liberty define the term "reference date." Qwest's equating of "completion date" with "database reference date" is unsupported by any PID language and should have been cause for an Exception to be created.

Liberty's language in this report dances around calling Qwest's equating of the "completion date" with the "database reference date" a problem. In the below language Liberty describes the issue as a "potential problem" and states that it "does not consider this problem to be a material one." AT&T considers Qwest's method of equating the database reference date and the completion date a problem in that the method is non-compliant with the PID.

In the below paragraph Liberty succinctly and clearly states the problem, "orders that are completed in one month [may] be reported in a later calendar month. As far as AT&T can determine, this is the first time this problem has been clearly explained and identified. In both the PID release for OP-3, OP-4, OP-6 and the Liberty Final Report can be found the following language:

> To begin the process for reporting these provisioning measures, a program called *rsorext.sas* extracts data from PANS for the current month and the past sevens (sic) months. This is done to ensure that all records with a **reference date** in the current month are captured. Qwest reported that a test had been conducted to ensure that it need not go back further to capture relevant records. (Performance Measurement Release Report, OP-3, OP-4 and OP-6, p. 2 and Final Report on the Audit of Qwest's Performance Measures, September 25, 2001, p. 56.)

The clarity that is found in this document in explaining the fact that Qwest does not comply with the PID requirement to only report data in the reporting month for those orders completed in the reporting month is not found in either the PID release or the Final Report.

Rather than blessing Qwest's noncompliant process of reporting results in a month that also contain orders completed in earlier months AT&T would suggest the more PID-compliant solution would have been for Qwest to wait for what Liberty characterized as "a lag of a couple of days" before running the *rsorext.sas* program. This would be a well-defined and consistently applied process that ensured that every order was accounted for in the month it should be accounted for. AT&T is sure that there are other

PID compliant solutions that could have been implemented instead of Qwest's PID non-compliant solution.]

Qwest solved this potential problem by calculating measures for records in which the database reference date is the reporting month. This method helps ensure that all records are reported, but may cause orders that are completed in one month to be reported in a later calendar month. Liberty does not consider this problem to be a material one, because:

- Every order is eventually accounted for
- The process is well-defined and applied consistently
- The overall impact (including an order in a future month's performance report) is minimal. [AT&T Comment – AT&T disagrees with Liberty's conclusion that the overall impact is minimal. Liberty's below findings would support a conclusion that the impact is material. Below, Liberty found that 11 percent of the LIS Trunk orders were accounted for by Qwest's non-compliant use of the reference date and nearly 6 percent of the unbundled loop discrepancies. These percentages hardly seem minimal.]

However, a CLEC would not know the reference date; it would only know the actual date of completion. The reference date matter accounted for about 11 percent of the LIS Trunk discrepancies and for nearly 6 percent of the discrepancies between AT&T and Qwest for OP-3, unbundled loops, for April 2001.

This reference date issue affects all products.

Changed Due Dates

Qwest and AT&T have differing views on how a service order for unbundled loops should be treated in performance measures in those cases where AT&T has changed the due date on the order. It was determined that Qwest's view was incorrect. The reconciliation of LIS Trunk and unbundled loop data has shown that Qwest incorrectly excluded records from the calculation of the OP-3 PID results. In every case where AT&T changed the due date after the order reached a certain stage in the process, Qwest treated the order as ineligible for inclusion in the OP measures. AT&T, on the other hand, only excluded an order if it changed the due date on the due date itself; it regarded these orders to be the ones whose due dates were missed due to for AT&T-caused reasons. If AT&T changed the due date at any earlier time, it did not exclude the order (at least for a reason related to the changed due date). This difference accounted for about a quarter of the OP-3 unbundled loop discrepancies and for a smaller percentage of the LIS Trunk discrepancies between Qwest and AT&T. [AT&T Comment – What were the actual percentages of LIS Trunk and unbundled loop orders that Qwest inappropriately excluded because the customer changed the due date? Did this exclusion cause Qwest's performance results to be inaccurate?]

~~This issue is not applicable under the current Qwest method for calculating performance measures. Version 4.0 of the ROC PID changed the method of accounting for customer-requested changes in the due date.~~ [AT&T Comment – Version 4.0 of the ROC PID is irrelevant to this reconciliation project. As shown in the fourth question in Liberty's Eighth Data Request to Qwest, "Liberty is using Version 3.0 of the PID for this data reconciliation project. Please confirm that Qwest believes this is the appropriate version to use, or explain which version

Qwest believes should be used." Qwest's response to that data request indicated that it did not use Version 4.0 for the project. Instead Qwest responded by stating:

> The following PID versions were in effect for the following periods:
> Version 2.0 Jan 2001 to Feb 8, 2001
> Version 2.2 Feb 8 2001 to May 31 2001
> Version 3.0 June 2001

In addition, AT&T also used PID Version 3.0 to perform its PID calculation. It is completely inappropriate for Liberty to introduce any comment involving PID version 4.0 in this report. Since no party performed its reconciliation using PID Version 4.0, Liberty's above reference to it unnecessarily confuses the issue with irrelevant information. AT&T suggests that the reference to PID Version 4.0 be deleted from this report.]

~~Qwest now reports those orders against an "Applicable Due Date," instead of the original due date.~~ [AT&T Comment – As previously discussed, what "Qwest now reports" is irrelevant to this exercise. What is relevant is how Qwest reported the results for the periods in question using PID Versions 2.0, 2.2 and 3.0. Consequently, AT&T suggests that the Liberty's sentence identifying the "Applicable Due Date" be deleted.] In the 2.0, 2.2 and 3.0 ~~earlier~~ versions of the PID that were used by the parties for this project, Qwest, the CLECs and Liberty were required to measured commitments met performance against the original due date. Qwest inappropriately and in violation of the PID requirements of Version 2.0, 2.2 and 3.0 ~~and it~~ judged as ineligible those orders for which the customer requested a later due date. The ~~earlier~~ 2.0, 2.2 and 3.0 PID versions did not explicitly allow this exclusion.; The ~~its~~ language that Qwest relied upon to support this inappropriate exclusion said "customer requested a later due date when the technician arrived to do the work." Qwest interpreted the exclusion more liberally than this phrasing would allow. ~~While it may seem unrealistic to hold Qwest to an original due date in every case that its customer requested a later one,~~ Because of Qwest's inappropriate interpretation of this exclusion, Qwest was in violation of the precise language that had been contained in the PID versions 2.0, 2.2 and 3.0. This violation resulted in Qwest's performance appearing better than it actually was had Qwest actually performed PID-compliant calculations. If Qwest had performed PID-compliant OP-3 calculations, the evidence shows that Qwest's LIS trunk and unbundled loop commitments met performance would have been considerably worse. The inappropriate exclusion of orders with customer changed due dates from the calculation of the OP-3 results affects all products. Liberty will issue an Exception Report addressing this issue. [AT&T Comment – AT&T finds it outrageous that Liberty casually dismissed this blatant deviation of Qwest's calculation processes from the PID requirement. AT&T also finds it inexplicable that Liberty failed to issue an Exception for this deviation. When reading Liberty's above analysis, the phrase "swept under the carpet" kept coming to mind. AT&T believes its above modifications to Liberty's Changed Due Date analysis more clearly, accurately and fairly describes the relevant facts and the conclusions that should be reached using those facts.]

Missed Due Dates

Qwest and AT&T have differing views on which orders should be excluded from OP-3, OP-4, and OP-6 on the grounds of customer-caused missed due dates. Qwest excludes every order that has a missed due date for any customer (i.e., AT&T) reason. AT&T states that it attempts to exclude only those orders that have missed due dates for the specific reasons stated in the PID. Unlike the changed due date issue discussed above, this distinction did not constitute a major source of the discrepancies between the parties. [AT&T Comment – The PID includes a list of

what are considered to be "standard categories of customer reasons." In the PID, preceding the list of standard categories of customer reasons is the phrase, "[s]tandard categories of customer reasons are." The PID then goes on to list the customer reasons. The language in the PID would support a conclusion that the list in the PID was the complete list and that the AT&T view on customer-caused missed due dates was correct. If the PID language preceding the list of customer reasons had been, "standard categories of customer reasons include but are not limited to" then Qwest's more expansive definition might have been appropriate. However, since it does not, AT&T's view on standard categories of customer reasons should be considered the accurate view.]

Firm Order Confirmations (FOCs)

Several issues caused a vast difference between what Qwest reported and what AT&T thought should be reported. First, AT&T counted multiple FOCs for PONs that included several orders and only one FOC. Second, AT&T did not capture FOCs for disconnect orders, cancelled orders, and change orders. Finally, for the month of June 2001, Qwest failed to report the first order of FOCs that contained multiple orders. Qwest had already reported this problem in its October 5, 2001, summary of notes to the regional results report. Liberty is still considering whether that notification was sufficient. [AT&T Comment – As an initial matter, Qwest's process for providing its summary of notes for monthly performance results is proving to be inadequate. Qwest only makes those notes available for one month, while the changes described in those notes may carry forward in subsequent versions of the notes. For example, the October 5, 2001 summary of notes that Liberty reference above cannot be accessed through Qwest's web site. Consequently, whatever problem Qwest reported with the PO-5 results in the October 5, 2001 summary of notes is now invisible. In examining the November 21, 2001 there's no way of knowing if the June 2001 PO-5 results are suspect.

Qwest's failure to report the first order of FOCs that contained multiple orders for the June 2001 results should have resulted in an Exception being generated. AT&T is unclear as to why Liberty would only be considering how to respond to a finding that Qwest excluded relevant transactions from the PO-5 results and would not simply issue an Exception. AT&T requests that Liberty explain why no exception was created.]

These matters accounted for practically all of the discrepancies between AT&T and Qwest in the PO-5 denominator for unbundled loops. Qwest's and AT&T's initial submittal showed that only 11 percent of their records matched. Qwest's reporting problem in June caused 5 percent of the total records and 11 percent of the records for June to be in error. It was not clear which company was in error for 8 percent of the records. [AT&T Comment – Is the lack of clarity on which company was in error for the 8 percent of the records the final conclusion, or is there additional work that Liberty is performing that would add clarity as to the source of the problem?]

Liberty found vastly higher matching of records in the case of LIS Trunks. Qwest and AT&T at the outset agreed on the denominator in 70 percent of the cases. About 36 percent of the apparent discrepancies were ultimately not real discrepancies at all. [AT&T Comment – Please describe the analysis that was performed that led Liberty to the conclusion that "[a]bout 36 percent of the apparent discrepancies were ultimately not real discrepancies at all.] Liberty found that Qwest had incorrectly reported on less than 3 percent of the records. [AT&T Comment – Liberty's preceding finding appears incorrect. In the preceding paragraph, Liberty concluded "Qwest's reporting problem in June caused 5 percent of the total records and 11 percent of the records for

have to be an error." If Qwest's failure to report all of the June FOC's by itself caused 5 percent of the records to be erroneous, how is it that in the preceding finding Liberty finds that "Qwest had incorrectly reported on less than 3 percent of the records? Does the 3 percent of erroneous records represent the errors above and beyond the 5 percent of erroneous records that resulted from the June reporting problem? Is it more accurate to state that 8 percent of the Qwest records were in error?]

Hot Cuts

OP-13A measures the percentage of loop hot cuts completed on time. This measure reflected considerable agreement between Qwest and AT&T, but even in this case, only 73 percent of the records initially agreed. Another 8 percent of those that did not match initially were found to be duplicates. Of the discrepancies that existed, Liberty found that 6 percent fell into the "inconclusive" category. These cases were instances where Qwest and AT&T disagreed on whether the cut was completed on time. The recorded start and stop times for the two companies varied. The place of most disagreement was the recorded start times for the cut, but even there most of the cases varied by less than one hour. There was no evident procedural or systemic reason that would support a conclusion that either company was routinely recording times earlier or later than the other was. In summary, while reported times varied, the information provided by AT&T did not show that Qwest was making any attempt to shorten the cut interval for the purpose of improving reported hot cut performance. [AT&T Comment – AT&T believes that in the preceding sentence Liberty is using the wrong standard. Liberty should not be evaluating whether Qwest was making any attempt to shorten the cut interval for the purpose of improving reported hot cut performance. That standard implies that before any negative finding can be made, Liberty must find that: 1) a Qwest error shortened the cut interval, and 2) the error was made with the intent of improving hot cut performance. That is the wrong standard. As previously stated by Liberty and slightly modified by AT&T, the question to be answered is "Have any of the information provided by the participating CLECs or Qwest demonstrate inaccuracies in Qwest's reporting of performance results under the measures defined in the PID?" An error is an error is an error. An error that Qwest makes that appears to be to Qwest's detriment should not be ignored simply because it might have harmed Qwest. In addition, there is no need to determine if the error was intentional or unintentional. Liberty failed to answer the most appropriate question of whether the information provided by AT&T showed that Qwest was inaccurately reporting performance results under the measures defined in the PID. Liberty should answer that question for this section of the report to be complete.]

In several cases, Qwest's reported interval was greater than the one recorded by AT&T. It appeared that AT&T might have considered the cut to be a "miss" if the total elapsed time was greater than one hour. However, the PID actually allows two hours for cuts involving 16 or fewer lines. Liberty requested more detailed log information to support its recorded times in selected cases. Qwest did not provide a response in time for inclusion in this report. [AT&T Comment – If Qwest did not provide a response to the request for more detailed log information, it would seem that any conclusion on the OP-13 results would be premature or else AT&T's conclusions should be taken as true given that Qwest didn't provide information to disprove it.]

C. Reconciliation Results

Liberty has prepared spreadsheets showing the results of its analysis of the AT&T data. These documents contain information that is proprietary to AT&T; therefore, Liberty has made a very limited distribution of the spreadsheets. The following paragraphs provide a summary description of the results shown in greater detail in the spreadsheets.

For LIS Trunks and OP-3, Liberty found that Qwest and AT&T agreed on the treatment of 9 percent of the orders, that Qwest clearly treated the order correctly in 73 percent of the orders, that AT&T's information did not show that Qwest was incorrect in 12 percent of the orders, and that 6 percent of the orders demonstrated inconclusive results. [AT&T Comment – For reasons previously discussed, AT&T believes that the preceding conclusion is incorrect. In the sentence immediately preceding these comments, Liberty has essentially concluded that Qwest made no errors in the calculation of the OP-3 results. This conclusion does not square with Liberty's previous conclusion in the discussion of the OP-3 results for changed due dates that, "Qwest was in violation of the precise language that had been contained in the PID." In what category does Liberty place those orders where Qwest's calculation was "in violation of the precise language that had been contained in the PID?" At a minimum, Liberty should have found Qwest reporting incorrect results for those orders with changed due dates that Qwest inappropriately excluded. AT&T requests that Liberty restate those results with the inappropriate exclusion of changed due date orders considered a conclusion that Qwest incorrectly included, excluded, or otherwise treated the record in the measure.] For OP-4, the percentages were the same, except that the parties agreed on only 6 percent and the number of inconclusive orders was 9 percent. [AT&T Comment – For reasons previously discussed, AT&T believes that the preceding conclusion is incorrect. In the sentence immediately preceding these comments, Liberty has essentially concluded that Qwest made no errors in the calculation of the OP-4 results. This conclusion does not square with Liberty's previous conclusion in the discussion of the OP-3 results for changed due dates that, "Qwest was in violation of the precise language that had been contained in the PID." In what category does Liberty place those orders where Qwest's calculation was "in violation of the precise language that had been contained in the PID?" At a minimum, Liberty should have found Qwest reporting incorrect results for those orders with changed due dates that Qwest inappropriately excluded. AT&T requests that Liberty restate those results with the inappropriate exclusion of changed due date orders considered a conclusion that Qwest incorrectly included, excluded, or otherwise treated the record in the measure.]

For unbundled loops and OP-3, Qwest and AT&T agreed on the treatment of 64 percent of the orders. Liberty concluded that Qwest was in error on 1 percent of the total, that in 19 percent of the total Qwest was either clearly correct or AT&T's information did not show Qwest to be incorrect, that 11 percent of the orders fell into a category of not actually being a discrepancy, and that the results for 5 percent of the orders were inconclusive. [AT&T Comment – For reasons previously discussed, AT&T believes that the preceding conclusion is incorrect. In the sentence immediately preceding these comments, Liberty has essentially concluded that Qwest made errors on only 1% of the orders in the calculation of the OP-3 results. This conclusion does not square with Liberty's previous conclusion in the discussion of the OP-3 results for changed due dates that, "Qwest was in violation of the precise language that had been contained in the PID." In what category does Liberty place those orders where Qwest's calculation was "in violation of the precise language that had been contained in the PID?" At a minimum, Liberty should have found Qwest reporting incorrect results for those orders with changed due dates that Qwest inappropriately excluded. AT&T requests that Liberty restate those results with the

inappropriate exclusion of changed due date orders considered a conclusion that Qwest incorrectly included, excluded, or otherwise treated the record in the measure.

The reconciliation effort was also supposed to include, "[t]he numerator and denominator of OP-4(2) and E combined for unbundled loops." There does not appear to be any Liberty findings on OP-4(2) and E for unbundled loops. AT&T requests that Liberty explain why no finding was made and when the parties can expect Liberty to conclude the analysis that would permit it to make a finding.

In addition, Liberty reports results as if the reconciliation for unbundled loops has been completed. However when AT&T requested Liberty provide its AT&T specific OP-6 analysis for loops (that analysis was not provided on November 3), AT&T was advised that the analysis was not finished and Liberty's spreadsheet was not available for AT&T's review. Apparently, neither is Liberty's summary of results for that performance measure.]

Qwest Errors

In addition to the programming problem for OP-15 and the June 2001 incomplete reporting of POCs for PO-5, the clear errors made by Qwest were minimal. [AT&T Comment – As previously discussed, AT&T considers the exclusion from the OP-3 and OP-4 measurement of orders with changed due dates to be a "clear error made by Qwest."] Liberty found a small number of service orders for which Qwest incorrectly classified a customer-caused miss. [AT&T Comment – What is the number or percentage?] It may be that some of the items that Liberty classified as inconclusive could have the same type of problem, as many of the items carried a Qwest-designated customer miss code. [AT&T Comment – In an exercise designed to determine if there was "inaccuracy in Qwest's reporting of performance results under the measures defined in the PID" it is not clear if Liberty spent sufficient energy investigating whether Qwest's miscoding of orders as customer misses extended to the items classified as inconclusive. Why was Liberty able to determine that some orders were definitely miscoded as customer misses while it was unable to determine if other orders were miscoded?

AT&T has reviewed the underlying spreadsheets Liberty has provided and has found several instances where the analysis does not match with the information AT&T provided to Liberty. These analyses differences directly affect Liberty's overall summary and must be taken into consideration before Liberty's report can be considered accurate. In addition to the order specific differences identified, AT&T believes that Liberty treated all orders that were identified by Qwest as non-eligible for inclusion in PID calculations to be correctly handled by Qwest even though Liberty's analysis indicates that Qwest improperly excluded those orders. This treatment skews Liberty's analysis and impacts its results. Liberty also assumes that Qwest's Due Date definition is correct in performing the assessment, counting all Qwest LIS orders for OP-3, OP-4, OP-6 and OP-15 as correctly handled. Since Liberty's explanation of AT&T's position indicates that it is likely that Liberty did not fully understand the issue, than that incomplete understanding has been reflected in all of its underlying analysis.

As late as November 6, a Qwest response to a Liberty data request was provided. This response dealt with analysis of Arizona orders and could have direct impact on Liberty's data reconciliation conclusions. Until Liberty has received all responses and completed its analysis, it is not reasonable to consider the Liberty Arizona data reconciliation report to be complete.]

D. Trouble Tickets

Liberty's work scope included a review of AT&T's and Qwest's Arizona trouble ticket data for unbundled loop products for the April to June 2001 period. Liberty conducted this review to determine whether Qwest had correctly reported its performance measures, particularly MR-6 – Mean Time to Repair *(MTTR)*. Liberty received summary information in spreadsheet form from both parties, as well as a hard copy of many of the AT&T and Qwest trouble tickets.[1]

Liberty identified several issues in its preliminary analysis:

- There was a large discrepancy in the population of "relevant" trouble tickets provided by each party.
- In many cases, AT&T had logged more than one Qwest trouble ticket number in connection with a single AT&T repair request.
- In no case did the MTTR or repair duration recorded by each party match.

There was a significant disparity in the population of relevant Qwest trouble ticket numbers that each party provided. Approximately 60 percent of the Qwest ticket numbers in each party's data set matched; the balance did not appear in the other party's data. Liberty confined its analysis to those Qwest trouble ticket numbers found in both data sets.[2]

Roughly 15 percent of AT&T repair orders had multiple, *i.e.*, between two and six, Qwest ticket numbers associated with them. Two main reasons explain why Qwest assigned more than one ticket number to an AT&T repair order:

- The AT&T repair order included two or more different circuits, which were subsequently assigned separate Qwest trouble ticket numbers.
- There was more than one repair performed on the given circuits, and these repairs were performed on different days. Qwest typically opened and closed the original tickets and opened new ones for the later repairs.

[AT&T Comment – Did Liberty find that Qwest consistently applies the above two procedures for every trouble ticket or is it sporadic? If Qwest's procedures are inconsistent, this should be noted.]

[1] In its spreadsheets, Qwest provided data including, among other things, trouble ticket number, product code, repair duration, and received date; there were no clear dates or start/stop times provided. AT&T provided, for each of its own trouble tickets, the corresponding Qwest trouble ticket number(s), the open and restore date and time of the Qwest tickets, and a short description of the problem and treatment by Qwest.

[2] Liberty did not attempt to isolate the reasons for the discrepancy, but during the course of its analysis identified some possible explanations. Liberty found that some of the ticket numbers provided by AT&T were for dates outside the April to June 2001 period, and some appeared to contain typographical errors (since Qwest was able to locate relevant tickets with similar numbers). [AT&T Comment – What other possibilities did Liberty consider other than typographical errors?]

The primary reasons for opening multiple Qwest trouble tickets on an AT&T service request arise from procedural differences between the parties. CLECs are permitted to bundle repair requests, provided that the repairs are for the same customer and location. Qwest, on the other hand, splits the repairs into separate trouble tickets in order to allow proper calculation of billing adjustments for individual circuits. While individual trouble tickets on a given problem may be opened and closed by Qwest, AT&T may have reasons (*e.g.*, recurring, intermittent service problems) to keep a trouble ticket with its own customer open. Should AT&T wish to pursue a matter on an open AT&T ticket, Qwest would have to open new tickets. From AT&T's perspective, there would thus be more than one Qwest ticket number for an AT&T ticket.

Liberty developed a summary chart itemizing the reason for multiple Qwest tickets, and submitted it to AT&T for comments. AT&T ultimately agreed with Liberty's analysis in one-third of the cases. For the others, AT&T questioned how specific situations were treated in the performance measures. Specific situations raised by AT&T included:

- When a trouble ticket is opened and closed but the AT&T customer remains down and another trouble ticket is required to restore service (*i.e.*, more than one Qwest trouble ticket is required to solve an AT&T customer's problem)
- When a reported trouble contains two circuits, each having different problems
- When a trouble is repaired incorrectly or incompletely
- When the wrong circuit is either repaired or reported (*i.e.*, a records error by either party)
- When a trouble ticket is opened to test a repair just made
- When a trouble ticket is closed incorrectly to "no trouble found" (NTF)
- Subsequent or "tracking" tickets.

Liberty examined each of the trouble tickets in question, and subsequently reviewed them with Qwest in detail. Qwest uses guidelines set forth in its business requirements documents to guide the opening and restoring of trouble tickets. [AT&T Comment – Are these documents provided to CLECs so they can ascertain what processes Qwest uses, or were these exclusively provided to Liberty?] Specifically:

- Multiple circuits on one CLEC repair request are split to separate Qwest tickets.
- A ticket is closed upon consent of the CLEC; if the problem remains after a ticket is restored, then a new ticket must be opened.[3]
- All trouble tickets are included in the population of relevant trouble tickets used to calculate performance measures, except those with trouble codes related to customer or carrier equipment and information tickets, (CPE, IEC, and INFO,

[3] According to Qwest, it gets approval from the CLEC before closing a ticket and records the name of the person giving such approval. If the CLEC requests that Qwest hold a ticket open and there is no further action 24 hours later, Qwest closes the ticket back to the restore time. [AT&T Comment – Did Liberty check to confirm that CLEC names were recorded before tickets were closed?]

which explains why some tickets appeared in AT&T's data but not in Qwest's data, because Qwest provided only tickets used to derive the reported measures).

- "No access" time is subtracted out of MTTR under the PID.
- Subsequent tickets are not included in the measure under the PID.
- Trouble reports on products under "retail tariffs"[4] are included in retail performance measures, rather than in the wholesale measures. [AT&T Comment: The trouble reports related to retail tariffs as identified by Liberty were not associated with UBL-Analog, they were associated with a possible LIS trunk. Since AT&T could not differentiate between PL and LIS, it was agreed that only Trouble Tickets for UBL-Analog loops would be evaluated. AT&T's records specifically identified these Trouble Tickets to not be part of the UBL-Analog universe. This part of the Liberty analysis is not germane to the agreed to reconciliation.]

The PID does not require distinct measurements to reflect the "quality" of a repair. The fact that a repair may have been made incorrectly, or that multiple attempts were required before the repair was completed is irrelevant; each repair that does not involve a CPE, IEC or INFO (which includes "test assist") trouble is included in the MR-6 measure.[5] When the wrong circuit is reported or repaired, regardless of which party made the error, the ticket is typically closed to CPE or INFO, and subsequently excluded from the performance measures.

Trouble tickets restored with a trouble code of NTF (no trouble found) are included in the performance measures, as the PID requires. Liberty found, however, that there was some judgment being applied in the assignment of trouble codes. "No trouble found" was closed to NTF in some cases and to CPE in other cases. According to its guidelines, if Qwest tested and found no circuit problem, then it would close the ticket to NTF. However, if additional available information indicated that the trouble was on the CLEC's side (*e.g.*, the customer identifying the wrong circuit or that the trouble was actually on the customer's side), then Qwest would close the ticket to CPE.[6] In the former case, the ticket would be included in the measure; in the latter case, it would not.

Liberty found that, for each of the trouble tickets in question, Qwest handled its trouble tickets consistently with its stated procedures and with the PID. Liberty did, however, find human errors in the coding for roughly 4 percent of the tickets. Specifically, tickets that apparently involved repair work were closed to CPE or INFO, and incorrectly excluded from the measure. Liberty believes that the magnitude of these errors was not sufficient to affect materially the Qwest-

[4] Qwest indicated that some AT&T customers' products are under the wholesale tariff and some are not; only those under the wholesale tariff are included in the wholesale measures.

[5] The differences would instead manifest themselves in the relative performance of each company. For example, if AT&T kept its own trouble ticket number open while Qwest opened and closed tickets more than once, AT&T's MTTR would be longer than Qwest's, but Qwest's repeat trouble rate would be higher.

[6] According to Qwest, at one time all of these tickets were restored as NTF, but this policy changed 2-3 years ago, and they began making this distinction between NTF and CPE.

reported results. Liberty has concluded that Qwest had handled the repair tickets correctly during the time period, and found no reason to conclude that it had reported its performance incorrectly.

The MTTR reported by AT&T on a given Qwest trouble ticket never matched the duration for the ticket reported by Qwest. For 59 percent of the tickets, the durations differed by more than 1 hour; for 30 percent, the durations differed by more than 12 hours. In a few cases, Qwest had actually recorded a longer MTTR than did AT&T, but in the majority of cases, the time recorded by AT&T was significantly longer than that recorded by Qwest. [AT&T Comment: It is not clear that Liberty's data reflects the entire universe of AT&T's 272 trouble tickets with at least one matching Qwest trouble ticket. How many of the 272 trouble tickets were the subject of Liberty's analysis? If these statistics are not for the entire universe, how did Liberty determine the sample to be a statistically valid quantity? Where is Liberty's explanation of this area? Did Liberty believe it was consistent with the agreed upon scope of the reconciliation to merely review a "sample" of the provided data particularly given the significance of the differences?

A 10% sample is inconsistent with Liberty's defined task which Liberty stated as "When Liberty has data about a trouble ticket from both parties, Liberty was to compare the repair intervals reported by the two parties." AT&T provided trouble ticket logs and matching Qwest trouble ticket information on over 12 times as many AT&T trouble tickets as analyzed by Liberty. Because these tickets had matching Qwest trouble ticket numbers (there were about a dozen that did not have matching Qwest trouble ticket numbers in AT&T's records) Liberty had the ability to request and Qwest should have had the information for Liberty to make the comparison as identified in its defined task. To do otherwise without a full explanation and without the assessment of the involved parties means that Liberty has not completed its task.]

Liberty submitted a data request to Qwest asking it to provide: (a) explanations for the difference in duration for a 10 percent sample of trouble tickets [AT&T comment: A 10% sample would have been at least 27 trouble tickets, not the 22 trouble ticket analysis (nearly 14% smaller) provided by Liberty in AT&&T specific details. Is this a statistically valid sample? Is the sample taken in a manner that is not skewing the results?], and (b) copies of some of the individual tickets [AT&T comment: Does this mean that Qwest did not provide all of the 10% sample?]. Liberty found that:

- The disparity in durations ranged from 3 minutes to over 9 days.
- There was an apparent 3-hour difference between the system clock used by Qwest and that of AT&T (Liberty therefore assumed this difference to be a constant throughout its analysis). [AT&T comment: AT&T's trouble ticket clock is keyed to Eastern Time; Liberty could have removed their assumption by simply asking for confirmation.]
- In 77 percent of the cases, Qwest and AT&T had recorded the same (or roughly the same) open time for the ticket. [AT&T Comment: Are all of these statistics based on the 10% sample or a different analysis?]
- In only 23 percent of the cases, Qwest and AT&T had recorded the same (or roughly the same) open and restore time for the ticket.
- In 77 percent of the cases, Qwest had at some point during the repair "no access" time that AT&T did not remove from its MTTR.

Liberty was not able to fully explain the differences in open or restore times. [AT&T comment: If Liberty was not able to explain the differences for a 10% sample, did Liberty consider taking a larger sample? If so, what were the parameters surrounding the decision not to take the additional sample?] According to Qwest, the times associated with a given ticket are assigned by its system automatically. AT&T's log entries are reportedly made manually. Liberty reviewed AT&T's log entries, and found that AT&T did not always record precisely the times associated with the Qwest tickets; rather its focus appeared to be geared more to recording interactions with its own customers. Absent other evidence, therefore, Liberty has concluded that there is not a basis for concluding that Qwest's start and restore times were inaccurate. [AT&T comment: Liberty's analysis is far from complete. An analysis of only 22 of the 272 total AT&T trouble tickets with an associated Qwest trouble ticket was provided. How can Liberty reach these conclusions without a more complete analysis or at least significant additional explanation of how this sample represents the trouble ticket universe? Which portions of the analysis present are based on the sample and which portions, if any, of the analysis are based on evaluations of the full universe of trouble tickets? What did Liberty do to determine that Qwest's "automatic" process was accurate?]

Much of the discrepancy in MTTR between the parties can be explained the fact that AT&T did not subtract "no access" time from the ticket durations provided to Liberty. The differences in restore time noted above arise from the fact that AT&T did not restate tickets back to the appropriate time to account for this "stop clock" time. [AT&T comment: AT&T did not have Qwest internal trouble ticket facts to make a restatement. Liberty's statement implies that AT&T knew all "stop clock" entries by Qwest, but that is not borne out by the trouble ticket information]. The fact that AT&T did not typically capture accurate "clock stop" information on its log entries, meant that Liberty could not validate the length of the "no access" times reported by Qwest. Absent other evidence, Liberty has concluded that there is not a basis for concluding that Qwest's no access time, and therefore MTTR, are inaccurate. [AT&T Comment: "stop clock" information for Qwest is only available to Qwest, not to AT&T. At best AT&T could guess the "stop clock" time. Because AT&T was not able to guess with accuracy Qwest's "stop clock" time, no time was excluded. This difference was known and was explained during discussions between AT&T and Liberty, but not clearly reflected in the way Liberty has documented its trouble ticket comparisons. Except for the "stop clock" time, the information should reasonably match, if not something else is wrong and should be addressed.]During its review of Qwest's tickets, Liberty did, however, find a mistake. Qwest improperly subtracted "clock stop" time when it was unwarranted. Liberty found few errors of this type; they were not frequent enough or significant enough in magnitude to affect materially Qwest-reported results. [AT&T Comment: Is Liberty's conclusion that Qwest's "mistakes" were insignificant based on a review of the sample size of 22 tickets only? How can Liberty conclude the "mistakes" were insignificant if it reviewed less than 10% of the available trouble tickets?]

IV. Results of Data Reconciliation – Covad and WorldCom

A. Covad

Covad initially requested an audit of the disaggregated line sharing and unbundled 2-wire non-loaded loop numerators and denominators for OP-4, OP-5, MR-3, MR-5, MR-6, and PO-5 for the months of May, June, and July 2001. After its own analysis, Qwest indicated that OP-5 was not auditable because the data used to calculate it originated from too many sources to permit a record-by-record reconciliation. [AT&T Comment – While the OP-5 measurement does not lend itself to a record-by-record comparison, the OP-5 numerators ((Number of New Installation Orders completed in the [prior + current months]/2*) - (Total Number of New Installation-related Trouble Reports closed in the reporting period within 30 Calendar Days of Order Completion, including on the day the order is installed)) and OP-5 denominators (Number of New Installation Orders completed in the [prior + current months]/2*) can be compared. Fundamentally, the number of trouble tickets opened within 30 calendar days of order completion and the number of orders completed in the current and prior month would need to be known. A comparison of new service trouble reports and orders completed in the reporting period would have essentially reconciled the relevant input data for the OP-5 calculation. Please describe the other methods that Liberty considered for reconciling the OP-5 measurement other than a record-by-record comparison.] Qwest and Covad could not produce data with a common field, which would be necessary to permit reconciliation of the maintenance and repair measures. [AT&T Comment – AT&T does not understand Liberty's use of the term "common field." Is Liberty implying that Qwest did not have records of Covad's trouble ticket number and Covad did not have records of Qwest's?]

Liberty reconciled OP-4 to the extent possible, given the information provided by Covad and Qwest. Liberty classified the orders according to whether Qwest and COVAD agreed on the numerator, denominator, and inclusion in the measure. Liberty then requested information from both parties. Qwest provided Local Service Requests (*LSR*), Work Force Administration Control (*WFAC*) records, and a discussion of specific orders that were included by Covad, but not by Qwest. Covad provided an updated database that included a number of orders that had been excluded for various reasons by Qwest, but did not include any documentation of Covad's position on any of the orders. Liberty reviewed the data filings, then performed additional analysis and presented a supplemental data request to the two parties. Again, Qwest provided LSRs and WFAC documentation on orders it had excluded, and, with only limited exceptions, Qwest provided all the information requested for OP-4. Covad did not respond. On November 28, 2001, Covad indicated that it had additional documentation related to the Arizona reconciliation. Liberty did not have time to secure and use that information in time to include its effect in this report. [AT&T Comment – Is it Liberty's intention to secure and use that information to include its effect in this report? If Liberty's analysis did not consider relevant information, then it would be premature for Liberty to arrive at any conclusions that were made without the relevant information. Why is it that "Liberty did not have time to secure and use that information in time to include its effect in this report?" What was preventing Liberty from taking the time to secure and use that information? What is Liberty's estimate on the amount of time it would have taken to secure and use that information?]

For the period from May through July 2001, Covad and Qwest agreed on 42 percent of the total OP-4 denominator orders. They agreed on the numerator in many fewer cases.

Qwest provided documentation for all its OP-4 line sharing orders that were in conflict with those included in Covad's numerator. The documentation consisted primarily of LSRs that provided the application date, completion date, and reference date. Liberty compared the values from these documents with values included in the comparable field in the data files supplied by Qwest. Liberty did not find any inconsistencies between the LSR documents and data files. [AT&T Comment – It would appear that Liberty verified the accuracy of Qwest's data by comparing Qwest data to Qwest data. Qwest could have miscoded or otherwise made an error on the LSR document that was carried through to the data file. This comparison provides no support to any conclusion on the accuracy of Qwest's raw data. Liberty's analysis should provide additional comfort to parties interested in the accuracy of Qwest's data.] Covad did not provide support for its data files. [AT&T Comment – Would the additional documentation that Covad identified, but Liberty did not have the time to secure and use, have provided support for its data files?] Liberty conducted the same type of analysis on 2-wire NL UBL orders with similar results. Liberty did not find inconsistencies between the LSR documents and Qwest data files. [AT&T Comment – Once again, Liberty appeared to verify the accuracy of Qwest data by comparing Qwest data to Qwest data. As previously discussed, this type of analysis adds very little value to the investigation into the accuracy of Qwest's raw data.]

Liberty also requested that Covad provide information on Qwest's PONs that were not matched by Covad. Covad indicated that it was unable to provide the information. Covad did provide an expanded data set that may have addressed some of the problems, but did not provide headers for the data set. Liberty was unable to use it. [AT&T Comment – What efforts did Liberty take with Covad to get headers for the data set? It would seem that providing data set headers would be a relatively simple undertaking. Did Liberty find it was impossible to obtain headers for the data set? Was Liberty somehow prevented from pursuing the acquisition of the data set headers? Given that Liberty has admitted that the data set may have addressed some problems, AT&T is disappointed that Liberty apparently "threw in the towel" on using what it admits could have been relevant data."] Liberty treated orders where Qwest was able to identify a PON as appropriate for inclusion in the performance report. Qwest was unable to provide PONs for some orders included in performance reports for the three-month period. Liberty treated these orders as inconclusive in its analysis. [AT&T Comment – Did Covad have information on the PONs that Qwest was unable to provide information for? If so, it would appear the more relevant conclusion for these orders would be that Qwest did not provide any information to demonstrate that Covad's treatment of the record was incorrect; therefore Covad's data should be considered accurate.]

Liberty requested documentation from Qwest for the orders that Covad included in the line sharing performance, but that Qwest did not include. Qwest responded with data for some instances, but stated there were some orders for which Qwest could not provide information. Liberty also treated these orders as inconclusive. [AT&T Comment – It would appear the more relevant conclusion for those orders would be that Qwest did not provide any information to demonstrate that Covad's treatment of the record was incorrect; therefore Covad's data should be considered accurate.]

In summary, for OP-4, Qwest and Covad matched on 42 percent of the line sharing and 2-wire NL UBL orders. There was substantial disagreement between Covad and Qwest on the numerator for the line sharing orders. Qwest provided LSR documentation to support its

position. Covad did not provide documentation for its position. [AT&T Comment – AT&T believes the statement "Covad did not provide documentation for its position" is inaccurate. From this report it appears that Covad did indeed provide relevant data that was missing header information and Covad attempted to provide other information on November 29. It would seem that a more appropriate conclusion would be, "Covad appeared to have information to support its position, however Liberty was under a very strict deadline to publish this report and Liberty chose to publish the report rather than pursue or evaluate the information supporting Covad's position."] For the period examined, Liberty found that 34 percent of the orders demonstrated inconclusive results, primarily because neither party could provide any support. [AT&T Comment – What portion of the 34 percent of orders would include orders for which Qwest could not provide any support?] Liberty's review of the Covad data and of the Qwest data and supporting documentation did not reveal any problems with the accuracy of Qwest's performance reporting. [AT&T Comment – If Qwest was unable to provide any support for a portion of the 34 percent of orders, that lack of support would seem to reveal a problem with the accuracy of the Qwest data. As previously discussed, a clear Qwest failure to demonstrate that its performance results are accurate should call into question the accuracy and reliability of those results.

Through its failure to highlight Qwest's lack of supporting information as the problem that it is, Liberty is teaching Qwest that the best way to get through a Liberty audit is for Qwest to not provide any information supporting its results. Liberty is apparently setting a standard that a lack of supporting information from Qwest is acceptable and does not support a conclusion that Qwest's performance results are inaccurate. Clearly, this is not the precedent that should be set. Qwest must have some obligation to demonstrate that its performance results are accurate.]

For PO-5, Liberty again matched and classified the extent of agreement between the parties, and requested support for areas of disagreement. Qwest provided a file analyzing the Covad orders that were not included in Qwest's files. The file identified the reason for excluding each order. Qwest also offered to provide additional documentation, provided that Covad provide documentation of its data file. [AT&T Comment – Did Covad provide documentation of its data file?] Since it was the best and only information available, Liberty used the Qwest analysis to evaluate Covad's May and June data. [AT&T Comment – If Covad apparently provided May and June data, how can Liberty conclude that the Qwest data "was the best and **only** information available?"] It showed that many of the records should not have been included for Arizona or for the months within the test period.

Liberty has prepared spreadsheets showing the results of its analysis of the Covad service orders. These documents contain information that is proprietary to Covad; therefore, Liberty made a limited distribution of them.

B. WorldCom

Liberty's scope of work associated with WorldCom (WCom) and Arizona included OP-3, Installation Commitments Met, and OP-4, Installation Interval, for LIS Trunks and 2-wire unbundled analog loops. The time period under consideration was January through May 2001.

WCom did not provide data at the level of detail measured by OP-3 and OP-4 in certain cases. Therefore, Liberty's reconciliation had to be adjusted accordingly. For example, WCom did not

disaggregate its OP-3D and OP-3E, and OP-4D and OP-4E, data by zone; therefore, the reconciliation addressed results for these sub-measures on a combined basis. In addition, the data provided by WCom did not contain sufficient information to calculate the OP-4 numerator, which is the actual installation interval. The UBL denominator for OP-4 excludes orders with customer-requested due dates that are greater than the standard interval. WCom could only determine these excluded orders on a limited basis. Therefore, Liberty sought to determine whether WCom's information on the total order counts showed any problems with the numbers reported by Qwest for OP-3 and OP-4.

Liberty's reconsolidation process confirmed the existence and generally appropriate use of Qwest's systems to produce accurate OP-3 and OP-4 measurements for WCom. Liberty found a small number of Qwest errors in the data inputs to these systems. These errors affected less than 2 percent of the total orders considered.

The initial reconciliation focused on the fact that Qwest reports at a service-order level, while WCom develops data at a purchase order level. A purchase order, or PON, might result in multiple service orders; therefore, Liberty had to establish the PON/SO relationship. Liberty found a number of differences between the WCom and Qwest classification and counting of orders. For example, WCom uses the month of actual order completion for reporting, while Qwest uses the reference date of an order, which means that some orders completed at the end of a month may be reported by Qwest in the following month or later. (See discussion in the AT&T section of this report.) The other significant difference in order counting was the fact that Qwest did not count orders classified as a customer-caused miss of the due date.

Liberty verified that Qwest's reported performance for WCom was correct strictly on the basis of Qwest's own data. [AT&T Comment – Once again Liberty verified that Qwest's data was accurate by comparing Qwest's data to Qwest's data.] Then, after the service order reconsolidation, Liberty determined that the orders reported by Qwest and WCom matched in 42 percent of the cases for LIS Trunks and in 75 percent of the cases for UBLs.

For the apparent discrepancies on LIS Trunk orders, Liberty found that in 47 percent of the total, either Qwest's and WCom's records affirmatively showed that Qwest was correct or that there was no information to prove that Qwest was incorrect. [AT&T Comment – What was the portion of the 47 percent in which there was no information to prove that Qwest was incorrect?] In 6 percent of the total, the results of the record analysis were inconclusive, and in less than 5 percent of the total, Liberty found that Qwest was incorrect. Qwest's errors were of two types: (a) that an order should have been ruled ineligible using Qwest's rules for a customer-caused miss, or (b) that the commitment date did not appear to be met as reported by Qwest. [AT&T Comment – Errors on at least five percent of the orders would appear to be a material amount. At what point would Liberty consider the rate of incorrect orders to be material?]

For the apparent discrepancies on UBL orders, Liberty found that in 22 percent of the total, either Qwest's and WCom's records affirmatively showed that Qwest was correct or that there was no information to prove that Qwest was incorrect. [AT&T Comment – What was the portion of the 47 percent in which there was no information to prove that Qwest was incorrect?] In 2 percent of the total, the results of the record analysis were inconclusive, and in less than 2 percent of the total, Liberty found that Qwest was incorrect. Qwest's errors involved either lack of support for a customer-caused miss classification or some other reason for excluding the order. Most of the errors occurred in January 2001.

Liberty has prepared spreadsheets showing the results of its analysis of the WCom service orders. These documents contain information that is proprietary to WCom; therefore, Liberty made a very limited distribution of them.

V. Future Qwest Data Reconciliation

CLEC claims that Qwest's performance measures were inaccurate had a foundation in the data available to them. The basis for those claims was a set of results that differed from those reported by Qwest by a very large amount. Liberty's data reconciliation work in Arizona showed that a small number of reasons explained a relatively large percentage of the differences. CLECs may not agree with Qwest on matters such as the definition of service order completion, Qwest's practice of making records ineligible because of customer changes to due dates, or closing trouble tickets simply because the wrong circuit had been identified. Nevertheless, these kinds of issues are the main reasons why results were so disparate. While debate on such matters may continue, the value to be gained from future reconciliation work would be substantially more time- and resource-consuming in the event that it must deal with each of the many records that would be ultimately explained by one of these issues.

The dedication of resources and the level of detail of information that is required on the part of CLECs in order to meaningfully participate in data reconciliation should be better understood as a result of the work done for Arizona. Even if the number of records that are subject to reconciliation is limited in future reconciliation work, the CLECs and Qwest now know the level of detail and nature of the records that are necessary to support positions on the treatment of a record for the purposes of a performance measure. If any party cannot make the requisite commitment, any attempt to reconcile records will have limited value.

There may be differences in the ways that Qwest performs in various parts of its region, and future reconciliation work should attempt to focus on those performance aspects that could result in differences from the Arizona findings. For example, service orders could be treated differently by different service order processing centers, or systems in some parts of Qwest's region could be closing trouble tickets with different codes or upon different circumstances than exist other parts. Liberty has requested that Qwest make an assessment of possible reasons why there could be differences among the states. The response to that request was not received by the time this report was written.

Liberty concluded on the basis of the work done in Arizona that the information provided by CLECs did not demonstrate material inaccuracies in how Qwest reported its performance. However, Liberty also believes that there is value to some level of data reconciliation in other parts of Qwest's region. To gain that value, the focus should be on a more detailed review of selected or sampled records rather than attempting to explain the reasons why, for example, one party's denominator of a particular measure and product is different than the other's. If the goal is to provide additional assurance that Qwest's performance measures are accurate, then more focused work on questions like the assignment of customer jeopardy to service orders or no-trouble-found close-outs of trouble tickets could prove beneficial. If, however, the goal is to explain generally why CLECs' results are so much different from those reported by Qwest, then Liberty considers the results found in Arizona to be largely responsive in meeting that goal.

[AT&T Comment: AT&T believes that this exercise fell far short of its potential. AT&T hoped the audit would help answer the question of whether or not Qwest was accurately collecting raw data to be used in Qwest's performance measurement calculation processes. Liberty's choice of the Qwest-favorable standard of whether the CLECs have proven Qwest wrong only gets at part of the question of whether Qwest is accurately collecting raw data. This report contains many instances and a high percentage of the orders where the conclusion was inconclusive or the

CLECs haven't proven that Qwest is wrong. Inconclusive findings or findings that the CLECs haven't proven Qwest wrong does not mean that Qwest's results are accurate. AT&T expects that future audits will better answer the question of whether Qwest's data are accurate by including some requirement for Qwest to demonstrate that its results are accurate – not just CLECs having to prove that Qwest's results are inaccurate.

It would appear that for a large percentage of orders and transactions Qwest would have failed to carry a burden of proving that its results are accurate. Future audits and data reconciliation efforts should test that notion.]

Attachments to AT&T's Comments on Liberty Consulting Group's Report on Qwest Performance Measure Data Reconciliation for Arizona

PID DUE DATE DEFINITION

AT&T RESPONSE TO THE NOVEMBER 9 QWEST PROVIDED EXPLANATION

On November 9, 2001 Brent Levy provided to Liberty, AT&T and other CLECs an explanation of the Completion Date for LIS trunks. Chuck Steese prepared this response after discussions with Paul Hlavac (Liberty) and Stephen Kail (AT&T). This document is AT&T's response to Mr. Steese's explanation and a further discussion of the PID measurement Due Date definition as related to the order Completion Date.

Mr. Steese explanation of the actions of AT&T and Qwest toward completion of a LIS order is consistent with AT&T's understanding except for some very important difference. Like Qwest, AT&T considers the trunk fully provisioned when the final test and turn up is completed. AT&T considers Qwest acceptance testing as Qwest's completion of Qwest's portion of the trunk (In AT&T terms this is called the LCDD or LEC Completion Due Date). As indicated by Mr. Steese, there is further AT&T network and circuit testing and then a final testing of the entire trunk (Called by AT&T and Qwest Test and Turn up). The Qwest SGAT addresses the availability of LIS on the "service date" in Section 7.4.8, which relates to the LCDD. The SGAT addresses LIS trunk group testing in Section 7.2.2.10, which results in Test and Turn up.

The PID measurement Due Date is identified by the Qwest FOC response. As part of the FOC response Qwest provides the date on which they will complete their portion of the LIS trunk. The FOC date is solely dependent upon Qwest's performance and is not dependent on AT&T or anyone else's performance. The FOC date is the same as the PID Due Date that Qwest performance is measured against. That date is the LCDD date, and it is consistent with the "service date" identified in Section 7.4.8 of the SGAT. It is not the date contemplated by Section 7.2.2.10.2 of the SGAT. This section of the SGAT addresses all "testing that may be needed to ensure that the service is operational and meets the applicable technical parameters." This language was added to the SGAT at the request of CLECs to insure that Qwest would remain obligated to test with the CLEC until the service worked (at Test and Turn up). While this is a necessary and important part of Qwest's obligation, it is not what is being measured by the PID Due Date.

Qwest should not be measuring its Due Date performance by using the Test and Turn up date for several reasons. First, Qwest is not in sole control of its performance to meet that date. By measuring Due Date performance based on the Test and Turn up date, Qwest becomes dependent on AT&T (and other CLECs) to perform. Second, the Test and Turn up date is not determined ahead of time. It is determined at the time AT&T calls Qwest to complete Test and Turn up and not by Qwest's FOC date. And third, Qwest has no ability to commit a CLEC to perform Test and Turn up on Qwest's completion date and no ability to schedule the Test and Turn up date for purposes of this PID

AT&T's and Qwest's process of first testing Qwest's portion of the trunk, then AT&T testing it's portion of the trunk and then jointly completing Test and Turn up requires time. To start and complete these three stages of testing on the same day is quite difficult because the processes are sequentially interdependent and in most instances requires multiple organizations to successfully test multiple aspects of the trunk. Any problem along that sequence of testing requiring a problem isolation and repair and then a retest, which would delay the next step and impact the timing of final test and turn up. To always commit resources to "stand by" for this testing sequence would not be wise. AT&T has recognized this and requires LCDD to be completed before PLDD testing and PLDD to be completed before Test and Turn up. (Qwest has advised AT&T on several occasions to wait until the committed Due Date to test because Qwest had not completed its tasks or was not available to test early. This means there is no assurance LCDD can't be completed prior to the Due Date and no reasonable expectation that Test and Turn up could be completed on Qwest's Due Date).

Qwest's process described to close out the order by "contacting the customer again for order acceptance" is a legal requirement in the SGAT and is independent of the performance being measured. Qwest's performance must be measured against the FOC date, the only date set in advance for which to measure performance. The ROC clearly would not have contemplated designing a performance measurement PID that was doomed to have exclusions of 80% or more. And it is difficult to imagine Qwest agreeing to a performance measure outside of its control. Thus it is clear that the Due Date identified in the PID is Qwest's acceptance date, not the final Test and Turn up date. (During the AT&T/Qwest Nebraska reconciliation discussions AT&T understood Qwest representatives to have agreed that Qwest's acceptance date established by the FOC response is the PID Due Date).

Qwest's documents provided by Mr. Steese confirming their processes to complete a LIS trunk order are relevant to meeting their legal obligations. They also contribute to defining the Due Date for performance measurement by reinforcing Qwest's dependency on CLECs if the Test and Turn up date is used as the performance measurement Due Date. Liberty's review and agreement with the Qwest's process document during the Performance Measurement Audit does not automatically mean that Qwest's use of the Test and Turn up date for the PID Due Date is correct. The Liberty review may not have addressed this specific issue since it is not specifically discussed in its most recent report.

With respect to exclusions for customer reasons (CO1), if AT&T fails to work with Qwest in a timely manner to test and accept Qwest's portion of the LIS trunk, then Qwest should correctly assign a jeopardy to AT&T. That assigned jeopardy should result in exclusion per PID 3.0. Any CO1 assigned by Qwest after LIS trunk acceptance, i.e., between Qwest acceptance and final Test and Turn up, is not applicable to and does not impact measuring Qwest's performance and should not be the basis for exclusion of the order for performance measurement purposes.

Mr. Steese comments in the aside that using the Qwest processes only harm Qwest's performance results. The basis for CLECs', Liberty's and hopefully Qwest's participation in the reconciliation process is to assess the accuracy of the input data used to determine performance. The performance results are secondary to this effort and should not bias in any way the reconciliation process.

BEFORE THE ARIZONA CORPORATION COMMISSION

WILLIAM A. MUNDELL
Chairman
JAMES M. IRVIN
Commissioner
MARC SPITZER
Commissioner

IN THE MATTER OF U S WEST COMMUNICATIONS, INC.'S COMPLIANCE WITH § 271 OF THE TELECOMMUNICATIONS ACT OF 1996	Docket No. T-00000A-97-0238

AT&T'S COMMENTS ON LIBERTY CONSULTING GROUP'S REPORT ON QWEST PERFORMANCE MEASURE DATA RECONCILIATION FOR ARIZONA

AT&T Communications of the Mountain States, Inc. and TCG Phoenix (collectively "AT&T"), hereby file their Comments on Liberty Consulting Group's Report on Qwest Performance Measure Data Reconciliation for Arizona attached hereto.

Respectfully submitted this 10th day of December 2001.

AT&T COMMUNICATIONS OF THE MOUNTAIN STATES, INC., AND TCG PHOENIX

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BEFORE THE ARIZONA CORPORATION COMMISSION

WILLIAM A. MUNDELL
Chairman
JAMES M. IRVIN
Commissioner
MARC SPITZER
Commissioner

IN THE MATTER OF U S WEST COMMUNICATIONS, INC.'S COMPLIANCE WITH § 271 OF THE TELECOMMUNICATIONS ACT OF 1996	)	Docket No. T-00000A-97-0238

AT&T'S SUPPLEMENTAL RESPONSE TO LIBERTY CONSULTING GROUP'S REPORT ON QWEST PERFORMANCE MEASURE DATA RECONCILIATION FOR ARIZONA

AT&T Communications of the Mountain States, Inc. and TCG Phoenix (collectively "AT&T"), hereby file their Supplemental Response to Liberty Consulting Group's Report on Qwest Performance Measure Data Reconciliation for Arizona.

Respectfully submitted this 11th day of December 2001.

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BEFORE THE ARIZONA CORPORATION COMMISSION

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IN THE MATTER OF U S WEST COMMUNICATIONS, INC.'S COMPLIANCE WITH § 271 OF THE TELECOMMUNICATIONS ACT OF 1996.	Docket No. T-00000A-97-0238 AT&T'S BRIEF ON LIBERTY DATA RECONCILIATION REPORT

AT&T Communications of the Mountain States, Inc. and TCG Phoenix (collectively, "AT&T") hereby file their brief on Liberty Consulting Group's ("Liberty") data reconciliation of Qwest Corporation's ("Qwest") performance measure data.

I. INTRODUCTION

On December 3, 2001, after a request from Qwest to complete its reconciliation report for Arizona before the other Qwest states, Liberty released its Report on Qwest Performance Measure Data Reconciliation for Arizona ("Arizona Report"). The pressure on Liberty to complete its Arizona Report before the reports for the other Qwest states in its region were completed was not in the public interest. In fact, subsequent events demonstrate that the rush to do the data reconciliation in Arizona unfairly prevented Liberty from discovering problems with Qwest data that were recently identified in Liberty's reconciliation for Colorado.

II. ARGUMENTS

A. Any Conclusions On the Accuracy and Reliability of Qwest's Performance Results Should Wait Until Liberty Consulting Has Completed Its More Extensive Evaluation of Performance Results for the Minnesota, Nebraska, Oregon, Utah, and Washington Data.

Since the December 13, 2001, workshop in Arizona on the Liberty Arizona data reconciliation report, Liberty has released its findings on the reconciliation of Qwest performance data for the state of Colorado.[1] Liberty's report in Colorado reached conclusions different than those it reached in the Arizona Report. Liberty found "[s]everal process errors [which] significantly affected Qwest's reported performance results."[2] Liberty also stated that it had a concern about the "number of apparent human errors that occurred in the processing of AT&T LIS trunk orders."[3] Finally, Liberty found in its analysis of the Covad data that human errors by Qwest personnel were apparently the cause of data inappropriately being included in Qwest's reported results.[4] In summary, Liberty's analysis of the Colorado data discovered many problems with Qwest's data that it did not discover in the Arizona analysis.

In the Colorado Report, Liberty attributed its conclusions that were critical of Qwest to three factors. These factors were:

1. Covad provided support information for the performance measures that were to be reconciled;

2. the scope of the AT&T reconciliation was smaller and so Liberty was able to investigate a higher percentage of orders in more depth than had been accomplished for the Arizona data; and

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[1] Second Report on Qwest Performance Measure Data Reconciliation – Colorado, dated January 3, 2001 ("Colorado Report"). For ease of reference, a copy of that report is attached hereto as Exhibit A. The ROC Observations and Qwest responses to those Observations are attached hereto as Exhibit B.
[2] Colorado Report at 4.
[3] *Id.*
[4] *Id.*

3. Liberty did not need to spend effort on issues that had been investigated in Arizona and in learning how data were stored and processed.[5]

In the Colorado Report, Liberty stated, "Qwest has indicated that there should not be differences among the states in its region as to how data are collected and processed for reporting performance measures."[6] In other words, the findings that Liberty makes in Colorado, and will make in Washington and Nebraska, should also apply to Arizona. Because of the discoveries that Liberty made in the Colorado audit, "Liberty views the results of its data reconciliation work to be cumulative and that overall conclusions should be made after its work for the states of Washington and Nebraska is complete."[7] To ensure that the Arizona Corporation Commission ("ACC") has the complete picture of Qwest's treatment of its raw data, the ACC should wait until after Liberty has published its last reconciliation report before reaching any final conclusions.

B. Liberty's Analysis of the Colorado OP-3 Commitments Met Data for LIS Trunks Calls Into Question Liberty's Arizona OP-3 Commitments Met LIS Trunk Conclusions.

In the Arizona data reconciliation effort, Liberty's analysis showed that Qwest applied a customer miss code to 72.7% of AT&T's LIS trunk orders in the period from January 2001 through May 2001.[8] What this means is that on 72.7% of the orders, Qwest missed the committed-to due date and blames the miss on the CLEC. Qwest excluded from the Performance Indicator Definition ("PID") calculations orders with Qwest-

[5] *Id.*
[6] *Id.*
[7] *Id.* It should be noted that Liberty is also conducting data reconciliation work for results from the states of Minnesota, Oregon and Utah..
[8] Liberty Ex. 5-3.

assigned customer miss codes. For reasons that were described in AT&T's written comments on Liberty's Arizona Report, AT&T believes that, in some cases, Qwest improperly excluded orders to which Qwest applied customer miss codes.[9] Notwithstanding AT&T's arguments on whether certain orders with Qwest-assigned customer miss codes should be excluded, in the Arizona analysis and the Arizona Report, Liberty made no meaningful findings on whether Qwest properly assigned the customer miss code for LIS trunk orders in the first place. On 6% of the Arizona LIS trunk orders, Liberty concluded that Qwest coded an order as being missed for customer reasons, and AT&T coded the same orders as being missed for Qwest reasons. For that 6%, Liberty found the results were inconclusive. For the other 66.7% of the Arizona LIS Trunk orders, Liberty made no explicit finding on the appropriateness of Qwest's application of the customer miss code.

In the more in-depth analysis of the Colorado OP-3 LIS trunk data, Liberty found significant problems with how Qwest was assigning jeopardy codes and customer-miss exclusions. The Colorado Report states, "Liberty discovered instances where the Missed Function Code (MFC) applied by Qwest to an order in WFAC was inappropriate, e.g., when Qwest applied a C01 jeopardy *in cases when the jeopardy should have been to Qwest.*"[10] The net effect of Qwest's inappropriate coding of miss codes to CLEC causes is that Qwest has systematically reported results for LIS trunk that makes its performance look better than it truly is. Liberty attributed the source of the misapplication of jeopardy and Miss Function Codes to human error on the part of Qwest. In the Colorado Report, Liberty concluded that, "21 percent [of the differences between Qwest and AT&T

[9] AT&T Ex. 5-4 at 9-11, 13-15 & 17-18.
[10] Colorado Report at 5 (emphasis added).

results] were likely caused by Qwest's errors in assigning jeopardy codes and customer-miss exclusions."[11]

AT&T has always suspected that Qwest has been inappropriately and systematically blaming CLECs for missed commitments that truly were caused by Qwest. For measurement, and eventually Performance Assurance Plan ("PAP") purposes, Qwest's coding of an order that missed a commitment as a customer miss or customer jeopardy is a "get out of jail free" card. Liberty's findings independently confirm AT&T's suspicions.

Liberty's discovery in Colorado of an excessive number of orders where Qwest miscoded the jeopardy and miss code to the CLEC would apply equally to the Arizona results. Consequently, the ACC should view Qwest's OP-3 results for LIS trunks in Arizona as unreliable and not to be trusted. Until Liberty finishes its complete audit and Qwest has had the opportunity to take the appropriate corrective actions in response to the Liberty findings, the ACC should not rely upon any Qwest data for LIS trunk provisioning measurements (OP-3 Installation Commitments Met, OP-4 Installation Interval, and OP-6 Delayed Days). The facts are that Qwest classified 72.7% of the AT&T LIS trunk orders in a five month period as a customer-caused jeopardy or miss and that Liberty found Qwest has been inappropriately classifying orders as customer-caused jeopardies or misses. The only conclusion that can be reached with these facts is that Qwest's provisioning related performance data for LIS trunks should be ignored because the data are unreliable.

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[11] *Id.* at 8.

C. **Liberty's Analysis of the Colorado OP-4 Installation Interval Data for LIS Trunks Calls Into Question Liberty's Arizona OP-4 Installation Interval LIS Trunk Conclusions.**

Liberty's analysis of Colorado OP-4 data for LIS Trunks shared many of the same findings as the OP-3 results. Qwest's errors in assigning jeopardy codes and customer-miss exclusions resulted in Qwest inappropriately excluding a significant number of orders from the OP-4 results.

In addition to findings in Colorado that Qwest was inappropriately excluding orders from OP-4 results consideration, Liberty found that Qwest was making significant errors in how it calculated intervals for the orders that it did include in the OP-4 results. Liberty found that "[o]ne third of the numerator discrepancies were caused by errors in Qwest's application date."[12] Liberty also concluded, "[t]hus, Qwest cannot always support the application times it used in developing the performance results for OP-4."[13] The application date and time is the point at which Qwest "starts the clock" for the purpose of determining how long it takes Qwest to install a service. If Qwest cannot support the point at which it "started the clock" for the OP-4 measurement, then the entirety of the OP-4 results for LIS trunks should be considered unreliable and should not be trusted.

Liberty also found that Qwest was inappropriately excluding from the calculation of the OP-4 measurement results any service order not completed within eight months.[14] Neither the Arizona nor the ROC OP-4 PID permits Qwest to exclude orders that are completed after eight months. While this situation did not occur with the AT&T orders in Arizona that were subject of the Liberty data reconciliation, it does appear that Qwest

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[12] *Id.*
[13] *Id.*
[14] *Id.* at 7.

has been systematically excluding these lengthy completion interval orders, and it is likely that this inappropriate exclusion has been applied for other CLECs or for AT&T orders in other months. This represents yet another reason why the OP-4 LIS trunk results should be considered unreliable and not to be trusted.

Finally, in the Colorado Report, Liberty found Qwest human error as the cause of invalid completion dates for orders that were excluded by Qwest. Qwest excluded 6.3% of the AT&T orders from the calculation of the OP-4 and OP-3 results because of invalid completion dates. While the Arizona PID does permit Qwest to exclude from the provisioning measurements orders with invalid completion dates, that exclusion was agreed to based upon an assertion from Qwest that the amount of such exclusions would be *de minimis*. Excluding 6.3% of the LIS trunk orders because of sloppy Qwest record keeping is hardly a *de minimis* level.

D. Liberty's Analysis of the Colorado Data for Covad Orders Demonstrates That if Liberty Had Completed its Analysis of Covad's Arizona Results, it Would Have Likely Uncovered Significant Qwest Data Accuracy Issues.

In a December 12, 2001, email from Bob Stright, Liberty indicated that, while it received information from Covad on November 29, 2001, "that would be helpful on a sample of orders," it did not consider that information in the Arizona Report and analysis. Liberty's findings in Colorado using Covad data would suggest that, had Liberty considered Covad's Arizona information, it would have found that Qwest had similarly significant problems with its Arizona data. Liberty's Colorado Report found that for OP-

4 line sharing orders, "Qwest was incorrect in 26 percent of the records."[15] Liberty also found for PO-5 results that "Qwest was incorrect in 38% of the records."[16]

For the OP-4 unbundled loop results in Colorado, Liberty found Qwest correctly reporting performance only 67% of the time. For OP-4 line sharing results in Colorado, Liberty found that Qwest correctly reported performance 61% of the time. For the PO-5 results, Liberty found that Qwest correctly reported results in Colorado only 50% of the time. These findings indicate that had Liberty completed its analysis of Covad's Arizona results, it is likely that the same type of problems would have been discovered. The only conclusion that can be reached with these facts is that Qwest's provisioning-related performance data for unbundled loops and line sharing are unreliable and should be ignored.

E. Liberty's Analysis of Nebraska Trouble Ticket Information Demonstrated That Qwest is Improperly Recording Trouble Ticket Information.

In its analysis of Nebraska trouble ticket information, "Liberty found that Qwest had improperly recorded the MTTR for a significant percentage of trouble tickets."[17] Liberty found this error rate to be "significant." Based upon that finding, Liberty concluded that, "[t]he reported results for MR-6 for April and June 2001 are incorrect." The specific problem that caused the excessive mean time to restore ("MTTR") intervals was an incorrect recording of the close time of the trouble ticket. While Liberty's finding was limited to the MR-6 results, an inaccurate recording of the trouble ticket close time will also affect the results for the MR-3 Out of Service Cleared within 24 hours, MR-4

[15] *Id.* at 11.
[16] *Id.* at 8.
[17] ROC Observation 1028, a copy of which is attached hereto as Exhibit C.

All Troubles Cleared within 24 hours, MR-5 All Troubles Cleared within 48 and MR-9 Repair Appointments Met PIDs.

F. Liberty Used the Wrong Standard for Performing the Audit.

Liberty stated that the goal of the audit, "was to determine whether, in consideration of the requirements of the PID, Qwest's methods, practices, or processes contained material error."[18] AT&T generally agrees with that goal. Fundamentally, the audit was to determine if Qwest's data collection processes are accurately, reliably and consistently collecting performance data that are used in the calculation of the PIDs and whether those processes are collecting and excluding performance data in a PID-compliant manner. For the data reconciliation efforts, there are two ways in which the issue of Qwest's input data accuracy could be resolved. The first way is for the CLEC to present evidence that demonstrates the Qwest data are inaccurate. The second way is for Qwest to present evidence to demonstrate that its data are accurate.

Liberty's analysis appeared to place much more of the burden on the CLEC to prove Qwest's data inaccurate. Liberty appeared to focus too little on whether Qwest had proven that its data were accurate. For example, for one AT&T LIS trunk order, Liberty's conclusion was:

> Qwest provided no information as to why they excluded this record. AT&T's ASR shows no activity that would suggest whether or not a jep. was warranted. AT&T did not provide any information that demonstrates Qwest's treatment of the order was incorrect.[19]

For the above order, Qwest excluded the order from the OP-3 calculations. Qwest provided no support as to why it excluded the order. While Liberty claimed that AT&T's

[18] Liberty Ex. 5-1 at 3.
[19] Liberty Ex. 5-3, AZ_OP-3_LIS_ATT, January 2001 Records, line no. 7.

records were not informative as to whether or not a jeopardy was warranted, in fact, AT&T provided information that shows AT&T completed its required work 1 day before the due date.[20] The information provided by AT&T for this order would support a conclusion that it was not possible for a jeopardy to have been appropriately assigned to AT&T. Notwithstanding the additional information provided by AT&T, Liberty effectively concluded that, for this order, even with a failure by Qwest to provide any information to support the exclusion, Qwest is right.

III. CONCLUSION

Liberty's findings in its analysis of the Colorado and Nebraska reconciliation efforts demonstrate clearly that any findings on the accuracy of Qwest's input data should be considered only after the data has been reconciled for *all* of the targeted states. Liberty's Colorado and Nebraska findings also demonstrate that data reconciliation remains very much a work in progress.

Although Liberty's findings generally appear favorable to Qwest in the Arizona Report, Liberty came to very different conclusions in Colorado and Nebraska when reviewing the same performance measurements and the same services. There is also the possibility that other new findings and conclusions may be reached after Liberty has completed the analysis of Minnesota, Nebraska, Oregon, Utah and Washington. Until Liberty has completed its reconciliation, there is no basis upon which this Commission may draw any conclusions about the accuracy and reliability of Qwest's data – a concept that Liberty itself has recognized.

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[20] AT&T Ex. 5-4, AZ 12-3 – Review of Liberty LIS Analysis, at 2.

Liberty's Colorado and Nebraska findings have called into question the accuracy and reliability of Qwest input data. To the extent Qwest responds to the negative findings Liberty has made (and may make in the future), its responses should indicate what efforts it has taken to correct the problem and rehabilitate any data that were affected by the problem. If Qwest chooses not to rehabilitate all of the suspect data, the portion that remains suspect must be eliminated from any consideration by the ACC.

For data collection and calculation problems that Qwest does fix, Liberty should be required to verify that the fix has produced the intended effect. It would not be sufficient for Qwest's to assert that it has fixed the problem. Independent assessment of the correction of the problem is absolutely essential.

Respectfully submitted this 18th day of January 2002.

AT&T COMMUNICATIONS OF THE MOUNTAIN STATES, INC. AND TCG PHOENIX

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Second Report on Qwest Performance Measure Data Reconciliation – Colorado

I. Introduction

The Liberty Consulting Group (Liberty) conducted an audit of Qwest's performance measures for the ROC, and issued the final report from that audit on September 25, 2001. As an extension to the audit, and through its Change Request process, the ROC requested that Liberty conduct a "data validation to resolve any debates concerning the accuracy of performance data emanating from particular ROC PIDs." (ROC Change Request #20.) Certain CLECs have expressed concerns about the accuracy of Qwest's reported performance results as they relate to service that they have been receiving. The ROC decided to conduct this data reconciliation work in order to test those concerns. Liberty's performance measures audit applied to all of the ROC states with the exception of Arizona. Nevertheless, Liberty was requested to include Arizona in the scope of its data reconciliation work. The report that used Arizona data was issued on December 3, 2001. This report provides the results of Liberty's review of data from Colorado.

Liberty conducted multiple discussions with state commission personnel, Qwest, and the CLECs, in order to secure their comments on the scope and objectives for this test. Liberty has determined that the objective for the data reconciliation process solicited by the ROC should be to answer the following question:

> **Does any of the information provided by the participating CLECs demonstrate inaccuracy in Qwest's reporting of performance results under the measures defined in the PID?**

The question presented is an important, but narrow one. It allowed the exclusion of activities that would have substantially expanded the scope of this test. For example, Liberty was not required to determine whether CLECs could reproduce Qwest's performance results with their own information, or what changes would be required to allow such recreation. There were also situations in which Liberty found that Qwest and a CLEC interpreted requirements differently or had different understandings of how interactions with Qwest or the information resulting from them should be treated. In those cases, Liberty did not seek to determine who was right and who was wrong, or who reflected the better practice. Instead, Liberty's goal was to determine whether, in consideration of the requirements of the PID, Qwest's methods practices, or processes contained material error. Therefore, in the case of data discrepancies, Liberty required an affirmative showing of Qwest error or omission before issuing an exception or observation. However, in order to make clear the details of its examination, Liberty has reported the cases where it found the information provided by the parties to be inconclusive. In the course of its data reconciliation work, if Liberty found something wrong with the way Qwest reported performance results, regardless of the information provided by the CLEC, Liberty reported that problem.

In its comments on CR #20, AT&T described what it thought should be the process for what has been referred to as "data reconciliation," as follows:

1. The CLEC identifies what it believes are discrepancies between performance results it has produced and the performance results that Qwest has produced. The CLEC should identify the particular performance measurement in question and the evidence that lead the CLEC to conclude that a discrepancy exists.

2. The auditor takes the CLECs information and confirms the existence of the discrepancy.

3. After confirming the discrepancy, the auditor determines and identifies the source of the discrepancy.

4. If the source of the discrepancy is the CLEC, the auditor will share its findings at a high level with the TAG. The specific details of the discrepancy shall be shared by the auditor privately with the specific CLEC.

5. If the source of a discrepancy is Qwest and that discrepancy points to some problem with Qwest's raw data, the auditor shall create an Exception/Observation per the Exception and Observation process used in the ROC OSS test. In the Exception/Observation, the auditor will make recommendations as to whether the identified deficiency is likely to affect multiple services and/or multiple CLECs. The auditor will also identify what it believes is the period of time that Qwest may have been producing questionable performance results.

6. After the Exception/Observation has been created, it should follow the normal process for closure as would any other Exception or Observation.

In general, the process described by AT&T reflected how the data reconciliation effort proceeded.

Three CLECs, Covad, WorldCom, and AT&T, chose to participate in data reconciliation. The participating CLECs had identified numerous discrepancies. In connection with this report, Liberty has separately supplied specific information about the CLECs' sources of discrepancies, as well as proprietary information concerning specific records and volumes. Liberty sought to prepare this report to inform the interested participants about the test and its results, without revealing confidential information. For example, the report generally refers to percentages of total orders instead of the actual number of orders. The specific performance measures and products that the participating CLECs wanted included in the data reconciliation, being widely known, were therefore not considered proprietary.

As a result of its data reconciliation work for the state of Colorado, Liberty has or will be issuing several Observation Reports, each of which is discussed below.

Qwest, the CLECs, and Liberty spent significant time and effort resolving the specific scope of the performance measures to be included in data reconciliation. It took considerable added effort to digest and process the information provided by CLECs and match it with data provided by Qwest. Liberty began this data reconciliation test with a significantly greater familiarity with the structure and nature of the Qwest data, with which Liberty worked extensively during earlier

audit activities. Gaining a similar kind of familiarity with CLEC data structure and content formed a more significant than expected part of this test. During the course of its data reconciliation test work, Liberty was able to match a significant portion of the apparently contradictory data presented by CLECs and Qwest. This success in data matching was important, but the discrepancies remained very large even after it was completed.

II. Overall Summary of Findings

This report presents more detailed, non-confidential results in later sections that are organized by CLEC. This section provides Liberty's overall conclusions, which have been formed on the basis of the reconciliation of Colorado data.

Several process errors significantly affected Qwest's reported performance results. These problems are documented in Observation reports 1026, 1027, 1029, and 1030. Qwest reported retail line-sharing orders as wholesale orders, orders were repeated in consecutive months because of different completion codes, orders were not reported because the CLEC designation was "unknown," and records were excluded because of no state code. Qwest has indicated that it has either corrected or is investigating these matters.

While the problems discussed in the four Observation reports listed above caused reported results to not reflect actual performance, they are the type of problem that can rather easily be fixed, and at least in some cases, performance results can be re-calculated. Of more concern to Liberty because it may not be so easily corrected is the number of apparent human errors that occurred in the processing of AT&T LIS trunk orders. This matter has been reported in Observation 1031. In addition, human errors were apparently the cause of some Covad UBL orders not being excluded from OP-4 in cases where the requested interval was longer than the standard (Observation 1032), and application dates and times were incorrectly determined by Qwest personnel on AT&T LIS trunk orders (Observation 1033).

As a result of its data reconciliation work for Arizona data, Liberty found that Qwest made some errors that affected performance results. However, those errors were generally either (a) of the kind and at levels to be expected at the front end of the performance measurement process, where people must manually enter vast amounts of information, or (b) appeared to be honest errors in judgment. The amount of these errors in relation to the total amount of information required for the performance measures did not exceed what Liberty considers to be expected levels, even under a carefully operated set of measurement activities. The Arizona work also noted a programming problem associated with measure OP-15 (Exception 1046) and a failure to report a group of Firm Order Confirmations in June 2001.

For the Colorado data, there were three primary factors that drove to different conclusions. First, Covad provided support information for the performance measures that were to be reconciled. Second, the scope of the AT&T reconciliation was smaller and so Liberty was able to investigate a higher percentage of orders in more depth than had been accomplished for the Arizona data. Finally, Liberty did not need to spend effort on issues that had been investigated in Arizona and in learning about how data were stored and processed. Qwest has indicated that there should not be differences among the states in its region as to how data are collected and processed for reporting performance measures. Therefore, Liberty views the results of its data reconciliation work to be cumulative and that overall conclusions should be made after its work for the states of Washington and Nebraska is complete.

III. Results of Data Reconciliation – AT&T

A. Issues

The scope of the data reconciliation work for AT&T and Colorado was:

- The denominator of PO-5D for Local Interconnection Service (LIS) trunks.
- The numerator and denominator of OP-3, OP-4, OP-6, and OP-15 for LIS trunks.

The reconciliation period was from January 2001 through June 2001. Qwest stated, however, that it did not report CLEC-specific state results for LIS trunks for OP-15 for January or February; therefore, Liberty could not reconcile data for those months. In addition, Qwest was unable to provide the data necessary to reconcile OP-15 for LIS trunks for May; therefore, data for that month could not be reconciled.

Human Error

Liberty noticed several types of human error that caused inaccuracies in Qwest's performance measure reporting. Liberty discovered instances where the Missed Function Code *(MFC)* applied by Qwest to an order in WFAC was inappropriate, *e.g.*, when Qwest applied a C01 jeopardy in cases when the jeopardy should have been to Qwest. The MFC is entered by Qwest personnel who are supposed to choose the code that represents the reason for a miss. It is used by other Qwest personnel as one factor in determining the Service Order Miss Code *(SOMC)* in RSOR. If the SOMC is to the customer, then the order was excluded from OP-3, OP-4, and OP-6 during the period being reconciled by Liberty. Numerous orders were, in fact, inappropriately excluded from these measures because of this type of human error. This issue is the subject of Liberty's Observation report 1031.

In addition, Liberty noted instances where Qwest's completion date was 01/01/01, which meant that the completion date was blank or invalid and the order was legitimately excluded from the measure. In other cases, the application date to entry date interval was greater than 31 days, and the order was legitimately excluded from the measure. However, the underlying cause of invalid completion dates and excessive intervals is also human error on the part of Qwest personnel.

Application Date/Time

Liberty noticed instances in which Qwest personnel determined AT&T's order application date/time incorrectly. This application date/time is used in OP-4 calculations. The PID requires that LIS trunk applications received after 3 p.m. MT are to be counted as received the next day. In some instances, Qwest failed to follow this rule. In other cases, it appears that Qwest used the wrong application date because of uncertainty as to whether the application was "complete and accurate" as is required by the definition section in the PID. This issue is the subject of Liberty's Observation report 1033.

In a 12/28/01 e-mail from Qwest, Liberty learned that Qwest apparently does not always have a record of the application times for LIS trunks. It is the responsibility of the Qwest Wholesale Service Coordinator *(WSC)* to determine the correct application date by looking at the

application time and following the process for writing service orders. This process includes recording the application date as the next day when the application time is after 3 p.m. MT on a LIS trunk order. This is consistent with the definition section at the end of the PID. The only times that are logged by Qwest, however, appear to be the time when the WSC enters the application date into the EXACT system and the time the most recent application/supplement was received from AT&T. These times need not be the same time as the application time. Thus, Qwest cannot always support the application times it used in developing the performance results for OP-4.

Service Order Completion Date

For LIS trunks, Liberty found that Qwest and AT&T have different operational definitions of when an order is considered to be completed. In most instances, AT&T views the order as completed earlier than Qwest does. AT&T believes the order is completed when a first test is done, but Qwest does not consider it completed until an additional test is completed as well. For many orders a due date is established, *i.e.*, the date by which both parties expect to complete the order. When a test is successfully completed on that due date, AT&T considers the order completed. AT&T therefore includes the order in the relevant performance measures as completed on the date of that test. However, Qwest believes another test is necessary, *i.e.*, a test for which AT&T is often not ready on the due date. Accordingly, Qwest classifies the order completion as having been missed for customer reasons, and therefore excludes it from many measure results. This disagreement about the meaning of order completion accounts some of the discrepancies between the parties. For example, it accounts for seven of the discrepancies between the parties for LIS trunks for OP-4 for the months of January to June in Colorado.

Both AT&T and Qwest have reasonable justifications for their definitions of order completion. Their difference is an operational one, which cannot be resolved in either party's favor by referring to the language of the PID. Liberty did not consider this test as including a Liberty determination of which company applied the better or most correct operational interpretation. Rather, Liberty sought to determine whether Qwest's approach was out of conformity with the PID. Liberty concluded that Qwest's definition and use of a service order completion date could not be judged to be out of conformance with the PID.

Data Processing Error

Liberty's analysis of LIS trunks disclosed that many orders being reported in OP-15 did not appear to be Qwest "misses," even according to Qwest's own data. The cause of the problem was a data transfer error. The Detailed Data Set that Qwest uses for the OP-15 measure incorporates data from the Integrated Data Repository *(IDR)* Pending data source. One extremely important piece of this data is the miss code, which determines whether the order will be included in OP-15, and whether it will be included in OP-15A or OP-15B. LIS trunks constitute a designed service; therefore, they have three-digit miss codes. Misses for customer reasons begin with the letter "C." For example, C01 is the miss code for the category of "Customer Not Ready." During the data transfer step, the third digit of the miss code was often (although not always) being truncated. The Wholesale Regulatory Reporting program looks up the code in a miss code table in order to determine how the order should be handled. If it fails to find the code, it establishes Qwest as the default cause of the miss. Therefore, all of the LIS trunk orders showing two digit miss codes were being reported as Qwest misses, even though not all of them were. Qwest has

stated that it knew about the problem, and has already fixed it, but the performance reports for the months being reconciled, and the data provided by Qwest that generated them, contained this error. Liberty issued an Exception Report 1046 addressing this issue. The problem occurred in four of the LIS trunk service orders.

This problem could exist (for the period being reconciled) for designed services other than LIS Trunks. Accordingly, an investigation would be appropriate to determine exactly the full range of products affected, and the months involved.

Use of Reference Date

Several performance measures use the number of orders completed in the reporting period as the denominator. Qwest's service order database does not contain a real-time picture of service order activity. Liberty's review during the performance measures audit showed that records are updated close to the time of the activity involved, such as completion; however, there is usually a lag of a couple of days. If the performance measures used only the report month, Qwest could miss a substantial amount of activity. Qwest solved this potential problem by calculating measures for records in which the database reference date is the reporting month. This method helps ensure that all records are reported, but may cause orders that are completed in one month to be reported in a later calendar month. Liberty does not consider this problem to be a material one, because:

- Every order is eventually accounted for
- The process is well-defined and applied consistently
- The overall impact (including an order in a future month's performance report) is minimal.

However, a CLEC would not know the reference date; it would only know the actual date of completion. The reference date matter accounted for about 15 percent of the LIS Trunk discrepancies for OP-3 for the months of January to June 2001. This reference date issue affects all products.

Lengthy Completion Intervals

In response to data request 30-2, Qwest told Liberty that it is unable to include in its performance reporting any service orders that are not completed within eight months. This problem accounted for six percent of the discrepancies in both OP-3 and OP-4 for LIS trunks for the months of January to June in Colorado.

B. Reconciliation Results

For the measure OP-3, Qwest and AT&T agreed on 47 percent of the orders. For the orders that the companies disagreed on, Liberty found that:

- 21 percent were likely caused by Qwest's errors in assigning jeopardy codes and customer-miss exclusions. In addition, another 9 percent of the orders contained a 01/01/01 completion date, which meant that Qwest's program properly excluded the orders but that there was likely human error in failing to enter a correct completion date. (Observation 1031.)
- 6 percent were not counted by Qwest because the order took more than eight months to complete.
- For 61 percent, Qwest's treatment was correct, or Qwest followed its procedures for not counting orders with a customer miss. In a quarter of these cases, the discrepancy was caused by Qwest using the reference date to report order completion. In 40 percent of these cases, the discrepancy was caused by disagreement as to when a LIS trunk order completes.
- 12 percent of the discrepancies contained conflicting information that Liberty was unable to resolve.

For measure OP-4, the base results are the same as those presented above for OP-3. In addition, however, the companies disagreed on most of the interval numerator values in cases where they agreed that the order should be included. For many of the numerator discrepancies, Liberty was not given information that resolved the conflict. In some cases, Liberty determined that Qwest correctly determined the numerator for OP-4 and AT&T did not. One-third of the numerator discrepancies were caused by errors in Qwest's application date. (Observation 1033.)

For measure OP-6, Liberty found that there was no actual disagreement in 37 percent of the orders, Qwest was incorrect on 27 percent of the orders for the same reasons given in the OP-3 analysis, Qwest was correct in 18 percent of the discrepancies, and 18 percent remained in conflict.

For the few orders that could be analyzed for measure OP-15, Liberty found that there was no actual disagreement in 24 percent of the records, Qwest was incorrect on 29 percent of the records, Qwest was correct on 29 percent of the records, and 18 percent remained in conflict. All but one of the Qwest errors related to the data processing problem that was the subject of Exception 1046. The other case was one in which Qwest's documentation did not support its position that an order was pending for Qwest reasons.

For PO-5, Qwest and AT&T agreed on 86 percent of the orders. Qwest was in error on 25 percent of the discrepancies, Qwest was correct on 25 percent, and 50 percent of the discrepancies could not be resolved with the available information.

IV. Results of Data Reconciliation – WorldCom

Liberty's scope of work associated with WorldCom (WCom) and Colorado included OP-3, Installation Commitments Met, and OP-4, Installation Interval, for LIS trunks and 2-wire unbundled analog loops. The time period under consideration was January through May 2001. The data provided by WCom did not contain sufficient information to calculate the OP-4 numerator, which is the actual installation interval. The UBL denominator for OP-4 excludes orders with customer-requested due dates that are greater than the standard interval. WCom could only determine these excluded orders on a limited basis. Therefore, Liberty sought to determine whether WCom's information on the total order counts showed any problems with the numbers reported by Qwest for OP-3 and OP-4.

For LIS trunks, Liberty found that Qwest and WCom agreed on the treatment of 7 percent of the orders. After receiving additional information from WCom, the companies agreed on another 9 percent of the orders. In 24 percent of the orders, Qwest excluded the record because of a customer miss. WCom information either confirmed the customer miss or did not provide any information to make Liberty think that Qwest was incorrect in making such an assignment. However, Liberty did not have the information that would have been required to find the same type of human error problems noted above in the AT&T section of this report. Often jobs have more than one service order with one being the actual installation and another being an administrative record. Qwest excluded such records that have no inward activity and WCom often included that order. This situation accounted for 24 percent on the total records. Sometimes Qwest will report an order that was completed in one month in the next month's results because of the database reference date. (Refer to the discussion in the AT&T section above.) This accounted for 7 percent of the total records. Finally, there were orders could not be reconciled because WCom lacked either a PON or a Qwest service order number, and Qwest was unable to trace the other information that WCom provided to an actual order. Initially, this accounted for 29 percent of the orders. Later, Qwest was able to find that several of these orders had been completed at various dates in the year 2000, not in the 2001 months that were under examination. This brought the total down to 21 percent, and, while still a significant percentage, should not be a major concern given the quality of the CLEC-provided information.

For unbundled loops, the companies initially agreed on 31 percent of the orders. After additional information was obtained from WorldCom, the orders for which the parties agreed increased to 62 percent. Qwest excluded the remaining orders for customer-caused miss reasons or had dates outside the period of the reconciliation. The information available from WCom did not dispute Qwest's information.

On December 19, 2001, Liberty sent detailed and proprietary worksheets to WCom and Qwest on the analysis of OP-3/4.

V. Results of Data Reconciliation – Covad

A. Issues

The agreed upon scope of the data reconciliation for Covad was a 25 percent sample of OP-4 (installation interval) for line-sharing and unbundled loops and of PO-5 (Firm Order Confirmations on time). Liberty chose the sample and received Covad's agreement of the method of drawing the sample. The time period for the review was the months of May, June, and July 2001.

Liberty found several problems with Qwest's performance reporting for Covad. First, Qwest reported some retail orders as wholesale. For line sharing, Qwest may generate two orders, one for the CLEC data side and another to account for Qwest's voice service. At least some of the orders of the second type were incorrectly reported as wholesale orders associated with the CLEC. Liberty documented this problem in Observation 1026. In response to the Observation, Qwest said that it had implemented a code change that looks orders that contain billing USOCs for line sharing and reviews all line-level USOCs to identify those with retail activity and excludes them from the results. Qwest said that this change would prevent future reporting of the retail orders as line sharing activity and effectively reduce volumes previously shown. For July 2001, Liberty found that this problem affected 5 percent of the sampled number of discrepant records that Liberty reviewed. Qwest indicated that the revised code would be executed on historical data starting from January 2001 and be reported with performance results that include December 2001.

Liberty also found that Qwest reported some of the same items in two consecutive months. This problem was documented in Observation 1027 and for Covad affected both UBL and line-sharing orders. While Liberty has not received Qwest's formal response to the Observation, Qwest has indicated that this problem was known and has been corrected. Qwest indicated that the problem had to do with different completion status codes given to some orders and that the effect was minimal. However, for the UBL records, this problem accounted for 22 percent of the sampled number of discrepant records that Liberty reviewed.

Liberty found that some line-sharing orders were not reported by Qwest because the CLEC was designated as unknown. This problem was documented in Observation 1029. Qwest's records confirmed the application and completion dates on these orders with the data provided by Covad. However, Qwest could not report the orders because the CLEC designation was not assigned correctly. This problem affected 70 percent of the orders that Liberty reviewed and that were in the category of included by Covad but not by Qwest in the reporting of July line-sharing results for OP-4.

Covad's information provided to Liberty for data reconciliation included many orders that Qwest did not report for PO-5. Investigation of these orders revealed that Qwest's program had excluded them because of an invalid or missing state code. There was nothing apparently wrong with Covad's orders. This problem accounted for about two-thirds of the items that Liberty reviewed and that were the category of included by Covad but not by Qwest in the reporting of July PO-5 results. This matter was documented in Observation 1030.

Qwest included some unbundled loop orders that should have been excluded because the requested provisioning interval was greater than the then current standard installation interval. This problem, which appears to be one involving human error, was documented in Observation 1032.

B. Results

Liberty prepared spreadsheets showing the results of its analysis of the Covad service orders for May, June, and July 2001. These documents contain information that is proprietary to Covad; therefore, Liberty made a limited distribution of them.

For OP-4 and unbundled loops, the companies agreed on only 16 percent of the orders. For another 8 percent of the orders, the companies agreed on inclusion in the denominator of the measure but disagreed on the interval for the numerator. Liberty sampled the 84 percent of the orders for which there was disagreement and found for those discrepancies that:

- Qwest was incorrect on 31 percent of the discrepancies. Most of these (22 percent) were reported incorrectly for the second time by Qwest (Observation 1027). Qwest also included orders (about 6 percent) that should have been excluded because the requested interval was longer than the standard (Observation 1032).
- For 61 percent of the discrepancies, Qwest correctly reported performance and Covad's information supported the way in which Qwest treated the orders. For example, in several cases Covad did not take into account the 4th of July holiday when counting interval days. In other cases, Liberty found nothing wrong with Qwest's reporting and Covad's information did not show otherwise. In some of the records, there turned out to be no real discrepancy other than Covad included the order in the wrong month.
- For 8 percent of the records, the information was either conflicting or Liberty was unable to determine which company was correct.

For OP-4 and line-sharing orders in June and July, the companies agreed on only about 14 percent of the orders. For another 30 percent of the orders, the companies agreed on inclusion in the denominator of the measure but disagreed on the interval for the numerator. Liberty sampled the 86 percent of the orders for June and July and for which there was disagreement and found for those discrepancies that:

- Qwest was incorrect in 26 percent of the records. Retail line-sharing orders reported incorrectly by Qwest (Observation 1026). Qwest incorrectly reported orders in two separate months (Observation 1027). Qwest excluded orders because the CLEC designation was "unknown" (Observation 1029).
- In 55 percent of the records, Qwest was correct or Covad did not provide any information to show otherwise.

- In 19 percent of the records there was conflicting information that Liberty was unable to resolve. Many of these were cases in which the parties disagreed by one day on either the application or completion dates.

For PO-5, the companies agreed on only about 10 percent of the orders. Liberty sampled the 90 percent of the orders for which there was disagreement. For June and July, Liberty found for these discrepancies that:

- Qwest was incorrect in 38 percent of the records. Most all of these were excluded by Qwest because of the problem with the state code (Observation 1030). There were some (PO-5C) fax orders that were not included in the data provided to Liberty, although Qwest claimed that these orders were accounted for.
- Qwest was correct or Covad did not provide any information to show otherwise for 44 percent of the records.
- 18 percent showed conflicting information that Liberty was unable to resolve.

DATE: January 11, 2001
To: ROC TAG

FROM: Bob Stright
The Liberty Consulting Group

RE: Qwest's Response to Observation 1026

Summary

Observation 1026 identified retail orders that were being included in performance reports as wholesale order. Qwest acknowledged that RRS was including orders that appeared to be retail in their wholesale performance results. Qwest indicated that in the process of provisioning a line-sharing order, a separate retail and wholesale order has to be issued by Qwest. The wholesale order is being correctly included in the RRS calculations. However, because there was no retail line sharing the second order was being defaulted into the wholesale category resulting in a double count. Qwest has implemented a code change to look for each "N" and "C" orders that contain billing USOCs with retail activity and will exclude retail orders from the measure. Qwest believes that this action will prevent the reporting of retail orders as Line Sharing activity. The code changes were implemented effective with the 11-01 release of the Performance Results. The initial revisions will be made to the 7-01 to 10-01 time period. Additional revisions will be made with the 12-01 release of the 1-01 to the 12- 01 report in January 2002.

Discussion

Qwest has provided RSOR files that contain the orders identified by Liberty that were affected by this observation. Liberty has reviewed these RSOR files and they indicate that the appropriate changes were made. However, Liberty has requested that Qwest provide the complete RSOR data files for the Covad-Colorado 2001 line-sharing for the months of April, May, June, and July for re-auditing to determine if the double counting problem has been cured. Liberty will report back to the ROC-TAG when this review is complete.

DATE: January 11, 2001

To: ROC TAG

FROM: Bob Stright
The Liberty Consulting Group

RE: Qwest's Response to Observation 1027

Summary

Observation 1027 identified various orders that were included and counted in more than one month. Qwest acknowledged the problem and indicated that it occurred when an order was completed in one month and past through completions again in a second month. If an order was passed through with a completed status (CP) in one month and goes through a second completion as a billing post (PP) in another month then it was double counted. Qwest has implemented new code that reviews the record for the previous seven months and if the record has been previously counted then it is omitted from the current month's calculations.

Qwest has run queries to ensure that the duplicate orders identified by Liberty in the May and July RRS results are no longer included. Liberty has reviewed the table included in this response and will perform additional analyses before closing this observation. Liberty has requested 2001 RSOR UBL Covad-Colorado data sets for the months of April, May, June, and July to determine if the code changes properly exclude the duplicate orders. Liberty will report back to the ROC-TAG when this review is complete.

DATE: January 11, 2001

To: ROC TAG

FROM: Bob Sofight
The Liberty Consulting Group

RE: Qwest's Response to Observation 1029

Summary

Observation 1029 noted the exclusion of certain CLEC line sharing orders because the CLEC was unknown. Qwest acknowledged that it was unable to report the majority of line sharing orders in the months of July and going forward for certain CLECs. Qwest indicated that its order writing process did not contain the detail associated with the field used to identify CLECs. Thus, Qwest was not able to report Line Sharing results for the majority of the orders at the CLEC specific level for this time period. Beginning with the 12-01 data and going forward a new detail field will be provided by PANS that should address this problem. Qwest indicated for the interim period from 7-01 to 11-01, a "work around" solution has been implemented. The code change will be reflected in the RRS performance report 1-01 to 12-01.

Liberty believes that Qwest's solutions (interim and permanent) will permit it to properly identify CLECs and related orders for the periods identified and will provide proper reporting. Liberty will request and review the changes to the field details that provide the required information and will report back to the ROC-TAG when that review is complete.

MEMORANDUM

DATE: January 11, 2002

TO: ROC TAG

FROM: Bob Stright
The Liberty Consulting Group

RE: Qwest's Response to Exception 1046

Exception 1046 stated that, during the period being covered by Liberty's data reconciliation, Qwest's systems sometimes truncated the third digit of an order's missed function code while it was being transferred from the Integrated Data Repository Pending data source to the Detailed Data Set used by RRS to calculate OP-15 performance measure results. The Wholesale Regulatory Reporting program looks up the code in a miss code table to determine how the order should be handled. If it fails to find the code, it defaults the miss to Qwest. Thus, all of the LIS trunk orders showing two digit miss codes were being reported as Qwest misses, even though not all of them were.

In its response to the exception, Qwest stated that it had already identified the problem and that the code was corrected in the 8/01 release of performance results effective with the 1/01 – 7/01 data and going forward. Qwest also stated that the problem affected all results produced for OP-15A and OP-15B on all designed service products for the period of 1/01 – 7/01. Qwest attached a document listing the number of affected orders for all but one of the months from January to July 2001. These data show that between 2 percent and 68 percent of the orders excluded because they appeared to be company-caused misses had 2-digit miss codes. Of course, only those orders whose missed function codes began with the letter "C" were excluded in error. Liberty has submitted data requests to assess Qwest's correction of the problem and will report back to the ROC-TAG when the review of that information is complete.

Test Vendor ID:	OBS 1030
Qwest Internal Tracking ID:	TI 794
Observation/Exception Title:	FOC State Code Issue
Test Type/Domain:	Data Reconciliation
Date Qwest Received:	01/02/2002
Initial Response Date:	01/11/2002

Test Incident Summary:

An observation has been identified as a result of the data reconciliation work for Colorado and the PO-5 measure.

Observation:
Qwest failed to report many Firm Order Confirmations for Covad because it did not correctly recognize the state code from the orders.

Background:
Qwest does not report records in cases where it is unable to match the record with a known state code.

Issue:
Covad's information provided to Liberty for data reconciliation included many orders that Qwest did not report for PO-5. Investigation of these orders revealed that Qwest's program had excluded them because of an invalid or missing state code. There was nothing apparently wrong with Covad's orders. Liberty has not completed the data reconciliation of other months and so the extent of this problem is not known.

Impact:
PO-5 for July 2001 did not reflect actual performance associated the timeliness of Firm Order Confirmations.

Qwest Formal Response

Qwest acknowledges that a very small percentage of transactions were not recorded in CRM in July 2001 because IMA was unable to auto-log the state codes for these transactions. Because these transactions were not recorded in CRM, they were not included in Qwest's PO-5 performance reporting. Nonetheless, because the omitted transactions represented only 1% of all PO-5 transactions, and because including these omitted transactions actually improves Qwest's July 2001 PO-5 performance, Qwest believes that its July 2001 PO-5 results did reflect actual performance.

This issue was largely caused by a code break in EDI 6.0 related to Unbundled Loop processing, which in certain situations rendered EDI unable to auto-log the state code for a transaction. By running an ad-hoc report, Qwest determined that for July 2001 this issue impacted 562 PO-5 transactions, region-wide, which is less than 1% of the 90,777 total PO-5 transactions that Qwest reported in July 2001. Qwest met the applicable PO-5 FOC timeliness standard for 561 of the 562 transactions (99.8%) omitted due to this auto-log issue. Including these 562 transactions with the original reported 90,777 transactions would therefore actually improve Qwest's originally reported PO-5 performance. With the movement of customers off of EDI 6.0 in August and September, and with the eventual retirement of EDI 6.0 in December 2001, this issue has been virtually eliminated; there remain a handful of omitted transactions each month. In

September 2001, for instance, only 3 PO-5 eligible LSRs were omitted from Qwest's reported results, which totaled 80,098transactions. 5 transactions were omitted in October out of 104,416, and 11 out of 100,726 in November. While the omission of only a few transactions out of tens of thousands would likely not impact Qwest's PO-5 results one way or the other, Qwest will nonetheless implement a new process to ensure that all PO-5 eligible transactions are recorded in CRM. By the 3rd of each month Qwest will run an Ad Hoc report listing those few transactions that were not auto-logged to CRM due to missing or invalid state codes. Qwest SDCs will use this report to manually populate the state code for these transactions, to ensure that they are captured in CRM and reported in PO-5.

Attachment(s): None