AT&TS Procedural 4/04/02

Motion Re: Section

271 Process

Midcontinents Response

to Qwest's Data Requests

of March 22, 2002

4/16/02

and Midcontinent;
03/25/02 - Corrected Page 1 to Qwest's Brief;
03/25/02 - Qwest's Data Requests to Black Hills FiberCom, Midcontinent and AT&T;
03/27/02 - Black Hills FiberCom's Reply Brief Re: Track A Proceedings;
03/27/02 - Reply to Qwest's Response to Motions filed by Black Hills FiberCom and Midcontinent Regarding Qwest's Section 271 Application;
03/28/02 - Order Admitting Nonresident Attorney (Jonathan Frankel);
04/03/02 - Rebuttal Affidavit of Larry B. Brotherson;
04/03/02 - Seven Rebuttal Affidavits of Margaret S. Bumgarner and Request for Confidential Treatment of Information;
04/03/02 - Three Rebuttal Affidavits of Thomas R. Freeberg;
04/03/02 - Affidavit of Mary Ferguson LaFave;
04/03/02 - Rebuttal Affidavit of Jean M. Liston;
04/03/02 - Rebuttal Affidavit of Lynn M. V. Notarianni;
04/03/02 - Rebuttal Affidavit of Mark S. Reynolds;
04/03/02 - Affidavit of Judith M. Schultz;
04/03/02 - Rebuttal Affidavit of Marie E. Schwartz;
04/03/02 - Four Rebuttal Affidavits of Lori A. Simpson;
04/03/02 - Two Rebuttal Affidavits of Karen A. Stewart;
04/03/02 - Pre-Filed Testimony and Data Reconciliation Reports of Robert L. Stright;
04/03/02 - Rebuttal Affidavit of David L. Teitzel;
04/03/02 - Reply Affidavit of Michael G. Williams;
04/04/02 - Order Granting Motions; Order Amending Procedural Schedule and Extending Hearing Dates;
04/04/02 - AT&T's Procedural Motion Regarding the Section 271 Process;
04/10/02 - Errata to the Affidavit of Kenneth L. Wilson;
04/12/02 - Statement of Supplemental Authority Regarding Qwest's Performance Assurance Plan;
04/15/02 - Qwest's Proposed Order of Witnesses;
04/16/02 - AT&T's Motion for Extraordinary Protective Order;
04/16/02 - Midcontinent's Request for Confidential Treatment of Information;
04/16/02 - Midcontinent's Response to Qwest's Data Requests of March 22, 2002;
04/17/02 - Supplemental Prefiled Testimony of W. Tom Simmons;
04/19/02 - Orders Admitting Nonresident Attorney (Lynn Stang, Robert Cattanach, John Devaney, Kara M. Sacilotto, Mary Rose Hughes, Shannon Heim, William Richardson, Charles Steese, Blair Rosenthal and Andrew Crain);
04/19/02 - Black Hills' Responses to Qwest's Data Requests for Black Hills;
04/22/02 - Revised Order of Witnesses;
04/22/02 - Affidavits of Barbara Brohl and Dennis Pappas;
04/22/02 - Supplemental Affidavit of Karen A. Stewart;
04/22/02 - Response to AT&T's Motion for Extraordinary Protective Order;
04/22/02 - Order Admitting Nonresident Attorney to Practice (Steven H. Weigler);
04/22/02 - Motion to Strike Supplemental Testimony, Public Exhibits and Confidential Exhibits of W. Thomas Simmons Received April 18, 2002;
04/22/02 - Motion Regarding Proceeding on Third Party Testing of Qwest's OSS;
04/22/02 - Supplemental Affidavit of Larry B. Brotherson;
04/24/02 - Additional Statement of Supplemental Authority Regarding Qwest's Performance Assurance Plan;
04/25/02 - AT&T's Request for Confidential Treatment of Information;
04/25/02 - AT&T's Responses to Qwest's Requests for Information;
04/29/02 - Qwest's Submission of Alternative QPAP Proposals;
04/29/02 - QPAP Approved as Amended;
04/29/02 - Qwest's Motion to Enter AT&T's Track A Data Request Response into Evidence;
05/01/02 - Qwest's November 2001 through February 2002 Performance Data as

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF SOUTH DAKOTA

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

AT&T'S PROCEDURAL MOTION REGARDING THE §271 PROCESS

AT&T hereby files its procedural motion regarding the §271 process in South Dakota requesting that the South Dakota Public Utilities Commission ("the Commission") allow its witnesses to appear at a relative time certain via telephone in order to be subject to cross-examination. In support of its Motion, AT&T states as follows:

Pursuant to the Commission's December 20, 2002 Order, AT&T filed testimony on the docket. AT&T's testimony included a detailed explanation of the issues it had with Qwest's application and a narrative of the reasons therefore. On March 28, 2002, the Commission commenced a meeting to discuss among other things "how shall the Commission schedule issues and/or witnesses for the hearings." As the other issues related to this docket took up a significant amount of time, Commission Staff Karen Cremer indicated that the parties would get together the week of April 1, 2002 to discuss how the hearing would commence and report back to the Commission.

On April 3, 2002, Qwest, through counsel, presented a "Proposed Order of Witnesses" indicating with asterisks the relatively few witnesses that were flexible (*see* Exhibit A). That same day, the parties met to discuss procedure. No party, including AT&T, appeared to object to Qwest's Proposed Order of Witnesses in which Qwest would be allowed to present its fifteen witnesses in the order it deemed fit. Also, no

party was opposed to Midcontinent and Blackhills Fibercom presenting their witnesses for cross examination at a time and date certain. However, when AT&T requested times certain to provide its two witnesses to present their testimony and/or answer any questions that the commission or any other party may have, Qwest and Commission staff took issue indicating that it would disrupt the flow of the presentation. Accordingly, staff's and Qwest's proposal was that AT&T have its witnesses present for the two-and-one-half week hearing to present its testimony piecemeal on an issue by issue basis. Staff and Qwest indicated to AT&T that AT&T was different because it had more issues.

AT&T will not be able to adhere to this procedure without significant hardship. First, the Commission has decided to hold this hearing during a time period that Washington State is holding numerous proceedings. As AT&T and its attorneys and witnesses continue to have significant participation in Washington, AT&T has to make accommodations to participate in two hearings at the same time.

Second, unlike Qwest, the proponent of this application, AT&T does not have unlimited resources to fund a two and one half week proceeding, especially considering that it has already expended significant resources in South Dakota to provide detailed testimony.

AT&T notes that there is no prejudice to any party if AT&T presents its witnesses at a given time after Qwest presents its case, as opposed to issue by issue. AT&T's detailed testimony has already been submitted.

For the above stated reasons, AT&T would propose that Midcontinent's proposal filed today, April 4, 2002, be adopted. Due to the conflict in Washington, AT&T would also request that its witnesses be present by telephone with its counsel present in Pierre.

Respectfully submitted on April 4, 2002.

AT&T COMMUNICATIONS
OF THE MIDWEST, INC.

John S. Lovald
Olinger, Lovald, Robbennolt & McCahren
PO Box 66
Pierre, South Dakota 57501
(605) 224-8851

Steven H. Weigler
Mary B. Tribby
AT&T Law Department
1875 Lawrence Street, Suite 1575
Denver, Colorado 80202
(303) 298-6957

Exhibit A

PROPOSED ORDER OF WITNESSES

WITNESS	TOPIC
** Connotes appearance order of witness "flexible"	
1. Teitzel**	Public Interest/Track A
preferred first because of "overview" aspect	
2. Notariani	OSS
required in first day or 2 of hearing	
3. Schultz	CMP/SATE
OSS and CMP/SATE go together	
4. Bumgarner	CI#1Collocation
	CI#9 Numbering Admin (Not Challenged)
	CI#10 Signaling/ Databases
	CI#11 Number Portability
	CI# 12 Local Dialing Parity(Not Challenged)
5. Freeberg	CI#1 Interconnection
	CI#13 Reciprocal Compensation
	CI#3 Poles, Ducts, ROW
6. Liston	CI#4 Unbundled Local Loops
7. Simpson	
	CI#6 Unbundled Local Switching
	CI#7 911, DA, Operator Svcs
	CI#8 White Pages Listings
	CI#14 Resale
	CI#2 UNE-P
8. Stewart	CI#2 Access to UNEs
	CI#2 Emerging Services/EELS
	CI#5 Unbundled Local Transport

9. LaFave	CI#5 Unbundled Local Transport
10. Williams	PIDs/Data Actuals
11. Stright	Data Reconciliation

PIDs/Data Actuals and Data Reconciliation go together

12. Brotherson**	General Terms
13. Brunsting **	Section 272
14. Schwartz **	Section 272
15. Reynolds**	QPAP
16. Toll**	Public Interest/Overview

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© OF THE TELECOMMUNICATIONS ACT OF 1996	**Docket No. TC01-165**

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have served a true and correct copy of AT&T'S PROCEDURAL MOTION REGARDING THE §271 PROCESS on the date designated below, via first class mail, postage pre-paid, upon the following:

Ms. Colleen Sevold
Manager-Regulatory Affairs
QWEST Corporation
125 South Dakota Avenue 8th Floor

Mr. Thomas J. Welk
Attorney at Law
Boyce Murphy McDowell & Greenfield
PO Box 5015
Sioux Falls, South Dakota 57117-5015

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

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

Mr. Ted Smith
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QWEST Corporation
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Ms. Lynn A Stang
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Denver CO 80202

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

Dated this 17th day of April, 2002.

JOHN S. LOVALD
Olinger, Lovald, Robbennolt, & McCahren
P.O. Box 66
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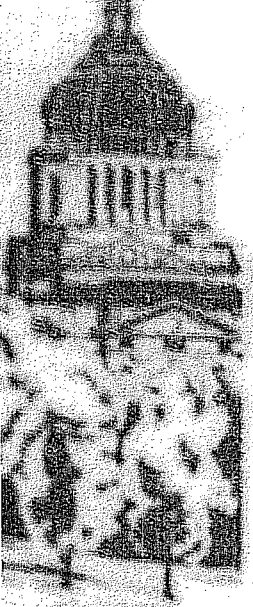
(605) 224-8851



South Dakota Public Utilities Commission

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

DATE: April 5, 2002

TO: All parties in Docket TC01-165

FROM: Rolayne Ailts Wiest, SDPUC

RE: Scheduling of witnesses

On April 4, 2002, the South Dakota Public Utilities Commission received comments from all of the parties regarding the scheduling of witnesses for the 271 hearing. At its March 28, 2002 meeting, I expressed my preference that the testimony be grouped by issues, and that each party would have its witnesses testify following a particular issue or issues. However, after a review of the comments, it would appear that the solution that would accommodate most of the parties' preferences is to have Qwest put on all of its witnesses first, followed by Staff and Intervenors, and then Qwest would have the opportunity for rebuttal. Qwest may decide on its own how it wishes to schedule its witnesses. With respect to Intervenors and Staff, I would ask that they decide among themselves what order works best for their witnesses. For example, it may be that AT&T should go last given that it will be at Washington hearings through April 30, 2002. With respect to AT&T's request that its witnesses be allowed to appear via telephone, I am hopeful that allowing AT&T to put on its case last will make this request moot.

Unless I hear from any of the parties by the morning of April 9, 2002, I will assume this is satisfactory. By April 11th, I would appreciate it if Staff and Intervenors would let me know the order of the parties following Qwest's presentation of its witnesses. Thank you all for your cooperation.

101 S. Capitol Boulevard, Suite 1900
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April 5, 2002

MARY S. HOBSON
Direct Dial
(208) 387-4277
email: MSHOBSON@stoel.com

Ms. Roberta Mills-West, General Counsel
Public Utilities Commission
State Capitol Building
Pierre, South Dakota 57501

Dear Roberta:

Following review of the Commission's Order of April 4, 2002 concerning Qwest's evidence on checklist compliance and schedule for supplemental evidence, Qwest believes it could be helpful for it to clarify its understanding of how the record is to be supplemented.

First, in accordance with Qwest counsel John Munn's statements at the Commission's March 28 meeting, Qwest has complied with the Commission's directions to supplement the record regarding its checklist compliance (as per Midcontinent's Motion for Definition of Track A Analysis) with its interconnection agreement with KMC Telecom V, Inc., which is attached to the Rebuttal Affidavit of Larry Brotherson as Exhibit LBB-GTC-1. As Qwest stated at the Commission meeting, and as various Qwest witnesses describe in their rebuttal affidavits, the KMC agreement is an SGAT opt-in that is in every relevant respect *identical* to the SGAT discussed in Qwest's direct and rebuttal affidavits, and every reference to a specific provision of the SGAT should also be taken as a reference to the identical provision of the KMC agreement. Accordingly, Qwest now relies on all of the evidence contained in the direct and rebuttal affidavits of its witnesses now on file with the Commission to demonstrate its compliance with section 271.

Midcontinent originally moved this Commission for permission to supplement its testimony in the event that such supplementation was required by the Commission's resolution of its Motion. Qwest believes, therefore, that the supplemental testimony of Staff and

STOEL RIVES LLP

ATTORNEYS

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	Name:	Fax No.	Company/Firm:	Office No.
TO:	ROBLAYNE WIEST	605-773-3809	SD PUC	605-773-3201
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	Karen Cremer	605-773-3809	SD PUC	605-773-3201
	Steven Weigler	303-298-6301	AT&T	303-298-6957
	David A. Gerdes	605-224-6289	Midcontinent	605-224-8803
	Gregory J. Bernard	605-348-5852	Black Hills Fiber	605-348-7516

	Name:	Sender's Direct Dial:
FROM:	Mary S. Hobson	(208) 387-4277

Client: Matter:

DATE: April 9, 2002

No. of Pages (including this cover):

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In case of error call the fax operator at (208) 389-9000.

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COMMENTS: Please see attached. Mary

STOEL RIVES LLP

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April 9, 2002

MARY S. HOBSON
Direct Dial
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email: MSHOBSON@stoel.com

Ms. Roxanne Ailts Wiest, General Counsel
Public Utilities Commission
State Capitol Building
Pierre, South Dakota 57501

Dear Roxanne:

Thank you for your memo of April 5. What you have proposed for scheduling is acceptable to Qwest. We expect that our case will fill the week of April 22. I will attempt to get out a tentative order of witnesses as soon as I can to assist others with their preparation. However, due to the fact we were anticipating the "issue-by-issue" approach that you originally suggested, I need to recheck schedules before I can suggest a witness order for Qwest.

Please be advised, however, that Qwest expects to take longer than is customary with its witnesses' summaries. Due to the complexity of the issues addressed by many of these witnesses, we believe the summary phase of the live testimony will provide a crucial part of the context for what follows. On average, I expect we will take approximately thirty minutes for each summary.

In anticipating how to schedule witnesses it would also be very helpful if we had some notion of how long the cross-examination will take. Would you please ask the parties if they could provide estimates of the length of their anticipated cross? Qwest will be willing to provide the same kind of information to the other counsel. It is not our intention to limit anyone or attempt to bind counsel to their estimates, but it would be very helpful to have a general idea how long the witnesses will be on the stand.

Thank you for your consideration of these matters.

Very truly yours,

Mary S. Hobson
Stoel Rives
Attorney for Qwest Corporation

cc: Parties of Service

Oregon
Washington
California
Utah
Idaho

Rebecca B. DeCook
Senior Attorney

Room 1575
1875 Lawrence Street
Denver, CO 80202
303 298-6357

April 9, 2002

RECEIVED

APR 10 2002

SOUTH DAKOTA PUBLIC UTILITIES COMMISSION

Via Overnight Mail

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

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

Dear Ms. Elofson:

Enclosed for filing are the original and ten copies of an errata to the Affidavit of Kenneth L. Wilson Regarding Checklist Item 4 – Unbundled Loops and Checklist Item 11 – Local Number Portability. AT&T is filing this errata to correct formatting and citation errors contained in the original affidavit filed on March 18, 2002. There have been no substantive changes to the affidavit. In addition, there are no changes to the originally-filed exhibits to this affidavit.

Please call me if there are any questions.

Sincerely,

Rebecca B. DeCook

Rebecca B. DeCook

RBD:jb

Enclosure

cc: Service List

CERTIFICATE OF SERVICE

I hereby certify that on this 9th day of April 2002, the original and 10 copies of AT&T's Errata to the Affidavit of Kenneth L. Wilson Regarding Checklist Item 4 and Checklist Item 11 in Docket No. TC01-165, were sent by overnight delivery service to:

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

and a true and correct copy was sent by U.S. Mail and e-mail on April 9, 2002 addressed to:

Colleen Sevold
Manager – Regulatory Affairs
QWEST Corporation
125 South Dakota Avenue, 8th Floor
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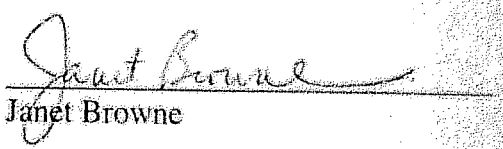

Janet Browne

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

AFFIDAVIT

OF

KENNETH L. WILSON

REGARDING

CHECKLIST ITEM 4 – UNBUNDLED LOOPS

AND CHECKLIST ITEM 11 – LOCAL NUMBER PORTABILITY

ON BEHALF OF

AT&T

March 18, 2002

A. INTRODUCTION AND QUALIFICATIONS

My name is Kenneth L. Wilson, and I am a senior Consultant and Technical Witness with Boulder Telecommunications Consultants, LLC. My business address is 970 11th Street, Boulder, Colorado, 80302. I am submitting this affidavit on behalf of AT&T.

My education and relevant work experience are as follows. I received a Bachelors of Science in Electrical Engineering from the University of Illinois in 1972, and I received a Masters of Science in Electrical Engineering in 1974. In addition, I have completed all the course work required to obtain my Ph.D. in Electrical Engineering from the University of Illinois. The course work was completed in 1976.

For 15 years before coming to Denver, I worked at Bell Labs in New Jersey in a variety of positions. From 1980 through 1982, I worked as a member of the network architecture and network planning team at Bell Labs for AT&T's long distance service. From 1983 through 1985, I was a member of the first AT&T Bell Labs cellular terminal design team. From 1986 through 1992, I led a Bell Labs group responsible for network performance planning and assurance for AT&T Business Markets. From 1992 through 1994, I was a team lead on a project to reduce AT&T's capital budget for network infrastructure.

From 1995 through the spring of 1998, I worked in AT&T's Local Services Organization as the Business Management Director, leading one of the groups responsible for getting AT&T into the local market in U S WEST's 14-state territory. I was the senior technical manager in Denver working on planning AT&T's local network, OSS interface architectures and the associated negotiations for AT&T to accomplish

these goals. In this position, I was the lead negotiator for AT&T in establishing interconnection contracts with U S WEST (now Qwest) in its 14 states.

Since Spring of 1998, as a consultant and expert, I have evaluated technical issues for a number of companies in complaints, anti-trust cases and § 271 compliance proceedings. I have represented AT&T on all fourteen § 271 checklist items in five different cases, including all of the § 271 cases in Qwest's region that have been considered to date. This representation involved attending over 40 workshops and hearing sessions to address various § 271 checklist issues. A copy of my curriculum vitae is incorporated into this document as Attachment A. This attachment also includes a list of testimony and expert reports I have submitted as well as my depositions and court appearances during last 10 years.

B. PURPOSE OF AFFIDAVIT

Because of my technical background, my experience in bringing AT&T into the local markets in Qwest's region, and my experience in other § 271 proceedings in Qwest's region relating to § 271 checklist items, AT&T has asked me to review the relevant documents in this case and assist it in assessing Qwest's compliance with the § 271 checklist obligations and presenting AT&T's concerns regarding Qwest's compliance. To that end, I have reviewed Qwest's SGAT, as well as materials submitted by AT&T and Qwest in other jurisdictions regarding these same issues and I have conducted interviews with AT&T operations personnel.

Based upon my review of this material, I have identified a number of areas where Qwest's compliance is deficient on Checklist Item 4 and Checklist Item 11. The following paragraphs give detailed explanations of the basis for this conclusion.

C. UNBUNDLED LOOP.

1. Legal Requirements.

Section 271(c)(2)(B)(iv) of the Act, item 4 of the competitive checklist, requires that a BOC provide "[l]ocal loop transmission from the central office to the customer's premises, unbundled from local switching or other services."[1] The FCC has defined the loop as a transmission facility between a distribution frame, or its equivalent, in an incumbent LEC central office, and the demarcation point at the customer premises.[2] This definition includes different types of loops, including "two-wire and four-wire analog voice-grade loops, and two-wire and four-wire loops that are conditioned to transmit the digital signals needed to provide service such as ISDN, ADSL, HDSL, and DS1-level signals."[3]

In order to establish that it is "providing" unbundled local loops in compliance with § 271(c)(2)(B)(iv), the FCC has stated that Qwest must demonstrate that it has a concrete and specific legal obligation to furnish loops and that it is currently doing so in the quantities that competitors demand and at an acceptable level of quality.[4]

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[1] 47 U.S.C. § 271(c)(2)(B)(iv).

[2] *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, First Report and Order, CC Docket No. 96-98, FCC 99-325, ¶ 380 (released August 8, 1996), ("*Local Competition Order*"); *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, Third Report and Order, CC Docket No. 96-98, FCC 99-238, ¶¶ 166 - 167, n. 301, (released November 5, 1999) ("*UNE Remand Order*") (retaining definition of the local loop from the Local Competition First Report and Order, but replacing the phrase "network interconnection device" with "demarcation point," and making explicit that dark fiber and loop conditioning are among the features, functions and capabilities of the loop).

[3] *Local Competition Order*, ¶ 380; *UNE Remand Order*, ¶¶ 166 - 167.

[4] *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 No. 99-295, FCC 99-404, ¶ 269 (released December 22, 1999) ("*BANY 271 Order*"); *Application of BellSouth Corporation Pursuant to § 271 of the Communications Act of 1934, As Amended, To Provide In-Region InterLATA Services in Louisiana*, CC Docket No. 98-121, FCC 98-271, ¶ 54 (released October 13, 1998), ("*BellSouth Second Louisiana 271 Order*").

In addition, the FCC orders state that Qwest must provide access to any functionality of the loop requested by a competing carrier unless it is not technically feasible to condition the loop facility to support the particular functionality requested.[5] In order to provide the requested loop functionality, such as the ability to deliver ISDN or xDSL services, Qwest may be required to take affirmative steps to condition existing loop facilities to enable competing carriers to provide services not currently provided over the facilities, with the competing carrier bearing the cost of such conditioning. Qwest must provide competitors with access to unbundled loops regardless of whether Qwest uses integrated digital loop carrier (IDLC) technology or similar remote concentration devices for the particular loops sought by the competitor. Again, the costs associated with providing access to such facilities may be recovered from competing carriers.[7]

In the *UNE Remand Order*, the FCC concluded that "LECs must provide access to unbundled loops, including high-capacity loops, nationwide" and that "requesting carriers are impaired without access to loops, and that loops include high-capacity lines, dark fiber, line conditioning, and certain inside wire."[8]

Accordingly, the FCC redefined the "local loop," stating that:

> The local loop network element is defined as a transmission facility between a distribution frame (or its equivalent) in an incumbent LEC central office and the loop demarcation point at an end-user customer premises, including inside wire owned by the incumbent LEC. The local loop network element includes all features, functions, and capabilities of such transmission facility. Those features, functions, and capabilities include, but are not limited to, dark fiber, attached electronics (except

---

[5] *BANY 271 Order*, ¶ 271; *BellSouth Second Louisiana 271 Order*, ¶ 187.
[6] *BANY 271 Order*, ¶ 271.
[7] *Local Competition Order*, ¶ 384.
[8] *UNE Remand Order*, ¶ 165.

> those electronics used for the provision of advanced services, such as Digital Subscriber Line Access Multiplexers), and line conditioning. The local loop includes, but is not limited to, DS1, DS3, fiber, and other high capacity loops.[9]

The FCC stated that its intent in adopting this definition is to "ensure that the loop definition will apply to new as well as current technologies..."[10]

As a result, the termination of the loop must be clearly defined in the manner set forth by the FCC in the *UNE Remand Order*. In addition, the FCC concluded that defining the loop termination point as the demarcation point is preferable to the NID "because, in some cases, the NID does not mark the end of the incumbent's control of the loop facility."[11] Citing § 68.3 of its rules, the FCC determined that:

> the demarcation point is defined by control; it is not a fixed location on the network, but rather a point where an incumbent's and a property owner's responsibilities meet. The demarcation point is often, but not always, located at the minimum point of entry (MPOE), which is the closest practicable point to where the wire crosses a property line or enters a building. In multiunit premises, there may be either a single demarcation point for the entire building or separate demarcation points for each tenant, located at any of several locations, depending on the date the inside wire was installed, the local carrier's reasonable and nondiscriminatory practices, and the property owner's preferences. Thus, depending on the circumstances, the demarcation point may be located at the NID, outside the NID, or inside the NID.

In addition, Qwest must provide high capacity loops, including "DS1, DS3, fiber, and other high capacity loops."[12] The FCC determined that "high-capacity loops retain the essential characteristic of the loop: they transmit a signal from the central office to the subscriber, or vice versa."[13]

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[9] 47 C.F.R. § 319(a)(1).
[10] *UNE Remand Order*, ¶ 167.
[11] *Id.*, ¶ 168.
[12] 47 C.F.R. § 51.319(a)(1)
[13] *UNE Remand Order*, ¶ 176.

The FCC stated that the definition of the loop includes "attached electronics including multiplexing equipment used to derive the loop transmission capacity" because the definition of a network element is not limited to facilities, but includes features, functions, and capabilities.[14] This expanded definition requires the RBOC to provide all types of loops, including, DS1 and DS3 loops and fiber loops, which would include OC3 and OC12 loops, at a minimum.

In addition, because the FCC drafted its definition to specifically encompass new technologies, the SGAT must allow CLECs to obtain other "fiber" and "high capacity" loops as new technology emerges.

For some disputed issues, Qwest has asserted that because another RBOC is provisioning loops, line splitting or NIDs in a certain manner and that RBOC was awarded § 271 relief, that determination is dispositive on the issue and the matter should be resolved in Qwest's favor, even if no party raised that particular issue. That is not the case. If no party raised the issue before the FCC, the FCC had no opportunity to confront the issue. Therefore, there is no binding ruling by the FCC on that issue simply by virtue of the FCC awarding the RBOC § 271 authority. In order for the FCC's § 271 orders to have precedental effect, the FCC must have confronted and ruled on a particular disputed issue.

2. Disputed Issues on Loops.

Qwest's provisioning of unbundled loops and its SGAT provisions related to unbundled loops are insufficient to demonstrate compliance. There are numerous examples of evidence that Qwest's performance is unsatisfactory in provisioning

[14] *Id.*, ¶ 175.

unbundled loops and where Qwest policy positions are contrary to the Act, FCC Orders and will deter the development of competition. Until Qwest's performance and its position on the disputed issues are brought into compliance with the Act and FCC Orders, Qwest cannot be deemed to be in compliance with Checklist Item 4.

a. Obligation to Build.

The Act states that Qwest and other incumbent local exchange companies ("LECs") must provide access to UNEs "on rates, terms and conditions that are just, reasonable, and nondiscriminatory."[15] Qwest currently constructs facilities for customers requesting service under the terms and conditions established in its federal and state tariffs. Qwest's SGAT permits Qwest to refuse to provide service to a requesting CLEC if no facilities are available, except under very narrow conditions.[16]

Specifically, Qwest has stated that it will only build DS0 loops for CLECs if Qwest has an obligation to build under its provider-of-last-resort obligations.[17] This offer is limited to the "first voice grade line per address." For all other loops, Qwest will not add capacity to its network to meet CLEC demand.[18] Qwest's SGAT does not go far enough and does not comply with the Act and the FCC's rules. Qwest connects its carrier-of-last-resort obligations to extend only to basic residential and business service. Qwest, however, provides far more services than these services to Such Dakota customers, including DS-1, DS-3, and other high capacity circuits. The language in Qwest's SGAT would permit Qwest to deny a CLEC's request to provision these circuits

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[15] 47 U.S.C. § 251(c)(3).

[16] *See, e.g.*, SGAT §§ 9.1.2 & 9.23.1.4.4. *See also*, Exhibit KLW-1, policy statement that was sent to CLECs prior to the SGAT revisions described herein outlining Qwest's change in policy.

[17] *See* SGAT, § 9.1.2; Exhibit KLW-1.

[18] *Id.*

as UNEs due to lack of facilities, when Qwest's tariffs, price lists, or contracts would obligate Qwest to construct those same facilities for its retail customers. In fact, the CLEC itself could require Qwest to construct those facilities if the CLEC ordered the services under Qwest's tariff or price list services, rather than as UNEs. Such blatant discrimination violates federal law.

This was the conclusion reached by the Washington Commission in its Workshop 2 Order, where Qwest was required to revise its SGAT to reflect that Qwest has an obligation to build UNES in any areas currently served by Qwest's network.[19] In fact, the Initial Order on the Loop Workshop in Washington states that the Workshop 2 ruling applies equally to loops.[20]

The FCC has stated that:

> [t]he duty to provide unbundled network elements on "terms, and conditions that are just, reasonable, and nondiscriminatory" means, at a minimum, that whatever those terms and conditions are, they must be offered equally to all requesting carriers, and where applicable, they must be equal to the terms and conditions under which the incumbent LEC provisions such elements to itself.[21]

The FCC's rules also require that the ILEC provision network elements to CLECs on terms and conditions no less favorable than the terms and conditions under which the ILEC provides such elements to itself.[22]

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[19] *In re Investigation Into U S WEST's Compliance With § 271*, WUTC Docket Nos. UT-003022 & 003040, Twenty-Fourth Supplemental Order ¶¶ 79 -80 (December 20, 2001) ("*Washington Final Order on Workshop 3*").

[20] *In re Investigation Into U S WEST's Compliance With § 271*, WUTC Docket Nos. UT-003022 & 003040, Twenty-Eighth Supplemental Order ¶¶ 20-22 (March 12, 2002) ("*Washington Final Order on Workshop 4*").

[21] *Local Competition Order*, ¶ 315. In an accompanying footnote, the FCC stated that "[t]he term 'provisioning' includes installation." *Id.*, n. 684.

[22] 47 C.F.R. § 313(b).

In its *Local Competition Order*, the only limitation the FCC places on the ILEC's obligation relates to unbundled interoffice facilities. In that Order, the FCC stated:

> Rural Telephone Coalition contends that incumbent LECs should not be required to construct new facilities to accommodate new entrants. We have considered the economic impact of our rules in this section on small incumbent LECs. In this section, for example, we expressly limit the provision of unbundled interoffice facilities to existing incumbent LEC facilities. We also note that Section 251(f) of the 1996 Act provide relief for certain small LECs from our regulations under § 251.[23]

While the FCC recognized the economic impact on small ILECs of having to build transport and explicitly held that all ILECs need not build transport, it made clear that for all other network elements, § 251(f) provides the relief for *rural* ILECs from any economic impact imposed on the *rural* ILECs as a result of having to build network elements for CLECs.[24] The clear inference to be drawn from this portion of the Order is that, with the exception of interoffice transport, the ILECs do have an obligation to construct UNEs to meet CLEC demand.

As further evidence of the FCC's intent, when citing to this section of its order in the *UNE Remand Order*, the FCC states:

> In the *Local Competition First Report and Order*, the Commission limited an incumbent LEC's transport unbundling obligation to existing facilities, and did not require incumbent LECs to construct facilities to meet a requesting carrier's requirements where the incumbent LEC has not deployed transport facilities for its own use. Although we conclude that an incumbent LEC's unbundling obligation extends throughout its ubiquitous transport network, including ring transport architectures, we do not require incumbent LECs to construct new transport facilities to meet specific competitive LEC point-to-point demand requirements for facilities that the incumbent LEC has not deployed for its own use.[25]

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[23] *Id.*, ¶ 451. *See also, UNE Remand Order*, ¶ 324.

[24] Section 251(f) applies only to rural ILECs; therefore, ILECs such as Qwest cannot seek exemption from it obligation to build under § 251(f).

[25] *UNE Remand Order*, ¶ 324.

Specifically, in this paragraph, the FCC concludes that "the ILEC's unbundling obligation extends throughout its ubiquitous transport network." The inescapable conclusion is that the only limitation on the ILEC's obligation to build is for interoffice facilities to existing facilities. For all other UNEs, Qwest has an obligation to build to meet CLEC demand throughout its service territory.

In addition, the FCC has held that the ILECs have an obligation to replace UNEs that are being provided to CLECs.[26] An obligation to replace UNEs is essentially the same thing as an obligation to build UNEs. Finally, the FCC's rules also require that the ILEC provision network elements to CLECs on terms and conditions no less favorable than the terms and conditions under which the ILEC provide such elements to itself.[27]

Nothing in the Eighth Circuit's ruling in *Iowa Utilities Board* appears to require a different result. Qwest has stated under *Iowa Utilities Board*, it is not required to build an unbuilt "superior network." The Eighth Circuit's superior network statement was made in the context of the Court's rejection of the FCC's superior quality rules – rules that required an incumbent LEC, if requested by the CLEC, to provide UNEs at a level of quality superior to that which the incumbent LEC provides to itself. That is not the nature of the CLECs' request here. CLECs are requesting that Qwest augment its existing network with added capacity - the same type of facilities it provides to its existing retail customers. That certainly can't be characterized as a superior network.

The Commission, therefore, should refuse to approve Qwest's SGAT, or permit Qwest to rely on the SGAT for purposes of § 271, until Qwest revises the SGAT to require Qwest to construct UNEs for CLECs throughout its service territory.

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[26] *Local Competition Order*, ¶ 268; 47 C.F.R. § 51.309(c).

[27] 47 C.F.R. § 313(b).

An additional reason that Qwest must be required to build facilities for CLECs is that CLECs are already paying for the build of new facilities in the prices they pay for UNEs. Fill factors are used in the calculation of UNE prices. A fill factor is used to ensure that sufficient capacity is always available. Once a certain percentage fill is achieved, a new facility is built. If a fill factor of 50% were used in the calculation of UNE prices, then the CLEC is being charged for a whole facility when only 50% of the facility's total capacity is being used . The effect of using fill factors, especially low fills, is that the CLEC is being charged to build new facilities in order to ensure that the fill level remains constant and Qwest does not run out of capacity. The fact that fill is included in UNE pricing means that CLECs are being charged for building new capacity, yet because of Qwest's new policy, only Qwest would be the beneficiary of that new capacity. That is inappropriate and a clear basis for rejecting Qwest's SGAT language in § 9.1.2.

Finally, with respect to high capacity loops, Qwest has argued that these loops are subject to competition from other carrier's services.[28] In fact, Qwest has asserted that AT&T and WorldCom are routinely building such facilities and have a larger share of some segments of the high-capacity market than Qwest. Of course, the evidence that Qwest relies upon for this assertion shows that AT&T and WorldCom rely on Qwest for the facilities they use to provide such high capacity services in Qwest's region and that Qwest has a monopoly foothold on the capacity for the wholesale side of this market.[29]

At the same time Qwest informed CLEC's of its new build policy, Qwest also indicated that it had altered its policy on held orders. Specifically, Qwest has now

[28] WA Transcript, p. 4198 (Exhibit KLW-2).
[29] WA Transcript, pp. 4252-53 (Exhibit KLW-2).

determined that orders that are currently in held status will be rejected if there are no facilities and no current construction jobs planned.[30] For new services orders placed by CLECs, if no facilities are available and no construction jobs are planned, the LSR will be rejected, rather than place the order in a held order status.[31]

Numerous CLECs expressed concerns with this new policy for several reasons. First, the policy appears to be primarily designed to alleviate Qwest's PID performance, creating the false perception that Qwest is provisioning network elements, in particular loops, at a quantity that CLECs may demand.[32] Clearly, that would not be the case as Qwest would be rejecting and not counting CLEC demand in its PID data, while the retail order would be accepted and, because no facilities are available, would count such order as a hit against Qwest's retail performance. Second, Qwest has not invoked a similar policy for its retail customers.[33] Qwest is discriminating against its wholesale customers by refusing to keep track of CLEC held orders and failing to take those held orders into account in developing its construction plans.

Third, CLECs questioned Qwest's ability to get in queue for new facilities ahead of CLECs on the basis that Qwest will always possess superior and advanced knowledge regarding its own build plans. Qwest agreed to add a provision to the SGAT that would provide CLECs with notice of major facilities build that states as follows:

> Qwest will provide CLEC notification of major loop facility builds through the ICONN database. This notification shall include the identification of any funded outside plant engineering job that exceeds $100,000 in total cost, the estimated ready for service date, the number of pair or fibers added, and the location of the new facilities (e.g., distribution

[30] Exhibit KLW-1; SGAT § 9.1.2.1.
[31] Exhibit KLW-1; SGAT § 9.1.2.1; WA Transcript, pp. 4226-27 (Exhibit KLW-2).
[32] WA Transcript, pp. 4227-28, 4237-38 (Exhibit KLW-2).
[33] Id., pp. 4227, 4241 (Exhibit KLW-2).

> Area for copper distribution, route number for copper feeder, and termination CLLI codes for fiber). CLEC acknowledges that Qwest does not warrant or guarantee the estimated ready for service dates. CLEC also acknowledges that funded Qwest outside plant engineering jobs may be modifies or cancelled at any time.

However, this proposed SGAT revision does not completely alleviate CLEC concerns that Qwest will be able to give its customer preferential treatment in the design, development and access to future facilities builds initiated by Qwest.

Accordingly, the language "provided that facilities are available" should be stricken from SGAT §§ 9.2.4.3.1.2.4, 9.23.1.4, 9.23.1.5, 9.23.1.6 and 9.23.3.7.2.12.8 and any other conforming changes required to remove any limitation on Qwest's obligation to build and that permit Qwest to reject LSRs for no facilities available, rather than allowing such orders to go held. Furthermore, SGAT § 9.19 should be amended. The first sentence of this section should be amended to read:

> Qwest will conduct an assessment of any request which requires construction of network capacity, facilities, or space for access to or use of unbundled loops.

The Commission should also make clear that under § 9.1.2 of the SGAT and related provisions, Qwest is obligated to build UNEs, except dedicated transport, on a nondiscriminatory basis at cost-based rates under § 252(d).

b. Qwest Must Refund Conditioning Charges When Qwest's Performance Causes the End User to Abandon the CLEC/DLEC.

In the SGAT, Qwest seeks to impose a charge for conditioning unbundled loops. AT&T disputes this charge on the grounds that Qwest is already recovering the cost of conditioning in its UNE loop charge.[34]

[34] WA Transcript, pp. 4290-91 (Exhibit KLW-2).

In addition, AT&T contends that if Qwest is permitted to assess a separate conditioning charge, it should be required to refund such charge when Qwest's performance causes the end user to abandon the CLEC/DLEC. Throughout the 271 workshops, AT&T and other CLECs raised concerns regarding the quality and timeliness of delivery of conditioned unbundled loops. Under the terms of Qwest's SGAT, the CLEC end users' experience could be adversely affected by Qwest's poor performance, causing the end user to abandon the CLEC, and the CLEC would still be obligated to pay the conditioning charges.[35]

Initially, AT&T proposed language that would require Qwest to refund to the CLEC a pro rata portion of the conditioning charges if the customer migrated away from the CLEC within a certain period after the service was requested, irrespective of Qwest's fault. As a result of discussions in workshops, AT&T now proposes the following language, which could be a new § 9.2.2.4.1 in the SGAT:

> 9.2.2.4.1 If CLEC's end user customer, for which CLEC has ordered x-DSL capable Unbundled Loops from Qwest, (i) never receives x-DSL service from CLEC, (ii) suffers unreasonable delay in provisioning, or (iii) experiences poor quality of service, in any case due to Qwest's fault, Qwest shall refund or credit to CLEC the conditioning charges associated with the service requested. This refund or credit is in addition to any other remedy available to CLEC.

This language would ensure that Qwest is compensated when it performs the loop conditioning in a timely manner and delivers a quality loop, as contracted for by the CLECs. If Qwest fails to do so, the CLEC should not have to bear the conditioning cost. This acts as an incentive for Qwest to perform and works toward making the CLEC whole. Arguably, even with this type of provision, the CLEC cannot be made whole if

[35] *Id.*, pp. 4296-97 (Exhibit KLW-2).

Qwest does not perform and causes a bad end user experience. Not only will the CLEC lose future revenue, but its reputation will be damaged. Customers do not care that it is Qwest rather than the CLEC who causes their bad experience. From the customers' perspective, the experience with the CLEC was bad.

Qwest took issue with AT&T's proposal, stating that it should be addressed as a billing dispute.[36] This is not an appropriate resolution. It would enable Qwest to collect payment for a service when it performed badly, and force the CLECs to pursue dispute resolution for each line that is misprovisioned. Dispute resolution is not a quick process and could be very costly depending on the number of disputes. According to Qwest's SGAT, a billing dispute would take in excess of 2 months just to get in front of a decision maker.[37] Arbitration will likely take several months to complete. This process is untenable for refund of conditioning charges, especially when Qwest purports to hold the funds while the dispute is pending and would be incented to keep that money as long as possible.

Some claims for conditioning charge refunds may end up in dispute resolution, but there should be an obligation up front that Qwest will refund the conditioning charge if Qwest fails to perform. AT&T believes that many cases of fault are clear-cut and not subject to debate. In those cases, this provision would be a quick and efficient mechanism to address the problem.

Qwest has suggested that CLECs should enter into termination liability agreements with end user customers to compensate for the conditioning cost if the

[36] WA Transcript, pp. 4299, 4301-02 (Exhibit KLW-2).
[37] SGAT §§ 5.4.4 and 5.18.

customer leaves after requesting CLEC xDSL service. This is unacceptable and side-steps the real issue, which is Qwest's failure to perform.

AT&T requests that the proposed language set forth above be added to the SGAT. This provision would help ensure that CLECs have a meaningful opportunity to compete consistent with the intent of the Act.

c. Qwest Must Provide CLECs with Loop Qualification Information, Including Access to LFACs.

Qwest is required to provide access to all loops qualification that any Qwest employee has access to, including LFACs database, and any other database or back office information that contains information regarding Qwest's loop plant. Qwest refuses to provide such access. AT&T seeks access to this loop information in order to obtain accurate loop qualification information and to learn whether spare facilities, including "fragments" of loops, can be made available by Qwest.

The FCC has made clear that CLECs must have access to this loop and loop plant information for loop qualification purposes. Specifically, in the *UNE Remand Order*, the FCC stated:

> We clarify that pursuant to our existing rules, an incumbent LEC must provide the requesting carrier with nondiscriminatory access to the same detailed information about the loop that is available to the incumbent, so that the requesting carrier can make an independent judgment about whether the loop is capable of supporting the advanced services equipment the requesting carrier intends to install. Based on these existing obligations, we conclude that, at a minimum, incumbent LECs must provide requesting carriers the same underlying information that the incumbent LEC has in any of its own databases or other internal records.[38]

In addition, the FCC made clear that:

> In addition, we agree with Covad that an incumbent LEC should not be permitted to deny a requesting carrier access to loop qualification

[38] *UNE Remand Order*, ¶ 427.

information for particular customers simply because the incumbent is not providing xDSL or other services from a particular end office. We also agree with commenters that an incumbent must provide access to the underlying loop information and may not filter or digest such information to provide only that information that is useful in the provision of a particular type of xDSL that the incumbent chooses to offer. For example, SBC provides ADSL service to its customers, which has a general limitation of use for loops less than 18,000 feet. In order to determine whether a particular loop is less than 18,000 feet, SBC has developed a database used by its retail representatives that indicates only whether the loop falls into a "green, yellow, or red" category. Under our nondiscrimination requirement, an incumbent LEC can not limit access to loop qualification information to such a "green, yellow, or red" indicator. *Instead, the incumbent LEC must provide access to the underlying loop qualification information contained in its engineering records, plant records, and other back office systems so that requesting carriers can make their own judgments about whether those loops are suitable for the services the requesting carriers seek to offer.* Otherwise, incumbent LECs would be able to discriminate against other xDSL technologies in favor of their own xDSL technology.[39]

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We disagree, however, with Covad's unqualified request that the Commission require incumbent LECs to catalogue, inventory, and make available to competitors loop qualification information through automated OSS even when it has no such information available to itself. *If an incumbent LEC has not compiled such information for itself, we do not require the incumbent to conduct a plant inventory and construct a database on behalf of requesting carriers. We find, however, that an incumbent LEC that has manual access to this sort of information for itself, or any affiliate, must also provide access to it to a requesting competitor on a non-discriminatory basis. In addition, we expect that incumbent LECs will be updating their electronic database for their own xDSL deployment and, to the extent their employees have access to the information in an electronic format, that same format should be made available to new entrants via an electronic interface.*[40]

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Consistent with the framework we adopted in the *Local Competition First Report and Order*, we conclude that access to loop qualification information must be provided to competitors within the same time

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[39] *Id.*, ¶ 428.

[40] *Id.*, ¶ 429.

intervals it is provided to the incumbent LEC's retail operations. *To the extent such information is not normally provided to the incumbent LEC's retail personnel, but can be obtained by contacting incumbent back office personnel, it must be provided to requesting carriers within the same time frame that any incumbent personnel are able to obtain such information.*[41]

In its *SBC Kansas/Oklahoma 271 Order*, the FCC required RBOCs to provide carriers with the same underlying information that they have in any of their own databases or internal records for pre-ordering, loop qualification purposes and how such access must be afforded:

> In this proceeding, we require a BOC to demonstrate for the first time that it provides access to loop qualification information in a manner consistent with the requirements of the *UNE Remand Order*. In particular, we require SWBT to provide access to loop qualification information as part of the pre-ordering functionality of OSS. In the *UNE Remand Order*, we required incumbent carriers to provide competitors with access to all of the same detailed information about the loop that is available to themselves, and in the same time frame, so that a requesting carrier could make an independent judgment at the pre-ordering stage about whether a requested end user loop is capable of supporting the advanced services equipment the requesting carrier intends to install. At a minimum, SWBT must provide carriers with the same underlying information that it has in any of its own databases or internal records. We explained that the relevant inquiry is not whether SWBT's retail arm has access to such underlying information but whether such information exists anywhere in SWBT's back office and can be accessed by any of SWBT's personnel. Moreover, SWBT may not "filter or digest" the underlying information and may not provide only information that is useful in the provision of a particular type of xDSL that SWBT offers. SWBT must provide loop qualification information based, for example, on an individual address or zip code of the end users in a particular wire center, NXX code or on any other basis that SWBT provides such information to itself. Moreover, SWBT must also provide access for competing carriers to the loop qualifying information that SWBT can itself access manually or electronically.[42]

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[41] *Id.*, ¶ 431.

[42] *In the Matter of Joint Application by SBC Communications Inc., Southwestern Bell Telephone Company, and Southwestern Bell Communications Services, Inc. d/b/a Southwestern Bell Long Distance for Provision of In-Region, InterLATA Services in Kansas and Oklahoma, Memorandum Opinion and Order*, CC Docket No. 00-217, FCC 01-29, ¶ 121 (released. January 22, 2001) ("*SBC Kansas/Oklahoma 271 Order*")(Citations omitted).. *See also UNE Remand Order*, ¶ 430; *In the Matter of Application of Verizon New England Inc., Bell Atlantic Communications, Inc. (d/b/a Verizon Long Distance), NYNEX Long*

In this case, the FCC has established the parity standard as any loop or loop plant information that "any Qwest employee has access to," not what is accessible by Qwest's retail operations.

As the FCC indicates, CLECs need access to loop and loop plant information so they can make an independent judgment at the pre-ordering stage about whether a requested end user loop is capable of supporting the advanced services equipment the requesting carrier intends to install. In addition, CLECs need access to this loop information in order to determine whether they can provision service to areas that are served by IDLC loops. Qwest has claimed that unbundling IDLC loops is difficult and can take a significant amount of time and that it is not always technically feasible to unbundled these loops. As a result, CLECs need the ability to understand, in those areas where IDLC has been deployed, what spare copper facilities are available, including loop fragments, to determine whether they can provision service in these areas. A CLEC may determine that it is too risky to market to that area because they would face delays in provisioning due to IDLC issues. This particular issue is not confronted by Qwest's retail arm, because Qwest does not need to unbundle IDLC to provision service over IDLC.

Qwest has refused to provide access to LFACs or to any other source of loop information available to its employees. During the course of the loop workshops, obtaining information regarding where loop or loop plant information resides in Qwest's database(s) or back office systems that are accessible by any Qwest employee has been like pulling teeth. Qwest has dodged these queries or has spun a record so confusing that

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Distance Company (d/b/a Verizon Enterprise Solutions) And Verizon Global Networks Inc., For Authorization to Provide In-Region, InterLATA Services in Massachusetts, Memorandum Opinion and Order, CC Docket No. 01-8, FCC 01-130, ¶ 54 (released April 16, 2001) ("*Massachusetts Verizon 271 Order*").

it is impossible to tell where loop qualification information resides in Qwest's systems and back office files. At varying times, Qwest claimed this information resides in LFACs, or LEIS and LEAD, which are subset of LFACs.[43] Irrespective of where it resides, if there is loop or loop plant information that is accessible to any Qwest employee, the FCC Orders state that CLECs are entitled to access that same information.

Qwest has claimed that all of the information on LFACs is available on the raw loop data tool.[44] As an initial matter, whether that is true or not is irrelevant. The FCC has made clear that CLECs are entitled to access the same loop information that any Qwest employee has access to and such information may not be filtered by Qwest. The information in the raw loop data tools has been filtered by Qwest.

In any case, Qwest has admitted that not all loop qualification information is in the raw loop data tools. For example, information on loop conditioning and spare facilities is not in the raw loop data tools.[45] Information regarding all spare facilities, including fragments, is necessary for CLECs to have a meaningful opportunity to compete. Qwest maintains records of spare facilities, including loop fragments, somewhere in its back office systems. Qwest's witness in Colorado stated that this information is available to Qwest engineers.[46] Qwest is required to provide CLECs with access to this information.

Qwest claims that spare facility information regarding loops that are attached to the switch or partially attached to the switch is now available in the RLDT. This leaves a

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[43] Colorado Transcript (05/25/01), pp. 74-75 (Exhibit KLW-3); WA Transcript, pp. 4319-20 (Exhibit KLW-2).

[44] WA Transcript, pp. 4316-17 (Exhibit KLW-2).

[45] CO Transcript (04/18/01), pp. 25-53 (Exhibit KLW-4), CO Transcript (05/25/01), pp. 74-77 (Exhibit KLW-3).

[46] CO Transcript (05/25/01), p. 74 (Exhibit KLW-3).

very large and important gap – loops, and loop elements such as distribution and feeder, that are not attached to the switch. This is the spare facility information that AT&T was concerned about from the outset. This information does not reside in the RLDT. Even if it did, however, this would no change Qwest's obligation under the FCC orders.

Qwest has also asserted that the information that a CLEC can obtain is equal to that available to Qwest's retail arm.[47] Ms. Liston claims that there is nothing in the FCC rules that requires Qwest to give CLECs more information."[48] The FCC orders that I have cited clearly state that CLECs must have access to the same information as **any** Qwest employee, not just its retail personnel.

More importantly, Qwest's retail arm has already pre-qualified the loops on which it wants to provide its DSL service. As Ms. Liston testified in Washington, Qwest was encountering loop accuracy issues with LFACs – the very information that was used to populate the RLDT.[49] Qwest embarked on a bulk deload process for certain predefined wire centers in each state. As part of this process, Qwest conducted MLTs on the copper loops in those wire centers and then conditioned any loop in these wire centers that had load coils or bridge taps. In short, Qwest predetermined where it intended to provide DSL service and obtained accurate information for those loops. As Ms. Liston testified, Qwest will not provision service to any customer seeking service on a loop that does not qualify for its Megabit service. Qwest will not condition loops that weren't already conditioned and Qwest will not search for spare facilities.[50]

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[47] Id., pp. 78 - 79 (Exhibit KLW-3); CO Transcript (05/23/01), pp. 141- 44 (Exhibit KLW-5).
[48] Id., pp. 143- 45 (Exhibit KLW-5).
[49] WA Transcript, pp. 4341-42 (Exhibit KLW-2).
[50] CO Transcript (04/18/01), pp. 228-229 (Exhibit KLW-4)

The bottom line is that Qwest's retail representatives are assured of getting accurate loop information on the loops that Qwest wants to serve. While the MLT information for these loops was loaded into LFACs and the RLDT, there remain a significant number of loops where such updated loop information has not been obtained. Of course, if the CLEC were satisfied with limiting its marketing to the same customers that Qwest wants to serve, then they would benefit from the same accurate information. However, the CLEC should not be limited in their marketing to areas that neatly match Qwest business plans. They must have the ability to pre-qualify their loops, even loops outside of Qwest's predetermined marketing area, in the same manner as Qwest. To put the CLEC on a level playing field, they must have access to all of Qwest's loop qualification information.

Qwest has claimed that it cannot provide access to LFACs or other databases because they contain information proprietary to Qwest, other CLECs or end user customers. Qwest has access to all of this so-called competitive information. There is no reason that CLECs could not be afforded the same access. In fact, AT&T would support the inclusion of an SGAT provision that would restrict CLEC use of information contained in LFACs, or other databases that may be made available, for proper purposes and not for gathering competitive information of competing carriers. AT&T is certain that accommodation can be made to ensure no improper access to or use of proprietary information results from CLEC access to LFACs. Verizon provides access to LFACs, apparently finding some solution to the proprietary information issue.[51]

[51] *SBC Texas-Oklahoma 271 Order*, ¶ 122; *Massachusetts Verizon 271 Order*, ¶ 57.

Next, Qwest has asserted that LFACs is not a search engine, rather it is an assignment tool. This is a red herring. Qwest employees have access to LFACs and other databases for obtaining loop information.[52] As Ms. Liston stated in the Colorado workshop, "the information [on spare facilities] is stored in different portions of the LFACs database. The tools are built strictly from a provisioning standpoint to provision services in terms of looking for, how do you get from Point A to Point B. They are engineering tools."[53]

In addition, the process that Qwest employed in the FOC trial in Colorado demonstrates that Qwest has the ability to use LFACs to locate loop information and that the ability to do this review is important to the loop qualification process. Specifically, Step 3 of the FOC trial process indicates that once Qwest receives an accurate LSR, it will access LFACS to attempt to assign pairs not in need of conditioning and create a design of the loop.[54] As the FOC Trial process documents reveal, Qwest takes this step for CLECs "because LFACS may reveal information not available through the RLDT, especially with regard to loops not already connected to a switch. The RLDT provides information from the Loop Qualification Database (LQDB), which in turn is derived from LFACS and other sources. But the LQDB covers only loops connected to a switch. LFACS, on the other hand, contains information for all facilities, even those not connected to a switch, but does not contain some of the information available through the RLDT, such as the results of the MLT."[55]

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[52] CO Transcript (05/25/01), pp. 73-76 (Exhibit KLW-3).
[53] *Id.*, p. 28.
[54] Exhibit KLW-6.
[55] *Id.*

That is precisely why CLECs need access to LFACs or whatever database has loop plant and spare facilities information. They need the ability to determine if they can provision service in an area that is served by IDLC with the services they seek to provide, just as Qwest' engineers do.

Perhaps most telling on this issue is a comparison of the loop qualification information that Verizon and Southwestern Bell are providing to CLECs. This comparison highlights the disparity of Qwest's offering when compared to the type of information access provided by Verizon and Southwestern Bell -- access that was determined by the FCC to satisfy the legal requirement.

For example, as discussed in the *SBC Kansas/Oklahoma 271 Order*, Southwestern Bell provides competitors access to:

> actual loop make-up information, theoretical, or design, loop make-up information, or can request that SWBT perform a manual search of its paper records to determine actual loop information. SWBT provides competitors access to actual loop make-up information contained in SWBT's back-end system Loop Facilities Assignment and Control System (LFACS) through the pre-ordering interfaces Verigate, Datagate and EDI/CORBA. Because LFACS was designed as a provisioning system, LFACS will provide the requesting carrier with actual information on the loop that SWBT or ASI, would use if it were going to provision the service requested. If, however, actual loop make-up information is not available in LFACS, SWBT will automatically provide theoretical, or design, loop makeup information. Specifically, SWBT will cause a query to be made into its LoopQual database for loop information based on a standard loop design for the longest loop in that end user's distribution area. The requesting carrier can then use this theoretical loop information to determine if it would be willing to provide xDSL service to that end-user. Additionally, a carrier may also request loop design information without having to first request an actual loop make-up query. Finally, carriers may also request that SWBT perform a manual search of SWBT's engineering records. Such a request may be submitted via Verigate or Datagate directly to SWBT's engineering operations personnel. Once SWBT engineers complete the manual search, they will update the

information in LFACS and the competing carrier can either receive the results via email or review the results in LFACS.[56]

According to the Order, in addition to the ability to access LFACs directly via Qwest GUI interfaces, a CLEC may also request that SWBT perform a manual search of its engineering records. Qwest does not offer access to LFACs or the ability to have a manual search of engineering records – both of which, as discussed above, are activities that Qwest performs when provisioning service for its customers and activities that Qwest undertook in the Colorado FOC trial.

Similarly, in the *Verizon Massachusetts 271 Order*, the FCC recounted the loop qualification information that Verizon gives CLECs access to, stating:

> Verizon provides four ways for competing carriers to obtain loop make-up information: (1) mechanized loop qualification based on information in its LiveWire database; (2) access to loop make-up information in its Loop Facility Assignment and Control System (LFACS) database; (3) manual loop qualification; and (4) engineering record requests. As we discuss in more detail below, competitors can request loop make-up information from the LFACS and LiveWire databases, or can request that Verizon perform a manual search of its paper records to determine whether a loop is capable of supporting advanced technologies.[57]

In addition to providing direct access to the Live Wire and LFACs databases, the Order describes the manual access offered by Verizon, indicating that Verizon provides a manual loop qualification process as a pre-order function in which Verizon examines information from the LiveWire and LFACS databases, and performs a mechanized line test (MLT) on the loop to verify the actual loop length.[58] If this information is inconclusive, engineers in Verizon's Facilities Management Center examine paper records to determine the loop length, whether or not the loop is qualified and, if it is not,

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[56] *SBC Kansas/Oklahoma 271 Order*, ¶121.
[57] *Verizon Massachusetts 271 Order*, ¶ 55.
[58] *Id.* ¶ 56.

the reason why.[39] Finally, Verizon, through an engineering record request, provides additional types of loop make-up information not returned through the mechanized and manual loop qualification processes. Verizon indicates that competitors may request this engineering query on a pre-order basis. To conduct this engineering query, Verizon's Facilities Management Center conducts a search of loop inventory and paper records. The additional information provided through an engineering query includes the exact locations of load coils, the exact locations and lengths of bridge taps, as well as actual cable gauges and the length of each gauge and provides loop make-up information for loops not in the LFACS database.[40]

Clearly, the Raw Loop Data tool fails in comparison to the comprehensive access to loop qualification information that is provided by Verizon and Southwestern Bell. Both Verizon's and Southwestern Bell's offers to CLECs are more comparable to the process that these RBOCs employ in provisioning service to their customers. The record demonstrates that Qwest has the ability to access to LFACs, other databases, and manual review processes to provision service to its customers, yet Qwest has refused to provide any loop qualification information beyond the RLDT available to CLECs. Qwest's offer is plainly discriminatory and contrary to the FCC's orders.

By denying competing carriers' access to loop qualification information as required by the *UNE Remand Order*, Qwest fails to meet its obligation to provide a competitor a meaningful opportunity to compete. Accordingly, AT&T recommends the following provision be added to the SGAT to afford CLECs the access to Qwest loop information that is permitted under the Act and FCC orders:

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[39] *Id.* ¶ 58.

[40] *Id.* ¶ 59.

> Qwest shall provide to CLEC on a non-discriminatory basis access to all company's records, back office systems and databases where loop or loop plant information, including information relating to spare facilities, resides that is accessible to any Qwest employee or any affiliate of Qwest. CLECs shall have the ability to audit Qwest's company records, back office systems and databases in each state to determine that Qwest is providing the same access to loop and loop plant information to CLECs that any Qwest employee has access. Such audit will be in addition to the audit rights contemplated by § 18 of this Agreement, but the processes for such audit shall be consistent with the processes set forth in § 18. CLEC agrees the access afforded to CLEC to Qwest's records, back office systems and databases and the use by the CLEC of any information obtained under this section shall be limited to performing loop qualification and spare facilities checks.

d. Qwest Must Allow CLECs to Perform or Request a Pre-Order MLT.

Mechanized loop testing (MLT) enables a carrier to test an actual loop and retrieve information regarding the loop length and other characteristics. MLT capability is another key component for loop qualification. A CLEC needs the ability to perform, or to have performed on its behalf, an MLT before provisioning of that loop in order to verify that the loop can support the services the CLEC intends to provide over that loop facility. In addition, an MLT would allow the CLEC to verify the presence of digital loop carriers or other facilities – valuable information for assessing whether the loop is capable of providing the services the CLEC seeks to offer. Access to MLT would assist in solving a serious problem CLEC are encountering in getting access to good, accurate prequalification information on loops, in particular for line sharing on loops.[61]

Qwest has responded to the CLEC's request for MLT information by stating that Qwest's retail operations do not have the ability to order MLTs on an individualized basis. This claim is misleading. Qwest has no need to do new MLTs on an

[61] WA Transcript, p. 4334 (Exhibit KLW-2); CO Transcript (05/23/01), pp. 195-96 (Exhibit KLW-5).

individualized basis for several reasons. First, Qwest knows where it has deployed digital loop carrier and can assess for itself whether it can deploy the services it seeks in these areas. Second, as discussed above, Qwest has already performed MLTs in the areas where it has determined it will market its Megabit service.

In any case, Qwest has the ability to run MLT for its services on a pre-order basis if it desires. Qwest has conceded that it has the ability to perform MLT on its switched based services.[62] It can do so any time it wants. For example, Qwest has the ability to expand the area that it seeks to provide DSL service and to select additional wire centers to test and which loops or service terminals to test. CLECs must have the same access to be afforded parity.

Qwest has stated that an MLT test cannot be done by a CLEC or on the CLEC's behalf because the test is invasive and may result in the customer being disconnected.[63] This assertion is simply false. Qwest has conceded that the customer's line is put out of service momentarily, less than a minute.[64] In addition, the MLT has the ability to determine whether the line is in use, so interference with customer's usage can be minimized. The fact that Qwest conducted MLTs on loops in connection with its bulk deload process is evidence that MLTs are not invasive.

Qwest's has also stated that MLTs are only performed for repair purposes.[65] Obviously, the fact that Qwest conducted MLTs for its own loop qualification purposes suggests that is not a true statement.

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[62] CO Transcript (04/18/01), p. 248 (Exhibit KLW-4).
[63] WA Transcript, p. 4335 (Exhibit KLW-2).
[64] *Id.*, pp. 4335-36.
[65] *Id.*, pp. 4336-37; CO Transcript (05/23/01), p. 194 (Exhibit KLW-5).

Qwest asserts that there is no need for CLECs to run MLT because the information the CLECs require is already in the raw loop data tool.[66] Again, Qwest's claim is inaccurate and is contrary to the FCC's requirements. Not every copper loop in the RLDT has an MLT distance. In addition, Ms. Liston verified that the information in the raw loop data tool associated with MLT is the MLT distance.[67] More information can be derived from an MLT than distance. An MLT also tells you whether there are electronics or equipment on the loop that would interfere with DSL service, very important information in determining whether the loop will support the services the CLEC seeks to provide.

As summarized in the FCC's *Kansas/Oklahoma 271 Order*, the *UNE Remand Order* required RBOCs to provide carriers with the same underlying information that they have in any of their own databases or internal records for pre-ordering, loop qualification purposes.

In this proceeding, we require a BOC to demonstrate for the first time that it provides access to loop qualification information in a manner consistent with the requirements of the *UNE Remand Order*. In particular, we require SWBT to provide access to loop qualification information as part of the pre-ordering functionality of OSS. In the *UNE Remand Order*, we required incumbent carriers to provide competitors with access to all of the same detailed information about the loop that is available to themselves, and in the same time frame, so that a requesting carrier could make an independent judgment at the pre-ordering stage about whether a requested end user loop is capable of supporting the advanced services equipment the requesting carrier intends to

[66] Qwest Transcript, p. 4557 (Exhibit KLW-2).
[67] Qwest Transcript 05/16/01a, p. 257 (Exhibit KLW-4).

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test. At a minimum, SWBT must provide carriers with the same underlying information that it has in any of its own databases or internal records. We explained that the relevant inquiry is not whether SWBT's retail arm has access to such underlying information but whether such information exists anywhere in SWBT's back office and can be accessed by any of SWBT's personnel. Moreover, SWBT may not "filter or digest" the underlying information and may not provide only information that is useful in the provision of a particular type of xDSL that SWBT offers. SWBT must provide loop qualification information based, for example, on an individual address or zip code of the end users in a particular wire center, NXX code or on any other basis that SWBT provides such information to itself. Moreover, SWBT must also provide access for competing carriers to the loop qualifying information that SWBT can itself access manually or electronically.[86] Thus, having access to filtered MLT distance information in the loop qualification databases is insufficient.

Finally, contrary to Qwest's claims, at least one other incumbent carrier recognized the need for this test and includes it as one way for CLECs to obtain loop qualification information on a pre-order basis. Verizon offers competing carriers manual loop qualification as one of four methods of obtaining loop make-up information. Upon request for manual loop qualification by a competing carrier, a CLEC may request that Verizon perform an MLT on the loop. If this test does not provide adequate information, Verizon engineers examine paper records to determine loop length, whether or not the loop is qualified and, if not, why.[87] It cannot be disputed that Verizon is offering MLTs

[86] *SBC Kansas/Oklahoma 271 Order*, ¶ 121. *See also UNE Remand Order*, ¶ 430; *Massachusetts Verizon 271 Order*, ¶ 58.

[87] *Massachusetts Verizon 271Order*, ¶ 58.

on a per order basis. Qwest has refused to perform such MLTs for CLECs or to allow the CLECs to do the MLT themselves.

In sum, Qwest has the ability to perform an MLT on a copper loop connected to its switch at any time, and can perform this test to obtain loop qualification information prior to provisioning Megabit. Qwest performed thousands of MLTs on its copper loops to pre-qualify its own loops for its Megabit service. AT&T requests access to the same information to which Qwest personnel have access, which includes the ability to perform and MLT prior to the provisioning an unbundled loop. This access is consistent with and required by the *UNE Remand Order*.[30]

c. Qwest should revise certain of its Loop intervals.

A number of the standard intervals set forth in Exhibit C for Unbundled Loops should be revised. Specifically, the standard intervals for 1(g) DS-1 Loops and 1(h) Repair Intervals for Basic 2-Wire Analog Loops are too long to provide the CLEC a meaningful opportunity to compete, are discriminatory, anticompetitive, and in some cases are contrary to applicable state law, and place the CLECs in a position where they cannot comply with established service quality standards that have been adopted in Washington.

The standard interval is the interval in which Qwest is committing to provide a particular UNE to the CLEC. It is the interval that the CLEC will rely upon in providing information to its retail customer when the CLEC will be able to provision service to that customer.[31] It is the interval which the CLEC uses for calculating its due date for submission of its order to Qwest and in designing and provisioning other components and

[30] *UNE Remand Order*, ¶ 427.
[31] *Id.*

facilities that make up the service that the CLEC is provisioning to its retail customer. Qwest's proposed intervals are set forth in the Service Interval Guide ("SIG") - Exhibit C to the SGAT.

Before addressing the specific revisions AT&T has proposed to Exhibit C, Qwest has asserted in other loop workshops and here that the loop intervals set forth in its SIG were agreed upon as part of the negotiations surrounding PID OP-4 in the ROC OSS test process and that, therefore, CLECs are foreclosed from requesting revisions to the SIG in this Loop workshop. Qwest's assertion is flawed on many levels.

The SIG cannot be afforded any weight whatsoever, since it was never presented to the ROC for its review and approval. To conclude otherwise would deprive parties of their right in this proceeding to confront evidence presented by Qwest. As discussed below, the record is undisputed that the SIG was never presented to the ROC for its review and approval and therefore cannot be viewed as dispositive here.

In the multistate loop workshop, this issue was fully addressed by the parties, including a representative of MTG, Denise Anderson. As a result of these discussions several facts became clear. First, the SIG was never presented to the ROC TAG for its approval.[72] Nor did the ROC TAG formally approve any of the standard intervals in the SIG.[73] The reason the SIG was not presented to the ROC TAG is because the ROC TAG does not control the approval of standard intervals.[74] As a result, it was the CLECs understanding that the CLECs were free to propose specific changes to Exhibit C in the § 271 workshop process. Indeed, Ms, Anderson from MTG testified that she did not

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[72] Multistate Transcript (06/05/01), pp. 162, 164 (Exhibit KLW-7).
[73] *Id.*, p. 162.
[74] *Id.*, p. 164.

believe that CLECs are foreclosed from raising issues regarding the service intervals in this workshop.[75] In addition, she confirmed that the TAG minutes which reflect the June 2000 agreement regarding the benchmarks for the 3 loop types described above specifically state that "once data is available in Q2, 2001, the intervals will be adjusted. This item will be open on the future discussion topic list."[76]

Certainly, Qwest does not appear to believe that the SIG has been agreed to and cannot be changed, since Qwest has proposed both reductions and increases for certain intervals in the SIG, without submitting those changes to the ROC TAG for their approval. For example, Qwest unilaterally increased the DS-1 intervals and decreased the xDSL/ISDN capable loop and analog (Quick) loop intervals – all without submission of those changes to ROC for their approval. It would be antithetical to allow Qwest the discretion to change the SIG at its whim, but at the same time refuse the CLECs the opportunity to challenge the SIG. In sum, there is no basis to conclude that CLECs should be foreclosed from raising and requesting revisions to intervals that were never confronted and discussed by the ROC TAG.

Based upon the multistate discussion and ROC documents, the only intervals that Qwest brought into the ROC TAG discussions were the intervals for Analog Loops, Non-Loaded Loops and ADSL-Qualified loops, and then the intervals that were considered were for order quantities of 9-16 loops.[77] The sole purpose for Qwest bringing these intervals into the TAG was to use those intervals as the average for establishing the benchmark. There was no discussion as to whether the intervals Qwest raised in

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[75] *Id.*, pp. 183 - 84, 196.

[76] *Id.*, p. 181. *See also* June 2000 Minutes of ROC TAG (Exhibit KLW-8).

[77] Multistate Transcript (06/05/01), pp. 194 – 95 (Exhibit KLW-7).

discussions were the appropriate standard intervals.[78] Also, there was no discussion of any of the intervals for other quantities of loop types.[79] Moreover, there was clearly no discussion whatsoever regarding the appropriate standard interval for DS-1 loops.[80]

For these reasons, CLECs should not be foreclosed from advocating changes to the SIG in the § 271 workshops. Clearly, state commissions have the authority to order different standard intervals than those proposed by Qwest in its SIG and that, to the extent that a party seeks to have that new interval incorporated into the PIDs for some future purpose, the party must take that issue to the ROC.[81]

As the Washington Administrative Law Judge stated in the Thirteenth Supplemental Order issued in the Loop workshop:

> The ROC OSS Test collaborative process did provide a number of measurements as benchmarks, as Qwest pointed out in its brief. However, other measurements were kept at the retail analog. In essence, there are both wholesale and retail service quality standards that must be followed. By saying that "Qwest shall comply with all state wholesale service quality standards," Qwest completely omits any requirement to follow retail service quality standards. In the absence of such requirements, Qwest could with impunity provide elements that would prevent an interconnecting carrier from meeting applicable standards in its retail service. That is unacceptable. Qwest must make every effort to comply with both wholesale and retail service quality standards.[82]

That is precisely AT&T's point. The fact that certain benchmarks were established by the ROC for testing purposes does not undermine the state's right to enforce its own service quality standards, or to change them at their discretion.

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[78] *Id.*, pp. 194, 198.

[79] *Id.*

[80] *Id.*, pp. 166 - 67.

[81] *See id.*, pp 168 - 169. For example, to the extent that the PIDs have some relevance to the PEPP, parties may want to update the PIDs.

[82] *In re Investigation Into U S WEST's Compliance With § 271*, WUTC Docket Nos. UT-003022 & 003040, Thirteenth Supplemental Order ¶ 45 (July 24, 2001) ("*Washington Initial Order on Workshop 3*")

The retail and wholesale service quality standards established by the state commissions are relevant to the assessment of whether the wholesale service intervals proposed by Qwest are appropriate. This is a relevant inquiry for several reasons. First, state commissions may have already established wholesale service intervals in which Qwest must provision the UNEs at issue here. Second, state commissions may have established retail service quality standards that apply to CLECs. To the extent that the standard interval proposed by Qwest impairs the CLEC's ability to meet any retail service quality standards imposed on the CLEC by state commissions, Qwest's standard is improper. Section 253 of the Act specifically enables state commissions impose requirements necessary to " ensure the continued quality of telecommunications services."[83]

Accordingly, AT&T recommends the following revisions to Exhibit C:

(d) Established Service Intervals for existing DS-1 Capable Loops, DS1 Capable Feeder Loop, 2-Wire Analog Distribution Loop:

a)	1 – 8 lines	~~9~~ 5 business days
b)	9 – 16 lines	~~9~~ 6 business days
c)	17 – 24 lines	~~9~~ 7 business days
d)	25 or More	ICB

(h) Established Repair Intervals for Basic 2-wire Analog Loops, Line Sharing and Line Splitting:

~~24~~ 18 Hours OSS
48 Hours AS

The rationale for these revisions is as follows.

With respect to Interval 1(d), DS-1 loops, in prior versions of Exhibit C, Qwest proposed the very intervals AT&T is requesting. Qwest now claims that it lengthened

[83] 47 U.S.C. § 253 (b).

these intervals because those are the intervals that exist on the retail side (apparently from Qwest's interstate special access tariff) and, therefore, the intervals in Exhibit C are parity.[84] Qwest notified CLECs of these changes to the standard intervals for DS-1s in the ROC process, but did not seek the approval or agreement of the ROC participants for these changes. Nor were these changes discussed by the ROC or TAG participants.

AT&T objects to Qwest's revised intervals. AT&T is the largest purchaser of DS-1s from Qwest on the "retail" side. Qwest arbitrarily and unilaterally changed the intervals offered to retail customers in the last year. For years prior to that, Qwest provided DS-1s pursuant to the intervals AT&T is proposing here, although it did not do so in a timely fashion. As has been the case with local service, Qwest has failed to build facilities to meet customer needs in a timely manner and AT&T filed service quality complaints to attempt to resolve this issue. Qwest's response was not to improve its service, but rather to change its provisioning commitment to its retail customers by lengthening the intervals. It now uses those retail intervals that it arbitrarily altered to argue parity. In AT&T's view, the solution to poor service is not to change the intervals. Moreover, poor service on the retail side should not be used to drive parity decisions of the wholesale side. Qwest should be required to establish an appropriate interval and meet that interval.

Qwest has been ordered to revise its DS-1 intervals in Arizona, New Mexico and Washington. In Arizona, the staff final report recommends that Qwest be directed to adopt the following intervals for DS-1:

1-8 lines	5 business days
9-16 lines	7 business days

[84] WA Transcript, p. 4471 (Exhibit KLW-2).

17-25 lines	9 business days
25 and above lines	ICB[85]

In Washington, the Commission directed Qwest to revise the SGAT to include the following intervals:

1-8 lines	5 days (high density) 8 days (low density)
9-16 lines	6 days (high density) 9 days (low density)
17-24 lines	7 days (high density) 10 days (low density)
25 or more	ICB[86]

In New Mexico, the Commission directed Qwest to adopt the following DS-1 intervals:

5 business days in high density areas
8 business day in low density areas.[87]

The intervals proposed by AT&T here are consistent with the high density intervals ordered by these Commissions.

As for 1(h), AT&T contends that an 18-hour interval on repair is more than sufficient given Qwest performance on mean time to restore. For its retail customers Qwest's mean time to restore is in a range of 7 to 14 hours, with and without dispatch. That is the parity figure that should be used as the basis for establishing the wholesale service interval. Thus, the 18-hour interval proposed by AT&T is clearly appropriate and should be reduced even further to be at parity with retail. If Qwest is not required to do

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[85] *In the Matter of Qwest Corporation's Section 271 Application, Final Report on Qwest's Compliance with Checklist Item No. 4*, Arizona Corporation Commission ACC Docket No. T-00000A-97-0238, dated February 20, 2002, ¶ 164.

[86] *Washington Final Order on Workshop 4*, ¶ 124-25.

[87] *In the Matter of Qwest Corporation's Section 271 Application and Motion for Alternative Procedure to Manage the Section 271 Process*, Order Regarding Facilitator's Report on Checklist Item 2, Checklist Item 4, Checklist Item 5 and Checklist Item 6, New Mexico Utility Case No. 3269, dated November 20, 2001, ¶ 72.

better than a 24-hour interval on the wholesale side, CLECs will never be able to come close to matching Qwest's repair time for its retail customers.

Qwest has argued that the performance measures establish a 24-hour repair interval and the repair interval for retail basic service is 24 hours. That is not the measure of parity. Parity is measured based upon the actual service Qwest provides to its retail customers, itself or its affiliates, not the standard established by state commissions.[88] That is the only measure that will provide CLECs with a meaningful opportunity to compete, particularly where Qwest is performing better than the standard. As the record and the reported performance results indicate Qwest' repair performance for its retail customers is significantly better that the 24-hour repair interval proposed in Exhibit C.

Finally, Qwest's interval fails to take into account work that the CLEC must perform relating to the repair. The CLEC must work the customer to receive the repair and identify the problem. Under SGAT § 9.2.5.1, the CLEC must perform trouble isolation prior to reporting the trouble to Qwest. The trouble must then be reported to Qwest and the appropriate documentation created. Once Qwest responds, the CLEC must contact the customer to let them know the trouble is fixed and determine if the Customer agrees. Qwest's interval fails to take this work activity into consideration.

For all the reasons set forth herein, Qwest should be required to revise its service intervals in the manner proposed by AT&T. Such revisions are necessary to afford CLECs a meaningful opportunity to compete, to afford the CLEC nondiscriminatory access to UNE loops, to comply with state commission requirements, and to afford the CLEC the ability to comply with state commission rules.

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[88] *Ameritech Michigan Order*, ¶ 139.

f. Qwest Should Redesignate Interoffice Facilities Where Loop Facilities are at Exhaust.

This issue concerns whether Qwest must redesignate fiber spans between Qwest offices as loops facilities if Qwest's distribution facilities in that area are at exhaust. Qwest's designates fiber spans between Qwest offices as interoffice facilities. AT&T contends that if the distribution facilities are at exhaust between two Qwest offices and Qwest receives orders for UNE loops that could be filled by redesignating those facilities to distribution facilities, Qwest should be required to do so to meet CLEC demand. Given Qwest refusal to build facilities to meet CLEC demand, this requirement makes sense. It also will eliminate any incentive for Qwest to improperly designate facilities as interoffice in order to reserve such facilities for Qwest's own use.

Qwest concedes that there is spare capacity, including dark fiber, that has been designated by Qwest as interoffice facilities, but states that it will not redesignate these facilities as loop or subloop facilities if demand requires and alternative facilities do not exist.[89] Qwest's policy is contrary to law, effectively allowing Qwest to reserve capacity for itself, denying CLECs access to unused capacity while, at the same time, refusing to build to meet CLEC demand. It would allow Qwest to game the Act by designating facilities as IOF, thus eliminating the availability of capacity for UNE loops.

Qwest's defense is that it does not redesignate facilities for itself so it will not do so for CLECs. Qwest has never presented any evidence to validate this statement. Nor has it presented any policy stating that such facilities will never be redesignated. In fact, in the Washington 271 proceeding, Mr. Zulevik, Covad's witness and a former employee

[89] WA Transcript, pp. 4407-10 (Exhibit KLW-2); *See* CO Transcript (04/20/01), pp. 62 – 68 (Exhibit KLW-9).

of U S WEST, testified that fiber that was forecasted for interoffice facilities was made available when needed for distribution facilities.[90] Certainly, Qwest has the discretion to use its facilities however it chooses if the need arises. AT&T understands that this should be an exception not the rule. However, it would be better to look to redesignate IOF facilities than dig up streets, if there is available capacity. Accordingly, AT&T requests such redesignation if facilities are at exhaust in order to meet CLEC demand for UNEs, rather than denying the CLEC the ability to serve its customers. AT&T's proposal is efficient and pro-competitive and should be adopted.

g. Qwest Must Provide Access to Loops Served Using IDLC.

Section 9.2.2.2 describes the analog loops Qwest intends to offer on an unbundled basis. Initially, the last sentence of this section contained a limitation that UNE loops would be provided "to the extent possible." This was included to limit Qwest's obligation to provided loops that are served using Integrated Digital Loop Carrier ("IDLC").

In the *Bell South Second Louisiana Order* and the *SBC Texas Order*, the FCC states that "[t]he BOC must provide competitors with access to unbundled loops regardless of whether the BOC uses [IDLC] technology . . ."[91] Qwest's SGAT, as initially filed, was not consistent with this requirement.

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[90] WA Transcript, p. 4411 (Exhibit KLW-2).

[91] *BellSouth Second Louisiana 271 Order*, ¶ 187, *In the Matter of Application by SBC Communications Inc., Southwestern Bell Telephone Company, And Southwestern Bell Communications Services, Inc. d/b/a Southwestern Bell Long Distance Pursuant to Section 271 of the Telecommunications Act of 1996 To Provide In-Region, InterLATA Services In Texas*, Memorandum Opinion and Order, CC Docket No. 00-65, FCC 00-238, ¶ 248 (released June 30, 2000) ("*SBC Texas 271 Order*").

Qwest contends that the FCC has acknowledged the difficulty of provisioning loops that are served off of IDLC. That is true; however, the FCC has never altered the ILEC's obligation to provide IDLC loops.

CLECs have experienced coordination problems when there is a conversion from Qwest's services provisioned in a community served by IDLC to UNE Loop. When a CLEC orders basic installation in a community served by IDLC they have encountered a high percentage of disconnects. It appears that the process problem stems from the fact that the Qwest disconnect order is not getting stopped while the technicians are determining whether the end-user customer's loop is served using IDLC and, if so, how Qwest is going to provision that loop. This results in the customer experiencing a loss of service. Qwest has indicated it has made some process changes that it represents will solve this problem. It is uncertain whether these process changes will, in fact, resolve this problem. However, AT&T agreed to close this issue in Washington, subject to ROC testing and satisfactory performance by Qwest.

Since the filing of testimony in these workshops, Qwest has made considerable progress in the steps it will take in provisioning IDLC loops. Specifically, during the course of the workshops, Qwest proposed new SGAT language to § 9.2.2.2.1 and introduced new processes and several exhibits that outline these new processes for provisioning loops that use IDLC technology.[92] In addition, Qwest has altered its position that hair pinning would be limited to 3 loops per central office and agreed to provision more than the three loops per central office on an interim basis.[93] Qwest also stated that a

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[92] *See* Exhibits JML Loop 8 and 9 and KLW-10.

[93] WA Transcript, 4516-17 (Exhibit KLW-2).

decision will be made to place a Central Office terminal when the number of hair pinned loops exceeds three loops.

With these commitments and Qwest's commitment to revise its technical publications to be consistent with these commitments, AT&T agreed to close this issue. However, it should be made clear in the order issued on this checklist item that Qwest remains obligated to provision loops served by IDLC and that the ultimate objective of the steps outlined in the workshop and to be addressed in the technical publication is to ensure that CLEC/DLECs have access to unbundled loops served using IDLC.

D. LINE SPLITTING

1. Legal Requirements.

Line splitting is the ability for different carriers to provide voice and data services over a single loop, utilizing both the high and low frequency spectrum portions of the loop. The FCC has determined that incumbent LECs have a current obligation to provide competing carriers with the ability to engage in line splitting arrangements.[94] The FCC's rules require incumbent LECs to provide requesting carriers with access to unbundled loops in a manner that allows the requesting carrier "to provide any telecommunications service that can be offered by means of that network element."[95] As a result, incumbent LECs have an obligation to permit competing carriers to engage in line splitting over any loop or loop combination.

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[94] *In the Matter of Deployment of Wireline Services Offering Advanced Telecommunications Capability*, Third Report and Order on Reconsideration, CC Docket No. 98-147, FCC 01-26, ¶ 18 (released January 19, 2001) ("*Line Sharing Reconsideration Order*").

[95] 47 C.F.R. § 51.307(c).

In addition, Qwest is required to provide to CLECs all the functionalities and capabilities of the loop, including electronics attached to the loop.[96] The splitter is an example of such electronics that is included within the loop unbundled network element.

2. Disputed Issues on Line Splitting.

As AT&T demonstrates below, Qwest fails to comply with the Act and applicable FCC Orders with regard to line splitting. Therefore, the Commission should find that Qwest has failed to satisfy its § 271 obligations. In failing to comply with its obligations to provide nondiscriminatory access to line splitting, Qwest has failed to comply with checklist items 2 (unbundled network elements) and 4 (local loop transmission).

a. Qwest Should be Required to Provide Access to Outboard Splitters on a Line-At-A-Time, or Shelf-At-A-Time Basis.

AT&T contends that Qwest should be required to provide access to outboard splitters that it places in its central offices and remote terminals and make them available on a line-at-a-time or shelf-at-a-time basis. Qwest objects to such a requirement. There is no legitimate legal, technical or operational justification for Qwest's refusal. Qwest allows access by its retail customers to its splitters on a line-at-a-time basis. It has presented no technical reason why similar access cannot be provided to CLECs. Qwest should be required to modify its SGAT to state that, to the extent Qwest deploys in its network splitters that are not integrated with the DSLAM and are capable of being provided to DLECs on a line-at-a-time or a shelf-at-a-time basis, that Qwest will provide DLECs with access to such splitters.

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[96] *UNE Remand Order*, ¶ 175.

Qwest has not disputed that it is technically feasible for Qwest to provide access to outboard splitters on a line-at-a-time basis. Rather, Qwest contends that they are not required to provide line-at-a time access.

CLECs purchasing UNE Loops or UNE combinations are entitled to "all capabilities of the loop including the low and high-frequency spectrum portions of the loop . . ."[97] In the FCC's Line Sharing Order, the FCC defined the high frequency portion of the loop as a capability of the loop.[98] In order to gain access to the high frequency portion of the loop, line splitting is required. Such line splitting is accomplished by means of passive electronic equipment referred to as splitters, which splits the low and high frequency portions of the loop. The FCC has also determined that ILECs must afford CLECs access to all of the UNE's features, functions, and capabilities, including attached electronics, in a manner that allows the requesting telecommunications carrier to provide any telecommunications service that can be offered by means of that network element, specifically including DSL services."[99] The FCC reiterated that the loop includes "attached electronics" if such electronics are necessary to fully access the loops feature, functions and capabilities in order to provide service to end users.[100] Under these determinations of the FCC, the splitter is a feature, function or capability of the loop that must be provided to CLECs.

Qwest cites to the SBC Texas 271 Order in support of its position. My reading of the *SBC Texas 271 Order* does not support Qwest's position. In that Order, the FCC

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[97] 47 C.F.R. § 51.319(a)(1).

[98] *In the Matter of Deployment of Wireline Services Offering Advanced Telecommunications Capability*, Third Report and Order, CC Docket No. 98-147, FCC 99-355, ¶ 17 (released December 9, 1999) ("*Line Sharing Order*").

[99] 47 C.F.R. §51.307; *UNE Remand Order*, ¶¶166-67.

[100] *Id.* ¶ 175.

merely notes that it had not yet exercised its rulemaking authority to require ILECs to provide access to splitters, and therefore, it would not require SBC to provide access to splitters as part of that proceeding.[101] The FCC explicitly declined to comment on the requirement that an ILEC provide access to an ILEC-owned splitter on the grounds that it was considering this issue in response to AT&T's petition for reconsideration of the *UNE Remand Order*.[102] The FCC decision with regard to SBC's application on this issue was set at a particular point in time. As all participants know, the law is constantly evolving in this area. The SBC decision does not address the issue as to what the FCC may decide at the point in time when Qwest is before the FCC with its application for § 271 relief, nor does it address what state commissions may order to promote the development of competition and the broader availability of advanced services.

The FCC's decision to not impose a requirement on ILECs to provide access to ILEC-owned splitters in its review of the SBC § 271 Application should not deter any state commission from imposing such a requirement on Qwest. It is my understanding that the state commissions are free to establish additional procompetitive requirements that are consistent with the Act, and the FCC's implementing rules and orders.

That is precisely what the Texas Public Utilities Commission concluded in a recent arbitration decision.[103] There, concluding that the FCC's BellSouth Texas 271 Order did not prevent the Texas Commission from doing so, the PUC affirmed an

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[101] *SBC Texas 271 Order*, ¶ 328.

[102] *Id.*

[103] *Order Approving Revised Arbitration Award, Petition of Southwestern Bell Telephone Company for Arbitration with AT&T Communications of Texas*, Docket No. 22315, pp. 7 - 9 (dated March 14, 2002) (Exhibit KLW-11).

arbitrators' recommended decision, which required Southwestern Bell to provide splitters on a line-at-a-time basis. Specifically, the Arbitrator stated:

> Although, as noted by SWBT, the FCC has to date, not required ILECs to provide the splitter in either a line sharing or line splitting context, the Arbitrators believe this Commission has the authority to do so on this record. The FCC has clearly stated that its requirements are the minimum necessary, and that state commissions are free to establish additional requirements, beyond those established by the FCC, where consistent. Indeed, in the *SWBT Texas 271 Order*, the FCC acknowledged that line splitting, a recent development, would be subject to potential arbitration before the Texas Commission. The Arbitrators, therefore, believe on this record that it is sound public policy to require SWBT to provide AT&T with a UNE loop that is fully capable of supporting any xDSL service.[104]

Then, citing the rulings of the FCC referenced above, the Arbitrators determined that SBC must provide access to its splitters. The decision stated (1) that "excluding the splitter from the definition of the loop would limit its functionality," (2) that "it is technically feasible for SWBT to furnish and install splitters to [enable CLECs to] gain access to the high frequency portion of the loop when purchased in combination with a switch port," and (3) that it is "inaccurate from a technical standpoint to analogize splitters to DSLAMs."[105]

Finally, the Texas decision noted that SWBT's effort to require LECs to collocate in order to gain access to the high-frequency portion of the loop "(1) unnecessarily increases the degree of coordination and manual work and accordingly increases both the likelihood and duration of service interruptions; (2) introduces unnecessary delays for space application, collocation construction and splitter installation; and (3) unnecessarily

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[104] *Revised Arbitration Award, Petition of Southwestern Bell Telephone Company for Arbitration with AT&T Communications of Texas*, Docket No. 22315, p. 16 (released September 27, 2000) ("*Texas Arbitration Award*"). (Exhibit KLW-12).

[105] *Id.*, pp. 17 - 19.

wastes central office and frame space."[106] Thus, the arbitrators found that SWBT's approach "significantly prohibits UNE-P providers from achieving commercial volumes."[107] On the flip side, they found that requiring the ILEC to provide the splitter not only advances competition but also "promotes more rapid deployment of advanced services to a broader cross section of consumers, as required by § 706" of the Act.[108]

Qwest has also claimed that it does not currently use outboard splitters in its central offices, stating that its splitters are integral, hard wired units.[109] During the Colorado Loop workshop, Qwest finally revealed the type of splitters it deploys in its network and testified that, in Qwest's current configuration, a shelf of splitters are "connecterized" to their DSLAMs.[110] Splitters that are "connecterized" to the DSLAM are not integrated into the DSLAM and, therefore, it is technically feasible to separate the splitter from the DSLAM.[111] For the splitters used by Qwest, it is technically feasible to break out the splitter from the DSLAM.[112] In fact, Covad testified in Colorado that the Qwest DSLAM/splitter configuration is no different that the Covad/Qwest splitter/ DSLAM configuration that Qwest is requiring CLEC to use in lieu of the Qwest splitter and under this configuration the Covad splitters are "connecterized to the Qwest

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[106] *Id.*, p. 19.
[107] *Id.*
[108] *Id.*
[109] WA Transcript, p. 4559 (Exhibit KLW-2).
[110] CO Transcript (05/22/01), pp. 141-42 (Exhibit KLW-13); WA Transcript, 4560-61 (Exhibit KLW-2).
[111] CO Transcript (05/22/01), pp. 149 – 50 (Exhibit KLW-13).
[112] *Id.*

DSLAM.[113] Indeed, Qwest's witness conceded that it was possible to provide access to a shelf of Qwest splitters in this configuration.[114]

Access to Qwest-owned splitters will serve to advance competition for DSL service and bundles of voice and data service, and as such, are very much in the public interest. As AT&T discussed in its comments relating to the Emerging Services workshop, there are several significant benefits to Qwest providing access to outboard splitters. When data CLECs share an ILEC-owned splitter, switching a voice customer's data provider among such providers is much simpler and conserves valuable resources.

Access to Qwest owned splitters also yields benefits when a customer terminates individual services, allowing for the efficient usage of splitters and racks within central offices where space is already scarce, and promotes competition among data CLECs because voice providers and ISPs encounter fewer barriers to switching from one provider to another.

Requiring Qwest to provide access to its splitters also promotes the ability of CLECs to offer a bundle of voice and data service in competition with Qwest. One of the procompetitive aspects of UNE-P is that it allows a voice CLEC to enter the market and compete with Qwest without having to obtain collocation space. Access to Qwest-owned splitters on a line-at-a-time basis eliminates the need for UNE-P providers to secure collocation arrangements, and thus provides similar benefits to the expansion of DSL with UNE-P. For example, by having access to splitters, UNE-P providers can effectively partner with any data CLEC that has deployed a DSLAM in the central office, and are not limited to those that have already deployed their own splitters or lack space

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[113] *Id.*

[114] *Id.*, pp. 143- 45.

for additional splitters. By making it less difficult for UNE providers to access the high frequency portion of the loop, this impediment to competition may be avoided.

Accordingly, Qwest should be required to modify its SGAT to state that it will provide access to its splitters on a shelf-at-a-time basis.

b. Qwest Should be Required to Provide Line Splitting on all Types of Loops.

Qwest is required to provide line splitting on all forms of loops and Qwest's differentiation between UNE-P splitting and other forms of Loop Splitting.

In its SGAT, Qwest proposes to make line splitting available only for loops provided via its UNE-Platform ("UNE-P") POTS offering. AT&T and other CLECs objected to this. It is AT&T's position that Qwest must offer line splitting on the UNE loop and any combination that uses the UNE loop. Qwest indicated later that it would offer loop splitting on UNE loops as of August 1, 2001.[115] That offer does not appear to be reflected in the South Dakota SGAT. Qwest must do loop splitting on UNE loops and its failure to do so makes Qwest's offer insufficient to constitute compliance with § 271 for several reasons.

Qwest's attempt to differentiate UNE-P line splitting and Loop Splitting demonstrates the fundamental dispute between Qwest and CLECs/DLECs. Qwest has asserted that its obligation to provide line splitting under the FCC's Orders is limited to UNE-P line splitting, citing to the FCC's *Line Sharing Reconsideration Order*, claiming that the Order is somehow ambiguous as to its applicability beyond UNE-P.[116]

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[115] WA Transcript, pp. 4571-72 (Exhibit KLW-2); *See also*, SGAT § 9.24.

[116] WA Transcript, pp. 4575-77 (Exhibit KLW-2).

AT&T disagrees. The FCC stated in its *Line Sharing Reconsideration Order* that the line sharing and line splitting obligations apply to the entire loop. Specifically, with respect to line splitting, the FCC stated in the *Line Sharing Reconsideration Order*:

> We find that incumbent LECs have a current obligation to provide competing carriers with the ability to engage in line splitting arrangements. The Commission's existing rules require incumbent LECs to provide competing carriers with access to unbundled loops in a manner that allows the competing carrier "to provide any telecommunications service that can be offered by means of that network element." Our rules also state that "[a]n incumbent LEC shall not impose limitations, restrictions, or requirements on ... the use of unbundled network elements that would impair the ability of" a competing carrier "to offer a telecommunications service in the manner" that the competing carrier "intends." We further note that the definition of "network element" in the Act does not restrict the services that may be offered by a competing carrier, and expressly includes "features, functions, and capabilities that are provided by means of such facility or equipment." As a result, independent of the unbundling obligations associated with the high frequency portion of the loop that are described in the Line Sharing Order, *incumbent LECs must allow competing carriers to offer both voice and data service over a single unbundled loop*. This obligation extends to situations where a competing carrier seeks to provide combined voice and data services on the same loop, or where two competing carriers join to provide voice and data services through line splitting.[117]

The FCC concluded that requiring RBOCs to provide line splitting:

> will further speed the deployment of competition in the advanced services market by making it possible for competing carriers to provide voice and data service offerings on the same line. As we found in the Line Sharing Order, these offerings are especially attractive to residential and small business customers. At present, end users receiving voice service from competing carriers via the UNE-platform may be unable to get xDSL service from a competing carrier without migrating their voice service back to the incumbent LEC. Line splitting, however, increases consumer choices by making it possible for carriers to compete effectively with the combined voice and data services that are already available from incumbent LECs and through line sharing arrangements. In addition, line splitting provides voice carriers who do not wish to provide xDSL service at this time to develop partnerships with data carriers and thereby offer

[117] *Line Sharing Reconsideration Order*, ¶ 18 (Emphasis added).

> end users voice and data services on the same line. Furthermore, as the New York Public Service Commission has found, the availability of line splitting may increase the likelihood that competing carriers will make investments in facilities that will help solidify competing carrier market share.[118]

The FCC makes no distinction in the manner in which the loop is delivered to the CLEC in its line splitting requirement. The FCC confirms that CLECs should have broad access to use all the features and functionalities of the loop and that ILECs may not impose any limitations on the use of the loop by the CLEC.[119] Qwest's refusal to allow CLECs to use the full functionality of the loop for purposes of line splitting is an improper limitation on the CLECs use of the loop. Qwest should be required to permit line splitting on all loops and loop combinations.

As a practical matter, there is no material difference between Qwest permitting line splitting on UNE-P, UNE Loops or any UNE loop combination. In all of these cases, the underlying loop facilities are being leased by the CLEC and the CLEC should be allowed to use the full features and functions of the loop as they choose. Moreover, splitting of the UNE loop and the EEL loop both involve splitting the line at the central office and should not require any different work by Qwest.

Qwest must make line splitting available on all loops, including all loop combinations, as a standard offering, on an unlimited basis. CLECs/DLECs must not be forced to use the time consuming SRP process to implement line splitting. Accordingly, Qwest should revise § 9.21 of its SGAT to clearly set forth its obligation to provide line splitting on all loops and loop combinations. In addition, the SGAT should be revised to clearly state that Qwest will offer EEL splitting as a standard offering and to state the

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[118] *Id.*, ¶ 23.
[119] *Id.*, ¶ 27.

terms and conditions of such an offering. Until Qwest does so, it cannot comply with Checklist Item 4.

E. NETWORK INTERFACE DEVICE (NID)

1. Legal Requirements.

Section 271(c)(1)(B)(ii) states that a BOC must provide "[n]ondiscriminatory access to network elements in accordance with the requirements of §§ 251(c)(3) and 252(d)(1). In its recent *UNE Remand Order*, the FCC on remand identified the list of network elements that Qwest must provide pursuant to § 251(c)(3).

The FCC redefined the NID to " include all features, functions, and capabilities of the facilities used to connect the loop distribution plant to the customer premises wiring, regardless of the particular design of the NID mechanism."[120] Specifically, the FCC defined the NID to include "any means of interconnection of end-user customer premises wiring to the incumbent LEC's distribution plant, such as a cross connect device used for that purpose."[121] The FCC also requires that "an incumbent LEC shall permit a requesting telecommunications carrier to connect its own loop facilities to on-premises wiring through the incumbent LEC's network interface device, or at any other technically feasible point."[122]

In addition, the FCC's definition encompasses "smart NIDs" which are devices used on PBX trunks and DS1 loops that give some maintenance monitoring for the loop. Qwest must also make available the full features and functions of the NID, such as termination devices for ISDN loops.

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[120] *UNE Remand Order*, ¶ 233.

[121] 47 C.F.R. § 51.319(b).

[122] *Id.*

2. Disputed Issues on NIDs.

a. Qwest Must Make the NID Available on a Stand-Alone Basis.

The issue at dispute is the manner in which Qwest is defining the NID. Qwest's NID definition is found at § 9.5.1 of the SGAT. Qwest asserts that the NID definition reflects merely the FCC's language.[123] However, Qwest clearly intends for its definition of a NID to provide access to a terminal only when such terminal constitutes the demarcation between a customer's inside wire and Qwest's network. If Qwest owns the inside wire then the CLEC obtains access to the NID terminal via the subloop processes. Qwest's testimony clearly indicates that it intends for the NID product to be narrower than the FCC's expansive definition. AT&T seeks to ensure that Qwest does not eliminate, through its narrowing of the FCC's broad definition of NIDs, access that is contemplated by the FCC in its unbundling rules.

In the *Local Competition Order*, the FCC defined the network interface device ("NID") as a cross-connect device used to connect loop facilities to inside wiring.[124] Subsequently, in the *UNE Remand Order*, the FCC broadened its definition "to include all the features, functions and capabilities of the facilities used to connect loop distribution plant to the customer premises wiring, regardless of the particular design of the NID mechanism."[125]

Specifically, FCC rules now define the NID as follows:

> The **network interface device network** element is defined as any means of interconnection of end-user customer premises wiring to the incumbent

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[123] Qwest curiously introduces part of the FCC's definition with the phrase "*The NID carries with it* all features, [etc.]" § 9.5.1 (emphasis added). The modification itself, which does not precisely track the FCC's definition, introduces some interpretive uncertainty as to how Qwest intends on the FCC's definition to be incorporated.

[124] *Local Competition Order*, ¶ 392, n. 852.

[125] *UNE Remand Order*, ¶ 233.

> LEC's distribution plant, such as a cross connect **device** used for that purpose. An incumbent LEC shall permit a requesting telecommunications carrier to connect its own loop facilities to on-premises wiring through the incumbent LEC's **network interface device**, or at any other technically feasible point.[126]

Qwest definition of the NID is not consistent with this definition. The FCC makes clear that access to the physical devices that might be described as a NID are less important than access to the functions constituting the NID. The FCC has made clear that the NID "structure" and "function" are distinct, concluding that "[a]lthough the physical structure of the NID is widely available, it is access to the function, rather than the hardware itself, that competitors rely upon."[127]

Qwest has stated that the NID definition is irrelevant because Qwest is providing the CLEC every conceivable access it could want through the NID or subloop products. That is not the case. Qwest's own witness observed that Qwest's deployment of NIDs was complex, noting that there are "hundreds of variations of [NID] terminals out there."[128] As was clear from the subloop workshop, the terms and conditions associated with accessing subloop are significantly different and more complex and time consuming than the NID access terms. Therefore, CLECs need the assurance of specific rules applicable to all NIDs. CLECs should not be forced to risk Qwest's application of such specific rules to limit the CLEC's "access to the function, rather than the hardware" of a NID. This is precisely why AT&T seeks to ensure that the expansive definition established by the FCC is not undermined by Qwest.

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[126] 47 C.F.R. § 51.319(b).

[127] *UNE Remand Order*, ¶ 232.

[128] *Id.*, p. 77.

The FCC has also indicated that incumbent LECs, such as Qwest, have used the MTE chokepoint as a means to severely inhibit competition. In the *MTE Order*, the FCC found that "incumbent LECs are using their control over on-premises wiring to frustrate competitive access in multitenant buildings."[129] Further, the FCC found "that incumbent LECs possess market power to the extent their facilities are important to the provision of local telecommunications services in MTEs."[130] Finally, the FCC recognized that "[i]n the absence of effective regulation, they therefore have the ability and incentive to deny reasonable access to these facilities to competing carriers."[131]

Without a clear statement that Qwest is indeed required to provide access to he NID to the full extent of the FCC's order, CLEC's risk problematic interpretive disputes with Qwest. These disputes may require initiation of the Bona Fide Request process, Dispute Resolution or, possibly, arbitration under the Act. Although CLECs specific operational issues may be inevitable, it is unacceptable to have to litigate every form of NID access, when the law is so expansive.

Accordingly, Qwest must be required to revise the definition of the NID in its SGAT to be consistent with the FCC's definition. In addition, the remainder of § 9.5 should be conformed to be consistent with the FCC's definition. For example, Qwest has maintained that where Qwest owns the on-premises wiring, Qwest will not offer the NID to CLECs. In such instances, Qwest maintains the NID is only available as a component

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[129] *In the Matter of Promotion of Competitive Networks in Local Telecommunications Markets*, First Report and Order and Further Notice of Proposed Rulemaking in WT Docket No. 99-217, Fifth Report and Order and Memorandum Opinion and Order in CC Docket No. 96-98, and Fourth Report and Order and Memorandum Opinion and Order in CC Docket No. 88-57, WT Docket No. 99-217, FCC 00-366, ¶ 6 (released October 25, 2000) ("*MTE Order*").

[130] *MTE Order* ¶ 11.

[131] *Id.*

of Qwest's subloop product.[132] The application of the definition of NID may extend beyond the physical terminal Qwest restrictively identifies as the NID. Indeed the functions and features of the NID may extend to certain "downstream" network components that may include some wiring, adjacent protectors and other equipment. Qwest should be required to make all components of the NID—including all features and functions of the NID—available to CLECs.

This is precisely what applicable law requires. The FCC's definition of the NID "include[s] all the features functions and capabilities of the facilities used to connect loop distribution plant to the customer premises wiring, regardless of the particular design of the NID mechanism."[133] It bears repeating: the FCC made clear that "[a]lthough the physical structure of the NID is widely available, it is access to the function, rather than the hardware itself, that competitors rely upon."[134] Accordingly, all components of the NID must be made available to CLECs, not merely the NID "terminal."

b. Qwest should be required to remove its connections from protectors when CLECs access the protector.

CLECs may encounter situations where they will need to request that Qwest free capacity on the NID so that the CLEC can provide service to the customer. This is an important issue because § 9.5.2.1 of the SGAT limits the CLEC's access to NID to cases where space is available on the NID. There is no provision that would require Qwest to make space available on the NID. This may be particularly necessary in situations where the customer does not want an additional NID on their premise or in MTE setting where

[132] SGAT § 9.5.1.
[133] *UNE Remand Order*, ¶ 233.
[134] *UNE Remand Order*, ¶ 232.

association rules limit additional boxes. Failure to free such capacity may make the NID, or connections within the NID, inaccessible to the CLEC.

Qwest has objected to this request, claiming it has no obligation to make space available on the NID and that AT&T's proposal for removing Qwest loop connection violates the National Electrical Code. Qwest is obligated to provide access to the NID, unless it is technically infeasible for it to do so. Therefore, Qwest is obligated to remove its loop connections from the NID, absent technical infeasibility.

There is no question that it is technically feasible for Qwest to remove its connections from the NID. Qwest does not dispute this. AT&T provided a Bell System Practice that explicitly permits a procedure called "capping off," a procedure which would entail removing the Qwest circuit from the NID and tying it down.[135] Qwest claims that this practice is from 1969, implying it is outdated. Qwest has never presented any evidence that this practice was ever superceded in the Bell System or U S WEST/Qwest.

Qwest has also claimed that this Bell System practice addresses a scenario that is different from the removal of the loop by the ILEC for use by the CLEC. This argument is false. Of course, the precise scenario at issue here did not exist at the time since CLECs were not envisioned at the time the Bell System practice was adopted. However, the procedure depicted in the Bell System practice of removing the protector from the house is analogous to the procedure proposed by AT&T. More to the point, lightning and over-voltage issues have not change since the date of this practice. The Bell System

[135] Exhibit KLW-14.

practice depicts a procedure that is proper and acceptable practice. If this practice was acceptable then from a safety perspective, there is no reason it would not be safe now.

The only evidence Qwest has presented to support its refusal to provide access to the NID is its reference to § 315A of the National Electrical Safety Code and the § 800-30(a) of the National Electrical Code.[136] Qwest claims that these provisions somehow proscribe it from removing its loop connections in the manner proposed by AT&T. Neither of the provisions cited by Qwest to the National Electrical Safety Code and the National Electrical Code address the proposal made by AT&T. Section 315A of the National Electrical Safety Code addresses the need for protection where a "communications apparatus is handled by other than qualified persons." That is not the case here. We are talking about situations where company technicians that are qualified persons would be capping off loop facilities.

Similarly, § 800-30(a) of the National Electrical Code is not applicable. This section applies to circuits that run partly or entirely in aerial wire or aerial cable that not confined within a block or circuits, aerial or underground, located within the block containing the building served so as to be exposed to accidental contact with electric light or power conductors operating at over 300 volts to ground. A block is defined in § 800-2 as square or portion of a city, town, or village enclosed by streets and including the alleys so enclosed, but not any street. "Exposed" has three definitions in the Code. In Article 100 – Definitions, exposed (as applied to live parts) is defined as capable of being inadvertently touched or approached nearer than a safe distance by a person and it is applied to parts that are not suitably guarded, isolated, or insulated. Also in Article 100,

[136] Exhibit KLW-15 and 16

exposed (as applied to wiring methods) is defined as on or attached to the surface or behind panels designed to allow access. Finally, in § 800-2 Definitions, exposed is defined as a circuit that is in such a position that, in case of failure of supports and insulation, contact with another circuit may result.

A capped circuit is not exposed under any of these definitions. Based upon the first definition, when the conductors are capped, the wire cannot be inadvertently touched. For purposes of the second definition, a capped circuit is not attached directly to the structure, it is attached to a standoff that is an insulator. Finally, based upon the third definition, the circuit is doubly insulated and so it cannot come in contact with another circuit even if one insulating sheathe is compromised.

When a communications circuit actually interfaces with inside wire at a building, then it is "exposed" and must have a protector under the National Electrical Code.

In essence, paragraph 800-30(a) requires Qwest to have a protector on a pole in the block for each circuit. This is because not all distribution facilities are actually connected to premises. Spare facilities exist in the loop plant that are not "dropped" to buildings. The reference to electric light or power conductors at over 300 volts is referring to the fact that telephone wires typically coexist on power poles with high voltage lines. Workmen must be protected from accidental contact with communications circuits that have become connected to high voltage power lines or lighting. If Qwest does not have such protectors on all circuits in the block, they are in violation of the National Electrical Code. All cables must have such protection as there is no assurance that any particular circuit actually terminates in a protector at a building. There is no exposure to voltages over 300 volts at buildings (with the exception of industrial facilities

that are covered by other sections) as the voltage that is available to such buildings is at maximum 120 V. However, the National Electrical Code does not require a protector at the house when the drop does not penetrate the building. Thus, this section of the National Electrical Code is not germane to AT&T's proposal.

Therefore, Qwest has not presented any viable technical or safety concerns. It must remove its loop connections in order to provide access to its NID in order to provide CLECs access to its NID where space is not otherwise available. AT&T proposes the following modification to the last sentence of § 9.5.2.1 to implement this obligation: "At no time should either Party remove the other Party's loop facilities from the other Party's NID without appropriately capping off the other Party's loop facilities."

F. LOCAL NUMBER PORTABILITY.

1. Legal Requirements.

Number portability is the ability of users of telecommunications services "to retain, at the same location, existing telecommunications numbers without impairment of quality, reliability, or convenience when switching from one telecommunications carrier to another."[137] In its initial order on number portability, the FCC noted that number portability is essential to meaningful competition in the provision of local exchange services and affirmed that number portability provides consumers flexibility in the way they use their telecommunications services and promotes the development of competition among alternative providers of telephone and other telecommunications services.[138]

Conversely, the FCC recognized that:

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[137] 47 U.S.C. § 153(30).

[138] *In the Matter of Telephone Number Portability*, First Report and Order and Further Notice of Proposed Rulemaking, CC Docket No. 95-116, FCC 96-286, ¶ 28 (released July 2, 1996) ("First Number Portability Order").

> a lack of number portability likely would deter entry by competitive providers of local service because of the value customers place on retaining their telephone numbers. Business customers, in particular, may be reluctant to incur the administrative, marketing, and goodwill costs associated with changing telephone numbers. As indicated above, several studies show that customers are reluctant to switch carriers if they are required to change telephone numbers. To the extent that customers are reluctant to change service providers due to the absence of number portability, demand for services provided by new entrants will be depressed. This could well discourage entry by new service providers and thereby frustrate the pro-competitive goals of the 1996 Act.[139]

Section 271(c)(2)(B) of the 1996 Act requires a BOC to comply with the number portability regulations adopted by the FCC pursuant to § 251.[140] Section 251(b)(2) requires all LECs "to provide, to the extent technically feasible, number portability in accordance with requirements prescribed by the Commission."[141] In order to prevent the cost of number portability from thwarting local competition, Congress enacted § 51(e)(2), which requires that "[t]he cost of establishing telecommunications numbering administration arrangements and number portability shall be borne by all telecommunications carriers on a competitively neutral basis as determined by the Commission."[142]

Pursuant to these statutory provisions, the FCC requires that RBOCs provide number portability in a manner that allows users to retain existing telephone numbers "without impairment in quality, reliability, or convenience."[143] In addition, the FCC

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[139] *Id.*, ¶ 31 (citations omitted).

[140] 47 U.S.C. § 271(c)(2)(B)(xii).

[141] *Id.*, § 251(b)(2).

[142] *Id.*, § 251(e)(2); *see also BellSouth Second Louisiana 271 Order*, ¶ 274; *In the Matter of Telephone Number Portability*, Third Report and Order, 13 FCC Rcd 11701, 11702-04 (1998) ("Third Number Portability Order"); *In the Matter of Telephone Number Portability*, Fourth Memorandum Opinion and Order on Reconsideration, CC Docket No. 95-116, ¶¶ 1, 6-9 (released June. 23, 1999) ("Fourth Number Portability Order").

[143] *BellSouth Second Louisiana 271 Order*, ¶ 276.

requires the RBOC to demonstrate that it can coordinate number portability with loop cutovers in a reasonable amount of time and with minimum service disruption.

2. Disputed Issues.

To satisfy Checklist Item 11, Qwest must demonstrate that it provides LNP with minimum service disruptions and without impairment of quality. Qwest's performance demonstrates Qwest is not providing nondiscriminatory access to LNP with minimum service disruptions and without impairment of quality. In addition, Qwest's processes do not ensure that CLEC's will obtain LNP in this manner and that Qwest's SGAT must be revised to provide such assurances. As discussed in more detail below, Qwest has now proposed a mechanized process that will delay the disconnect of its loop from its switch to 11:59 p.m. of the day following the CLEC's scheduled customer conversion. While AT&T commends Qwest for the movement it has made on this issue and AT&T is hopeful that this process change will resolve this issue ultimately, Qwest proposal is now merely a paper promise. Until the process is, in fact, implemented and tested and the parties have sufficient experience that the process will in fact resolve the problems that AT&T and Cox have encountered, Qwest cannot be deemed to be providing nondiscriminatory access to local number portability with minimum service disruptions and without impairment of quality. In addition, while Qwest has distributed its documentation that reflects its revised product offering, Qwest has steadfastly refused to fully reflect the new process in its SGAT. Until Qwest does so, it has no legally binding commitment to provide LNP.

When AT&T provides a new loop to a customer, either via its cable telephony or fixed wireless facilities, and requests that the customer be ported for this new physical

loop. If Qwest disconnects its loop before the new CLEC loop is in place, the customer will lose telephone service. There are numerous reasons why the disconnect may occur before the port: to name a few, customers don't keep their installation appointments, the installers could be delayed, or there could be installation problems. Whatever the reasons, to avoid customer service outages, coordination must occur on these conversions and some verification process needs to exist to ensure that the port has been activated by the CLEC before Qwest disconnects its loop.

Coordination of cutovers – whether it be for a Qwest-provided loop or a CLEC-provided loop – is critical to ensuring that the port is completed without interruption of the customer's service. Qwest's LNP process does not provide sufficient protections against customer service outages. Qwest's own testimony highlights the problem. While Qwest attributes the problem to two CLECs and their processes, AT&T and Cox presented testimony that Qwest's processes have caused customers to lose dial tone. SGAT revisions must be made to provide CLECs with the assurance that their customers will not loose dial tone when switching service from Qwest to the CLEC.

Qwest refuses to put forth the SGAT language that would put teeth behind such coordination for CLEC-provided loops.

The FCC has stressed the importance of such coordination, stating:

> a BOC must be able to deliver within a reasonable timeframe and with a minimum of service disruption, unbundled loops of the same quality as the loops the BOC uses to provide service to its own customers. In the context of checklist item (xi), we interpret this to mean that the BOC must demonstrate that it can coordinate number portability with loop cutovers in a reasonable amount of time and with minimum service disruption.[144]

[144] *BellSouth Second Louisiana 271 Order*, ¶ 279. (Citations omitted.)

In addition, in the context of hot cut loop conversion, the FCC has stressed the importance of proper hot cuts to avoid customer service outages and the impact that the failure to provision proper hot cuts will have on competition:

> The ability of a BOC to provision working, trouble-free loops through hot cuts is critically important in light of the substantial risk that a defective hot cut will result in competing carrier customers experiencing service outages for more than a brief period. Moreover, the failure to provision hot cut loops effectively has a particularly significant adverse impact on mass market competition because they are a critical component of competing carriers' efforts to provide service to the small- and medium-sized business markets.[46]

The same logic applies equally to all coordinated cutovers for LNP with Unbundled Loops or CLEC-provided loops. Clearly, the objective should be, as is reflected in the FCC LNP standards, to avoid customer service outages. Otherwise, the service outages will reflect adversely on the CLEC and will negatively impact the CLEC's ability to obtain and retain customers. Customers blame the CLEC when they encounter problems with their service when they convert to a CLEC. It is not uncommon for customers who have encountered service disruptions when switching from the incumbent LEC to the CLEC to return to the incumbent LEC. Therefore, from a competitive standpoint, smooth conversions are critical to competition.

This is not a hypothetical issue. Both Cox Communications and AT&T raised concerns regarding the impact that Qwest's disconnect process is having on their provision of service to residential customers, particularly where the CLEC is providing that service using its own loops. Cox, the other CLEC that Qwest acknowledges is providing local service over its own loops, raised concerns about the coordination of ports for its loops with the removal on the translations from the Qwest switch in the fall

[46] *SBC Texas 271 Order*, ¶ 156.

of 1999 in the Nebraska § 271 proceeding and requested that Qwest delay its disconnect until the day after the Cox scheduled install. Cox in Arizona, appeared at the workshop and again raised concerns regarding Qwest's LNP performance in coordinating its disconnect with the Cox install and requested that Qwest's disconnect be delayed until the day following the scheduled install of Cox's service. AT&T has raised this same concern throughout the § 271 LNP workshops.

Qwest initially responded that if a CLEC wishes to coordinate LNP with CLEC-provided loops, the CLEC must order the managed cut process that is set forth in § 10.2.5.3. The managed cut process set forth in § 10.2.5.3 is designed to manage the cutover of large business customer conversions. The managed cutover process, while acceptable for large business conversions, would be unwieldy, costly and an implementation nightmare if applied to the mass-market. In order to ensure that residential cutovers were coordinated, AT&T would have to subject every conversion to the managed cut process. Not only would this impose significant cost on every conversion, but given the number of AT&T residential conversions in Qwest's region, there is simply not enough manpower in either AT&T or Qwest to accomplish the conversions.

Qwest then offered was to move the disconnect time back to 11:59 p.m. on the day of the CLEC's install, which means that the CLEC must provide notice to Qwest by 7:00 p.m. on the day of the disconnect. While AT&T agreed that Qwest's proposal was an improvement from the 8 p.m. time frame, it was still insufficient to protect customers from losing dial tone. AT&T presented evidence that demonstrated that Qwest was

having difficulty stopping its disconnect even when it received notice in the morning of the day of the port.

After much debate and several adverse rulings, Qwest proposed a new next-day disconnect solution, designed to resolve the significant problems that AT&T and Cox, in Arizona, was experiencing.[39] 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.

As an initial matter, OP-17, the PID that is designed to measure Qwest's performance on this disconnect issue, will not fully measure the new disconnect process implemented by Qwest. The OP-17 states that one of the prerequisites for measurement is that the CLEC must notify Qwest by 8:00 p.m. on due date in order to be counted as a CLEC-requested delay, if not, that order is excluded from the PID measure. However, Qwest's new product offer 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 p.m. of the due date, under the current PID, Qwest will count that order as an exclusion 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 has proposed a revision to OP-17 in the SGAT process that would synch up the PID with Qwest's new offering. Qwest has objected to revising the PID.

[39] Exhibit KLW-1?

In addition, in other states, Qwest has presented results from it self-reported data, claiming that this data demonstrates that Qwest's new process is working. However, Qwest has never provided the underlying data that supports these results, so there is no way to analyze this data to understand whether it is accurate and verifiable. Nor can it be determined whether this data even tests Qwest's new process. It is unclear how this data is being compiled and what it is measuring. Nor can it be ascertained what input data was used for these results. Qwest's process for collecting input data must be tested, and the accuracy of the input data must be verified. It is only after this comparative evaluation is completed and Qwest has corrected any identified deficiencies, that Qwest's results can truly be considered to be audited and reliable.

Second, there is no SGAT language that addresses this new offering. Specifically, the last sentence in § 10.2.2.4 states "If CLEC requests Qwest to do so by 5:00 p.m. mountain time, Qwest will assure that the Qwest Loop is not disconnected that day." Similarly, § 10.2.5.3.1 states:

> Qwest will set the ten (10) digit unconditional trigger for numbers to be ported, unless technically infeasible, by 11:59 p.m. (local time) on the business day preceding the scheduled Port date. (A 10-digit unconditional trigger cannot be set for DID services in 1AESS, AXE10, and DMS10 switches thus managed cuts are required, at no charge.) *The ten (10) digit unconditional trigger and Switch translations associated with the End User Customer's telephone number will not be removed, nor will Qwest disconnect the Customer's Billing and account information, until 11:59 p.m. (local time) of the next business day after the Due Date.*

These provisions do not address Qwest's new product offer, which specifically states that CLECs have until noon of the day following the scheduled due date to notify Qwest to delay the disconnect.[147]

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[147] See Exhibit KLW-17.

Qwest touted this offering as the solution to the premature disconnects that AT&T and other CLECs were encountering. It is Qwest that proposed this solution, not AT&T. Qwest made this change because of the commercial experience evidence produced by AT&T and Cox that showed Qwest processes were causing the premature disconnection of CLEC customers. Qwest changed its processes in response to this evidence, so that it could gain approval on Checklist Item 11. It is this process change that prompted AT&T to seek a revision to the PID to synch up the PID with the product offering initially made and then clarified by Qwest. It is this process change that has prompted AT&T to seek changes to the SGAT to ensure that the SGAT language properly reflects Qwest's new commitment. Yet, now despite Qwest's claim that this is the solution that will put Qwest in compliance with Checklist Item 11, Qwest refuses to reflect this solution in its SGAT. Without SGAT language describing this solution, CLECs have no assurance that Qwest will live up to this obligation or that Qwest will not unilaterally alter this product, forcing the CLECs to invoke the CMP process to reinstate this process. Ultimately, the SGAT language permits Qwest to respond to every failure to stop the disconnect from the switch when it received appropriate notice from the CLEC by 12:00 noon on the day after the originally scheduled disconnect by saying "we tried." That is unacceptable from a legal standpoint. It is Qwest's burden to demonstrate that it has the legal obligation in its SGAT to provide LNP in accordance with the FCC's standards. AT&T has demonstrated that Qwest's SGAT is deficient. Until Qwest revises its SGAT to properly reflect what it has agreed to, Qwest has not and cannot fulfill the requirements of Checklist Item 11.

To cure this problem, AT&T proposes that § 10.2.5.3.1 be revised as follows:

> Qwest will set the ten (10) digit unconditional trigger for numbers to be ported, unless technically infeasible, by 11:59 p.m. (local time) on the

business day preceding the scheduled Port date. (A 10-digit unconditional trigger cannot be set for DID services in 1AESS, AXE10, and DMS10 switches thus managed cuts are required, at no charge.) The ten (10) digit unconditional trigger and Switch translations associated with the End User Customer's telephone number will not be removed, nor will Qwest disconnect the Customer's Billing and account information, until 11:59 p.m. (local time) of the next business day after the Due Date. CLEC is required to make timely notifications of Due Date changes or cancellations by 8:00 p.m. mountain time on the Due Date through a supplemental LSR order. In the event CLEC does not make a timely notification, CLEC may submit a late notification to Qwest as soon as possible but in no event later than 12:00 p.m. mountain time the next business day after the Due Date to Qwest's Interconnect Service Center in the manner set forth below. For a late notification properly submitted, Qwest agrees to ensure that the End User's service is not disconnected prior to 11:59 p.m. of the next business day following the new Due Date or, in the case of a cancellation, no disruption of the End User's existing service. Late notifications must be made by calling Qwest's Interconnect Service Center followed by CLEC submitting a confirming supplemental LSR order.

Qwest has agreed to this language in other states, with the addition of two additional words in the second to last sentence:

> For a late notification properly submitted, Qwest agrees to **try to** ensure that the End User's service is not disconnected prior to 11:59 p.m. of the next business day following the new Due Date or, in the case of a cancellation, no disruption of the End User's existing service.

Qwest claims this revision is necessary because of some fear that the late notice language will become the norm. AT&T disagrees. Qwest's new process has been in effect for some time and, as far as AT&T is aware, the concern raised by Qwest that late notice would become the norm has not materialized. Moreover, clearly Qwest's product team that is responsible for this product was not concerned about Qwest's ability to meet this obligation and did not require the wishy-washy language that Qwest is now trying to insert into its SGAT. Finally, during the workshops, Qwest claimed that it could stop the disconnect by 11:59 p.m., if it received notice from the CLEC by 8:00 p.m. on that day. CLECs questioned that claim based upon CLEC experience. Here, Qwest has nearly 12

[illegible] to stop the disconnect. Based upon its own testimony this should pose no problem for Qwest. Accordingly, Qwest's concern is unfounded and must be rejected in favor of language that more accurately tracks its product offering.

More importantly, AT&T objects to Qwest's proposed addition, because with the addition of the words "try to" Qwest would effectively eliminate any binding commitment to the new process. The CLEC could suffer extensive customer disconnects and all Qwest would have to do is say that they tried to stop the disconnect in accordance with the contract. The CLEC would have no commitment that they could enforce.

G. CONCLUSION

For all the reasons set forth herein, Qwest has failed to comply with Checklist Items 4 and 11.

FURTHER AFFIANT SAYETH NOT.

Wiest, Rolayne

From: Cremer, Karen
Sent: Thursday, April 11, 2002 12:05 PM
To: 'Greg Bernard'; 'David A. Gerdes'; Cremer, Karen; weigler@att.com; [redacted]@qwestconsulting.com; mstacy@wyoming.com; Wiest, Rolayne; 'Hobson, Mary'
Cc: [redacted]@mmi.net; mary_johnes@mmi.net; Jacobson, David; Best, Harlan; Forney, Heather; Senger, Keith; Frazier, Kelly; Farris, Michele
Subject: RE: Midcontinent; Qwest 271 docket; Our file: 0053

[redacted] to hear from the Intervenors and Staff by 4/11 as to an agreed upon order of witnesses--this is [redacted]

[redacted] witnesses and order of examination: Qwest, ATT, Midco, Fibercom, and Staff (subject to ATT's [redacted] on 4/29 and 30

Steven H. Weigler
Senior Attorney
Law & Government Affairs

[redacted]

April 10, 2002

Via U.S. Mail

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

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

Dear Ms. Elofson:

Enclosed for filing are the original and ten copies of AT&T's Statement of Supplemental Authority Regarding Qwest's Performance Assurance Plan.

Please call me if there are any questions.

Sincerely,

Steven H. Weigler

SHW/jb

Enclosure

cc: Service List

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**

STATEMENT OF SUPPLEMENTAL AUTHORITY REGARDING QWEST'S PERFORMANCE ASSURANCE PLAN

AT&T Communications of the Midwest, Inc. ("AT&T") filed its Comments on Qwest's Performance Assurance Plan on March 18, 2002. The Washington Utilities and Transportation Commission has since issued its Thirtieth Supplemental Order addressing the Qwest Performance Assurance Plan (issued April 5, 2002). AT&T submits the Washington Order as supplemental authority. AT&T notes that the Washington Commission did not adopt every position that AT&T has advocated. However, this seventy-five page comprehensive order addresses, in detail, the most egregious faults found in the currently proffered Qwest Performance Assurance Plan and orders appropriate language changes. The Washington Utilities and Transportation Commission ruled as follows:

1) Antonuk utilized an inappropriate standard of review.[1]
2) It is appropriate to look at other state plans for precedent.[2]
3) A 36% cap is appropriate.[3] However, the sliding cap concept in the current QPAP is not appropriate.[4]
4) The Commission should use the current years Net ARMIS Revenue in determining the cap as opposed to Qwest's proposed 1999 Net ARMIS Revenue.[5]
5) A six-month cap on escalation is appropriate.[6]

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[1] Exhibit A at p.12
[2] *Id.* at p.14.
[3] *Id.* at p.15.
[4] *Id.* at p.18.
[5] *Id.* at p.17.
[6] *Id.* at p.20.

6) Qwest is required to remove the 100 percent cap from the performance measures calculated as averages or means contained in the QPAP.[7]

7) Qwest must modify section 7.3 of the QPAP to require Tier 2 payments in any month that Qwest fails to meet the Tier 2 performance standards.[8]

8) Rejects WorldCom's suggestion to change the critical Z values.[9]

9) Qwest is required to edit "§13.8 and 12.1 to assess penalties, where necessary, to address service quality issues, but to allow Qwest to dispute any payments it believes are duplicative."[10]

10) Qwest is required to file monthly special access reports for Washington as mandated in the Colorado Performance Assurance Plan.[11]

11) Qwest is required to add performance measurements related to UELs including OP-3, OP-4, OP-6, OP-15, MR-5, MR-6, MR-7, MR-8 including payment opportunities. Qwest must also provide sub loop and line sharing standards to the QPAP once the ROC collaborative establishes them.[12]

12) Qwest is required to add PO-2b in the Low Tier I and High Tier 2 payment category.[13]

13) Qwest must adopt AT&T's proposal for high value services.[14]

14) The Washington Commission and not Qwest must have ultimate change control authority for changes made to the QPAP.[15]

15) The Washington Commission defers on joining the multi-state review process until such process is ultimately developed. Until that time, §16.1 and §16.2 must refer exclusively to the Commission.[16]

16) The Washington Commission and not the American Arbitration Association will handle any disputes between the parties related to the QPAP.[17]

17) Qwest must remove the reference to the volume of data points from section 16.1.[18]

18) The Washington Commission defers on whether to be involved in a multi state review process until after such process is fully developed. Until that time, Qwest must deposit Tier II payments in escrow.[19]

19) The QPAP should become effective upon the date the FCC grants Qwest's §271 application.[20]

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[7] *Id.* at p.22.
[8] *Id.* at p.24.
[9] *Id.* at p.26.
[10] *Id.* at p.29.
[11] *Id.* at p.32.
[12] *Id.* at p.33.
[13] *Id.* at p.34.
[14] *Id.* at p.36.
[15] *Id.* at p.38-39.
[16] *Id.* at p.40.
[17] *Id.*
[18] *Id.*
[19] *Id.* at p.42.
[20] *Id.* at p.45.

20) Qwest gets a clean slate as to escalation at the time of 271 entry.[20]

21) The QPAP will expire in six years. However, payments to individual CLECs will continue subject to a review of their necessity.[21]

22) The Washington Commission strikes Qwest's language regarding election of remedies. CLECs can sue for non-contractual remedies and can receive wholesale service quality standards and/or other remedies for performance not covered in the QPAP. CLECs can also sue for contractual remedies if they meet a procedural threshold.[22]

23) Qwest cannot unilaterally offset under any circumstance, but can argue offset to the Commission for Tier II and court for Tier I.[23]

24) In §13.3 related to exceptions, Qwest must notify CLEC and Commission within 72 hours of learning of *force majure* event. The Commission, and not Qwest, is the entity that determines whether a request for waiver of payment obligations in any event should be granted. Furthermore, Qwest must file any exception with the Commission "no later than the last business day of the month after the month in which payments are being disputed."[24]

25) The Washington Commission determined "[a]s the QPAP is being incorporated into the SGAT, it ought to conform to the SGAT, not trump the SGAT. The terms of the SGAT should prevail in any conflict between the QPAP and SGAT."[25]

26) In §11.2, Qwest must make cash equivalent payments (as opposed to bill credit) payments to CLECs except when a non-disputed CLEC payment to Qwest is more than 90 days past due.[26]

27) In §14.4, Qwest must edit language to indicate "Qwest shall retain for a three-year period (measured from the monthly payment due date) sufficient records to demonstrate fully the basis of its calculations for making payments under this PAP."[27]

28) Regarding audit, the Washington Commission indicated that it will wait and see regarding joining any multi-state auditing process. Until that time, the Commission will make the sole determination of which measures should be audited. Any party can petition the Commission regarding auditing certain measures.[28] The Washington Commission also added the following language related to audit:

> 15.5. *Any party may petition the Commission to request that* Qwest investigate *any consecutive Tier 1 miss or any* second consecutive Tier 2 miss to determine the cause of

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[20] *Id.* at p.46.
[21] *Id.* at p.47.
[22] *Id.* at p.50-51.
[23] *Id.* at p.52.
[24] *Id.* at p.53.
[25] *Id.* at p.54.
[26] *Id.* at p.56.
[27] *Id.* at p.57.
[28] *Id.* at p.60.

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

Due to the comprehensive nature of this Order, AT&T would request that this Commission utilize it as significant precedent in mandating changes to the Qwest Performance Assurance Plan.

Respectfully submitted on April 10, 2002.

AT&T COMMUNICATIONS
OF THE MIDWEST, INC.

By: _____

Mary B. Tribby
Steven H. Weigler
AT&T Law Department
1875 Lawrence Street, Suite 1575
Denver, Colorado 80202
(303) 298-6957

CERTIFICATE OF SERVICE

I hereby certify that on this 10th day of April 2002, the original and 10 copies of AT&T's Statement of Supplemental Authority Regarding Qwest's Performance Assurance Plan were sent by U.S. Mail to:

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

and a true and correct copy was sent by U.S. Mail and e-mail on April 10, 2002 addressed to:

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Janet Browne

BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

In the Matter of the Investigation Into U S WEST COMMUNICATIONS, INC.'s[1] Compliance With Section 271 of the Telecommunications Act of 1996	DOCKET NO. UT-003022
In the Matter of U S WEST COMMUNICATIONS, INC.'s Statement of Generally Available Terms Pursuant to Section 252(f) of the Telecommunications Act of 1996	DOCKET NO. UT-003040

THIRTIETH SUPPLEMENTAL ORDER

COMMISSION ORDER[2] ADDRESSING QWEST'S PERFORMANCE ASSURANCE PLAN

[1] Since the inception of this proceeding, U S WEST has merged and become known as Qwest Corporation. For consistency and ease of reference we will use the name Qwest in this Order.

[2] This proceeding is designed, among other things, to produce a recommendation to the Federal Communications Commission regarding Qwest's compliance with certain requirements of law. This Order addresses some of those requirements. The process adopted for this proceeding contemplates that interim orders including this one will form the basis for a single final order, incorporating previous orders, updated as appropriate. The Commission will entertain motions for reconsideration of this Order so that issues may be timely resolved.

EXHIBIT A

TABLE OF CONTENTS

I. SYNOPSIS

In this Order, the Commission rejects certain recommendations made by the Multi-state Facilitator in his QPAP Report, adopts the remainder of the Facilitator's recommendations, and directs Qwest to make certain modifications to its performance assurance plan for Washington state.

II. BACKGROUND

2 This is a consolidated proceeding to consider the compliance of Qwest Corporation (Qwest), formerly known as U S WEST Communications, Inc. (U S WEST), with the requirements of section 271 of the Telecommunications Act of 1996 (the Act),[3] and to review and consider approval of Qwest's Statement of Generally Available Terms (SGAT) under section 252(f)(2) of the Act. The Commission allowed Qwest's SGAT to go into effect at its June 16, 2000, open meeting. The Commission is reviewing the provisions of the SGAT in this proceeding to determine whether the provisions comply with section 252(d) and section 251 of the Act, as well as requirements of Washington state law.

3 In this proceeding, the Commission must determine whether to recommend to the Federal Communications Commission (FCC) that Qwest be allowed to enter the interLATA toll market in Washington state. Through a series of workshops, hearings, and orders, the Commission has reviewed Qwest's compliance with a number of the requirements of section 271. Through hearings that are the subject of this Order, the Commission heard testimony and evidence on the subject of Qwest's Performance Assurance Plan (QPAP). The QPAP is designed as a self-executing remedy plan to ensure Qwest's continued compliance with the requirements of section 271 should the FCC grant an application by Qwest to provide in-region, interLATA service in Washington state.

4 Section 271 sets forth a number of requirements that a Bell Operating Company (BOC), such as Qwest, must meet before obtaining the FCC's approval to provide in-region, interLATA service in a state. In addition to demonstrating that the BOC has fully implemented the 14-point competitive checklist set forth in section 271(c)(2)(B), a BOC must show that it satisfies the requirements of section 271(c)(1)(A), referred to as "Track A," or section 271(c)(1)(B), referred to as "Track B," demonstrate that it is in compliance with section 272, and that the BOC's entry

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[3] Pub. L. No. 104-104, 110 Stat. 56, *codified at* 47 U.S.C. § 151 *et seq.*

into the in-region, interLATA market is "consistent with the public interest, convenience, and necessity."[4]

5 The public interest requirement provides "an opportunity to review the circumstances presented by the application to ensure that no other relevant factors exist that would frustrate the congressional intent that markets be open, as required by the competitive checklist, and that entry will therefore serve the public interest as Congress expected."[5] One of the factors the FCC has considered is whether there is "sufficient assurance that markets will remain open after grant of the application,"[6] and in particular, "whether a BOC would continue to satisfy the requirements of section 271 after entering the long distance market."[7]

6 The FCC has relied on post-entry performance assurance plans developed collaboratively by the BOC, competitive carriers, and the states in finding that there are performance monitoring and enforcement mechanisms in place that would, "in combination with other factors, provide strong assurance that the local market will remain open after [the BOC] receives section 271 authorization."[8]

7 In approving BOC section 271 applications, the FCC has applied a "zone of reasonableness test" in determining whether a performance assurance plan was "likely to provide incentives that are sufficient to foster post-entry performance."[9] The FCC has looked to the following five characteristics in applying its zone of reasonableness test:[10]

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[4] 47 U.S.C. §271(d)(3)(C); *see also, In the Matter of Application of Bell Atlantic New York for Authorization Under Section 271 of the Communications Act To Provide In-Region, InterLATA Service in the State of New York*, Memorandum Opinion and Order, CC Docket No. 99-295, FCC 99-404, ¶18 (rel. Dec. 22, 1999) (*Bell Atlantic New York Order*).

[5] *Bell Atlantic New York Order*, ¶423.

[6] *Id.*

[7] *Id.*, ¶429.

[8] *Id.*; *see also In the Matter of SBC Communications Inc., Southwestern Bell Telephone Company and Southwestern Bell Communications Services, Inc., d/b/a Southwestern Bell Long Distance Pursuant to Section 271 of the Telecommunications Act of 1996 to Provide In-Region, InterLATA Services in Texas*, Memorandum Opinion and Order, CC Docket No. 00-65, FCC 00-238, ¶¶ 422-23 (rel. June 30, 2000) (*SBC Texas Order*); *In the Matter of Joint Application by SBC Communications Inc., Southwestern Bell Telephone Company, and Southwestern Bell Communications Services, Inc., d/b/a Southwestern Bell Long Distance for Provision of In-Region, InterLATA Services in Kansas and Oklahoma*, Memorandum Opinion and Order, CC Docket No. 00-217, FCC 01-29, ¶¶269-70 (rel. Jan. 22, 2001) (*Kansas/Oklahoma Order*).

[9] *Bell Atlantic New York Order*, ¶433; *SBC Texas Order*, ¶423.

[10] *Bell Atlantic New York Order*, ¶433; *In the Matter of the Application of Verizon Pennsylvania Inc., Verizon Long Distance, Verizon Enterprise Solutions, Verizon Global Networks Inc., and Verizon Select Services Inc. for Authorization to Provide In-Region, InterLATA Services in Pennsylvania*, Memorandum Opinion and Order, CC Docket No. 01-138, FCC 01-269, ¶128, n.442 (rel. Sept. 19, 2001) (*Verizon Pennsylvania Order*).

- Potential liability that provides a meaningful and significant incentive to comply with the designated performance standards;
- Clearly-articulated, pre-determined measures and standards, which encompass a comprehensive range of carrier-to-carrier performance;
- A reasonable structure that is designed to detect and sanction poor performance when it occurs;
- A self executing mechanism that does not leave the door open to unreasonable litigation and appeal; and
- Reasonable assurances that the reported data is accurate.

While the FCC has never required BOC applicants to demonstrate that they are subject to performance assurance plans as a condition of section 271 approval, the FCC does consider such plans "probative evidence that the BOC will continue to meet its section 271 obligations and that its entry is consistent with the public interest."[11] The FCC does not impose any structural requirements on a state developed plan. In fact, the FCC recognizes that "state commissions will continue to build on their own work and the work of other states" in developing plans.[12] Overall the FCC looks to see whether the plan is likely to be effective "in practice" in deterring and enforcing against backsliding behavior by the BOC.[13]

III. PROCEDURAL HISTORY

In August 2000, eleven states in Qwest's region--Washington, Oregon, Iowa, Nebraska, North Dakota, South Dakota, Utah, Wyoming, Montana, Idaho, and New Mexico--formed a collaborative to discuss Qwest's Post-Entry Performance Plan (PEPP), known as the Regional Oversight Committee (ROC) PEPP collaborative. After a number of workshops were held to determine the process and resolve substantive issues, Qwest ended its participation in the collaborative process in May 2001. Qwest stated its intent to prepare a Performance Assurance Plan (PAP) incorporating those agreements reached in the collaborative, and to file its PAP in separately in each state.

On June 27, 2001, after hearing comments from participants in the PEPP collaborative and the Multi-state Proceeding,[14] Mr. John Antonuk, the facilitator for

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[11] *SBC Texas Order*, ¶420; *Bell Atlantic New York Order*, ¶429; *Kansas/Oklahoma Order*, ¶269.
[12] *Verizon Pennsylvania Order*, ¶128.
[13] *SBC Texas Order*, ¶421.
[14] Seven states--Iowa, Utah, North Dakota, Wyoming, Montana, Idaho, and New Mexico—have held a joint proceeding similar to the proceeding in Dockets No. UT-003022 and UT-003040 to evaluate

the Multi-state Proceeding, issued Procedural Recommendations for Considering Qwest's PAP. In those recommendations, Mr. Antonuk determined that "there would be substantial efficiency in addressing Qwest's PAP" in a single proceeding as the factual issues raised by the PAP would be similar in each state. The Facilitator invited states participating in the PEPP collaborative to participate in the Multi-state Proceeding for purposes of considering Qwest's PAP.

11 On June 29, 2001, Qwest filed its PAP and a list of resolved and unresolved issues with the parties in the Multi-state Proceeding. This version of the QPAP has been admitted in this proceeding as Exhibit 1200. On July 9, 2001, the Commission sought comments from the parties on whether the Washington Commission should participate in the Multi-state Proceeding to consider Qwest's PAP.

12 On July 23, 2001, the Commission issued its *12th Supplemental Order*, notifying the parties that it intended to participate with a number of other states in the initial review of Qwest's proposed Performance Assurance Plan (QPAP) due to the efficiencies and continuity of process offered by a joint process. The Commission ordered the parties to follow the hearing schedule adopted by Mr. Antonuk. That schedule anticipated the issuance of a report at the conclusion of the hearings. The Commission explained that it considered the Facilitator's Report to be anagalous to an initial order entered by an administrative law judge or hearing examiner, and that all findings and conclusions reached in the Report would be subject to review by the Commission.

13 Hearings in the Multi-state Proceeding were held on August 14-17, and August 27-29, 2001, in Denver, Colorado. The seven states participating in the Multi-state Proceeding were joined by the states of Washington and Nebraska. The transcripts of the hearing and exhibits admitted during the hearings were marked and admitted into this Commission's proceeding during hearings held on December 18-19, 2001. The Facilitator issued his Report on Qwest's Performance Assurance Plan (QPAP Report, Report, or Facilitator's Report) on October 22, 2001. *Ex. 1285.*

14 On October 11, 2001, the Commission issued a notice scheduling hearings for December 18-21, 2001 to discuss the QPAP for December 18-21, 2001. The Commission convened a prehearing conference on October 30, 2001 before administrative law judge Ann E. Rendahl to identify the issues to be presented during the hearings and establish a schedule for filing comments and exhibits in preparation for the hearings. By notice issued on October 24, 2001, the Commission sought comment from all parties concerning the QPAP Report, and posed several specific questions to the parties. On that same date, the Commission issued bench requests to Qwest concerning the QPAP Report, specifically requesting that Qwest file a new version of the QPAP, red-lined to reflect the Facilitator's recommendations.

Qwest's SGAT and Qwest's compliance with section 271 of the Act. This proceeding has become known as the "Multi-state 271 Proceeding."

13 The *21st Supplemental Order, Prehearing Conference Order*, identifies four topics for the hearings in December: the QPAP Report, Compliance with Commission Orders, Qwest Performance Results, and Data Verification. However, the *23rd Supplemental Order*, a prehearing conference order issued on December 14, 2001, granted a motion to continue hearing on Qwest's performance results and data verification until The Liberty Consulting Group had completed its report on the reconciliation of Qwest and CLEC operational reporting data.

14 Qwest filed responses to the bench requests on November 7, 2001, including its red-lined QPAP. *See Ex. 1217.* All parties filed responses to the Commission's questions and any comments on Qwest's responses to the bench requests on November 21, 2001. Parties filed responsive or rebuttal comments on December 5, 2001. The Commission heard comments and arguments from the parties concerning disputed issues arising from the QPAP Report on December 18 and 19, 2001, and admitted Exhibits 1200 through 1284, including exhibits and transcripts from the Multi-state hearings in August 2001. Subsequent to the hearing, the Administrative Law Judge admitted the responses to Bench Requests 39 through 42, and Qwest's illustrative payments pursuant to the QPAP, as Exhibits 1286 through 1289, and Exhibit 1223, accordingly.

15 This Order resolves the issues raised by the parties in briefs, comments, and oral argument to the Commission regarding the content of Qwest's Performance Assurance Plan for the state of Washington. As stated in the *12th Supplemental Order*, the Commission deems the QPAP Report an initial order of the Commission. The QPAP Report stated findings and conclusions on all material facts inquired into during the course of the hearings on Qwest's Performance Assurance Plan. The Commission rejects certain findings and conclusions made in the QPAP Report, and adopts the remainder, with the modifications discussed below.

IV. PARTIES AND REPRESENTATIVES

16 The following parties and their representatives participated in the August 2001 hearings in the Multi-state Proceeding in Denver, Colorado concerning Qwest's Performance Assurance Plan: Qwest, by Lynn A. Stang, attorney, Denver, CO; AT&T, by Steven Weigler and John Finnegan, attorneys, Denver, CO; WorldCom, Inc. (WorldCom), by Tom Dixon, attorney, Denver, CO; Z-Tel Communications (Z-Tel), by Claudia Earls, attorney, Tampa Bay, FL; XO Utah, Inc., XO Washington, Inc. (XO), and Time-Warner Telecom of Washington (TWT) , by Gregory J. Kopta, attorney, Seattle, WA; Covad Communications, Inc. (Covad) by Megan Dobernek, attorney, Denver, CO; Sprint by Barbara Young, attorney, Mount Hood, OR; SBC Communications, by Cheryl Boyd, attorney; New Mexico Advocacy Staff, by Marianne Reilly, attorney, Santa Fe, NM; Public Counsel, by Robert W. Cromwell, Jr., Assistant Attorney General, Seattle WA.

19 The following parties and their representatives participated in the December 2001 hearings concerning Qwest's Performance Assurance Plan: Qwest, by Lisa Anderl and Adam Sherr, attorneys, Seattle, WA, and Lynn A. Stang, attorney, Denver CO; AT&T Communications of the Pacific Northwest, Inc. and TCG Seattle (collectively AT&T), by Steven Weigler, attorney, Denver, CO; WorldCom, by Michel Singer-Nelson, attorney, Denver, CO; Time-Warner Telecom (TWT), XO Washington, Inc., and Electric Lightwave Inc. (ELI), by Gregory J. Kopta, attorney, Seattle, WA; Covad, by Megan Doberneck, Denver CO; and Public Counsel by Robert W. Cromwell, Jr., Assistant Attorney General.

V. THE QPAP

20 As stated above, the QPAP is intended to be a self-executing remedy plan to ensure Qwest's continued compliance with the requirements of section 271 should the FCC grant an application by Qwest to provide in-region, interLATA service in Washington state. Qwest intends the QPAP to be included in the SGAT as Exhibit K, and to be adopted as a part of a CLEC's approved interconnection agreement with Qwest.

21 The QPAP is a two-tiered plan, meaning Qwest must make payments to CLECs (Tier 1 payments) and/or to the state (Tier 2 payments) when Qwest fails to meet certain parity standards or benchmarks, on a per-occurrence or per-measurement basis. The payments, and calculation of the payments, as described in sections 6 through 9 of the QPAP. Section 12 of the QPAP establishes an annual limit or cap on the payments.

22 The parity standards and benchmarks were developed in the PEPP collaborative using statistical measurements, based on certain performance measurements. The statistical measurements are described in QPAP sections 4 and 5. The performance measurements included in the QPAP are defined by Performance Indicator Definitions, or PIDs, developed in the ROC's ongoing Operational Support System (OSS) collaborative.

23 Section 14 of the QPAP requires Qwest to make certain reports to state commissions and CLECs concerning its performance in previous months. As modified by the Facilitator, section 15 of the QPAP provides for joint audits and investigations of the QPAP by participating state Commissions, who would select an independent auditor. Expenses for such audits and investigations would be paid for by a combination of Tier 1 and Tier 2 funds. *Ex. 1217, Section 15.4.* In addition, section 16 of the QPAP provides for a review conducted every six months to determine whether any performance measurements should be added, deleted, or modified, whether the benchmark or parity standards should be modified, and whether the payment structure should be modified.

24 Finally, section 13 of the QPAP includes a set of limitations on the operation and administration of the QPAP, such as the effective date of the plan, when Qwest is excused from making payments, and a requirement that CLECs make an election of remedies, for CLECs.

VI. DISCUSSION

25 Following the discussion below concerning the standard of review and consideration of other state and BOC plans, the issues are organized according to the FCC's five characteristics for determining whether a performance plan falls into the "zone of reasonableness."

A. STANDARD OF REVIEW

26 The QPAP Report includes a section titled "Standard of Review," in which the Facilitator set forth the criteria for evaluating the sufficiency of the QPAP. *QPAP Report at 4-6.* The Facilitator included not only the FCC's five characteristics of its zone of reasonableness test, but also a number of "considerations," such as whether the incentives of the plan impose an "irrational price" on in-region, interLATA entry. *Id. at 6.* A number of CLECs object to the Facilitator's use of additional criteria, arguing that the Commission should reject and strike these additional criteria.

AT&T

27 AT&T does agree with the Facilitator's statement that "the task is not to decide how to increase incentives, but to decide upon the sufficiency of those proposed, which includes at least a full consideration of their comparability with those already reviewed by the FCC." *AT&T's Comments on the Liberty Consulting Group's QPAP Report at 4 (AT&T Comments).* However, AT&T argues that the Facilitator's additional criteria do not provide a "clearly articulated standard" as required by the FCC's five-prong zone of reasonableness test. *Id. at 5.* Specifically, AT&T objects to the Facilitator's statements on page 6 of the Report that it is irrelevant whether greater burdens on Qwest would increase its incentives to comply with service obligations, and that making such an issue relevant 'is not only fantastical, it is beyond any rational conception of fairness and propriety." *Id. at 5.* AT&T notes that the Staff of the Utah Division of Public Utilities issued its own version of the QPAP Report, striking this particular language.[15] *Id.*

28 AT&T objects to the Facilitator's consideration of whether "the incentive aspects of the plan (i.e., those that go beyond compensating CLECs for actual harm) impose a price on in-region, interLATA entry that would be irrational for a BOC to pay for the privilege of such entry." *Id. at 4.* AT&T argues that the QPAP is intended to create

[15] *Utah Division of Public Utilities QPAP Report* (October 26, 2001) *(Utah Staff Report).*

incentives for Qwest to perform, not to determine the "toll" a BOC should pay for the privilege of section 271 entry, or the "strain" upon a BOC for paying CLECs for its failure to perform. *Id. at 6.*

WorldCom

29 WorldCom echoes AT&T's objections to the additional criteria as vague, ambiguous, and inconsistent with FCC orders. *WorldCom's Comments on Liberty Consulting's Report Regarding Qwest's Performance Assurance Plan at 2 (WorldCom Comments).* WorldCom recommends the Commission either ignore or strike the Facilitator's additional criteria. *Id.* Further, WorldCom specifically objects to the Facilitator's conclusion that it is irrelevant to answer the question of whether greater burdens on Qwest would increase its incentives to perform. *Id.* WorldCom asserts that the FCC has found the issue to be highly relevant, stating in its *Verizon Massachusetts Order* that "[d]amages and penalties should be set at a level above the simple cost of doing business."[16] *Id. at 3.*

Joint CLECs

30 ELI, TWT, and XO (Joint CLECs) object that the Facilitator created new legal standards for evaluating the QPAP. *ELI, TWT, and XO Comments on QPAP Report at 4 (Joint CLEC Comments).* The Joint CLECs assert that the Facilitator imposed his own beliefs of the purpose of the QPAP, rendering the recommendations in the Report irreconcilable with the objective that a plan provide "a meaningful and significant incentive to comply with designated performance standards." *Id. at 5.* The Joint CLECs also argue that the Facilitator departed from basic principles of administrative law by failing to require Qwest to pre-file testimony with its proposed QPAP, and by shifting the burden of proof to the CLECs to show that the QPAP was unreasonable. *Id. at 3.*

31 The Joint CLECs assert that the Commission should reject the QPAP Report in its entirety, and conduct its own independent analysis of the QPAP and the record evidence. *Id. at 6.*

Qwest

32 Qwest defends the process the Facilitator used to evaluate the QPAP, arguing that the Utah Staff concluded that the process was sufficient. *Qwest Corporation's Rebuttal to Comments Filed on the Facilitator's Report at 2-3 (Qwest Rebuttal).* Qwest

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[16] *In the Matter of Application of Verizon New England Inc., Bell Atlantic Communications, Inc. (d/b/a Verizon Long Distance), NYNEX Long Distance Company (d/b/a Verizon Enterprise Solutions) and Verizon Global Networks Inc., For Authorization to Provide In-Region, InterLATA Services in Massachusetts,* Memorandum Opinion and Order, CC Docket No. 01-9, FCC 01-130, ¶345 (rel. April 16, 2001) (*Verizon Massachusetts Order*).

disputes the CLECs' criticism of the additional factors set forth by the Facilitator, arguing that the Facilitator was justified in asking questions about the extent of the burden Qwest must bear in making payments to the CLECs. *Id. at 4-5.* Qwest argues that the Commission should approve its revised QPAP as it is consistent with other plans approved by the FCC and satisfies the FCC's zone of reasonableness test. *Id. at 7.*

Discussion and Decision

33 As we stated in the *12th Supplemental Order*, we will treat the Facilitator's Report as an initial order of the Commission. However, that does not mean that we must accept the analysis or recommendation made by the Facilitator on every issue. We will review the evidence of record and the arguments of the parties when reviewing the Facilitator's recommendations, just as we review the recommendations and decisions of administrative law judges in this and every other proceeding before us.

34 We do not find that the process was in any way in error, deficient, or compromised. The Facilitator established a process that provided an opportunity for the parties to be heard, for evidence to be gathered, and for issues to be joined. Evidence was admitted and a transcript prepared. Parties were given an opportunity to submit briefs prior to and after the hearing. This proceeding is a creature of the Telecommunications Act, not state law, and while we have endeavored to apply and follow our procedural rules, there is no requirement that we do so in this matter.

35 We find that the Facilitator correctly stated the five prongs of the FCC's zone of reasonableness test, but went too far in stating his own "considerations" for review of Qwest's QPAP and his comments on increasing Qwest's incentives. The Facilitator's considerations appear to focus primarily on the ongoing dispute between Qwest and the CLECs about Qwest's total payment liability, and how much is sufficient to create the proper incentive for continued compliance with section 271 requirements. This issue is addressed more fully below.

36 While Qwest is correct that the FCC's standards and zone of reasonableness are not a "straitjacket," they do provide sufficient guidance to evaluate Qwest's plan. No more is necessary to consider Qwest's proposed plan. We therefore reject the Facilitator's statements on pages 5 and 6 of the Report, beginning with the sentence: "The ultimate decision on the QPAP's sufficiency, as the FCC addresses the matter, should be one that takes into account the following considerations:"

37 We find that the FCC's "zone of reasonableness" test is the most appropriate in determining whether Qwest's proposed plan, as modified by the Facilitator, is sufficient to deter and enforce backsliding behavior and whether any of the changes proposed by the CLECs are necessary. While we will apply the FCC's standards in evaluating Qwest's proposed plan, we continue to believe that this Commission has

authority under state law and the Telecommunications Act to require Qwest to act if its performance results in service that is unfair, unreasonable or would stifle competition in the state. *See RCW 80.04.110, RCW 80.36.300.* The nature of the Commission's jurisdiction to require the QPAP and oversee its implementation and operation is discussed further below concerning the six-month review process.

B. CONSIDERATION OF OTHER STATE OR BOC PLANS

38 During the December hearings, we posed the question of whether the Commission should look solely to the language of the QPAP in resolving disputed issues, or whether the Commission may consider other state or BOC plans as a whole or in part to develop a plan for Washington. *Tr. 5934.*

39 For example, there was a great deal of discussion about a proposed plan under development before the Colorado Public Utilities Commission, referred to as the CPAP.[17] The Colorado Commission did not join the other states in the ROC PEPP collaborative, but developed a plan independently through the use of a special master. *Tr. 5934-35.* We have recently learned that the Colorado Commission has approved a final plan. In addition, parties discussed that the Utah Staff had modified the recommendations in the Facilitator's Report and issued its own recommendations to the Utah Commission. *Tr. 5960-61.*

CLECs and Public Counsel

40 In its comments on the Report, and during the hearing, Public Counsel advocated adoption of the CPAP, asserting that it would provide the greatest benefit to the consumer. *Tr. 5943; Public Counsel's Comments on the QPAP Report at 2-3 (Public Counsel Comments).* AT&T, WorldCom and Covad also advocated adoption of the CPAP or use of the CPAP as a template plan. In addition, WorldCom advocated review of the Utah Staff Report.

Qwest

41 In its rebuttal comments and during the hearing, Qwest objected to the use or "importation" of any other proposed plan or portion of a plan in developing the QPAP for Washington. *Qwest Rebuttal at 6-7; Tr. 5956-57.* Specifically, Qwest argues that other plans, such as the CPAP, have been developed under different processes, using

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[17] The version of the CPAP referred to during the hearing, and in this Order, was provided by the Colorado Hearing Examiner as Attachment A to the Decision on Motions for Modification and Clarification. *See In the Matter of the Investigation Into Alternative Approaches for a Qwest Corporation Performance Assurance Plan in C Colorado,* Decision on Motions for Modification and Clarification of the Colorado Performance Assurance Plan, CPUC Docket No. 011-041T, Decision No. R01-1142-I (Nov. 5, 2001) *(November 5, 2001 Colorado Decision).*

a different record. Qwest objects that importing or using all or part of another plan violates any sense of procedural fairness before this Commission. *Id.*

Discussion and Decision

42 We agree with Qwest that it would not be appropriate to "disavow" the process of developing the QPAP in this state by wholly adopting another state's proposed plan. However, we do not believe we are limited to looking solely to Qwest's proposed plan to resolve the disputed issues. The FCC has noted that it expects "state commissions will continue to build on their own work and the work of other states" in developing plans.[18] Further, the FCC has stated that "the development of performance measures and appropriate remedies is an evolutionary process that requires changes to both measures and remedies over time."[19] Therefore, we find it appropriate to look to other state plans, finalized or in progress, to determine whether elements of a performance assurance plan are sufficient for Washington state.

C. MEANINGFUL AND SIGNIFICANT INCENTIVE

1. Total Payment Liability

43 We look to the total payment liability established in the QPAP, as well as remedies, to determine whether Qwest has met the criteria of a plan that provides meaningful and significant incentives to comply with designated performance standards. In other plans, BOCs have established a revenue cap to limit the total amount of revenue the BOC must annually put at risk of payment to CLECs for failure to meet designated performance standards.

44 Section 12 of the QPAP establishes a cap on total payments. *Ex. 1217.* The parties remain in dispute over the following issues: (1) the percent of local exchange revenue that Qwest must put at risk; (2) the base year used to calculate the amount of revenue at risk; and (3) whether the amount of revenue at risk should be permitted to increase or decrease based on Qwest performance.

45 The QPAP Report recommends a 36 percent revenue cap, i.e., that Qwest should initially place 36 percent of its 1999 ARMIS Net Revenue[20] at risk of payment to

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[18] *Verizon Pennsylvania Order*, ¶128.
[19] *Id.*
[20] The Automated Reporting Management Information System (ARMIS) was initiated in 1987 for collecting financial and operational data from the largest telecommunication carriers regulated by the FCC. Additional ARMIS reports were added in 1991 to collect service quality and network infrastructure information from local exchange carriers subject to price cap regulations, and in 1992 for the collection of statistical data formerly included in Form M. Today, ARMIS consists of ten public reports. For more information *see* http://www.fcc.gov/wcb/armis/. *See also Bell Atlantic New York Order*, n. 1332 for discussion of the calculation of "net return".

CLECs and the state for failure to meet designated performance standards. *Report at 16.* The Report also allows the revenue cap to move up by as much as 8 percent or down by as much as 6 percent, depending on Qwest's performance. *Report at 18-19.*

a. The Revenue Cap

AT&T

46 AT&T agrees with the recommendation in the Utah Staff Report to use a 44 percent cap, based on their finding that a 36 percent cap did not provide sufficient incentive for the BOC in New York state. *AT&T Comments at 9.*

WorldCom

47 WorldCom opposes any cap on Qwest's total payment liability. WorldCom requests, at a minimum, that the Commission adopt the approach of the Utah Staff by setting the cap at 44 percent. *WorldCom Comments at 3-4.*

Joint CLECs

48 The Joint CLECs express the concern that any limitation on Qwest's obligation to make QPAP payments would make such payments nothing more than the cost of doing business. *Joint CLEC Comments at 19.*

Qwest

49 Qwest argues that the FCC has repeatedly approved a limit on BOC liability of 36 percent of the BOC's net revenue. Qwest argues that the FCC has found such an amount at risk to constitute a meaningful incentive. *Qwest Rebuttal Comments at 8.*

Discussion and Decision

50 The FCC established the first performance plan for Bell Atlantic – New York (BANY), now Verizon – New York, with a payment liability limit based on 36 percent of BANY's 1999 ARMIS Net Revenue.[21] Since that time, the FCC has approved other section 271 applications that included performance assurance plans with a 36 percent liability limit.[22] Where the FCC has not set a 36 percent cap, it has approved a limit on the amount at risk.[23] WorldCom asks the Commission to remove

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[21] *Bell Atlantic New York Order*, ¶436. The New York Commission later increased the amount to 44 percent to address certain issues that arose after the grant of section 271 authority.

[22] *SBC Texas Order*, ¶424, n.1235; *Kansas/Oklahoma Order*, ¶274, n.837.

[23] *Verizon Pennsylvania Order*, ¶129; *Verizon Massachusetts Order*, ¶241, n.769; *In the Matter of Verizon New York Inc., Verizon Long Distance, Verizon Enterprise Solutions, Verizon Global Networks Inc., and Verizon Select Services Inc., for Authorization to Provide In-Region, InterLATA*

any limit on the amount of revenue at risk in the QPAP. Based on the FCC's determinations, we believe it is reasonable that the total amount of payments made by Qwest to CLECs and the state under the QPAP should be capped.

51 AT&T and WorldCom request, in the alternative, that the cap on total payment liability be set at 44 percent of ARMIS Net Revenue. We are not persuaded that setting the cap at 44 percent represents an improvement to the QPAP. In response to Bench Request No. 38, Qwest provided the Commission with data showing the amount of payments Qwest would have made under the QPAP from June through September of 2001. *Exs. 1219-C, 1221-C.* Qwest's response shows that on an annualized basis, the company would have made payments far below the $81 million of revenue it proposes to put at risk based on the 36 percent cap. *Id.* Given the FCC's actions on this issue to date, and Qwest's current performance, there is no basis to modify the Facilitator's recommendation that Qwest place 36 percent of ARMIS Net Revenue at risk for payment to CLECs for failure to meet designated performance standards.

b. 1999 ARMIS Net Revenue

52 In other section 271 applications, the total amount of revenue liability has been calculated based on the amount of local exchange revenue reported to the FCC's ARMIS accounting system.[24] Qwest began developing the QPAP in the fall of 2000, at a time when 1999 ARMIS revenue data was the most current data available. Thus, Section 12 of the QPAP bases the revenue cap on 1999 ARMIS data. *Ex. 1217.* In the October 24, 2001 Notice, the Commission asked the parties to comment on the question of whether the cap should be based on 1999 ARMIS Net Revenue or more recent data.

53 The Report recommends the use of 1999 ARMIS data, finding that 1999 revenues are known, whereas revenue from any other year may create an unknown risk. *Report at 21-22.*

CLECs and Public Counsel

54 AT&T, WorldCom, and Public Counsel all assert that more current ARMIS data should be used to calculate the cap amount. *AT&T Comments at 43; WorldCom Comments at 4-5; Public Counsel Comments at 9.* During the hearings, WorldCom, AT&T, and Public Counsel agreed that the most current ARMIS data should be used even if the amount is less than the amount for 1999. *Tr. 5999-6001.*

Services in Connecticut, Memorandum Opinion and Order, CC Docket No. 01-100, FCC 01-208, ¶76 (rel. July 20, 2001) (*Verizon Connecticut Order*).

[24] *See, e.g., Bell Atlantic New York Order*, ¶436.

Qwest

54 In its initial comments, Qwest opposed any update to the 1999 ARMIS data stating that it agrees with the Facilitator that it is inherently speculative whether Qwest's local revenue will increase or decrease in future years. *Qwest Corporation's Response to Notice of Opportunity for File Comments at 3 (Qwest Initial Comments).* In response to comments from the other parties, Qwest continues to oppose the use of more current ARMIS data and questions whether CLECs would still believe Qwest should use more current data if those results were less than the 1999 ARMIS results. *Qwest Rebuttal at 12.*

Discussion and Decision

56 We find that using current ARMIS data is important to achieving the FCC's goal of a plan that provides meaningful and significant incentive. Using the most current ARMIS data available provides a better match between the relative amount of revenue at risk and the prospective time period when the QPAP will be in operation. The CLECs and Public Counsel have stated that they do not object to current data even if it would result in a total amount at risk that is lower than in prior years. *Tr. 5999-6001.* We direct Qwest to update section 12 of the QPAP to reflect the use of current ARMIS data.

c. Raising or Lowering the Cap

57 The parties are in dispute over whether the revenue cap should stay constant or change over time. A cap that remains constant is referred to as a "hard cap," whereas a cap that can change over time is a "soft cap," or "procedural cap." The Report proposes a procedural type cap that would allow the 36 percent cap to increase by as much as 8 percent or decrease by 6 percent depending on Qwest's performance over two years. *Report at 18-20.*

AT&T

58 AT&T objects to the Facilitator's proposal, arguing that no party advocated the solution proposed in the Report, and that the standards for determining movement of the cap are too advantageous to Qwest. *AT&T Comments at 7-8.* Further, AT&T argues that the CLECs opting into the QPAP would be waiving their rights to all contractual remedies, and that the Facilitator's proposal could result in the denial of any remedies to CLECs. *Id at 8.* If Qwest's performance is so poor that the cap must be increased, some CLECs will not receive any payments for the harm they suffer. *Id.* AT&T also objects to the Facilitator's comment that this proceeding will determine the "toll" that Qwest should pay for entry into the long distance market. *Id. at 6.*

WorldCom

59 WorldCom argues that the FCC has not approved any plan that allows for a decrease in the revenue cap, and urges the Commission to reject this part of the Facilitator's proposal. *WorldCom Comments at 4.* WorldCom proposes that the Commission retain the procedural increase in the cap proposed in the Report. *Id.*

Public Counsel

60 Public Counsel opposes the Facilitator's recommendations, arguing that the proposal would limit this Commission's ability to review Qwest's failure to conform to the QPAP or modify the amount of the cap. *Public Counsel Comments at 4-5.* Public Counsel also objects to lowering the cap. Public Counsel objects to the Facilitator's concerns for the need for predictability and how capital markets may view the QPAP, asserting that the purpose of the QPAP is to deter anti-competitive activity. *Id. at 6.*

Qwest

61 Qwest initially proposed a hard cap, but accepted the Facilitator's proposal for a procedural cap and incorporated the mechanism into the red-lined QPAP filed with the Commission in response to Bench Request No. 37. *Ex. 1217, §12.2; see also Qwest Rebuttal at 11.*

62 Qwest defends the Facilitator's reasoning in establishing a flexible cap. However, Qwest states "if the CLECs are opposed to a flexible cap, Qwest has no objection to a flat 36 percent cap." *Qwest Rebuttal at 11.*

Discussion and Decision

63 We are concerned with the Facilitator's recommendation to allow the cap to move up or down. No party to the proceeding made such a proposal either in testimony or briefs. We agree with Public Counsel's concerns that the Facilitator's proposal may unnecessarily restrict our ability to review the operation of the QPAP. We find that Qwest's original proposal to use a flat 36 percent cap is appropriate to calculate the annual amount of revenue at risk of payment to CLECs. Qwest must revise section 12 of the QPAP accordingly.

2. Tier 1 Payment Escalation

64 Tier 1 payments are payments Qwest makes to individual CLECs when Qwest fails to meet performance standards when providing service to a particular CLEC. *Ex. 1217, §6.0.* Section 6.2.2 of Qwest's original QPAP provides that if Qwest fails to meet a performance standard for an individual CLEC for consecutive months, the payment amount for the measure automatically escalates. *Ex. 1200, Table 2.* For example, if

Qwest provides non-conforming performance in May, June, and July, the payment to the CLEC would increase each month as provided in Table 2. The Report recommended that after six consecutive months of payment escalation, no further escalation should be required, and that payments for subsequent consecutive failures should be capped at the six-month payment level. *Report at 44-45.* The Facilitator was not persuaded by CLEC arguments that a cap on payments would create a less effective incentive to perform. *Id. at 44.* Further, the Facilitator asserted that the payments would be uneconomical if not capped. *Id. at 45.*

AT&T

64 AT&T opposes the six-month cap on payment escalation, asserting that the Colorado Hearing Examiner and the Utah Staff both rejected a cap on escalation. *AT&T Comments at 23-24.* AT&T argues that escalation payments without a cap would deter Qwest from strategically paying penalties and slowing competition instead of meeting the performance measures. *Id. at 24.* AT&T takes exception to the Facilitator's rationale for a six-month cap, noting that the Facilitator relied on factors that were not based on any evidence of record. *Id. at 25-26.*

WorldCom

65 Like AT&T, WorldCom opposes the six-month cap on payment escalation. WorldCom objects to the Facilitator's finding that if Qwest continued to fail to perform after six months, the CLECs could bring the issue to the state commission. *Id. at 10-11.* WorldCom argues that this goes against the FCC's criteria that performance assurance plans provide a self-executing mechanism to limit litigation and appeal. *Id. at 11.* WorldCom notes that the Utah Staff recommends against a cap on the basis that the performance measures are the same as those developed in the ROC OSS test and that Qwest should be able to meet those measures. *Id. at 10, citing Utah Staff Report at 42.* Further, WorldCom notes that the Colorado Hearing Examiner decided against a freeze on escalated payments. *Id., citing November 5, 2001, Colorado Decision at 22.*

Joint CLECs

67 The Joint CLECs are opposed to the six-month cap on payment escalation, stating that "Qwest produced no evidence to demonstrate that QPAP payments at the six-month level are sufficient to provide Qwest with the financial incentive to improve its performance in successive months." *Joint CLEC Comments at 22.*

Public Counsel

68 Public Counsel asserts that escalating payments beyond six months will provide appropriate, meaningful and significant incentive for Qwest to perform. *Public*

Counsel Comments at 17. Public Counsel recommends the Commission adopt the approach of the Colorado Hearing Examiner not to limit payment escalation. *Id.*

Qwest

69 Qwest asserts that no party has provided evidence demonstrating that unlimited escalation is necessary to ensure that Tier 1 payments are compensatory to CLECs, or to provide Qwest sufficient incentive to meet the QPAP's performance standards. *Qwest Rebuttal at 19.* Qwest notes that the Facilitator found that continued non-performance could be due to a standard not operating properly, rather than Qwest's failure to perform. *Id. at 18-19.* Qwest further argues that, without a cap, CLECs may be substantially overcompensated and would not have the incentive to invest in facilities-based competition. *Id. at 19-20.* In addition, Qwest asserts that the FCC has approved plans for the states of Texas, Kansas, Oklahoma, Arkansas, and Missouri that contain a six-month cap on escalation payments. *Id. at 20-21.*

Discussion and Decision

70 We believe the six-month cap on escalation payments is appropriate. We understand the CLECs' objections to the six-month cap, and their concern for creating sufficient incentive for Qwest to perform. However, we are also concerned with the prospect that Qwest could find itself in a financial dilemma caused by continually escalating payments. We must find the proper balance between providing the correct incentive for Qwest and assurance for the CLECs. Under Table 2 of the QPAP, payments made to CLECs will be very substantial at the sixth month of escalation. We believe that even with the six-month cap, Qwest should have sufficient incentive to meet the performance standards for measures contained in the plan. As noted elsewhere in this Order, we retain the authority to look at this issue during the biennial or six-month review processes should the circumstances warrant.

3. Duration/Severity Caps

71 Payment measures in the QPAP use various metrics to measure performance, such as percents, ratios, and time intervals. Payments for the failure to meet the performance standards are based on the number of occurrences, or orders placed by the CLEC. Payment amounts owed to CLECs are calculated by determining the degree to which actual performance--as measured by the performance metric--deviated from the standard and applying it to the number of orders placed by the CLEC.

72 The QPAP proposes that the amount of deviation between actual performance and the performance standard not be allowed to exceed 100 percent for purposes of calculating the amount owed to the CLEC. As a result, sections 8 and 9 of the proposed QPAP contain provisions that limit the potential payments to CLECs for substandard performance to the total number of orders placed by the CLEC during the

month for each qualifying product and sub-measure times the per payment amount. *Ex. 1217.* This cap is referred to as the duration/severity, or 100 percent, cap.

AT&T, the Joint CLECs, and Z-Tel opposed the cap during the Multi-state Proceeding. The Facilitator rejected their request stating:

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

Report at 69. AT&T and Z-Tel proposed to remove the cap on payments for performance measures calculated as averages or means. The Report concludes that no change is necessary, because the CLECs did not present evidence addressing the number and length of distribution on delayed orders. *Id. at 70.*

AT&T

AT&T asserts that the Facilitator did not understand the CLECs' arguments concerning the "application of the per-occurrence measurement scheme for interval measurements, and then criticized the CLECs for not providing evidence to support an argument they never made." *AT&T Comments at 35.* AT&T explains that the CLECs assert that "the per-occurrence scheme should be sensitive to both the monthly volume of the CLEC orders and the deviation of Qwest's average monthly performance to CLECs from the Qwest average monthly performance to itself." *Id. at 38.* AT&T asserts that the issue is whether or not payment occurrences should be capped at the number of CLEC orders. *Id. at 39.* AT&T argues that payment occurrences should not be capped, as such a cap would protect Qwest from its own poor performance to CLECs. *Id.* Finally, AT&T asserts that the CLECs' proposal is included in plans approved by the FCC. *Id.*

Joint CLECs

The Joint CLECs assert that it was inappropriate for the Facilitator to shift the burden of proof to the CLECs, since Qwest is the only party with such information. *Id. at 26.* The Joint CLECs argue that the recommendation lacks logical, factual, or legal support, since the Report recommends adoption of Qwest's proposal solely because the CLEC proposal was flawed. *Id. at 27.* The Joint CLECs recommend the Commission require Qwest to remove the cap on payments for duration measures. *Id.*

Qwest

77 Qwest asserts that the Facilitator's acceptance of Qwest's 100 percent limit on missing interval measurements has been accepted by the Utah Staff and the Colorado Hearing Examiner, and included in plans approved by the FCC. *Qwest Rebuttal at 33.* Qwest objects to the CLECs' rationale that the worse Qwest's performance is, the more Qwest should have to pay. *Id. at 34.* Qwest argues that payment occurrences should be capped to prevent CLECs being paid for orders that do not exist. *Id.*

Discussion and Decision

78 The concept of Qwest providing services to CLECs at parity with the services it provides to its own retail customers is key to the advancement of local service competition. Qwest's proposal is to make payments for its failure to provide service at parity up to the point where the CLEC has received a payment for non-performance for each order placed. Beyond that point, no matter how long it takes to provision service, Qwest argues that there should be no further compensation. The CLECs ask that the Commission remove the cap so that Qwest will have incentive to minimize any disparity in provisioning services between itself and CLECs. We agree with the CLECs and direct Qwest to remove the 100 percent cap from the performance measures calculated as averages or means contained in the QPAP.

79 Bench Request No. 42 directed Qwest to explain the apparent differences between the use of "parity value" in formulae used to calculate the number of misses for parity measures and the language in the QPAP explaining how misses are calculated for parity measures. Qwest responded that it had provided the formulae in response to Bench Request No. 37. *Ex. 1289.* Qwest's response indicates that there were no actual differences between the formulae and the intent of the language in the QPAP regarding the calculation of misses. *Id.* Nonetheless, we direct Qwest to clarify the language in the QPAP regarding the calculation of misses for parity to specifically incorporate the term "parity value" so that there will be no confusion at a later date as to how the calculations are performed.

4. Tier 2 Payments

80 Tier 2 payments are payments made to the state of Washington when Qwest fails to meet certain performance standards. *See Ex. 1217, §7.0.* Certain performance measures are subject to Tier 2 payments because the performance results are only available on a regional basis, such as Gateway Availability. CLECs receive no payment when Qwest fails to meet these performance standards. Other performance measures that are subject to individual CLEC payment are also subject to Tier 2 payments because of their importance to the CLECs' ability to compete. These measures are referred to as Tier 2 measures having Tier 1 counterparts.

The original QPAP required Tier 2 payments only after 3 consecutive months of non-performance. *Ex. 1200, §7.3.* The Report determined that Qwest should make Tier 2 payments in the event Qwest fails to meet the performance standard for any Tier 2 performance measure for any two months in any consecutive three-months "in any 12 month rolling period." *Report at 43.* In addition, for Tier 2 measures with no Tier 1 counterpart, the Facilitator recommended that payments should escalate as provided for in the QPAP. *Id.*

AT&T

AT&T seeks clarification of the reference in the Report to Tier 2 payment escalation, noting that the QPAP does not include a provision for Tier 2 payment escalation. *AT&T Comments at 23.*

WorldCom

WorldCom opposes the findings in the Report and requests that the Commission require Tier 2 payments to be made in any month that Qwest fails to meet a Tier 2 performance measure. *WorldCom Comments at 9.* WorldCom also recommends that Tier 2 payments escalate by twice the prior month's payment amount and be subject to a step-down function.[25] *Id.*

Public Counsel

Public Counsel opposes the Tier 2 payment trigger proposed in the Report as overly complicated. *Public Counsel Comments at 16.* Public Counsel recommends a more straightforward approach, in which Qwest would make a Tier 2 payment for each month of non-conforming performance. *Id.*

Qwest

Qwest argues that it is appropriate to allow a three-month correction period, because of the lag time involved in addressing continuing problems. *Qwest Rebuttal at 17.* Qwest explains that the Tier 2 payments work the same way in the Texas, Oklahoma, and Kansas plans. *Id.* Qwest argues that since those plans allow a longer correction period than the two-out-of-three month trigger proposed by the Facilitator, the shorter period would clearly be acceptable to the FCC. *Id.* With respect to the question of Tier 2 payment escalation, Qwest believes the Facilitator's reference to payment escalation is simply a mistake. *Id. at 18.*

[25] A step-down function refers to decreases in escalated monthly payment levels in months when performance conforms with the standards.

Discussion and Decision

86 The purpose of Tier 2 payments is to provide sufficient incentive for Qwest to continue meeting its performance obligations once it receives section 271 approval. We question whether sufficient Tier 2 incentives will exist if Qwest can fail to meet the performance standards one-third of the time or more without consequence. We are puzzled by Qwest's reasoning for the Tier 2 payment lag as due to "lag time involved in addressing continuing problems." Given that the focus of the ongoing OSS test is to identify and correct problems with Qwest's OSS systems, it seems doubtful that Qwest could receive our approval or the FCC's section 271 approval in the presence of "continuing problems" with the OSS systems. Qwest must, therefore, modify section 7.3 of the QPAP to require Tier 2 payments in any month that Qwest fails to meet the Tier 2 performance standards.

87 With respect to the question of Tier 2 payment escalation, we are inclined to believe that the Facilitator's reference to payment escalation was intended to refer to Table 5 which shows payments for per-measurement performance measures that escalate as performance worsens. We therefore reject WorldCom's request to escalate Tier 2 payments for consecutive misses. Should the issue of escalating Tier 2 payments prove to be problematic, the parties may raise the issue during the six-month review process.

5. Collocation Payments

88 The Report requires Qwest to include in the QPAP an agreed-to proposal for determining collocation payments. *Report at 55-56.* Qwest modified section 6 of the red-lined QPAP to show proposed payments relating to the provision of collocation. *Ex. 1217, §§6.3, 6.4; Table 3.* In addition to the requirements in the QPAP, state rules establish standards and payments for collocation provisioning in Washington State. *WAC 480-120-560.* We requested comment from parties as to how we should address the differences between the proposed QPAP collocation standards and payments, and the standards and payments contained in WAC 480-120-560.

AT&T

89 AT&T asserts that it sees no reason why the collocation standards in WAC 480-120-560 should not apply to the QPAP. *AT&T Comments at 42.*

WorldCom

90 WorldCom asserts that if collocation standards in Washington state rules and the QPAP differ, the Commission should adopt the more stringent standards. *WorldCom's Response to Commission Questions at 1.* WorldCom states that for forecasted collocations, the Washington rule allows 77 days while the collocation PID

standard in the QPAP provides for a 90-day period. *Id.* WorldCom requests that the Commission modify the QPAP to incorporate the Washington rule. *Id. at 2.*

Qwest

92 In initial comments, Qwest states that its Washington SGAT incorporates specific collocation standards and remedies, based on WAC 480-120-560, in section 8.4.1.10. *Qwest Initial Comments at 3.* Qwest argues that to maintain two distinct conflicting standards and remedies in the same contract would be inappropriate. *Id.* Qwest proposes replacing the collocation delayed installation provision in section 6.3 of the QPAP with the terms in section 8.4.1.10 of the SGAT, and eliminating the duplicative SGAT section. *Id. at 2-3.*

93 In reply comments, Qwest objects to AT&T and WorldCom's proposals. *Qwest's Reply to Parties' Comments on Commission Questions at 2.* Qwest asserts that CLECs should elect their remedies. *Id.*

Discussion and Decision

94 The CLECs request that the Commission incorporate the collocation rule, WAC 480-120-560, into the QPAP. Qwest proposes to adopt the payment portion of the collocation rule into the QPAP and use the provisioning intervals contained in performance measures CP-2 and CP-4, which are different than the provisioning times contained in the rule. We agree with the CLECs' request to incorporate the collocation rule into the QPAP. Qwest must modify the QPAP to reflect that the CP-2 and CP-4 business rules are applicable only to matters not addressed in WAC 480-120-560. In addition, we intend that section 6.3 of the QPAP and section 8.4.1.10 of the SGAT be consistent in applying the Washington rule.

6. Low Volume Critical Values

95 Section 5.1 of the original QPAP contains the critical Z values that are used for statistical testing.[26] *Ex. 1200.* Qwest initially proposed a critical Z value of 1.65 to be used for all CLEC volumes. The PEPP collaborative produced a partial agreement to use a critical Z value of 1.04 for low volume LIS trunks, and DS-1s and DS-3s that are UDITs, resale, or unbundled loops, and higher critical Z values for higher volumes. The Facilitator considered and rejected a request by WorldCom and Z-Tel to use the 1.04 critical Z value for all services with low volumes. *Report at 64.*

WorldCom

[26] The critical Z value is a statistical measure used to determine the point at which Qwest fails to meet a performance measure.

95 WorldCom notes that there was only partial agreement in the PEPP collaborative because WorldCom and Z-Tel did not agree with the proposal. *WorldCom Comments at 23.* WorldCom asserts that it is important to balance Type I and Type II errors. *Id.* WorldCom further argues that to support larger critical values at higher sample sizes, at a minimum, the 1.04 critical value for sample sizes 1-10 should apply to all services and not be limited to only the few listed in Qwest's proposal. *Id. at 23-24.* WorldCom recommends that the Commission reject the Report's recommendation and order that the QPAP apply the lower value of 1.04 to all low volume services. *Id. at 24.*

Qwest

96 In response, Qwest states that "the use of the 1.645 versus the 1.04 critical value for the specific calculations cited by WorldCom was a negotiated issue that reflected the 'give and take' process among the parties." *Qwest Rebuttal at 32.* Qwest argues that the Commission should accept the agreement from the collaborative and reject WorldCom's proposal. *Id.*

Discussion and Decision

97 The Report explains that, under the negotiated agreement, the use of the lower 1.04 critical value would benefit CLECs in the case of 1,519 measures and that in return, the higher critical Z values would apply to the benefit of Qwest in 1,917 cases, or "roughly the same number of parity measures." *Report at 64.* The Report finds that the proposal to extend the use of the 1.04 value to all services would destroy that balance by applying the lower 1.04 value to over 10,000 tests. *Id.* We note that the negotiated proposal, while it did not include all the parties in this proceeding, included a majority of the participants. We agree that there is no reason to change the critical Z values, and, therefore, reject WorldCom's proposal.

7. Exclusions from the Cap on Payments

98 Section 12 of the QPAP establishes caps on monthly and annual payments to CLECs and the state. *Ex. 1217.* Public Counsel argues that payments made by Qwest to uphold the integrity of the QPAP should be excluded from the caps. These include payments for late reporting and interest payments for late payments or underpayments. *Public Counsel Comments at 9.* Qwest agreed during the oral argument that payments made as a result of late reporting should be excluded from the cap. *Tr. 5998.* We agree that payments made to uphold the integrity of the QPAP should be excluded from the cap and direct Qwest to revise section 12 to reflect this decision.

8. Carry-Forward Provision

99 A carry-forward provision would address the circumstance where Qwest's payments to CLECs and the state reach a monthly or annual cap, and payments are still owed to CLECs or the state, but may not be paid due to the cap on payments. A carry-forward provision would allow any payments owed from any month the cap is reached to be paid in subsequent months when the cap is not reached. Qwest's proposed QPAP does not include such a provision.

100 The Facilitator rejected Qwest's proposal for monthly caps, and instead proposed a means of equalizing payments to CLECs when the annual cap is reached. *Report at 19-20, 62.* Qwest has included this proposal in its QPAP. *Ex. 1217, §12.3.*

Public Counsel

101 Public Counsel strongly recommends that if the Commission determines that the QPAP should have a revenue cap, the Commission should require Qwest to include a carry-forward mechanism to ensure that CLECs receive payments due them but not paid because of the cap. *Public Counsel Comments at 8.* Public Counsel argues that such a provision will ensure that Qwest has the appropriate incentive not to provide inferior service once the cap is reached. *Id.* Public Counsel recommends the Commission require Qwest to include in section 12 of the QPAP language based on section 11.3 of the proposed CPAP. *Id. at 8-9.*

Qwest

102 Qwest did not respond to this issue in comments filed with the Commission, nor was it discussed during the hearing.

Discussion and Decision

103 This Order determines that the QPAP must include a cap, but does not adopt the Facilitator's recommendation to allow the cap to move up or down. Section 12.3 of Qwest's proposed QPAP sets forth the Facilitator's recommended process for equalizing payments to CLECs in the event the annual cap is reached. *Ex. 1217.* If the monthly cap[27] is reached in any given month, but the annual cap is not exceeded, Qwest would not be required to make full payment to the CLECs for the month where the cap was reached. We decline to adopt Public Counsel's recommended carry-forward provision for the monthly cap because Public Counsel has not provided sufficient justification at this point in time. (Our review of the monthly mock payment reports filed by Qwest shows there is little likelihood that the monthly cap

[27] The monthly cap in section 12.3 is not a cap on payment per se, but a calculation of the annual cap on a cumulative monthly basis to track how close Qwest is in reaching the annual cap.

CONTINUATION

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will be reached. *See Ex. 1223.*) If the circumstances warrant, parties may request that the Commission reconsider this issue at a later date, including during the biennial or six-month reviews.

9. Service Quality Payments

104 Section 13.8 of the QPAP provides that Qwest is not required to make Tier 2 payments and any other payments, penalties or sanctions for "the same underlying activity or omission" under a Commission order or service quality rules. The section limits any payments Qwest must make to the Commission to the payments it would make under the QPAP. Similarly, section 12.1 of the QPAP provides that the annual cap on payments includes all payments made by Qwest for "the same underlying activity or omission . . . under any other contract, order or rule." *Ex. 1217.*

Public Counsel

105 Public Counsel argues that nothing in the plan should diminish the Commission's jurisdiction over Qwest's service quality. *Public Counsel Comments at 14-15.* Public Counsel argues that the Bell Atlantic New York plan includes a provision that does not limit state commission authority over service quality. *Id.* Public Counsel recommends that the Commission require Qwest to delete Section 13.8, and include the following: "Nothing in the Performance Assurance Plan can or will diminish Commission jurisdiction over Qwest service." Id.

106 Similarly, Public Counsel recommends the Commission modify section 12.1 of the QPAP to retain Commission authority over service quality by including the following language: "Payments made by Qwest for retail service quality performance are not included in the cap on payments."

Qwest

107 Qwest argues that sections 13.8 and 12.1 were designed to avoid double payment for the same activity and are consistent with plans adopted in Texas, Kansas, and Oklahoma. *Qwest Rebuttal at 16.* Qwest asserts that the QPAP is not intended to "deprive the Commission of existing jurisdiction to address either wholesale or retail performance issues," but is designed to avoid paying twice for failing to meet the same standard. *Id.*

Discussion and Decision

108 We note that the proposed CPAP provides that "any penalties imposed by the Commission" are not subject to the cap. *CPAP, §11.2.* The CPAP also provides a process for Qwest to dispute any payments under state service quality rules that it perceives as duplicate payments under the plan. *Id., §16.8.*

109 At the heart of this issue is the Commission's independent authority to review Qwest's service. While Qwest may argue that the CLECs elect remedies by adopting the plan to the exclusion of all other alternatives, the Commission does not relinquish any authority, nor is it required to do so in approving the QPAP. Qwest must modify sections 13.8 and 12.1 to be consistent with section 11.2 of the CPAP to allow the Commission to assess penalties, where necessary, to address service quality issues, but to allow Qwest to dispute any payments it believes are duplicate.

D. CLEARLY ARTICULATED AND PREDETERMINED MEASURES

110 One of the characteristics the FCC considers in evaluating a performance assurance plan is whether a plan has clearly articulated and pre-determined measures and standards encompassing a range of carrier-to-carrier performance. Section 3.0 of the QPAP explains that the performance measurements used in the QPAP are included in Attachment 1. *Ex. 1217.* The QPAP further explains that "each performance measurement identified is defined in the Performance Indicator Definitions ("PIDs") developed in the ROC Operation Support System collaborative, and which are included in the SGAT at Exhibit B." *Id, §3.0.*

1. Adding UNEs and Performance Measures to the QPAP

111 During the Multi-state Proceeding, several parties requested that other performance measurements be included in the QPAP, including special access circuits, canceled orders, diagnostic UNEs (including EELs, line sharing, and sub-loops), cooperative testing, address due-date changes, pre-order inquiry time-outs, change management measures, software test release quality, test bed measurement, and missing status notifiers. The Report rejected the addition of special access, canceled orders, cooperative testing, address due-date changes, pre-order inquiry time-outs, software release quality, test bed measurement, and missing status notifiers. *Report at 47-52, 56-58.* For Change Management, the Report found that Qwest has already added PO-16 and GA-7 to the QPAP, and for the diagnostic UNEs, the Report found that EELs, line sharing, and sub-loops should be added to the QPAP as soon as practicable. *Id. at 48, 50-51.*

a. Special Access Circuits

112 The Report denies WorldCom's and the Joint CLEC's request to include special-access circuits in the performance measurements in the QPAP. *Report at 57-58.* The Report finds that "the overwhelming majority of special-access circuits at issue here were purchased under federal tariff." *Id. at 57.* The Report finds that the FCC has jurisdiction over the issue, not the state. *Id.* The Report further states that Qwest has been ordered to ease its restrictions on converting special-access circuits to EELs, and

that if CLECs elect to do so, they will be protected under interconnection agreements. *Id.*

WorldCom

113 WorldCom requests that the Commission order Qwest to include performance measures for special-access services in its QPAP for the state of Washington. *WorldCom Comments at 22.* WorldCom argues that the Facilitator erred in rejecting the inclusion of special access in the QPAP on the basis that states did not have jurisdiction over special access circuits since over 90 percent of such circuits are purchased from the FCC tariff. *Id. at 17.* WorldCom relies on this Commission's decision in the *Special Access Order*,[28] as well as decisions by the FCC, and the states of Texas, New York, Massachusetts, Indiana, and Colorado requiring performance standards for special access. *Id. at 17-21.*

Joint CLECs

114 The Joint CLECs oppose the Facilitator's decision, noting that Qwest never refuted the testimony that CLECs "heavily rely on Qwest private line and special access circuits to provide local exchange service to their customers." *Joint CLEC Comments at 11.* The Joint CLECS also claim that Qwest never addressed their arguments that "CLECs are just as dependent on timely and proper provisioning by Qwest of special access as are CLECs that purchase equivalent high capacity services on an unbundled or resale basis." *Id.* The Joint CLECs assert that their inability to provide UNEs and special access circuits on the same facility, and Qwest's restrictions on converting special access circuits to EELs, results in a lack of alternatives to using special access circuits. *Id. at 12-13.*

115 The Joint CLECs point out that the Report also recommends that EELs not be subject to any payments and that high capacity loops be subjected to payment levels in some cases significantly below the profits on retail services provisioned with the facilities. *Id. at 16.* The Joint CLECs assert that these recommendations, if adopted, would exclude any effective performance assurance for high capacity circuits in the QPAP. *Id. at 16-17.* The Joint CLECs request that the Commission require Qwest to include such circuits subject to the same payment obligations applicable to comparable UNEs. At a minimum, the Joint CLECs request that the Commission require Qwest to measure performance for special access circuits and determine whether to apply payment obligations at the next QPAP review opportunity. The Joint CLECs argue that a QPAP "that does not provide an effective self-executing remedy for Qwest's

[28] *In re the Complaint of AT&T Communications of the Northwest, Inc. v. U S WEST Communications, Inc., Regarding the Provision of Access Services*, Tenth Supplemental Order, WUTC Docket No. UT-991292 (May 18, 2000) (*Special Access Order*).

failure to provision high capacity circuits cannot be in the public interest" by excluding incentives to provide nondiscriminatory service. *Id. at 17.*

Qwest

116 Qwest asserts that "the Commission lacks even the jurisdiction to address performance issues relating to the 97 [percent] of Qwest's special access circuits that are purchased from the interstate tariff." *Qwest Rebuttal at 23.* Qwest also argues that to the extent the Commission imposes special access obligations or remedies on Qwest, they would directly interfere with the FCC's authority to govern matters within its jurisdiction and would be inconsistent with the filed rate doctrine. *Id. at 24.* Qwest also states that the FCC has expressed serious legal and policy concerns about including special access circuits within the scope of section 251 c (3) – unless the facilities involve significant local exchange service by CLECs, in which case they may be converted to UNEs and would be covered by the QPAP. *Id. at 26.* Finally, Qwest notes that on November 19, 2001, the FCC issued a Notice of Proposed Rulemaking and requested comments on whether the FCC should adopt a select group of performance measurements and standards for evaluating ILEC performance in provisioning of special access services. *Id. at 27-28.*

Discussion and Decision

117 As a threshold matter, Qwest asserts that the Commission does not have authority to order special-access reporting because it does not have jurisdiction over interstate services. We have previously considered this argument in Docket UT-991292, a complaint against Qwest's predecessor U S WEST regarding the provision of access services. In the *Special Access Order* in that proceeding, we stated:

> The Commission agrees with the parties that the FCC retains sole jurisdiction over the enforcement of rate terms in tariffs filed pursuant to federal statute. However, the Commission rejects U S WEST's contention that its provision of intrastate services under federal tariffs within the 10% rule is totally free of state control in any manner. The FCC has not preempted state regulatory agencies from inquiring into the matters that AT&T raises. In the absence of clear authority that a customer's election to take service under a federal tariff per the 10% rule preempts all state regulatory authority, we decline to so rule. The significance of intrastate traffic to the public and to the economy of the state, and the Commission's need to ensure that intrastate services are free from discrimination and barriers to competitive entry, require us to assert jurisdiction when it is lawful for us to do so.[29]

We assert our jurisdiction in this proceeding.

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[29] *Special Access Order, ¶28.*

118 The Joint CLECs use special access circuits in the provisioning of facilities-based local exchange networks. The Commission encourages the development of competition in Washington by facilities-based providers. We are concerned with the potential lack of any incentive for Qwest after the grant of section 271 authority to provision and repair special-access circuits used by CLECs in a timely manner that provides CLECs a meaningful opportunity to compete. While Qwest asserts that CLECs can use EELs to perform the same function as special-access circuits, EELs are, as a practical matter, not available in Washington. *Tr. 6171; see also Joint CLEC Comments at 13.*

119 We find that the record in this proceeding supports a requirement that Qwest, at a minimum, report its monthly provisioning and repair intervals for special access circuits. We understand that Qwest is not currently able to provide such reports. However, the Special Master in Colorado recently issued a supplemental report in which he sets forth a process for the Colorado commission to follow that would result in developing reports for special access.[30] Rather than embark on a separate, duplicative process for special access reporting, we direct Qwest to begin filing monthly special access reports for Washington at the same time it begins special access reporting to the Colorado commission.

b. Adding New UNEs

120 Several new UNEs were created as a result of the *UNE Remand Order,*[31] including EELs, sub-loops, and line sharing. A standard has not yet been defined for these UNEs because commercial experience with them has been too limited to support a benchmark or parity standard. These UNEs are currently designated as "diagnostic UNEs" or TBD (to be decided). The Report found that Qwest should add EELs, sub-loops, and line sharing to the QPAP payment structure "as soon as practicable." *Report at 48.*

WorldCom

121 WorldCom argues that the recommendation in the Report is too vague. *WorldCom Comments at 11.* WorldCom requests that the Commission strengthen the recommendation in the Report and order that the EEL, line sharing, and sub-loop measures become part of the QPAP payment structure immediately upon being assigned performance standards. *Id. at 12.* WorldCom objects to Qwest's statement

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[30] *In the Matter of the Investigation into Alternative Approaches for a Qwest Corporation Performance Assurance Plan in Colorado,* Supplemental Report and Recommendation of the Special Master to the Public Utilities Commission of the State of Colorado, CPUC Docket No. 01I-041T, at 12-17 (February 19, 2002).

[31] *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996,* Third Report and Order, CC Docket No. 96-98, FCC 99-238 (rel. Nov. 5, 1999) *(UNE Remand Order).*

that it will not automatically include UNEs currently designated as diagnostic or TBD in the QPAP once standards are determined and that further additions should be addressed in the six-month review process. *Id.*

Joint CLECs

122 The Joint CLECs oppose the Facilitator's finding that there is insufficient experience with EELs to assign a standard, and recommend that the Commission require Qwest to establish a standard based on the provisioning and repair standards set forth in Qwest's Service Interval Guide. *Joint CLEC Comments at 9-11.*

Qwest

123 Qwest has committed to providing payment opportunities for EELs when the ROC collaborative determines standards for the UNE. *Qwest Rebuttal at 38.* During the hearings, however, Qwest stated that these measures should not be included into the QPAP automatically, but discussed at the six-month review. *Tr. 6189.*

Discussion and Decision

124 We are concerned that Qwest opposes any further additions of measures to the QPAP until the six-month review. We believe that the QPAP must have sufficient measures in place that reflect a broad range of carrier-to-carrier performance at the time Qwest enters the long distance market, including EELs, sub-loops, and line sharing. The Regional Oversight Committee Technical Advisory Group (ROC-TAG)[32] recently established a set of performance measures applicable to EELs that includes OP-3, OP-4, OP-5, OP-6, OP-15, MR-5, MR-6, MR-7 and MR-8. Qwest must provide payment opportunities in the QPAP for these measures as the standards are determined and not wait until a six-month review to do so. Qwest must also add the sub-loop and line sharing standards to the QPAP as the ROC collaborative establishes them.

c. Adding New Performance Measures

125 The CLECs request that the Commission order Qwest to establish several new performance measures in the QPAP, including PIDs for canceled orders, cooperative testing, and electronic order flow-through.

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[32] The ROC TAG consists of state commission staff, competitive local exchange carrier (CLEC) representatives, Qwest representatives, and other industry members. It has been active in the initial planning of the OSS test. The TAG collaboratively developed the Testing and Scoping Principles that will drive the testing effort. The TAG is also collaboratively developing the Performance Measurements for testing purposes, which are the same Performance Measurements used in the QPAP, and has had an extensive role in developing the Master Test Plan (MTP).

Joint CLECs

126 With respect to canceled orders, the Joint CLECs state that the Facilitator's Report erred in finding that the QPAP provides payments for orders that are delayed whether or not they are finally canceled, noting that Qwest's witness testified that Order and Provisioning measures only measure completed orders. *Joint CLEC Comments at 7-8.* The Joint CLECS request that the Commission require Qwest to include canceled orders among the orders eligible for payment for non-conforming performance in ordering and provisioning. *Id. at 8.*

Covad

127 Covad requests that Qwest be required to establish two new PIDs, a cooperative testing measure and a canceled order measure. *Verified Comments of Covad Communications Company on Qwest's Proposed Performance Assurance Plan at 41 (Covad Comments).* Covad states that cooperative testing is the only method by which Covad can ensure that an xDSL-capable loop is delivered, and addresses Covad's ability to compete effectively and efficiently with Qwest. *Id.* Therefore, Covad argues that it is imperative that a cooperative testing measure be included in the QPAP. *Id.*

AT&T

128 AT&T requested during the hearing that the Commission include in the QPAP the electronic flow-through measure, PO-2(b), noting that the standard was currently at impasse and that AT&T has requested the ROC Steering Committee and Executive Committee to rule that PO-2(b) be included in the QPAP. *Tr. 6191-92.*

Discussion and Decision

129 Of the three new PIDs requested by CLECs, only one, electronic order flow-through (PO-2b) has been developed and standards agreed upon. We note that an electronic order flow-through measure is already included in the CPAP. We find that such a measure is important to a CLEC's ability to compete with Qwest. Therefore, we direct Qwest to add this measure to the QPAP in the Low Tier 1 and High Tier 2 payment categories.

130 With respect to the requests to establish PIDs for canceled orders and cooperative testing, we note that Qwest has not developed PIDs for these measures and that there is a ROC process for requesting new PIDs. Parties should use that process to pursue the development of new PIDs.

2. Changes to Measure Weighting

131 During the PEPP collaborative, the participants agreed to a scheme whereby performance measures were assigned high, medium, or low payment values depending on their relative importance to the parties. During the Multi-state Proceeding, AT&T proposed assigning higher payment amounts to certain "high-value" services. Qwest countered with an offer to accept the proposal if the CLECs agreed to move other performance measures to lower value categories. AT&T argued that Qwest's proposal was unbalanced. The Facilitator found that since no other proposal was subsequently made or accepted, the weights should return to those proposed in the QPAP that Qwest initially filed. *Report at 53-54.*

WorldCom

132 WorldCom opposes the Facilitator's decision, stating that it did not agree with Qwest's counter-proposal to lower Tier 2 payment levels on certain measures because they are key provisioning and repair measurements that affect customer perception of new-provider performance. *WorldCom Comments at 13-14.* Citing a recent Michigan decision concerning SBC-Ameritech, WorldCom now proposes that the Commission require that all of Qwest's measures have equal ranking. *Id. at 14-16.*

Joint CLECs

133 The Joint CLECs oppose the Facilitator's decision, arguing that the record evidence does not support the finding that the original QPAP weighting was reasonable. *Joint CLEC Comments at 28.* The Joint CLECs point out that Qwest's current DS-3 monthly rate in the FCC tariff for Washington is $1,500, and that Qwest has proposed a rate of $855 in the Part B UNE cost docket. *Id. at 29.* The Joint CLECs also note that the QPAP payment to the CLEC for not providing the DS-3 circuit is only $150 and would not approach the monthly rate for the service until after five consecutive months of misses. *Id.* The Joint CLECs argue that payment levels that permit Qwest to continue to profit from retaining a retail customer while withholding facilities from competitors for five months should not be considered reasonable if the purpose of the payments is to ensure that Qwest provisions those facilities on a timely basis. *Id.* The Joint CLECs request that the Commission reject the Report's recommendation and require Qwest to increase the payment levels for high capacity loops and transport, without corresponding decreases in payments for other services. *Id. at 32.*

Qwest

134 Qwest states that it is unclear what WorldCom is proposing in urging that all measures be weighted equally, but that the proposal appears to refer to actions in other proceedings which are not a part of this record. *Qwest Rebuttal at 22.* With respect to the proposal for higher payment for higher-value services, Qwest notes it

did not disagree with the principle, but pointed out that services costing less should then have lower associated payment amounts. *Id. at 21.* Qwest asserts that it introduced a proportionality analysis demonstrating that the AT&T proposal would create greater disparity than the Qwest proposal. *Id.* Finally, Qwest states that the Joint CLECs argue that existing high capacity loop and transport payments should be increased and continue to ignore the argument that payments for lower value services should be lowered commensurately. *Id.*

Discussion and Decision

135 We reject the Facilitator's decision to retain the payment levels for high-value services at the levels initially proposed by Qwest. In this particular case, we find that higher payment levels for high-value services create a more appropriate incentive for Qwest to provide nondiscriminatory service, because they more closely correlate with one another. Qwest must amend the QPAP to include the payment table for high-value services proposed in Exhibit 1205 at page 12.

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

1. The Six-Month Review Process

136 Section 16 of Qwest's original QPAP provides a means for amending the performance measurements in the plan at six-month intervals. *Ex. 1200, Attachment 1, §16.* The scope of Qwest's proposed six-month review process includes additions, changes and deletions of performance measurements, changes to benchmark standards, changes from benchmark to parity standards, changes to the classification of measurements from high, medium, or low, and Tier 1 to Tier 2, and changes in payment levels. *Id., §16.1.* Qwest's proposed QPAP requires Qwest's approval before any changes are made. *Id.*

137 The Facilitator recommended three changes to the proposed six-review process: (1) Provide for normal SGAT dispute resolution for disagreements regarding the addition of new measures to the plan (*Report at 62*); (2) Recognize and support a multi-state review process to resolve QPAP disputes, including funding through a special fund consisting of contributions of Tier 1 and Tier 2 payments (*Id. at 42, 62*); and (3) Provide for biennial reviews of the continuing effectiveness of the QPAP, that will incorporate all issues discussed during preceding six-month reviews (*Id. at 62).* The Facilitator did not recommend changing either Qwest's "veto power" over any change in the plan, or the scope of the six-month review process, finding that Qwest requires such control to limit its financial liability under the plan. *Id. at 61.* The parties remain in dispute over these issues.

138 Qwest has modified its QPAP to reflect the Facilitator's recommendations, including developing language anticipating that the nine states participating in the Multi-state Proceeding would engage in a common review. *Ex. 1217, §16.1.*

AT&T

139 AT&T objects to the control Qwest has retained over changes to the plan, and also objects to the limited scope of changes to the plan. *AT&T Comments at 32-35.* AT&T argues that the proposed CPAP and the Utah Staff Report both leave to the state Commission, not Qwest, the decision of whether to make changes to the QPAP. *Id. at 33.* AT&T recommends the Commission adopt the language from section 18.6 of the proposed CPAP which would allow parties to suggest more fundamental changes to the plan, but only to address exigent circumstances. *Id.* Finally, AT&T objects to findings in the Report comparing the Texas plan and the QPAP, noting that the Texas plan provides for mutual agreement of the parties before changes are made to the plan. *Id. at 34.*

WorldCom

140 WorldCom opposes the requirement that Qwest agree before any changes can be made to the plan and opposes the limited scope of the six-month review. *WorldCom Comments at 22.* WorldCom requests the Commission include language in the QPAP similar to that in the Texas or Colorado plans. *Id. at 22-23.*

Public Counsel

141 Public Counsel objects to the Report's conclusion that Qwest must retain control over changes to the QPAP in order to limit Qwest's financial exposure. *Public Counsel Comments at 12.* Public Counsel argues that to deter anti-competitive behavior, and to create appropriate incentives, the QPAP should provide the Commission with authority to make changes. *Id. at 12-13.* Public Counsel strongly recommends modifying the QPAP to reflect that the Commission should retain the authority to modify the QPAP. *Id.*

Qwest

142 Qwest asserts that the Commission lacks authority to impose the plan on Qwest, and therefore does not have any authority to subsequently modify it. *Qwest Rebuttal at 30.* Qwest has challenged the Colorado and Utah plan proposals giving the state Commission authority to unilaterally amend the plan on the grounds that it is prohibited by state or federal law. *Id. at 29.* Qwest insists that its proposed plan and the Facilitator's recommendations are no different on this point than the plan approved in Texas. *Id. at 31.* Qwest states that "the FCC has recognized that an effective plan should allow the parties to modify and improve the plan's performance

QPAP to allow the Commission authority to determine whether changes ought to be made to the QPAP. Qwest must amend section 16.1 of the QPAP to strike "Changes shall not be made without Qwest's agreement," and add the following: "After the Commission considers such changes through the six-month process, it shall determine what set of changes should be embodied in an amended SGAT that Qwest will file to effectuate these changes."

b. Scope of Changes to the QPAP

147 With respect to the question of the scope of six-month reviews, we note that neither Qwest, the CLECs, or the Commission has any experience, nor can they predict, how the plan will work once it is in operation in Washington. For this reason, we believe it would be unreasonable to preclude or limit the Commission's authority to examine issues that may arise in the course of operation of the plan. However, the Commission is concerned that the six-month review process not become a forum for relitigating the essential terms of the plan. We believe the six-month review should focus on fine-tuning the performance metrics delineated above, while the other plan elements may be reexamined at the biennial review. However, consistent with the terms of section 18.7 of the CPAP, we will permit parties to request that the Commission review other issues if they can demonstrate that exigent circumstances exist. In addition, the Commission itself may identify issues for review. Qwest must modify section 16.1 to include the following language: "Parties or the Commission may suggest more fundamental changes to the plan, but unless the suggestion is highly exigent, the suggestion shall either be declined or deferred until the biennial review."

c. Multi-state Review Process

148 The Facilitator's Report envisions a multi-state review process for the six-month and biennial reviews, and a special fund that will cover the cost of the multi-state process. *Report at 62.* We support, in part, the Facilitator's proposal for both a six-month and biennial review process. We support the concept of a multi-state process because of the efficiencies and administrative convenience that joint reviews can provide to the states. However, we are not prepared to commit ourselves, at this time, to the specific multi-state review process set forth in Qwest's proposed plan. *Ex. 1217, §§16.1, 16.2.* We discuss separately below the issue of the Special Fund and contributions from Tier 1 and Tier 2 payments proposed in the QPAP.

Public Service Commission of Wyoming Docket No. 70000-TA-00-599 (Record No. 5934) (Jan. 30, 2001)(*Wyoming QPAP Order*); *In the Matter of the Investigation into Qwest Corporation's Compliance with Section 271 of the Telecommunications Act of 1996*, Preliminary Report on Qwest's Performance Assurance Plan and Request for Comments on Findings, Montana Public Service Commission Utility Division Docket No. D2000.5.70 (Feb. 4, 2002) (*Montana Preliminary QPAP Report*).

149 As noted in the recent Montana and Wyoming orders, the multi-state review process is still under development.[36] We believe it is this Commission's responsibility to consider any changes that need to be made, to ensure the effectiveness of the QPAP, and to resolve any disputes that may arise from its operation. Further, the ROC TAG is currently developing a post-271, long-term PID administration and review process. We prefer to wait and see how this process evolves before agreeing to a specific multi-state review process for the six-month and biennial reviews. We therefore will defer our decision on participation in any multi-state six-month review or biennial review process until a later date. We will determine, and advise the parties of our determination of, the process for the six-month review no later than 60 days after FCC approval of Qwest's application for section 271 authority.

150 Qwest must revise sections 16.1 and 16.2 to refer only to this Commission. Similar to the preliminary decision made in Montana, Qwest must include new language providing that nothing in the QPAP prohibits the Commission from joining a multi-state effort to conduct QPAP reviews and developing a process whereby the multi-state group would have the authority to act on the Commission's behalf.[37] Qwest must also delete the language in section 16.1 concerning the use of an arbitrator to resolve disputes; the Commission will conduct the six-month review process and resolve any disputes between the parties.

d. Response to Bench Request No. 39

151 In Bench Request No. 39, we asked Qwest for the basis of underlying language in section 16.1 that limits the reclassification of the payment level for measures during a six-month review to whether the actual volume of data points was less or greater than anticipated. In response, Qwest explained that the intent of the language was to provide a means to change the low, medium, or high designation of a performance measure if the measure turns out to be of greater or lesser importance than expected. *Ex. 1286.* We agree that payment levels for measures may need to be adjusted during a six-month review. However, we are concerned that relying solely on the volume of data points for that determination may unduly limit the scope of review. Causes may exist for changes to payment levels that are not related to the volume of data points. For instance, the volume of data points for a measure may turn out to be as expected, but Qwest's performance for the measure may not. In such a case, if volume were a constraint, the Commission would not be able to refocus incentives in the six-month review even if a new focus were warranted. Qwest must, therefore, remove the reference to the volume of data points from section 16.1.

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[36] *Wyoming QPAP Order*, ¶13; *Montana Preliminary QPAP Report* at 35.
[37] *Montana Preliminary QPAP Report* at 35.

2. The Special Fund - Use of Tier 1 and Tier 2 Payments for Reviews and Audits

152 The original QPAP provides for payment to the state in the form of Tier 2 payments to be used for any purpose "that relates to the Qwest service territory that may be determined by the State Commission." *Ex. 1200, §7.5.* Section 7.5 provides that the payments will be placed in a state fund determined by the Commission or in the state General Fund if the Commission is not authorized to receive such payments. *Id.*

153 The Report recommends certain changes to the language in section 7.5, expanding state power over the use of the payments. *Report at 41-42.* The Report also recommends that one-third of Tier 2 payments and one-fifth of the escalated portion of Tier 1 payments should be placed into a special fund to support the cost of multi-state six-month reviews, biennial reviews, audits, and QPAP administration. *Report at 42.*

154 Qwest has modified the QPAP to include this recommendation. *See Ex. 1217, §11.3.* Under QPAP section 11.3, the Special Fund would be an interest-bearing escrow account established by Qwest. Any Tier 1 payments to the Special Fund not used during a two-year period would be returned to CLECs. *Id., §11.3.2.* To the extent that Tier 1 and Tier 2 funds are not sufficient, Qwest will contribute funds to the Special Fund. *Id., §11.3.3.*

AT&T

155 AT&T disagrees with the creation of a funding system that uses Tier 1 payments, as no party made such a proposal during the proceeding. *AT&T Comments at 21-22.* Noting that CLECs already pay state taxes, regulatory fees and/or certification fees, AT&T believes that only Tier 2 funds should be used to fund future administration of the QPAP. *Id.*

WorldCom

156 WorldCom asks the Commission to reject a funding mechanism that uses a portion of CLEC Tier 1 payments to support state commission activities. *WorldCom Comments at 7-8.* WorldCom argues that CLEC payments are insufficient to compensate CLECs when Qwest provides poor wholesale performance, and that the recommendation in the Report to divert a portion of Tier 1 funds adds "insult to injury." *Id.*

Joint CLECs

157 The Joint CLECs oppose the use of Tier 1 funds for future administrative costs of the QPAP, noting the lack of legal or evidentiary support on the record. *Joint CLEC Comments at 40-41.* In addition, the Joint CLECs note that Qwest would make no

contribution to the Special Fund or to the QPAP's administration. The Joint CLECs assert that such a proposal lacks any fundamental fairness or pretense of neutrality or nondiscrimination. *Id. at 41.* The Joint CLECs stated in hearing that since the Commission has not indicated what it anticipates doing in the six-month review or audit processes, the question of funding is better left for a future proceeding. *Tr. 6029.*

Public Counsel

158 Public Counsel recommends that Tier 2 funds be used to cover the costs of auditing and reviewing Qwest's performance under the QPAP, and that any remaining funds be used to enforce "the pro-competitive provisions of the Act as well as consumer education and protection." *Public Counsel Comments at 15.*

Qwest

159 Qwest asserts that it supports common administrative efforts, and that contributions to the fund must be consistent across the board if a collaborative approach is to work. *Qwest Rebuttal at 16-17.* Qwest further argues that the Tier 1 payment contribution is entirely appropriate, as CLECs will benefit from the collaborative approach. *Id.*

Discussion and Decision

160 As we discuss, above, concerning the six-month review process, and below concerning the audit process, we decline to commit to a specific multi-state process at this time. We will defer the issue of our participation in any multi-state process until after the FCC considers Qwest's application for section 271 authority. Similarly, we will defer any decision whether to contribute a portion of Tier 2 funds to a Special Fund, and whether to require Qwest to contribute any funds, including a portion of the escalated Tier 1 funds, to the Special Fund until we determine our participation level in a multi-state process. Any later decision to use Tier 1 funds will apply on a going-forward basis.

161 Consistent with our decision concerning participation in multi-state processes, we direct Qwest to modify the QPAP to include language stating that nothing in the QPAP prohibits the Commission from directing the establishment of an identified escrow account or other fund, and or contributing a portion of Tier 2 funds to the account for the purpose of funding a multi-state process to review and audit the QPAP.

162 Until we determine whether we will participate in any multi-state process, Qwest must modify section 7.5 of the QPAP to reflect that Qwest must maintain an identified escrow account and deposit any payments of Tier 2 funds for Washington

State into that account. We will review the proper placement of these funds based on our decision whether to participate in a multi-state process.

F. SELF-EXECUTING MECHANISM

163 Section 13 of the QPAP is titled "Limitations." This section sets forth certain rules for implementation of the QPAP and provisions that limit Qwest's obligations, or liabilities, under the QPAP. In this portion of the order, we address topics from section 13 of the QPAP such as when the QPAP should become effective, whether CLECs should be required to elect remedies, and when Qwest is excused from making payments, such as for force majeure events. In this portion of the order, we also discuss other QPAP sections that are intended to avoid unreasonable litigation and appeal, such as the method of payment, and recovery of payments from ratepayers.

1. Implementation of the QPAP/Effective Dates

164 The parties dispute several issues concerning when the QPAP should become effective, when Qwest should start to make payments and at what level, and when the QPAP should cease to be effective. The parties chose to rely on their pre-filed comments and did not address these issues during the hearing.

a. Effective Date of QPAP

165 Section 13.1 of the QPAP provides that the plan becomes effective only when Qwest receives section 271 authority from the FCC for that state. *Ex. 1217.* The Report recommends adopting this section of the QPAP. *Report at 74-75.* The Report also requires Qwest to file monthly reports of performance and presumed payment levels between October 2001 and the date the FCC grants section 271 relief.[38] *Report at 75.* The parties dispute whether the QPAP should become effective before or after the FCC approves Qwest's application for section 271 relief for Washington state.

AT&T

166 Although AT&T advocated during the Multi-state Proceeding that the QPAP become effective immediately, AT&T now agrees with the Utah Staff proposal that the plan become effective in a state on the date Qwest files an application with the FCC for that state. *AT&T Comments at 40.* AT&T argues that Qwest should be prepared to comply with the QPAP at the same time that it asserts to the FCC that it is compliant with section 271 requirements.

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[38] Qwest began filing such reports with the Commission in January 2002, reflecting payments that would have been made based on performance for November 2001. These reports will be admitted into the record as Exhibit 1223-C.

Discussion and Decision

171 Similar to the Facilitator's Report, the Colorado Hearing Examiner has proposed that the plan become effective upon FCC approval of an application, but that Qwest must begin to file immediately performance reports and a calculation of the payments it would make if the plan were effective. *November 5, 2001 Colorado Decision at 11.* The November decision explains the if the plan were to go into effect upon state approval, the six-month review would possibly occur at the time of Qwest's application to the FCC and the Commission's comments on the application, causing resource issues for the Commission. *Id. at 11-12.*

172 This Commission is currently reviewing Qwest's performance data, as well as projected payments due to any performance failures. Further, the FCC will receive all evidence of Qwest's pre-application performance. We agree with Qwest that providing such information is a sufficient incentive to perform well prior to filing its application and receiving section 271 authority. Thus, we adopt the Facilitator's recommendation that the plan should become effective upon the date the FCC grants Qwest section 271 relief for the state of Washington. The Colorado Hearing Examiner's reasoning is also compelling: The Commission may not have the resources to conduct a six-month review at the same time a recommendation is due to the FCC on Qwest's application.

b. Memory of Payments at Effective Date

173 Sections 14.1 and 14.2 of the QPAP provide that, upon the effective date, Qwest will file reports of its monthly performance with CLECs and the state Commission. Given that the QPAP provides that Qwest must file monthly reports tracking its performance, some CLECs argue that Qwest should begin making payments at an escalated level once the QPAP becomes effective. The Report rejected the CLECs' proposal that the QPAP should include a "memory" of past performance upon the effective date. *Report at 75.* The parties continue to dispute whether payment levels should begin at an escalated level when the QPAP becomes effective.

AT&T

174 AT&T argues that the slate should not be wiped clean upon the effective date of the QPAP, ignoring Qwest's past poor performance. *AT&T Comments at 41.* Similar to its arguments concerning the proper effective date, AT&T argues that this creates a disincentive to performing well prior to obtaining section 271 approval.

Covad

175 Covad argues that the payments, or "penalties," are an essential part of the QPAP. *Covad Opening Brief at 8.* Covad asserts that if Qwest's performance has been so

prior that escalated payments would have been in effect, that Qwest should begin making payments at the escalated, or historical, level. *Id.*

Qwest

¶ 178 Qwest argues against a memory of payments on the effective date for the same reasons it opposes an immediate effective date. *Qwest Rebuttal at 36; see also Reply Brief of Qwest Corporation in Support of its Performance Assurance Plan at 44.*

Discussion and Decision

¶ 179 We adopt the Facilitator's recommendation on this issue. Payment levels should start at the one month level when the QPAP becomes effective. The reasons the CLECs state to justify requiring payments to begin at escalated levels are (1) to create additional incentive for Qwest to perform better, (2) to create a more open local market, and (3) to compensate CLECs. As we have discussed above, Qwest's performance records and mock payment levels are currently available to the Commission, as well as to the FCC. We do not believe the threat of escalated payments at the effective date will significantly increase Qwest's incentive to comply with section 271 requirements. If Qwest wants section 271 authority from the FCC, it stands to reason that Qwest has sufficient incentive to perform well now.

c. Termination of QPAP if Qwest Exits Long Distance Market

¶ 180 Section 16.2 of the QPAP provides that the plan will be rescinded immediately if Qwest exits the interLATA market. *Ex. 1217.* The Report recommends adopting this section of the QPAP, and allowing Qwest to terminate the QPAP when it exits the long distance market. *Report at 75.* The parties remain in dispute about whether the QPAP should remain effective if Qwest exits the long distance market.

Joint CLECs

¶ 181 The Joint CLECs object to the Facilitator's recommendation, arguing that the QPAP provides the only wholesale service quality rules and remedies in Washington. *Joint CLEC Comments at 42.* The Joint CLECs note that the Commission has not adopted such rules, choosing to look first to this proceeding for wholesale service quality issues. The Joint CLECs are concerned that, in the absence of rules adopted by the Commission, CLECs will have no remedy for anti-competitive behavior by Qwest if Qwest leaves the long distance market and focuses its efforts solely on the local market. *Id.*

Discussion and Decision

180 We share the Joint CLECs' concerns that CLECs may be without remedy if the QPAP were to automatically terminate if Qwest leaves the long distance market. The proposed Colorado plan provides that the plan will expire in six years, except that payments to individual CLECs will continue subject to a review of their necessity. *CPAP, Section 18.11.* We find the Colorado Hearing Examiner's determination appropriate and require Qwest to modify the QPAP to mirror the CPAP provision on this issue. This will allow Qwest to eliminate certain payments upon leaving the market, but allow for Commission review of the necessity of certain payments, as well as provide time to implement any necessary wholesale service quality rules.

2. Election of Remedies

181 Section 13.6 of the QPAP requires CLECs to elect a remedy for poor performance. If CLECs choose to receive payments under the QPAP, the QPAP provides that those payments are in the form of liquidated damages, and that the remedies are exclusive. The QPAP requires CLECs to waive their rights to seek alternative remedies for poor performance. The version of the QPAP that Qwest filed in the Multi-state Proceeding included an exception allowing CLECs to seek remedies for non-contractual causes of action. *See Ex. 1200.* The Report requires Qwest to modify portions of section 13.6 to further limit the exceptions, and to limit recovery under non-contractual remedies to any additional amount not recovered through QPAP payments. *Report at 32.*

182 The Facilitator recommended modifying section 13.6 of the QPAP by adding the following:

> By electing remedies under the PAP, CLEC waives any causes of action based on a contractual theory of liability, and any right of recovery under any other theory of liability (including but not limited to a regulatory rule or order) to the extent such recovery is related to harm compensable under a contractual theory of liability (even though it is sought through a non-contractual claim, theory, or cause of action).

Ex. 1217.

AT&T

183 AT&T first objects to the Facilitator's statements that the QPAP is a liquidated damages plan that is intended to replace costly litigation. *AT&T Comments at 11, citing Report at 28.* AT&T stresses the difference between the QPAP and a bilateral contract between commercial parties. *Id. at 11-12.* While AT&T agrees that QPAP payments will, in some circumstances, remedy the harm caused by Qwest's poor

performance, AT&T asserts that QPAP remedies should not be the exclusive remedy. *Id. at 14.*

184 During the Multi-state Proceeding, AT&T objected to Qwest's original QPAP sections 13.5 and 13.6 as limiting a CLEC's alternative remedies. *Id. at 21-22; see also Ex. 1225 at 7-8; Ex. 1227 at 19.* AT&T strenuously objects to the Facilitator's modifications to QPAP section 13.6. *AT&T Comments at 17.* AT&T asserts that the Facilitator's modifications would preclude a CLEC from bringing any contractual cause of action, or damages from any non-contractual cause of action, something that Qwest itself had never intended. *Id. at 17-18.* In particular, AT&T argues that the Facilitator's language would preclude a CLEC from receiving any remedy in an anti-trust matter except for the "adder." *Id. at 18.*

185 AT&T requests that the Commission adopt section 16.6 of the CPAP. That section would require an election of remedies, but allows CLECs to seek additional remedies for substantial harm not contemplated by the QPAP by seeking permission through the dispute resolution process to proceed with the action. Section 16.6 of the CPAP provides, in part:

> Tier 1X payments are in the nature of liquidated damages. Before CLEC shall be able to file an action seeking contract damages that flow from an alleged failure to perform in an area specifically measured and regulated by the CPAP, CLEC must first seek permission through the Dispute Resolution Process set forth in section 17 to proceed with the action. This permission shall be granted only if CLEC can present a reasonable theory of damages for the non-conforming performance at issue and evidence of real world economic harm that, as applied over the preceding six months, establishes that the actual payments collected for non-conforming performance in the relevant area do not address the extent of the competitive harm. If CLEC can make this showing, it shall be permitted to proceed with the action.

186 AT&T argues that an exclusive election of remedies provision is inequitable, and that CLECs should be able to sue for additional contract damages to protect themselves against extraordinary losses that may result from Qwest's poor performance. *AT&T Comments at 17-18.*

187 Alternatively, AT&T and WorldCom propose to substitute the Facilitator's proposal in section 13.6 of the QPAP with the following: "A CLEC may elect either: (a) the remedies otherwise available at law, or (b) those available under the QPAP and other remedies as limited by the QPAP." *WorldCom and AT&T Comments on Qwest's Responses to the Bench Requests at 2 (World Com and AT&T Joint Comments).*

WorldCom

188 During the Multi-state Proceeding, WorldCom objected to language in QPAP sections 13.5 and 13.6 that precludes payment of double recovery for "analogous" acts. *WorldCom Opening Brief of WorldCom, Inc. Regarding Qwest Corporation's Proposed Performance Assurance Plan at 18; see also Ex. 1241 at 53.* WorldCom notes that it does not object to precluding double recovery, but believes "analogous" is too vague a term. *Id.*

189 As noted above, WorldCom and AT&T proposed alternative language to include in QPAP section 13.6. *WorldCom and AT&T Joint Comments at 2.*

Covad

190 Covad objects to any provision in the QPAP, in particular sections 13.5 and 13.6, that may preclude "CLECs from exercising their rights to pursue any legal or regulatory action, with attendant remedies." *Covad Opening Brief at 43.* In particular, Covad objects to provisions that would limit "CLEC rights to pursue Section 251/252 remedies that supplement the PAP, state law regulatory enforcement actions, federal enforcement action under Section 271(d)(6), or any applicable antitrust, tort, contract, or state consumer protection remedies." *Id. at 42.*

Joint CLECs

191 The Joint CLECs oppose the Facilitator's proposed modification to QPAP section 13.6 that limits a CLEC's alternative remedies. *Joint CLEC Comments at 37-39.* Further, the Joint CLECs oppose that portion of the Facilitator's Report justifying the modification. *Id. at 37.* Specifically, the Joint CLECs argue that making the QPAP payments the exclusive remedy would deny CLECs the rights to pursue alternative remedies for harm caused by certain performance not measured by, or provided for under the QPAP, e.g., EELS and canceled orders. *Id. at 38.* The Joint CLECs recommend that the Commission modify the QPAP to allow CLECs to adopt the QPAP as a whole, without waiving their rights to seek alternative remedies for harm caused by Qwest's violation of contractual or statutory requirements. *Id. at 39.*

Qwest

192 Qwest asserts that the Facilitator's proposed language allows CLECs to pursue non-contractual remedies, but, in conjunction with the offset provision, also in section 13.6, precludes a CLEC from obtaining a double recovery. *Qwest Rebuttal at 12.* Qwest agrees with the Facilitator that allowing CLECs to pursue alternative remedies is "substantially unbalanced." *Id. at 13, quoting Report at 11.*

Discussion and Decision

193 After reviewing the parties' arguments, pleadings, and the proposed QPAP and CPAP, we agree with the CLECs that the modifications proposed in the Report to QPAP section 13.6 are not acceptable. The Report finds that portions of sections 13.5 and 13.6 may be contradictory and then eliminates any alternative remedies for CLECs. *Report at 32.* QPAP section 13.5 and CPAP section 16.4 are similar in that they allow CLECs to pursue other non-contractual legal and non-contractual regulatory claims and remedies, in addition to obtaining payments under the QPAP. However, in contrast to CPAP section 16.6, QPAP section 13.6, as modified by the Facilitator, severely, and inequitably, limits the alternative remedies available to CLECs. As discussed by the Joint CLECs, there are certain matters not yet covered by QPAP payments which could lead to severe inequities if QPAP payments were the sole remedy available.

194 AT&T and WorldCom's proposed election of remedies language is clear and straightforward. We also find the language in section 16.6 of the proposed CPAP to be clear and explicit about the types of alternative remedies available to CLECs, and believe it may avoid needless or protracted litigation about what remedies are available. In addition, the procedural exception in the CPAP is appropriate, given that we do not know how Qwest will perform or behave in the face of CLECs seeking alternative remedies.

195 Therefore, Qwest must strike the last sentence in QPAP section 13.6, as shown in Exhibit 1217. Qwest must add the election of remedies language proposed by AT&T and WorldCom, and include a portion of section 16.6 of the CPAP as shown below.

> 13.6 This PAP contains a comprehensive set of performance measurements, statistical methodologies, and payment mechanisms that are designed to function together, and only together as an integrated whole. To elect the PAP, CLEC must adopt the PAP in its entirety, in its interconnection agreement with Qwest. A CLEC may elect either: (a) the remedies otherwise available at law, or (b) those available under the QPAP and other remedies as limited by the QPAP.
>
> > 13.6.1 Before CLEC shall be able to file an action seeking contract damages that flow from an alleged failure to perform in an area specifically measured and regulated by the CPAP, CLEC must first seek permission through the Dispute Resolution Process set forth in section 5.18 to proceed with the action. This permission shall be granted only if CLEC can present a reasonable theory of damages for the non-conforming performance at issue and evidence of real world economic harm that, as applied over the preceding six months, establishes that the actual payments collected for non-conforming

performance in the relevant area do not address the extent of the competitive harm. If CLEC can make this showing, it shall be permitted to proceed with the action.

3. Offsetting Remedies

196 As originally filed in the Multi-state Proceeding, QPAP section 13.7 allowed Qwest itself to offset any award "for the same or analogous wholesale performance covered by this PAP." *Ex. 1200, Att. 1.* The Facilitator modified section 13.7 to clarify when an offset should be made, and to preclude an offset for payments relating to CLEC or third-party damage to property or personal injury. *Report at 36.* However, the Facilitator did not modify language allowing Qwest the right to make the offset. *Id. at 35.*

AT&T

197 AT&T argues that section 13.7 as originally drafted, and modified by the Facilitator, gives Qwest unilateral control over offsets. *AT&T Comments at 20.* AT&T does not object to the concept of offsets. *Tr. 6102-3.* AT&T is concerned that allowing Qwest the right to offset, subject to the dispute resolution process in the SGAT, would create an additional layer of litigation. *Id. at 21.* As such, AT&T argues that the provision is contrary to the FCC's criteria for reviewing a performance assurance plan. *Id.* AT&T argues that the Texas plan and proposed CPAP both give the power to offset an award to the finder of fact, whether it be a state regulatory commission or a court. *Id; see also Tr. 6121.* AT&T requests that the Commission adopt the language in the Texas plan, CPAP or Utah Staff Report relating to offsets. *AT&T Comments at 21-22.*

WorldCom

198 WorldCom asserts that Qwest improperly inserted a sentence into QPAP section 13.7 concerning offsets of portions of damages allowed by non-contractual theories of liability that are not also recoverable under contractual theories of liability. *WorldCom and AT&T Joint Comments at 2.* WorldCom requests the Commission order Qwest to remove the sentence, as the Facilitator did not recommend its addition. *Id.*

Covad

199 Like AT&T, Covad objects to any unilateral right of Qwest to offset an award granted to a CLEC. *Covad Opening Brief at 42.* Covad is concerned that a Qwest right to offset would effectively deny a CLEC the right to pursue alternative legal remedies. *Id. at 43.*

Joint CLECs

300 The Joint CLECs object to the Report and QPAP section 13.7 for two reasons: first, the Joint CLECs reject the notion that offsets should be allowed, and second, that Qwest has any right to unilaterally offset an award, as opposed to reserving that right to the entity determining the award. *Joint CLEC Comments at 33-34.* The Joint CLECs note that the Utah Staff rejected the concept of offsets, noting that Utah rules do not allow for offsets. *Id. at 34.* The Joint CLECS request that the Commission order Qwest to remove section 13.7 from the QPAP, or in the alternative, modify the section to preclude Qwest from unilaterally making the offset. *Id. at 36.*

Qwest

301 Qwest asserts that the issue is whether Qwest has more than the right to argue for an offset. *Qwest Rebuttal at 15.* Qwest asserts that it needs to clearly state its rights in the QPAP. *Id.* In the Multi-state Proceeding, Qwest argued that any payment offset disputes could be handled through the dispute resolution process or arbitrated. *Brief of Qwest Corporation in Support of its Performance Assurance Plan at 70, n.230.* Qwest also expressed the concern that a court may not interpret the QPAP in the same manner as a regulatory commission, and that it, therefore, wishes to retain control over offsets. *Id. at 69.*

Discussion and Decision

302 Allowing Qwest to make the sole decision about what to offset is inappropriate. The QPAP is intended to provide self-executing payments for poor performance and to avoid needless and protracted litigation. Giving Qwest the right to determine whether to offset and the amount of offset may add another level of litigation when the offset could be addressed within a single case, be it before a court or regulatory commission. We find that the language in section 16.7 of the proposed CPAP appropriately addresses the issue. Qwest must modify QPAP section 13.7 to incorporate the language in section 16.7 of the proposed CPAP and delete the last sentence of section 13.7 as requested by WorldCom.

4. Force Majeure Language

303 Section 13.3 of the QPAP provides a set of circumstances that would excuse Qwest from making Tier 1 and Tier 2 payments. As described in the Report, the CLECs raised a number of issues with Qwest's proposed language concerning force majeure events. *Report at 36-38.* The Report recommended referencing SGAT section 5.7 which defined force majeure events, allowing state commissions to resolve disputes over force majeure events, and adding language proposed by AT&T to further define the connection between the force majeure event and Qwest's performance,

determining that such events applied to benchmark, but not parity measurements. *Id. at 39-40.*

204 Qwest modified its QPAP to incorporate the Report's recommendations, but failed to delete language referring to parity measurements. *Ex. 1217; Qwest Response to AT&T and WorldCom's Comments on Qwest's Response to Bench Request No. 37 at 2 (Qwest Response re: Bench Request No. 37).*

AT&T/WorldCom

205 AT&T and WorldCom filed comments noting that Qwest included AT&T's force majeure language as required by the Facilitator, but inappropriately included a reference to parity measures in the last sentence of section 13.3. *AT&T and WorldCom Joint Comments at 2-3.*

Public Counsel

206 Public Counsel agrees with the Report's recommendation that Qwest provide notice of a force majeure event within 72 hours of learning of the event. *Public Counsel Comments at 14.* However, Public Counsel requests that the Commission require Qwest to modify section 13.3 to provide (1) that the Commission is the entity that determines whether a request for waiver of payment obligations should be granted, and (2) that Qwest must file any waiver request with the Commission "no later than the last business day of the month after the month in which payments are being disputed." *Id.*

Qwest

207 Qwest does not respond to Public Counsel's request to modify section 13.3. Qwest initially agreed with AT&T and WorldCom that the reference to parity measures at the end of section 13.3 in the red-lined QPAP should be deleted. *Qwest Response re Bench Request No. 37 at 2.* Qwest later asserted that the reference to the term "parity" in the last sentence of section 13.3 in Exhibit 1217 is correct and should not be stricken. *Supplement to Qwest's Response to AT&T and WorldCom's Comments on Qwest's Response to Bench Request No. 37 at 1-2.* Qwest asserts that the sentence at issue applies not just to force majeures events, but also to other excusing events, and that the reference is appropriate and should remain in the QPAP. *Id.*

Discussion and Decision

208 We find Public Counsel's request to be reasonable. The Facilitator notes that Qwest agreed during the Multi-state Proceeding that state commissions were the appropriate entity to resolve disputes over requests for waivers. *Report at 39.* Qwest must modify section 13.3 to reflect Public Counsel's requests.

209 As to the reference to parity in section 13.3 of the QPAP, we note, as did Qwest, that AT&T's proposed language for the force majeure section does include a reference to parity. *See Ex. 1225 at 12.* However, we also find the Facilitator's arguments persuasive that "parity . . . requires that parity measures may not be subject to force majeure payment exclusions." *Report at 40.* Qwest must strike the reference to "parity" in the last sentence of section 13.3 of the QPAP.

. Does QPAP or SGAT Language Prevail

210 Qwest intends to incorporate the QPAP into the SGAT as Exhibit K to the SGAT. *Qwest Initial Comments at 4.* Several parties raised concern that incorporating the QPAP into the SGAT creates a question as to which document prevails over the other.

AT&T

211 AT&T points out several inconsistencies between the QPAP and the SGAT, notably where the SGAT requires Qwest to pay penalties or compensate the CLEC for failure to take some act, and the QPAP, which limits CLEC remedies and requires that CLECs elect remedies. *AT&T Comments at 43-44; Tr. 6140-41.*

Qwest

212 Qwest asserts that to the extent the SGAT and the QPAP both provide for a payment to a CLEC for failure to perform, the CLEC must elect remedies between the SGAT and QPAP. *Tr. 6144.* Qwest also asserts that there should not be conflicts between the SGAT and QPAP. *Tr. 6146.*

Discussion and Decision

213 The SGAT sets forth Qwest's and the CLEC's obligations to each other when interconnecting their networks to provide intraLATA service. The QPAP is a set of performance measurements and agreed-to payments for Qwest's failure to meet those measurements. Understandably, the CLECs who have negotiated certain language in the SGAT argue that the SGAT should prevail, or at least that inconsistencies should be addressed before the QPAP goes into effect. As the QPAP is being incorporated into the SGAT, it ought to conform to the SGAT, not trump the SGAT. The terms of the SGAT should prevail in any conflict between the QPAP and the SGAT.

214 In response to the Commission's question as to whether the QPAP is consistent with existing provisions in the Washington SGAT and interconnection agreements, AT&T, WorldCom, and other parties noted several inconsistencies, but had not completed their review. During the oral argument, the administrative law judge acknowledged

that the Commission would establish a process to determine compliance between the QPAP and the Facilitator's Report. *Tr. 6243.* Given that the parties do not yet know if there is conflict between the SGAT and the QPAP, we believe it will be necessary to also determine consistency with the SGAT at the same time.

6. Payment Method

215 Section 11.2 of the QPAP provides for payments to CLECs to be made by bill credit rather than cash or check. The Report found Qwest's proposal appropriate, stating that CLEC arguments about the administrative convenience of requiring the equivalent of cash were not persuasive. *Report at 76.*

WorldCom

216 WorldCom opposes the Facilitator's decision, referring to the Colorado Hearing Examiner's decision which found that bill credits are more difficult to administer than cash equivalent payments and noted several circumstances where Qwest would be required to make cash payments anyway, despite the use of the bill credit method. *WorldCom Comments at 26-27.* WorldCom asks the Commission to require payments to CLECs under the QPAP in the form of cash rather than bill credit. *Id.*

Covad

217 Covad asserts that using bill credits will create serious administrative difficulties for CLECs and will likely delay the CLECs' ability to use the payment because the payment will become entangled with other billing issues. *Covad Opening Brief at 26.*

Public Counsel

218 Public Counsel asserts that the use of bill credits may result in additional disputes related to billing issues which would be counterproductive for all parties and contrary to the goal of having a PAP that is self-executing. *Public Counsel Comments at 17.* Public Counsel recommends the Commission adopt the Colorado approach of providing for cash payments to CLECs, but allowing Qwest to credit the payments for bills that are more than 90 days past due. *Id.*

Qwest

219 Qwest states that bill credits are not complex to administer and the form in which the credits are issued is not at all confusing. *Qwest Rebuttal at 37-38.* Qwest is also concerned with its growing accounts-receivable from CLECs and believes cash payments would be tantamount to providing CLECs unjustified cash subsidies. *Id.*

Discussion and Decision

220 We are persuaded that the Colorado Hearing Examiner's approach to the form of payment provides the appropriate balance between the competing positions of the parties. That is, Qwest will make cash equivalent QPAP payments to CLECs except when a non-disputed CLEC payment to Qwest is more than 90 days past due. Qwest must amend section 11.2 of the QPAP to adopt the language from section 12.2 of the CPAP which states: "All payments shall be in cash. Qwest shall be able to offset cash payments to CLEC with a bill credit applied against any non-disputed charges that are more than 90 days past due."

7. Recovery of Payment From Ratepayers

221 During the Multi-state Proceeding, AT&T requested that the QPAP include specific language prohibiting Qwest from recovering in rates from its regulated ratepayers the payments made under the QPAP. *AT&T's Brief Regarding Qwest's Proposed Performance Assurance Plan at 29.* The Facilitator recommended against including such a provision, agreeing with Qwest that such a provision is unnecessary, given that state and federal case law already precludes a BOC from recovering plan payments in rates. *Report at 86.*

AT&T

222 In comments filed with the Commission, AT&T disagreed with the Facilitator that the FCC and state commissions did not need guidance in the QPAP on this issue. *AT&T Comments at 42.* AT&T urges the Commission to include specific language precluding Qwest from recovering QPAP payments in its revenue requirement, or from wholesale customers. *Id.*

Public Counsel

223 Public Counsel requests the Commission include a provision stating that Qwest may not recover QPAP payments in rates from its retail or wholesale customers. *Public Counsel Comments at 15-16.*

Qwest

224 Qwest argues that the QPAP's function is not a state ratemaking document. Further, Qwest argues that a provision concerning recovery in rates is not necessary as the FCC has prohibited BOCs to seek such recovery in rates. *Qwest Rebuttal at 40.*

Discussion and Decision

225 We adopt the Report's recommendation that there is no need to include a provision in the QPAP precluding Qwest from recovering QPAP payments in rates. To the extent there is state and federal case law addressing the issue, we believe that is sufficient to govern Qwest's behavior and provide this Commission with guidance in the event a question should arise about Qwest's actions.

8. Recalculation of Payments

226 Upon the CLECs' request, the Report recommends that Qwest retain records of the underlying performance and payment data for a three-year period. *Report at 83.* The Report also recommends a QPAP provision that would allow payments to be recalculated retroactively for a three-year period. *Id.* As recommended in the Report, Qwest modified its QPAP to include section 14.4, which allows Qwest to recalculate payments made under the QPAP for up to three preceding years. *Ex. 1217.*

227 In Bench Request No. 40, the Commission asked Qwest whether other state plans contained a similar section and why Qwest believes the section should be included in the QPAP. Qwest responded that this section is unique to the QPAP, and that the Facilitator directed Qwest to add the language. *Ex. 1287.*

228 The FCC requires that performance plans have a self-executing mechanism that does not open the door unreasonably to litigation and appeal.[39] We are concerned that the language in this section is too vague. The section does not state whether the recalculation would take place as a result of any exclusion permitted under section 13.3, or for some other reason, such as Qwest discovering it has somehow been calculating payments incorrectly over a several-year period, or as a result of an audit under section 15 of the QPAP.

229 We concur with the Facilitator that the QPAP should include a retention period. However, the vagueness of the section detracts from the certainty that this plan is supposed to provide to the parties. If Qwest or any party believes there is a problem with a calculation, such concerns should be raised and dealt with by the Commission contemporaneously. Qwest must strike the first three sentences in section 14.4, and replace them with the following: "Qwest shall retain for a three-year period (measured from the monthly payment due date) sufficient records to demonstrate fully the basis of its calculations for making payments under this PAP."

[39] *Bell Atlantic New York*, ¶433.

G. ASSURANCES OF REPORTED DATA'S ACCURACY

1. Multi-state Audits/Investigations

230 The audit program in the QPAP is intended to provide "sufficient assurance that a high level of confidence can be placed in the performance results that Qwest measures -- results that will drive QPAP payments and will serve as a primary basis for [commission] oversight of wholesale performance." *Report at 78-79.* The Facilitator found that the audit program in Qwest's original QPAP was not sufficient, as it (1) made it difficult to track significant changes in the systems, methods, and activities by which Qwest measures performance, (2) did not provide assurances for tracking data accuracy into the future, and (3) allowed Qwest too much control over the program of auditing its own system of performance measurement. *Id. at 79.*

231 The Report recommended a multi-state process for audits, noting that there would be substantial commonality among issues, and that Qwest would face significant costs if all 14 states in its region were to conduct individual audits. *Id. at 79.* The Report also recognized that states will need to retain the ability to conduct their own audits to meet the particular needs and circumstances of the state. *Id.*

232 The Report proposes an audit approach that allows for both pre-planned and as-needed testing of Qwest's measurement program. *Id. at 80.* The Report expresses concern that the audit program focus on particular performance measurements that appear to be unstable or of particular risk. *Id.* Finally, the Report recommends that the states jointly retain an independent auditor for a two-year period to conduct the audit, and assess the need for individual audits requested by individual CLECs. *Id. at 81.* The Report recommends use of Tier 2 funds to support audit costs, as well as a portion of Tier 1 escalated payments should the Tier 2 funds prove insufficient. *Id. at 82.*

233 Qwest has modified the QPAP consistent with the Facilitator's recommendations. The red-lined QPAP provides for a two-year audit cycle and a "detailed audit plan developed by an independent auditor retained for a two-year period." *Ex. 1217, §15.1.* The QPAP identifies the scope of the audit plan as "identifying specific performance measurements to be audited, the specific tests to be conducted, and entity to conduct them," with specific attention to "higher risk areas identified in the OSS report." *Id., §15.1.2.*

234 The QPAP proposes that a committee of Commissioners from different states would have oversight over the auditor's activities, and would resolve disputes arising from the audit. *Id., §§15.1.1, 15.1.4.* The QPAP requires Qwest to report any changes it makes to management processes to ensure the propriety of the changes. *Id., §15.2.* Any disagreements between Qwest and CLECs about accuracy or integrity of data will be referred to the auditor. *Id., §15.3.* CLECs may not request an audit after three

years have elapsed from the payment date. *Id.* The audit program expenses are to be paid first from Tier 2 payments to the "Special Fund," and then one-half from Tier 1 funds in the Special Fund, and one-half by Qwest. *Id., §15.4.*

235 Qwest made no changes to section 15.5 of the QPAP which addresses investigations by Qwest into whether CLECs were responsible for Tier 2 misses.

CLECs

236 The participating CLECs did not comment on the multi-state audit and investigation process contemplated in the Report and red-lined QPAP, other than to object strongly to the proposed use of Tier 1 funds for multi-state efforts. Their comments are discussed in more detail below concerning the Special Fund.

Public Counsel

237 Public Counsel objects to the Facilitator's recommendation for a multi-state audit, investigation and review process. Public Counsel argues that performance issues may differ in each state, because CLECs use different modes of entry in each state, each state experiences different levels of competition, and that wholesale service quality will also likely differ in each state. *Public Counsel Comments at 10.* Public Counsel also objects to the "delegation of state regulatory authority to an unofficial, informal body." *Id. at 11.* Public Counsel recommends that the Commission retain sole authority over reviews, audits, and monitoring of Qwest's performance in Washington under the QPAP. *Id.*

Qwest

238 Qwest argues that the Commission recognized in its *12th Supplemental Order* the commonality of issues and the efficiencies that would be gained through a multi-state review process. *Qwest Rebuttal at 38-39.* Qwest responds to Public Counsel's concerns of delegation of state authority by referring to statutory authority in RCW 80.01.070 for the Commission to participate in joint hearings outside of the state of Washington. *Id. at 39.* Qwest recommends the Commission adopt the recommendations in the Report for multi-state audit and investigation processes. *Id.*

Discussion and Decision

239 We concur in the Report's findings that Qwest's original proposed audit program in section 15 of the QPAP is not sufficient to ensure a high level of confidence in the performance results that Qwest measures. However, as we have discussed above concerning the six-month review process and the creation of a Special Fund, we are

not prepared to commit ourselves, at this time, to the specific multi-state review process set forth in Qwest's red-lined QPAP.

240 Consistent with our discussion above concerning Commission jurisdiction for continued oversight over the QPAP, we believe it is the state's responsibility to evaluate any issues that may arise over performance results or performance measures, including changes in the way Qwest produces performance results. However, should we determine that it is appropriate to join the efforts of other states in a multi-state auditing or investigation process, we do not believe it is a delegation of state authority to do so, given our statutory authority to engage in joint hearings outside of the state. *See RCW 80.01.070.*

241 We prefer to wait and see how the ROC-TAG process develops before agreeing to a specific multi-state review process for an audit process. Therefore, we defer our decision on participation in any multi-state audit process until a later date. To that end, Qwest must replace the language in sections 15.1 through 15.4 of the red-lined QPAP, Exhibit 1217, with the following:

> 15.1 Any party may request that the Commission conduct an audit of performance results or performance measures. The Commission will determine, based upon requests and upon its own investigation, which results and/or measures should be audited. The Commission may, at its discretion, conduct audits through participation in a collaborative process with other states.
>
> 15.2 The costs of auditing will be paid for from Tier 2 funds. If such funds are insufficient, the Commission may require that a portion of Tier 1 escalated payments be set aside for auditing programs.
>
> 15.3 Qwest must report to the Commission monthly any changes it makes to the automated or manual processes used to produce performance results including data collection, generation, and reporting. The reports must include sufficient detail to enable the parties to understand the scope and nature of the changes.
>
> 15.4 In the event of a dispute between Qwest and any CLEC regarding the accuracy or integrity of data collected, generated, and reported pursuant to the QPAP, Qwest and the CLEC will first consult with one another and attempt to resolve the dispute. If the issue is not resolved within 45 days, either party may request that the Commission consider the matter.

242 Further, we are concerned that section 15.5 of the QPAP is not clear as to who would conduct the investigation and more importantly, who would make the determination

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

2. Monthly Reports to Public Counsel

243 Sections 14.1 and 14.2 of the QPAP require Qwest to provide monthly reports to CLECs and the Commission of Qwest's performance for the measurements set forth in the QPAP. Public Counsel requests that the Commission modify the QPAP to allow Public Counsel to receive monthly QPAP performance reports provided to the Commission. *Public Counsel Comments at 13; see also Tr. 6229-6230.* Qwest did not respond to Public Counsel's request.

244 We find it appropriate that Public Counsel should receive copies of the monthly reports filed with the Commission. We note that the CPAP requires that Qwest provide such reports to the Colorado Office of Consumer Counsel. *CPAP, Section 13.2.* Qwest must modify section 14.2 of the QPAP as follows: "Qwest will also provide *to* the Commission, *and relevant parties upon request,* a monthly report of aggregate CLEC performance results . . .."

VII. FINDINGS OF FACT

245 Having discussed above in detail the oral and documentary evidence received in this proceeding concerning all material matters, and having stated findings and conclusions upon issues at impasse between the parties and the reasons and bases for those findings and conclusions, the Commission now makes and enters the following summary of those facts. Those portions of the preceding detailed discussion that state findings pertaining to the ultimate findings stated below are incorporated into the ultimate findings by reference.

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

2. Monthly Reports to Public Counsel

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VII. FINDINGS OF FACT

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246 (1) Qwest Corporation, formerly U S WEST Communications, Inc., is a Bell operating company (BOC) within the definition of 47 U.S.C. § 153(4), providing local exchange telecommunications service to the public for compensation within the state of Washington.

247 (2) The Commission is an agency of the State of Washington vested by statute with the authority to regulate the rates and conditions of service of telecommunications companies within the state, to verify the compliance of Qwest with the requirements of section 271(c) of the Telecommunications Act of 1996, and to review Qwest's Statement of Generally Available Terms, or SGAT, under section 252(f)(2) of the Act.

248 (3) Section 271 of the Act contains the general terms and conditions for BOC entry into the interLATA market.

249 (4) Pursuant to 47 U.S.C. § 271(d)(2)(B), before making any determination under this section, the FCC is required to consult with the state commission of any state that is the subject of a BOC's application under section 271 in order to verify the compliance of the BOC with the requirements of section 271(c).

250 (5) The FCC has relied on performance assurance plans developed collaboratively by the BOC, CLECs, and the states in determining whether the BOC has met in part, the public interest requirement of section 271(d)(3)(C).

251 (6) Pursuant to 47 U.S.C. § 252(f)(2), BOCs must submit any statement of terms and conditions that the company offers within the state to the state commission for review and approval.

252 (7) On June 6, 2000, the Commission consolidated its review of Qwest's SGAT in Docket No. UT-003040 with its evaluation of Qwest's compliance with the requirements of section 271(c) in Docket No. UT-003022.

253 (8) On July 23, 2001, the Commission issued the *12th Supplemental Order* in this proceeding, directing the parties to participate in the Multi-state Proceeding for the initial review of Qwest's Performance Assurance Plan, or QPAP.

254 (9) During hearings held on August 14-17 and August 27-29, 2002, in the Multi-state Proceeding in Denver, Colorado, Qwest, a number of CLECs, and Public Counsel submitted testimony, exhibits, and briefs to allow the Facilitator to evaluate the sufficiency of Qwest's Performance Assurance Plan.

255 (10) On October 22, 2001, the Facilitator for the Multi-state Proceeding issued his Report on Qwest's Performance Assurance Plan. Consistent with our decision in the *12th Supplemental Order*, the Facilitator's Report is an initial order of the Commission.

256 (11) In preparation for hearings held before the Commission on December 18 and 19, 2001, in Olympia, Washington, Qwest, a number of CLECs, and Public Counsel submitted written comments on the Facilitator's Report, as well as responses to bench requests and questions, to allow the Commission to evaluate the sufficiency of Qwest's Performance Assurance Plan as modified by the Report.

257 (12) The QPAP is intended to be a self-executing remedy plan to ensure Qwest's continued compliance with the requirements of section 271 should the FCC grant an application by Qwest to provide in-region, interLATA service in Washington state.

258 (13) Qwest intends to incorporate the QPAP into the SGAT as Exhibit K, and to require CLECs with approved interconnection agreements to adopt the QPAP as a part of their agreement.

259 (14) Under the QPAP, Qwest must make payments to individual CLECs (Tier 1 payments) or the state (Tier 2 payments) if Qwest fails to meet certain performance standards. The standards are based on performance measurements that were defined by Performance Indicator Definitions (PIDs) developed in the ROC OSS collaborative.

260 (15) The Colorado Commission has not approved a final performance assurance plan. A hearing examiner has issued recommendations and proposed a draft plan, the CPAP, for consideration by the full Commission. The parties have asked a Special Master to consider several issues before the full Commission considers the plan as a whole.

261 (16) The Staff of the Utah Department of Public Utilities modified the recommendations in the Facilitator's Report and issued its own recommendations to the Utah Commission.

262 (17) The record in this proceeding is replete with references to other state performance assurance plans, finalized or in progress.

263 (18) Section 12 of the QPAP establishes a revenue cap on total payments of 36 percent of Qwest's 1999 ARMIS Net Revenue, and allows the cap to increase by as much as 8 percent, or decrease by as much as 6 percent, depending upon Qwest's performance.

264 (19) The CLECs and Public Counsel do not object to using current ARMIS revenue data, even if that data would result in a total amount at risk that is lower than in prior years.

265 (20) Table 2 of Qwest's QPAP incorporates the Facilitator's recommendation that, if Qwest fails to meet a performance standard for an individual CLEC for consecutive months, the payment amount for the measure escalates each month up to six months, and is then capped.

266 (21) Sections 8 and 9 of the proposed QPAP contain provisions that limit the potential payments to CLECs for substandard performance to the total number of orders placed by the CLEC during the month for each qualifying product and sub-measure.

267 (22) Qwest modified section 7.3 to include the Facilitator's recommendation that Qwest should make Tier 2 payments in the event Qwest fails to meet the performance standard for any Tier 2 performance measure for two consecutive months in any consecutive three month period, during any 12 month rolling period.

268 (23) The Facilitator recommended that payments for Tier 2 measures with no Tier 1 counterpart should escalate as provided for in the QPAP.

269 (24) Qwest modified section 6 of the QPAP to show proposed payments relating to the provision of collocation.

270 (25) In addition to collocation requirements in the QPAP, the SGAT and WAC 480-120-560 establish standards and payments for collocation provisioning in Washington State.

271 (26) Section 5.1 of the QPAP contains the critical Z values that are used for statistical testing.

272 (27) Section 12 of the QPAP establishes caps on monthly and annual payments to CLECs and the state.

273 (28) Qwest's proposed QPAP does not include a carry-forward provision. Qwest has included in section 12.3 of the QPAP the Facilitator's proposal for equalizing monthly payments to CLECs when the annual cap is reached.

274 (29) Section 13.8 of the QPAP provides that Qwest is not required to make Tier 2 payments and any other payments, penalties or sanctions for "the same underlying activity or omission" under a Commission order or service quality

rules. Similarly, section 12.1 of the QPAP provides that the annual cap on payments includes all payments made by Qwest for "the same underlying activity or omission . . . under any other contract, order or rule."

275 (30) Section 11.2 of the CPAP provides that "any penalties imposed by the Commission" are not subject to the cap, and section 16.8 of that plan provides a process for Qwest to dispute any payments under state service quality rules that it perceives are duplicate payments under the QPAP.

276 (31) The Report rejected the addition of new performance measurements for special access, canceled orders, cooperative testing, address due-date changes, pre-order inquiry time-outs, software release quality, test bed measurement, and missing status notifiers, found that Qwest had already added certain change management measures to the QPAP, and found that diagnostic measures for certain UNEs, i.e., EELs, line sharing, and sub-loops, should be added to the QPAP as soon as practicable.

277 (32) Performance standards have not been developed for EELs, sub-loops, and line sharing because commercial experience with them has been too limited to support a benchmark or parity standard. These UNEs are currently designated as "diagnostic UNEs" or TBD (to be decided).

278 (33) The Facilitator rejected a request by AT&T to assign higher payment amounts to high-value services.

279 (34) Section 16 of the QPAP provides a process for amending the performance measurements in the plan at six-month intervals. The Facilitator recommended three changes to the proposed process, including the SGAT dispute resolution process, a multi-state review process, including funding through a special fund consisting of contributions of Tier 1 and Tier 2 payments, and biennial reviews of the continuing effectiveness of the QPAP.

280 (35) Bench Request No. 39 asked Qwest to provide for the basis of underlying language in section 16.1 of the QPAP that limits the reclassification of the payment level for measures during a six-month review to whether the actual volume of data points was lesser or greater than anticipated.

281 (36) Section 7.5 of the QPAP provides that Tier 2 payments to the state will be placed in a state fund determined by the Commission or in the state General Fund if the Commission is not authorized to receive such payments, and states the purpose for using the funds.

282 (37) Qwest added section 11.3 to the QPAP to include the Facilitator's recommendation to create a Special Fund comprised of one-third of Tier 2

payments and one-fifth of the escalated portion of Tier 1 payments to support the cost of multi-state six-month reviews, biennial reviews, audits, and QPAP administration.

283 (38) Section 13.1 of the QPAP provides that the plan becomes effective only when Qwest receives section 271 authority from the FCC for that state. The Report recommends adopting this section of the QPAP, and requires Qwest to file monthly reports of performance and presumed payment levels between October 2001 and the date the FCC grants section 271 relief.

284 (39) Section 16.2 of the QPAP provides that the plan is rescinded immediately if Qwest exits the interLATA market.

285 (40) Section 13.6 of the QPAP requires CLECs to elect a remedy for poor performance. If CLECs choose to receive payments under the QPAP, the QPAP provides that those payments are in the form of liquidated damages, and that the remedies are exclusive. The Report requires Qwest to modify portions of section 13.6 to further limit the exceptions, and to limit recovery under non-contractual remedies to any additional amount not recovered through QPAP payments.

286 (41) As modified by the Facilitator, QPAP section 13.7 allows Qwest itself to offset any award for similar acts or omissions, and precludes an offset for payments relating to CLEC or third-party damage to property, or personal injury.

287 (42) Section 13.3 of the QPAP provides a set of circumstances that would excuse Qwest from making Tier 1 and Tier 2 payments..

288 (43) Section 11.2 of the QPAP provides for payments to CLECs to be made by bill credit rather than cash or check.

289 (44) Qwest modified its QPAP, as recommended in the Report, to include section 14.4 which allows Qwest to recalculate payments made under the QPAP for up to three preceding years.

290 (45) The Report modified the audit process in section 15 of the QPAP, recommending a multi-state process for audits, and proposing an audit approach that would allow for both pre-planned and as-needed testing of Qwest's measurement program. Qwest incorporated the Facilitator's recommendations in section 15.

291 (46) Sections 14.1 and 14.2 of the QPAP require Qwest to provide monthly reports to CLECs and the Commission of Qwest's performance for the measurements set forth in the QPAP.

VIII. CONCLUSIONS OF LAW

292 Having discussed above in detail all matters material to this decision, and having stated general findings and conclusions, the Commission now makes the following summary conclusions of law. Those portions of the preceding detailed discussion that state conclusions pertaining to the ultimate decisions of the Commission are incorporated by this reference.

293 (1) The Washington Utilities and Transportation Commission has jurisdiction over the subject matter of this proceeding and the parties to the proceeding.

294 (2) The administrative process in the Multi-state Proceeding was not deficient, in error, or compromised in any way. The Facilitator established a process that provided an opportunity for the parties to be heard, for evidence to be gathered, and for issues to be joined.

295 (3) The FCC's "zone of reasonableness" test is the most appropriate basis for determining whether Qwest's proposed plan is sufficient to deter and enforce backsliding behavior. The Facilitator correctly stated in the Report the five prongs of the FCC's zone of reasonableness test, but went too far in stating his own "considerations" for review of Qwest's QPAP and his comments on increasing Qwest's incentives.

296 (4) We reject the Facilitator's statements on pages 5 and 6 of the Report, beginning with the sentence: "The ultimate decision on the QPAP's sufficiency, as the FCC addresses the matter, should be one that takes into account the following considerations:"

297 (5) The Commission has authority under state law and the Telecommunications Act to require Qwest to act if it fails to perform such that it provides service that is unfair, unreasonable or would stifle competition in the state.

298 (6) While procedural fairness requires that the Commission begin with Qwest's proposed QPAP, it is appropriate for this Commission to consider the provisions of other state plans to determine whether elements of Qwest's performance assurance plan are sufficient to deter and enforce backsliding behavior in Washington state.

299 (7) Given the FCC's actions in approving performance assurance plans, and Qwest's current performance, there is no basis to modify the Facilitator's recommendations that Qwest's payments to CLECs and the state under the QPAP should be capped, or that 36 percent of Qwest's ARMIS Net Revenue

should be put at risk for payment to CLECs for failure to meet designated performance standards

300 (8) Using the most current ARMIS data provides a provides a meaningful and significant incentive for Qwest by creating a better match between the relative amount Qwest must place at risk and the prospective time period that the QPAP will be in operation.

301 (9) The Facilitator's proposal for a flexible revenue cap may unnecessarily restrict the Commission's ability to review the operation of the QPAP. Qwest's original proposal to use a flat 36 percent cap is appropriate to calculate the annual amount of revenue at risk of payment to CLECs.

302 (10) Table 2 of the QPAP demonstrates that payments made to CLECs will be very substantial at the sixth month of escalation. The threat of such payments should create sufficient incentive for Qwest to meet the performance standards for measures contained in the plan, and thus, sufficient assurance for CLECs that Qwest will meet the standards.

303 (11) Parity of service between CLECs and Qwest's retail customers is key to the advancement of local service competition. Qwest will not have sufficient incentive to minimize any disparity in provisioning services between the retail customers and CLECs unless Qwest removes the duration/severity, or 100 percent, cap from the performance measures in the QPAP calculated as averages or means.

304 (12) Neither Qwest's nor the Facilitator's proposals for when to trigger Tier 2 payments creates sufficient incentive for Qwest to perform. Qwest's argument that a time lag is necessary to correct continuing problems is doubtful, given the military style testing in the ongoing OSS test based on the same performance measures.

305 (13) The Facilitator's reference to payment escalation for Tier 2 payments is most likely to Table 5 which shows payments for per-measurement performance measures that escalate as performance worsens.

306 (14) WorldCom's argument for modifying the critical Z values is not persuasive.

307 (15) Payments made to uphold the integrity of the QPAP, such as late payment penalties, should be excluded from the cap.

308 (16) The monthly mock QPAP payment reports filed by Qwest shows there is little likelihood that the monthly cap will be reached, and provides no basis for including a carry-forward provision in the QPAP at this time.

309 (17) The Commission has independent authority to review Qwest's overall service quality. The Commission will not relinquish its authority over service quality, nor is it required to do so in approving the QPAP.

310 (18) We assert our jurisdiction over intrastate special access services, consistent with our decision in paragraph 28 of the *Special Access Order*, in the interest of ensuring that intrastate services are free from discrimination and barriers to competitive entry.

311 (19) The record in this proceeding establishes the need for Qwest to report its monthly provisioning and repair intervals for special access circuits.

312 (20) The QPAP must have sufficient measures in place that reflect a broad range of carrier-to-carrier performance at the time Qwest enters the long distance market, including measures for EELs, sub-loops, and line sharing.

313 (21) An electronic order flow-through measure is important to a CLEC's ability to compete with Qwest.

314 (22) Parties should use the ROC process for requesting new PIDs to pursue the development of new PIDs for inclusion in the QPAP.

315 (23) Higher payment levels for high-value services create a more appropriate incentive for Qwest to provide nondiscriminatory service.

316 (24) The Commission has authority under state and federal law to order Qwest to amend the QPAP during the six-month review process. In addition, the FCC stated in its *Verizon Pennsylvania Order* that it expects state commissions to play a prominent role in modifying and improving the performance metrics in performance assurance plans.

317 (25) It would be unreasonable to preclude or limit the Commission's authority to examine issues that may arise in the course of operation of the plan, as neither Qwest, the CLECs, nor the Commission has any experience, nor can they predict, how the plan will work once it is in operation in Washington.

318 (26) The scope of the six-month review should focus on fine-tuning the performance metrics in the plan, allowing other plan elements to be re-examined at the biennial review.

319 (27) This Commission is responsible for considering any changes to the plan to ensure the effectiveness of the QPAP and to resolve any disputes that may arise from its operation in Washington. We are not prepared to commit

ourselves, at this time, to the specific multi-state review process, or the Special Fund proposal set forth in the Report or Qwest's proposed plan.

320 (28) Relying solely on the volume of data points to determine whether payment levels should be adjusted may unduly limit the Commission's scope of review, as there may be other reasons to change payment levels that are not related to the volume of data points.

321 (29) The requirement that Qwest provide monthly performance data and projected QPAP payments to the Commission will provide a sufficient incentive for Qwest to perform well prior to filing its application with the FCC and receiving section 271 authority, and negates the need to make the QPAP effective upon state approval, or to require that payments should begin at an escalated level on the effective date.

322 (30) CLECs may be without remedy if the QPAP were to automatically terminate once Qwest leaves the long distance market. Section 18.11 of the CPAP provides an appropriate alternative, allowing the plan to expire in six years, but allowing payments to individual CLECs to continue subject to a review of their necessity.

323 (31) The recommendations in the Report to modify section 13.6 would severely and inequitably limit the alternative remedies available to CLECs. The language in section 16.6 of the CPAP is clear and explicit about the types of alternative remedies available to CLECs, and will likely avoid needless or protracted litigation about what remedies are available. In addition, the procedural exception in the CPAP is appropriate, given that we do not know how Qwest will perform or behave in the face of CLECs seeking alternative remedies.

324 (32) Allowing Qwest to determine whether to offset remedies and the amount of offset is inappropriate, as it may add another level of litigation when the offset could be addressed within a single case, be it before a court or regulatory commission. The language in section 16.7 of the CPAP appropriately addresses the issue.

325 (33) Public Counsel's request to modify section 13.3 to include a waiver process is reasonable.

326 (34) The concept of parity requires that parity measurements not be subject to force majeure payment exclusions.

327 (35) The terms of the SGAT should prevail in any conflict between the QPAP and the SGAT. The QPAP is being incorporated into the SGAT, and must conform to, not trump, the SGAT.

328 (36) The Colorado Hearing Examiner's approach to the form of payment provides the appropriate balance among the competing positions of the parties, such that Qwest will make cash equivalent QPAP payments to CLECs except when a non-disputed CLEC payment to Qwest is more than 90 days past due.

329 (37) There is no need to include a provision in the QPAP precluding Qwest from recovering QPAP payments in rates, because state and federal case law are sufficient to govern Qwest's behavior and provide this Commission with guidance.

330 (38) The QPAP should include a retention period, however, the language in section 14.4 of the QPAP is too vague and detracts from the certainty that this plan is intended to provide.

331 (39) Qwest's audit program in the QPAP, as originally proposed, is not sufficient to ensure a high level of confidence in the performance results that Qwest measures.

332 (40) Section 15.5 of the QPAP is not clear as to who would conduct an investigation, and more importantly, who would make the determination regarding CLEC responsibility, and only addresses investigation into Tier 2 misses, but not Tier 1 misses.

333 (41) It is appropriate for Public Counsel to receive copies of the monthly reports filed with the Commission.

IX. Order

334 THE COMMISSION ORDERS That Qwest must alter its proposed Performance Assurance Plan consistent with the following orders, prerequisite to securing a recommendation that its Performance Assurance Plan complies with the FCC's guidelines, and in order to ensure Qwest's continued compliance with the requirements of section 271 should the FCC grant it authority to offer in-region, interLATA service in Washington state:

335 (1) Qwest must modify section 12 of the QPAP to incorporate a flat 36 percent revenue cap, and to reflect the use of current ARMIS net revenue data.

336 (2) Qwest must modify section 6 of the QPAP to incorporate the Facilitator's recommendation for a six-month cap on Tier 1 escalation payments.

337 (3) Qwest must remove the 100 percent cap from the performance measures calculated as averages or means and contained in sections 8 and 9 of the QPAP.

338 (4) Qwest must clarify the language in the QPAP regarding the calculation of misses for parity to specifically incorporate the term "parity value" so that there will be no confusion at a later date as to how the calculations are performed.

339 (5) Qwest must modify section 7.3 of the QPAP to require Tier 2 payments in any month that Qwest fails to meet the Tier 2 performance standards.

340 (6) Qwest must incorporate the Washington state collocation rule into the QPAP, and ensure that the reference in the QPAP to CP-2 and CP-4 business rules is applicable only to matters not addressed in WAC 480-120-560. Qwest must also ensure that section 6.3 of the QPAP and section 8.4.1.10 of the SGAT are consistent in applying the Washington rule.

341 (7) Qwest must revise section 12 to reflect that payments made to uphold the integrity of the QPAP, such as late payment penalties, should be excluded from the cap.

342 (8) Qwest must modify sections 13.8 and 12.1 of the QPAP to be consistent with the sections 11.2 and 16.8 of the CPAP, to allow the Commission to assess penalties where necessary to address service quality issues, but allow Qwest to dispute any payments it believes are duplicate.

343 (9) Qwest must begin filing monthly special access reports in Washington in the same month that Qwest begins special access reporting to the Colorado commission.

344 (10) Qwest must provide payment opportunities in the QPAP for the set of performance measures applicable to EELs, including OP-3, OP-4, OP-5, OP-6, OP-15, MR-5, MR-6, MR-7 and MR-8, as the standards are determined and must not wait until a six-month review to do so. Qwest must also add the sub-loop and line sharing standards to the QPAP as the ROC collaborative establishes them.

345 (11) Qwest must add an electronic flow-through measure to the QPAP in the Low Tier 1 and High Tier 2 payment categories.

346 (12) Qwest must amend the QPAP to include the payment table for high-value services proposed in Exhibit 1205 at page 12.

347 (13) Qwest must modify section 16.1 of the QPAP to strike "Changes shall not be made without Qwest's agreement," and add the following: "After the Commission considers such changes through the six-month process, it shall determine what set of changes should be embodied in an amended SGAT that Qwest will file to effectuate these changes."

348 (14) Qwest must modify section 16.1 to include the following language: "Parties or the Commission may suggest more fundamental changes to the plan; but, unless the suggestion is highly exigent, the suggestion shall either be declined or deferred until the biennial review."

349 (15) Qwest must revise section 16.1 and 16.2 of the QPAP to refer only to this Commission. Qwest must include new language in that section providing that nothing in the QPAP prohibits the Commission from joining a multi-state effort to conduct QPAP reviews. Qwest must delete the language in section 16.1 concerning the use of an arbitrator to resolve disputes, as well as language referring to the volume of data points.

350 (16) We defer our decision to participate in any multi-state six-month review, biennial review, or audit process until a later date. We will determine, and advise the parties of our determination of, the process for the six-month review, biennial review, and audit process no later than 60 days after FCC approval of Qwest's application for section 271 authority.

351 (17) Similarly, we defer any decision whether to contribute a portion of Tier 2 funds to a Special Fund, and whether to require Qwest to contribute any funds, including a portion of the escalated Tier 1 funds, to the Special Fund until we determine our participation in a multi-state process. Until we determine whether and how we will participate in any multi-state process, Qwest must modify section 7.5 of the QPAP to reflect that Qwest must maintain an identified escrow account and deposit any payments of Tier 2 funds for Washington state into that account.

352 (18) Qwest must modify the QPAP to strike the language in section 11.3, and include language stating that nothing in the QPAP prohibits the Commission from directing the establishment of an identified escrow account or other fund, and or contributing a portion of Tier 2 funds to the account for the purpose of funding a multi-state process to review and audit the QPAP.

353 (19) We adopt the Facilitator's recommendations that the QPAP should become effective upon the date the FCC grants Qwest section 271 relief for the state of Washington, and that payment levels should start at the one month level when the QPAP becomes effective.

354 (20) Qwest must modify section 16.2 of the QPAP to mirror section 18.11 of the CPAP, allowing CLEC payments to continue, subject to review, upon Qwest exiting the long-distance market.

355 (21) Qwest must strike the last sentence in QPAP section 13.6, as shown in Exhibit 1217. Qwest must add the election of remedies language proposed by AT&T and WorldCom, and include the portion of section 16.6 of the CPAP, as described above in paragraph 195 of this Order.

356 (22) Qwest must modify QPAP section 13.7 to incorporate the language in section 16.7 of the CPAP.

357 (23) Qwest must modify section 13.3 of the QPAP to provide (1) that the Commission is the entity that determines whether a request for waiver of payment obligations should be granted, and (2) that Qwest must file any waiver request with the Commission no later than the last business day of the month after the month in which payments are being disputed. Qwest must also delete the reference to "parity" in the last sentence of section 13.3 of the QPAP.

358 (24) Qwest must amend section 11.2 of the QPAP to adopt the language from section 12.2 of the CPAP which states: "All payments shall be in cash. Qwest shall be able to offset cash payments to CLEC with a bill credit applied against any non-disputed charges that are more than 90 days past due."

359 (25) Qwest must strike the first three sentences in section 14.4 of the QPAP, and replace them with the following: "Qwest shall retain for a three year period (measured from the monthly payment due date) sufficient records to demonstrate fully the basis of its calculations for making payments under this PAP."

360 (26) Qwest must modify section 15 of the QPAP as set forth in paragraphs 241 and 242 of this Order.

361 (27) Qwest must modify section 14.2 of the QPAP as follows: "Qwest will also provide *to* the Commission, *and relevant parties upon request,* a monthly report of aggregate CLEC performance results."

362 (28) The Commission retains jurisdiction to implement the terms of this Order.

DATED at Olympia, Washington and effective this 15 day of April, 2002.

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

MARILYN SHOWALTER, Chairwoman

RICHARD HEMSTAD, Commissioner

PATRICK J. OSHIE, Commissioner

NOTICE TO PARTIES: This is an Interim Order, and, as such, is not subject to the post-Order review processes of the Administrative Procedure Act. The Commission will, however, entertain all requests for clarification or for revision of any substantial error of fact and law. Because the opportunity is afforded at this juncture, parties will be foreclosed from raising such matters on the issues resolved herein without a showing of good cause for failure to raise the matter at this time

PROPOSED ORDER OF WITNESSES

WITNESS	TOPIC	APPROX. DATE
** Connotes appearance order of witness "flexible"		
1. Teitzel	Public Interest/Track A	4/22
2. Newtson	OSS	4/22
3. Schultz	CMP/SATE	4/22-4/23
4. Dechberg		
	CI#1 Interconnection	4/23
	CI#13 Reciprocal Compensation	
	CI#3 Poles, Ducts, ROW	
5. Bumgarner		4/23-4/24
	CI#1Collocation	
	CI#7 911	
	CI#9 Numbering Admin (Not Challenged)	
	CI#10 Signaling/ Databases	
	CI#11 Number Portability	
	CI# 12 Local Dialing Parity(Not Challenged)	
6. Litzen	CI#4 Unbundled Local Loops	4/23-4/24
7. Simpson		4/24
	CI#6 Unbundled Local Switching	
	CI#7 DA, Operator Svcs	
	CI#8 White Pages Listings	
	CI#14 Resale	
	CI#2 UNE-P	
8. Brotherson	General Terms	4/24
9. Stewart		
	CI#2 Access to UNEs	4/24-4/25
	CI#2 Emerging Services/EELS	
	CI#5 Unbundled Local Transport	
10. LaFave	CI#5 Unbundled Local Transport	4/25

Note: Due to scheduling conflicts with Qwest attorney, Chuck Steese, Qwest will not be able to put Mr. Williams or Mr. Stright on before the morning of 4/25.

11. Williams (Steese)	PIDs/Data Actuals	4/25-4/26
12. Stright (Steese)	Data Reconciliation	4/25-4/26
13. Denning	Section 272	4/25-4/26
14. Schwartz	Section 272	4/25-4/26

[redacted]

Gary B. Witt
Senior Attorney

Room 1575
1875 Lawrence Street
Denver, CO 80202
303 298-6163

April 15, 2002

Via Overnight Mail

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

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

Dear Ms. Elofson:

Enclosed for filing are the original and ten copies of AT&T's Motion for Extraordinary Protective Order.

Please call me if there are any questions.

Sincerely,

Gary B. Witt

Gary B. Witt

GBW/jb

Enclosure

cc: Service List

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF SOUTH DAKOTA

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

AT&T'S MOTION FOR EXTRAORDINARY PROTECTIVE ORDER

AT&T Communications of the Midwest, Inc. ("AT&T"), pursuant to ARSD 20:10:01:41, submits this Motion for Extraordinary Protective Order as follows:

1. This motion comes in response to discovery requests from Qwest (attached), seeking proprietary information that is highly sensitive and contains extremely confidential trade secrets relating to the current operating status of AT&T's business in South Dakota ("Confidential Information"). While AT&T and Qwest's Confidentiality Agreement in this docket sets out a level of protection for materials produced herein, AT&T believes that the specific information requested by Qwest requires an additional, higher level of protection.

2. For the reasons set forth below, AT&T respectfully requests that the Commission enter a Protective Order that the Confidential Information described below be made available only to designated members of the Commission Staff, and no others.

3. In this case, Qwest has requested that AT&T provide data on its business and residential services, including numbers of access lines and customers for various types of services offered by AT&T within Qwest's service territory in the state of South Dakota. AT&T regards this information as highly sensitive, because it directly reflects upon AT&T's ability to provide services to the public. Hence, the information has the potential to affect AT&T's position in the marketplace, and its status and position among

other carriers. For this reason alone, it is extremely valuable to AT&T's competitors. Moreover, to the extent the information requested reflects AT&T's entry strategy within the South Dakota local exchange market, it is of even greater value to its competitors' marketing and sales forces. AT&T provides this information to the FCC on Form 477, subject to the most stringent confidentiality protections afforded under federal law.

4. The protections afforded under the existing Confidentiality Agreement are insufficient for this information. Because the information requested by Qwest would be advantageous to Qwest, as well as to other competitors, AT&T must take every precaution to ensure that the information is not used by those competitors. If those competitors have access to the Confidential Information, even under the existing Confidentiality Agreement, they would have an economic advantage not intended by the Commission in these proceedings. Once the Confidential Information is available in any context to competitive interests, restrictions on the use of such information are by and large meaningless. Advisors and consultants could easily use the Confidential Information to advise their clients without identifying the source of the information (or by that time having ample opportunity to find corroborating sources).

5. The information sought here—loop and customer counts within Qwest service territory in South Dakota, broken down between business and residential categories—clearly falls within the category of trade secret or other confidential information. At the FCC, competitively sensitive information is protected from mandatory disclosure pursuant to 5 U.S.C. 552(b)(4), or "Exemption 4." The D.C. Circuit has recently held that information that would "provide competitors with valuable insights into the operational strengths and weaknesses of a [company threatens]...the

type of competitive harm envisioned in Exemption 4." *Public Citizens Health Research Group v. FDA*, 185 F.3d 898, 905 (D.C. Cir. 1999), internal quotations omitted. The FCC itself has found "confidential" information to include information relating to a carrier's investment in plant (because that information would allow "competitors to devise strategies to introduce new services to the competitors' benefit, or exploit weaknesses in [the carrier's]...existing operations") and also information about a carrier's deployment status, including construction information.[1] Again, this is the very type of information being sought here.

6. At least one state court agrees that line count information is highly proprietary and must be protected to avoid exploitation by competitors. See *State of North Carolina ex rel. Utilities Commission v. MCI Telecommunications Corp.*, 514 S.E.2d 276, 283 (N.C.App. 1999) ("provid[ing] public access to [such information]...would provide competitors rather extensive insight into the business plans of a particular [competitive LEC]").

7. Some of the parties who have intervened in this matter are direct competitors of AT&T. It would be manifestly unjust to allow disclosure of the Confidential Information to these parties without placing specific additional restrictions on the use of that information. Competitors could potentially use this information to assess AT&T's ability to provide service within the state, and upstage or counter AT&T's future plans for facilities and business development.

8. In determining whether a party has made a showing of good cause for the issuance of a protective order, many courts have applied a balancing test. *Mountain*

[1] *Local Exchange Carriers' Rates, Terms, and Conditions for Expanded Interconnection Through Physical Collocation for Special Access and Switched Transport*, 14 FCC Rcd. 978 (1999), *Southern Company*

States Tel. and Tel. Co. v. Department of Public Service Regulation, 194 Mont. 277, at 285-6, 634 P.2d 181, at 187 (1981) (court and commission should balance competing interests presented in the case); *Krahling v. Executive Life Insurance Co., et al.*, 125 N.M. 228, 959 P.2d 562 (1998), citing Arthur R. Miller, *Confidentiality, Protective Orders, and Public Access to the Courts*, 105 Harv.L.Rev. 427, 432-33 (1991) (court should balance the party's need for information against the injury that might result if uncontrolled disclosure is compelled). In this case, the legitimate interest of Qwest, for example, to view this Confidential Information is not really apparent, even in the context of these proceedings. In other words, does the fact that Qwest seeks interLATA authority to compete with AT&T give Qwest a legitimate interest in the competitively sensitive information of AT&T, its future competitor? AT&T contends that the answer is no, and that the disclosure of this information should by rights be limited to examination *in camera* by the Commission, and Commission Staff only.

9. In a balancing of interests, the scales here must tip in favor of AT&T's ability to maintain its privacy interest in its Confidential Information. While it may be important for the Commission itself, together with Staff, to review the information in order to be able more accurately to determine the level of competition present within the State, there is no reason to allow disclosure of the information to Qwest or the other competitors.

10. AT&T here seeks an extraordinary Protective Order that contemplates that the Confidential Information described above be made available only to designated members of the Commission staff, and no others. AT&T contends that such a limitation, above and beyond the normal standard used in protecting proprietary information, is

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Request for Waiver of Section 90.629 of the Commissions' Rules, 14 FCC Rcd. 1851, at 1860 (1998).

necessary and appropriate in view of both the nature of the Confidential Information, and the legitimate interests of the parties to these proceedings.

Dated this 15th day of April, 2002.

AT&T COMMUNICATIONS OF THE MIDWEST, INC.

By: Gary B. Witt

Mary B. Tribby
Gary B. Witt
Steven H. Weigler
1875 Lawrence Street, Suite 1500
Denver, Colorado 80202
Telephone: (303) 298-6163

REQUESTS FOR INFORMATION/PRODUCTION OF DOCUMENTS

Request No. 1: Please provide the number of end user residential lines you currently service in Qwest service territory in South Dakota through facilities entirely owned by you. For purposes of this Request, the term "facilities" includes, but is not limited to copper, coaxial, or fiber facilities.

NOTE: this Request does not seek information regarding access lines served via unbundled network elements (UNEs).

Request No. 2: Please provide the number of end user business lines you currently serve in Qwest service territory in South Dakota through facilities entirely owned by you. For purposes of this Request, the term "facilities" includes, but is not limited to copper, coaxial, or fiber facilities.

NOTE: this Request does not seek information regarding access lines served via unbundled network elements (UNEs).

Request No. 3: Please provide the number of end user residential lines you serve in Qwest service territory in South Dakota using services purchased from Qwest services for resale.

Request No. 4: Please provide the number of end user business lines you serve in Qwest service territory in South Dakota using services purchased from Qwest services for resale.

Request No. 5: Please provide the number of end user residential lines you serve in Qwest service territory in South Dakota using stand-alone unbundled loops purchased from Qwest. For purposes of this Request, the term "stand-alone unbundled loops" does not include UNE-Platform services.

Request No. 6: Please provide the number of end user business lines you serve in Qwest service territory in South Dakota using stand-alone unbundled loops purchased from Qwest. For purposes of this Request, the term "stand-alone unbundled loops" does not include UNE-Platform services.

Request No. 7: Please provide the number of end user residential lines you serve in Qwest service territory in South Dakota using a finished package of bundled network elements (often identified as "UNE-Platform" or "UNE-P") purchased from Qwest.

Request No 8: Please provide the number of end user business lines you serve in Qwest service territory in South Dakota using a finished package of unbundled network elements (often identified as "UNE-Platform" or "UNE-P") purchased from Qwest.

CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of April 2002, the original and 10 copies of AT&T's Motion for Extraordinary Protective Order, were sent by Overnight Mail to:

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

and a true and correct copy was sent by U.S. Mail and e-mail on April 15, 2002 addressed to:

Colleen Sevold
Manager – Regulatory Affairs
QWEST Corporation
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Sioux Falls, SD 57194

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Janet Browne

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	)))))	TC01-165

NOTICE

The information in this file is designated confidential under Ch. 20:10:01 of the rules of the South Dakota Public Utilities Commission. Disclosure of any such confidential information to a person other than Commission members, employees, or others is prohibited unless otherwise permitted by the Commission.

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF SOUTH DAKOTA

IN THE MATTER OF THE ANALYSIS INTO QWEST CORPORATION'S COMPLIANCE WITH SECTION 271(c) OF THE TELECOMMUNICATIONS ACT OF 1996	)))))	TC01-165

MIDCONTINENT'S REQUEST FOR CONFIDENTIAL TREATMENT OF INFORMATION

Pursuant to ARSD 20:10:01:41 Midco Communications, Inc., d/b/a Midcontinent Communications ("Midcontinent") files the following information with the Commission requesting confidential treatment:

1. Midcontinent's response to Qwest's data requests dated March 22, 2002, containing responses to requests 1 through 9, inclusive. Each data request seeks the number of end user lines in various categories. Such information is confidential and proprietary. The information in the hands of competitors could be used to Midcontinent's competitive disadvantage.

This request for confidential treatment of information is based upon the following information:

a. The foregoing constitutes an identification of the documents and the general subject matter of the materials for which confidentiality is being requested.

b. The length of time for which confidentiality is being requested is until this docket and all appeals therefrom have been exhausted. Thereafter all documents shall be destroyed or returned to the undersigned.

c. The name, address and telephone number of a person to be contacted regarding the confidentiality requests is: David A. Gerdes, May, Adam, Gerdes & Thompson, P.O. Box 160, Pierre, South Dakota, 57501-0160, (605)224-8803, attorneys for Midcontinent.

d. The grounds upon which confidentiality is requested are that the material constitutes proprietary information owned by Midcontinent, the release of which would be detrimental to Midcontinent and cause irreparable injury. The release of any such

information would create a competitive disadvantage of Midcontinent with its competitors. Further, the information is susceptible to no beneficial or legitimate business purpose to anyone other than the parties to the documents.

e. The factual basis that qualifies the information for confidentiality is that the information was requested as a part of discovery in the above-entitled docket. The information serves no useful purpose except as it may relate to the issues between the parties in this docket. Any outside use of this information will be a violation of Midcontinent's confidential rights.

WHEREFORE Midcontinent prays that the Commission keep the accompanying information confidential under its rules, and that any person or party viewing such information may do so only under a confidentiality agreement approved by Midcontinent or its authorized representative.

Dated this 16 day of April, 2002.

MAY, ADAM, GERDES & THOMPSON LLP

BY: DAVID A. GERDES
Attorneys for Midcontinent
503 South Pierre Street
P.O. Box 160
Pierre, South Dakota 57501-0160
Telephone: (605)224-8803
Telefax: (605)224-6289

CERTIFICATE OF SERVICE

David A. Gerdes of May, Adam, Gerdes & Thompson LLP hereby certifies that on the 16 day of April, 2002, he mailed by United States mail, first class postage thereon prepaid, a true and correct copy of the foregoing in the above-captioned action to the following at their last known addresses, to-wit:

Colleen Sevold
Manager-Regulatory Affairs
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Sioux Falls, SD 57194

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April 16, 2002

HAND DELIVERED

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

RE: **MIDCONTINENT COMMUNICATIONS; QWEST'S 271 APPLICATION**
Docket TC01-165
Our file: 0053

Dear Debra:

Accompanying this letter is a request for confidential treatment of information and an envelope containing Midcontinent's response to Qwest's data requests of March 22, 2001, which contain confidential information. The envelope is marked as required by ARSD 20:10:01:41. We ask that you file this as confidential information under the applicable Commission rules.

With a copy of this letter, I am sending a copy of the Request for Confidential Treatment of Information only, for the information of the parties in this docket. This information will be shared with the parties upon their signing an appropriate confidentiality agreement.

Yours truly,

MAY, ADAM, GERDES & THOMPSON LLP

DAVID A. GERDES
DAG:mw
Enclosures
cc/enc: Service List
Tom Simmons
Mary Lohnes