PUBLIC VERSION

BRIEF OF QWEST CORPORATION IN SUPPORT OF ITS PERFORMANCE ASSURANCE PLAN (QPAP)

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BRIEF OF QWEST CORPORATION IN SUPPORT OF ITS PERFORMANCE ASSURANCE PLAN (QPAP)

Qwest Corporation ("Qwest") submits this brief in support of its demonstration that Qwest's performance assurance plan ("QPAP") satisfies the public interest requirements for in-region interLATA service established by section 271(d)(3)(C) of the Telecommunications Act of 1996.[1]

INTRODUCTION

Qwest's QPAP is a robust plan that satisfies the criteria established by the FCC in its 271 orders. The plan will provide a compelling economic incentive for Qwest to maintain high wholesale performance standards after entering the interLATA market.

The QPAP has been evaluated through a comprehensive review that has been reflected in an extensive evidentiary record. It was examined and modified in a collaborative process, which began in August 2000, when the state commissions in 11 of Qwest's 14 in-region states invited interested parties to participate in workshops (the "ROC PEPP collaborative") to develop a post-271 performance assurance plan.[2] Five multi-day workshops (as well as a series of conference calls) were held between October 2000 and May 2001, with participation of staff members from the 11 states, as well as by AT&T, WorldCom, Z-Tel, Covad, McLeod, Eschelon, other CLECs, and Southwestern Bell.

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1 47 U.S.C. § 271(d)(3)C).

2 Participating states included Idaho, Iowa, Nebraska, New Mexico, North Dakota, Montana, Oregon, South Dakota, Utah, Washington, and Wyoming. Arizona and Minnesota declined the invitation to participate. Colorado opened Docket 01I-041T on January 24, 2001 to consider a Performance Assurance Plan separately. Oregon and South Dakota did not participate in the subsequent multistate process led by the Facilitator, Mr. John Antonuk.

After the ROC collaborative workshops, Qwest submitted its QPAP and supporting comments to the Facilitator in these multistate proceedings. After Qwest submitted its QPAP, the CLECs, state commission staffs, and public advocacy staffs had a further opportunity to comment on the plan, followed by seven days of hearings, with testimony from 11 witnesses, including cross-examination by CLECs and state commission staffs.

As demonstrated in Qwest's comments in support of its QPAP,[3] the Qwest plan satisfies the five general characteristics of the FCC's "zone of reasonableness" test for a section 271 performance assurance plan.[4] We discuss each factor briefly below, including several additional improvements Qwest described at the August hearings that further refine what is already a robust plan.

(1) Qwest's potential liability under the QPAP provides a meaningful and significant incentive to comply with the designated performance standards.

Under the QPAP, Qwest will place $306 million at risk, equal to 36% of its 1999 ARMIS net return[5] for local service in all nine states. The FCC has *repeatedly* found that placing this level of net revenues at risk provides a "meaningful incentive" for a BOC to

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3 *See* Exhibit K to Qwest's Statement of Generally Available Terms and Conditions and Supporting Comments (June 29, 2001), Ex. S9-QWE-CTI-1 ("Qwest's Comments").

4 *See* Memorandum Opinion and Order, *Application by Bell Atlantic New York for Authorization Under Section 271 of the Communications Act To Provide In-Region, InterLATA Service in the State of New York*, 15 FCC Rcd 3953 ¶ 433 (1999) ("*Bell Atlantic New York Order*"), *aff'd sub nom. AT&T Corp. v. FCC*, 220 F.3d 607 (D.C. Cir. 2000).

5 ARMIS data "represents total operating revenue less operating expenses and operating taxes" and is provided to the FCC on an annual basis. *See Bell Atlantic New York Order* ¶ 436; Memorandum Opinion and Order, *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*, 15 FCC Rcd 18354 ¶ 424 (2000) ("*SBC Texas Order*"). No party claims that Qwest's calculation was inaccurate. Qwest has agreed to remove the "Adjustment for Commission Rate Orders" column in its calculation of the annual caps in Attachment 1 to the QPAP.

maintain a high level of performance.[6] Thus, by adopting this FCC-endorsed incentive to comply with performance standards, the QPAP satisfies this prong of the FCC's reasonableness test.

In addition, while not required to satisfy the FCC's reasonableness test, Qwest has nevertheless offered to add a priority of payments provision to the QPAP. This provision would ensure that Tier 1 payments to CLECs are paid first, before Tier 2 payments are paid to the state.

(2) The QPAP contains clearly articulated and pre-determined measures and standards that encompass a range of carrier-to-carrier performance.

The QPAP's enforcement measures, the Performance Indicator Definitions ("PIDs"), were developed during months of collaboration with CLECs and state commission staff in the ROC Operational Support System ("OSS") process.[7] The PIDs cover the entire range of gateway, pre-order, order, service provisioning, repair, network performance, and billing functions for resale, transport, unbundled loops, and other wholesale services.

After extensive negotiations in the ROC collaboratives, Qwest and CLECs reached consensus on all of the PIDs that are to be included in the QPAP, except for change management PIDs. These have been subsequently addressed in this proceeding.

The PIDs included in the QPAP as a result of the ROC PEPP collaborative are very comprehensive. The QPAP will also include several additional measurements

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6 *See Bell Atlantic New York Order* ¶ 433; *SBC Texas Order* ¶ 424; Memorandum Opinion and Order, *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*, 16 FCC Rcd 6237 ¶ 274 (2001) ("*SBC Kansas/Oklahoma Order*").

agreed to after the collaborative. Qwest has voluntarily agreed to include two additional performance measurements, GA-7 (Timely Outage Resolution) and PO-16 (Release Notifications), which were approved by the ROC TAG on August 9, 2001 and June 21, 2001, respectively, even though these measurements are both diagnostic. In addition, Qwest has also agreed to include OP-17 (LNP Disconnect Timeliness), MR-11 (LNP Trouble Reports Cleared within 24 Hours), and MR-12 (LNP Trouble Reports — Mean Time to Restore) in the form approved by the ROC OSS TAG, even though these measurements were never raised at the ROC PEPP collaborative.

(3) The QPAP provides a reasonable structure that is designed to detect and sanction poor performance when and if it occurs.

The QPAP started with the statistical methodology and payment structure of the Texas PAP approved by the Texas commission and the FCC. Based on input from participants in the ROC collaborative workshops, Qwest made further improvements to that Texas PAP. Like the Texas plan, the QPAP relies upon the modified z-statistic for statistical testing for parity measurements. Unlike the Texas plan, however, the QPAP employs the more straightforward "stare and compare" method for benchmark measurements. Qwest also agreed to eliminate the K-Table exclusions and critical values and to replace them with a Table of Critical Values after reaching a consensus agreement with many of the CLECs participating in the ROC PEPP collaborative.

The QPAP also adopted the Texas two-tiered payment structure, with Tier 1 payments made to CLECs and Tier 2 payments made to the states. This two-tiered structure assures that Qwest provides reasonable compensation for nonconforming wholesale service performance to CLECs and that Qwest has significant financial

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[7] *See* Ex. S9-QWE-CTI-1; *see also* Service Performance Indication Definitions version 3.0, Ex. S9-

incentive to maintain appropriate wholesale performance both to individual CLECs as well as to CLECs in the aggregate.

The FCC has determined that the Texas PAP payment structure provides an adequate sanction for poor performance. As a result of the ROC PEPP collaborative process, Qwest agreed to make substantial changes to that structure, which should provide even more significant compensation levels to CLECs and financial incentives to Qwest. Under the Texas PAP, payments escalate as nonconforming performance continues over consecutive months. Qwest also agreed to add a monthly de-escalation mechanism in which payment levels for nonconforming performance step down at the same rate as they escalate — rather than returning immediately to their initial levels. Qwest also eliminated all payment caps on individual performance measurements, except for billing measurements; restructured collocation payments; raised the Tier 1 Medium performance measurements to High; and restructured the payment structure for regionwide performance measurements.

These improvements on the FCC-approved Texas payment structure and statistical methodology ensure that the QPAP will detect and sufficiently sanction nonconforming performance by Qwest.

(4) The QPAP contains a self-executing mechanism that does not leave the door open unreasonably to litigation and appeal.

The QPAP provides self-executing payments to the CLECs and the states, based on monthly performance results. There are only limited exceptions to Qwest's obligation to make payments, and, under section 13.3.1 of the QPAP, Qwest has the burden of proving in a particular case that application of an exception is appropriate. These

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QWE-MGW-3 ("QPAP PIDs").

exceptions are based on provisions in the FCC-approved PAPs for Texas, Kansas, and Oklahoma.

In addition, even though CLECs' comments on the QPAP did not raise any issues about dispute resolution, based on questions raised at the August hearings, Qwest has offered to clarify the dispute resolution mechanism applicable to the QPAP by adding a separate section on dispute resolution in the QPAP itself.

(5) The QPAP provides reasonable assurance that the reported data are accurate.

The QPAP contains extensive data validation and auditing safeguards that are patterned after other FCC-approved PAPs.[8] By the time the QPAP becomes effective in a state, the performance measures will have undergone not one, but two separate, comprehensive audits of the data collection, calculation, and reporting functions, by two different independent auditors.[9] Qwest also has included a root cause analysis provision in its plan, and has agreed to include a risk-based audit program based on principles in the Liberty Monitoring Report. The risk-based audit program will include audits triggered by measurements that change from substantially manual to substantially mechanized, and audits of material measurements that have a high degree of risk, as substantiated by the Liberty Monitoring Report. In addition, CLECs have an opportunity to receive their raw data in order to perform their own data reconciliation, and CLECs may request audits of individual performance measurements. Finally, the QPAP also

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8 *See Bell Atlantic New York Order* ¶ 442; *SBC Texas Order* ¶ 428; *SBC Kansas/Oklahoma Order* ¶ 278; Memorandum Opinion and Order, *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*, 16 FCC Rcd 8988 ¶ 247 (2001) ("*Verizon Massachusetts Order*").

9 The performance measures included in the QPAP were audited both by Liberty Consulting Group in the ROC OSS collaborative and by Cap Gemini Ernst & Young in the Arizona collaborative.

provides for audits of the financial accounting system. These audit procedures are rigorous and will provide reasonable assurance that the reported data will be as accurate as possible.

DISCUSSION

I. SUFFICIENCY OF THE QPAP

COMPENSATION TO CLECS

Claims That QPAP Payments Will Not Provide Sufficient Compensation to CLECs Nor Sufficient Incentive to Qwest to Meet Performance Standards Are Without Merit.

CLECs claim that the QPAP will produce a level of payments that will not give them adequate compensation and that will not provide sufficient incentive to Qwest to meet performance standards.[10] The record of this proceeding demonstrates exactly the opposite.

Using the actual performance results for the period February to May 2001, Qwest presented quantifications of the level of payments that the QPAP would produce if the QPAP had been in effect.[11] Quantifications that use actual CLEC results provide a means to evaluate both the QPAP and CLECs' proposals to modify it.

At the most general level, Qwest's quantifications of the QPAP demonstrate that aggregate Tier 1 and Tier 2 payments would be substantial for the nine states, even when

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10 *See AT&T and ASCENT's Verified Comments on Qwest's Proposed Performance Assurance Plan* at 18 (July 27, 2001) ("AT&T Comments"); *Verified Comments of Covad Communications Company on Qwest's Proposed Performance Assurance Plan* at 4 (July 27, 2001) ("Covad Comments"); *Comments of WorldCom, Inc. in Response to Qwest Corporation's Proposed Performance Assurance Plan* at 6 (July 27, 2001) ("WorldCom Comments"); *Z-Tel Comments* § III (July 27, 2001) ("Z-Tel Comments").

11 *See* Ex. S9-QWE-CTI-5.

the overall percentage of performance standards met is 92%.[12] On a more specific level, the quantifications demonstrated that the level of Tier 1 payments to CLECs would be more than compensatory. The average OP-3 (Installation Commitments Met) and OP-4 (Installation Interval) payment to CLECs per installation order for which the commitment date to the CLEC customer was not met was **[CONFIDENTIAL DATA BEGINS:** XXXX **CONFIDENTIAL DATA ENDS]**.[13] At this level of Tier 1 payments, CLEC compensation would be equivalent to making the service free to CLECs for more than **[CONFIDENTIAL DATA BEGINS:** XX **CONFIDENTIAL DATA ENDS]** years.[14] Comparison of QPAP payments to the recurring or nonrecurring rates that the CLEC pays for the service is a relevant measure of CLEC compensation. Under the economic theory of prices, prices reflect the value of the services.[15] Therefore, comparisons of QPAP payments to the price of the service is relevant. Arguably, the level of payments for missed orders is more than compensatory to CLECs, because it far exceeds the value of the service. Furthermore, in every instance, a missed commitment date did not cause the CLEC to lose its retail customer, because the order was completed and the unbundled loop went into service.[16]

For this same test period, Qwest also presented data on the average payment to CLECs for OP-13a (Coordinated Cuts on Time). The average Tier 1 payment per cut that

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12 *See id*., confidential slide 2.

13 *See* Ex. S9-QWE-CTI-5, confidential slide 5; C. Inouye 8/14/01 Testimony, Tr. at 47. The vast majority of unbundled loops ordered by CLECs are analog and non-loaded 2-wire loops whose rates are generally less than $20 per month. C. Inouye 8/14/01 Testimony, Tr. at 47, 53; C. Inouye 8/14/01 Confidential Testimony, Tr. at 95.

14 *Id.*

15 Even prices set through regulation reflect value, because they attempt to mirror a competitive market.

missed the standard would be **[CONFIDENTIAL DATA BEGINS:** XXX **CONFIDENTIAL DATA ENDS]**.[17] This amount again far exceeds the cost that the CLEC pays for a coordinated cut;[18] thus, this level of QPAP payment is compensatory to CLECs. Furthermore, in every instance a coordinated cut that was not on time did not cause the CLEC to lose its retail customer, because the cut was completed and the unbundled loop went into service.

While the role of Tier 1 payments is to provide compensation to CLECs, those payments also provide a financial incentive to Qwest to meet performance standards. Tier 2 payments provide further financial incentive. In the evaluation of whether the QPAP provides sufficient financial incentive, it is appropriate to examine the combined effect of Tier 1 and Tier 2 payments.[19] The additional effect of Tier 2 payments for the February to May 2001 period was substantial. For each of the services, unbundled loops and coordinated cuts, the combined level of Tier 1 and Tier 2 payments would have substantially exceeded the revenues that Qwest derived from these services.[20] Thus, unless Qwest improves its performance, Qwest will lose money on every missed unbundled loop installation and every missed coordinated cut.[21] Such an economic situation is an obvious incentive to Qwest not to miss performance standards.

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16 *See* Ex. S9-QWE-CTI-5, confidential slide 5.

17 *See id*., slide 3.

18 *See* C. Inouye 8/14/01 Confidential Testimony, Tr. at 44-46. With cooperative testing, the rate for coordinated cuts is approximately $200 for the first cut. *Without* cooperative testing, the rate is approximately $90 for the first cut. The rate for coordinated cuts decline for additional cuts. *See id*. at 45.

19 *See* C. Inouye 8/14/01 Testimony, Tr. at 34-35; C. Inouye 8/14/01 Confidential Testimony, Tr. at 46.

20 *See* Ex. S9-QWE-CTI-5, confidential slide 5; C. Inouye 8/14/01 Testimony, Tr. at 34-35; C. Inouye 8/14/01 Confidential Testimony, Tr. at 46.

21 *See* C. Inouye 8/14/01 Testimony, Tr. at 52; C. Inouye 8/14/01 Confidential Testimony, Tr. at 46.

CLECs Provided No Credible Evidence To Support Their Claims.

CLECs fail to provide any real evidence to support their claims either that the QPAP will not provide CLECs with sufficient compensation for economic harm or that it will not provide Qwest with sufficient financial incentive to meet performance standards.

No CLEC provided verification of any *lost retail customers* due to Qwest's service performance, nor the frequency at which any such retail customers would be lost. Likewise, no CLEC provided quantitative evidence of any of its *expenses or investments* incurred as a result of Qwest's service performance. Logically, if economic harm is as substantial as CLECs claim, proof and quantification of such harm should readily exist in CLECs' business records. The fact that no CLEC presented such evidence of its economic harm is an indication that economic harm, if it exists, is not substantial.

CLECs provide no evidence to support their claims that the level of QPAP payments is insufficient to provide financial incentive to Qwest. CLECs resort to the argument that the level is whatever level it takes for Qwest to meet the performance standards.[22]

[22] Z-Tel takes the position that the sufficient level of QPAP payments is that which causes Qwest to *never miss* a performance standard, that is, to achieve *perfect* performance under the QPAP. This obviously flawed position is addressed below.

II. PAYMENT STRUCTURE AND AMOUNTS

OVERALL CAP

The 36% Annual Cap On QPAP Payments Is Consistent With the FCC's Requirements.

The QPAP exposes Qwest to substantial financial liability — as much as $306 million per year over the nine states.[23] This sum represents 36% of Qwest's net return from local exchange service in these nine states, a potential exposure that the FCC has already concluded will provide a "meaningful incentive" to comply with the designated performance standards."[24]

Financial risk does not have to be unlimited in order to be significant. In each of the six section 271 applications approved by the FCC to date, the BOC's PAP had a cap on the "total" liability.[25] In each case, the FCC found that placing 36% of the BOC's net return at risk constituted a meaningful incentive, despite being a cap on the level of

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23 *See* Exhibit K, Performance Assurance Plan, at Att. 3, Ex. S9-QWE-CTI-1 ("QPAP"). $306 million is the sum of the annual cap for Idaho, Iowa, Montana, Nebraska, New Mexico, North Dakota, South Dakota, Utah, Washington, and Wyoming.

24 *Bell Atlantic New York Order* ¶ 433; *SBC Texas Order* ¶ 424; *SBC Kansas/Oklahoma Order* ¶ 274.

25 *Bell Atlantic New York Order* ¶ 435 ("total of $269 million in potential bill credits placed at risk, on an annual basis, under all components of the performance plan[]"); *SBC Texas Order* ¶ 424 ("total of $289 million in potential penalties placed at risk, on an annual basis, under the performance plans"); *SBC Kansas/Oklahoma Order* ¶ 274 ("total of $45 million for Kansas and $44 million for Oklahoma in potential penalties placed at risk, on an annual basis, under the performance plans"); *Verizon Massachusetts Order* ¶ 241 ("total of $155 million in potential bill credits placed at risk, on an annual basis, under all components of the performance plan"); Memorandum Opinion and Order, *Application of Verizon New York Inc., Verizon Long Distance, Verizon Enterprise Solutions, Verizon Global Networks Inc., and Verizon Select Services Inc., for Authorization to Provide In-Region, InterLATA Services in Connecticut*, CC Docket No. 01-100, FCC 01-208 ¶ 76 (rel. July 20, 2001) ("*Verizon Connecticut Order*") ("Verizon's Connecticut PAP is essentially the same as the New York PAP . . . , except for penalty caps, which have been reduced proportionately to reflect the much smaller number of lines served by Verizon in Connecticut.").

payments. In no event has the FCC determined that unlimited risk of payments was necessary to provide a meaningful financial incentive to a BOC.[26]

The QPAP Provides Substantial Benefits To CLECs and There Is No Economic Justification To Make Those Benefits Unlimited.

The QPAP will provide a substantial benefit to CLECs. They will have an opportunity to receive self-executing payments when Qwest's service quality misses performance standards. These payments will be provided on a monthly basis, as automatic credits on CLECs' bill statements. CLECs will receive these credits without having to demonstrate or quantify any economic harm. The automatic nature of these payments and the lack of a requirement to prove any such harm provide substantial benefits to CLECs, and there is no economic justification for CLECs to receive unlimited payments under these circumstances.[27]

The Colorado Special Master's Recommendation Supports the 36% Annual Cap Rather Than a Procedural Cap or No Cap.

Contrary to AT&T's assertion, the Special Master evaluating the Colorado PAP likewise recommended a hard cap, not a procedural cap.[28] AT&T's suggestion that the Special Master "oppos[ed] any definitive cap"[29] mischaracterizes both the legal rationale and the actual recommendation in the Special Master's Report. In fact, the Special Master concluded that Qwest's liability should be limited:

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26 *See SBC Texas Order* ¶ 424.

27 *See* C. Inouye 8/14/01 Testimony, Tr. at 125-28 ("there is no justification for CLECs to have unlimited self-executing payments . . . without any demonstration of harm, but that is what the CLECs are asking for under this theory of a procedural cap").

28 *See* Ex. S9-WCM-CWE-3 at 16.

29 AT&T Comments at 14.

> Reflecting tort law's caution against excessive punitive damages awards, all PAPs to date have built in some mechanism to *limit the liability* of the regulated Bell Company. This PAP also envisions such a scheme, but along different lines than prior PAPs.[30]

In other words, the need to guard against excessive damages requires an actual "limit" on the BOC's liability — not merely a procedural mechanism, as proposed by CLECs, to evaluate whether further payments are warranted.

Accordingly, the Colorado Special Master *included* a cap in his Report. The Colorado PAP will have an annual cap of $100 million, which is similarly based on 36% of the 1999 Colorado ARMIS net return. AT&T's statement that Tier 1 payments in Colorado are not subject to the cap is factually incorrect: The Tier 1Y portion of Tier 1 payments is expressly subject to the $100 million annual cap. Furthermore, the Tier 1X portion of Tier 1 payments, while not directly subject to the $100 million annual cap, does count toward the cap insofar as it limits Tier 1Y and Tier 2 payments.[31]

Qwest Has Offered To Give Priority To Tier 1 Payments To CLECs.

Notwithstanding the sufficiency of the cap provisions taken from the Texas plan, Qwest has offered to adopt a priority of payments regime. Subject to a monthly cap equal to 1/12th of the annual cap, Qwest would pay Tier 1 payments first, up to, but not exceeding, the monthly cap. Qwest would pay Tier 2 payments next, up to, but not exceeding, the monthly cap. Any excess Tier 1 and/or Tier 2 payments would roll forward and be paid in a subsequent month to the extent that the subsequent month's cap

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30 Final Report and Recommendation, *In re Investigation into Alternative Approaches for a Qwest Corporation Performance Assurance Plan in Colorado*, No. 01I-041T, at 16 (Colo. PUC filed June 8, 2001), Ex. S9-WCM-CEW-3 ("Colorado Special Master's Final Report") (footnote omitted) (emphasis added).

31 *See* C. Inouye 8/14/01 Testimony, Tr. at 122-25; *see also* Colorado Special Master's Final Report § III.D.

was not exceeded. At the end of the year, any unpaid Tier 1 or Tier 2 payments would be paid (again, Tier 1 first) until the 36% cap is reached.[32]

No CLEC Has Provided Any Reasonable Support for Elimination of the 36% Annual Cap.

CLECs claim that a procedural cap is necessary to prevent Qwest from making an economic decision to continue to provide nonconforming service because it is financially advantageous. They assert that Qwest would be able to compare the level of QPAP payments to the level of operational cost that would have to be incurred to meet the performance standards and/or the net cost of discrimination to gain market share.[33]

Such reasoning is flawed on several levels. First, such a CLEC claim would be valid only if 36% of net revenues were less than the marginal cost of meeting performance standards or less than the value of market share gain. CLECs have provided no evidence to show that this is the case. Without such evidence, the CLEC claim is purely hypothetical and deserves no weight.[34] Second, such a calculation could not be a complete evaluation because of non-quantifiable costs such as regulatory risks that such noncompliance would pose to Qwest at both state and federal levels.[35] Finally, the CLEC

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32 *See* C. Inouye 8/14/01 Testimony, Tr. at 127-28.

33 *See* AT&T Comments at 14; WorldCom Comments at 33-34; *see also* M. Griffing 08/27/01 Testimony, Tr. at 118 ("[i]f you cap the total payments, you've set a cap on the marginal cost to Qwest").

34 Indeed, in the *Bell Atlantic New York Order*, the FCC specifically considered and rejected the argument made by MCI WorldCom that the PAP must entail liability "equal to or greater than the benefits that BA-NY would receive over time from providing such poor performance" and similar arguments by other parties. *Bell Atlantic New York Order* ¶ 435 n.1330. The FCC noted that: "[w]e do not find it necessary to determine the 'optimal' penalty amount for a stand-alone enforcement mechanism, [therefore] we will not specifically address the details of MCI WorldCom's study, the "flaws" identified by the New York Commission, or Bell Atlantic's counterarguments." *Id*.

35 *See* M. Griffing 8/27/01 Testimony, Tr. at 120:

> MR. ANTONUK: [I]sn't there an analog on Qwest's side which is if they are out of compliance for more than fairly brief and fairly temporary periods of time, they start to get into a whole series of long-range problems too, like losing credibility with the FCC,

claim ignores the cumulative effect of the cap over several years. The $306 million is not a one-time cap, but rather is an annual cap. Therefore, potential QPAP payments over five years would total $1.5 billion for the nine states. Costs related to achieving a high level of compliance, such as expansion of computer systems, capital costs for more trucks and equipment, and the cost of hiring and training more employees would likely be spread out over years and therefore would pale in comparison to $1.5 billion.

CLECs also claim that a procedural cap is necessary to prevent unsatisfactory service from going uncompensated after the annual cap has been reached.[36] As a threshold matter, this argument is inconsistent with CLECs' claims elsewhere that Tier 1 payments are not compensatory at all, but are instead purely incentive payments.[37] CLECs cannot argue at the same time that, on the one hand, Tier 1 payments should not be treated as liquidated damages because they *are not* compensatory, and, on the other hand, that Tier 1 payments should not be subject to a procedural cap because they *are* compensatory. Moreover, the quantitative evidence provided by Qwest demonstrates that CLECs will be more than fairly compensated for missed performance standards up to the point that the 36% annual cap is reached.[38]

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losing 271 authority altogether, . . . having states and the federal government initiate a whole host of parallel enforcement actions . . . .

THE WITNESS: Yes.

36 *See* AT&T Comments at 14; WorldCom Comments at 33-34; Z-Tel Comments at § II.

37 *See* G. Ford 8/28/01 Testimony, Tr. at 63, 106; Z-Tel Comments at § II.

38 *See supra* Part I.

RESPONSE TO CLEC PROPOSALS TO MODIFY PAYMENT STRUCTURE

CLECs Have Failed to Demonstrate That Their Payment Modifications Are Necessary.

Based upon their claims that the QPAP will not provide sufficient compensation or sufficient financial incentive to Qwest, CLECs have proposed several modifications to increase Tier 1 and Tier 2 payments. However, given the quantitative evidence provided by Qwest that demonstrates just the opposite — and the absence of any countervailing evidence from CLECs — the QPAP payment levels are appropriate and all CLEC modifications to the QPAP payment structure are unjustified.[39]

The specific CLEC proposals, which should be rejected based upon the Qwest quantitative evidence and the absence of any countervailing evidence, are addressed below.[40]

100% CAP ON OCCURRENCES

The AT&T and Z-Tel Proposals to Eliminate the 100% Cap on CLEC Misses for Interval Measurements Are Unwarranted and Would Compensate CLECs for Business Volumes That Do Not Exist.

AT&T and Z-Tel argue that the QPAP's 100% cap on CLEC misses for interval measurements is unreasonable.[41] However, both CLECs ignore that the 100% cap is

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39 Dr. Griffing disputed the relevance of the quantifications, arguing that the relevant economic analysis is a comparison of the marginal cost of complying with performance standards versus the marginal benefit of continued noncompliance. *See* M. Griffing 8/27/01 Testimony, Tr. at 115-18. Dr. Griffing professes, however, an inability to perform such analyses and argues that the next best solution is to choose administrative simplicity and let all payment levels rise to whatever level is necessary to ensure Qwest compliance. *See id.* at 117-18. Contrary to Dr. Griffing's testimony, the next best solution is not to choose administrative simplicity, but rather to choose the quantification of QPAP Tier 1 and Tier 2 payment levels using actual CLEC performance results, which provides compelling evidence that CLECs are more than adequately compensated and that Qwest will face strong financial incentives to meet the performance standards. *See* C. Inouye 8/14/01 Confidential Testimony, Tr. at 44-46. In addition, Mr. Inouye was prepared to refute Dr. Griffing's premise that marginal benefit and marginal costs could not be calculated by providing just such calculations. *See* C. Inouye 8/29/01 Testimony, Tr. at 39.

40 *See* Qwest's discussion in the following sections: "100% Cap on Occurrences"; "Response to Z-Tel Proposal Regarding Percentage Measurement Misses"; "Escalation of Tier 1 Payments"; "Three

intended to prevent CLECs from receiving payments for orders that they did not place. It is fundamental in a per occurrence payment structure that CLECs be compensated for no more than the number of units, *e.g.*, orders, FOCs, trouble reports, etc., that they actually had. Otherwise CLECs would be compensated when these essential units never existed and at levels that are inconsistent with the pre-determined per unit payment amount.[42] For example, if CLECs place 100 total orders and Qwest misses a two day performance standard by three days for the entire batch, Qwest will have been deemed to have missed the standard by 150%. Since the number of orders is then multiplied by the percentage of the miss (100 x 150%), Qwest will be liable for 150 missed orders, clearly an absurd result when CLECs only placed 100 orders. *Id.* Thus, the 100% cap merely prevents CLECs from recovering for orders that they did not place.

Despite having performance results in their possession, AT&T and Z-Tel provide no evidence that the elimination of the 100% cap is necessary in order for Tier 1 payments to be compensatory or to create sufficient incentive. By contrast, Qwest provided numerical evidence that the QPAP — with the 100% cap — is more than compensatory to CLECs. Considering OP-3 and OP-4 in tandem, because they both measure Qwest's provisioning performance and represent separate CLEC payment opportunities, the per unit Tier 1 payment results for OP-3 and OP-4 is more than compensatory.[43] Therefore, there is no justification for the elimination of the 100% cap.

Consecutive Month Trigger"; High, Medium, and Low Payment Categories"; "Split of Tier 2 Payments"; and "Z-Tel's Proposal to Permanently Freeze Escalated Tier 1 Per Occurrence Payments."

41 *See* AT&T Comments at 38-40; Z-Tel Comments § IV.

42 *See* Ex. S9-QWE CTI-5, confidential slides 17-18; C. Inouye 8/14/01 Testimony, Tr. at 85-89.

43 *See* Ex. S9-QWE-CTI-5, confidential slide 4.

AT&T claims that Qwest "departed from the Texas Performance Remedy Plan to obtain an unwarranted and inappropriate advantage" by including the 100% cap even though the Texas PAP approved by the FCC did not contain a similar provision.[44] AT&T's accusation overlooks the addition of the 100% cap to the Texas PAP during the first six-month review of the Texas PAP,[45] and the fact that an identical provision was included in the Oklahoma PAP approved by the FCC; the Kansas PAP — also approved by the FCC — contains an even lower cap, which limits the number of misses to 50% of CLEC volume.[46]

Z-Tel also makes the futile claim that the FCC has rejected this type of cap.[47] Z-Tel relies on an FCC staff letter discussing the performance plan stipulated in the SBC-Ameritech merger. This letter simply makes the obvious point that the SBC-Ameritech agreement does not include a provision for the 100% cap and, despite Z-Tel's attempts to the contrary, it cannot be read to imply that the FCC is opposed to such a provision.[48] Z-Tel has presented no evidence that the absence of such a cap was a considered judgment by the FCC in establishing the plan at issue there. Furthermore, the performance plan agreed to in the SBC-Ameritech merger is narrower in scope than the QPAP and does not

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44 *See* AT&T Comments at 40.

45 The inclusion of the 100% cap in the QPAP came at the urging of CLECs participating in the Arizona PAP collaborative and the Arizona Commission Staff. It was included along with a number of other Texas changes from the Texas six-month review.

46 *See* C. Inouye 8/29/01 Testimony, Tr. at 19-22; Ex. S10-QWE-CTI-8 at 6-9.

47 *See* Ex. S10-ZTL-GSF-4, slide 8.

48 Moreover, a letter from FCC staff is clearly not binding on the Commission itself. *See C.F. Communications Corp. v. Century Telephone of Wisconsin, Inc.*, Memorandum Opinion and Order on Remand, 15 FCC Rcd. 8759 ¶ 28 (2000).

have the payment escalation features of the QPAP.[49] Finally, the FCC's approval of the Oklahoma and Kansas PAPs directly contradicts Z-Tel's assertion.

RESPONSE TO Z-TEL PROPOSAL REGARDING PERCENTAGE MEASUREMENT MISSES

Z-Tel's Proposed Formula To Calculate the Number Of Misses For Percentage Measurements Will Result In Exorbitant Payment Levels To CLECs.

Z-Tel proposes a specific mathematical formula to make Tier 1 payments more dependent upon the degree of miss from performance standards. Z-Tel's suggested formula includes values equal to 10 for "A" and 20 for "B."[50] At the hearing, however, Z-Tel's witness, Dr. Ford, unequivocally disputed the notion that Z-Tel proposed a specific formula with values for "A" and "B."[51] Dr. Ford described his testimony as merely putting forth "conceptual ideas."[52] Because Dr. Ford has abandoned any defense of a specific recommendation, and did not provide any rational economic justification for his formula or for the choice of numerical values for "A" and "B," the Z-Tel proposal merits no consideration in this proceeding.

Qwest produced a quantitative analysis of the Z-Tel proposal using actual CLEC performance results for the nine states that proves that the Z-Tel proposal will produce

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49 *See* C. Inouye 8/29/01 Testimony, Tr. at 18-19; Ex. S10-QWE-CTI-8 at 1-5. More fundamentally, the SBC-Ameritech merger order was wholly unrelated to section 271. The SBC-Ameritech plan was adopted and implemented under entirely different statutory provisions governing merger approvals in order to address the unique anticompetitive risks associated with a BOC-to-BOC merger. *See Applications of Ameritech Corp., Transferor, and SBC Communications Inc., Transferee, For Consent to Transfer Control of Corporations Holding Commission Licenses and Lines Pursuant to Sections 214 and 310(d) of the Communications Act and Parts 5, 22, 24, 25, 63, 90, 95, and 101 of the Commission's Rules*, Memorandum Opinion and Order, 14 FCC Rcd 14712, ¶ 184 (1999). Those risks are entirely absent here.

50 *See* Z-Tel Comments § IV, and attached Qwest Plan as modified by Z-Tel Communications (July 27, 2001) § 8.2.2.2; G. Ford 8/28/01 Testimony, Tr. at 120, 125.

51 G. Ford 8/28/01 Testimony, Tr. at 119-26.

nothing but a windfall to CLECs. The first analysis involved CLEC "B" PO-5, FOCs on Time, performance results for a single month. During that month, **[CONFIDENTIAL DATA BEGINS:** XXX **CONFIDENTIAL DATA ENDS]** FOCs were not delivered in conformance with the performance standard. Under Z-Tel's proposal, the Tier 1 payment to CLEC "B" would have been **[CONFIDENTIAL DATA BEGINS:** XXXXXX **CONFIDENTIAL DATA ENDS]** or **[CONFIDENTIAL DATA BEGINS:** XXXX **CONFIDENTIAL DATA ENDS]** for each late FOC.[53]

When applied to OP-13a (Coordinated Cuts On Time) performance results for the nine states, Z-Tel's proposed formula would have caused a **[CONFIDENTIAL DATA BEGINS:** XXXXXXX **CONFIDENTIAL DATA ENDS]** payment for **[CONFIDENTIAL DATA BEGINS:** XXXX **CONFIDENTIAL DATA ENDS]** coordinated cuts that missed the performance standard. The payment per missed cut would be **[CONFIDENTIAL DATA BEGINS:** XXXXX **CONFIDENTIAL DATA ENDS]** for a service that costs CLECs at most $200.[54]

Z-Tel's proposed formula applied to OP-3 (Installation Commitments Met) and OP-4 (Installation Intervals) performance results for the nine states would have caused a payment of **[CONFIDENTIAL DATA BEGINS:** XXXXXX **CONFIDENTIAL DATA ENDS]** for **[CONFIDENTIAL DATA BEGINS:** X **CONFIDENTIAL DATA ENDS]** unbundled loop orders that were not in conformance with the performance standard. The payment per missed order would be **[CONFIDENTIAL DATA**

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52 *Id*. at 120.

53 *See* Ex. S9-QWE-CTI-5, confidential slide 19.

54 *See id*., confidential slide 20.

BEGINS: XXXXX **CONFIDENTIAL DATA ENDS]** for a service that costs the CLEC approximately $20 per month.[55]

Overall, applying the Z-Tel mathematical formula and the Z-Tel proposal to eliminate the 100% cap would have caused annual Tier 1 payments *alone* to exceed the nine-state 36% annual cap by **[CONFIDENTIAL DATA BEGINS:** XXX **CONFIDENTIAL DATA ENDS]** even though Qwest met 92% of all performance standards for the period February to May 2001.[56] The Qwest evidence proves without any doubt that the Z-Tel proposals are entirely unreasonable and are designed solely to produce windfalls to CLECs. Dr. Ford's attempt at the hearings to distance himself from the formula in his verified statement reflects his inability to refute the accuracy of Qwest's quantitative analysis. Dr. Ford's abandonment of his formula should end any consideration of the Z-Tel proposal.

ESCALATION OF TIER 1 PAYMENTS

The Proposal to Escalate Per Occurrence Payment Levels Beyond Six Months Will Over-Compensate CLECs.

Several CLECs and Dr. Griffing propose escalating the level of Tier 1 per occurrence payments for an indefinite period of time.[57] The CLECs and Dr. Griffing provide no evidence that such escalation is necessary in order for Tier 1 payments either to be compensatory or to provide sufficient incentive to Qwest to meet the QPAP's performance standards.

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55 *See id*., confidential slide 21.

56 *See id*., confidential slide 22.

57 *See, e.g*., AT&T Comments at 18-22; M. Griffing 8/27/01 Testimony, Tr. at 118.

On the other hand, Qwest provided evidence demonstrating that continuous escalation beyond the six-month $400, $600, and $800 per occurrence payment levels in the QPAP would substantially over-compensate CLECs and give them an incentive not to invest in the facilities-based competition that forms the ultimate goal of the 1996 Act.[58] Qwest demonstrated that the total financial incentive of the QPAP — the combination of Tier 1 and Tier 2 payments — is equivalent to giving away wholesale service for 7 to 15 years.[59] The majority of that payment will go directly to CLECs. Certainly, payments at these levels in relation to the number of years of revenues that would be generated to break even will be both compensatory to CLECs and sufficient financial incentive to Qwest. This unnecessary proposal by the CLECs and Dr. Griffing would have the effect of creating windfall profits for the CLECs and should be rejected.

Z-Tel's Proposal to Permanently Freeze Escalated Tier 1 Per Occurrence Payment is Entirely Unreasonable.

Qwest and CLECs participating in the ROC PEPP collaborative agreed to a reasonable escalation of payments and appropriate symmetrical de-escalation in subsequent months when Qwest provides conforming performance. This provision is more stringent than the Texas PAP provision, in which the escalated payments revert to the first-month level after just one month of conforming performance.[60] In contrast, Z-Tel proposes an escalation method in which Tier 1 payments *never* de-escalate or revert to the original level, notwithstanding even perfect service after the escalation. The Z-Tel

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58 *See* Ex. S9-QWE-CTI-5, slide 26; *see also* C. Inouye 8/14/01 Testimony, Tr. at 105-07. In addition, Tier 1 payment quantifications discussed earlier for OP-3, OP-4, OP-13a, for CLEC "A" and for CLEC "B," all demonstrated that the payments were more than compensatory without the effect of the CLECs' proposal.

59 *See id*. at 106.

60 *See* Tex. PAP § 8.2.

proposal to freeze Tier 1 payment levels at these permanently high levels is dependent upon Z-Tel's contention that payment levels should rise until Qwest achieves 100% compliance with all performance standards.[61]

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

> The Commission may find that statistically significant differences exist [between the BOC's provision of service to competing carriers and its own retail customers], but conclude that such differences have little or no competitive significance in the marketplace. In such cases, the Commission may conclude that the differences are not meaningful in terms of statutory compliance. Ultimately, the determination of whether a BOC's performance meets the statutory requirements necessarily is a contextual decision based on the totality of the circumstances and information before the Commission.[62]

Moreover, such a proposal provides unreasonable compensation to CLECs[63] and is unrealistic. If the penalty becomes oppressive, Qwest would be required to gold-plate its operations so as to have sufficient labor and capital resources available to handle every unforeseeable fluctuation in CLEC business. Normal business operations fluctuate from day to day, week to week, and month to month. Monday's volumes are generally higher

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61 *See* G. Ford 8/28/01 Testimony, Tr. at 61-62.

62 *Verizon Connecticut Order*, App. D-5 ¶ 8.

63 Dr. Ford testifies that if over-compensation is an issue, then the payment should simply be directed to Tier 2. *See* G. Ford 8/28/01 Testimony, Tr. at 87. Nevertheless, Dr. Ford makes no attempt to

than other days of the week. June and August have more inward and outward line movement than other months. Arizona has higher demand in the winter, while North Dakota has lower demand. Z-Tel's proposal would require Qwest to engage in absurd and economically inefficient conduct of investing and staffing to meet peak load demand, 100% of the time. Such gold-plating is clearly economically inefficient, although competitively advantageous for CLECs.[64]

Z-Tel's proposal also ignores the real world time lag in the reporting of performance results, the time involved in hiring and training employees, and the time required to engineer and place capital investment to meet demand. Performance results are not known until almost 30 days after the end of the month to which the data relate. If Qwest misses a performance measurement, it may not know that until the end of the next month. And if the reason for the miss is recurring, Qwest will likely miss again the following month. Thus, a two consecutive month miss is a strong possibility before Qwest ever has a reasonable opportunity to take steps to fix the problem. If the miss is the result of an unexpected jump in demand, Qwest may not be able to meet performance standards until it has hired and trained additional employees. The lead time for network technicians is 8 weeks, creating the likelihood of additional consecutive months of missed performance standards.[65]

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revise Z-Tel's proposal and under the Z-Tel proposal continuous escalation of Tier 1 payments would simply become windfalls to CLECs.

64 The economic theory of traditional rate of return regulation was that gold-plating was encouraged by the fact that rates were set based upon the rate base. Utilities were believed to have the incentive to over-invest in capital so as to inflate the rate base so as to inflate earnings. Z-Tel's QPAP modification would simply require the same gold-plating with the resulting operational cost effect becoming the burden of Qwest's regulated retail customers.

65 *See* C. Inouye 8/29/01 Testimony, Tr. at 30-32.

The presumption that consecutive monthly misses are a priori evidence that payment levels are insufficient completely ignores the reality of the business world. The Z-Tel proposal should be rejected.

THREE CONSECUTIVE MONTH TRIGGER

Proposals to Eliminate the Three Consecutive Month Miss Trigger for Tier 2 Payments and to Escalate Tier 2 Per Occurrence Payment Levels Are Without Merit.

Both the QPAP's three consecutive month miss trigger and the payment table for Tier 2 are reasonable. The role of Tier 2 payments is to act as an *additional* financial incentive, as opposed to being the *sole* financial incentive, and the quantifications demonstrated that Tier 2 payments adequately fulfill that purpose.[66] Both provisions of the QPAP are identical to provisions in the Texas, Oklahoma, and Kansas performance plans that have already received approval from the FCC and the relevant state commissions.

Given that Tier 2 payments provide additional incentives and operate at a different level (*i.e.*, CLEC aggregate level) than Tier 1, it is perfectly reasonable that Tier 2 not mirror Tier 1 in terms of the trigger for payments or the structure of the payment table. Tier 1 payments serve the dual function of compensation and incentive. Tier 2 payments, by contrast, are purely for the purpose of providing incentive. The nature of this additional payment is to motivate behavior and as such it is appropriate that the payments are triggered after a period of time in which Qwest has had an opportunity

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66 Dr. Griffing's cross-examination of Mr. Inouye illustrates the misunderstanding of some participants over the purpose of the three consecutive month miss trigger in the QPAP. The purpose is not to eliminate the possibility of Type I error, as Dr. Griffing attempted to establish through cross-examination.

to solve nonconforming service. As Qwest pointed out during the hearings, the time delay involved in reporting results makes it all but impossible for Qwest to react to nonconforming performance until the third month after the first month miss.[67] Thus, the three consecutive month trigger is entirely appropriate for Tier 2.

CLECs presented no countervailing evidence that demonstrates that Tier 2 payments should be triggered sooner or escalated to higher levels in order to provide Qwest with sufficient financial incentive to meet performance standards. Without such evidence, there is no reasonable justification to make the modifications suggested by CLECs and Dr. Griffing.

HIGH, MEDIUM, AND LOW PAYMENT CATEGORIES

Proposals to Eliminate Entirely or To Collapse High, Medium, and Low Classifications of Performance Measurements or To Re-Classify Certain Measurements Lack Justification.

WorldCom, XO, and Z-Tel provided no evidence to show that the High, Medium, and Low classifications are inappropriate, that these classifications prevent the QPAP from providing Tier 1 payments that are compensatory, or that the classifications prevent the combination of Tier 1 and Tier 2 payments from providing sufficient financial incentive to Qwest. Without such evidence, the WorldCom, XO, and Z-Tel proposals should be rejected.

The WorldCom proposal to eliminate the High, Medium, and Low classifications is noteworthy for the absence of a clearly delineated alternative. WorldCom appears to want all performance measurements to be classified High, but provides no justification.

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67 *See infra* discussion "Z-Tel's Proposal to Permanently Freeze Escalated Tier 1 Per Occurrence Payment."

Absent reasoned justification that a High designation for all performance measurements is necessary to provide sufficient compensation to CLECs and to provide financial incentive to Qwest, the WorldCom proposal should be rejected.

The Z-Tel proposal to eliminate the Tier 1 Medium and Tier 2 Low classifications and to raise the remaining per occurrence payment levels is nothing more than a backdoor attempt to raise CLEC revenues and Qwest's overall payment liability. Z-Tel's justification, the current absence of performance measurements carrying those classification, does not in any way justify raising of the Tier 1 and Tier 2 payment levels.

XO's proposal to raise the designation of PO measurements to High and Billing measurements to Medium is equally ill-supported. XO's justification is its representation that PO measures are "vital" to XO's business and that a Low designation for billing measures is inadequate to ensure performance. As New Mexico Staff has noted, a CLEC proposing to shift a measurement category "should provide convincing evidence that such a plan will enhance the QPAP."[68] Neither XO nor any other CLEC presented *any* real evidence in this proceeding demonstrating the actual harm they might suffer from a missed PO or BI performance measurement. Without such evidence, CLECs cannot claim that payments should be increased by shifting the measurement categories upward.

Furthermore, XO ignores that Qwest is at risk to make up to five Tier 1 payments for each LSR XO submits. Depending upon the number of consecutive months of

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68 *Testimony of Dr. Marlon Griffing On Behalf of New Mexico Public Regulation Advocacy Staff Regarding the QPAP* at 14 (July 27, 2001) ("Dr. Griffing Written Testimony").

misses, the incentive to Qwest to avoid missing PO standards is $125 to $2,000 per CLEC LSR.[69]

SPLIT OF TIER 2 PAYMENTS

The Covad Proposal To Pay 50% of Tier 2 Payments To CLECs Results From Covad's Misunderstanding of the QPAP.

Covad proposes that 50% of Tier 2 payments go to CLECs and relies entirely upon the Colorado Special Master's Final Report and Recommendation for its support. The Covad quote is drawn from that portion of the Special Master's report that relates to *Tier 1.Y* payments, not Tier 2 as claimed by Covad.[70] The QPAP equivalent of Colorado Tier 1.Y payments is the escalation portion of Tier 1 payments, which already go 100% to CLECs.[71]

LOW VOLUME, DEVELOPING MARKETS

Section 10.0 of the QPAP ensures that certain services in "developing markets" receive extra compensation by application of a $5,000 minimum payment if Qwest misses a performance standard when aggregate CLEC volumes are greater than 10, but less than 100. Covad and Z-Tel propose that the provision apply when individual CLEC volumes, as opposed to the aggregate CLEC volume, are less than 100.[72] Covad's and Z-Tel's proposal defies the distribution of CLEC volumes that was discussed extensively in

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69 *See* Ex. S9-QWE-CTI-5, confidential slide 6. The five payment opportunities are PO-3, PO-5, the family of PO-6 and PO-7, PO-8, and PO-9.

70 *See* Covad Comments at 17. The statement Covad attributes to the Colorado Special Master at the bottom of page 17 of its comments is actually drawn from Section III.B, "Incentive-Based (Tier 1.Y) Payments," of the Special Master's report.

71 *See* C. Inouye 8/14/01 Testimony, Tr. at 113.

72 *See* Covad Comments at 23-24; Z-Tel Comments § IX.

the ROC PEPP collaborative and would cause the low volume, developing market provisions to apply long after markets are neither low volume nor developing, and, therefore, is not appropriate. For example, the actual CLEC data (from February to May 2001) demonstrate that 96% of the time OP and MR performance measurements have a CLEC volume of less than 100.[73] Their proposal is thus inconsistent with the concept of low volume, developing markets and is simply another attempt to extract additional money from Qwest. Z-Tel's proposal is unprincipled and would result in what could be seen as discriminatory conduct, compensating some CLECs under one QPAP provision and other CLECs according to another QPAP provision merely because their monthly volumes are different.[74]

SMALL CLEC COMPENSATION

The Evidence Refutes Covad's Claim That It and Other Small CLECs Are Disadvantaged By the QPAP.

Covad claims that the QPAP treats small CLECs, such as Covad, unfairly and will under-compensate them for economic harm.[75] Covad cites the "per occurrence" payment structure of the QPAP and claims that low payouts are a necessary outcome when CLECs have small order volumes.[76]

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73 *See* C. Inouye 8/14/01 Testimony, Tr. at 119-20 ("[B]etween 60 and 70 percent of the time, CLEC volume is less than 100, less than ten. In fact, I went through and looked for the results that we have been using for the price-outs, the February through — February through May time frame, the nascent service provision centers on OP and MR measures exclusively, in other words, that's what it applies to, so I only looked at the OP and MR measures. And I counted the number and I disregarded services or did not limit it to any service, included all services, OP and MR measures; 96 percent of the time the volumes are less than 100.").

74 It is conceivable that in the next month the treatment of CLECs could be reversed simply because their order volumes have changed.

75 *See* Covad Comments at 14.

76 *See id.*

Covad presented no quantitative evidence to substantiate this claim — even though Qwest provided Covad with both its performance results and an estimate of QPAP payments. This omission speaks volumes. In fact, the evidence presented by Qwest disproves Covad's claim. For the February to May 2001 time period, Covad would have received the *fourth highest payout* among the 171 CLECs for which performance results were gathered.[77] Z-Tel, another small CLEC, would have received the sixth highest payout.[78] XO, Eschelon, and New Edge would have received the seventh, eighth, and tenth highest payouts.[79] AT&T and WorldCom, on the other hand, would have received the eleventh and twentieth highest payouts.[80]

In addition, individual performance results for two small CLECs (CLEC "A" and CLEC "B") also demonstrate that the level of compensation is more than fair. For the four month period February to May 2001, CLEC "A" would have received **[CONFIDENTIAL DATA BEGINS:** XXXXXX **CONFIDENTIAL DATA ENDS]** for **[CONFIDENTIAL DATA BEGINS:** X **CONFIDENTIAL DATA ENDS]** unbundled loop installations and **[CONFIDENTIAL DATA BEGINS:** XXX **CONFIDENTIAL DATA ENDS]** coordinated cuts that failed to meet performance standards. That QPAP payment far exceeds CLEC "A's" expenses, which are **[CONFIDENTIAL DATA BEGINS:** XXXXX **CONFIDENTIAL DATA ENDS]** per year for the **[CONFIDENTIAL DATA BEGINS:** X **CONFIDENTIAL DATA ENDS]** unbundled loops and a **[CONFIDENTIAL DATA BEGINS:** XXXXX **CONFIDENTIAL DATA**

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77 *See* C. Inouye 8/14/01 Testimony, Tr. at 60-63; Ex. S9-QWE-CTI-2, confidential slides CTI-5, CTI-6, and CTI-7.

78 *See id.*

79 *See id.*

ENDS] one-time expense for the **[CONFIDENTIAL DATA BEGINS:** XXX **CONFIDENTIAL DATA ENDS]** coordinated cuts.[81]

In another example pricing out compensation to a small CLEC, this one involving provisioning of UNE-P to small CLEC "B," the QPAP would have provided a payment of **[CONFIDENTIAL DATA BEGINS:** XXXXXX, **CONFIDENTIAL DATA ENDS]** even though Qwest missed the installation date promised to the CLEC's retail customers only three times.[82] The payment stems almost entirely from the fact that the average installation interval was **[CONFIDENTIAL DATA BEGINS:** XXX **CONFIDENTIAL DATA ENDS]** days longer than the retail parity. The fact that the CLEC's retail customers had their expectations of an installation date met in all but three instances indicates the absence of any significant economic harm to CLEC "B." There is every reason to believe that CLEC "B's" retail customers, except for **[CONFIDENTIAL DATA BEGINS:** XX **CONFIDENTIAL DATA ENDS]**, were satisfied with the timeliness of the installation because it occurred on the date promised. Moreover, it is unlikely, except for the **[CONFIDENTIAL DATA BEGINS:** XX **CONFIDENTIAL DATA ENDS]** customers, that CLEC "B's" retail customers would know that they waited on average **[CONFIDENTIAL DATA BEGINS:** XXX **CONFIDENTIAL DATA ENDS]** days longer than Qwest's retail customers. Thus, it is unlikely that this small delay would have caused any harm to CLEC "B."

Even assuming that a difference of **[CONFIDENTIAL DATA BEGINS:** XXX **CONFIDENTIAL DATA ENDS]** days was harmful to CLEC "B," the QPAP payment

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80 *See id.*

81 *See* Ex. S9-QWE-CTI-2, confidential slide CTI-7.

82 *See id*., confidential slide CTI-7.

for each late day is **[CONFIDENTIAL DATA BEGINS:** XXX **CONFIDENTIAL DATA ENDS]**. The rate the CLEC pays Qwest for UNE-P is approximately $30 per month, or about $1 per day. Thus, the QPAP payment is more than sufficient to compensate any harm that could have occurred.

Finally, the overall quantifications provided by Qwest reflect the "per occurrence" payment structure of the QPAP, the same structure Covad claims is unfair and will under-compensate small CLECs. Covad's claim has no credibility in the face of this QPAP price-out.

MINIMUM PAYMENTS

A Minimum Payment Is Not Necessary To Achieve Adequate Compensation For Small CLECs.

Covad and WorldCom argue that a minimum payment should be imposed.[83] Their proposals are completely unnecessary. There is no evidence that under-compensation exists in situations of low volume. Moreover, the minimum amounts they suggest are unreasonable.

Covad's justification for a minimum payment is based on its misconception of the QPAP provisions.[84] Covad claims that the QPAP gives Qwest "one free miss." The claim apparently refers to the mathematical adjustment in the QPAP that adjusts benchmark standards so as to prevent the standard from becoming 100% when CLEC volumes are five or less.[85] For example, when there is a 90% standard but volumes of

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83 *See* Covad Comments at 19; WorldCom Comments at 34-35.

84 *See* C. Inouye 8/14/01 Testimony, Tr. at 99-101; Ex. S9-QWE-CTI-5, confidential slide 23.

85 For parity measures, which are the bulk of the measures in the QPAP, there is no such thing as a "free miss." By agreement in the ROC PEPP proposal, permutation testing for parity measures is done all the way down to sample sizes of one. *See* C. Inouye 8/14/01 Testimony, Tr. at 99.

only five or less, a 90% performance level cannot be mathematically achieved. (At a monthly volume of five, only the performance levels of 100%, 80%, 60%, etc. are mathematically possible.) Under Covad's view, by not allowing one miss, the standard would effectively become 100%, *i.e.*, absolutely perfect performance.

Data from February to May 2001 showed that the "one miss" benchmark standard applied to less than 8% of all Tier 1 measurements.[86] A situation that may or may not happen 8% of the time is no justification to apply a minimum payment 100% of the time. Or put another way, Covad has offered no rationale whatsoever for applying minimum payments in 92% of the cases — quite apart from the well accepted statistical adjustment employed in the remaining 8% of the cases where it is applicable.[87]

WorldCom's proposal strays far from its small CLEC justification and is simply disingenuous.[88] WorldCom attempts to justify a minimum payment with speculation as to what might happen to a small CLEC with low volumes. However, its proposal is for a minimum payment that would apply to all CLECs, large and small, and for all ranges of CLEC volumes, low and high. Furthermore, WorldCom proposes that the minimum payment be subject to escalation for consecutive monthly misses and for severity of the miss.[89] Attempting to add escalation and severity to the minimum payments is shameless bootstrapping. As discussed above,[90] the quantification of QPAP payouts based upon actual performance results shows that small CLECs are treated more than fairly by the

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86 *See id*. at 101.

87 *See id*. at 100.

88 WorldCom proposes that the QPAP incorporate a minimum payment of at least $2500 per occurrence with no restrictions on sample size or products. *See* WorldCom Comments at 34-35.

89 *See* Ex. S9-QWE-CTI-5, confidential slide 24; C. Inouye 8/14/01 Testimony, Tr. at 101-03.

90 *See supra* discussion accompanying notes 53-56.

QPAP. Moreover, a $2,500 per occurrence payment for the late installation of a service that sells for $20 per month would provide CLECs with a payment equal to over *10* years of service for one miss. This would be equivalent to requiring a car dealer to give a customer the use of a leased vehicle for 10 years if the dealer was a day late in delivering the car. Accordingly, WorldCom's minimum payment proposal is wholly unwarranted.[91]

Z-Tel claims a minimum payment is needed in order to assure adequate CLEC compensation. Z-Tel provided no supporting evidence. As discussed above, quantification of QPAP payments to small CLECs demonstrated exactly the opposite. The Z-Tel proposal therefore is inappropriate.

HIGH VALUE SERVICES

AT&T's Suggestion That Per Occurrence Payments Should Be Proportional To the Value of the Services Affected Cannot Be Selectively Applied.

AT&T argues that "high value services," which it defines as collocation, LIS trunks, and unbundled dedicated interoffice transport, unbundled loops and resold services used at the DS-1 and DS-3 rates, should be subject to a different payment structure.[92] Because "high value services" are more expensive than other wholesale services, AT&T suggests that missing a performance standard for high valued services would harm a CLEC more than missing a performance standard for less expensive services.[93] Qwest has always indicated a willingness to consider applying higher payments to higher valued services, but AT&T's proposed level of payments for high valued services creates highly disproportionate QPAP payments relative to the value of

91 *See supra* discussion of "Small CLEC Compensation."

92 *See* AT&T Comments at 25.

the services, high valued and low valued.[94] Qwest presented a more reasonable alignment of PAP payments relative to the monthly rate of high and low valued services. Qwest will accept the principle proposed by AT&T, but only if it is applied on a more limited scale and if it is applied equally to low valued services.[95]

AT&T's Proposal To Modify the Collocation Payments Is Not Supported By the Available Data or Other CLECs.

AT&T also argues that collocation payments should be raised significantly and made on a per late day basis.[96] In support of this position, AT&T suggests that new caged, physical collocation jobs can cost as much as $250,000 and that the current payment structure does not give Qwest enough incentive to meet its commitment to collocation.[97] AT&T's proposal is inconsistent with the views of other CLECs. At the May ROC PEPP workshop, the CLECs proposed to modify the collocation payment structure by utilizing individual collocation results and applying a specific per day payment schedule which they described with specificity to the collaborative.[98] On June 6, 2001, Qwest e-mailed its acceptance of the CLECs' suggestion and extended the concept to feasibility studies. McLeodUSA and Eschelon responded that they would stand by the CLEC proposal shown on slide CTI-10.[99] The Colorado Special Master also

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93 *See id*.

94 *See* C. Inouye 8/14/01 Testimony, Tr. at 69-75; Ex. S9-QWE-CTI-5, slide 11. However, to the extent that AT&T proposes to include 4-wire unbundled loops in the category of high value services, that aspect of the proposal is not acceptable to Qwest.

95 *See* C. Inouye 8/14/01 Testimony, Tr. at 75-77; Ex. S9-QWE-CTI-5, slides 12-13.

96 *See* AT&T Comments at 26.

97 *See id*.

98 *See* C. Inouye 8/14/01 Testimony, Tr. at 78-79.

99 *See* Ex. S9-QWE-CTI-2, slide CTI-10.

adopted the same collocation payment structure, and no CLEC in the Colorado proceeding either complained about or opposed that proposal. The fact that other CLECs and the Colorado Special Master found Qwest's collocation proposal to be acceptable demonstrates that it is reasonable. AT&T has failed to provide any evidence that such views are unreasonable.

In fact, Qwest demonstrated with actual CLEC collocation results that the ROC PEPP collocation payments structure is better suited to the value of collocation jobs CLECs are ordering. For the states in this proceeding, the majority of the *actual* collocation jobs are augments, which cost far less than AT&T's estimate of $250,000.[100] In fact, from October 2000 to March 2001, 157 jobs out of 289 for the nine states were augments, and typical augments cost CLECs only $1,500 to $15,000.[101] New-Physical collocation jobs comprise approximately 25 percent of the total number of jobs, and typically range from $60,000 to $100,000.[102] Because the actual costs of collocation jobs are much lower than AT&T suggests, there is no need to raise the collocation payments above the current levels in order to provide Qwest with sufficient incentive to meet its service benchmarks.[103]

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100 *See* Ex. S9-QWE-CTI-2, slide CTI-11.

101 *See* C. Inouye 8/14/01 Testimony, Tr. at 82.

102 *See id*.

103 In response to AT&T surrebuttal testimony, Mr. Inouye presented additional collocation results that showed that collocation payments for a 40-day delay would exceed the value of a collocation job for 54 out of the 89 jobs either completed or in progress since January 1, 2001. When the QPAP payment exceeds the value of the collocation job, the CLEC effectively receives not only the cost of constructing the collocation for free, but actually makes money, a result that is unjustified and would only be further exaggerated by the AT&T proposal. *See* C. Inouye 8/29/01 Testimony, Tr. at 15-17.

III. OTHER FEATURES

PAYMENTS FOR LATE REPORTS

The QPAP's $500 per day payment for late reports (section 14.3) provides significant incentive for Qwest to issue reports on time. Under the QPAP payment level, for example, a ten-day delay (beyond the grace period) in issuing the monthly reports equates to $70,000 across the 14 states.[104]

In contrast, CLECs' various proposals for greater payments would yield payments that are entirely unreasonable. AT&T and Z-Tel propose applying the QPAP's $500 per day payment *to each report*.[105] Given the substantial number of CLEC and state performance reports required and the fact that if Qwest is late on one, it is likely to be late on all of them, the AT&T and Z-Tel proposal would result in a $4.2 million payment for a ten-day delay for a single month's set of reports. This level would obviously be absurd.

WorldCom's proposal is equally unreasonable. WorldCom proposes a payment of $5,000 per day for late reports and $1,000 per day for incomplete reports.[106] It also proposes a $1,000 payment per day for reports that are later revised by Qwest or reports for which a CLEC "cannot access its detailed data underlying Qwest's performance reports due to failures under the control of Qwest."[107] While WorldCom's proposal purports to be based on the Texas PAP, this last provision was *not* included in the Texas PAP. Although the first two proposed payment levels are consistent with the Texas PAP, Qwest demonstrated that the Texas payment level is unreasonably high. Under the

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104 *See* C. Inouye 8/14/01 Testimony, Tr. at 146; Ex. S9-QWE-CTI-5, slide 35.

105 *See* AT&T Comments at 40-41; Z-Tel Comments § XII.

106 *See* WorldCom Comments at 53.

$5,000 per day payment formula, for example, a mere ten-day delay would yield a late fee of *$700,000 for a single month's reports* across the 14 states.[108]

Moreover, the AT&T, WorldCom, and Z-Tel proposals for such high payments for late reports cannot be justified by any alleged harm caused to CLECs. A late report does not delay payment to a CLEC, because payments are due 30 days from the date the report is *due*,[109] with interest payable on any late payments. Moreover, CLECs still have an opportunity to request both the underlying raw data (section 14.1) and a CLEC-audit (section 15.2); CLECs may request a CLEC-audit within 12 months following the month in which the report is issued.[110]

INTEREST ON LATE PAYMENTS

The QPAP does not specify that Qwest must pay interest on any PAP payment that is paid late. However, Qwest is willing to pay interest on such late payments, at the one-year Treasury rate, provided that the same rate applies to both overpayments and underpayments.[111]

PAYMENT METHOD

The QPAP requires Qwest, consistent with past practice and industry customs, to issue payments through a bill credit rather than by check.[112] Covad and WorldCom claim that administrative ease favors payment by check — a position that simply ignores the

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107 *Id.* at 53-54.

108 *See* C. Inouye 8/14/01 Testimony, Tr. at 148; Ex. S9-QWE-CTI-5, slide 35.

109 *See* QPAP § 11.1.

110 *See id*. § 15.2.

111 *See* C. Inouye 8/14/01 Testimony, Tr. at 151.

fact that businesses enter payments into a financial accounting system that utilizes accounting debits and credits, not cash. In the ROC, certain CLECs expressed concern about being able to determine what payments were for and for which measurements. In response to these concerns, Qwest prepared a sample bill format, which was sent to the 271 super list on June 29, 2001, so that CLECs could review the level of detail in the sample bill.[113] Despite promises by CLECs in the ROC PEPP collaborative to consider the sample bill format and determine whether it would ease CLEC concerns, no CLEC provided comments on the sample bill format. CLECs' silence regarding the sample format indicates the weight that should be given to the CLECs' claim of administrative ease.

FCC INITIATED CHANGES

Qwest has proposed three changes to the QPAP that Qwest voluntarily makes based upon informal input from the FCC.[114] At the hearings, no CLEC or state commission staff expressed opposition to the changes. The changes should be adopted as follows:

(1) The two families of OP-3 sub-measurements, OP-3a and OP-3b, OP-3d and OP3e, will be eliminated so that no missed CLEC order under any of these measurements would go uncompensated.[115]

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112 *See id*. at 152-54 ("[N]o company . . . runs their business by a cash box.").

113 *See id*. at 153-54.

114 *See id.* at 159-62.

115 Such a change can be accomplished by simply striking footnote "c" to the QPAP Attachment 1 and re-labeling the remaining footnotes.

(2) Two adjustments would be made to the calculation of the 36% net revenue cap provided in QPAP Attachment 1: remove the column "Adjustment for Commission Rate Orders" and recalculate the column "Annual Cap."[116] Consequently, the New Mexico 36% cap will be $38 million, instead of $28 million.

(3) For Tier 2 payments where the three consecutive month miss applies, a critical value of 1.645 will be used for statistical testing of Tier 2 parity measurements instead of Table 1 critical values. For OP-2 and MR-2 performance measures (for which the three consecutive month miss requirement does not apply) the Table 1 critical values will be used for statistical testing of corresponding Tier 2 parity measurements.[117]

IV. STATISTICAL METHODOLOGY

WORLDCOM AND Z-TEL PROPOSED MODIFICATION OF THE ROC PEPP STATISTICAL AGREEMENT

The statistical agreement was reached after extensive discussions among participants of the ROC PEPP collaborative.[118] WorldCom and Z-Tel participated in those discussions. They failed to persuade the ROC participants to expand the agreement at that time, and they have presented no new evidence in support of their position.

Importantly, the ROC statistical agreement was reached based on a thorough consideration by CLECs, Qwest, and state commission staffs of not only statistical theories, but also the distribution of CLEC volumes. The fact that 62% of the time the performance measurements subject to statistical testing will have a CLEC volume of less

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116 The "**" footnote in Attachment 1 of the QPAP will also be eliminated.

117 In the event that the QPAP is modified to exclude the three month miss requirement, Table 1 critical values would apply to all Tier 2 parity measurements.

118 *See* Qwest Comments at 13-14.

than 10 was a significant factor in forging the ROC statistical agreement.[119] This predominant volume of less than 10 is the reason why the 1.04 critical value is applied only to LIS trunks, DS-1 and DS-3 UDITs, DS-1 and DS-3 resale, and DS-1 and DS-3 unbundled loop when volumes are less than 10.

The ROC statistical agreement is fair to Qwest and the CLECs because it is balanced. On the one hand, the K-Table was eliminated from the QPAP and the 1.04 critical value will be applied to 1,519 parity tests. On the other hand, critical values higher than 1.645 will be applied to 1,917 parity tests.[120] Acceptance of the WorldCom and Z-Tel proposal would create a dramatic imbalance given the distribution of CLEC volumes: The 1.04 critical value would apply in 10,368 parity tests. Critical values higher than 1.645 would continue to apply in 1,917 parity tests.[121] Z-Tel wishes to frame the issue as being strictly an issue of statistical theory. That is far from the case. As noted above, the statistical agreement was not born solely from statistical theory, but rather included consideration of the distribution of CLEC volumes.[122] But even putting the broader consideration aside, it is worth noting that in the Verizon-New York 271 application, the FCC considered arguments to balance Type I and Type II errors at an 85% confidence level and concluded that there was not sufficient evidence "to determine

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119 *See* Ex. S9-QWE-CTI-9.

120 *See* Ex. S9-QWE-CTI-5, confidential slide 30.

121 *See id*.

122 Z-Tel's futile attempt to narrow consideration of the ROC statistical agreement to statistical theory is evident on slide 16 of Dr. Ford's rebuttal. *See* Ex. S10-ZTL-GSF-4, slide 16. Z-Tel claims the distribution of data is "immaterial to a sensible application of statistics." *Id*.

that setting the confidence level at 85 percent will in fact balance the probability of Type I and Type II errors."[123]

WHETHER 1.04 CRITICAL VALUE APPLIES TO 4-WIRE UNBUNDLED LOOPS

AT&T proposes that the QPAP be "clarified" by the deletion of the phrase "DS-1 and DS-3 that are" from in front of "UDITs, Resale, or Unbundled Loops" and the addition of the phrase "used at DS-1 and DS-3 rates." This is a subtle way of disregarding the statistical agreement reached at the ROC so as to treat 4-wire unbundled loops as a part of the agreement. But 4-wire loops are *not* the same as DS-1 loops (though they may sometimes be used at the DS-1 bit rate if the CLEC adds electronics).[124] Four-wire unbundled loops were not a part of the ROC agreement, and no contortion of words or facts should alter it.[125] The ROC PEPP memorialized the agreement with specificity and 4-wire nonloaded unbundled loops were not included.

AT&T proffers a feeble justification for expanding the agreement. AT&T's rationale is based entirely on its notation that the ROC OSS collaborative chose DS-1 private line as the retail comparative for 4-wire loops.[126] There is no retail analog for a 4-wire loop. DS-1 stands as a proxy for a retail analog and is the retail comparable to the 4-wire unbundled loop, because it represents an acceptable provisioning interval, without any regard to the value of the service to the CLEC.

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123 *Bell-Atlantic New York Order* ¶ 17 (footnotes omitted).

124 *See* C. Inouye 8/15/01 Testimony, Tr. at 32.

125 Notably, AT&T at no time claims that Qwest even agreed in the ROC PEPP collaborative to include 4-wire unbundled loop in the category to which a 1.04 critical value applies.

126 *See* J. Finnegan 8/17/01 Testimony, Tr. at 197.

In that regard, it is significant that AT&T at no time claims that Qwest agreed in the ROC PEPP collaborative to include 4-wire unbundled loop in the category to which a 1.04 critical value applies. The reason is because AT&T knows it cannot sustain such a claim because AT&T pressed in the May ROC workshop for "explicit identification of PIDs & services subject to 1.04 C.V."[127] Mr. Finnegan admitted to being the author of the page from Exhibit CTI-3 that this list appears on.[128] The fact of the matter is that AT&T never believed the 1.04 critical value applied to 4-wire unbundled loops during the ROC PEPP workshop. For AT&T now to suggest the statistical agreement needs "clarification" is disingenuous.

Finally, AT&T's argument is untenable, because not all 4-wire loops are used at the DS-1 rate, and it is the CLEC that determines how the 4-wire loop can be, or is, used, by adding electronics to the loop.[129] Qwest cannot control or even know when a CLEC chooses to turn a 4-wire loop into a high capacity service. Thus, it would be impossible for Qwest to even implement AT&T's proposal.[130]

OTHER AT&T PROPOSALS

AT&T claims the QPAP leaves out necessary information because the "alpha" is not specified. Qwest disagrees. Alpha is a statistical term understood to be the Type 1 error rate and equal to the number one minus the confidence level at which statistical testing is performed. The value of alpha was never specified in the QPAP when

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127 *See* C. Inouye 8/15/01 Testimony, Tr. at 32-33; Ex. S9-QWE-CTI-5, slide CTI-3.

128 *See* J. Finnegan 8/27/01 Testimony, Tr. at 44.

129 *See* M. Williams 8/17/01 Testimony, Tr. at 113 (noting that when Qwest provides a loop, "[w]e [sic] [they] would just be writing [sic] [riding] those two wires and we wouldn't know how the CLEC was using them.").

statistical testing was to be performed at the 95% confidence level. With the introduction of critical values in Table 1 of the QPAP, alpha varies just as the confidence level associated with the 1.04 critical value (85% confidence level) and the 1.645 (95% confidence level) varies.[131]

AT&T claims that sections 7.2 and 7.3 of the QPAP should be modified to include reference to permutation testing when CLEC volumes are 30 or less. AT&T's proposal should not be accepted because it creates an imbalanced situation in which permutation testing is referenced in regards to Tier 2 parity measurements, but not Tier 1 parity measurements. Such an imbalance would create the mistaken impression that permutation testing does not apply to Tier 1 parity measurements.[132] The QPAP is appropriate as written, with the statistical methods described separately in section 4.0 of the QPAP so that their application is not confined to either Tier 1 or Tier 2.

AT&T also proposes clarification that permutation applies when *CLEC* volume is 30 or less, as opposed to when *Qwest* volume is 30 or less. Qwest believes it is commonly understood that permutation testing is applied to low CLEC volumes, not Qwest volumes. Accordingly, AT&T's proposal is inappropriate.

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130 *See* C. Inouye 8/29/01 Testimony, Tr. at 14-15.

131 *See* C. Inouye 8/14/01 Testimony, Tr. at 132. Values of alpha at other critical values in Table 1 are irrelevant because permutation testing is limited to CLEC volumes of 30 or less.

132 *See id*. at 132-33.

V. PERFORMANCE MEASUREMENTS

PO-1

The QPAP's treatment of PO-1, Pre-Order Response Times for GUI and EDI reflects the agreement reached by the ROC PEPP collaborative, and AT&T's proposal to change this measurement to inflate the number of payment opportunities is inappropriate.

PO-1 measures response times for seven different transaction types typically performed by CLECs, and it is divided into two sub-measurements: PO-1A, which measures transactions submitted through IMA-GUI, and PO-1B, which measures transactions submitted through EDI. Both PO-1A and PO-1B are interval measurements, with the intervals measured in seconds.

During the ROC PEPP workshops, Qwest proposed that, for payment purposes, the transactions would be aggregated into one weighted averaged response time for all IMA-GUI transactions (PO-1A) and one weighted averaged response time for EDI transactions (PO-1B.)[133] Qwest further proposed a payment structure that escalated payment based upon the duration of the response times, reflected in ranges of seconds.[134] Thus, under this proposal, the seven transaction types for GUI would be averaged and carry one payment opportunity. The evidence demonstrates that the participants in the collaborative, including AT&T, agreed to this proposal.[135] And that agreement reflects a reasonable treatment of these measurements.

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133 *See id*. at 114-15.

134 *See id.* at 115-16.

135 *See* Ex. S9-QWE-CTI-3 at 3 (collaborative notes labeled "Qwest remedies" and listing under item 6, "collapse PO-1 to EDI & GUI"); C. Inouye, 8/14/01 Testimony, Tr. at 116 ("No CLEC contested the collapse [of] the PO-1 to EDI and GUI or, I should say, no CLEC claims that there was a misunderstanding in that agreement.").

AT&T's proposal to modify this measurement would balloon the payment opportunities under this measurement from two (one for PO-1A and one for PO-1B) to *seven* (one for each of the seven transactions types).[136] AT&T's claim that it had this very different intent when the measurement was discussed at the ROC workshop[137] lacks credibility and is belied by its own actions and the inconsistencies inherent in its proposed treatment of PO-1. AT&T admits that the parties agreed to aggregation.[138] However, under a newly identified interpretation of "aggregation," PO-1 would have to be identified with submeasurements PO-1-1, PO-1-2, PO-1-3, PO-1-4, PO-1-5, PO-1-6, and PO-1-7.[139]

Incredibly, AT&T also claims that PO-1C should be included in the QPAP and that its absence from the collaborative agreement was an "oversight."[140] AT&T makes this claim despite its admission that the QPAP correctly depicts the payment structure agreed to by the parties.[141] Moreover, PO-1C is a percentage measurement ("percentage of time") as opposed to an interval measurement ("units of seconds") and, therefore, could not be included in that penalty structure, because the penalty structure is based on *intervals*.[142] In fact, PO-1C, is very different from the seven transaction types that the

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136 *See* JFF Demonstrative Ex., slide 15; J. Finnegan 8/17/01 Testimony, Tr. at 187; AT&T Comments at 37.

137 *See* J. Finnegan 8/17/01 Testimony, Tr. at 85-86.

138 *See* AT&T Comments at 34.

139 *See Ex.* S9-ATT-JFF-11, slide 15.

140 AT&T Comments at 34.

141 *See* AT&T Comments at 37 (proposed redlined changes of Table 4).

142 *See* C. Inouye 8/14/01 Testimony, Tr. at 116-17 ("On PO-1 C the claim by AT&T is that is an oversight. I would dispute that. It was not an oversight. It was not my intention to include PO-1C. PO-1 C incidentally is a percentage measure. It is different than the other PO-1s which are intervals. If you look again on CTI-3, if you look on the very last page, you'll see that the payment structure that I proposed for PO-1 which is on the bottom of the page is stated in terms of seconds, in other words, an interval not

parties agreed to aggregate, and there is no credible argument that the parties meant to include PO-1C in the QPAP.[143]

The acceptance of the PO-1 agreement by CLECs in the Arizona PAP collaborative and the absence of any dispute over the inclusion of the PO-1 agreement by Colorado Special Master's Report contradict AT&T's claims. After the PEPP workshops concluded, Qwest incorporated the PO-1 agreement into a revised PAP filed with the Arizona Commission. AT&T did not participate in that proceeding. However, WorldCom participated in both the ROC PEPP workshops and the Arizona proceeding, and it accepted the PO-1 agreement without any indication of a misunderstanding, such as the one AT&T now alleges.[144] The same PO-1 agreement was adopted in the Colorado Special Master's Report, and AT&T's comments on that Report also failed to raise any objection to this treatment of PO-1.[145] And the Colorado Report specifically

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percentages. You couldn't apply PO-1 C to the payment structure I proposed at the ROC because it is a percentage measure and doesn't fit with this payment structure."); s*ee also* J. Finnegan 8/27/01 Testimony, Tr. at 36-37 (agreeing that PO-1A&B are measured in seconds and PO-1C is measured by a percentage).

143 *See* C. Inouye 8/14/01 Testimony, Tr. at 116-17. The MTG Report demonstrates the two aggregations. In that Report, the agreement is reflected by the statement: *"PO-1 will be collapsed to EDI and GUI for remedy calculations.* The following penalties apply:

> . . .
>
> | PO-1 | Remedy Level |
> |---|---|
> | 2 sec. or less | $1,000/$14,000 |
> | > 2% to 5% | $5,000/$70,000 |
> | > 5% to 10% | $10,000/$140,000 |
> | > 10% | $15,000/$210,000." |

MTG and NRRI, *Post Entry Performance Plan Final Collaborative Summary*, at 10 (June 5, 2001), Att. 2 to Qwest's Comments, ("MTG Report") (emphasis added).

144 *See* C. Warner 8/27/01 Testimony, Tr. at 102-05.

145 *See* J. Finnegan 8/27/01 Testimony, Tr. at 41 (agreeing that AT&T did not raise an objection to the Report's treatment of PO-1).

provides that: "PO-1 shall have *two* sub-measurements."[146] AT&T has provided no good cause to upset the collaborative agreement on this issue.

PROPOSALS FOR NEW MEASUREMENTS

The Performance Measurements Were Largely Settled In the ROC Workshop.

With the exception of change management performance measurements, which Qwest has now added, the ROC PEPP collaborative agreed on the specific performance measurements that should be included in the QPAP.[147] No party claimed otherwise. Nonetheless, several parties have proposed a variety of additional performance measurements in this proceeding. Mr. Williams testified that Qwest agreed to include two change management performance measurements, PO-16 and GA-7, when standards are identified by the ROC OSS collaborative. Even though the ROC PEPP agreed as to all other measurements to be included in the QPAP, Mr. Williams also testified that Qwest would add LNP related measurements, OP17, MR11, and MR12. The inclusion of these measurements represents a significant concession by Qwest. For the reasons set forth below, proposals to include other measurements are completely unsubstantiated and unnecessary.

Qwest Has Added the Change Management PIDs Recently Developed By the ROC TAG.

Qwest has agreed to include two performance measurements addressing change management, GA-7, Timely Outage Resolution, and PO-16, Release Notifications, even

146 *See* Colorado Special Master's Final Report at App. A, Part IV(3) (emphasis added).

147 *See* MTG Report at App. A (listing agreed measurements; for several measurements, the parties were able to reach agreement with respect to Tier 1 issues but left open Tier 2 issues).

though the definitions of these measurements were only approved by the ROC TAG on August 9, 2001 and June 21, 2001, respectively, and they are both diagnostic.[148] Qwest agreed to include both measurements as Tier 2 measurements categorized as "High," once standards are determined in the ROC OSS collaborative.[149]

No other change management performance measurements are warranted. AT&T and WorldCom's proposal of an additional measurement purporting to measure software release quality is unjustified. As Mr. Williams testified, the proposed measurement is duplicative of other measurements currently in the QPAP, including GA-7.[150] Moreover, the ROC OSS Steering Committee recently rejected the CLECs' request for the ROC to develop this proposed measurement.[151]

WorldCom's proposed "test bed" measurement is clearly premature and should not be included in the QPAP. As Mr. Williams explained, the test bed itself was only put in place on August 1, 2001, and no measurement has been defined for it yet.[152] The parties are still in the preliminary stages of discussing a proposed measurement in the

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148 *See* M. Williams 8/16/01 Testimony, Tr. at 274-75; Ex. S9-QWE-MGW-1, MGW slide 5 (GA-7) and MGW slide 4 (PO-16). Moreover, GA-1 to GA-6 measurements are appropriately measured on a regionwide basis. It is not feasible for them to be measured on a state-by-state basis. Accordingly, the definitions of these PIDs provide that they are regionwide measurements. *See* QPAP PIDs. Qwest is not capable of implementing them separately for each state, and the ROC has accepted them as regionwide measurements.

149 *See* M. Williams 8/16/01 Testimony, Tr. at 275.

150 *See id*. at 275-76 (noting that this measurement has not been accepted by the ROC TAG).

151 *See* Ex. S10-QWE-CTI-10 at 6 ("The Steering Committee voted unanimously to reject the proposed measure.")

152 *See* M. Williams 8/16/01 Testimony, Tr. at 280 ("We are working on a proposal which initially should be diagnostic because here you have both a process that is brand-new and ultimately a measurement that would be brand-new and it's very appropriate to let that process stabilize, let the measurement stabilize, get the bugs out of it before you start trying to include it with the things like that that are in QPAP . . . .").

ROC OSS TAG.[153] Moreover, the inclusion of a "test bed" performance measurement in the QPAP is not necessary for FCC approval. The Texas performance assurance plan was approved absent this measurement.

Qwest Agreed To Add LNP Measurements.

Even though the performance measurements were never raised at the ROC PEPP collaborative, Qwest has agreed to include OP-17, MR-11, and MR-12 in the form approved by the ROC OSS TAG.[154] For these too, the ROC OSS collaborative finalized the measurements only days before the commencement of the hearings on this matter. Qwest agreed to include all three measurements in Tier 1 at the "High" category, and in Tier 2 in the "Medium" category.[155] No party to this multistate proceeding has contested Qwest's proposed treatment of these measurements.

Additional Measurements Are Unnecessary.

The remaining proposals for new measurements advanced by CLECs lack justification. Neither WorldCom nor any other CLEC proposed WorldCom's measurement for "missing notifier trouble tickets" in *any* forum, either the ROC TAG or the ROC PEPP.[156] As Mr. Williams testified, over a year ago, the ROC TAG determined to adopt PO-10 (only as a diagnostic measurement), in response to CLEC concerns over missing LSRs.[157] WorldCom's eleventh hour pitch for this measurement in this forum does not merit consideration.

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153 *See id.*

154 *See* Ex. S9-QWE-MGW-1 (PIDs for OP-17, MR-11, MR-12).

155 *See* M. Williams 8/16/01 Testimony, Tr. at 273-74.

156 Ex. S9-QWE-MGW-4, slide 7.

157 *See id.*

Covad suggests a number of additional measurements, all of which either are not appropriate for a performance measurement or are covered by existing measurements. For example, Covad's concerns over customer cancellations[158] do not and should not be addressed by a measurement. Qwest cannot be held responsible for Covad's relationships with its customers or determine why a Covad customer cancels an order.[159] Moreover, while these orders are active, they are captured and measured by the existing performance measurements.[160] For example, OP-6, which is already in the QPAP, measures Pending Delayed Days.

Covad's claimed need for measurement of cooperative testing and for inclusion of PO-15 in the QPAP[161] are raised for the first time in this proceeding. The cooperative testing measurement was never raised in the ROC OSS collaborative when PIDs were being developed, nor did Covad claim a need for PO-15 to have a standard (rather than be diagnostic).[162] Neither issue was raised in the ROC PEPP collaborative.[163] Covad fails to advance any substantive reason for including the measurements in the QPAP, and the timing in which the issue is raised belies its claimed importance.

SPECIAL ACCESS

The performance measurements in the QPAP do not include measurements or sub-measurements for special access, and none should be added. XO, Time Warner, and

158 *See* Covad Comments at 42.

159 *See* M. Williams 8/16/01 Testimony, Tr. at 129 (noting that it is impossible for Qwest to know the reason why a CLEC customer has cancelled an order, let alone to develop a PID to measure it).

160 See Ex. S9-QWE-MGW-4, slide 8-9.

161 *See* Covad Comments at 40-42.

162 *See* Ex. S9-QWE-MGW-4, slide 8; M. Williams 8/16/01 Testimony, Tr. at 282.

WorldCom claim that performance measurements should be added to the QPAP to address services that they purchase out of tariffs, mostly interstate tariffs.[164] These requests are untenable on several grounds.

First, this issue was raised and addressed at the ROC OSS collaborative. Originally, ELI proposed to include special access in the PIDs. As Ms. Lubamersky testified at the hearings, after several telephonic meetings to discuss the issue, "ELI agreed that . . . section 251 did not include special access private line services and, therefore, agreed that the PIDs should not include them either."[165] No CLEC asked that special access performance measurements be included in the PIDs at the time that the ROC PEPP collaborative was considering which performance measurements to include in the QPAP.[166]

Second, this resolution was clearly compelled by law. Interstate special access, by definition, cannot be considered an obligation of a BOC under section 251. For these

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163 *Id.*

164 *See PAP Workshop Response Testimony of Tim Kagele* at 3 (July 27, 2001) (referring to "special access services purchased out of an ILEC's federal or state access tariff"); T. Kagele 8/28/01 Testimony, Tr. at 18 (admitting that majority of special access services is purchased from *FCC* tariffs) (emphasis added); *PAP Workshop Response Testimony of Rex Knowles* at 27 ("Knowles Written Testimony") (admitting XO obtains the "vast majority" of these facilities from tariffs and admitting that the performance figures presented in the testimony "predominantly represent Qwest's performance under its tariffs"); R. Knowles 8/28/01 Testimony, Tr. at 14-15 (admitting that vast majority of special access is purchased of *FCC* tariffs) (emphasis added); WorldCom Comments at 22 (admitting that "many of the circuits are ordered from interstate traffic [sic]" [presumably WorldCom meant to refer to "interstate tariffs"]).

165 *See* N. Lubamersky 8/16/01 Testimony, Tr. at 220-21 (noting that the ROC OSS collaborative discussed whether to include special access or private line services in the PIDs and "[t]he ultimate closure on the issue was when ELI withdrew their request to include any special access . . . products in the PIDs"). Moreover, Mr. Peters of ELI admitted that ELI has made no request to reopen the issue at the ROC. *See* T. Peters 8/28/01 Testimony, Tr. at 24.

166 *Cf.* C. Warner 8/27/01 Testimony, Tr. at 94 (admitting WorldCom did not propose special access performance measurements at the time the ROC PEPP collaborative was considering performance measurements and raised them only in the last workshop [when the parties had moved on to other issues]); *see id.* at 93 (admitting that WorldCom did not raise the issue of special access measurements in the Arizona collaborative).

reasons, the FCC has also repeatedly made clear that "we do not consider the provision of special access services pursuant to tariffs for purposes of determining checklist compliance."[167] In doing so, the FCC has considered and squarely rejected CLECs' argument that special access services should be included in section 271 analyses simply because they use the same physical facilities and are functionally equivalent to Enhanced Extended Links ("EELs"):

> Although dedicated local transport and the interoffice portion of special access are generally provided over the same facilities, they differ in certain other respects . . . . We do not believe that checklist compliance is intended to encompass the provision of tariffed interstate access services simply because these services use some of the same physical facilities as a checklist item. We have never considered the provision of interstate access services in the context of checklist compliance before. The fact that competitive LECs can use interstate special access service in lieu of the EEL . . . and can convert special access service to EELs does not persuade us that we should alter our approach and consider the provision of special access for purposes of checklist compliance.[168]

Thus, the FCC has concluded that "there is *no need to consider the provision of special access in the context of the public interest requirement*,"[169] which forms the basis for PAPs. As the FCC noted, "these issues are appropriately addressed in the Commission's section 208 complaint process."[170]

Third, the FCC currently has a proceeding open to consider the unbundling obligations of section 251.[171] The FCC has noted that these issues are complex and that

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167 *Verizon Massachusetts Order* ¶ 156 n.489 (citing *SBC Texas Order* ¶ 335; *Bell Atlantic New York Order* ¶ 340).

168 *Bell Atlantic New York Order* ¶ 340 (internal citations and footnotes omitted); *see also SBC Texas Order* ¶ 335.

169 *Bell Atlantic New York Order* ¶ 340, n.1052 (emphasis added).

170 *Id.* ¶ 341; *see also SBC Texas Order* ¶ 335.

171 *See Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, Third Report and Order and Fourth Further Notice of Proposed Rulemaking, 15 FCC Rcd 3696 (1999), as modified by Supplemental Order, 15 FCC Rcd 1760 (1999), as further modified by Supplemental Order

extending those obligations to special access "could have significant policy ramifications," potentially causing market dislocation and discouraging facilities-based competition.[172] It would be inappropriate for the state commissions to take any action that could inhibit the FCC's ultimate disposition of these legal and policy issues, given the FCC's primary role in establishing the governing framework for local competition under the 1996 Act.[173]

Fourth, actions by other states have not been inconsistent with this approach. The Colorado Special Master specifically declined to include special access performance measurements in the Colorado PAP, stating:

> The long term challenge with regard to special access reflects a similar difficulty faced in the intercarrier compensation arena: how to facilitate the convergence of pricing for the same function when it is presently priced differently when used for different purposes. Following the lead of other states, I do not believe that Section 271 is the correct forum to address this [special access] issue.[174]

And a very recent decision by the Indiana Utility Regulatory Commission expressly declined to develop performance measurements for special access.[175] As it held:

> we conclude that Special Access is not simply local transport as included in Section 271. We decline to expand the checklist as provided in Section

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Clarification, 15 FCC Rcd 9587 (2000); *see also* Supplemental Order Clarification ¶ 4 ("The *Fourth FNPRM* asks about the legal and policy implications of allowing requesting carriers to substitute combinations of unbundled loop and transport network elements for the incumbent LEC's tariffed special access service.").

172 Supplemental Order Clarification ¶¶ 2, 7-8.

173 *See AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366 (1999).

174 Colorado Special Master's Final Report at 28.

175 *See In the Matter of the Petition of Indiana Bell Telephone Company, Incorporated d/b/a Ameritech Indiana Pursuant to I.C. 8-1-2-61 for a Three-Phase Process for Commission Review of Various Submissions of Ameritech Indiana to Show Compliance with Section 271(C) of the Telecommunications Act of 1996*, Cause No. 41657, at 6 (Indiana Util. Reg. Commn. Aug. 8, 2001), attached hereto as Attachment 1.

> 271 to include Special Access services as a part of this [section 271] proceeding.[176]

As the Indiana Commission further concluded, the state proceedings cited by the CLECs here do not establish any contrary trend to consider special access as a section 251 or 271 obligation. The New York Public Service Commission decision involved a separate proceeding (not a part of the section 251 or 271 docket) and "prior Commission directives and monitoring by our Staff" over a span of four years.[177] WorldCom and Time Warner fail to provide any citation to support a proposition that the Minnesota Commission has established any special access service standards under section 251 or any other section. In fact, the Minnesota Commission, to date, has not adopted *any* special access performance standards and has specifically disclaimed any authority to do so under federal law.[178] Finally, while the Texas Public Service Commission has issued an order directing the parties to consider the issue further in a workshop, Southwestern Bell has sought rehearing and clarification of the order, noting that the "FCC has three times concluded that performance relative to provisioning of Special Access service is not relevant to checklist compliance."[179]

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176 *Id*.

177 *See Proceeding on Motion of the Commission to Investigate Methods to Improve and Maintain High Quality Special Services Performance by Verizon New York, Inc.*, Case 00-C-2051, *Proceeding on Motion of the Commission to Investigate Performance-Based Incentive Regulatory Plans for New York Telephone Company*, Case 92-C-0665, Opinion and Order Modifying Special Services Guidelines for Verizon New York Inc., Conforming Tariff, and Requiring Additional Performance Reporting at 1-2 (NY PSC June 15, 2001), Attachment to WorldCom Comments.

178 *See Order Finding Jurisdiction, Rejecting Claims for Relief, and Opening Investigation*, Docket NO. P-421/C-99-1183 (Minn. PUC Aug. 15, 2000).

179 *See Section 271 Compliance Monitoring of Southwestern Bell Telephone Company*, Southwestern Bell Telephone Company's Motion for Rehearing and Clarification, Project No. 20400, at 6-7 (Tex. PUC July 2, 2001).

VI. AUDITS AND SIX-MONTH REVIEW

AUDITS

The audit provisions contained in the QPAP were modeled after the Texas plan and provide more than adequate assurances of data accuracy and reliability. In order to provide additional assurances, however, Qwest has agreed to the concept of adopting certain risk-based changes to the QPAP proposed in the Liberty Monitoring Report. With these additions, there can be no credible claim that the QPAP fails to meet the FCC's expectations with respect to data accuracy.

The Risk-Based Test Program That Qwest Has Agreed To Conduct Will Ensure That Any Vulnerable Performance Measures Are Carefully Monitored.

Qwest agreed to add language to the QPAP requiring it to conduct "risk-based test program."[180] Borrowing from the Liberty Monitoring Report, Qwest has agreed to conduct two types of risk-based audits: (1) audits triggered by measurements that change from substantially manual to substantially mechanized; and (2) audits of material measurements that have a high degree of risk, as substantiated by the Liberty Monitoring Report.[181] The measurements subject to this provision will be determined by the auditor, and will be placed on a schedule for auditing over the course of two years.[182]

In order to ensure the consistency and efficiency of the audits across the fourteen state region, as well as the expertise of the auditor, Qwest has proposed to choose the auditor from a limited and prescribed group of the national firms with experience in

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180 *See* M. Williams 8/17/01 Testimony, Tr. at 344-45.

181 *See* M. Williams 8/16/01 Testimony, Tr. at 300-01; M. Williams 8/17/01 Testimony, Tr. at 23-24.

182 *See* M. Williams 8/16/01 Testimony, Tr. at 287-88, 351. The Liberty Report contemplates an eighteen-month review of areas, identified in the performance measurements audit, in which Liberty has

testing/auditing ILEC OSS and/or performance measurements or metrics.[183] CLECs' claims[184] that Qwest, by choosing the auditor, will somehow undermine that auditor's independence should be dismissed as ridiculous given the stature of the firms qualified to perform such work.[185]

CLEC proposals for comprehensive annual audits[186] waste resources by imposing auditing requirements that are not properly tailored to the actual levels of risk of inaccuracies. There is no reason to believe that measures that have no history of vulnerability will become inaccurate in the future. Moreover, if an unexpected problem does arise, it can be reviewed in a CLEC-initiated audit (as discussed below). That audit should unearth and correct any problems in the measurement as a whole.

CLEC-AUDITS

The QPAP's existing CLEC-audit provisions are reasonable and consistent with the considerations in the Liberty Monitoring Report. The Liberty Monitoring Report recognizes that CLEC-audits should not be unconstrained, and that (as is common in analogous contractual provisions of this kind) the auditing parties should absorb their costs in the event that no material concerns are found.[187] The Monitoring Report also recognizes that certain express constraints, such as "non-duplication of tests from regular

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identified concerns. However, as Liberty recognizes, those areas may be dealt with in follow-up audits or in the additional categories of audits that Qwest has agreed to include in the QPAP.

183 *See* M. Williams 8/16/01 Testimony, Tr. at 288-89, 357.

184 *See, e.g.*, AT&T Comments at 44.

185 *See* M. Williams 8/16/01 Testimony, Tr. at 288-89.

186 *See* Covad Comments at 34.

187 *See* The Liberty Consulting Group, *Report on the Audit of Qwest's Performance Measures* (July 11, 2001), Ex. S9-QWE-MGW-2 at 143 (noting that the purpose of such a requirement is, appropriately, to "limit the number of such requests").

two-year program" and "maximum number of CLEC requests per year," are also appropriate.[188] Using the Report as a guideline, Qwest's QPAP audit provisions reasonably limit individual CLECs to two audits per calendar year, with each audit permitted to include up to two performance measurements.[189] Under this formula, CLECs could audit dozens of performance measures in a given year.[190] In addition, if an auditor were to detect an issue, even if it did not affect the CLEC that had requested the audit, Qwest would address it for all CLECs — even if such a resolution meant that Qwest would owe more payments to all CLECs.[191] Given that Qwest has agreed to conduct risk-based audits, it therefore is reasonable and necessary that the same auditor perform all of the audits — both risk-based and CLEC-initiated — and that no CLEC-audits should duplicate the other audits conducted by the auditor.

AT&T, WorldCom, and Covad claim to use the Colorado Special Master's Final Report as a basis for proposed changes to the QPAP's CLEC-audit provisions. Each CLEC, however, helps itself to significant changes to those Recommendations, unreasonably eliminating appropriate constraints on CLECs and increasing the burdens on Qwest. For example, in seeking to shift the burden of paying for the CLEC-audit to Qwest when there is a "material deficiency," AT&T ignores the Special Master's limitation of material deficiency to one that would "require an additional payment of at least 10% more than the total amount paid on the affected measures."[192] Covad is even

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188 *Id*.

189 *See* QPAP § 15.4; M. Williams 8/16/01 Testimony, Tr. at 303; M. Williams 8/17/01 Testimony, Tr. at 28.

190 *See* M. Williams 8/16/01 Testimony, Tr. at 302-03.

191 *See* M. Williams 8/17/01 Testimony, Tr. at 69-70.

192 Colorado Special Master's Final Report at 6.

more intrepid, seeking to impose a 5% standard.[193] In addition, AT&T deletes the Special Master's safeguard against frivolous CLEC-audits.[194] That provision is designed to deter CLECs from gaming the CLEC-audit provision, by banning a request for another CLEC-audit for one year after a CLEC has requested a frivolous audit.[195]

AT&T's proposal that Qwest provide a password-protected website and Covad's request that all process documentation and code requirements be included in data reconciliation are excessive and inappropriate.[196] Qwest's willingness to develop a website on which to post CLEC-specific results and data is a completely voluntary endeavor and should not be a QPAP requirement. Developing and maintaining such a website is a complex and expensive proposition, and no other BOC has been subjected to such a requirement.

The purpose of the data reconciliation provision of the QPAP is to allow the parties to work out apparent differences in CLEC data.[197] Covad's request for all information that relates to production of the measurements, such as code and process documentation,[198] is not appropriate for this purpose. In effect, such a demand on Qwest's resources would be similar to that incurred during an actual audit of the performance measurements. And unlike the actual audits, because data reconciliation

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193 Covad Comments at 36 (emphasis added).

194 *See* AT&T Comments at 43-46.

195 The Special Master provides that "[i]f the CLEC-requested audit unearths no material errors (i.e., those requiring an additional payment of 10% more than the total amount paid on the affected measures), the CLEC shall not be allowed to request another mini-audit during the year following the mini-audit request (though the CLEC shall be allowed to request data reconciliation during that time)." Colorado Special Master's Final Report at 6.

196 *See* AT&T Comments at 45; Covad Comments at 33.

197 *See* M. Williams 8/17/01 Testimony, Tr. at 36-38.

198 *See* Covad Comments at 33.

opportunities are unlimited, CLECs would be allowed to impose this burden on Qwest without any restraint. There is no appropriate purpose for the information other than for a complete and comprehensive audit of the measurement — an evaluation that should be conducted by a qualified auditor, not by CLECs, which have neither the expertise nor the objectivity to engage in such a data review. If a problem goes beyond the reconciliation of specific data, the CLEC can request an audit of the measurement, in which case the auditor would scrutinize all relevant processes and documentation.

CLEC PROPOSAL FOR QWEST TO FREEZE ITS DATA GATHERING AND COLLECTION PROCESS

CLECs claim that Qwest should essentially "freeze" processes for producing performance results and that such a requirement be included in the QPAP. The requirement is unreasonable and has not been imposed on any other BOC.

Qwest does not propose that it be permitted to change the PIDs included in the QPAP.[199] Qwest does require flexibility in managing the *processes* it uses to collect the data necessary to produce *results* in accordance with the PIDs. There is no reason to believe that such flexibility will cause any inaccuracies or in any way affect CLECs. To the contrary, Qwest has demonstrated that it has adequate methods of controlling and monitoring changes to its data gathering and collection processes. As Mr. Williams described, Qwest currently has a change management governance process, in which changes to data gathering and collection of QPAP measurements are strictly monitored and controlled.[200]

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199 *See* M. Williams 8/17/01 Testimony, Tr. at 71-72, 126.

200 *See* M. Williams 8/16/01 Testimony, Tr. at 296-97.

Second, Qwest stated its practice of posting on an external website, material prospective changes — changes that affect the processes, methods, and activities related to the production of performance measurements and reports — as well as a note summary, in which Qwest will outline in summary form the types of changes that have affected results.[201] These processes ensure that Qwest will identify and manage changes internally and will make those changes visible to CLECs, state commissions, and other parties interested in monitoring the technical aspects of data gathering and reporting.

CLECs' proposal would restrict Qwest's ability to make changes to its processes in ways that are completely unreasonable. It would require Qwest to seek commission approval before making *any* changes to its data gathering processes (including updates to USOC table) or before undertaking workarounds in cases in which Qwest encounters unexpected glitches or errors.[202] These constraints would cause inefficiencies and inaccuracies.[203] Moreover, such a requirement would put Qwest in the position of receiving potentially conflicting decisions from different commissions with respect to the same method or procedure.

The QPAP's Root Cause Provision Enables Qwest To Investigate Nonconforming Performance Above A Certain Threshold.

The QPAP's root cause provision was modeled from the Texas PAP but takes into account the lower CLEC volumes in the Qwest states.[204] The provision establishes a reasonable threshold within which Qwest will be able to operate without being subjected

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201 *See id*. at 296; M. Williams 8/17/01 Testimony, Tr. at 46-47, 122.

202 *See, e.g.*, WorldCom Comments at 43.

203 *See* M. Williams 8/16/01 Testimony, Tr. at 290-93; M. Williams 8/17/01 Testimony, Tr. at 126.

204 *See* M. Williams 8/17/01 Testimony, Tr. at 101.

to payments for any deficiencies.[205] Contrary to the CLECs' contentions,[206] the local exchange business is such that not every small instance of nonconformance, or every month of a Tier 1 payment, warrants intense scrutiny — especially when small volumes can trigger deficiencies. Above a certain threshold, however, *i.e.*, where it is appropriate, Qwest *is* willing to examine the root cause of a problem.[207]

Qwest Will Provide CLECs With Raw Data.

Qwest has agreed to make CLEC raw data available upon CLEC request. However, it is unreasonable to set an arbitrary deadline (and accompanying payment) by which Qwest must provide the data.[208] The time needed to produce the raw data is dependent upon a number of factors, including ones beyond Qwest's control: the circumstances of the request, the timing of the request, and the extent of data requested. AT&T has provided no evidence that Qwest's proposal to provide data within a mutually acceptable time frame is unreasonable. Moreover, AT&T has failed to identify any harm that a CLEC could incur if it receives the data after two weeks. AT&T's arbitrary two-week deadline and late report type payment is simply unreasonable and has no relationship to the FCC's expectation that the PAP will contain assurances of accurate data.

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205 *See id*. at 101-02.

206 *See* Covad Comments at 32; WorldCom Comments at 30.

207 *See* M. Williams 8/17/01 Testimony, Tr. at 101-02.

208 *See* AT&T Comments at 17-18 (proposing to treat data supplied after two weeks as a late report under section 14.3).

SIX-MONTH REVIEW

The QPAP contains a mechanism for reviewing certain elements every six months in order to ensure that those provisions can evolve to accommodate new circumstances and experience gained after the QPAP is in place. Other elements of the QPAP are specifically excluded from the six-month review process so that Qwest has certainty as to the conditions under which it offers the QPAP. This provision in the QPAP is no different than similar provisions in AFORs and price regulations plans that have been voluntarily entered into by Qwest and state commissions,[209] and was also recommended by the Colorado Special Master.

AT&T argues that the six-month review should not be limited to performance measurements, but should extend instead to a review of the entire PAP.[210] AT&T's suggestion to reopen the *entire* QPAP every six months is impractical and unsound. To reopen every aspect of the plan to revision, including the fundamental structural elements, would make it impossible to administer the QPAP. The plan has undergone an extensive collaborative process, lasting nearly 12 months now, and it is essential to have the basic structure in place and unchanging. Moreover, this same provision was included in the Texas, Kansas, and Oklahoma PAPs approved by the FCC.[211]

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209 *See* C. Inouye 8/14/01 Testimony, Tr. at 154-155.

210 *See* AT&T Comments at 47. AT&T also disputes the criteria specified in section 16.1 to reclassify performance measurements. *See id.* AT&T argues that they are vague and should be deleted. *See id.* However the criteria are purposely flexible so as to allow measurements to be added, deleted, or modified depending upon how CLEC volumes materialize. *See* C. Inouye 8/14/01 Testimony, Tr. at 155-56.

211 *See* C. Inouye 8/14/01 Testimony, Tr. at 155-56.

To protect Qwest against changes to the QPAP after it goes into effect, Qwest has specified that "[c]hanges shall not be made without Qwest's agreement."[212] AT&T argues that such changes should not require Qwest's consent and, instead, "the ultimate decision on the nature of any change [should be by] the Commission."[213] WorldCom likewise disputes the notion that Qwest should have a "veto" over any change to the QPAP.[214] This protection is reasonable and necessary in order to give Qwest certainty about the obligations it undertakes in the QPAP and to have some knowledge that it can satisfy those obligations — which carry significant financial liability. AT&T and WorldCom seek nothing more that to transform a defined obligation agreed to by Qwest into a blank check, pursuant to which Qwest would have no assurance of what its obligations were or whether it could reasonably expect to satisfy them.

VII. LEGAL OPERATION OF THE QPAP

LIQUIDATED DAMAGES, ALTERNATIVE REMEDIES, AND OFFSET

The QPAP guarantees payments to CLECs for nonconforming wholesale performance, and it provides Tier 2 payments to the state if Qwest fails to meet parity and benchmark standards on an aggregate CLEC basis. These payments are made in a "self-executing" manner without any requirement that CLECs file a claim or demonstrate harm. The QPAP therefore contains appropriate mechanisms to ensure that Qwest is not subject to multiple standards or regulation or recovery for the same harm. The QPAP

212 QPAP § 16.1; *cf. id.* § 17.0 (referring to "voluntary" nature of plan).

213 AT&T Comments at 46.

214 WorldCom Comments at 55.

achieves these results through the liquidated damages and remedies provisions (sections 13.5 and 13.6) and the offset provisions (sections 13.7 and 13.8).

TIER 1 LIQUIDATED DAMAGES PAYMENTS TO CLECS

Under sections 13.5 and 13.6, Qwest will make self-executing Tier 1 liquidated damages payments[215] to compensate the CLECs that opt into the QPAP for any damages arising from Qwest's wholesale performance obligations. Treatment of Tier 1 payments in the QPAP is the same as in the FCC-approved Texas, Oklahoma, and Kansas PAPs.[216] Like traditional liquidated damages provisions, the QPAP establishes in advance what payments are appropriate compensation for damages due to Qwest's nonconformance.[217] This payment structure satisfies the FCC's express requirement that a performance assurance plan contain "a self-executing mechanism that does not leave the door open unreasonably to litigation and appeal."[218] CLECs that opt into the QPAP therefore will receive payments from Qwest for nonconformance with the QPAP metrics *without ever having to claim, prove, or incur any harm*.

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215 *See* Colorado Special Master's Final Report at 12 (noting that Tier 1 payments "can be analogized to liquidated damages provisions embodied in contracts"). Z-Tel's suggestion that the liquidated damages payments to CLECs should be renamed "incentive payments" is non-sensical because the payments are made directly to the CLECs and are compensatory in nature — if the payments were in fact purely financial incentives, they would not be made to the CLECs. *See* C. Inouye 8/14/01 Testimony, Tr. at 138. Of course, in addition to compensating CLECs, Tier 1 payments also serve to increase Qwest's incentive to comply with the QPAP's performance standards.

216 *See* Tex. PAP § 6.1 (describing payments to CLECs as "liquidated damages"); Kan. PAP § 6.1 (same); Okla. PAP § 6.1 (same).

217 AT&T's point that "until the damage at issue actually occurs, it is impossible for AT&T to ascertain the extent of such damages," *see* AT&T Comments at 12, once again misunderstands the purpose of liquidated damages, which is precisely to address situations where quantification of harm is difficult and to set in advance a reasonable figure to approximate that harm. *See Reid v. Mutual of Omaha Ins. Co.*, 776 P.2d 896, 905 (Utah 1989).

218 *Bell Atlantic New York Order* ¶ 433.

As with many contractual promises for liquidated damages, this remedy is designed to be the only remedy under "rules, orders, or other contracts, including interconnection agreements, arising from the same or analogous wholesale performance."[219] This is nothing more than the logical implication that courts have traditionally recognized of any liquidated damages provision. The intent of fixing an indisputable amount for damages would be completely frustrated if the CLEC were entitled simply to use the liquidated damages provision as a floor in litigation seeking a more favorable amount.[220] Like other election of remedies provisions, this one also ensures that CLECs cannot have their cake and eat it too by electing, on a case-by-case basis, whether to obtain the liquidated damages amount when they can prove no harm at all or to pursue some higher amount when they do claim harm. This provision also prevents the unreasonable scenario of Qwest being subjected to different performance standards for the same activity.

AT&T and Z-Tel argue that the QPAP's liquidated damages provision is just an "incentive" payment.[221] Their characterization of Tier 1 payments is simply incorrect

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219 QPAP § 13.6.

220 *See Catholic Charities v. Thorpe*, 741 N.E.2d 651, 657 (Ill. Ct. App. 2000) (holding that contract clause that gives nonbreaching party the "option" to collect liquidated damages is unenforceable, because it "in effect preserves the promisee's right to alternatively seek compensatory damages") (citation omitted); *see also* 5 Arthur L. Corbin, *Corbin on Contracts: A Comprehensive Treatise on the Working Rules of Contract Law* § 1061, at 353 (stating that under a valid liquidated damages clause, "[t]he injured party can get judgment for the specific amount promised, no more and no less"); John D. Calamari & Joseph M. Perille, *The Law of Contracts* § 14-32, at 645 (3d ed. 1987) (noting that contract clauses that specify liquidated damages but that offer the non-breaching party an option to sue for actual damages "have been struck down as they do not involve a reasonable attempt definitively to estimate the loss").

221 *See* AT&T Comments at 12-13; Z-Tel Comments § III. CLECs' claim that the liquidated damages are actually "incentive" payments is inconsistent with their concurrent contention that certain provisions of the QPAP do not produce sufficient payments to the CLECs, *i.e.*, low volume, developing markets. *See supra* at 29-30; *see also* WorldCom Comments at 11 ("Because CLEC harm is so varied, it is not possible to quantify the *compensatory harm* for all CLECs . . . .") (emphasis added); Covad Comments at 23-26 (arguing that Qwest should not use aggregate data in low volume, developing markets measures because using individual CLEC data would "ensure that each individual CLEC actually receive[s] the

and indeed is inconsistent with the CLECs' own statements.[222] Tier 1 payments are designed to function as compensatory damages to CLECs. Otherwise, there would be no reason to make any payments to CLECs. While Tier 1 payments also act as a financial incentive for Qwest to provide service that conforms with performance standards, the incentive effect on Qwest does not change the fundamentally compensatory purpose of these payments vis-à-vis CLECs.[223] The Colorado Special Master's Report, which the CLECs cite — at least selectively — likewise explicitly noted this distinction between liquidated damages and incentive payments:

> Following a rough analogy to tort law, compensatory payments are designed to make the injured party whole; incentive payments, like punitive damages, are provided to deter socially undesirable conduct. As for the scheme of compensatory — or contract-like — payments, the Report suggests that they will be made available for carriers who suffer deficient performance. ***Such payments, which can be analogized to liquidated damages provisions embodied in contracts***, should thus reflect the consequences of the deficient performance: lost employee time, lost profits, customer goodwill, etc.[224]

Accordingly, there is no merit to CLECs' attempt to characterize Tier 1 payments as purely incentive payments, and the QPAP's treatment of these payments as liquidated damages is appropriate.

However, the QPAP's remedies provisions would *not* preclude CLEC suits for other non-contractual legal or non-contractual regulatory claims that may be available to

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appropriate Tier 1 compensation"); Z-Tel Comments § III ("When a party to an agreement fails to perform its obligations, the aggrieved parties to the agreement should be compensated for the lost benefits of the agreement.").

222 *See supra* note 215.

223 *See* C. Inouye 8/14/01 Testimony, Tr. at 112 ("[T]he level of Tier 1 payments to CLECs is very much compensatory and the combination of Tier 1 and Tier 2 provides significant financial incentives to Qwest.").

224 Colorado Special Master's Final Report at 12 (emphasis added).

CLECs.[225] Nor would the QPAP limit federal enforcement action under section 271(d)(6). Finally, opting in to the QPAP similarly would not foreclose any CLEC claims that might arise under other terms and conditions of the SGAT that do not relate to the performance issues in the QPAP, such as damages due to violation of the intellectual property provisions of the SGAT or due to willful misconduct by a Qwest employee.

Rather, any non-contractual remedies would be subject to the offset provision of the QPAP.[226] Thus, if a CLEC were to obtain both a QPAP award and an alternative non-QPAP award for the "same or analogous wholesale performance,"[227] section 13.7 would entitle Qwest to offset the awards in either of two ways, but not both. First, Qwest may reduce such an award by liquidated amounts already paid or due under the PAP. Second, Qwest may reduce liquidated payments made or due under the PAP by the amount of the compensatory portion of any such award. This second alternative is included because Qwest recognizes that a court or other body making an award may not permit that award to be offset by the amount of prior payments under the QPAP.[228] The

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225 *See* QPAP § 13.5.

226 A similar type of offset in section 13.8 prevents Qwest from being liable both for Tier 2 payments and for fines or assessments of a state commission for the same or analogous performance. Section 13.8 allows Qwest to offset any future Tier 2 payments to the state against any such payments already made for the same or analogous performance under the state commission's rules or to request that the commission perform such an offset. This approach reflects that taken in the Texas, Kansas, and Oklahoma PAPs. These PAPs state that the BOC "shall not be liable for both Tier-2 'assessments' and any other assessments or sanctions under [the state Act] or the Commission's service quality rules relating to the same performance." Tex. PAP § 6.3; *see also* Okla. PAP § 6.3; Kan. PAP § 6.3.

227 The word "analogous" is used to avoid any confusion about whether "performance," for these purposes, denotes a "standard" or an "activity." It is intended to cover situations that involve the same underlying Qwest wholesale service or activity, even where measured or accounted for in a different manner. *See* Qwest Corporation's Responses to Oral Questions by Mr. Antonuk at the August 14-17, 2001 Hearings at 5 (Aug. 28, 2001).

228 Contrary to AT&T's rather hysterical contention, Qwest would not be "*unilaterally* attempt[ing] to withhold funds from a judicial judgment." AT&T Comments at 9 (emphasis added). As a threshold matter, the CLECs are not required to opt into the terms of the PAP; they would be bound by it only if they determined to opt in and therefore to receive, *inter alia*, Tier 1 liquidated damages payments — even when they have experienced no actual damages. Moreover, Qwest would obviously disregard a judicial order at

intent of these two offset options is to limit Qwest's total liability to the greater of the amount of the non-QPAP award or the amount of liquidated payments made or due under the PAP. Such offset provisions are well established under the law of damages.[229] As with the election of liquidated damages under the QPAP, the offset ensures that a CLEC does not receive multiple recovery windfalls for the same underlying conduct.[230]

For purposes of clarity, and based on questions about the language of the offset provision, Qwest is willing to modify section 13.7 as follows:

> 13.7 If for any reason **Qwest is obligated by any court or regulatory authority of competent jurisdiction to pay to any CLEC that agrees to this QPAP compensatory damages based on** ~~**CLEC agreeing to this PAP is awarded compensation for**~~ the same or analogous wholesale performance covered by this PAP, Qwest may **reduce**~~offset~~ **such**~~the~~ award **by**~~with~~ **the** amount **of any payments made or due to such CLEC**~~paid~~ under this PAP**,** or **may reduce**~~offset~~ **the amount of any**~~future~~ payments **made or**

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its peril; it would therefore contemplate raising the offset as a defense to any claim by the CLEC and that defense would therefore be considered by the court. Nonetheless, by opting into the PAP, the CLEC indicates its consent to such an offset, and that consent will of course be relevant to the court's decision.

229 For instance, the Uniform Commercial Code, as adopted by all the states, provides for offsets in the sale of goods context. For example, the New Mexico code provides:

> (2) Where the seller justifiably withholds delivery of goods because of the buyer's breach, the buyer is *entitled to restitution of any amount by which the sum of his payments exceeds*
>
> (a) the amount to which the seller is entitled by virtue of terms liquidating the seller's damages in accordance with Subsection (1); or
>
> (b) in the absence of such terms, twenty percent of the value of the total performance for which the buyer is obligated under the contract or $500, whichever is smaller.
>
> (3) The buyer's right to restitution under Subsection (2) *is subject to offset* to the extent that the seller establishes:
>
> (a) a right to recover damages under the provisions of this article other than Subsection (1); and
>
> (b) the amount or value of any benefits received by the buyer directly or indirectly by reason of the contract.

N.M. Stat. Ann. § 55-2-718 (emphasis added); *see also* Idaho Code § 28-2-718; Iowa Code Ann. § 554.2718; Mont. Code Ann. § 30-2-718; N.D. Cent. Code § 41-02-97 (2-718); Ore. Rev. Stat. § 72.7180; S.D. Codified Laws § 57A-2-718; Utah Code Ann. § 70A-2-718; Wash. Rev. Code § 62A.2-718; Wyo. Stat. Ann. § 34.1-2-718.

230 At the workshop, questions were raised about possible disputes in the interpretation of these provisions. CLECs can, of course, use the dispute resolution procedures of the SGAT to address any disputes regarding Qwest's case-by-case application of the offset provision.

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

REIMBURSEMENT FOR CLEC PAYMENTS UNDER STATE SERVICE QUALITY RULES

AT&T and XO have proposed that Qwest reimburse CLECs for any payments that CLECs are required to make under state retail service quality rules.[231] Quite apart from the existence of any defense to such payments that may be available to CLECs for circumstances beyond their control, such a reimbursement would be precluded by section 13.6, and appropriately so. Section 13.6 addresses remedies "arising from the same or analogous *wholesale* performance."[232] This provision would extend to a rule or order relating to retail service quality, because any theory for seeking reimbursement from Qwest would be based on Qwest's wholesale performance to the CLEC.[233]

Under the QPAP CLECs receive liquidated damages payments for Qwest's performance. As noted above, these payments do not require proof of any actual damages, but as with liquidated damages provisions are designed to be a complete remedy. AT&T's proposal has the opposite effect: It applies to all situations, including where AT&T has already received a payment under the QPAP.[234] Thus, this provision

231 *See* AT&T Comments at 57-58; Knowles Written Testimony at 14-15.

232 QPAP § 13.6 (emphasis added).

233 Section 13.6 addresses remedies "arising from the same or analogous *wholesale* performance," QPAP § 13.6 (emphasis added). This provision would extend to a rule or order relating to retail service quality, because any theory for seeking reimbursement from Qwest would be based on Qwest's wholesale performance to the CLEC.

234 *See* C. Inouye 8/14/01 Testimony, Tr. at 157-58.

appears to be simply another attempt to carve out an extra payment opportunity from the liquidated damages established under the QPAP.

In addition, the proposed reimbursement would be administratively unworkable and likely to lead to litigation, in contravention of one of the FCC's principal goals — certainty in application.[235] In particular, there would be significant issues of causation involved in determining whether the retail service quality issue was due to Qwest's performance or the CLEC's performance. These issues would need to be litigated based on the circumstances of each case to avoid windfalls to CLECs when the violation of the state rule was due to their own performance.

DENIAL OF RATE RECOVERY

AT&T's proposal to include language in the QPAP stating that Qwest may not recover payouts made under the QPAP by increasing its rates is entirely unnecessary and would simply restate the FCC's already clearly articulated position. In both the *Bell Atlantic New York* and the *SBC Texas* orders, the FCC has stated that 271 payments may not be charged to ratepayers. The Texas Order stated:

> Consistent with our accounting rules, antitrust damages and certain other penalties paid by carriers, SWBT should not reflect any portion of penalties paid out under the Plan as expense in the revenue requirement for interstate services. As we noted in the *Bell Atlantic New York Order*, such accounting treatment ensures that ratepayers do not bear, in the form of increased rates, the cost of penalties paid out under the Plan in the event that SWBT fails to provide adequate service quality to competitive LECs.[236]

The New York order, likewise, stated:

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235 *See Bell Atlantic New York Order* ¶ 433.

236 *SBC Texas Order* ¶ 430.

> . . . we conclude that Bell Atlantic should not be permitted to reflect any portion of market adjustments as expenses under the revenue requirement for interstate services of the Bell Atlantic incumbent LEC. Such accounting treatment ensures that ratepayers do not bear, in the form of increased rates, the cost of market adjustments under the APAP and ACCAP in the event Bell Atlantic fails to provide adequate service quality to competitive LECs. We agree with CPI that any other approach would seriously undermine the incentives meant to be created by the Plan. We note that the New York Commission has adopted a similar approach at the state level.[237]

Accordingly, there is no need to add to the QPAP a provision reiterating the FCC's settled policy on this issue.

EXCLUSIONS

Section 13.3 contains several standard exclusions, similar to those outlined in the Texas PAP,[238] that would excuse Qwest's nonconforming wholesale performance: force majeure, act or omission by a CLEC that is contrary to its obligations or a CLEC act of bad faith, and problems associated with third-party equipment or systems that could not have been avoided by reasonable due diligence.[239] In Texas, SBC has invoked an exclusion under this section only once so far,[240] thus demonstrating that the exclusions are designed to apply only in unusual circumstances. As an additional protection against

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237 *Bell Atlantic New York Order* ¶ 443.

238 *See* C. Inouye 8/14/01 Testimony, Tr. at 139-40.

239 Should Qwest invoke an exclusion under section 13.3, it will provide notice of the exclusion on the bill statement provided to the CLEC. *See* C. Inouye 8/15/01 Testimony, Tr. 137-38; C. Inouye 8/16/01 Testimony, Tr. at 119.

240 *See* C. Inouye 8/14/01 Testimony, Tr. at 140, 297.

misuse of the exclusions, the QPAP provides that Qwest will bear the burden of proving that it is entitled to the exclusion.[241]

The CLECs suggest various changes to the different subsections of 13.3 to ensure that Qwest will not inappropriately invoke one of the exclusions. None of these is appropriate.

FORCE MAJEURE

Section 13.3 contains a stand-alone definition of "force majeure" because the QPAP was intended to be self-contained and not to require extensive cross-references to other provisions of the SGAT. The force majeure clause in section 13.3(1) comports with similar, standard clauses in commercial agreements, and insulates Qwest from making payments when its nonconforming performance is due to certain unforeseeable circumstances that are beyond its control. In particular, government regulation is a typical exclusion, and is properly included in the QPAP as a potential force majeure event because a state legislature, Congress, or any other government body might, at any time, alter the legal landscape in such a way that was not reasonably foreseeable but that would prevent Qwest from complying with its obligations under the QPAP.[242]

Contrary to the claims of AT&T and WorldCom, Qwest should be able to claim a force majeure exclusion for both parity and benchmark performance measures, even if

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241 *See* C. Inouye 8/14/01 Testimony, Tr. at 145, 291; C. Inouye 8/15/01 Testimony, Tr. at 244; *see also* discussion of "Dispute Resolution" *infra* (describing Qwest's proposed clarifications to the dispute resolution provision).

242 *See Kansas Mun. Gas Agency v. Vesta Energy Co.*, 843 F. Supp. 1401, 1406 (D. Kan. 1994) ("Typical force majeure events in a gas supply contract consist of various events that are beyond the supplier's control, including, among other things, such conditions as acts of God, strikes, lockouts, wars, blockades, *government regulatory intervention*, explosions, sabotage, freezeup and line collapse.") (emphasis added).

Qwest is able to perform a certain function for itself and not for the CLEC(s).[243] For example, there are geographical differences in how a force majeure event might affect Qwest and a CLEC (*i.e.*, a tornado striking a part of a state where only the CLEC provides services, leaving CLEC with longer installation intervals than Qwest in another part of the state).[244] The QPAP permits a force majeure excuse only if failure of wholesale performance is "the result of" the force majeure event.[245] This standard protection sufficiently ensures that Qwest can excuse performance only when the force majeure event legitimately serves as an excuse.

CLEC BAD FAITH

Section 13.3(2) of the QPAP properly shields Qwest from Tier 1 and Tier 2 payments when the nonconformance results from second situation that is beyond its control: an act or omission by a CLEC that is contrary to its obligations or an act of bad faith. For example, Qwest would not be required to make payments if a CLEC were to "dump[]" orders or applications at or near the end of a business day or in "unreasonably large batches."[246] These terms would be interpreted on a case-by-case basis, in light of the factual circumstances. As a general matter, however, they are intended to refer to situations in which a CLEC submits orders or applications in large quantities that has the foreseeable effect of causing Qwest to miss a performance standard or where CLEC had the ability to submit the orders over multiple days or through project management.

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243 *See* AT&T Comments at 11; WorldCom Comments at 50.

244 *See* C. Inouye 8/15/01 Testimony, Tr. at 130-31, 245-50.

245 QPAP § 13.3.

246 *Id*.

Similarly, section 13.3(2) provides that if a CLEC "fail[s] to provide timely forecasts to Qwest," Qwest will be excused from its Tier 1 and Tier 2 payments if the forecasts "are required to reasonably provide services or facilities."[247] Qwest does not contend, however, that *any* failure to provide timely forecasts would be deemed an act of bad faith — just those that are so required. For clarification purposes, Qwest would not oppose language to make clear that section 13.3(2) applies only when such forecasts are reasonably required "under the SGAT or state rules" to provide services or facilities.[248]

Covad argues that the "CLEC bad faith" exclusion should be eliminated because "Qwest [would have] the sole right to determine whether a CLEC has acted in a manner inconsistent with its obligations under the applicable interconnection agreement or controlling law, or whether a CLEC has acted in 'bad faith.'"[249] This assertion is incorrect. Qwest bears the burden of demonstrating that its nonconformance with a performance measure is excused on one of the permissible grounds, and the dispute resolution provisions of the SGAT are available to CLECs under this provision. Moreover, as the New Mexico commission's witness, Dr. Griffing, testified, CLEC gaming of the self-executing payment system is a very real possibility.[250] CLECs might, for example, save up all of their orders and send them in to Qwest all at once in hopes that "they'll gain more from having failure than they will have having Qwest comply."[251] Such CLEC behavior creates a "moral hazard," when economic actors "undertak[e]

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247 *Id*. § 13.3(2).

248 *See* Qwest Corporation's Responses TO ELI, Time Warner Telecom and XO Requests for Clarification on Qwest's PAP (response to request #6).

249 Covad Comments at 30-31.

250 *See* M. Griffing 8/27/01 Testimony, Tr. at 118-19.

251 *Id*. at 119.

actions, especially when they cannot be monitored contrary to what would otherwise be expected of them or what is contrary to public policy."[252] Dr. Griffing testified that such CLEC behavior "is possible. It could happen."[253]

Covad proposes in the alternative that Qwest be required to place contested Tier 1 payments into an interest-bearing escrow account. Such a measure is unnecessary, both because Qwest must show that it was justified in invoking the exclusion and because Qwest would have the same incentive to resolve any dispute over a claimed exclusion regardless of whether the amount in question were being held in escrow. In addition, Qwest has already agreed to pay interest on late payments.[254]

EQUIPMENT FAILURE AND THIRD-PARTY SYSTEMS

Sections 13.3(1) and 13.3(3) excuse nonconforming performance due to "[e]quipment failure" and "problems associated with third party systems or equipment," respectively. Equipment failure and third-party events are typical exclusions from liability for nonperformance in commercial agreements.[255]

These two clauses, while containing some overlap, nonetheless address certain different situations. "[E]quipment failure" includes the failure of *any* equipment,

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252 *Id*. at 118-19.

253 *Id*. at 119; *see also Verizon Delaware Inc. v. Covad Communications Co*., Complaint, at 3-4 (N.D. Cal.) filed June 1, 2001 (suit alleging that Covad "orchestrated a deliberate scheme to attribute Covad's service failures to Verizon . . . [and that] Covad's former employees were 'pressured' and 'badgered' into issuing false reports about Verizon's services and 'reprimanded' if they failed to comply").

254 *See supra* discussion of "Interest on Late Payments."

255 *See, e.g., Aumet v. Bear Lake Grazing Co*., 732 P.2d 679, 683 (Idaho Ct. App. 1987) (noting that the lease did not contain clauses "that would provide the lessee relief from such a covenant in the event of unforeseen delays caused by such factors as market fluctuations, *equipment breakdown or unavailability*, and other *force majeure* circumstances") (first emphasis added); *Edington v. Creek Oil Co*., 690 P.2d 970, 973 (Mont. 1984) (noting that the contract at issue provided, in relevant part, that the lease would terminate in the event of "*breakage or failure of machinery or equipment . . .* [or] *failure of pipe lines normally used to transport or furnish facilities for transportation*") (emphasis added).

including equipment owned and operated by Qwest; under section 13.3(1), if any of this essential equipment fails, Qwest will not be obligated to make Tier 1 or Tier 2 payments. By contrast, the "third party systems or equipment" clause in section 13.3(3) specifically addresses failure of equipment systems owned or operated by third parties, but that Qwest needs to provide the levels of service required under the QPAP. In this second situation, Qwest will remain obligated to make Tier 1 or Tier 2 payments if the problems with the third-party systems or equipment could have been avoided with reasonable diligence. Section 13.3(3) also provides that Qwest may not invoke the third-party exclusion more than three times per year, giving Qwest an incentive to select and monitor its third-party vendors carefully. This exclusion does not — and should not — contain a deadline by which the third-party systems or equipment must be repaired.[256] The inclusion of such a deadline would entirely contradict the need for the exclusion, *i.e.*, that Qwest does not have reasonable control over the repair of any such systems and equipment.

CONFIDENTIAL CLEC DATA

Pursuant to section 14.2, the CLECs would authorize Qwest, upon a state commission's request, to provide the commission with CLEC data so that the commission can analyze the QPAP results and evaluate whether Qwest is performing adequately.[257] AT&T argues that Qwest should not be permitted to provide the CLEC data to the commissions; rather, the commissions should approach the various CLECs directly for the information.[258] Such authorization, however, is administratively difficult.

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256 *But see* Z-Tel's Comments § XI (suggesting arbitrary "72-hour" deadline).

257 *See* C. Inouye 8/14/01 Testimony, Tr. at 150.

258 *See* AT&T Comments at 17.

Moreover, because Qwest's compliance with the QPAP will be at issue, Qwest must be allowed to provide the information directly, without the concern of tampering. Because Qwest recognizes that portions of these performance results may contain confidential CLEC information, however, Qwest would not oppose adding language to section 14.2 to indicate that the information would be provided to the commission on a confidential basis.[259] Of course, once the information is received by the state commissions, Qwest would have no control of or responsibility for the Commission's continued treatment of the data as confidential.

DISPUTE RESOLUTION

CLECs' comments on the QPAP did not raise any issues about dispute resolution. However, based on questions raised at the hearings from August 14-17, 2001, Qwest has offered to clarify the dispute resolution mechanism applicable to the QPAP by adding a new, separate section on dispute resolution in the QPAP itself. As Qwest outlined in its August 28, 2001 responses to CLECs' requests for clarification, Qwest is willing to add the following provision:

> **18.0 Dispute Resolution**
>
> This section governs dispute resolution related to the QPAP. Dispute resolution shall be available only for disputes arising under the sections of the QPAP listed in this section 18.0. The mechanism for dispute resolution shall be the dispute resolution procedures specified in sections 5.18.2 through 5.18.8 of the SGAT. Dispute resolution under the procedures provided in those sections of the SGAT shall be the preferred but not the exclusive forum for the disputes specified in this section 18.0. Each party reserves its rights to resort to the Commission or to a court, agency, or regulatory authority of competent jurisdiction. The sections of the QPAP for which dispute resolution is available are:

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259 *See* C. Inouye 8/15/01 Testimony, Tr. at 278-81.

- Disputes arising under sections 13.3 and 13.3.1;
- Application of an offset against future payments under section 13.7;
- Proceedings under section 13.9;
- Payment adjustments for under- and over-payments under sections 15.1 and 15.3; and
- Establishment of good cause under section 15.2.

Using the procedures in the SGAT (sections 5.18.2 through 5.18.8) allows disputes to be handled under procedures that will be familiar to the parties and should facilitate expeditious resolution of the disputes. In addition, this proposed section, like the SGAT, preserves the parties' rights to take their dispute to a commission, agency, court, or other competent authority.

EFFECTIVE DATE

Under section 13.1, the QPAP will go into effect in each state when Qwest receives effective 271 authority from the FCC for that state.[260] The QPAP is expressly offered to provide assurance of future compliance *after* 271 entry; thus, it would be inconsistent with the purpose of the PAP to implement it before Qwest receives 271 authority. A Commission's unilateral imposition of the QPAP, particularly the self-executing Tier 1 and Tier 2 payments, implicates serious constraints under state law as well as under basic principles of administrative law and procedural due process.

CLECs' requests to implement the QPAP before 271 entry misconstrue the purpose of a PAP. Contrary to the comments of certain CLECs,[261] the QPAP performance standards to which Qwest has voluntarily agreed to bind itself, should it receive section 271 approval, are not required by section 271 or 251. The FCC has never

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260 *See* QPAP § 13.1. In addition, for the QPAP to enter into effect for each CLEC, the CLEC must have adopted the QPAP in its interconnection agreement. *See id*. § 13.2.

required a BOC to make payouts under a PAP before 271 entry — indeed, it has repeatedly observed that it has "never required" a PAP in the first place, because the 1996 Act does not require a PAP.[262] Qwest's QPAP proposal is thus entirely contingent upon its receipt of 271 approval from the FCC and relates to its special obligations under the public interest requirement of section 271(d)(3)(C) — not any of the provisions of section 251.[263]

In short, PAPs are voluntary arrangements, required by neither section 271 nor section 251, offered by a BOC wishing to enter the interLATA market whereby the BOC agrees, in exchange for section 271 approval, to bind itself to a PAP. The terms of the PAP are extraordinary, requiring payments even if CLECs suffer no actual damages. Such terms have been proposed only pursuant to a section 271 application and cannot be transformed by regulatory fiat into a wholly unrelated obligation without Qwest's consent.

The CLECs have identified no authority for such a transformation. Each State's Commission may only act within the bounds of the authority that its state legislature has given it.[264] The QPAP is self-executing. It is not triggered by a complaint, whether

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261 *See, e.g.*, AT&T Comments at 15-17; Covad Comments at 11-13; WorldCom Comments at 16-19; XO Comments at 15-17.

262 *See Bell Atlantic New York Order* ¶ 429; *see also SBC Texas Order* ¶ 420; *SBC Kansas/Oklahoma Order* ¶ 269; *Verizon-Massachusetts Order* ¶ 236. The FCC's view that the Act does not require a PAP, let alone one that takes effect *before* 271 entry, is entitled to substantial deference. *See AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366 (1999); *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

263 Contrary to AT&T's claim, CLECs have always had the ability to enforce section 251 obligations under interconnection agreements and a PAP is not required for that purpose.

264 *See, e.g., US West Communications, Inc. v. PSC*, 998 P.2d 247, 249 (Utah 2000); *Capital Elec. Coop., Inc. v. PSC*, 534 N.W.2d 587, 589 (N.D. 1995); *Montana Dakota Utils. Co. v. PSC*, 847 P.2d 978, 983 (Wyo. 1993); *Utah Power & Light Co. v. Idaho PUC*, 685 P.2d 276, 281 (Idaho 1984); *Montana Power Co. v. PSC*, 671 P.2d 604, 611 (Mont. 1983); *Jewell v. Washington Utils. & Transp. Comm'n*, 585 P.2d 1167, 1169 (Wash. 1978); *ENMR Tel. Coop. v. New Mexico State Corp. Comm'n*, 884 P.2d 810

initiated by a party claiming injury or by a state commission. The CLECs have failed to demonstrate that the laws of any of the nine states provide the necessary authority to require Qwest to make self-executing payments, payable to its competitors as damages or payable to the state, in the absence of any opportunity to be heard.

Indeed, imposition of a self-executing PAP on a non-consenting BOC before section 271 approval is granted would independently violate due process principles. Basic principles of administrative law and procedural due process under federal and state law would require that Qwest be afforded a full and fair opportunity to be heard before the PAP would be imposed upon it by regulatory fiat: "The right to prior notice and a hearing is central to the Constitution's command of due process,"[265] and some kind of hearing is required at some time before a State finally deprives a person of his property interests.[266] The imposition of the QPAP's self-executing payments based on performance measures established without affording Qwest an opportunity to challenge each of these measures would therefore be entirely inconsistent with due process rights.

In particular, the QPAP imposes penalties on Qwest for discriminating against its competitors simply because of statistical disparities in performance measures. Where allegations of discrimination are based on conclusions drawn from statistical data, due process requires that the charged party be given the opportunity to rebut the purported

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(1994); *PSC v. New Mexico Envtl. Improvement Bd.*, 549 P.2d 638, 641 (N.M. Ct. App. 1976); *Chicago, Burlington & Quincy R.R. Co. v. Iowa State Commerce Comm'n*, 105 N.W.2d 633, 635 (Iowa 1960).

265 *United States v. James Daniel Good Real Prop.*, 510 U.S. 43, 53 (1993); *see also Seamons v. Snow*, 84 F.3d 1226, 1235 (10th Cir. 1996).

266 *See Zinermon v. Burch*, 494 U.S. 113, 132 (1990) ("In situations where the State feasibly can provide a predeprivation hearing before taking property, it generally must do so regardless of the adequacy of a postdeprivation tort remedy to compensate for the taking."); *see also Propert v. District of Columbia*, 948 F.2d 1327, 1332 (D.C. Cir. 1991) ("[H]owever weighty the governmental interest may be in a given case, the amount of process required can never be reduced to zero — that is, the government is never

statistical proof or to explain the apparent statistical disparity.[267] Because statistical data are always rebuttable, due process demands that Qwest have the opportunity to respond to any alleged disparity before a state imposes monetary penalties.[268] Thus, adopting the QPAP without Qwest's consent would deny Qwest its constitutional right to an opportunity to respond to any charges leveled against it.

Moreover, principles of due process and equal protection preclude treating BOCs differently, for these purposes, from non-BOC incumbent LECs. The FCC has already authoritatively determined that section 271 does not require the coercive imposition of a PAP on a BOC (or, of course, any other incumbent LEC) and particularly not in circumstances divorced from a grant of 271 authorization. But there could be no constitutionally valid justification *apart* from section 271 to single out BOCs for special disadvantages, particularly when they are not yet even providing the interexchange services that give rise to the ostensible competition concerns underlying the enactment of section 271. Just as there is no sound basis in law or policy for a state commission to expose non-BOC incumbent LECs to a scheme of self-executing payments assessed without due process, neither is there any basis for inflicting such a scheme on BOCs themselves, especially in the absence of section 271 authorization.

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relieved of its duty to provide *some* notice and *some* opportunity to be heard prior to final deprivation of a property interest.") (emphasis in original).

267 *See Hazelwood Sch. Dist. v. United States*, 433 U.S. 299, 309-13 (1977) (holding that appellate court committed error by disregarding evidence that could rebut proffered statistical proof).

268 *See International Bhd. of Teamsters v. United States*, 431 U.S. 324, 339-40 (1997) (finding that "statistics are not irrefutable" and "may be rebutted" in discrimination cases).

RESPONSE TO "MEMORY"

Initial CLEC Payments Under The QPAP Should Not Be Artificially Inflated Based On "Memory."

CLECs propose that at the time the QPAP becomes effective that the count of consecutive month misses should include the months prior to the effective day of the QPAP.[269] This CLEC proposal is simply another means of putting the QPAP into effect without section 271 approval and, as demonstrated by Qwest's price-out data, is neither necessary to insure compensatory payment levels, nor to provide Qwest with financial incentives to meet performance standards.

INCENTIVE WHILE APPLICATION PENDING

Qwest's incentive to maintain a high level of performance under section 271 continues even while its 271 application is pending. Dr. Griffing's concern that there will be "a gap of at least four months" between the completion of the OSS test and the FCC's decision on the application, during which Qwest's performance would somehow escape regulatory scrutiny[270] is unwarranted. CLECs and the state commissions will be free to supplement the record with evidence that is current through the date of their comments. And the FCC has discretion to accept decisionally significant new data thereafter.[271] Thus, even after the CLECs and state commissions have commented on the pending application, if there is a material change in Qwest's performance results, CLECs and the

269 *See* AT&T Comments at 28; Covad Comments at 12-13; Dr. Griffing Written Testimony at 29-30; WorldCom Comments at 19.

270 M. Griffing 8/27/01 Testimony, Tr. at 127-29.

271 *Bell Atlantic New York Order* ¶ 35 (citations omitted).

state commissions could seek to present that factual information to the FCC and the FCC would have discretion to consider it if the FCC deems it to be probative.

CONCLUSION

For the foregoing reasons, Qwest respectfully requests that the Facilitator recommend to the nine state commissions that the QPAP satisfies the public interest standards established by the FCC.

Dated this 13th day of September, 2001.