BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH

In the Matter of the Application of U S WEST Communications, Inc., for Approval of Compliance with 47 U.S.C. § 271(d)(2)(B)	)	DOCKET NO. 00-049-08

BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

In the Matter of the Investigation Into U S WEST Communications, Inc.'s Compliance With Section 271 of the Telecommunications Act of 1996	)	Docket No. UT-003022
In the Matter of U S WEST Communications, Inc.'s Statement of Generally Available Terms Pursuant to Section 252(f) of the Telecommunications Act of 1996	)	Docket No. UT-003040

ELI, TIME WARNER TELECOM, AND XO
OPENING BRIEF ON QWEST'S PERFORMANCE ASSURANCE PLAN

Electric Lightwave, Inc. ("ELI"), Time Warner Telecom of Washington, LLC ("TWTC"), and XO Utah, Inc., and XO Washington, Inc. ("XO") (collectively "Joint CLECs"), hereby submit the following Opening Brief on Qwest Corporation's ("Qwest's") proposed Performance Assurance Plan ("PAP" or "QPAP"). The Joint CLECs recommend that the Commission reject the QPAP until Qwest makes the substantial modifications necessary to provide Qwest with an adequate financial incentive to perform its obligations under federal and state law and Qwest's interconnection agreements with

competing local exchange companies ("CLECs").

INTRODUCTION

The fundamental purpose of any performance assurance plan is to provide Qwest with sufficient financial incentive to meet its contractual and other legal obligations to CLECs. In other words, failure or refusal to comply with its obligations should be more costly and less beneficial to Qwest than compliance. An appropriate plan would establish performance standards that can be attained by a reasonably efficient and motivated provider, as well as payment levels for failure to meet those standards that provide the appropriate incentive to meet those standards. The ultimate objective for Qwest should be to make no payments because Qwest is providing service to CLECs that meets or exceeds the performance levels in the plan. Even Qwest agrees that it *aspires* to achieve 100% compliance with its performance requirements and that "Qwest's goal is to pay as little as possible by getting the services as high as possible." 8/29 Tr. at 57-58 (Qwest Inouye).

The QPAP fails to satisfy these standards. The performance measures are derived from the performance indicator definitions ("PIDs") developed during the Regional Oversight Committee ("ROC") process to evaluate Qwest's Operational Support Systems ("OSS"), but Qwest's use of those PIDs enables Qwest to avoid making any payment for a significant number of CLEC orders. The payment levels, caps, and limitations that Qwest has proposed also do not provide Qwest with an adequate incentive to perform. Indeed, Qwest's own calculations of payments that would have been made had the QPAP been in effect earlier this year demonstrate that even the incentive to obtain interLATA authority under Section 271 is insufficient to compel Qwest to meet its performance obligations. Qwest's assertion that it is "very proud" of meeting its performance standards an average of only 92% of the time, 8/14 Tr. at 135-36 (Qwest Inouye) is particularly troubling, especially in light

of the significantly poorer performance on critically important measures such as coordinated cuts. *See* Confidential Ex. S9-QWE-CTI-5 at 3 (Inouye Presentation).

The QPAP as currently proposed will not provide Qwest with sufficient financial incentive to comply with its legal obligations. Accordingly, the Commission should condition any approval of the QPAP on modifications to the QPAP (1) to apply and provide payments for all critically important facilities and services Qwest is obligated to provide to CLECs, (2) to establish reasonable payment levels without caps, and (3) to remove unlawful and unreasonable limitations on the term, use, and applicability of the QPAP. The record, morever, demonstrates that not even Qwest fully understands how the language it has proposed will operate in practice, and the Commission would be better served if the parties develop language that implements Commission determinations of disputed issues. The Commission thus should also conduct additional proceedings, similar to the workshops conducted on checklist items, to develop appropriate contract language for the QPAP.

DISCUSSION

A. The QPAP Fails to Include Any Remedies for Nonperformance With Respect to a Significant Number of Facilities and Services.

Qwest intends the QPAP to provide the exclusive remedy for any and all contractual claims a CLEC may have against Qwest related to Qwest's performance under the interconnection agreement. The QPAP, however, does not include payments for Qwest's failure to provision all unbundled network elements ("UNEs") or other facilities and services that Qwest is legally obligated to provide to requesting CLECs. Specifically, the QPAP excludes payment (and in most cases measurement) for cancelled orders, special access circuits used to provide local exchange service, and enhanced extended loops ("EELs"). Each of these items is critically important to the ability of CLECs – particularly

facilities-based CLECs – to offer local service in competition with Qwest. The Commission, therefore, should refuse to approve the QPAP until it is revised to include these items.

1. Cancelled Orders

Qwest touts its QPAP as compensating CLECs for Qwest's inadequate performance even though "[n]o evidence exists that CLEC lost its retail customer; all evidence to the contrary; the order was completed, not cancelled." Ex. S9-QWE-CTI-5 at 5 (Inouye 8/14 Presentation). The QPAP, however, provides *no* payment when the CLEC loses its retail customer and cancels its order to Qwest. The ordering and provisioning measures only measure completed orders. If Qwest delays a CLEC order and the CLEC's customer then cancels its order, the CLEC has lost a customer because of Qwest's nonperformance and no QPAP payment applies.[1] *E.g.*, 8/15 Tr. at 288-89 (Qwest Inouye). That order is not even counted among Qwest's total orders when Qwest is calculating percentages or means. To add insult to injury, the CLEC also is precluded from seeking any other remedy because, as discussed in more detail below, the QPAP is effectively the exclusive remedy for any violation of Qwest's legal obligations to the CLEC. As a result, the CLEC receives no compensation for Qwest's poor performance that causes the most damage to CLECs.

Qwest's only response to this concern is the tired refrain that the PIDs were developed in the ROC OSS collaborative, and CLECs agreed to those PIDs. CLECs, however, did not agree that they are not entitled to any compensation for orders they cancel because of Qwest's failure to provision the orders as promised. Nor did CLECs anticipate that Qwest would adopt a policy that permits Qwest

[1] Similarly, PO-5, which measures firm order confirmations ("FOCs"), measures only FOCs that Qwest has actually provided, *see* Ex. S9-QWE-MGW-3 at 12 (PIDs) (PO-5 includes only orders "that *receive* an FOC during the reporting period") (emphasis added), and Qwest could avoid QPAP payments on late FOCs by never providing an FOC.

unilaterally to cancel orders if Qwest determines that it does not have the facilities to provision that order. *E.g.*, WUTC Workshop 4 Ex. 952 (Qwest Position Statement on Build Requirements for Unbundled Loops). The QPAP enables Qwest to avoid both performance and payment obligations by never provisioning the order. Qwest can simply delay the installation of a UNE or other facility or service until the CLEC cancels the order or until Qwest cancels the order. Such an outcome should be antithetical to an appropriate PAP.

Accordingly, the Commission should require Qwest to include cancelled orders among the orders eligible for OP payments under the QPAP. Rather than calculating payments on performance solely based on completion of the order, Qwest should be required to calculate payments based on completion *or cancellation* of an order. If the order is cancelled before the installation is due and before Qwest has notified the CLEC of an anticipated delay, no payment would apply. If the order is cancelled after Qwest has missed the installation date or notified the CLEC that Qwest will miss the installation date, the CLEC should receive the same payment it would have received had the order been installed on the latest installation due date.

2. Special Access

Facilities-based competitors, including the Joint CLECs, heavily rely on Qwest private line and special access circuits to provide local exchange service to their customers. These circuits include high capacity (DS-1, DS-3, and OC-n) loops and transport, individually or in combination, that are used to provide the connection between the customer location and the CLEC network. Ex. S10-TWT-TEK-1 at 4 (Kagele); Ex. S10-XOU-RMK-1 at 18 & 20 (Knowles). "CLECs are just as dependent on the timely and proper provisioning by Qwest of special access services as are CLECs that purchase equivalent high capacity services on an unbundled or resale basis." Ex. S10-TWT-TEK-1 at 4-5.

Indeed, "XO today uses private lines as its primary mode of entry in markets throughout the Qwest region." Ex. S10-XOU-RMK-1 at 21. The QPAP, however, does not include any payments or other remedies for Qwest's substandard provisioning of private line or special access circuits used to provide local service.

The QPAP's failure to include measures and payments for private line and special access circuits means that Qwest has no financial incentive to provide private line or special access circuits to CLECs as Qwest will have if the CLEC obtains the same facilities as UNEs or EELs. To the contrary, Qwest will have every incentive to lower the service quality of private line and special access circuits. Those circuits comprise a significant portion of the "retail" analog for unbundled loops that Qwest uses to determine whether its provisioning of facilities and services to CLECs is in parity with Qwest's retail performance. Lowering the service quality of private line and special access circuits enables Qwest to lower the service quality of unbundled loops and transport while continuing to provide "parity" between "retail" and "wholesale" service. Ex. S10-XOU-RMK-1 at 18-20. The result would be further undermining of the development of effective local exchange competition as CLECs are unable to match the service quality that Qwest provides to its true retail customers due to the inferior service that Qwest provides to the CLECs.

Verizon and SWBT have engaged in just such service degradation to the detriment of competition in New York and Texas after the FCC granted these incumbent local exchange companies ("ILECs") Section 271 authority. Ex. S10-TWT-TEK-1 at 14. As a result, the New York Commission has initiated an investigation into Verizon's provisioning of private line and special access circuits, and the Texas Commission has required SWBT to modify its PAP to include these circuits. *Id*. at 11-12. The Commission should not wait until after Qwest has been granted Section 271 authority to

address this issue. Rather, the Commission should require Qwest to include private line and special access circuits used to provide local service among the facilities and services subject to measurements and payments under the QPAP.

Qwest opposes any application of the QPAP to private line or special access circuits, contending that CLECs can obtain the same functionality by ordering EELs or other UNEs. Qwest is incorrect, at least as a practical matter.[2] Qwest refuses to permit CLECs to use the same Qwest facilities for both UNEs and special access circuits, a position that the multi-state facilitator has recommended that the Utah Commission adopt.[3] A CLEC thus can only obtain high capacity UNEs if it purchases completely separate facilities, doubling the cost and rendering UNEs economically and practically infeasible in most cases. Ex. S10-XOU-RMK-1 at 22-23. In addition, Qwest refuses to construct UNEs but will construct the same facilities as private line or special access circuits – again, a position that the multi-state facilitator has endorsed.[4] *Id*. at 23-24. A CLEC that needs high capacity circuits from Qwest when Qwest claims that facilities are not available thus has no alternative but to obtain those circuits as private line or special access circuits. Qwest is not entitled to have it both ways. Loop and transport facilities used to provide local exchange service should be treated the same. If CLECs must obtain those facilities from Qwest as private line or special access circuits rather than UNEs, the CLECs are entitled to the same performance assurance applicable to UNEs.

---

[2] The theoretical available ability of EELs and high capacity UNEs in the wake of the FCC's UNE Remand Order lead ELI to drop its request that the ROC include private line and special access circuits in the PID measures, but ELI's subsequent experience has demonstrated that Qwest does not, in fact, make EELs and high capacity loops available. 8/28 Tr. at 23-24 (ELI Peters).

[3] The Initial Order in Washington does not address this issue directly, and the issue is pending before the Commission.

[4] The Initial Order in Washington has rejected Qwest's position, at least in the context of UNEs in

Qwest also contends that CLECs and other carriers purchase the vast majority of private line and special access circuits out of Qwest's interstate tariffs and that the Commission has no jurisdiction over interstate tariffed services. The Commission, however, is charged with ensuring that Qwest provides facilities and services at rates, terms, and conditions that are fair, just, and reasonable, and with fostering the development of effective local exchange competition. *See*, *e.g.*, Utah Code Ann. § 54-8b-1.1(3) & (6) and 2.2; RCW 80.36.080 & 300(5). The Act also expressly authorizes the Commission to enforce service quality and other state requirements with respect to access to, and interconnection with, Qwest's network. 47 U.S.C. § 251(d)(3) & 252(f)(2). Yet, as Qwest has repeatedly stated, the Act does not require the Commission to adopt or approve a specific PAP but generally requires that Qwest provide facilities and services to CLECs that are at least equal in quality to the facilities and services Qwest provides to itself. *E.g.*, *id*. § 251(c). Thus, nothing in the Act prevents the Commission from refusing to approve the QPAP unless and until it ensures that Qwest will provision the facilities and services CLECs need to provide local exchange service at acceptable levels of service quality, even if CLECs must obtain those facilities and services out of Qwest's interstate tariff. The Texas Commission reached that conclusion, and so should this Commission.

The record evidence demonstrates that private line and special access circuits are critical to facilities-based CLECs' ability to provide local exchange service to their customers and that the PID measures and QPAP payments could readily be revised to apply to such circuits. Ex. S10-XOU-RMK-1 at 18-21 & 29-30; Ex. S10-TWT-TEK-1 at 4-10. Indeed, Qwest did not even attempt to contest these issues. The Commission, therefore, should require Qwest to include private line and special access circuits in the QPAP to the same extent and subject to the same measures and payments

---

general. *See* Thirteenth Supp. Order ¶¶ 79-80.

as comparable UNEs.

3. EELs

The perils of "productization" have no better illustration than exclusion of EELs from payments under the QPAP. An EEL is a combination of a loop and transport. To the extent that EELs are included in the PID measures, they are measured only as "diagnostic," *i.e.*, without comparison to a benchmark or parity standard. *E.g.*, Ex. S9-QWE-MGW-3 at 25, 28 & 34 (PIDs); 8/17 Tr. at 76 & 79-80 (Qwest Williams). If a CLEC orders the loop and transport elements separately, each UNE would be eligible for payments under the QPAP. If the CLEC orders the elements as a combination, however, that combination is not eligible for *any* payment under the QPAP.[5] 8/17 Tr. at 76 (Qwest Williams). Qwest undoubtedly will argue that CLECs should approach the ROC to establish a benchmark or parity measure for EELs so that QPAP payments would apply. *See id*. at 76-77. The Commission and the CLECs, however, have no assurance that the ROC will establish a benchmark or parity standard for EELs or that any such action would be effective before Qwest incorporates the QPAP into the SGAT and "freezes" the QPAP until the first periodic review after Qwest is granted Section 271 authority. *See id*. Nor has Qwest proposed any payment level for EELs if they were to be included in the QPAP.

The exclusion of EELs from the QPAP is inconsistent with the public interest, as well as Qwest's position that special access circuits should not be included in the QPAP because EELs are available. Qwest is not entitled to exempt EELs from its QPAP payment obligations simply because Qwest, rather than the CLEC, actually combines the loop and transport UNEs. EELs, therefore,

[5] In contrast, a combination of a loop and multiplexing – which is ordered using the same process as ordering an EEL, *e.g.*, SGAT § 9.2.4.6 – would be measured and eligible for payments under the

should be eligible for the same payments under the QPAP for which the unbundled loop and transport UNEs are eligible when ordered individually, and the QPAP should be modified accordingly.

B. The Payment Levels in the QPAP Do Not Provide an Adequate Incentive for Qwest to Perform Its Legal Obligations.

Not only should the QPAP apply to all critical facilities and services that Qwest must provide to CLECs but the payments for failure to provide those facilities and services must be established at a level that gives Qwest the financial incentive to perform. The payment levels in the QPAP currently are not established at that level. Particularly problematic are the caps that Qwest places on its payment obligations, which are fundamentally inconsistent with Qwest's claims that the QPAP compensates CLECs for Qwest's poor performance and that the payments provide the appropriate incentive. Qwest also continues to refuse to establish reasonable payment levels, particularly for "high value" facilities and services, *i.e.*, facilities and services with high recurring or nonrecurring rates and are used to provide high capacity and other services to customers with critical telecommunications needs. The Commission should not approve the QPAP until Qwest removes the caps on its payment obligations and establishes appropriate payment levels for Qwest's nonperformance.

1. Caps

Qwest proposes a variety of caps on its QPAP payment obligations, including capping total liability at 36% of net revenues (QPAP § 12), monthly escalation of payment levels at the six month level (QPAP § 6.2.2, Table 2), and performance measures that are averages or means at 100% of the

---

QPAP. 8/17 Tr. at 80-81 (Qwest Williams).

orders used to calculate the average or mean (QPAP § 8.2.1.2). These caps are inconsistent with the public interest and should be eliminated. Their sole purpose is to insulate Qwest from the consequences of its own poor performance. Indeed, Qwest seeks to bind the Commission, as well as the CLECs, to these caps and proposes to limit the remedies the Commission may award in the event the QPAP payment obligations would exceed the total cap to "recommend[ing] to the FCC that Qwest should cease offering in-region interLATA services to new customers." QPAP § 12.3. Qwest's purported justification for caps is that the caps represent the payment level that is sufficient to provide Qwest with the necessary financial incentive to improve its performance. That position lacks even common sense. No cap would be necessary if the caps are set at the levels necessary to compel Qwest to perform because by definition, payments would not exceed that level. If payments would exceed the cap, however, the prior payment levels obviously were not sufficient financial incentive for Qwest to improve its performance. *E.g.*, Ex. S10-XOU-RMK-1 at 9-11 (Knowles).

Qwest also contends in the context of the overall cap that the FCC has approved PAPs for other ILECs that include a cap on payments at 36% of net revenues. While true, that does not justify Qwest's proposal selectively to mimic that aspect of those plans. Unlike those plans, the QPAP is effectively the *sole* remedy available to a CLEC for Qwest's poor performance. *Id*. at 12-14. Yet, the total dollars represented by 36% of net revenues is less than the profits Qwest generates from intrastate services under its authorized rate of return in Washington and former rate of return in Utah (which Qwest now exceeds under price cap regulation). *Id*. at 11. Qwest thus could continue to provide local exchange service at a profit while making the maximum payments under the QPAP for providing poor service to its competitors – without even considering the profits Qwest generates from "deregulated" services and would generate from providing interLATA services. *See* 8/16 Tr. at 66-67 (Qwest

Inouye) (revenues from deregulated services are not included in the ARMIS figures used to calculate the cap). Under these circumstances, the QPAP would just be another cost of doing business, rather than a financial incentive to ensure the development of effective local exchange competition.

Qwest further claims in the context of its proposed cap on the escalation of individual monthly payments that a cap is necessary to prevent CLECs from being overcompensated. The primary purpose of the QPAP is to give Qwest the financial incentive to live up to the letter and spirit of its interconnection agreements, as opposed to attempting to quantify and compensate CLECs for the losses they suffer as a result of Qwest's nonperformance. *Id*. at 10. Payments to CLECs provide some compensation but principally encourage Qwest to improve its performance, particularly in light of the fact that Qwest finds paying CLECs *any* money especially distasteful. If the Commission nevertheless shares Qwest's concern with overcompensating CLECs, the Joint CLECs would propose, along with Z-Tel, that Tier 1 payments stop escalating after six months but that Tier 2 payments begin to escalate at that time. Ex. S10-ZTL-GSF-4 at slide 15 (Ford Presentation). Under that structure, payments for nonperformance would continue to increase after six months, but the state, rather than the CLECs, would receive the increase.

Qwest concedes that this proposal would address its concerns with overcompensating CLECs, but Qwest rejects the proposal because the result, in Qwest's view, would be over-deterrence. 8/16 Tr. at 6 (Qwest Inouye). Qwest offered no evidence to support its view or to explain why Qwest would continue to fail to perform after six months of making escalating QPAP payments if those payment levels provide Qwest with sufficient incentive to perform. Common sense, as well as record evidence, demonstrates that Qwest will not perform unless it is more painful not to perform, and continuing to increase payment levels for successive months of failure is necessary to increase the

financial pain to Qwest until that level is reached. *E.g.*. Ex. S10-XOU-RMK-1 at 9 (Knowles); Ex. S10-ZTL-GSF-4 at slide 15 (Ford Presentation).

Finally, Qwest challenges the proposals made by AT&T and Z-Tel to remove the cap on payments for performance measures calculated as averages or means, *e.g.*, OP-6 (delayed days) or MR-6 (mean time to restore service). Qwest claims that the result of removing the cap would be payments for "phantom" orders, *i.e.*, more orders than were used to calculate the average or mean. Qwest's argument is pure sophistry. Qwest created an artificial association between payment levels and total number of orders by establishing payments for delayed provisioning or repair based on all orders or trouble tickets used to calculate the average. There is no correlation between the interval in which an order is provisioned or service repaired and the total number of orders or trouble tickets Qwest receives for the same types of facilities. *See* Ex. S10-ZTL-GSF-4 at slide 7 (Ford Presentation).

The AT&T and Z-Tel proposals to eliminate caps are similar to service quality assessments that state commissions have used historically to encourage Qwest to improve its performance. Such assessments often take the form of a charge or credit (usually the recurring and/or nonrecurring rate for the service) that applies periodically (often every few days or hours, depending on the standard interval) until Qwest provisions the order or repairs the service. Far from demonstrating that that this well-established assessment mechanism results in excessive payments, Qwest's calculation of payment levels without caps demonstrates just how poor Qwest's performance has been. *E.g.*, Ex. S10-ZTL-GSF-4 at slide 2 (Ford Presentation). As is true of all payments under the QPAP, Qwest controls how much it makes in payments to CLECs. Once Qwest provides service to CLECs that is at least equal to the service Qwest provides to itself, Qwest will not have to make any payments for poor performance, including uncapped payments for held orders or delayed repairs.

Accordingly, the Commission should reject the QPAP as inconsistent with the public interest until Qwest modifies its proposal to eliminate all caps on its payment obligations.

2. Payment Classifications and Amounts

Qwest proposes not only to cap its payment obligations but to minimize payment levels. Not until the hearing did Qwest propose payment levels for collocation and high capacity loops that entered the realm of reasonableness,[6] but even then, Qwest gave with one hand and took with the other. The price of more reasonable payment levels for DS-1 and DS-3 loops is to accept significantly lower payment levels for 2-wire loops. Ex. S9-QWE-CTI-5 at 12 (Inouye Presentation). Qwest characterized its proposal as "deaveraging" loop payment levels, yet Qwest produced no evidence to demonstrate that its prior payment level proposal was based on an average of all types of loops or that Qwest's total payment obligations would remain the same under both proposals. To the contrary, Qwest flatly refused to recalculate its performance payments in February through May 2001 to demonstrate the impact of its latest proposals. Indeed, Qwest's total payments may have *decreased* in light of Qwest's representation that few of the orders it used to calculate the payments were for high-capacity unbundled loops. The Commission, therefore, should adopt the higher payment levels for DS-1 and DS-3 loops and transport but should not lower the payment level for two-wire loops.

Qwest should also apply the higher payment levels to four-wire loops. Qwest's refusal to do so apparently is based on Qwest's belief that four-wire loops are not necessarily used to provide "high

[6] Qwest's latest proposed payments for collocation, Ex. S9-QWE-CTI-5 at 14, is far more reasonable than Qwest's initial proposal, but the Joint CLECs remain concerned that the payments do not provide sufficient financial incentive in the context of a full collocation job, which even Qwest concedes can exceed $100,000. Nevertheless, if a CLEC that has opted into the QPAP has an option to seek remedies for inadequate collocation performance under Commission rules (like WAC 480-120-560) or other applicable law as discussed below, the Joint CLECs would not oppose the latest collocation

value" services and that four-wire loop rates are more comparable to two-wire loop rates than to DS-1 or DS-3 rates. Qwest is mistaken. An efficient company will use the least-cost facility that can be used to provide a particular service, and a four-wire loop can be – and generally is – used to provide DS-1 service, even if it *can* be used for "lower value" services as well. Qwest failed to produce any evidence to demonstrate that a significant number of four-wire loops would be used for "lower value" services when those facilities cost almost twice as much as a two-wire loop that could be used to provide the same service.

Qwest also misrepresented the recurring rates for loops in Washington, which improperly skewed its comparative analysis of the various unbundled loop rates and corresponding QPAP payment levels. The Commission established the statewide average two-wire loop rate for Qwest at $18.16 and the four-wire loop at 85% higher than the two-wire rate, or $33.60 on a statewide averaged basis. WUTC Docket Nos UT-960369, *et al*., Seventeenth Supp. Order ¶¶ 525 & 527. Qwest's interconnection agreements include DS-1 loop rates as low as $51.37, Ex. S10-TWT-TEK-1 at 5 (Kagele), and Qwest has proposed recurring rates of $74.88 for a DS-1 loop and $854.58 for a DS-3 loop in Washington, which are pending Commission evaluation. WUTC Docket No. UT-003013, Part B, Ex. 1064 (Qwest Updated Recurring Rates Charges (RFK-3)). Four-wire loop rates and the value of the services provisioned over four-wire loops are far more analogous to DS-1 loops than to two-wire loops, and thus the QPAP payment levels for DS-1 loops are far more appropriate for four-wire loops than the two-wire loop payment levels.

Qwest also has refused to apply the higher payment levels to interconnection trunks, even though those facilities are provisioned at DS-1 and DS-3 levels. Qwest's refusal is based on its claim

---

payment levels that Qwest has proposed.

that Qwest pays most of the cost of those facilities, which allegedly are used predominantly to deliver calls from Qwest's end users to Internet Service Providers ("ISPs") served by CLECs.[7] Qwest's representation is surprisingly good news to CLECs, given that Qwest previously has staunchly refused to pay for any portion of interconnection facilities used for ISP-bound traffic, but even if Qwest has dramatically reversed its position on this issue, Qwest's representations are irrelevant.

The amount each carrier pays for interconnection facilities bears no relationship to the value of those facilities to the CLECs. If CLECs cannot enable their customers to communicate with the vast majority of customers served by Qwest, CLECs are out of business. Qwest claims that the trunk blocking measure, NI-1, addresses this concern, but a CLEC will not market or provision service if it knows that the result will be significant call blocking. Unless Qwest has the appropriate financial incentive to provision interconnection trunks in a timely manner, Qwest effectively can delay and otherwise undermine the development of effective local exchange competition. *E.g.*, 8/17 Tr. at 168-70 (AT&T Finnegan); Ex. S9-ATT-JFF-11 at 7 (Finnegan Presentation). Payment levels for interconnection trunks, therefore, should be at the same levels as DS-1 and DS-3 loops and transport.

Finally, Qwest continues to maintain three payment levels – low, medium, and high – for Tier 1 and for Tier 2 payments, even though the QPAP only uses two of those levels. Qwest should eliminate one of those levels and use the "medium" and "high" rate levels for all Tier 1 payments. None of the measures relegated to the current "low" level merit such minimal treatment. Indeed, the pre-order/order measures should be moved to the "high" category, with only the billing measures left in a lower level. Ex. S10-XOU-RMK-1 at 4-6 (Knowles). The QPAP should be modified accordingly.

---

[7] Qwest, of course, produced no evidence to support its contention that it actually is paying any portion of interconnection facilities, much less that interconnection facilities are used primarily to route ISP-

C. The QPAP's Limited Applicability and Other Restrictions Are Unreasonable and Inconsistent With the Public Interest.

The third major area of deficiencies in the QPAP is the limitations Qwest has proposed for the term, use, and applicability of the QPAP. Qwest's proposal that the QPAP apply only when, and as long as, Qwest provides interLATA services ignores the importance of the QPAP to enforcing Qwest's legal obligations. Qwest also proposes a series of limitations that, in effect, would shield Qwest from any and all liability for its actions related to CLECs, under any theory of liability, except payments under the QPAP, and that would prevent any changes to the QPAP except those to which Qwest agrees. Such limitations are unlawful, unreasonable, and inconsistent with the public interest, and the Commission should refuse to approve the QPAP until those limitations are removed.

1. Effective Dates

Qwest proposes that the QPAP take effect only after Qwest has been granted authority to provide interLATA services under Section 271. QPAP § 13.1. Qwest's proposal is not reasonable. "While an appropriate PAP will assist Qwest to demonstrate compliance with Section 271, the fundamental purpose of the PAP is to promote the development of effective local exchange competition by ensuring that Qwest provides CLECs with access to, and interconnection with, its network as required by state and federal law." Ex. S10-XOU-RMK-1 at 15 (Knowles). The Commission would only further delay the development of effective local exchange competition by waiting until after Qwest has been granted interLATA authority under Section 271 to make the QPAP effective. The Georgia Public Service Commission reached this same conclusion in the context of BellSouth's performance plan and required BellSouth to implement its plan prior to FCC approval of a Section 271 application:

---

bound traffic.

> BellSouth maintains that remedies should only be adopted to prevent backsliding once BellSouth has entered the long distance market. Yet avoiding backsliding is only one of the purposes served by a remedies plan. By delaying adoption of a penalty plan until BellSouth enters the long distance market, the Commission would forego the opportunity to enable more rapid development of competition. At the hearing, many CLECs testified that they are currently experiencing problems with the quality of service they are receiving from BellSouth. These problems could make it more difficult for CLECs to attract and retain customers. An appropriate penalty plan will further encourage BellSouth to provide nondiscriminatory service during the critical early stages of competition, while providing some compensation to CLECs for the additional costs they incur when BellSouth's performance falls short. The Commission finds that the remedy plan shall go into effect 45 days from issuance of order. This time will allow BST to put statistical methods and the remedy plan into operation.

Id. at 16 (quoting *In re: Performance Measures for Telecommunications Interconnection, Unbundling, and Resale*, Georgia PSC Docket No. 7892-U, Order at 23 (Jan. 16, 2001)).

Delaying implementation of the QPAP also raises practical concerns. Qwest presented evidence of the payment levels that would have applied had its proposed plan been in effect earlier this year, but Qwest provided little information about how those payment levels were calculated, other than providing the raw data that Qwest allegedly used. Qwest also refused to update those calculations to incorporate the plan revisions Qwest proposed during the hearings. 8/15 Tr. at 301-03 (Qwest Inouye). The Commission and the other parties, therefore, do not know how the QPAP will operate one it has been implemented, much less whether the plan that Qwest has proposed will create the necessary financial incentive to perform. Immediate implementation of the QPAP would provide much needed information about the QPAP's operation and impact.

The only reasonable basis for Qwest's proposal to postpone implementation of the QPAP would be if the incentive to satisfy Section 271 were sufficient to motivate Qwest to comply with the Act and if the QPAP were intended to take the place of obtaining Section 271 authority. Qwest's own

evidence, however, demonstrates that its incentive to obtain Section 271 authority is not sufficient to ensure compliance with its legal obligations. Had the QPAP, with all of its flaws, been in effect in February through May 2001, Qwest would have made millions of dollars in payments for nonperformance. Confidential Ex. S9-QWE-CTI-5 at 2. Far from showing that the QPAP is "robust," as Qwest claims, this evidence proves that Qwest was not in compliance with Section 271 during that time period – more than five years after passage of the Act and over one year after Qwest initiated these proceedings with the representation that Qwest had met all of its legal obligations. Implementation of the QPAP is needed now, not just after Qwest is authorized to provide interLATA services.

By the same token, the QPAP should remain in effect unless and until the Commission replaces it with its own service quality remedies. Qwest's proposal provides that "in the event Qwest exits the interLATA market, the State PAP shall be rescinded immediately." QPAP Section 16.2. Qwest's rationale for this provision is that it would subject CLECs "to normal requirements of the marketplace, especially the requirement to demonstrate economic harm in order to receive damages." 8/14 Tr. at 157 (Qwest Inouye). The requirements of a *de facto* monopoly marketplace, however, are not "normal." Without the QPAP or interest in providing interLATA service, Qwest would have no financial incentive to perform. Consumers would be the ultimate losers if the only available remedy for Qwest's nonperformance of its legal obligations is to bring costly and time-consuming complaints before the Commission, the FCC, or state or federal courts. Qwest, moreover, admits that business contracts, tariffs, and Commission rules under "normal requirements of the marketplace" often include liquidated damages or other remedy provisions. 8/16 Tr. at 33-34 (Qwest Inouye). The Commission, therefore, should require that an appropriate QPAP be filed and effective as soon as possible and remain effective

unless and until the Commission approves a replacement.

2. Other Section 13 Limitations

Section 13.3. Qwest proposes additional limitations on the applicability and operation of the QPAP in Section 13. Section 13.3, for example, relieves Qwest of the obligation to make payments under certain circumstances, including (1) Force Majeure events, (2) CLEC bad faith, or (3) problems associated with third-party systems or equipment. Each of these conditions is vague and ambiguous at best. Qwest proposes to establish a stand-alone Force Majeure definition in the QPAP that conflicts with the Force Majeure definition in the SGAT. *Compare* QPAP § 13.3(1) *with* SGAT § 5.7. On its face, proposing inconsistent Force Majeure provisions for inclusion in the same agreement is unreasonable. In addition, all agreements are subject to the duty of both parties to operate in good faith, and an express condition on Qwest's payment obligations that the CLEC operate in good faith is unnecessary. This provision is particularly problematic in its use of terms like "dumping" as an indication of CLEC bad faith, which are undefined and not subject to objective determination. Similarly, "problems associated with third-party systems or equipment" is open to subjective interpretation and may be irrelevant in light of inclusion of "equipment failure" as a Force Majeure event. The sole exception to Qwest's obligations to make payments under the QPAP should be a legitimate Force Majeure event – as defined in the SGAT or underlying agreement, which already exempts Qwest from compliance requirements and need not be repeated. This section, therefore, should be deleted or reduced to a cross-reference to the applicable Force Majeure provision of the underlying interconnection agreement.

Section 13.4.1. Qwest proposes that the CLEC not be able to use the QPAP as an admission by Qwest of any liability or culpability for a violation of state or federal law. QPAP §§ 13.4 & 13.4.2.

The Joint CLECs do not object to such a provision but do object to Qwest's attempt to preclude use of the QPAP, including measurements, as *evidence* that Qwest is not in compliance with applicable law in Section 13.4.1. As a practical matter, Qwest's measurements of its performance, as developed and audited under the auspices of the ROC, are the best evidence of Qwest's performance available to most, if not all, CLECs. Qwest has offered no reasonable basis for making such measures or payments based on those measurements inadmissible as evidence in a Commission, FCC, or judicial proceeding and effectively depriving CLECs of recourse to these forums for non-contractual relief. The Commission, therefore, should require Qwest to delete Section 13.4.1 from the QPAP.

Section 13.6. Qwest proposes that the QPAP be the exclusive remedy for all Qwest nonperformance if the CLEC elects to include the QPAP in its interconnection agreement. This proposal is far too broad. A CLEC should not be compelled to forgo all "other alternative standards or relief" for "the same or analogous wholesale performance" when, as discussed above, the QPAP does not provide payments for all aspects of Qwest's wholesale performance. Nor should a CLEC be compelled to choose between the QPAP as a whole and other available remedies. While a CLEC should not be entitled to multiple recoveries for the same nonperformance, a CLEC should be entitled to recourse under Commission rules to an alternate remedy in lieu of relying on QPAP provisions on a service or measure-specific basis. For example, the CLEC should not be required to give up all QPAP payments to be able to take advantage of the Washington Commission's remedies for Qwest's failure to provide collocation on a timely basis, RCW 80.36.560, instead of seeking QPAP payments for the same nonperformance. A CLEC should be able to choose whether to obtain payments under the QPAP or credits under the Commission rule even if the CLEC has incorporated the QPAP into its interconnection agreement. This section should be modified accordingly.

Section 13.7. In addition to proposing the QPAP as the exclusive contractual remedy for Qwest's nonperformance, Qwest proposes to offset any award of compensation pursuant to non-contractual remedies with payments under the QPAP for the "same or analogous performance." In practical effect, Qwest's unilateral ability to determine when an offset is appropriate and the use of the undefined term "analogous" means that the QPAP is the *sole* remedy for Qwest's nonperformance under the interconnection agreement under any theory of liability. Such a condition is patently unreasonable. If Qwest is entitled to an offset, the Commission, FCC, court, or arbitrator making the award should make that determination, not Qwest. Any offset, moreover, would be appropriate only if the QPAP payments have compensated the CLEC for the same, not "analogous" performance – again, a question of fact for the Commission, FCC, court, or arbitrator. This section, therefore, should be removed from the QPAP or substantially revised to provide that Qwest may *request* that any award of compensation for the *same* wholesale service covered by the QPAP be subject to an offset by QPAP payments but that any such offset must be ordered by the entity making the award to be offset.

Section 13.8. Qwest proposes to limit its liability to the Commission to either Tier 2 payments or "any Commission order or service quality rules" for the "same or analogous performance." Again, this provision is far too broad. If the Commission finds that Qwest's nonperformance is willful or otherwise subject to sanction, Qwest is not entitled to hide behind the QPAP. Nor may Qwest use the QPAP to preclude the Commission from providing remedies for "analogous" performance that may not even be subject to payments under the QPAP. This section should be deleted.

Section 13.9. Qwest proposes to be able to challenge payments under the QPAP if those payments exceed a monthly cap. "The only reason the level would be 'too high' is because Qwest's performance is too poor, and CLECs should not be required to incur additional time and resources,

including attorneys fees, to obtain allegedly 'self-executing' remedies." Ex. S10-XOU-RMK-1 at 18 (Knowles). This section should be revised to delete this provision. If Qwest believes the payment levels are the result of something other than Qwest's excessively poor performance, it can raise that issue in the periodic review process. Alternatively, Qwest is willing to delete this entire section, 8/16 Tr. at 29 (Qwest Inouye), and if QPAP payments are not the exclusive remedy for nonperformance, as discussed above, the Joint CLECs would agree to delete the entire section.

3. Limitations on Liability

The SGAT limits each Party's liability, other than for willful misconduct, "to the total amounts charged to CLEC under this Agreement during the contract year in which the cause accrues or arises," although this limitation "shall not limit the amount due and owing under any Performance Assurance Plan." SGAT § 5.8.1. As currently drafted, however, QPAP payments would be included in the amounts subject to the limitation of liability, threatening to insulate Qwest from liability for any other violation of the interconnection agreement. The relationship between SGAT Section 5.8 and the QPAP is more appropriately addressed (and has been raised) in the SGAT general terms and conditions workshop. The Joint CLECs raise the issue here to ensure that it is addressed, but also to provide another illustration of Qwest's attempts to use the QPAP as the exclusive remedy for *any* Qwest misconduct or failure to perform its legal obligations.

Qwest's own evidence demonstrates that QPAP payments could exceed the total amounts a CLEC (particularly a small CLEC) pays to Qwest under its interconnection agreement. *See, e.g.*, Ex. S9-QWE-CTI-5 at 11 & 13 (demonstrating that QPAP payments substantially exceed the recurring rates the CLEC pays Qwest). Under those circumstances, the QPAP payments would maximize Qwest's liability under Section 5.8 of the SGAT, including any obligation to pay compensation for

Qwest's negligence, non-willful misconduct, or any other violation of the interconnection agreement. QPAP payments thus would be the only compensation the CLEC would receive from Qwest, even though the QPAP provides payments only for missing specified PID measures, and Qwest presented no evidence to demonstrate that such payments include compensation for any other breach of Qwest's obligations to CLECs. The Commission, therefore, should ensure that Qwest does not use the QPAP to avoid liability for Qwest's other obligations under the SGAT or interconnection agreement.

4. Six Month Review

The Joint CLECs agree that a periodic review of the QPAP is appropriate for all interested parties to ensure that the plan provides the appropriate financial incentives. Qwest, however, proposes to eviscerate this process by requiring that Qwest agree to any changes to the QPAP as a result of the six-month review. QPAP § 16.1. This provision does not even approach reasonableness. Such a limitation, from a practical standpoint, would mean that the only changes possible to the QPAP would be those that benefit Qwest. From a legal standpoint, the QPAP, once approved, will become part of the SGAT and part of CLECs' interconnection agreements. "It is well-settled law that the parties to a contract may, *by mutual agreement*, alter all or any portion of that contract *by agreement* upon modification thereof." *Rapp v. Mountain States Tel. & Tel. Co.*, 606 P.2d 1189, 1191 (Utah 1980) (emphasis added); *accord, e.g.*, *Jones v. Best*, 134 Wn.2d 232, 240, 950 P.2d 1 (1998) ("Mutual assent is required and one party may not unilaterally modify a contract."). Not just Qwest, but CLECs must consent to any modification to the QPAP that is part of an interconnection agreement, and the Commission must also approve any change to the QPAP that is part of an interconnection agreement or the SGAT. *See* 47 U.S.C. § 252(f). Alternatively, the Commission can arbitrate or otherwise resolve disputes over SGAT or interconnection contract provisions. *See id*. § 252.

The QPAP should be treated no differently than any other provision of the SGAT or a Commission-approved interconnection agreement. Either party may request a change, and if the parties cannot agree on that change, a party may request Commission resolution of the dispute. As a result of the periodic review process, therefore, either Qwest or CLECs may request changes to the QPAP. If the parties can agree on changes, the Commission should approve them for implementation in the SGAT and interconnection agreements. If the parties cannot agree, the Commission should resolve the dispute and require that resolution to be implemented in the SGAT and interconnection agreements. Section 16.1 should be modified accordingly.

CONCLUSION

For the reasons discussed above and during the hearings, the Commission should refuse to adopt the QPAP in its current form. Instead, the Commission should condition any approval of the QPAP on modifications to the QPAP (1) to apply and provide payments for all critically important facilities and services Qwest is obligated to provide to CLECs, including cancelled orders, special access circuits, and EELs; (2) to establish reasonable payment levels without caps on total payments, escalation of payments, or the amount of payments on measures calculated using averages or means, and (3) to remove unlawful and unreasonable limitations on the term, use, and applicability of the QPAP. The Commission should also establish additional proceedings to enable the parties to develop appropriate contract language to implement the Commission's determinations on disputed issues.

DATED this 13th day of September, 2001.

DAVIS WRIGHT TREMAINE LLP
Attorneys for Electric Lightwave, Inc., Time Warner Telecom of Washington, LLC, and XO Washington, Inc.

By _____
Gregory J. Kopta
WSBA No. 20519