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

WORLDCOM'S COMMENTS ON LIBERTY CONSULTING'S REPORT REGARDING QWEST'S PERFORMANCE ASSURANCE PLAN

I. INTRODUCTION

WorldCom, Inc, on behalf of its regulated subsidiaries, (collectively "WorldCom") submits these comments on Liberty Consulting Group's October 22, 2001 Report (the "Report") regarding Qwest's Performance Assurance Plan ("PAP"). WorldCom incorporates by reference all of its previously filed pleadings about the PAP[1] as well as the testimony and evidence it presented at the hearings and does not repeat all of those points here. However, those documents support these exceptions and comments.

WorldCom requests that the Washington Utilities and Transportation Commission (the "Commission") reject Mr. Antonuk's recommendations as follows. In addition, WorldCom joins in AT&T's exceptions to the Report.

II. DISCUSSION

A. The Report incorrectly recites the FCC's standard of review for PAPs.

[1] WorldCom filed Comments on July 27, 2001, its Opening Brief on September 13, 2001 and its Reply Brief on September 20, 2001.

Mr. Antonuk correctly cites the Federal Communications Commission's ("FCC") five general principles for a successful performance assurance plan on page 4 of his Report:

- Potential liability that provides a meaningful and significant incentive to comply with the designated performance standards;
- Clearly articulated, predetermined measures and standards, which encompass a comprehensive range of carrier to carrier performance;
- A reasonable structure that is designed to detect and sanction poor performance when it occurs;
- A self executing mechanism that does not leave the door open unreasonable to litigation and appeal;
- Reasonable assurances that the Reported data is accurate.[2]

The problem is that Mr. Antonuk added his own considerations on page 6. Several of these additional considerations are vague and ambiguous and are inconsistent with FCC orders. Moreover, the Report is not clear as to how Mr. Antonuk applied these "standards." The additional considerations set forth are not appropriate for a performance assurance plan and WorldCom asks the Commission to ignore them. The above listed FCC considerations are the basic standards that the Commission should use to evaluate Qwest's PAP.

The Report also states that Mr. Antonuk did not consider "whether greater burdens on Qwest would increase its incentives to comply with its service obligations" indicating "(t)he answer to that question is as irrelevant as it is self-evident."[3] WorldCom disagrees with this conclusion and agrees with the Staff of the Utah Division of Public Utilities that it should be rejected.[4] Nowhere in the FCC Orders addressing

[2] In re Section 271 Application of Bell Atlantic New York to Provide In-Region, InterLATA Service in the State of New York, CC Docket No. 99-295, 15 F.C.C.R. 3953 (Dec. 22, 1999), aff'd, AT&T Corp v. FCC, 220 F.3d 607 (D.C. Cir. 2000), at paras. 432-433.
[3] See, the Report at page 6.
[4] See, Exhibit A Utah Staff QPAP Report at page 7.

Section 271 applications does the FCC endorse such ideas. In fact, the FCC guidance is contrary. For example, the FCC found:

> In determining if liability provides a significant incentive, it is relevant to compare a BOC's net revenue from local service to the maximum remedy amount. Damages and penalties should be set at a level above the simple cost of doing business.[5]

Thus, the question of whether the payments required under the PAP are sufficient to incite Qwest to improve its performance is central to the analysis of an effective PAP.

B. The Commission should reject the Report recommendations on proposed total payment liability.

Qwest proposes that the maximum amount of payments made pursuant to the PAP be set at 36% of its net revenues for the State of Washington. WorldCom opposes any cap on Qwest's total payment liability. Some Competitive Local Exchange Carriers ("CLECs") generally propose that the cap be set at 44% of Qwest's revenues. Mr. Antonuk agrees with Qwest. In doing so, he states, "[c]oming experience will tell us much more about whether a 36 percent cap is or is not appropriate" and continues, articulating a number of factors that that he believes could "support movement of the 36 percent limit in either direction." [6] Other states have already lived that experience. For instance, as part of its post-271 remedial actions, the New York Public Service Commission raised the total remedies for Verizon's poor performance to nearly 44% of net local revenue. It had been set at 36%. In the BellSouth region, Georgia and Kentucky also set exposure at 44% of net revenue.[7]

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[5] In re Application of Verizon New England, Inc., Bell Atlantic Communications, Inc. (d/b/a Verizon Long Distance), NYNEX Long Distance Company (d/b/a Verizon Enterprise Solutions) and Verizon Global Networks, Inc., for Authorization to Provide In-Region, InterLATA Services in Massachusetts, CC Docket No. 01-9 (rel. Apr. 16, 2001) at para. 240.

[6] The Report at page 18.

[7] See, Georgia Public Service Commission Order in Docket No. 7892-U and Kentucky Public Service Commission Order, Docket No. 2001-105 dated July 13, 2001.

Mr. Antonuk also implemented an unprecedented provision for Qwest to potentially decrease the 36% cap. To WorldCom's knowledge, the FCC has never authorized a plan in which the Incumbent Local Exchange Carriers ("ILEC's") total liability is less then 36%. No party advocated that the liability cap decrease under any circumstance and no evidence exists in the record to support it. Moreover, a decrease in the cap would decrease the effectiveness in the plan and, thus, it is not in the public interest.

The Utah Commission Staff disagrees with Mr. Antonuk's recommendations relating to the liability cap. It finds the fixed 36% cap to be unacceptable, reasoning:

> [I]n view of the fact that the New York Public Service Commission has found it necessary to readdress this issue in its existing PAP and increase that cap to 44% because of repeated non-compliance of the BOC, the lack of more substantial experience with PAP operation across the country suggests the propriety of allowing a balanced and limited span of variability in response to actual experience. As a result, the Utah staff recommends that the initial cap be set at 44% (as explained below). Further, if Qwest exceeds the 44% cap by at least 4 percentage points for any consecutive one 12-month period, the QPAP should provide for an increase of up to 4 percent in the cap, upon order of a state commission after notice and hearing.[8]

Without waiving its arguments opposing any cap, WorldCom requests that the Washington Commission at a minimum adopt the approach of the Utah Staff, that is, set the initial cap at 44% and allow for a procedural increase in the cap upon order of the Commission. Moreover, the Commission should reject Mr. Antonuk's suggestion that the cap decrease.

C. The total liability cap should be based on Qwest's ARMIS data for the year 2000, not 1999.

[8] See, Exhibit A Utah Staff QPAP Report at page 6.

Any procedural cap imposed by the Commission should be based on the Qwest's ARMIS data for the year 2000. The Report finds that it should be based on 1999 ARMIS data. At page 22, Mr. Antonuk comments on the parties' recommendation that more recent ARMIS data be used, stating, "(t)his argument appears to rest upon the implicit premise that net intrastate operating revenue will continue to increase despite growth in competition for local exchange business. This premise is quite speculative." WorldCom is unaware of any evidence provided by Qwest as to the appropriateness of relying on 1999 ARMIS data. In addition, WorldCom's research confirms that Qwest's 2000 ARMIS data shows that its total net return in Washington is approximately $23 million higher than it was in 1999.[9]

At the hearing, Qwest's witness Mr. Inouye agreed to update this information, using the 2000 data.[10]

> Q Good afternoon, Mr. Inouye. I'm Tom Spinks from the Washington Utility Commission Advisory Staff.
>
> A Good afternoon.
>
> Q Just a few questions, I promise. Is Qwest willing to update its Exhibit K 1999 ARMIS revenue data to year 2000 data?
>
> A Yes, I would be willing to do that.

[9] See, Exhibit B, WorldCom's 2000 Net Return Calculation.
[10] See, the Multi-State Transcript, 08/16/01, p.187, lines 6-13.

WorldCom requests that the Commission order the total liability cap to be based on Qwest's 2000 ARMIS data for the state of Washington.

D. The Commission should disregard Qwest's evidence of what payments would have been under its proposed PAP for February through May 2001.

At the hearing, Qwest offered an analysis of the payments its proposed PAP would have produced for the months of February through May 2001 to show that its proposal produced liability significant enough to motivate it to provide its wholesale customers with service quality consistent with the Performance Indicator Definitions ("PIDs"). The CLECs argue that this evidence is not material to the issue of whether Qwest's proposal "provides a meaningful and significant incentive to comply with the designated performance standards," as required by the FCC. Mr. Antonuk rejected the CLEC arguments.

In rejecting the CLEC arguments, Mr. Antonuk reasoned, "[t]he presumed payments were, of course, not actually made. They were modeled for an historical period of time during which payments were not required. Not having been payable or paid, they obviously could not have motivated performance as they might have had they been payable."[11] This supports the CLEC argument that these payment amounts are over inflated. Moreover, Qwest consistently argues that its performance is improving. Assuming that is true, it is reasonable to assume that when Qwest obtains 271 approval and is responsible for PAP payments, Qwest's performance will be better than it was in February 2001 – May 2001.

[11] See, the Report at page 25.

For these reasons, the analysis of Qwest payouts under its proposed PAP for the period February through May 2001 should be disregarded by the Commission in its evaluation of whether Qwest's proposal satisfies the FCC criteria on performance assurance plans.

E. The Commission should reject the Report's recommendation that a portion of Tier 1 payments should be paid to administer wholesale telecommunication activities.

The Report states, "[t]he QPAP should provide that one-fifth of the escalation portion of payments otherwise due to CLECs for non-compliant service in each participating state and one-third of the state's Tier 2 payments be made to a special fund that would be available for states participating in a common administration effort to use for: (a) administrative activities, (b) dispute resolution, and (c) other wholesale telecommunications service activities determined by the participating commissions to be best carried out on a common basis."[12]

WorldCom asks the Commission to reject Mr. Antonuk's unilateral addition of a funding mechanism to use a portion of the Tier 1 payments due to CLECs to support state commission activities. This recommendation was not advocated by any party to this proceeding, is unsupported by the record and reduces the effectiveness of the plan. At page 42, the Report itself notes this was "not addressed by the participants."

Moreover, the CLECs argued extensively throughout this proceeding that Qwest's proposed PAP resulted in payouts insufficient to compensate CLECs for the harm CLECs suffer when Qwest provides poor wholesale performance. The CLECs criticized, among

[12] See, the Report at page 42.

other factors, the amount of payments, the weighting of measures, the magnitude of misses and the six-month limitation on the escalation of payments. Mr. Antonuk rejected most of these arguments. To add insult to injury, Mr. Antonuk recommends that 20% of the escalation payments be taken away from the CLECs. The Utah Staff rejected this proposal. [13] WorldCom requests that the Washington Commission do the same.

F. The Commission should reject the Report's recommendation relating to the three-month trigger for Tier 2 payments.

Qwest's proposes that the non-compliance period extend up to three consecutive months before Tier 2 payments would be triggered. Qwest argued that there are sound reasons why Tier 2 payments should, unlike Tier 1 payments, not begin the first month. Qwest said that the Tier 2 payments were not compensatory to CLECs, but were designed to add to Qwest's incentives to perform. Given the lag involved in identifying continuing problems and in taking steps to meet them, Qwest considered it appropriate to allow a three-month correction period, which it said is identical to how Tier 2 payments work in the Texas, Oklahoma, and Kansas plans.[14]

AT&T argued that payments should begin after a single month of non-compliant performance, in order to assure that there are effective sanctions for poor performance on Tier 2 measures.[15] The New Mexico Advocacy Staff argued that the payment lag proposed by Qwest would serve to postpone the need for Qwest to begin to address performance problems associated with Tier 2 measures.[16] AT&T said that Qwest has more than its regulatory reporting systems to advise it of any problems that it may be

[13] See, Exhibit A Utah Staff QPAP Report at page 40.
[14] Qwest Initial PAP Brief at page 25.
[15] AT&T Initial PAP Brief at page 11.
[16] New Mexico Advocacy Staff Initial PAP Brief at page 16.

having in meeting obligations to CLECs. Qwest's own internal information sources, according to AT&T, should highlight areas requiring management attention earlier than three months after the fact.[17]

Mr. Antonuk recommends his own proposal for the trigger. WorldCom cannot completely understand this recommendation from the discussion in the Report. It appears that he recommends a 2-month trigger for Tier 2 payments that have a Tier 1 counterpart as well as those that do not. [18] In addition, it appears clear that if no Tier 1 counterpart exists, the payments escalate and are subject to the step-down (sticky duration) function. However, the statement in the last sentence on page 43 "(recommended immediately above for Tier 2 measures that have no Tier 1 counterpart)" is unclear. Is that meant to subject Tier 2 payments with Tier 1 counterparts to the escalation and step down functions as well? Moreover, although Mr. Antonuk provides for Tier 2 payments to escalate, he does not address the method and degree to which Tier 2 payments escalate under his proposal.

WorldCom requests that the Washington Commission support the tighter trigger that the Utah Staff recommends[19] and believes that all Tier 2 payments should escalate and be subject to the step down function. For ease of operation, WorldCom recommends escalating Tier 2 by simply doubling the Tier 2 payment for each subsequent month of non-compliance and applying the step-down function. This should help to accomplish one of the goals of the PAP, that is, to provide Qwest with potential liability that provides

[17] AT&T Reply PAP Brief at page 14.
[18] See, the Report at p.43.
[19] See, Exhibit A, Utah Staff QPAP Report, at page 41.

"a meaningful and significant incentive to comply with the designated performance standards."

G. The Commission should reject Qwest's proposal to limit escalation payments to six months.

The Report recommends that the Commission adopt Qwest's proposal to limit escalation payments to six months. WorldCom disagrees with this recommendation. WorldCom continues to argue that escalations in payments should continue to escalate even after the six-month period. Mr. Antonuk's recommendation deviates from that of both Colorado and Utah. The Colorado Public Utilities Commission ordered that the "(p)ayment escalation will not freeze after six months" and that "Qwest's argument to freeze escalated penalties makes no logical sense."[20] The Utah Division of Public Utilities Staff states, "[w]e decline to recommend a six-month cut-off on escalation" and that "(s)ince all of the measures involved in the proposed QPAP are derivative to the ongoing Regional Oversight Committee-Operational Support Systems ("ROC-OSS") testing effort, it is clear that Qwest should be able to meet all of them. Because the ROC-OSS testing is "military style," Qwest will have already demonstrated its ability to meet each one of the measures prior to any application for interLATA relief."[21]

The Report appears to justify failing to continue escalating payments after six-months by stating "(t)here exists the ability under non-271 sources of regulatory authority to examine the causes and consequences of structural failures or weaknesses in the facilities, management, systems, processes, activities, or resources by which regulated

[20] See, Exhibit C, In the Matter of the Investigation into Alternative Approaches for Qwest's Performance Assurance Plan in Colorado, Decision on Motions for Modification and Clarification of the Colorado Performance Assurance Plan, dated November 5, 2001 at page 59.
[21] See, Exhibit A, Utah Staff QPAP Report at page 42.

providers of utility services, such as Qwest, satisfy their service obligations."[22] This inappropriately places the burden on CLECs and state commissions and their staffs to address Qwest's consistently poor performance through expensive and time consuming contested cases. Instead the burden should be on Qwest to show why it should be excused from properly fixing the problem. Moreover, this recommendation is inconsistent with one of the FCC's five standards for performance assurance plans, that the plan contains a "self-executing mechanism that does not leave the door open unreasonably to litigation and appeal." Under the Report's recommendation, during the first six months of non-compliance, the requirement is met. If the non-compliance continues, however, the door is open to litigation. As noted by the Colorado Hearing Commissioner, this result is illogical.

In summary, both Colorado and Utah have appropriately argued against limiting the escalating payments to six months. The burden to show why Qwest should be excused from escalating payments is on Qwest. Therefore, WorldCom requests that the Washington Commission reject the Report's recommendation and allow for escalation in payments beyond six-months.

H. Measures not currently included in the payment structure of the PAP should become part of the payment structure immediately upon assignment of standards of performance.

The Report states, "(a)s is the case for EELs, the use of a diagnostic standard reflects the fact that experience with line sharing and sub-loop elements was too limited to support a benchmark or parity standard. Clearly, they should be included in the QPAP payment structure as soon as is practicable."[23] "As soon as practicable" is vague and

[22] See, the Report at page 45.
[23] The Report at page 48.

ambiguous. WorldCom requests that the Commission strengthen the recommendation of the Report and order that these sub-measures immediately become part of the PAP payment opportunities once they are assigned standards of performance.

Qwest represents that it will no longer automatically include changed diagnostic sub-measures when it formally files its final PIDs, and that any further changes to diagnostic measures should be addressed in the six-month review process.[24] WorldCom and Mr. Antonuk disagree with this proposal. There are several PIDs and sub-measures to PIDs, such as Line Sharing, that were previously categorized as either Diagnostic or "to be determined" ("TBD"), for which the parties have recently agreed to negotiated standards.[25] These newly negotiated PIDs and sub-measures should be incorporated into the PIDs. The parties agreed to review some sub measures, such as EELs, again in six-months. Once those standards are established, the measures or sub-measures should become a payment opportunity for CLECs.

At the time of briefing, Qwest agreed to add two change management measures to the PAP: GA-7 (Timely Outage Resolution) and PO-16 (Release Notifications). Mr. Antonuk notes that those measures were "diagnostic, but would be included as 'High' Tier 2 measurements after the ROC OSS collaborative establishes benchmark measures for them." Mr. Antonuk recommends, "It is appropriate to include the [change management] measures as Qwest has proposed after benchmarks are established, given their importance and the region-wide nature of their operation and impact."[26] The ROC

[24] See, Multi-State Transcript, dated August 17, 2001, cross-examination of Qwest witness, Michael G. Williams, at page 53, Line 13 through page 56, Line 16.
[25] See, Exhibit D, Performance Indicators – Changing Diagnostic/TBD to New Standards.
[26] The Report at page 50-51.

TAG has recently agreed to standards for both GA-7 and PO-16.[27] Therefore, WorldCom requests that the Commission order that these standards be included in the PAP at this time.

WorldCom had requested that a Test Environment Responsiveness Measure, PO-19, be included in the PAP payment structure after its adoption. The Report finds, "[i]t is premature to express opinions about the future inclusion of a measure that is in this state of development." Since briefing this issue, the parties have agreed to the PO-19 Stand Alone Test Environment (SATE) PID language and are currently continuing to negotiate the standard. WorldCom requests that the Commission order that this measure also be included in the QPAP immediately upon the parties' agreement on the standard.

I. The Commission should order that all measures have equal weighting.

During this proceeding, CLECs requested that the weighting and the PAP payment amounts be increased for certain high capacity loop measures, such as DS1 and DS3. Qwest agreed to do so, but then dropped the weighting and corresponding payment amounts for other services, such as residential resale. The CLECs argued that it was appropriate to increase the high capacity measures but not to decrease any others in response. Mr. Antonuk generally found Qwest's position to be reasonable but returned the weighting to that originally proposed by Qwest, finding "no reasonable proposal being made or accepted."[28]

WorldCom did not agree with Qwest to decrease the Tier 2 measurements OP-3 (Installation Commitments Met), OP-4 (Installation Interval), OP-5 (New Service Installation Quality), OP-6 (Delayed Days), MR-7 (Repair Repeat Report Rate), and MR-

[27] See, Exhibit D, Performance Indicators – Changing Diagnostic/TBD to New Standards.
[28] The Report at page 54.

8 (Trouble Rate) from "high" to "medium." These are key provisioning and repair measurements that impact customer perception of the new provider's performance. Reducing their weighting would reduce the effectiveness of the PAP for basic services thus impacting CLECs' abilities to compete in the local market in Washington.

The Michigan Public Service Commission decided that all metrics should have a "medium" ranking as described in the Texas plan.[29] The Michigan Commission then doubled the Tier I amounts approved in Texas as an appropriate penalty amount.[30] This resulted in per occurrence amounts for all the per occurrence remedies being equal to the first month and higher subsequent duration months than the Texas plan (and Qwest's proposed plan) and the per measure remedies being slightly less for most measures.

In a July 25, 2001 reconsideration order[31] responding to SBC-Ameritech's concern that the Michigan Order did not consider duration increases, the Michigan Commission partially granted reconsideration and decided to monitor whether the current remedy levels result in service improvements over the next three months. At the end of that period, the Commission will issue a follow-up order, after a hearing if necessary, imposing a multiplier (**which may be two or another number**) if it finds it necessary to achieve the purposes of the remedy plan. Thus, the Michigan Commission originally set all measures as medium and doubled, and even with granting SBC's reconsideration request acknowledges that it may be necessary to impose a multiplier to achieve the plan's purposes.

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[29] In the matter of Ameritech Michigan's submission on performance measures, Reporting, and benchmarks, pursuant to the October 2, 1998 order in Case No. U-11654, Case No. U-11830, at p. 7.
[30] *Id*. at p. 17.
[31] See, http://cis.state.mi.us/mpsc/orders/comm/2001/u-11830g.pdf

The Illinois Commerce Commission staff also filed comments in the proceeding addressing Resolution of Disputed Issues pursuant to Condition 30 of the SBC/Ameritech Merger Order,[32] recommending that the Commission treat all metrics equally at the higher levels in the SBC-Texas plan. Policy Analyst Melanie K. Patrick, Ph.D testified:

> A more coherent strategy that would provide better incentive for Ameritech Illinois to provide good performance overall would be to make all measurements of equal importance. I recommend making all performance measurements of `high' importance, for two reasons. First, using the 'high' designation emphasizes to Ameritech that these measurements represent services provided to CLECs that will have a critical impact on the service provided, in turn, by CLECs to their own customers. The provision of good service is important to the ability of individual CLECs to develop their own market share. In addition, as Staff Witness (Samuel) McClerren points out in his testimony, good wholesale service quality provision is essential to the overall development of a competitive telecommunications environment. These performance measurements are important, and their measurement designation should be a reflection of that importance. Second, in the Ameritech proposed remedy plan the measurements designated as having `high' importance also have the largest penalties associated with them. Applying the highest penalty amounts to all performance measures will reinforce the incentive nature of the performance remedy plan used by Ameritech.

On Pages 59-62 of her testimony, Dr. Patrick reviewed Ameritech's performance describing how little was paid under Ameritech's Texas "clone" plan in the last four quarters of 2000 for significant misses—missing 1,200 measures on average for Tier I and 450-500 for Tier II three months in a row during that period.

Dr. Patrick's proposal to make all measurements of equal importance is a simple solution to ranking measures and the inherent problems caused by ranking measures.

[32] See, SBC/Ameritech Merger Order, Illinois Commerce Commission, Docket No. 01-0102.

WorldCom requests that the Commission order that all of Qwest's measures have equal ranking.

J. The Commission should include special access services in Qwest's PAP.

WorldCom requests that the Commission order Qwest to include special access services in its PAP for the state of Washington. As ELI, Time Warner, and XO Utah have argued, the PAP should at a minimum, measure Qwest's performance in providing special access circuits to competitors. Mr. Antonuk erred by concluding that:

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

The FCC has long made clear that it will consider as part of the public interest test discriminatory or anticompetitive conduct by a Bell Operating Company ("BOC"), as well as a BOC's failure to comply with state and federal regulations. Failure to provide nondiscriminatory availability to access services to competitors is relevant to section 271 compliance (including post-entry compliance). The simple reason: Once Qwest is ultimately granted 271 long distance authority, it will have an increased incentive to provide poor performance on these key circuits to its competitors, and favor its own retail customers in the provision of special access services. Therefore, this Commission should address the potential for discriminatory conduct as part of its state and federal authority to address 271-related backsliding and to promote competition in all telecommunications markets in Washington. .

Several states have issued decisions recently that acknowledge growing concerns about ILEC special access performance, both in the context of 271-related performance plans, and in addressing specific problems experienced by competing carriers seeking to compete to serve larger business customers where the ILEC is the only ubiquitous provider of "last mile" facilities.

- Subsequent to the FCC adoption of its original plan, the Texas PUC found in its review of Southwestern Bell's post-271 performance:

> … to the extent a CLEC orders special access in lieu of UNEs, SWBT's performance shall be measured as another level of disaggregation in all UNE measures.[33]

Currently, the issue of implementation is under arbitration.

- Although not tied directly with Verizon's PAP in New York because monitoring of Verizon's special services had been in place as a separate matter for years, on June 15, 2001, the New York Public Service Commission concluded an investigation and found that special access services are critical to businesses and the "new economy" of their state, as well as to CLECs for local competition purposes; that Verizon was still the dominant provider; and that regulation of this and the lingering "last mile monopoly" is still essential. The New York Commission further found that provisioning of these essential monopoly services is poor, and has not improved despite the end of the "frenzy for capacity" that there is evidence of discrimination between wholesale and retail provisioning of these services, which is likely to get

[33] Texas PUC Project No, 20400 - *Section 271 Compliance Monitoring of Southwestern Bell Telephone Company of Texas*, Order No. 33, Approving Modification to Performance Remedy Plan and Performance Measurements, May 24, 2001.

worse as the Verizon gets further into long distance. Therefore, the New York Commission ordered that ALL circuits ordered via ASRs should continue to be reviewed and that Verizon should provide performance data on all circuits to the Commission.[34]

- . Recently, the Massachusetts Department of Telecommunications and Energy ("DTE") ordered Verizon to include Reporting on interstate special access performance as part of the DTE's investigation into Verizon's poor provisioning of intrastate special access services.[35]
- The Indiana Utilities Regulatory Commission recently issued its guidance to parties in the Ameritech Performance Assurance and Remedy Plan proceeding: "The Commission is leaning toward requiring SBC/Ameritech to develop performance measurements and business rules (and perhaps penalties and remedies) for special access to include in the Indiana Remedy Plan."[36]
- In the context of Qwest's 271-related PAP, the Hearing Commissioner in Colorado also included special access provisioning in his recommended decision issued on September 26, 2001, and subsequently denied Qwest's

[34] The New York Order issued June 15, 2001, was included as Exhibit B to WorldCom's Comments in Response to Qwest Corp.'s Proposed Performance Assurance Plan dated July 27, 2001.
[35] Massachusetts D.T.E. 01-34 - *Investigation by the Department of Telecommunications and Energy on its own motion pursuant to G.L. c. 159, §§ 12 and 16, into Verizon New England Inc., d/b/a Verizon Massachusetts' provision of Special Access Services*, Order, September 7, 2001.
[36] See, Indiana URC Cause No. 41657, *In the Matter of the Petition of Indiana Bell Telephone Company, Incorporated, d/b/a Ameritech Indiana, Pursuant top 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*, Initial Order, September 11, 2001, Attachment A, p.A-33.

petition for reconsideration of that order.[37] As the Hearing Commissioner pointed out in the final decision considering Qwest's Motion for Modification,

> Bringing Special Access performance metrics into the sunshine, without any attendant penalties, may by itself ensure that Qwest's performance for special access is adequate. At this time, the Commission has no particular inclination to take the next step and include special access in the CPAP penalty scheme. So long as Qwest's special access provisioning is brought to light through CPAP Reporting and remains adequate, I would anticipate that Reporting alone will be adequate.
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> * * * * * * * *
>
> Finally, I am not convinced by Qwest's jurisdictional argument. That special access is from the federal tariff does not mean it cannot be part of the CPAP.
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> * * * * * * * *
>
> The crux of Qwest's jurisdictional argument is beside the point. Monitoring and Reporting of special access will be required. . . . It makes no difference whether that [Qwest] tariff offering includes jurisdictionally uniform performance guarantees.[38]

- Special Access is also under active consideration in several other states, e.g.,

  Tennessee, Illinois, Michigan and Minnesota.

While the majority of the special access circuits are ordered from Qwest's interstate tariffs, under the FCC's rules, only 10 percent of all traffic traversing such a circuit needs to be interstate to require a telecommunications carrier to order the circuit as "special access" from Qwest's interstate tariff. However, up to 90% of the traffic over those circuits may be intrastate. It is undisputed that this Commission has jurisdiction over intrastate traffic.

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[37] See Exhibit C.

[38] Exhibit C at pages 31-33.

Congress explicitly contemplated concurrent jurisdiction with states in the regulation of telecommunications under the 1934 and 1996 Acts. No federal law or FCC rule exists with which any service quality directive of a state commission could conflict. Moreover, no service quality Reporting imposed by a state commission could put Qwest in the position of being physically unable to comply with both state and federal rules. In addition, neither Congress nor the FCC has undertaken comprehensive regulation of ILEC special access service quality that would demonstrate an intent to "occupy the field"[39]

This Commission's has previously rejected Qwest's argument that special access services purchased out of interstate tariffs is outside the Commission's jurisdiction.[40] In ruling on similar jurisdictional arguments raised by Qwest in an AT&T complaint on Qwest's Special Access performance, this Commission held:

> The Commission's interpretation of the "10%" rule is consistent with section 2(b) of the Communications Act of 1934. … "[T]hat section says that nothing in the Communications Act of 1934 shall be construed to give the FCC jurisdiction over the charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communications service. [41]

The Commission further held:

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[39] The recent intent expressed by FCC commissioners Copps, Abernathy and Martin in favor of a Notice of Proposed Rulemaking on Special Access performance did not indicate when such a notice will be issued, what the nature of its contents would be, whether states would be delegated any, concurrent or complete responsibility for Special Access performance standards and monitoring, or when, if ever, the FCC would conclude such a rulemaking. *Remarks by FCC commissioners Copps, Abernathy and Martin at the November 8, 2001 meeting, in the context of FCC issuance of a Notice of Proposed Rulemaking on adopting national UNE performance metrics. CC Docket No. 01-318*. As the summary above shows, other states are recognizing the importance of Special Access performance, and are not waiting for the FCC to act.

[40] Washington Utilities and Transportation Commission, Docket No. UT-991292, *In Re the Complaint of AT&T Communications of the Northwest, Inc., v. U S WEST Communications, Inc, Regarding the Provision of Access Services*.

[41] WUTC Docket No. UT-991292, *In Re the Complaint of AT&T Communications of the Northwest, Inc., v. U S WEST Communications, Inc, Regarding the Provision of Access Services*, Tenth Supplemental Order, May 18, 2000, paragraph 26.

> In the absence of clear authority that a customer's election to take service under a federal tariff per the 10% rule preempts all state regulatory authority, we decline to so rule. The significance of intrastate traffic to the public and to the economy of the state, and the Commission's need to ensure that intrastate services are free from discrimination and barriers to competitive entry, require us to assert jurisdiction when it is lawful for us to do so.[42]

Referring to again to the "mixed use" rule of the FCC, applied to Special Access services, the Commission continued:

> The Commission's decision to exercise jurisdiction under state law in this case demonstrates that it is prepared to oversee intercarrier relations and service quality issues that affect the provision of intrastate access services. Further, the Commission's recent record, considered in its entirety, should send a clear signal to the regulatory community that it will continue to exercise oversight and use whatever means are reasonably necessary in order to fulfill its statutory duty in the public interest.[43]

Arguments concerning the filed-rate doctrine, primary jurisdiction, and federal preemption were also rejected by the Minnesota Commission in the decision issued in AT&T's complaint against U S WEST in that state.[44]

Finally, in an *ex parte* filing made at the FCC by Qwest and dated August 22, 2001, Qwest agreed that public Reporting and other enforcement mechanisms of special access provisioning could have a positive impact on its operations as an interexchange carrier and a CLEC.

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

[43] WUTC Docket No. UT-991292, *In Re the Complaint of AT&T Communications of the Northwest, Inc., v. U S WEST Communications, Inc, Regarding the Provision of Access Services*, Tenth Supplemental Order, May 18, 2000, paragraph 51.

[44] In the Matter of the Complaint of AT&T Communications of the Midwest, Inc., Against U S WEST Communications, Inc. Regarding Access Service, Minnesota Public Service Commission, Docket No. P-421/C-99-1183, Order finding Jurisdiction, Rejecting Claims for Relief, and Opening Investigation at pages 4-11, issued August 15, 2000.

It is clearly appropriate and lawful for the Commission to address this issue and approve reasonable, practical, and effective special access performance measures to be included in Qwest's PAP. WorldCom thus requests that the Commission include special access services in the PAP.

K. Qwest should not have "veto" power over changes made to the PAP going forward.

Section 16 of the PAP provides, "changes shall not be made without Qwest's agreement." Circumstances exist in the PAP where Qwest is required to make a change without "consent," including modifications required by changes in the law or by commission order. WorldCom opposes any suggestion that Qwest has a "veto" over any change to the PAP.

On this issue, the Report states, "[i]n summary, we believe that the QPAP is not fundamentally different from either the Texas plan or the Colorado Special Master's Report in the matter of changing the plan."[45] WorldCom disagrees.

Section 18.6 of the Colorado SGAT provides:

> The six-month CPAP review process shall focus on refining, shifting the relative weighing of, deleting, and adding new PIDs**; however, such review is not limited to these areas. After the Commission considers such changes through the six-month process, it shall determine what set of changes should be embodied in an amended SGAT that Qwest will file in order to effectuate these changes"**[46] (emphasis added).

[45] The Report at page 62.
[46] See, Exhibit E, COLORADO PERFORMANCE ASSURANCE PLAN RECOMMENDED SGAT LANGUAGE at page 19.

Moreover, the Colorado Hearing Commissioner removed Qwest's veto power in his decision addressing motions to modify his decision on the Colorado PAP, striking the language in Section 19.1, "~~No changes shall be made without Qwest's consent".~~

The Texas plan also includes the provision, "[a]ny changes to existing performance measures and this remedy plan shall be **by mutual agreement of the parties** and, if necessary, with respect to new measures and their appropriate classification, by arbitration."[47] (emphasis added).

This contradicts Mr. Antonuk's conclusion that the PAP is not fundamentally different from the Texas or Colorado plans. In fact, it supports a commission decision to reject Qwest's proposal for "veto" power. WorldCom requests that the Commission include language in the PAP similar to that included in the Texas plan or as provided in Colorado.

L. The Commission should order that a critical value of 1.04 should apply to all low volume measures.

The PAP reflects a statistical approach that arose out of a partial agreement by the parties participating in the PEPP collaborative. The partial agreement was to alter the default critical value from 1.65 to 1.04 for a number of small-volume measures and to increase it to varying levels above 1.65 for progressively larger volume measures. As the Report states,"(t)he QPAP reflects a statistical approach that came from **partial** agreement at the PEPP collaborative."[48] The key is that it was only a "partial" agreement. Both WorldCom and Z-Tel objected to the proposal. WorldCom believes it is important to balance both Type I (a false finding of inequality of service levels) and Type II (a false finding of equal service) errors. To support these larger critical values at higher sample

[47] See, Texas Performance Remedy Plan-TX (T2A)
[48] The Report at page 63.

sizes, at a minimum, the 1.04 critical value for sample sizes of 1-10 should apply to all services and not be limited to only the few listed in the Qwest proposal.

Although the Arizona Commission did not address WorldCom's position to apply a critical value of 1.04 to all services, it did decrease the critical value to 2.0 for samples over 150 instead of increasing the critical value to as high as 4.3 for sample sizes over 3000.[49] The current statistical table limits the balancing approach by limiting the measures included when applying the 1.04 critical value and requires significantly higher critical values with increased sample sizes. To properly adjust for Type II error the the critical value must be lowered to below 1.65 at small sample sizes for all service if the critical value above 1.65 is raised at larger sample sizes. If the critical value for all services is not lowered to below 1.65 at small sample sizes for all services, then a one-sided test results in favor of Type I error (as Qwest prefers).

WorldCom requests the Commission reject the Report's recommendation and order that the PAP apply the lower value of 1.04 to all low volume measures.

M. The PAP should be implemented before Qwest receives section 271 approval from the FCC.

WorldCom requests that the Commission adopt "self-executing" remedies that take effect before Qwest receives section 271 approval.[50] The PAP is intended to enforce

[49] See, ACC Docket No. T- 00000A-97-0238, PROPOSED STAFF REPORT ON QWEST'S PAP at page 21.

[50] See, Georgia PSC's Order in Docket No. 7892-U; In re: Performance Measurements For Telecommunications Interconnection, Unbundling And Resale Released January 16, 2001, which in pertinent part states "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

Qwest's section 251 obligations under the federal Telecommunications Act of 1996, requiring Qwest to open its local market and ensure that Qwest provides additional assurance that the local market will remain open after Qwest receives section 271 authorization. By allowing the plan to take effect prior to Qwest's entry into the long distance market, the Commission may review evidence on the effectiveness of the plan that may be used to adjust payments and terms of the plan to ensure Qwest meets both its section 251 obligations and its section 271 obligations prior to its entry into the long distance market.

Massachusetts[51], Pennsylvania, Louisiana and Michigan are among states that have adopted self-executing remedies to enforce section 251 requirements before section 271 approval. CLECs also could, and many did, include the SBC-Texas remedy plan in their contracts before section 271 authorization.

WorldCom has been and continues to advocate that the plan should be implemented prior to 271 approval. However, in an attempt to continue negotiations on this, the CLECs in the May 2001 ROC Post-Entry Performance Plan ("PEPP") workshops asked Qwest to consider to allow the plan to have "memory" at implementation in lieu of an effective date prior to 271 approval. Qwest refused.

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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." (emphasis supplied, at p. 22).

[51] While Massachusetts adopted a PAP similar to New York's that took effect after 271 approval, it earlier in the first round of interconnecction contract arbitrations had adopted the first self-executing performance remedy plan contained in ILEC-CLEC interconnection agreements. Currently CLECs receive the higher of the PAP or the consolidated arbitration remedies in Massachusetts, since Verizon's recent gain of section 271 authority.

The Utah Staff recommends that Qwest be required to make the PAP effective contemporaneous with the filing of its FCC application.[52] WorldCom believes that the purposes of the PAP and the goals of the Act are best furthered by requiring that this Commission implement the PAP in Washington upon approval. WorldCom requests that the Commission so order. If, however, the Commission rejects this argument, WorldCom asks that it rule consistent with the Utah Staff's recommendation, that the PAP be implemented contemporaneous with the filing of Qwest's 271 application with the FCC for the State of Washington.

N. The Commission should require payments to CLECs to be made in cash rather than bill credits.

With regard to the dispute about the form of payments to CLECs, the Report agreed with Qwest that payment should be made in the form of bill credits and finds, "(t)he CLEC arguments about the administrative convenience of requiring payment by the equivalent of cash were not persuasive."[53] WorldCom, along with the Colorado Hearing Commissioner, disagree with Qwest's proposal. The Hearing Commissioner held:

> Payments will be made in cash rather than in the form of bill credits. ***
> The parties' arguments regarding the merits of cash payments are persuasive. First of all, bill credits are complex to administer. If, for example, the payment amount exceeds the CLEC's wholesale bill for that month, then Qwest will need to make a supplemental cash payment: two forms of payment to a single CLEC in a single month. Also, if Qwest and the CLEC were in the midst of a billing dispute, the CPAP payment would need to be made in cash anyway. Furthermore, bill credits require billing system modifications that may lead to errors or confusion, and that will be difficult to test during the CPAP pre-271 Reporting period. Overall, cash

[52] See, Exhibit A, Utah Staff QPAP Report at page 72.
[53] The Report at page 76.

> payments are simpler and more straightforward for all the parties involved, and thus are superior to bill credits.[54]

For the reasons articulated by the Colorado Hearing Commissioner, WorldCom asks the Washington Commission to require payments to CLECs under the PAP be in the form of cash rather than bill credits.

III. CONCLUSION

For the reasons stated, WorldCom requests that the Commission reject the above cited recommendations of the Report and modify Qwest's proposal as outlined herein.

Dated: November 21, 2001

WORLDCOM, INC.

By:_____
Michel L. Singer Nelson

[54] See Exhibit C at page 20.