BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

In the Matter of the Investigation into U S WEST Communications, Inc.'s Compliance with § 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 **QWEST CORPORATION'S REBUTTAL TO COMMENTS FILED ON THE FACILITATOR'S QPAP REPORT**

INTRODUCTION

Pursuant to the Commission's Notice of Opportunity to File Comments dated October 24, 2001, Qwest Corporation ("Qwest") respectfully submits this response to the comments of Public Counsel, WorldCom, AT&T, and ELI/Time Warner/XO ("ELI") concerning the multi-state Facilitator's report ("Report") on Qwest's Performance Assurance Plan ("QPAP").

I. THE FACILITATOR'S REPORT IS BASED UPON CONSIDERED JUDGMENTS MADE IN LIGHT OF FCC PRECEDENTS, AND IS ENTITLED TO SUBSTANTIAL DEFERENCE.

The CLECs disagree with a number of the judgments reached by the Facilitator in the course of his review of the provisions of the QPAP. So did Qwest. However, despite the existence of a number of these complex provisions that threaten to expose it to millions of dollars of payments annually in an uncertain post-271 world, Qwest has essentially accepted the Report as an integrated whole. The CLECs take quite a different tack. They continue to challenge a wide variety of the Facilitator's judgments based upon arguments he has carefully considered and rejected, and they also seek to cherry-pick from proposals advanced in Colorado and Utah

that they prefer (both of which are subject to pending challenge by Qwest). We address below the specific problems with each of the CLEC arguments. As a threshold matter, however, the CLECs have seriously misconceived the appropriate standard of review in this matter.

Unlike checklist items, the QPAP does not involve resolving disputes about Qwest's past or present wholesale performance; it is a comprehensive plan designed and offered by Qwest that outlines the specific terms upon which Qwest will provide *future* service (and pay CLECs if it does not). In its initial procedural order, the Commission determined to evaluate that comprehensive plan only after an analysis by the Facilitator. It also determined that it would "consider Mr. Antonuk's report to be ana[log]ous to an initial order entered by an administrative law judge or hearing examiner."[1] Thus, contrary to ELI's suggestion, the Facilitator's report is to be considered "in the same light as the Commission has considered the ALJ Initial Orders in this proceeding."[2]

As the Utah Staff concluded, the "process was comprehensive, well conducted, subject to wide participation, and thorough in addressing the broad range of issues and subjects appropriate to a post-entry assurance plan of the type expected by the FCC."[3] After extensive ROC collaborative workshops,[4] Qwest submitted its QPAP to the Facilitator for his review. This was

---

1 *See* 12th Supplemental Order Ordering Participation in Multiple State Workshop Addressing Qwest's Post-Entry Performance Plan, *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 (July 23, 2001) ¶ 11.

2 ELI, TWTC, and XO Comments on QPAP Report, *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 (Nov. 21, 2001) at 2 ("ELI Comments").

3 Utah Division of Public Utilities QPAP Report (Oct. 26, 2001) at 2 ("Utah Staff Report").

4 AT&T gratuitously suggests that Qwest "basically walked away from the collaborative process while it was in mid-stream." AT&T's Comments on the Liberty Consulting Group's QPAP Report, *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 (Nov. 21, 2001) at 2 ("AT&T Comments"). In fact, Qwest participated in five multi-day workshops on the QPAP and numerous conference calls over the course of eight months in an effort to reach agreement with CLECs on the terms of the plan. Not surprisingly, the parties disagreed on some issues, though they

no "trial by ambush."[5] Qwest accompanied its plan with supporting comments explaining its positions on issues the CLECs had already identified as concerns in prior workshops and the many significant changes Qwest had made in the ROC PEPP Collaborative. Qwest also provided the report of the project managers in that process, Maxim Telecom Group ("MTG"), which identified the agreements reached as well as issues over which there was disagreement. The CLECs and state advocacy staffs, including the Washington Public Counsel, then provided responsive comments on the plan. The Facilitator thereafter conducted seven days of hearings on these issues, with testimony from eleven witnesses, and cross-examination of the Qwest personnel involved in the design of the QPAP. Finally, the Facilitator directed the parties to submit briefs and reply briefs to address the open issues, before issuing his comprehensive decision resolving those issues.

The Facilitator's Report is not the product of anyone's "fantasy," and it hardly proceeds from the goal not to place "any more burden on Qwest than Qwest has proposed to bear."[6] It does not "rubber stamp Qwest's proposals."[7] Notwithstanding the significant changes Qwest made in the PEPP workshops, the Facilitator recommends a number of additional significant changes to the QPAP that increase Qwest's potential financial exposure, including creating additional risks by adjusting the cap, modifying the Tier 2 trigger to make payments more likely, and instituting minimum payment for CLECs that have lower order volumes. Nor does it

---

found common ground on many others. Qwest then brought the QPAP to the Facilitator for review in lieu of taking the plan directly to each of the state commissions of the nine participating states and in order to bring closure to the 271 process. It is obviously not in AT&T's competitive interest for such closure to occur.

5 ELI Comments at 3.

6 *Id.* at 5, 6.

7 *Id.* at 2.

"ignore record evidence."[8] While some of its conclusions are based on evidence submitted by Qwest that the CLECs do not like, they generally made no effort to provide any rebuttal evidence of their own.[9] And the suggestion that the Facilitator's service as a consultant to the participating state commissions was somehow compromised because Qwest paid for that service[10] is nothing short of preposterous, particularly at this late date.[11]

Nor, as the CLECs suggest, did the Facilitator violate any FCC legal standards in his analysis of the QPAP. *Indeed, many of the CLECs' challenges are to provisions of the Report that determined to follow FCC precedents that the CLECs simply do not like.* The CLECs complain that, in doing so, the Facilitator should not have concerned himself with the "ethereal" question of whether the QPAP payment provisions bear any reasonable relationship to the actual harm that a missed PID might cause them.[12] In their view, the QPAP "is an FCC-mandated plan

---

8 *Id.*

9 AT&T argues that it was prohibited from introducing evidence of harm from disparate treatment by Qwest. AT&T Comments at 13 & n.35. The only reference AT&T makes, however, is to a proffer of the costs of collocation to CLECs, which was rejected because AT&T attempted to introduce it after the testimony of its own witness and during its cross-examination of Qwest's witness — "[j]ust as I was uncomfortable having [Qwest's witness] talk about new issues that would support the Qwest proposal." C. Inouye 8/29/01 Testimony, Tr. at 51 (statement of Mr. Antonuk).

10 AT&T Comments at 2 & n.1.

11 If ELI is seeking to disqualify the Facilitator, it should have raised its concerns long before now, not after it has determined that it might have gotten different results from another decisionmaker. *Cf.* 28 U.S.C. § 144 (claim of bias must generally be filed not less than 10 days before beginning of term at which proceeding to be heard); *Franks v. Nimmo*, 796 F.2d 1230, 1234 (10th Cir. 1986).

12 AT&T Comments at 4-7; *see also* ELI Comments at 4-5; WorldCom's Comments on Liberty Consulting's Report Regarding Qwest's Performance Assurance Plan, *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 (Nov. 21, 2001) at 2-3 ("WorldCom Comments"). Contrary to ELI's assertion, the Facilitator did not see this as the "primary purpose" of the QPAP. ELI Comments at 4. This perfectly logical question was only one of several he believed should be "take[n] into account" — including whether the QPAP comports with previous plans approved by the FCC (a factor the CLECs consistently ignore), and whether the plan "provide[s] sufficient incentive" for Qwest to continue to comply with section 271 after entering the long distance market. Facilitator's Report at 6. And as noted above, the Facilitator sought to increase that incentive in a variety of ways.

to assure that markets remain open for competition."[13] In fact, the FCC has repeatedly made clear that it does not require the submission of *any* performance assurance plan as a condition for 271 approval,[14] much less one that maximizes payments to CLECs without regard to any relationship to the harm of a missed measurement. Nor is the QPAP required for purposes of complying with the obligations for all ILECs to unbundle their local networks under section 251(c)(3) of the Act; rather, it is part of Qwest's showing under the "public interest" criterion in Section 271(d)(3)(C).

Contrary to the CLECs' assertions, that standard is not a straightjacket. It does not prohibit the Facilitator from asking the logical question whether payments sought by CLECs are disproportionate to their harm, in order to assure that the QPAP embodies a "reasonable" payment structure, as required by the FCC.[15] As the Supreme Court established over 60 years ago, the public interest standard of the Communications Act "is a supple instrument for the exercise of discretion by the expert body which Congress has charged to carry out its legislative

---

13 AT&T Comments at 2.

14 *See* Memorandum Opinion and Order, *Application by Bell Atlantic New York for Authorization Under Section 271 of the Communications Act To Provide In-Region, InterLATA Service in the State of New York*, 15 FCC Rcd 3953 ¶ 429 (1999) ("*Bell Atlantic New York Order*"), *aff'd sub nom. AT&T Corp. v. FCC*, 220 F.3d 607 (D.C. Cir. 2000); Memorandum Opinion and Order, *Application by SBC Communications Inc., Southwestern Bell Telephone Company, and Southwestern Bell Communications Services, Inc. d/b/a Southwestern Bell Long Distance Pursuant to Section 271 of the Telecommunications Act of 1996 To Provide In-Region, InterLATA Services in Texas*, 15 FCC Rcd 18,354, ¶ 420 (2000) ("*SBC Texas Order*"); Memorandum Opinion and Order, *Joint Application by SBC Communications Inc., Southwestern Bell Telephone Company, and Southwestern Bell Communications Services, Inc. d/b/a Southwestern Bell Long Distance for Provision of In-Region, InterLATA Services in Kansas and Oklahoma*, 16 FCC Rcd 6237 ¶ 269 (2001) ("*SBC Kansas/Oklahoma Order*"); Memorandum Opinion and Order, *Application of Verizon New England Inc., Bell Atlantic Communications, Inc. (d/b/a Verizon Long Distance), NYNEX Long Distance Company (d/b/a Verizon Enterprise Solutions) And Verizon Global Networks Inc., For Authorization to Provide In-Region, InterLATA Services in Massachusetts*, 16 FCC Rcd 8988 ¶ 236 (2001) ("*Verizon Massachusetts Order*").

15 *See, e.g., Bell Atlantic New York Order* ¶¶ 432-33 ("reasonable structure" designed to detect and sanction poor performance).

policy."[16] It surely encompasses concerns about massive and unwarranted wealth transfers from BOCs to their competitors, which could artificially depress the very form of facilities-based competition that the 1996 Act was designed to encourage.[17] And it also certainly permitted the Facilitator to ask whether at some point the payments sought by the CLECs would, if accepted, amount to "thumb[ing] our nose at Congressional intent to increase competition" in the long distance markets currently dominated by CLECs/IXCs such as AT&T and WorldCom.[18]

Finally, Qwest notes that Public Counsel prefers the currently proposed Colorado PAP to the QPAP. A number of the CLECs similarly recommend that this Commission now adopt either portions of that proposal, or the recommendations of the Utah Commission staff, which disagreed with the Facilitator on certain issues. Qwest also notes first that the CPAP is different from the QPAP; it was developed through a different record and is based on a give-and-take specific to that review process. Second, the CLEC's attempt to disavow the outcome of the lengthy process in which this Commission and its Staff engaged and/or to pick and choose provisions from different plans developed in different proceedings is untenable and far afield of the due process they claimed entitlement to when the ROC proceeding began. Finally, Qwest

---

16 *FCC v. WNCN Listeners Guild*, 450 U.S. 582, 594 (1981), quoting *FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134, 138 (1940). *See also MCI Tel. Corp. v. AT&T*, 512 U.S. 218, 245 (1994).

17 *See, e.g., Implementation of the Local Competition Provisions of the Telecommunications Act of 1996,* Third Report and Order and Fourth Further Notice of Proposed Rulemaking, 15 FCC Rcd 3696 ¶¶ 5-7 (1999). As FCC Chairman Powell noted only last week, only facilities-based competitors "offer the promise of more substantial and enduring investment in local markets," the promise of "a redundant national network infrastructure" that is now more important than ever, as well as "*real meaningful choice for consumers.*" Remarks of Michael K. Powell, Chairman, Federal Communications Commission, at the Association of Local Telecommunications Services, Nov. 30, 2001, at 6 (emphasis in original).

18 Facilitator's Report at 5.

advances the Commission that Qwest is currently challenging the Colorado and Utah provisions that the CLECs propose.[19]

And the FCC has made clear that the question here is *not* whether "more is better." It is *not* whether now to replace the QPAP offered by Qwest, which already contains a number of compromises accepted by Qwest through the multi-state process endorsed by this Commission, with a wholly different plan premised on a wholly different record. The issue is whether Qwest's proposal, as modified through this negotiated process of give and take, satisfies the FCC's "zone of reasonableness." The most probative evidence on this score is that the QPAP is consistent with the basic framework of similar plans already approved by the FCC in other cases. As we now show, there can be no doubt that the QPAP satisfies the FCC's standards, which are controlling here.

II. THE COMMENTERS' SPECIFIC OBJECTIONS ARE INCONSISTENT WITH THE FCC'S PRECEDENTS AND THE RECORD EVIDENCE.

We address below the objections to specific aspects of the Facilitator's Report, in the order set forth in that Report.

Overall Cap

Qwest proposed to accept substantial financial risk as an incentive to meet the QPAP performance measures — up to $306 million per year ($81 million per year in Washington),

---

[19] *See* Response of Qwest Corporation to Decision on Motions For Modification and Clarification of the Colorado Performance Assurance Plan, *In the Matter of the Investigation Into Alternative Approaches For a Qwest Corporation Performance Assurance Plan in Colorado*, Docket No. 01I-041T (Nov. 30, 2001) ("Qwest's Colorado Comments"); Qwest's Comments on the Staff Report on Qwest's Performance Assurance Plan, *In the Matter of the Application of QWEST CORPORATION, fka US WEST Communications, Inc., for Approval of Compliance with 47 U.S.C. § 271(d)(2)(B)*, Docket No. 00-049-08 (Nov. 6, 2001) ("Qwest's Utah Comments").

Of course, it particularly ludicrous for WorldCom or any other CLEC to ask the Commission to ignore the record and process of this proceeding in favor of provisions from another plan in another jurisdiction.

which represents 36 percent of Qwest's net return from local service in the nine states. The Facilitator cited repeated approval of the 36 percent cap, but also recommended that the 36 percent cap move in either direction according to a preset formula so that it would adapt to changing circumstances. The caps would move as follows:

- If Qwest would have exceeded the cap by at least 4 percent for any consecutive period of 24 months, then the cap could increase by up to 4 percent, with a maximum total increase of 8 percent.

- If Qwest's payments were 8 percent or more below the cap for any consecutive period of 24 months, then the cap could decrease by up to 4 percent, with a maximum total decrease of 6 percent.

The CLECs disagree with both the 36 percent overall cap and the provision allowing for downward movement of the cap. They argue alternatively that Qwest's potential liability should be allowed to increase to 44 percent but not decrease, that it should not be capped at any level, or that only a "soft" cap or a "procedural" cap should be used. These arguments are completely undermined by FCC precedent. In application after application, the FCC has approved an absolute limit on the BOC's liability.[20] More specifically, and as AT&T has acknowledged,[21] the FCC has repeatedly found that placing 36 percent of the BOC's net return at risk constituted a meaningful incentive.[22] As the Facilitator pointed out, the CLECs have failed to demonstrate — despite ample opportunity to do so — that the particular facts in this case raise considerations that were not present in the FCC's previous section 271 applications in which a 36 percent hard

---

[20] *See Bell Atlantic New York Order* ¶ 435; *SBC Texas Order* ¶ 424; *SBC Kansas/Oklahoma Order* ¶ 274; *Verizon Massachusetts Order* ¶ 241; *Verizon Connecticut Order* ¶ 76; *Joint Application by SBC Communications Inc., Southwestern Bell Tel. Co., and Southwestern Bell Communications Service, Inc. d/b/a Southwestern Bell Long Distance Pursuant to Section 271 of the Telecommunications Act of 1996 To Provide In-Region, InterLATA Services in Arkansas and Missouri,* FCC 01-338 (rel. Nov. 16, 2001), at ¶¶ 128-29 & n.409 ("*SBC Arkansas/Missouri Order*").

[21] *See* AT&T Comments at 6.

[22] *See Bell Atlantic New York Order* ¶¶ 435-36; *SBC Texas Order* ¶ 424; *SBC Kansas/Oklahoma Order* ¶ 274; *Verizon Connecticut Order* ¶ 76; *SBC Arkansas/Missouri Order* ¶¶ 128-29 & n.409.

cap was included in the plan.[23] In the absence of such a demonstration, the Facilitator properly rejected the CLECs' assertion that financial risk must be unlimited to be adequate — particularly when coupled with the risk of enforcement proceedings or revocation of section 271 authorization after interLATA service has been initiated.

The Facilitator also recognized Qwest's need for "certainty" regarding its maximum potential liability.[24] Qwest should not be forced to decide whether to accept the significant undertaking it has made in the QPAP without some assurance as to the limit of the liability in that undertaking.[25] This is particularly true in light of the fact that subjecting Qwest to unlimited liability is not necessary to accomplish the goals of the QPAP — either to provide sufficient incentive for Qwest's wholesale performance or to compensate CLECs for the harm associated with poor performance.

ELI argues that if the QPAP cap does not equal the profit Qwest generates from local exchange services, QPAP payments "would just be another cost of doing business, rather than a financial incentive to ensure the development of effective local exchange competition."[26] ELI's advocacy on this point mistakenly assumes that Qwest has no better use for its "profits" than paying penalties for nonconforming performance, rather than paying investors for the use of their

---

[23] *See* Facilitator's Report at 15.

[24] *Id*. at 16.

[25] A "soft" cap that carries forward liability into future years does not address this fundamental problem. It is not really a cap at all, but simply a deferred payment plan. Similarly, a "procedural" cap exposes Qwest to the same prospect of unlimited financial exposure, the uncertainty of which is not mitigated by the fact that public service commissions will "make such decisions carefully and wisely." Report at 16.

[26] ELI Comments at 20.

funds. The Facilitator considered and appropriately rejected ELI's argument, just as the FCC has rejected similar arguments in the past.[27]

AT&T and WorldCom argue that if a cap must be put in place, then it should be set at 44 percent rather than 36 percent. To support this proposition, WorldCom points to the 44 percent cap established by the New York Public Service Commission in post-271 proceedings involving Verizon. As the Facilitator correctly noted, however, the New York commission only set a 44 percent cap in response to record evidence about Verizon's performance.[28] It would inappropriate to subject Qwest at the outset to any cap higher than the 36 percent standard established by FCC precedent based upon record evidence in another proceeding about another BOC's performance, to which Qwest was never a party — and when here the CLECs themselves note that "Qwest routinely achieves most of the performance measurements with benchmarks as standards."[29]

AT&T's claim that "the trend is toward a much higher cap and/or procedural cap"[30] is spurious. AT&T baldly fails to acknowledge and identify to this Commission two recent decisions from the FCC in which it approved a hard 36 percent cap.[31]

Of course, the Facilitator also recommended that the cap could move upwards, as high as 44 percent, in the event of continuous nonconforming service. The CLECs do not endorse this

---

27 *See* Facilitator's Report at 15-16. In the *Bell Atlantic New York Order*, the FCC specifically considered and rejected arguments made by MCI WorldCom and other parties that the PAP must entail liability "equal to or greater than the benefits that BA-NY would receive over time from providing such poor performance." *Bell Atlantic New York Order* ¶ 435 n.1330. The FCC noted that: "we do not find it necessary to determine the 'optimal' penalty amount for a stand-alone enforcement mechanism, [therefore] we will not specifically address the details of MCI WorldCom's study, the 'flaws' identified by the New York Commission, or Bell Atlantic's counterarguments." *Id*.

28 *See* Report at 18.

29 AT&T Comments at 27. *See also* ELI Comments at 25.

30 AT&T Comments at 10.

31 *See SBC Kansas/Oklahoma Order* ¶ 274; *SBC Arkansas/Missouri Order* ¶¶ 128-29 & n.409.

flexibility, because it carries with it the risk of a lower cap in the event of continuous *conforming* service. In other words, they want only a one-way ratchet — always up and never down. This unprincipled argument ignores the purpose of the flexible cap as a correcting mechanism. And while several CLECs object that the flexible cap cannot be increased unless there were continuous nonconforming service over many months, as noted above, the degree of flexibility is already biased in an upward direction (permitting movement upward by up to 8 percent, but downward by only 6 percent). AT&T's assertion that Qwest can somehow avoid triggering the higher cap by manipulating its performance from bad in one month to good in another ignores the fact that Qwest's ability to meet the QPAP's standards is dictated by complex factors and cannot be turned on and off like a switch.

However, if the CLECs are opposed to a flexible cap, Qwest has no objection to a flat 36 percent cap. That is what Qwest originally proposed, based upon the plans that have repeatedly obtained FCC approval. As discussed above, such a cap has been found to provide a meaningful incentive and to serve the public interest in ensuring some degree of certainty about the undertaking that Qwest has proposed to make. Nor does Qwest object to Public Counsel's suggestion that payments as a result of late reporting or payment be excluded from the cap.

Several parties argue that the cap should be premised on the most recently available ARMIS data.[32] The Facilitator appropriately rejected this argument. As he concluded, a number of elements may affect net revenues from year to year, such as market share loss, price reductions resulting from competition, and changes in return calculations. Thus, ". . . there is no reason that the ongoing use of 1999 net intrastate revenues is more likely to increase or decrease

[32] WorldCom also cites Qwest's willingness to update its 1999 ARMIS revenue data. WorldCom Comments at 5. While Qwest was willing to do so, it never agreed that the cap should be premised on 2000 data.

Qwest's net financial exposure."[33] Indeed, the CLECs' insistence on use of 2000 ARMIS data known to them (which would result in a higher cap), without any mention of the possible use of more recent 2001 ARMIS data that may be available prior to the effective date of the QPAP (which may or may not result in a higher cap), speaks volumes about their ultimate goal here.[34]

Preclusion of Other CLEC Remedies

Section 13.6 of the QPAP provides that QPAP payments shall constitute the exclusive remedy for CLECs to recover damages from Qwest based on contractual theories of liability for performance under the QPAP. As the Facilitator noted, the QPAP does not prohibit CLECs from seeking relief against Qwest under noncontractual theories, such as actions in tort or antitrust, but Section 13.7 of the QPAP permits Qwest to offset QPAP payments against any damage award that a CLEC receives under such noncontractual theories, where the award is for the same underlying activity or omission.[35] In addressing these provisions, the Facilitator recognized the need to preserve CLECs' ability to seek noncontractual remedies, while preventing CLECs from seeking a multiple recovery for the same harm. While recommending some clarifying changes to the QPAP's provisions (which Qwest has implemented consistent with the Report), the Facilitator concluded that the QPAP approach of providing for an exclusive remedy for contractual damages and an offset against noncontractual damages was an appropriate and fair

---

33 Facilitator's Report at 22.

34 WorldCom suggests that Qwest witness Carl Inouye's agreement to update its Exhibit K 1999 ARMIS revenue data (which is used to calculate the cap) to reflect year 2000 revenue data is evidence that Qwest would agree to use 2000 ARMIS data to calculate the cap amount. *See* WorldCom Comments at 5-6. This is not true. While it is true that, when asked by Staff if Qwest would comply with a request to update the calculation to reflect 2000 data, Mr. Inouye responded that he would not object to doing so to provide information, he did not agree to use the 2000 data to calculate the cap.

35 *See* Facilitator's Report at 30.

means of providing CLECs with substantial self-executing payments without demonstration of harm and protecting Qwest from multiple standards and double recovery.[36]

AT&T and ELI argue that the QPAP should not constitute CLECs' exclusive remedy even for contractual theories of liability. AT&T contends that CLECs should be permitted to seek contract remedies for the same performance addressed by the QPAP even after receiving QPAP payments, where the CLECs can show that the QPAP payments were not fully compensatory.[37] Similarly, ELI argues that CLECs should be able to seek other remedies, such as those available under state public service commission rules, even where they have accepted QPAP payments.[38]

The Facilitator appropriately rejected these arguments as being "substantially imbalanced."[39] The CLECs are not, of course, required to elect to participate in the QPAP. But here they seek in essence to use the QPAP payments as a floor for their recovery, and to use other contractual remedies in search of a higher amount. That approach is completely contrary to the purpose of the theory of liquidated damages underlying these self-executing payments, which is to bind the parties in advance to a fixed amount of recovery for the harm.[40] While the injured party is freed from the obligation to prove the actual harm that it suffered and can even recover

---

36 *See id.* at 32.

37 *See* AT&T Comments at 15.

38 *See* ELI Comments at 37-39.

39 Facilitator's Report at 11. As Qwest noted in its brief in support of the QPAP, the QPAP's treatment of Tier 1 payments as liquidated damages is the same as in the FCC-approved Texas, Oklahoma, and Kansas PAPs. *See* Tex. PAP § 6.1 (describing payments to CLECs as "liquidated damages"); Kan. PAP § 6.1 (same); Okla. PAP § 6.1 (same).

40 *See Reid v. Mutual of Omaha Ins. Co.*, 776 P.2d 896, 905 (Utah 1989); *see also Priebe & Sonse, Inc. v. United States*, 332 U.S. 407, 417 (1947) (Frankfurter, J., dissenting) (stating that the purpose of liquidated damages is "to avoid the waste of controversy as to the extent of a loss, should it occur, and to save judges and juries from having to guess about it . . . .").

without suffering any harm at all, it cannot recover for damages above the predetermined figure.[41] As the Facilitator concluded:

> It would be one thing to delete the Tier 1 payments altogether, requiring CLECs to show harm and to demonstrate its amount. . . . However, it is not reasonable to allow CLECs to keep the Tier 1 base payments and Tier 1 accelerated payments when it suited them, but to seek more when it did not. One of the things that make liquidated damages appropriate is that they liquidate them for both sides. There is no reasonable basis for requiring one party to take the risk that payments will exceed actual harm while allowing the other party to avoid the risk that the payments will be less than actual harm.[42]

ELI's argument that parties often have alternative statutory remedies[43] ignores the whole point of agreements to liquidate the amount of damage for a specific (here, contractual) remedy. The appropriate statutory analogy here would be workers' compensation laws, which bar contractual recovery of actual damages in return for self-executing payments without requirements for proof of such actual damages.

AT&T and ELI also challenge the Facilitator's recommendation regarding Section 13.7 offset right. These CLECs concede that multiple recovery for the same damages is improper.[44] They argue, however, that the trier of fact, not Qwest, should be permitted to determine whether an offset is appropriate in a particular instance.

---

41 AT&T argues that the QPAP's liquidated damages provision would give Qwest "*carte blanche* to re-monopolize local telecommunications without any ramification except QPAP payments which Qwest will easily be able to calculate." AT&T Comments at 17. AT&T's argument ignores the fact that CLECs are free under the QPAP to seek relief under noncontractual theories of liability, such as tort or antitrust. Of course, Qwest also would be subject to enforcement actions by state or federal authorities.

42 Facilitator's Report at 33.

43 ELI Comments at 39.

44 *See* AT&T Comments at 20; ELI Comments at 35.

As the Facilitator pointed out, "nothing in [the QPAP] gives Qwest the right to make an unreviewable decision about whether an offset is allowable."[45] Thus, Qwest will *not* simply "refuse to pay the judgment" of a court.[46] Any CLEC that disagrees with the applicability of a Section 13.7 offset right asserted by Qwest may have the issue ultimately resolved through dispute resolution. The real issue is whether Qwest has more than merely the right to "argu[e] for offset."[47] That right would be of dubious value if the QPAP does not make it clear. As the Facilitator recognized, Section 13.7 effectively commits the CLECs to their concession that they will not assert rights to multiple recovery for the same underlying activity.

AT&T also argues that offset is not appropriate against antitrust or tort recoveries, simply because those are different causes of action from contract theories.[48] Section 13.7 makes clear that offset is permitted only against damages in antitrust or tort cases where those damages are "also recoverable under contractual theories of liability" — and not, as the Facilitator concluded, against "separate harm or damage."[49] As the Colorado Special Master recognized in his analysis of liquidated damages,[50] lost profits and customer goodwill are precisely the kind of damages that contractual provisions are designed to liquidate, and thus against which the QPAP payments should be offset against these amounts to prevent multiple recovery.

---

45 Facilitator's Report at 35.

46 ELI Comments at 35.

47 AT&T Comments at 21; ELI Comments at 34.

48 Comments of AT&T at 19.

49 Facilitator's Report at 36.

50 Special Master's Report at 12.

Jurisdiction Over Service Quality

Public Counsel's suggestion of deleting Section 13.8 of the QPAP would create significant risks of double payment for Tier 2 misses. So would its proposed revision of Section 12.1. As currently structured, these provisions are designed to avoid double payment for "the same underlying activity or omission," and they are consistent with provisions in the Texas, Kansas, and Oklahoma PAPs.[51] Public Counsel has advanced no basis for such an unfair result. The QPAP does not attempt to deprive the Commission of existing jurisdiction to address either wholesale or retail performance issues; it simply requires that any financial penalty for failure to meet the relevant standard not be assessed twice over.

Use of Portion Tier 1 Payments to Administer QPAP

The Facilitator recommended that the QPAP should be modified to allow a state to use Tier 2 funds for any purpose allowed by state law, and that one-third of Tier 2 payments and one-fifth of the escalation portion of Tier 1 payments should be made to a special fund that would be available for states for common administration of the QPAP.[52] Qwest supports such common administrative efforts. AT&T, WorldCom, and ELI, on the other hand, complain that the Facilitator's suggestion with respect to the Tier 1 payments to CLECs is unjustified.[53] Those CLECs ask the Commission to follow the lead of the Utah Staff, which deleted the Tier 1 payment component of the common administrative fund.[54]

---

[51] See Texas PAP §§ 6.2 (Tier 2 assessments as exclusive remedy) and 7.3 (cap includes Tier 2 assessments with no exception for fines for retail service quality performance); Kansas PAP §§ 6.2 and 7.3 (same); Oklahoma PAP §§ 6.2 and 7.3 (same).

[52] *See* Facilitator's Report at 41-42.

[53] *See* AT&T Comments at 22-23; WorldCom Comments at 7-8.

[54] *See* AT&T Comments at 23; WorldCom Comments at 8.

If such a collaborative approach is to work, however, the contributions to the fund must be consistent across the board. Moreover, because CLECs will also benefit from the collaborative approach, the contribution from Tier 1 funds (which come from Qwest, of course) is entirely appropriate. Fairness requires CLEC contribution and equal participation by all states.

Trigger for Tier 2 Payments

There are two issues raised by the parties regarding Tier 2 triggers: whether the Facilitator's recommended modification is sufficient, and what he meant when he stated that "[e]scalation should take place as provided in the QPAP . . . ."[55]

First, as the Facilitator noted, because of the lag time involved in addressing continuing problems, "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," which have all been found acceptable by the FCC. *Id.* It is also important to note that Qwest's QPAP contained a modification that significantly limited the operation of the Tier 2 trigger, by converting a number of Tier 2 measures (GA-1, GA-2, GA-3, GA-4, GA-6, PO-1, OP-2, and MR-2) to a region-wide measure payment structure that effectively removed the three consecutive month trigger.

Although Qwest believes that its initial position regarding the need for a three month trigger still applies, it has modified the QPAP to reflect the Facilitator's recommended decision to increase payment opportunities for Tier 2 measures by effectively reducing the time before payments begin. If Qwest's previous triggers were acceptable to the FCC, then surely the Facilitator's modified triggers are. Indeed, in the multi-state hearing, Qwest provided unrebutted

---

[55] Facilitator's Report at 43.

evidence that the combined average Tier 1 and Tier 2 payment for an unbundled loop that missed the commitment date (OP-3) and installation interval (OP-4) performance standards would be $1,832. The most frequently ordered unbundled loops are analog loops, which cost a CLEC approximately $20 per month. In the face of this level of payment, WorldCom has no justification for challenging the Facilitator's more generous trigger proposal.

No other party has provided any evidence that Qwest's initial trigger proposal, much less the Facilitator's trigger proposal, is insufficient. In fact, the FCC's approval of a Tier 2 trigger mechanism similar to the one initially proposed by Qwest proves that it *is* sufficient.

Second, Qwest submits that the Facilitator's reference to payment escalation in regard to Tier 2 payments is simply a mistake that is inconsistent with the operation of the QPAP. AT&T recognized as much, noting that, "[u]nlike for Tier 1 payments the latest QPAP does not have any provision for escalation of Tier 2 payments."[56] WorldCom's attempt to take advantage of this obvious misstatement by suggesting that Tier 2 payments should now escalate[57] is preposterous and should be dismissed.

<u>Escalation of Tier 1 Payments</u>

The QPAP provides for a six month limit on the escalation of the Tier 1 payments amounts, modeled after SWBT plans those approved by the FCC for other states. The Facilitator accepted this limitation on the incentive structure of the escalation mechanism, because of the very real possibility that continued misses despite six months of escalating payments could be

[56] AT&T's Comments on the Liberty Consulting Group's QPAP Report, November 21, 2001, p. 43.

[57] WorldCom's Comments on Liberty Consulting's Report Regarding Qwest's Performance Assurance Plan, at 9.

caused by other reasons.[58] Indeed, for example, he recognized that continued non-conformance could be the result of less than optimally designed standard.[59]

AT&T, ELI, the Public Counsel, and WorldCom all recommend unlimited escalation.[60] The commenters have not, however, offered any new arguments or evidence to demonstrate that the Facilitator's finding was unreasonable.[61] Instead, some of the parties resort to attacking the Facilitator himself. ELI characterizes the Facilitator's views as "nothing short of outrageous."[62] AT&T flippantly says that "about the only thing that is known with certainty is that we are all going to pay taxes and die."[63] In short, these commenters contribute much new heat but very little new light to the question.

Indeed, no party has provided evidence demonstrating that unlimited escalation is needed to ensure that Tier 1 payments are compensatory or to provide sufficient incentive to Qwest to meet the QPAP's performance standards.[64] As noted above, the financial incentives already embodied in the QPAP are enormous compared to the revenues that wholesale services produce. Qwest provided evidence during the workshops demonstrating that continuous escalation beyond the current six-month per occurrence payment levels in the QPAP would substantially over-compensate CLECs — and give them an incentive not to invest in the facilities-based

---

58 *See* Facilitator's Report at 45.

59 *Id*. at 44.

60 *See* AT&T Comments at 23; ELI Comments at 22; Public Counsel's Comments on the QPAP Report, *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 (Nov. 21, 2001) at 16 ("Public Counsel Comments"); WorldCom Comments at 10.

61 WorldCom notes that the cap on escalation means that "the door is open to litigation." WorldCom Comments at 11. This makes no sense: with or without the cap, the payments are self-executing.

62 ELI Comments at 22, 23.

63 AT&T Comments at 27.

64 *See* Qwest Br. at 21.

competition that forms the ultimate goal of the 1996 Act.[65] No party ever refuted that evidence, and the parties provide no reason to discredit it.

In addition, Qwest will not necessarily be able to correct noncompliant behavior immediately or even within six months. There is a considerable time lag involved in reporting performance results, hiring and training new employees, designing and implementing system changes, performing engineering work, and placing new capital investment.[66] For this reason, it is entirely possible that Qwest will be unable to meet a performance standard for an extended period of time (and thus will be subjected to punitive liability) *even though Qwest fully intends to comply with a performance standard*. Consequently, Qwest's ability to meet its requirements within a specific time frame may have little to do with its financial incentives, and the assumption that higher payment levels will always give Qwest more incentive to comply is unfounded and simplistic. Indeed, the possibility that Qwest's section 271 authorization will be revoked makes such punitive sanctions wholly unnecessary,[67] as does the fact that Qwest will be subject to "non-271 sources of regulatory authority to examine the causes and consequences of structural failures or weaknesses" in Qwest's provision of service.[68]

As noted above, many other states have recognized the need to cap the escalation of payments. A number of other plans approved by state commissions and the FCC have included

---

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

66 *See* Qwest Br. at 24-25.

67 Facilitator's Report at 45.

68 *Id*.

such limits, including the Texas, Kansas, Oklahoma, Arkansas, and Missouri.[69] The Staff of the Arizona Corporation Commission has also recently accepted the provision in Qwest's plan.[70]

The commenters rely on the proposals of the Colorado Hearing Commissioner and the Utah Staff to the contrary. Qwest has challenged the escalation component of those decisions in both states, for all of the reasons set forth above, including their inconsistency with precedent.[71]

Payment Classifications and Amounts

During the workshops, some CLECs requested that weighting (and therefore payment amounts) be increased for services that cost more and are therefore of higher value. Thus, they argued, missing a performance standard in these services should count more. Qwest did not disagree with this principle, but pointed out that it had a necessary corollary: that services costing less should have lower associated payment amounts. Qwest then introduced a proportionality analysis, which was unrebutted, demonstrating that AT&T's proposed one-way ratchet would create great disparity compared to the proportionality contained in Qwest's proposal.[72]

AT&T does not challenge the Facilitator's endorsement of Qwest's view that any change be shown to be proportional. ELI, however, continues its one-way ratchet efforts. It argues that existing high capacity loop and transport payments should be increased, and continues to ignore the corollary about lower value services raised by the CLEC proposal.

---

69 *See* Texas PAP § 8.0; Kansas PAP § 8.0; Oklahoma PAP § 8.0; Arkansas PAP § 8.0; Missouri PAP § 8.0.

70 *See* Proposed Staff Report on Qwest's Performance Assurance Plan, *In the Matter of Qwest Corporation's Section 271 Application*, ACC Docket No. T-00000A-97-0238 (Oct. 29, 2001) ¶ 133.

71 *See* Qwest's Colorado Comments at 13-18; Qwest's Utah Comments at 14-17.

72 *See* Exs. S9-QWE-CTI-5 (slides 11-13); C. Inouye 8/14/01 Testimony, Tr. at 75-77.

WorldCom's approach is simply to urge that all measures be weighted equally. It is unclear what WorldCom is proposing, but it refers to proceedings in Michigan, involving another BOC, rather than the record of this case involving Qwest. And as it concedes, the Michigan Commission has decided to reconsider its prior approach of doubling all Tier I amounts approved in Texas.[73] WorldCom's further reference to the Illinois staff's support of higher metrics in order to promote "overall development of a competitive telecommunications environment" or simply to "reinforce the incentive"[74] includes no indication of why, or to what extent, "more is better." Moreover, it relates to the SBC/Ameritech order, which imposed unique conditions in the case of a BOC-to-BOC merger that are inapplicable to 271 plans. These proceedings thus are not inconsistent with the Facilitator's considered judgment in this case.

Cancelled Orders

ELI continues to urge that the QPAP include payments for orders that have been cancelled. The Facilitator found that the CLECs never provided any evidence that might correlate a cancellation to the missed PID — or, indeed, that "cancelled orders, whatever the reasons, are material in number."[75] Absent such evidence, he found it reasonable to assume that more than nominal delay would be required to cause customers to cancel CLEC orders. The CLECs have provided no adequate answer to their lack of evidence on this point. And the suggestion of ELI that the date of cancellation should be deemed to be the date of completion of installation for performance purposes (ELI Comments at 8) raises a host of additional problems, concerning incentives for CLECs to game the system through cancellation orders that (unlike

[73] WorldCom Comments at 14 (citing Opinion and Order, *Ameritech Michigan's Submission on Performance Measures, Reporting, and Benchmarks, Pursuant to the October 2, 1998 Order in Case No. U-11654*, The Michigan Public Service Commission, Case No. U-11830 (July 25, 2001) at 7).

completion dates) are wholly outside the control of Qwest.[76] It is for these reasons that inclusion of cancelled orders in interval measures was appropriately rejected by the ROC TAG during the development of the PIDs.

Special Access

ELI and WorldCom continue to argue that Qwest's provisioning of special access circuits should be included in the QPAP.[77] The Facilitator rejected the same requests by those parties, noting that:

> The evidence of record supports the conclusion that the overwhelming majority of special access circuits at issue here were purchased under federal tariffs. Remedies for failure to meet the requirements of that tariff should be addressed by the agency with jurisdiction under such tariffs; i.e., the FCC, not state public service commissions. Similarly, the QPAP need not address failures to meet existing state tariffs; CLECs can appeal directly to state commissions for any necessary relief.[78]

The Facilitator's approach to this issue is clearly correct. This Commission lacks even the jurisdiction to address performance issues relating to the 97% of Qwest's special access circuits that are purchased from the interstate tariff.[79] As with other services that fall outside the scope of section 251, special access services are subject to the traditional jurisdictional divide under the Communications Act of 1934: the FCC addresses interstate services, and the state

---

74 *Id.* at 15.

75 Facilitator's Report at 47.

76 Qwest seeks to clarify one point about the applicability of the QPAP to cancelled orders. As ELI notes, orders are not reflected in the QPAP's performance measurements if they are ultimately cancelled. As the Facilitator noted, however, a cancellation by ELI or its customer bears no demonstrable relation to Qwest's performance.

77 See ELI at 17; WorldCom Comments at 16.

78 Facilitator's Report at 57.

79 *See* K. Stewart, 8/16/01 Testimony, Tr. at 236-37.

commissions address intrastate services.[80] Moreover, to the extent that this Commission's application of performance standards would impose obligations on or remedies against Qwest that are different from those imposed under the relevant interstate tariff, those obligations or remedies not only would directly interfere with the FCC's authority to govern matters within its jurisdiction, but would also be inconsistent with the filed rate doctrine.[81]

Contrary to WorldCom's assertion, other states have not concluded that they have jurisdiction over interstate special access services. Indeed, the Massachusetts Department of Telecommunications and Energy ("DTE") order cited by WorldCom squarely determined that the DTE *lacked* jurisdiction over any special access services purchased from federal tariffs, because they are exclusively under the jurisdiction of the FCC.[82] Like the FCC's *New York Order*,[83] the DTE concluded that the proper vehicle for addressing service quality issues with respect to those services is the section 208 process.[84]

---

80 *See* 47 U.S.C. § 152; *Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 375 (1986). It is no answer that a customer may use an interstate access service to transport some intrastate traffic. The Commission's rule for more than a decade has been that, if 10 percent or more of the traffic carried by an access line is interstate, the service must be "assigned to the interstate jurisdiction." *MTS/WATS Market Structure Order*, 4 FCC Rcd 5660 ¶ 2 (1989).

81 *See* 47 U.S.C. § 203(a); *American Tel. & Tel. Co. v. Central Office Tel., Inc.*, 524 U.S. 214, 223-224 (1998); *see also Buckman Co. v. Plaintiffs' Legal Comm.*, 531 U.S. 341 (2001).

82 *See* Order on AT&T Motion to Expand Investigation, *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*, D.T.E. 01-34, at 10 (Mass. DTE Aug. 9, 2001), available at <http://www.state.ma.us/dpu/telecom/01-34/89order.pdf> ("Massachusetts DTE Decision")(". . . Congress has delegated authority for interstate, and by extension mixed use, communications to the FCC. The FCC's authority is exclusive . . . . Remedies for quality of service violations of federally tariffed special access services lie with the FCC. . . . The Department concludes that it is preempted from investigating and regulating quality of service for federally tariffed special access services.").

83 *See Bell Atlantic New York Order* ¶ 341 (noting that to the extent parties have service quality concerns about special access purchased from the BOC's federal tariff, "these issues are appropriately addressed in the Commission's section 208 complaint process").

84 *See* Massachusetts DTE Decision at 10. While the DTE did order Verizon to include reporting on interstate special access performance as part of this state proceeding unrelated to section 271, it did so based on findings about Verizon's performance that are irrelevant here. *See id.* at 12. And in that case, Verizon had "stated that its provisioning of federal circuits is identical to its provisioning of in-state circuits." *Id.* at 12. Even in that non-271 proceeding, however, the DTE expressly rejected the notion that it had jurisdiction over *any* special access

The Texas PUC action cited by WorldCom and ELI, likewise, was not a finding by the Commission that it has jurisdiction. The Texas Commission did not engage in a detailed analysis of special access; it mentioned special access only in a chart attached to its order, stating, *in toto*:

> The Commission finds that, 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. The Commission also finds it appropriate to conduct a workshop, consistent with the discussion at the May 24, 2001 Open Meeting, on the issue of special access and UNEs.[85]

Subsequent to that order, the Commission granted SWBT's request for arbitration on this issue, and SWBT's jurisdictional objections are currently pending.[86]

With respect to New York, WorldCom acknowledges that the New York Commission order it cited was "not tied directly with Verizon's PAP."[87] The order involves an investigatory proceeding in connection with the Commission's ongoing monitoring of Verizon's intrastate special services for over six years, and relates only to intrastate "special services."[88] The New York Commission expressly disavowed any intention to cover federally tariffed services, stating "we do not apply incentives to federally tariffed access services."[89] It further recognized that Verizon's previously approved PAP likewise did not cover federally tariffed special access

---

purchased from the federal tariff, *id.* at 10, and it expressly noted that, "we will not apply any findings or potential remedies to interstate services." *Id.* at 12.

85 *See Section 271 Compliance Monitoring of Southwestern Bell Telephone Company of Texas*, Project No. 20400, Order No. 33, Approving Modifications to Performance Remedy Plan and Performance Measurements, Att. A at 88. (Tex. PUC June 1, 2001).

86 *See Petition of Southwestern Bell Telephone Company for Arbitration Regarding the Implementation of Special Access Performance Measurements*, Docket No. 24515, Order No. 3, Setting Intervention Deadline and Schedule for Briefing on Threshold Issues (Tex. PUC Oct 1, 2001).

87 WorldCom Comments at 17.

88 *See Proceeding on Motion of the Commission to Investigate Methods to Improve and Maintain High Quality Special Services Performance by Verizon New York, Inc.*, Opinion and Order Modifying Special Services Guidelines for Verizon New York Inc., Conforming Tariff, and Requiring Additional Performance Reporting, Case 00-C-2051, *Proceeding on Motion of the Commission to Investigate Performance-Based Incentive Regulatory Plans for New York Telephone Company*, Case 92-C-0665 at 1, 4 (NY PSC June 15, 2001).

services: "UNE and EEL . . . are already subject to the Performance Assurance Plan. Thus, the special access service offering, taken under federal tariff, would be the only carrier offering not subject to an incentive."[90]

Finally, the Colorado Hearing Commissioner's decision, cited by WorldCom and ELI, likewise, is not instructive on this issue.[91] Qwest has recently challenged that decision which is directly contradicted by the earlier holding by the Colorado Special Master. The Special Master reached the same conclusion as the Facilitator: "Following the lead of other states, I do not believe that Section 271 is the correct forum to address" special access.[92] Without citing any governing legal authority, the Hearing Commissioner, in contrast, summarily stated that "I am not convinced by Qwest's jurisdiction argument." He based this conclusion not on the merits of the legal arguments, but the fact that he found the CLECs "have made a plausible factual case that special access is being used to enter the local exchange market."[93] Qwest raised serious legal objections to the Hearing Commissioner's decision to include reporting of special access,[94] and these objections are currently pending.

In addition, the FCC has expressed serious legal and policy concerns about including special access circuits within the scope of section 251(c)(3) regulation — unless the facilities involve significant local exchange service by CLECs, in which case they may be converted to

---

89 *Id.* at n.23.

90 *Id.* at n.21.

91 *See* ELI Comments at 13-15; WorldCom Comments at 18-19.

92 Special Master's Report at 28.

93 Colorado Decision on Motions for Modification at 34.

94 *See* Qwest's Colorado Comments at 19-24.

UNEs and *would already be covered by the QPAP*.[95] It is based on this same logic that the ROC TAG, when initially designing the measurements used to gauge Qwest's performance for 271 purposes, rejected the idea of including special access as one of the services to be measured.

WorldCom asserts that the FCC has not indicated when, if ever, it intends to address special access issues further.[96] This is no longer true. At the same time that WorldCom and ELI were demanding that the state commissions address interstate special access, AT&T was petitioning the FCC to do the same, claiming that the states do not have the necessary jurisdiction. On November 19, 2001, the FCC issued a Notice of Proposed Rulemaking to address this issue, over which it has plenary jurisdiction. It now is seeking "comment on whether the [FCC] should adopt a select group of performance measurements and standards for evaluating incumbent local exchange carrier . . . performance in the provisioning of special access services."[97] FCC Chairman Michael Powell has made clear that in this Notice the FCC "has agreed to develop a record and consider whether performance standards for special access are warranted."[98] Indeed, AT&T had urged the FCC to initiate this rulemaking precisely because, in its view, "unlike UNEs, for which jurisdiction is shared with the state commissions,

---

[95] Under the FCC's Supplemental Order Clarification, *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, 15 FCC Rcd 9587 (2000) ("*Supplemental Order Clarification*"), requesting carriers may obtain unbundled loop-transport combinations if they are providing a "significant amount of local exchange service" to the customer. *Id.* ¶ 21. The order specifies three alternative methods to meet this showing: (1) the requesting carrier is the exclusive provider of local exchange service to the end user; (2) the requesting carrier provides local exchange and exchange access to the end user's premises and handles at least one-third of the end user's local traffic; and for DS1 circuits and above, at least 50% of the activated channels on the loop have at least 10% local voice traffic; or (3) at least 50% of the activated channels on a circuit are used to provide originating and terminating local dialtone service and at least 50% of the traffic on each channel is local voice traffic, and the entire loop has at least 33 percent local voice traffic. *Id.* ¶ 22.

[96] WorldCom Comments at 20 n.39.

[97] Notice of Proposed Rulemaking, *Performance Measurements and Standards for Interstate Special Access Services*, CC Docket No. 01-321, FCC 01-339 (rel. Nov. 19, 2001) ¶ 1 ("*Special Access NPRM*").

[98] Federal Communications Commission Chairman Michael Powell, Remarks at the Association for Local Telecommunications Service, Nov. 30, 2001, at 5

interstate special access problems are uniquely the responsibility of this Commission" and "cannot be adequately addressed by state public utility commissions."[99] As this Notice observes, a number of states have already acknowledged that they do not have the legal "authority to regulate the incumbent's provisioning of such services."[100]

In this Notice, the FCC has also raised questions concerning the costs and benefits associated with various special access reporting procedures and requirements.[101] This aspect of its recent Notice highlights the practical obstacles of providing a meaningful measurement of special access purchased in lieu of UNEs. As special access is not legally mandated under section 251 or 271, Qwest has made no attempt to segregate orders for PID reporting. At this point, Qwest's systems are not capable of distinguishing orders purchased by a carrier for local or interstate use or, if local, for use in lieu of a UNE. In light of the substantial legal and policy questions raised by the FCC proceedings governing special access, which are almost exclusively taken under federal tariff, it would be unreasonable for the Commission to withhold its positive recommendation on the condition that Qwest include disaggregated special access reporting in its QPAP.

---

[99] Petition for Rulemaking to Establish Performance Standards, Reporting Requirements, and Self-Executing Remedies Needed to Ensure Compliance by ILECs with their Statutory Obligations Regarding the Provision of Interstate Special Access Services at 1-2 (Oct. 30, 2001).

[100] *Special Access NPRM* ¶ 11 n.27 (citing Letter from Maureen O. Helmer, State of New York Department of Public Service, to Chairman Michael K. Powell, FCC (May 22, 2001); 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, D.T.E. 01-34, at 14 (Aug. 9, 2001) (finding that over 99 percent of special access services Verizon Massachusetts provisioned in 2000 were ordered under the federal tariff, that the Commission has exclusive jurisdiction over the terms and conditions contained in federal tariffs, and that mixed interstate/intrastate special access services with more than ten percent interstate traffic is tariffed at the federal level).

[101] *Id.* ¶ 18.

Six-Month Review

The QPAP's six-month review provision provides an opportunity for the Commission, Qwest, and CLECs to consider the addition, deletion, or modification of performance measurements in the QPAP. In addressing the six-month review of the QPAP, the Facilitator acknowledged the propriety of limiting the scope and nature of the reviews. The one significant modification he recommended was that the QPAP should provide for dispute resolution procedures in the event that there is disagreement with a six-month review process recommendation regarding proposed addition of new measures to the QPAP payment structure.[102] Qwest does not oppose the Facilitator's proposal to arbitrate such disputes, and through its comments on the Facilitator's Report, Qwest provided language allowing for AAA arbitration as described in the SGAT provisions.[103]

AT&T and the Public Counsel argue that the Commission's role in administering the six-month review should be broadened.[104] Citing the example of the decisions of the Colorado Hearing Commissioner and the Utah Staff, AT&T and the Public Counsel suggest that the Commission should retain the unilateral authority to revise the QPAP.[105] Qwest has challenged both of those decisions on the grounds that allowing a state to have the unilateral right to modify a PAP is neither reasonable nor permitted by state or federal law.[106] Indeed, the Colorado

---

102 *Id*. at 62.

103 *See* Qwest's Performance Assurance Plan (Nov. 1, 2001) § 16.0 (Reviews).

104 *See* AT&T Comments at 33; Public Counsel at 12-13. WorldCom similarly suggests that Qwest should not retain any veto power over changes to the QPAP. *See* WorldCom Comments at 22-23.

105 *Id*.

106 *See* Qwest's Colorado Comments at 4-13; Qwest's Utah Comments at 17-19. In addition, Qwest noted in its Utah Comments that the Utah Staff's proposal that the Commission retain authority to change aspects of the plan is not consistent with the Staff's endorsement of the AAA process embodied in the SGAT provisions. Qwest's Utah Comments at 18.

Hearing Commissioner did not even claim to derive such authority "under state or federal law," but rather solely from his view that Qwest would have no choice but to accept it: "Qwest can file whatever SGAT language it wants and call it a performance assurance plan. The only language I will endorse for § 271 purposes is attached to this Order."[107] And both of those decisions deviate from the relevant precedents on this issue (the Special Master's recommendation in Colorado and the Facilitator's decision in Utah).

That remarkable position has no support in law or logic. As Qwest demonstrated in its comments to the Facilitator, the Commission lacks the authority to impose the QPAP on Qwest, and therefore to impose any modifications to it, without the consent of Qwest and the Commission.[108] Indeed, to allow one party to maintain an unlimited right to change the terms makes Qwest's agreement to abide by the terms of this special undertaking in consideration for section 271 relief wholly illusory. The unique nature of this federal regulatory regime, which involves requirements placed only on BOCs under section 271 and not on all ILECs under section 251, makes it a particularly inappropriate basis for unilateral Commission modification. Even the Utah Staff agreed that there is an obligation to create a "kind of certainty for the BOCs" as they enter new markets.[109]

The FCC decisions approving PAPs by other BOCs in other states recognize this same principle. These decisions make clear, as a threshold matter, that "we have never required"

---

[107] Decision on Motions for Modification and Clarification of the Colorado Performance Assurance Plan at 38 (Nov. 5, 2001). *See also* Colorado Special Master's Report at 3 (report "does not address whether the Colorado PUC would be authorized to impose a similar regime under either state or federal law").

[108] *See* Reply Brief of Qwest Corporation in Support of its Performance Assurance Plan (QPAP) (Sept. 20, 2001) at 41.

[109] Utah Staff's QPAP Decision at 15.

PAPs in the first place, as a condition of section 271 approval.[110] And the sweeping modification authority suggested by AT&T and Public Counsel is substantially at odds with the scope of the plans approved in these other states. To be sure, the FCC has recognized both that an effective plan should allow the parties to modify and improve the plan's "performance metrics" as necessary and that the state commissions can and should have a prominent role in such improvements.[111] But it has never held that a PAP should allow such changes to be made to the basic architecture of the plans by issuing a blank check to the state commissions. Quite the contrary. The FCC has approved PAPs for Texas, Kansas, Oklahoma, Arkansas, and Missouri that each provide that "[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."[112] Those plans, which served as the model for the QPAP, provide for a review of the performance measurements and standards at six-month intervals.[113] In its order approving SBC's section 271 application for Texas, the FCC recognized that this mechanism provided sufficient opportunity for modification and improvement.[114] In fact, both AT&T and WorldCom appear to endorse the Texas approach, which — contrary to their suggestions — is no different from what the Facilitator has required here.[115]

---

110 *Bell Atlantic New York Order* ¶ 429.

111 *See, e.g.*, *Bell Atlantic New York Order* at ¶ 438; *SBC Texas Order* ¶ 425; Memorandum Opinion and Order, *Application of Verizon Pennsylvania Inc., Verizon Long Distance, Verizon Enterprise Solutions, Verizon Global Networks Inc., and Verizon Select Services Inc., for Authorization to Provide In-Region, InterLATA Services in Pennsylvania,* CC Docket No. 01-138, FCC 01-269 ¶ 131 (rel. Sept. 19, 2001) ("performance measurements and standards").

112 Texas PAP § 6.4; Kansas PAP § 6.4; Oklahoma PAP § 6.4; Arkansas PAP § 6.4; Missouri PAP § 6.4.

113 *See id*.

114 *SBC Texas Order* ¶ 425.

115 WorldCom "requests that the Commission include language in the PAP similar to that included in the Texas plan or as provided in Colorado." WorldCom Comments at 23. AT&T also seeks to distinguish the QPAP

Ultimately, as these prior decisions have recognized, there would be no point in entering into a plan that could be modified at any time. The unfairness of such a provision is particularly apparent here, where Qwest began with a plan approved by the FCC and then agreed to make significant changes with the thought that, in the end, the result would be a workable plan. To permit that plan to be rewritten now would be wholly inappropriate. The Facilitator has provided adequate safeguards that permit flexibility through the six-month review process. Those should be adopted.

1.04 Critical Value

Most of the parties agreed in the PEPP collaborative "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."[116] WorldCom argued at the workshop that the 1.04 value should apply to all low volume measures, and continues to press this point in its comments on the Facilitator's Report.[117] The Facilitator appropriately accepted the approach that was agreed to by a majority of the parties during the PEPP collaborative. It should be noted that use of the 1.645 critical value versus the 1.04 critical value for the specific calculations cited by WorldCom was a negotiated issue that reflected the "give and take" process among the parties regarding a number of statistical issues. The Commission should honor this agreement and reject WorldCom's proposal that would effectively upset the balance achieved by the majority of the parties through negotiation.

---

from the Texas plan in this regard. AT&T Comments at 34. The distinction appears to be a purported right of Qwest unilaterally to revise the QPAP. Qwest has stated and continued to emphasize that it does not retain a unilateral right to change the QPAP while it is in effect and nothing in the QPAP language provides otherwise.

116 Facilitator's Report at 63.

117 WorldCom Comment's at 23-24.

100% Cap on Occurrences

AT&T and ELI object to the Facilitator's acceptance of the QPAP's 100% limit on misses for interval measurements. As the Facilitator noted, this limitation has been included in both the Texas and the Oklahoma PAPs, and it is far more modest than the 50% cap approval by the FCC in Kansas.[118] It has also been accepted by the Utah staff and in Colorado, both states whose proposals the CLECs otherwise endorse. AT&T's only response to these precedents is the disingenuous reference[119] to what is actually simply the Facilitator's acknowledgement that "the FCC did not approve the Texas plan limits at the time of 271 approval; the Texas state commission approved the cap thereafter."[120] The timing of this recognition hardly provides any support for AT&T's argument.

As the Facilitator concluded, the QPAP provision here is an "arithmetical compromise to fit the quality of the data we have to work with under this measure."[121] That compromise arises from the need to reflect sensitivity to the volume of orders. *Id*. In doing so, it is necessary to avoid the anomaly of making payments for more orders than there actually would be.[122]

To clarify this phenomenon, consider the following hypothetical example of a CLEC order volume for a specific service of three orders with the following installation intervals: 2 days, 25 days, and 3 days. Assume further that Qwest's average retail interval is 4 days. Qwest calculates missed occurrences for interval measures by applying the percentage difference

---

[118] Facilitator's Report at 68, 69. *See also* C. Inouye 8/29/01 Testimony, Tr. at 19-22; Ex. SID-QWE-CTI-8 at 6-9.

[119] *See* AT&T Comments at 39 n.121.

[120] Facilitator's Report at 68.

[121] *Id*. at 69.

[122] *Id*. at 68.

between the average interval for providing the CLEC with service and the average interval for providing analogous retail service, to the total CLEC orders for the service during the reporting period. Thus, the average CLEC interval would here would be 10 days (2+25+3)/3 = 10). The percentage miss would be 150% (10-4/4). Applying this percentage to the 3 CLEC orders would result in compensation for 4.5 missed occurrences (150% x 3 = 4.5), when the CLEC only submitted a total of 3 orders (2 of which were provisioned in less time than the Qwest retail average). The point of the 100% cap is to avoid just this result of requiring payments for orders that do not exist.

AT&T's only argument in response is once again the unprincipled "more is better" argument: "The CLEC's simple argument is that the worse the Qwest performance, the more Qwest should pay."[123] As noted above, the questions of how much more, and whether proportionality is at all relevant, are essential ones that any plan must address in order to comply with the FCC's requirement of resemblance.

The Facilitator noted that the CLECs' arguments provided neither "a factual or logical basis" for any conclusion that eliminating the cap approved in other plans would come any "closer to ultimate reality" given the need to have a volume-sensitive measurement.[124] ELI now seeks put the burden on Qwest to provide such a basis. The design of the plan, however, does not involve any fact questions within Qwest's unique control. It was incumbent on ELI to provide an alternative method of accounting for volume and severity of misses if it did not believe Qwest's approach was satisfactory. ELI did not do so, and as a result it was perfectly reasonable for the Facilitator to adopt the kind of cap approved in prior cases.

---

123 AT&T Comments at 39.

124 Facilitator's Report at 69.

Payment of Interest

Qwest proposed use of the one-year Treasury rate on late payments. The Facilitator rejected this approach, in favor of the prime rate, noting that the cost of money for "commercial telecommunications entities" is the relevant factor here.[125] Qwest has not challenged this recommendation, but AT&T is still not satisfied. It prefers the Utah staff's approach — which was to use Qwest's cost of money as set in a rate case already four years old, rather than a commonly accepted standard rate of interest for borrowing by creditworthy businesses that will change as financial conditions change during the life of the QPAP. Neither this suggestion, nor AT&T's unspecified alternative of a statutory rate, bears any relationship to the CLEC's current cost of funds.

Effective Date

Both AT&T and WorldCom ask the Commission to implement the QPAP (or give it "memory") before Qwest receives section 271 approval.[126] The parties' suggestion stands in sharp contrast to the conclusions of the Facilitator,[127] the Colorado Hearing Commissioner,[128] and the Staff of the Arizona Corporation Commission,[129] all of whom agreed that Qwest's PAP should become effective in a state only when Qwest receives section 271 approval from the FCC for that particular state. It is also inconsistent with the plans approved by the FCC for a number of other states, such as New York (§ II-H), Connecticut (§ II-H), and Massachusetts (§ II-I).

---

125 Facilitator's Report at 73.

126 *See* WorldCom Comments at 24-25.

127 *See* Facilitator's Report at 74.

128 *See* Colorado Decision on Motions for Modification at 7.

129 *See* Arizona Staff's Proposed Report at 42.

WorldCom's primary justification for its position is that "[t]he PAP is intended to enforce Qwest's section 251 obligations under the federal Telecommunications Act of 1996."[130] WorldCom's argument is wrong as a matter of law and ignores the entire purpose of the QPAP. Nothing in any section of the 1996 Act *requires* a BOC to agree to a PAP. The only purpose of a PAP is to help show that a BOC "will continue to meet its section 271 obligations and that its entry [into the interLATA market] would be consistent with the public interest."[131] Making the QPAP effective before 271 relief is granted (or giving it a pre-271 "memory") is completely contrary to this premise.[132]

Although it never before raised this issue, AT&T supports the Utah Staff's recommendation that the QPAP should become effective on Qwest's 271 application date rather than its approval date.[133] Qwest has challenged that recommendation[134] because it is unfounded. The Utah Staff's suggestion presumes incorrectly that any perceived benefit from letting its performance slip would outweigh the enormous risk of losing the goal Qwest has spent years to obtain — receiving the section 271 approval from the FCC. As the Facilitator recognized, the "risk of short-term backsliding is mitigated by the fact that current information can and

---

130 WorldCom Comments at 24-25.

131 *Bell Atlantic New York Order* ¶ 429.

132 Similarly, ELI's suggestion that the QPAP should remain effective even if Qwest exits the interLATA market, ELI Comments at 43, ignores the basic purpose of the QPAP. The QPAP is not, as ELI suggests, intended to "promote the development of effective local exchange competition." ELI Comments at 42. That is the purpose of section 251 of the Act, and the remedies available thereunder. The QPAP's purpose relates to section 271 — to prevent "backsliding" after Qwest receives section 271 authority to offer interLATA service. It would thus make no sense at all to continue to enforce the QPAP if Qwest is no longer in the interLATA market. *See* Facilitator's Report at 75.

133 *See* AT&T Comments at 40. WorldCom also advocates the Utah Staff's approach as an alternative to its own. *See* WorldCom Comments at 26.

134 *See* Qwest's Utah Comments at 23-24.

presumably will be provided to the FCC, should it be relevant."[135] The Utah Staff offered no support for rejecting the Facilitator's considered judgment and did not address any of Qwest's additional arguments that there are significant issues regarding the state commission's authority to implement a voluntary PAP other than on the conditions upon which it is proposed.

Form of Payment

The only CLEC that continues to insist that it should receive cash QPAP payments, even when it owes Qwest other funds for the same services, is WorldCom.[136] As the Facilitator recognized,[137] the only "administrative convenience" of having Qwest cut checks to CLECs that owe Qwest money is the convenience to CLECs of not paying their bills when they come due.

WorldCom's only argument is that it has prevailed on this point in Colorado. As Qwest has demonstrated, however, that approach is inconsistent with the record and with logic. It is, after all, Qwest that best knows whether "bill credits are complex to administer."[138] And as the Facilitator found based on the record of this case, the form in which Qwest proposes to issue these credits (Exhibit S-9-QWE-CTI-4) is not at all confusing.[139] Where there is no billing dispute, there is no rational reason why credits should not replace cash payments. Indeed, the plans approved by state commissions and the FCC in New York, Connecticut, and Massachusetts all provide for payments to be made *exclusively* in the form of bill credits.[140]

---

135 Facilitator's Report at 75.

136 *See* WorldCom Comments at 26-27.

137 *See* Facilitator's Report at 76.

138 WorldCom Comments at 26.

139 Facilitator's Report at 76.

140 *See* §§ II(C)(2), (D)(2) of those plans.

The QPAP should not be a vehicle for permitting CLECs to compete with Qwest through unjustified cash subsidies. Qwest's burgeoning accounts receivable from CLECs demonstrate that this concern is not academic. On average, CLEC charges that are more than 30 days past due represent 96% of current month billings, only about one-third of which involve billing disputes. By comparison, long distance carrier charges that are more than 30 days past due are only 26% of current month billings. There is no basis for modifying the Facilitator's recommendation to permit bill credits in these circumstances.

EELs

Qwest committed that the QPAP will provide payment opportunities for EEL measurements when standards are determined in the ROC OSS Collaborative.[141] As WorldCom points out, the ROC Collaborative recently engaged in lengthy discussions about which EEL measurements should have standards and what those standards should be. After full CLEC input, the ROC determined that a standard would be established for EELs included in OP-3. CLECs agreed that the remaining EEL measurements should remain diagnostic. There is no basis for ELI's suggestions that a payment standard should be established by this Commission.[142]

Multistate Audit and Review Process

Public Counsel opposes the Facilitator's suggestion that reviews, audits, and monitoring under the QPAP could more efficiently be done (as the initial proceedings have been done)

---

[141] WorldCom also urges that the ROC TAG has recently agreed to standards for GA-7 and PO-16, which should, therefore, now be included in the QPAP, and that the PO-19 standard should also be included "immediately upon the parties' agreement on the standard." WorldCom Comments at 12-13. Qwest has already added GA-7 and PO-16 to the QPAP. There has never been any agreement as to PO-19, however, and it does follow that it should be included under Qwest's agreement to include diagnostic submeasurements that receive a standard, such as EELs. Indeed, the Facilitator expressly and separately rejected WorldCom's proposal to include PO-19.

[142] *See* ELI Comments at 11.

through a cooperative effort of the participating commissions. Qwest believes that there would be substantial efficiencies to all parties from such a proposal, and that the performance issues will likely share common themes. Indeed, the Commission has already recognized, in determining to participate in the multi-state review process to evaluate the QPAP, that doing so would allow it to perform that function "more efficiently than doing so on its own," particularly in light of "common issues of fact."[143] CLECs have already worked together with Qwest on a multistate basis to design performance measurements, and these CLECs all have multistate operations. The fact that different Qwest employees work in different states, or that the Qwest networks involve different physical facilities, does not undermine the principle that the QPAP will be the same or largely the same in each state and that the "common issues of fact" about Qwest's wholesale performance in these states recognized by the Commission are not likely to change.

Nor would such an open proceeding with full rights of participation decrease the "transparency" of the Commission's processes, or constitute any improper delegation of the Commission's authority. The Commission's prior order authorizing participation in the multi-state process expressly found that such participation would "offe[r] parties every opportunity for full participation and assur[e] a complete record for the Commission."[144] And it concluded that the Commission "has authority pursuant to RCW 80.01.070 to hold joint hearings with other state commissions and to hold such hearings outside of the state of Washington."[145] The convenience of continuing such a process during subsequent audits and reviews will make for

143 12th Supplemental Order, *supra,* at 3.

144 *Id.* at 4.

145 *Id.*

much more efficient implementation of a plan that has considerable complexity, to the benefit of all parties.

Denial of Rate Recovery

AT&T argues that the QPAP should be amended to include language stating that Qwest may not recover payouts under the QPAP by increasing its rates. As the Facilitator concluded, this is not the function of the QPAP. It is the province of federal and state rate regulation, and both state and federal regulators have made clear that they already prohibit such recoveries.[146]

CONCLUSION

For the foregoing reasons, Qwest respectfully requests that the Commission reject the proposals of the commenters.

DATED this 5th day of December 2001.

/Lynn Stang/

Lynn Anton Stang
1801 California Street, Suite 4900
Denver, CO 80202
(303) 672-2734

Lisa Anderl
1600 7th Avenue, Suite 3206
Seattle, WA 98191
Attorneys for Qwest Corporation

[146] Facilitator's Report at 86; *see also SBC Texas Order* ¶ 430; *Bell Atlantic New York Order* ¶ 443.