Service Date: February 4, 2002

DEPARTMENT OF PUBLIC SERVICE REGULATION
BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MONTANA

* * * * *

IN THE MATTER OF the Investigation into Qwest Corporation's Compliance with Section 271 of the Telecommunications Act of 1996	))))	UTILITY DIVISION DOCKET NO. D2000.5.70

PRELIMINARY REPORT ON QWEST'S PERFORMANCE ASSURANCE PLAN AND REQUEST FOR COMMENTS ON FINDINGS

Introduction

This report contains the Commission's preliminary findings as to whether Qwest's performance assurance plan (QPAP) is sufficient to ensure the local phone service market in Montana will remain open after Qwest obtains Section 271 approval from the Federal Communications Commission (FCC). Evaluation of the QPAP is one part of the Commission's analysis of Qwest's compliance with the public interest requirements of Section 271.

In its orders regarding Section 271 applications, the FCC clearly indicates that a successful 271 application must have mechanisms in place to ensure that the efforts the regional Bell companies like Qwest have taken to open up their local service markets are maintained after they win Section 271 approval. Companies that have obtained 271 approval to date have demonstrated anti-backsliding measures are in place to assure future compliance by implementing a performance assurance plan. The FCC identifies five key characteristics it looks for when evaluating whether a performance assurance plan satisfies the public interest. According to the FCC, a plan should contain:[1]

- Potential liability that provides a meaningful and significant incentive to comply with the plan's performance standards;

[1] *Bell Atlantic New York Order* 15 FCC Rcd at 4166-67, para. 433.

- Clearly articulated, pre-determined measures and standards that 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 open the door unreasonably to litigation and appeal; and
- Reasonable assurance that the reported data are accurate.

Qwest's performance assurance plan was addressed by the participants in written comments, in two separate in-person workshops in August 2001, and in briefs. John Antonuk, the consultant hired by the nine states participating in the QPAP proceeding to conduct the workshops, issued his *Report on Qwest's Performance Assurance Plan* on October 22, 2001. Antonuk was hired to conduct these workshops after the predecessor post-entry performance plan (PEPP) collaborative process had ended without Qwest and competitive local exchange carriers (CLECs) achieving a consensus plan. In his *Report*, Antonuk reviewed the issues raised by the participants and made recommendations regarding the QPAP for Commission consideration. Participants in the Montana PSC docket that filed comments in response to Antonuk's *Report* were Qwest, AT&T, Covad Communications, Montana Consumer Counsel (MCC) and WorldCom. On November 8, 2001, the Commission received Qwest's replacement filing commenting on Antonuk's *Report*, including a redline version of its June 29, 2001 QPAP. The redline version identifies Qwest's clarifications and modifications of certain Antonuk resolutions, and where Qwest agrees with his *Report*. This redline version of the QPAP is posted on the Commission's internet website at this location: http://psc.state.mt.us/tcom/tcom.htm.

This preliminary report summarizes Antonuk's *Report* as well as the comments filed on the *Report*. Participants to this proceeding are invited to comment on the preliminary findings in this report. The Commission respectfully requests each commenting party to connect clearly its comments consistent with the structure and outline of issues in this report. Comments must be filed with the Commission by February 25, 2002. The Commission will then review those comments and reach a final decision on whether the QPAP satisfies the public interest test in Montana.

SUMMARY OF ANTONUK'S REPORT, PARTICIPANTS' COMMENTS, AND COMMISSION PRELIMINARY FINDINGS

There are many recommendations made by Antonuk in his *Report* that are uncontested by the participants in this proceeding. Unless otherwise addressed in this preliminary report, the Commission adopts those recommendations.

The more general comments of the parties include the following. In its comments WorldCom concurs in the exceptions AT&T takes to the report and joins in the arguments AT&T raises to support WorldCom's positions taken herein. The MCC filed comments that take exception to several aspects of the Antonuk's *Report*. Covad asserts that the sole criterion by which to measure the QPAP is by whether it "fosters competition in the local exchange market." Achieving this goal depends on a finding that Qwest's entry into the long distance market is in the public interest. In regards to this Montana PAP, the public interest test is met only when a mechanism is in place to ensure that the local market is irreversibly open to competition and that wholesale service quality will not deteriorate after Qwest receives 271 relief. As incumbents lack the incentive to help competitors, Covad adds that the FCC strongly encourages monitoring of post-entry wholesale service performance by a PAP and the ultimate question Commission must address is whether to accept Antonuk's resolutions or adopt positions advanced by others.

The structure of this report mirrors the organization of Antonuk's *Report* and groups issues raised by the participants under five sections. Each section corresponds to the five QPAP characteristics outlined by the FCC in its orders on performance assurance plans.

I. MEANINGFUL & SIGNIFICANT INCENTIVE

A. Total payment liability.

1. <u>36% of intrastate net revenues standard</u>. Antonuk agreed with Qwest that the appropriate amount of revenue to place at risk each year under the QPAP is 36% of Qwest's 1999 net intrastate revenues as reported to the FCC on its ARMIS return. For Montana, the 36% standard results in Qwest having $16 million at risk each year under the QPAP. Antonuk reasons that the FCC has

approved this amount as it provides a meaningful incentive to provide adequate performance in its 271 orders in other states. He finds the 36% standard an appropriate starting point, to be examined again in the context of all the other QPAP provisions affecting Qwest's incentive to perform.

Covad comments

Covad opposes a 36% hard cap because it will under compensate CLECs, is inconsistent with the purpose of a performance assurance plan, is not in the public interest and should be rejected. Annual caps may under compensate CLECs. The "injustice of undercompensation" is underscored by the fact that CLECs receive no compensation for the numerous orders that are cancelled when Qwest's service quality is deficient. As the cap serves only to limit Qwest's exposure to penalties, it is counter-intuitive as caps are only reached when penalties are insufficient incentive for Qwest to provide adequate service quality. Based on a recent Colorado Commission order, Covad recommends changes to the QPAP. As the Colorado Commission ordered, there should be a soft, procedural, cap and instead of a 36% procedural cap, Covad recommends New York's 44% cap. Covad notes the Utah Commission Staff's observation that the New York Commission raised the cap to 44% "after the failure of an initial 36% cap."

Commission preliminary finding: Because the amount of any proposed cap is inseparable from the below issue of procedural versus absolute caps, the Commission's finding follows the latter discussion.

2. Procedural cap vs. absolute cap. Instead of either a procedural cap (which can rise if Qwest's performance under the plan is so bad that its payments exceed the amount of the cap) or an absolute cap (which could not be raised no matter what), Antonuk prefers a "sliding" cap that has the following attributes:

- The Commission could order the 36% cap to increase by no more than 4 percentage points when the cap is exceeded by 4 percent or more for any 24-month consecutive period, if:

    - the Commission finds Qwest could have stayed under the cap through its reasonable and prudent efforts, and
    - that finding has been made after the Commission reviews the results of root-cause analyses and has provided Qwest the opportunity to be heard.

- The Commission could order the cap to decrease by no more than 4 percentage points when Qwest's total payment liability is 8 or more percentage points (i.e., 26% or less) below the cap amount for 24 consecutive months, if:
    - the Commission finds the performance results occurred because of an adequate Qwest commitment to provide adequate service, and
    - that finding is made after all interested parties have an opportunity to be heard.

- The sliding cap applies to the next 24-month period beginning at the completion of the first 24-month period, provided that the maximum cap increase is 8 percentage points and the maximum cap decrease is 6 points.

Qwest comments

Whereas it deviates from the "hard 36% annual cap", Qwest finds Antonuk's approach reasonable and amends the QPAP (Section 12.2) to allow the cap to range between 44% and 30%.

AT&T comments

AT&T objects to Antonuk's "sliding cap" proposal because: (1) it provides for a 4% increase to the cap only after CLECs have been denied payments due to the

cap for 2 years, during which time Qwest could exceed the cap for months at a time with impunity; (2) the FCC has never authorized a plan where total liability was less than 36% of net intrastate revenues, yet Antonuk's proposal allows the cap to decrease down to 32%; (3) the sliding cap proposal was not advocated or requested by any party, including Qwest. AT&T recommends as better solutions to the cap issue either the Utah Staff proposal or the Colorado approach. The Utah Staff proposal raises the cap to 44% of net intrastate revenues as the New York commission did, and provides for up to a 4-percentage-point increase in the cap if Qwest exceeds the cap for 12 straight months. In Colorado, according to AT&T, there is no cap on Tier 1 payments (to CLECs) but Tier 2 payments (to states) are subject to a procedural cap. The Colorado commission may raise the cap if Qwest's payment liability equals or exceeds the annual cap for two consecutive years or if two consecutive months' worth of payments equal or exceed one-third of the annual cap. AT&T notes that Bell South's recent 271 applications to the FCC for Georgia and Louisiana included performance plans that, in Georgia, puts 44% of Bell South's 1999 intrastate net revenues at risk and, in Louisiana, does not limit Bell South's payment liability (although it includes a procedural cap of 20% of 1998 net revenues).

<u>MCC comments</u>

MCC finds unnecessary the raising and lowering of caps as resolved in the Report, the so-called "sliding scale", and instead favors Qwest's 36 % cap proposal. MCC finds the cap reasonable for several reasons: (1) the incentive risk is substantial and will likely encourage service and performance at parity to what Qwest's retail customers receive, (2) sliding caps are potentially harmful and should be changed based on evidence explaining why performance declines and (3) a changed cap may trigger less acceptable performance for the majority of Qwest's retail customers.

<u>Covad comments</u>

Adjusting the cap upward or downward is not acceptable to Covad.

Commission preliminary finding: The Commission is presented with four different options regarding the annual cap on total payment liability. The key benefits and drawbacks of each option are explained below:

1. **Antonuk's proposal for a "sliding cap."**

   Antonuk determines that, because there is not much experience anywhere yet with performance assurance plans, it would be prudent to allow movement of the cap – up or down --- within a confined range in certain defined circumstances. Qwest prefers the hard 36% cap, but agreed to incorporate Antonuk's proposal instead. AT&T, Covad and MCC objected to the sliding cap proposal for the reasons identified above. Chief objections are that the FCC has never approved a plan that allows the cap to decrease below 36% and that the proposal allows too much time to pass between Qwest's noncompliant performance in excess of the cap and implementation of a higher cap. Essentially, this is a procedural cap with undesirable attributes.

2. **"Hard" cap of 36% of net intrastate revenues.**

   The FCC has found the 36% standard sufficient to create a meaningful and significant incentive to perform for other Bell operating companies seeking 271 relief. MCC recommends the hard 36% cap. AT&T and Covad object to a hard cap because it could result in Qwest not providing compensation to CLECs who had been harmed by Qwest's noncompliant performance.

3. **AT&T and Covad also argued that the cap amount should be set at 44% rather than 36%.**

4. "Procedural" cap of 36% of net intrastate revenues.

Antonuk found that a procedural cap exposes Qwest to unknown risk. He reasons that, just as CLECs are able to decide whether the costs of entering the competitive local market are too high, so should Qwest. A procedural cap reduces Qwest's ability to determine its payment liability exposure under the QPAP. Qwest and MCC do not support a procedural cap. AT&T and Covad support the Colorado approach to a procedural cap.

Of the above options the Commission finds that a 36% procedural cap is preferable to the other options. The Commission invites comments on how to implement a 36% procedural cap. Comments should address the criteria by which the cap would rise and, if so, how high it may rise.

3. Tier 1 percentage equalization when cap is reached. If the cap is reached in any year, a problem may occur due to the operation of a cap: while CLECs who incur noncompliant service from Qwest up to that point receive compensation, CLECs who incur noncompliant service after the cap is reached receive no compensation. To address this problem, Antonuk recommends the following method of equalization at the end of each year when the cap is reached:

a. The amount by which any month's total payments exceed $1/12^{th}$ of the annual cap shall be apportioned between Tier 1 and Tier 2 according to the percentage that each Tier bears of the total payments for the year to date. Antonuk refers to the results of this calculation as the "tracking account."

b. Tier 1 excess will be debited against ensuing payments that are due to each CLEC by applying to the year-to-date payments received by each a percentage that generates the required total Tier 1 amount.

c. The tracking amount will be apportioned among all CLECs so as to provide each one with payments equal in percentage to its total year-to-date Tier 1 payment calculations.

d. This calculation begins in the first month that payments are expected to exceed the annual cap and continues in each month of that year. Qwest will recover any debited amounts by reducing payments due from any CLEC for that month and any succeeding months as necessary.

Qwest comments

Qwest does not oppose Tier 1 equalization. Qwest incorporates Antonuk's language into the QPAP (12.3) but with some changes it views necessary to clarify the operation of the complex process. Because QPAP monthly payments may fall below or exceed the monthly cap, accounts must be balanced using year-to-date payments and a cumulative monthly cap.

Commission preliminary finding: The Commission finds merit in Antonuk's recommendation to equalize payments to CLECs. Because Qwest modified Antonuk's recommendation, the Commission invites comments on how Qwest proposes to implement Antonuk's recommendation. (See QPAP Section 12.3.)

4. Qwest's marginal costs of compliance. Because he found no evidence to enable its use, Antonuk rejects the New Mexico Staff's proposal that the proper inquiry is not the size of the payments to CLECs, but Qwest's marginal costs of noncompliance.

5. Continuing propriety of a cap based on 1999 net revenues. Antonuk rejects ELI/Time Warner/XO Utah's proposal to not always base the cap on 1999 net revenues. Antonuk reasons it is preferable to rely upon the firm amount represented by the 1999 net revenues than it would be to accept the uncertainty of the amount of the cap fluctuating up or down.

Covad comments

Covad disputes Antonuk's decision to always base caps on 1999 net revenues and prefers a more recent -- year 2000 ARMIS – basis. Covad's principal reason is the inability of 1999 data to capture post Qwest-US West merger efficiencies and economies. Covad concludes that the source data must be reviewed regularly to ensure Qwest's total exposure "remains constant."

Commission preliminary finding: The Commission agrees with Covad that the cap amount should be revised yearly to reflect the company's most recently reported amount of net intrastate revenues.

6. Likely payments in low-volume states. Antonuk addresses New Mexico Staff's concern that the QPAP will not provide Qwest with sufficient incentive to provide compliant service in states with low order volumes by noting that the QPAP will provide for minimum payments.

7. Deductibility of payments. Antonuk dismisses WorldCom's concern that Qwest may be able to deduct QPAP payments for income tax purposes because the QPAP in this respect is no different than other performance assurance plans considered by the FCC.

Commission preliminary finding: The Commission sees a relation between the income tax deductions Qwest may take for QPAP payments and the earlier issue of Qwest's total payment liability. Qwest appears to assert that if a 36% cap is combined with 1999 ARMIS net revenues, it faces about a $16

million dollar exposure in Montana. However, the net impact of such a penalty is less due to Qwest's apparent right to tax offsets for Tier 1 and Tier 2 payments.[2] If payments to CLECs or to a state are offsets to tax obligations, then while the purpose of such payments is, in part, achieved, unless the consequence on Qwest of such payments was designed to account for tax effects, the objective is not achieved.[3] This, in part, is one reason a 36% hard cap is favored less than a procedural cap. The Commission is interested in further explanation on how the tax offsets are shared between state and federal tax obligations, by how much Montana tax revenue might decrease with the offset and if there is a rollover provision in the tax code that permits Tier 1 and/or Tier 2 payments to offset tax obligations in years subsequent to the year in which the payments were actually made.

B. Magnitude of payout levels.

Antonuk rejects CLEC claims that the QPAP payout levels are too low. He finds the payout information that Qwest submits to demonstrate that Qwest's cost of noncompliance is significant and substantial under the QPAP.

C. Issues related to compensation for CLEC damages.

1. Relevance of compensation as a QPAP goal. Antonuk rejects arguments (Z-Tel's and others') that the purpose of a PAP is to create incentives to detect and sanction poor performance, not to compensate CLECs for harm, and that the payments to CLECs are not liquidated damages. Antonuk adds that the FCC couches its test in terms of incentives, but an elementary legal principle in the field of remedies is the public interest in holding parties responsible for the damages they cause to induce them to behave in ways to avoid such harm.

---

[2] See Qwest's response to data request PSC -144.

[3] See Qwest's response to data request PSC -146.

Antonuk concludes it is appropriate for the QPAP to address the issue of CLEC compensation for contractual damages, and it is appropriate that the QPAP liquidate such damages.

AT&T comments

AT&T objects to Antonuk's position that the QPAP is a liquidated damages contract. AT&T argues the QPAP is similar to a commercial liquidated damages contract, but there are important differences, such as: the QPAP's main purpose is to ensure that Qwest continues to deliver compliant service to CLECs; Qwest offers the QPAP in order to meet the public interest requirements of Section 271; the QPAP contemplates substantial governmental intervention and control; the SGAT (which includes the QPAP) is mandated by the federal Telecommunications Act; Qwest is required by law to negotiate in good faith; and states receive payments under the QPAP absent any contractual relationship with Qwest.

Covad comments

Covad asserts that the SGAT into which the QPAP is folded is not an "ordinary commercial contract" but rather a "hybrid" contract.

Commission preliminary finding: The Commission finds that, while the QPAP is similar to a typical commercial liquidated damages contract between two parties, it also serves other purposes such as those identified in AT&T's comments.

2. Evidence of harm to CLECs. Antonuk finds Qwest to argue correctly that CLECs did not provide evidence in this proceeding to show what their damages had been or would be.

AT&T comments

AT&T claims that once Antonuk decided the QPAP is a liquidated damages contract, as opposed to being similar to one, he then took the CLECs to task for

failing to quantify their damages. AT&T argues this is a burden placed on it inappropriately by Antonuk, but even so, claims it was prohibited in this proceeding from providing evidence of damages it suffers when Qwest's service is noncompliant. According to AT&T, examples of damages include the costs of unutilized or underutilized AT&T personnel, equipment and marketing due to Qwest's failure to provide service to AT&T, goodwill costs, and customer service cancellations, including possible cancellations of other services such as cable, wireless, toll and cable modem. AT&T argues it is not possible to quantify CLEC damages.

Commission preliminary finding: No finding or comment is necessary.

3. Preclusion of other CLEC remedies. Sections 13.5 and 13.6 of the QPAP treat Tier 1 payments as liquidated damages which are designed to provide an exclusive remedy to compensate CLECs for damages resulting from Qwest's poor service. In return for the right to such payments without having to prove harm, Qwest would secure the assurance that other damages arising from the same performance will be waived. Qwest also asserts that the offset provision of the QPAP (Section 13.7) would apply to non-contractual remedies. CLECs disagree, arguing they should not be foreclosed from seeking other remedies. Qwest's reply brief commits to not preclude non-contractual legal and regulatory claims, but Antonuk finds Sections 13.5 and 13.6 unclear and inconsistent when taken together. Antonuk adds that the same need exists to ensure that from any such recovery there is deducted in one way or another the contract damages amount for which the QPAP should provide. To remedy the inconsistency, and to make clear that the QPAP allows CLECs to recover noncontractual damages, Antonuk strikes most of Section 13.6, replacing the stricken language with a provision requiring a CLEC to elect either (a) the remedies otherwise available by law, or (b) those available under the QPAP and other remedies as limited by the QPAP. Thus, CLECs may select all or none of the QPAP remedies. CLECs electing QPAP

remedies are not precluded from seeking recovery under noncontractual theories of liability those parts of damages that are not recoverable under contractual theories of liability (e.g., federal enforcement under 271(d)(6), antitrust, tort and consumer protection remedies).

Qwest comments

Qwest does not oppose Antonuk's preclusion of other CLEC remedies and asserts that its modified QPAP (13.6) incorporates Antonuk's "three-factor" test concerning alternative remedies. Qwest, however, modifies the QPAP further to clarify that payments under PSC rules and orders will be considered contractual. Qwest's clarifications assume that PSC rules and orders regarding wholesale service quality issues are also contractual as they relate to interconnection agreements.

AT&T comments

AT&T strenuously objects to Antonuk's recommended revisions as providing Qwest the ability to put CLECs out of business without fear of significant financial harm to itself. AT&T disagrees with Antonuk's findings that restrict CLEC remedies to only those available under the QPAP. AT&T argues that Antonuk's position is legally inappropriate and raises public policy concerns. AT&T claims that, if Antonuk's approach is adopted, alternative CLEC remedies for damages are essentially eliminated in a way never contemplated by the FCC or any other state commissions. AT&T proposes instead the findings of the Colorado PUC regarding remedies, which allow CLECs the ability to sue to recover extraordinary losses due to Qwest's poor performance. AT&T recommends the Commission adopt the Colorado commission's language regarding preclusion of CLEC remedies (CPAP 16.6).

Covad comments

Covad asserts Antonuk's conclusions are fatally flawed as they ignore the fact the QPAP will be incorporated into the SGAT as well as the fact that damages not

compensated under the QPAP should be recoverable. Covad recommends rejecting his conclusions and accepting the Colorado PUC's approach. That approach finds, in part, that concerns about backsliding justify the risk that Qwest may overcompensate CLECs on occasions for damages while preserving the rights of CLECs to sue when under compensated. In turn, the Colorado PUC finds appropriate a provision that permits the assertion of "contractual theories of relief" where extraordinary losses are sustained as a result of Qwest's poor service quality.

Commission preliminary finding: The Commission rejects as unreasonable Antonuk's recommendation, which would preclude CLECs opting into the QPAP from seeking other remedies when they sustain extraordinary losses as a result of Qwest's noncompliant performance. The Commission adopts the recommendation of AT&T and Covad and directs Qwest to replace the third and final sentence of Montana QPAP Section 13.6 (11/6/2001 version) with the following slightly revised language recommended by the Colorado PUC at CPAP section 16.6:

> ***Tier 1 payments are in the nature of liquidated damages. Before a CLEC shall be able to file an action seeking contract damages that flow from an alleged failure to perform in an area specifically measured and regulated by the QPAP, CLEC must first seek permission through the Dispute Resolution Process set forth in SGAT Section 5.18 to proceed with the action. This permission shall be granted only if CLEC can present a reasonable theory of damages for non-conforming performance at issue and evidence of real world economic harm that, as applied over the preceding six months, establishes that the actual payments collected for non-conforming performance in the relevant area do not redress the extent of the competitive harm. If CLEC can make this showing, it shall be permitted to proceed with this action. If the CLEC cannot make this showing, the action shall be barred. To the extent that CLEC's contract action relates to an area of performance not addressed by the QPAP, no such procedural requirement shall apply.***

The Commission agrees with Antonuk's finding that CLECs electing QPAP remedies are not precluded from seeking recovery under noncontractual theories of liability those parts of damages that are not recoverable under contractual theories of liability (e.g., federal enforcement under 271(d)(6), antitrust, tort and consumer protection remedies).

4. Indemnity for CLEC payments under state service quality standards. Antonuk rejects AT&T's proposal that Qwest compensate CLECs for any payments they must make for failure to meet state or federal service quality rules, provided that Qwest wholesale service deficiencies cause CLEC failures. This issue was addressed in prior workshops (indemnity for CLEC payments under state service quality standards) where such indemnification was similarly rejected.

5. Offset provision (Section 13.7) AT&T objects to Qwest's provision that allows it to reduce damages a court or regulatory agency orders it to pay a CLEC by the amount of QPAP payments to that CLEC, if the damages are based on the "same or analogous" wholesale performance. As regards the issue of Qwest's right to an offset, Antonuk finds that this issue is really about where to resolve disputes that concern offsets. He finds the QPAP dispute resolution process to provide parties an opportunity to challenge any Qwest decision to reduce QPAP payments under the offset language. He includes in the QPAP a provision for interest on awards so that Qwest does not have a time-value-of-money advantage while resolving disputes. As regards disputes about the "same or analogous performance" provision, he finds the Qwest revised language generally appropriate as it limits the offset provisions to the portion of damages that represent compensatory recovery by CLECs. In finding the term "analogous" too vague he prefers the phrase "same underlying activity or omission for which Tier 1 assessments are made under this QPAP." While the QPAP has nothing to do with compensation for physical property or personal injury damages, to preserve the effect of other SGAT provisions that do, he revises Section 13.7 to prohibit

offsets against CLEC payments that relate to third-party physical damage to property or personal injury.

Qwest comments

Qwest incorporates into the QPAP (13.7) changes Antonuk recommends.

AT&T comments

AT&T agrees that CLECs are not entitled to double recovery for the same damages. However, AT&T claims that the offset issue is one that should be argued in court if a CLEC decides to sue in order to recover alleged losses and that the issue should be decided by the finder of fact in that forum. AT&T points out that neither the Texas nor Colorado performance assurance plans include provisions such as this one that allows Qwest to offset payments won by CLECs using alternative remedies. AT&T notes that Qwest will have the opportunity to argue the appropriateness of offset in court. AT&T rejects Antonuk's reasoning that Qwest is not actually able to use this provision to offset legal judgments obtained against Qwest by a CLEC because the CLEC is free to use the dispute resolution procedure in the SGAT to pursue its claim in front of the state commission. AT&T recommends the Commission reject Antonuk's finding regarding the offset provision and instead adopt the offset language of the Texas or Colorado commissions, or that recommended by the Utah Staff.

Covad comments

Covad asserts that while Antonuk foists the responsibility and cost to determine the appropriateness of offsets onto CLECs, Covad prefers having the entity (PSC or court) that renders damage awards to make offset decisions.

Commission preliminary finding: The Commission rejects Antonuk's recommendation that permits Qwest to offset damages a court or other agency orders it to pay a CLEC by the amount of QPAP payments to that CLEC when the damages are based on the same wholesale performance.

The Commission does not believe double recovery by a CLEC for the same poor performance is proper, but finds that the appropriate entity to determine whether an award to a CLEC should be offset is not Qwest, but is the same court or adjudicatory body that awarded the damages to the CLEC. Similarly, that entity will also decide whether the performance at issue is the same performance as that which was compensated under the QPAP. Qwest is directed to replace the first two sentences of QPAP Section 13.7 (11/6/2001 version) with the following Colorado CPAP recommended language:

> ***If for any reason a CLEC agreeing to this QPAP is awarded compensation for the same harm for which it received payments under the QPAP, the court or other adjudicatory body hearing such claim may offset the damages resulting from such claim against payments made for the same harm.***

The Commission agrees with Antonuk's reasoning that prohibits offsets against CLEC payments related to third-party physical damages or personal injury. Therefore, no change to the final sentence of QPAP Section 13.7 is necessary.

6. Exclusions (Section 13.3).

This section of the QPAP lists cases that excuse Qwest from Tier 1 and Tier 2 payments. Antonuk's *Report* discusses six such exclusions.

a. Bad faith. Antonuk finds this exclusion should stay in the QPAP because CLECs should not receive QPAP payments as a result of their manipulative conduct. However, he adds a provision to Section 13.3 so that Qwest does not use this exclusion to excuse its own failure to deliver performance it should reasonably be expected to provide just because the CLEC knows of Qwest's weakness.

b. Duplicative force majeure provisions. Given that the SGAT provides for service obligations, Antonuk rejects Qwest's argument that the QPAP requires its own separate and different force majeure provision.

c. Resolving disputes over force majeure events. Antonuk agrees with Qwest's view that the PSC resolve disputes of whether force majeure events occurred. The QPAP should require Qwest to notify the PSC of its force majeure claims within 72 hours of learning of them, or after it reasonably should have learned of them.

d. Nexus between force majeure events and Qwest performance. Antonuk accepts the QPAP's existing language, but recommends adding AT&T's language specifying the method for calculating the impact of a force majeure event on interval measures (and payments). Qwest's burden will be to not only show a force majeure event occurred, but to demonstrate its relation to failed performance.

e. Applicability of force majeure to parity measures. Antonuk finds that parity performance measures should not be subject to force majeure payment exclusions.

f. CLEC forecast exclusion. Antonuk finds the language of this provision is too broad and he recommends limiting the exclusion to failure to provide forecasts that are "explicitly required by the SGAT." He does not allow forecast exclusions stemming from state rules.

Qwest comments

Qwest states to incorporate language into the QPAP (see 13.3.2 and 13.3) in accordance with all of Antonuk's findings regarding exclusions.

7. SGAT limitation of liability to total amounts charged to CLECs. Antonuk finds that the payments referred to in SGAT Section 5.8.1 and in the QPAP are mutually exclusive: Qwest's liability for property damage and personal injury should not be limited by QPAP payments, and vice versa. He recommends that Section 5.8.1 should be revised to include this provision: "payments pursuant to the QPAP should not be counted against the limit provided for in this SGAT section."

Qwest comments

Qwest states to have revised the QPAP and adds that it will file to revise the SGAT (5.8.1).

D. Incentive to perform.

1. Tier 2 payment use (Section 7.5). AT&T would eliminate the section that requires using Tier 2 payments for purposes that relate to the Qwest service territory. Antonuk prefers language that allows a PSC to direct the use of the money, within the limits of state law. He also recommends that the QPAP include a funding mechanism to first use Tier 2 payments to support state commission activities that relate to wholesale telecom service issues, but also to use a portion of Tier 1 payments, if necessary, to support those activities. This mechanism operates as follows: 1/3 of Tier 2 payments and 1/5 of Tier 1 escalation payments would go to the fund for the states that participate in a multistate administration effort for (a) administrative activities, (b) dispute resolution, and (c) other wholesale telecom service activities that the participating PUCs decide are best carried out on a multistate basis. Any unused Tier 1 payments would be returned to CLECs who made them, on a prorated basis, at least every two years. To fund the activities on an interim basis Antonuk would require Qwest to make an advance payment against future Tier 2 obligations.

Qwest comments

Qwest modifies QPAP (7.5) and further clarifies that it will pay Tier 2 funds unless the Commission directs it to deposit the funds into "another source provided for under state law." However, Qwest adds it will make such payments provided the Commission identifies a state fund that exists by the time Tier 2 payments are due under the QPAP. Otherwise, Qwest will make deposits to the state's general fund. Also, in regard to Tier 2 payment use, Qwest includes four new QPAP sections (11.3, 11.3.1, 11.3.2 and 11.3.3) to establish the source and use of a funds set aside for the "Special Fund." Somewhat ambiguously, Qwest adds that "At least initially, the participating states are those which provide a positive recommendation based on the attached QPAP." Qwest asserts it is necessary for Commissions to pre-designate individuals the Commission authorizes to disburse such funds for legitimate purposes (QPAP section 15.0).

AT&T comments

AT&T objects to Antonuk's proposal that 1/5th of CLECs' Tier 1 escalation payments be used to support a fund for multistate oversight of the QPAP. AT&T argues the proposal is inappropriate because it was not discussed by the participants in this proceeding and because CLECs already pay state taxes and regulatory fees to support regulatory commissions, and should not be expected to remit to the states a portion of their payments for poor service.

Covad comments

Covad would constrain PSC uses to exclude ones that benefit Qwest. Covad finds it "incongruous" to compel Qwest's payments to be used for purposes by which it benefits and may, in fact, create a perverse incentive on the part of Qwest to provide wholesale service to CLECs.

Commission preliminary finding: The Commission rejects Antonuk's proposal to divert a portion of CLECs' Tier 1 escalation payments to a fund to be used by the Commission in its efforts regarding QPAP oversight and wholesale service quality. The Commission intends at this time to fund its

QPAP oversight activities through the use of Tier 2 payments. If Tier 2 payments prove to be insufficient to cover the cost of QPAP oversight, the Commission reserves the right to revisit this issue.

The Commission supports Antonuk's recommendation that Montana and other state commissions in Qwest's service area join together to participate in a multistate QPAP oversight effort. The Commission will contact other state commissions to determine their interest and, if there is interest, will work with those states to develop a plan for going forward with this proposal.

Regarding the use of Tier 2 funds, the Commission agrees with Antonuk's recommendation that the QPAP include a provision that allows the Commission to direct the use of Tier 2 payments, within the limits of state law. In keeping with this finding, the Commission directs Qwest to keep the first sentence of QPAP Section 7.5 as it appears in the 11/6/2001 version of the QPAP, but to delete the remainder of this provision.

2. 3-month trigger for Tier 2 payments. Antonuk finds that in any 12-month rolling period in which there occurs two non-compliant months out of any consecutive three months, payments for Tier 2 measures without a Tier 1 obligation should begin after one more month of noncompliance, with escalation as laid out in the QPAP. In the case of Tier 2 measures that are also Tier 1, the Tier 2 payments will begin in the second consecutive month of noncompliance, provided that the same "two-out-of-three month condition" is met.

Qwest comments

Qwest agrees to incorporate Antonuk's changes to the QPAP (9.1.2).

AT&T comments

AT&T requests clarification of Antonuk's recommendation here because, as AT&T interprets the QPAP, there is no provision for escalation of Tier 2 payments.

Commission preliminary finding: Like AT&T, the Commission does not find a provision in the QPAP for escalation of Tier 2 payments to the states. The Commission otherwise concurs with Antonuk's recommendation. Participants are invited to provide the Commission with any clarifying information.

3. Limiting escalation to 6 months. Qwest favors limiting escalation to six months while CLECs (AT&T, ELI/Time Warner/XO Utah, WorldCom, Z-Tel, and Covad) and the New Mexico Advocacy would not limit escalation. Antonuk rejects the CLECs' and New Mexico Advocacy staff's proposal for several reasons. First, he asserts it is not clear that poor performance past six months means Qwest methodically calculated that the continuing costs of compliance exceeds the continuing costs of violation. He adds that many of the measures at issue are not parity measures but rather benchmark measures and this record does not demonstrate with certainty that those levels of performance can be met and sustained at any cost within the realm of economic reason. However, they generally relate to services about which little experience existed when the measures were adopted. Thus, the correlation between long-term non-compliance and insufficiency of inducements is not self evident as some have argued. If non-compliance continues for six months in the face of stiff financial consequences, one of the issues that would bear consideration is the achievability of the established benchmark. Second, parity measures, while based on a substantiated and common belief that there are no material differences between serving retail and wholesale customers, cannot be said to rest upon an absolute certainty that growing experience with the CLEC community will not show otherwise. Third, calculated comparisons of the marginal costs of compliance versus non-compliance are not the only reason problems can persist. Antonuk finds the logic

of extended escalation to depend profoundly upon the certainty of propositions like these. He finds it speculative to conclude that insufficiently increasing payments, as opposed to other factors, such as: (a) a less than optimally crafted standard, (b) a series of extenuating external circumstances, (c) buyer efforts to induce failure, (d) management's performance decisions and actions (that may have been soundly believed sufficient to improve performance, but proven inadequate only as time passed), or even other reasons, cause or contribute to a failure to provide compliant performance.

Antonuk concludes that if it can be shown that six months of escalation creates payment levels judged to be far enough in excess of both the value of CLECs and the costs of calculating decisions to continue to under perform, then a six-month cutoff of escalation is reasonable. This conclusion is appropriate in light of three other factors: (1) there are provisions for root cause analysis of continuing problems; (2) there exists the option of ending 271 authorization where that measure is shown to be appropriate to the circumstances and (3) there 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 providers of utility services, such as Qwest, satisfy their service obligations.

AT&T comments

AT&T disagrees with Antonuk's finding and points out that both the Colorado commission and the Utah Staff rejected limits on payment escalation. AT&T claims that Qwest's argument that unlimited payment escalation would overcompensate CLECs misses the point because the purpose of payment escalation is to balance CLEC compensation for their losses and to ensure the penalty is higher than the amount Qwest is willing to absorb as a cost of doing business. AT&T cited the Colorado commission's reasoning that continuing escalation of payments for continuous poor performance should help prevent the

possibility that Qwest might evaluate whether it would rather absorb QPAP penalties and deter competition or avoid penalties and comply with the law.

Covad comments

Covad finds Antonuk's criticisms of CLECs for speculating inconsistent with his speculation that poor performance beyond six months is beyond Qwest's control. Covad reasons that because military-style testing demonstrates Qwest's ability to meet all PIDs prior to interLATA relief, Qwest should not be able argue, as Antonuk reasons, that poor performance beyond six months is due to circumstances beyond its control. Covad argues that limiting payment escalation to 6 months would merely allow Qwest to discriminate against CLECs for extended periods of time. Covad notes the Colorado Commission's Special Master's Final Report that requires escalation beyond six months and recommends adopting such an approach.

Commission preliminary finding: The Commission rejects Antonuk's recommendation for a six-month limitation on Tier 1 payment escalation for the reasons identified by AT&T and Covad: (1) to deter Qwest from providing poor service to CLECs for extended periods of time; and (2) to help to ensure Qwest's payment for noncompliance is higher than the amount Qwest is willing to absorb as a cost of doing business. Participants are invited to propose changes to QPAP Section 6.2.2 (and Table 2 therein) to reflect the escalation increments for noncompliant months after the 6th month.

4. Splitting Tier 2 payments between CLECs and the states. Because it was not done in the Colorado PAP as Covad asserts, and no other 271 PAP approved by the FCC does so, Antonuk rejects Covad's proposal to divide Tier 2 payments between the states and CLECs. Antonuk finds that Tier 1 payments already provide adequate compensation to CLECs.

II. CLEARLY ARTICULATED AND PRE-DETERMINED MEASURES

A. Measure selection process. Antonuk explains how the Performance Indicator Definitions (PIDs) were developed and how they are incorporated into the QPAP.

B. Adding measures to the payment structure.

1. Requiring payments for cancelled orders. Antonuk rejects the CLECs' proposal that the QPAP should provide for payments when CLEC customers cancel orders after Qwest misses a due date.

2. Requiring payments for "diagnostic" PIDs. Antonuk finds that EELs, line sharing and sub-loops should be included in the QPAP payment structure as soon as practicable. He notes that firm benchmarks or parity standards will have to be adopted first.

Covad comments

Covad asserts the Report's conclusion should be revised to provide that when PIDs convert from being diagnostic to either a benchmark or a parity standard that the QPAP will include them as of the date Section 271 relief is granted.

Commission preliminary finding: The Commission concurs with Antonuk's resolution and only adds that its recent emerging services final report on line sharing and subloop unbundling expresses the same view. Line sharing now has a penalty provision. Additionally, the Commission agrees with Covad that PIDs that are currently labeled "diagnostic" be included in the QPAP as soon as they are converted to benchmark or parity standards.

3. Cooperative testing. Antonuk rejects Covad's proposal for a cooperative testing performance measure that minimizes CLEC trouble reports for xDSL UNE

loops they order from Qwest. (Covad said Qwest has not complied with its agreement to perform acceptance testing in cooperation with Covad for all xDSL loops that Covad leases; cooperative testing would turn up defective loops before Covad has to submit trouble reports to Qwest after installation.) Antonuk said Covad should raise the issue in whatever forum is created to identify, discuss and resolve performance measure issues.

4. Adding a new PID -- PO-15D -- to address due date changes. Antonuk rejects this Covad proposal because Covad did not propose a standard for this currently diagnostic measure and, therefore, there is no basis for payment calculation under the QPAP.

5. Including PO-1C preorder inquiry timeouts in Tier 1. Antonuk rejects this AT&T proposal because the QPAP already provides compensation for preorder response time measures, that Antonuk believes is adequate for now. He finds that, if the ROC-OSS test finds a large enough number of timeouts to cause concern about the impact on the preorder response times, then the issue should be revisited.

6. Adding change management measures. Antonuk finds it appropriate to add the two change management measures that Qwest agreed to include in the QPAP (GA-7, timely outage resolution, and PO-16, release notifications). They are diagnostic now and after benchmarks are established by the ROC-OSS collaborative they will be added as "high" Tier 2 measurements.

7. Adding a software release quality measure. Antonuk recommends that WorldCom's proposed RQ-3 PID, that measures the quality of Qwest's software releases by determining the number of releases that require amendment, suspension or retraction within 14 days of implementation, be considered for inclusion on the agenda for the first 6-month review of the QPAP.

8. Adding a test bed measurement. As it is a measure under development Antonuk finds it premature to decide whether WorldCom's proposed PO-19 (test environment responsiveness) should be included in the QPAP.

9. Adding a missing-status-notice measure. Antonuk rejects WorldCom's proposal to add a performance measure to track missing status notices in anticipation of Qwest experiencing a problem (like Verizon did in NY) of failing to provide these notices.

C. Aggregating the PO-1A (pre-order IMA-GUI response times) and PO-1B (pre-order EDI response times) performance measures. Antonuk agrees with Qwest that an agreement was reached in the PEPP collaborative to collapse the 7 individual transaction measurements contained in each of these PIDs into two for purposes of the QPAP, and he supports that agreement.

D. Measure weighting.

1. Changing measure weights. Antonuk recommends adopting the measure weighting initially proposed in the QPAP and not adopting either the weighting increases sought by CLECs for certain "high-value" services (collocation, LIS trunks, UDIT, unbundled loops, resold DS-1 and DS-3) or the weighting decreases Qwest sought in return (residence & business resale, 2-wire loops, analog loops).

2. Eliminating low weighting. Antonuk rejects CLECs' proposals to eliminate the "low" weighting designation altogether.

3. LIS trunks weighting. Antonuk rejects AT&T's proposal to increase the weighting of LIS trunk measures.

Qwest comments

Qwest's comments summarize the content of Antonuk's Report and proffer no changes on measure weights.

E. Collocation payment amounts.

As evidence demonstrates that Qwest accepts the proposal proffered by the CLECs in the ROC-PEPP collaborative and that the proposal reflects the Michigan approach in regard to collocation payments, Antonuk rejects the New Mexico Staff's suggestion that the QPAP reflect either the Michigan or Georgia approach to determining collocation payment amounts. The incorporation of this proposal in the QPAP responds to the New Mexico Staff's concern.

Qwest comments

Qwest incorporates the "days late" collocation payment proposal into the QPAP (at 6.3).

F. Including special access circuits.

WorldCom requests inclusion of special access circuits in the performance measures while ELI/Time Warner/Xo considered payments important due to CLEC use of special access to provide local exchange service. Qwest asserts there is agreement by the ROC-OSS collaborative to drop special access circuits from discussions. Because the evidence demonstrates that most special access circuits at issue here were provided under Qwest's interstate FCC tariffs, Antonuk concludes that such circuits do not merit QPAP inclusion as PID performance measures as requested by ELI/Time Warner/XO Utah and WorldCom. Unless inappropriate barriers exist and that have the practical effect of requiring tariff purchases where interconnection purchases should be available, Antonuk reasons that the FCC should address failures to meet tariff requirements.

WorldCom comments

WorldCom asserts that Antonuk's Report errs in reasoning that because CLECs purchase the majority of special access trunks from federal tariffs, CLECs should seek remedies at the FCC. WorldCom asserts that because the FCC has long held it will consider discriminatory and anticompetitive RBOC conduct as part of the public interest test states should address such alleged conduct as part of 271 authority that addresses backsliding; this may occur concurrent with FCC efforts. WorldCom adds that inclusion of special access is under consideration in Texas. WorldCom also notes, that only 10 percent of traversing traffic need be interstate for a CLEC to order federally tariffed special access. WorldCom adds that the New York PSC found special access services critical to business in their state. WorldCom mentions how other states' actions consider special access in performance reporting. As for service quality, there is no federal-state conflict, there are no federal service quality standards and neither Congress nor the FCC has taken regulatory actions on "intrastate access" service quality. WorldCom concludes that it is appropriate for the Commission to approve reasonable performance measures for special access.

Commission preliminary finding: Based on WorldCom's comments, the Commission finds that it is premature to make a preliminary decision based on Antonuk's *Report* and WorldCom's comments Instead, merit exists in receiving comments on WorldCom's suggestions and on Colorado's recent resolution. The Commission invites comment on how the Colorado Commission resolved the same issue (see Colorado Commission, Decision No. R01-997-I, Docket No. 01I-041T, Issue No. 54, Issues September 26, 2001, at pages 79-82), and why that resolution is not relevant here. Comments should also address the relevance of FCC-regulated special access rates vis-à-vis this Commission's deregulation of special access except for IXC facilities connecting a POP and an ILEC's CO.

G. Proper measure of UNE intervals.

Antonuk rejects Covad's argument to base QPAP payments on the service intervals of SGAT Exhibit C (the standard interval guide) instead of the PID-established intervals. His rejection stems from his finding that there is, as was discussed in the UNE workshop, consistency between the PID and Exhibit C.

H. Insufficient compensation for low-volume CLECs.

Antonuk rejects Covad's argument that the QPAP's design primarily compensates high-volume CLECs at the expense of low-volume ones. He finds that Qwest provides credible and unrebutted evidence that the QPAP would not serve to under-compensate smaller volume CLECs. Second, in regards to Covad's objection to the QPAP provision that gives Qwest a "free miss" each month in the case of CLEC's with small order volumes, Antonuk also finds that a yearly rolling average will correct the "rounding down" problem of this provision; however, as a yearly rolling average does not solve the issue of escalating payments for consecutive-month misses, escalation that apples in any month where any miss occurs for low-volume CLECs where the annual calculation shows Qwest violated the applicable requirement will solve that problem. He concludes that the QPAP should incorporate these changes.

Qwest comments

Qwest implements the Antonuk's decision into the QPAP (Section 2.4) but makes minor adjustments to Antonuk's calculation to determine missed performance measures for benchmark standards where low CLEC volumes are such that a 100% performance result would be required to meet the standard. Whereas Antonuk concludes that Qwest use 12 months of performance results to determine if the miss in the current month should be counted, Qwest seeks to clarify the language such that it will use the current month's results, plus a sufficient number of prior consecutive month's performance data so that a 100% performance result would not be required to meet the standard.

Commission preliminary finding: The Commission invites comment on the language submitted by Qwest as described above.

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

A. 6-month plan review limitations (Section 16).

The QPAP (Section 16) provides for the occasions when the QPAP may be amended. Antonuk finds Qwest's QPAP to limit reviews similarly to how the Texas PAP and the Colorado PAP limits reviews. AT&T had noted that the New York and Texas plans allow any aspect to be examined at six-month intervals and urged the same in consideration of the public interest. Qwest objects to opening the QPAP generally to amendments. Antonuk reviews what revisions the Colorado Special Master's Report allows at 6 month and at 3 year intervals. The purpose of the latter review is to determine the PAP's effectiveness at "inducing compliant performance." He finds this process should be adopted (*Report*, p. 61). Antonuk reasons that due to uncertainty on the continued role of the ROC in performance measure development and administration, the Texas arbitration provision is therefore appropriate to assure that the QPAP meets the applicable standards without unduly exposing Qwest to indeterminate increases in its financial exposure. He also recommends three changes to the QPAP review section:

1. Instead of allowing Qwest to veto recommendations, provide for normal SGAT dispute resolution procedures in the event that there is disagreement with a six-month review process recommendation regarding the addition of new measures to the QPAP payment structure.

2. Recognize and support multi-state efforts (should they occur) to create a Tier 2-funded method and an administrative structure for resolving QPAP disputes.

3. Provide for biennial reviews of the QPAP's continuing effectiveness for the purpose of allowing state commissions to regularly report to the FCC on the

degree to which there are adequate assurances that Qwest's local exchange markets remain open.

Qwest comments

Qwest adds language to the QPAP (16.1) to allow arbitration to resolve disputes over the addition of new measures arising out of the six-month review; this is as provided for in the SGAT. Qwest amends the QPAP to allow six-month reviews to be conducted collaboratively (16.1). As Antonuk's Report recommends a two-year review, Qwest amends the QPAP (16.2) to read in part: "Two years after the effective date of the first FCC 271 approval of the PAP, the participating Commissions may conduct a joint review by a independent third party to examine the continuing effectiveness of the PAP as a means of inducing compliant performance."

AT&T comments

AT&T claims Antonuk did not provide a definitive solution to the issue of who controls the 6-month review process. AT&T objects to the existing 6-month review provisions that give Qwest control over whether any changes will be made or even addressed. AT&T seeks instead to shift control of the 6-month review process away from Qwest and recommends the approaches of the Colorado commission and of Utah Staff, both of which clearly provide that the state commission is the decision-maker when it comes to QPAP changes being addressed in the 6-month review process.

The MCC agrees with a two-year review cycle over the long term but if performance measures and penalties are to be updated successfully, MCC prefers an annual review for each of the first three years of the PAP and a thorough review upon three years' effectiveness.

Commission preliminary finding: The QPAP calls for reviews every six months for the purposes of determining: (1) whether performance measurements should be added, deleted or modified; (2) whether to change benchmark standards to parity standards; and whether to modify the weighting and/or tiers assigned to

measurements. A major review by an independent third party of the continuing effectiveness of the QPAP is scheduled for two years after the QPAP takes effect. In addition, there is a provision that provides that the QPAP will be available to CLECs until Qwest eliminates its Section 272 affiliate, at which time the Commission and Qwest will review the continuing necessity of the QPAP. The same provision calls for the QPAP to be rescinded if Qwest exits the interLATA market. The Commission addresses each of Antonuk's recommendations for changes to the QPAP review section below:

Limitations on reviews (Section 16.1): Antonuk approves the Qwest QPAP language regarding limitations of the 6-month reviews to performance-measure related issues. The Commission generally agrees with Antonuk's recommendation, but finds the Commission should retain the discretion to add other topics related to performance measurements and criteria for measurement reclassification to the 6-month reviews just in case it becomes necessary to respond to circumstances that may arise as experience is gained with the operation of the QPAP. The Commission directs Qwest to revise Section 16.1 to add the following provision to this section:

> ***The Commission retains the right to add topics and criteria other than those specifically listed here.***

Dispute resolution (Section 16.1): Antonuk recommended turning to the SGAT dispute resolution procedure at SGAT section 5.18.3 when parties participating in the 6-month review cannot agree whether new performance measures should be added to the QPAP. The SGAT dispute resolution procedure focuses on the use of formal arbitration to settle disputes. Antonuk's reasoning for this recommendation centered on the uncertainty of a continued role in performance measure administration by the Regional Oversight Committee acting on behalf of the state commissions. Antonuk preferred, and proposed, that state commissions set up a joint, multistate dispute resolution process. The Commission supports the recommendation that a multistate process be established and funded and will work toward that end. However, underlying this support for a multistate dispute

resolution process is the Commission's finding that it is the Commission's responsibility to ensure the effectiveness of the QPAP and to resolve disputes arising out of it. For that reason, the Commission rejects Antonuk's recommendation that disputes resulting from the QPAP review process be handled pursuant to the SGAT dispute resolution procedure. Rather, unless and until a multistate dispute resolution process is established, the Commission finds that the Commission will resolve disputes arising out of the QPAP reviews.

Biennial reviews of the QPAP: Antonuk recommended the Commission review the QPAP's continuing effectiveness every two years instead of after three years. MCC recommended an annual review in order to update performance measurements and penalties, with a thorough review after three years. The Commission adopts Antonuk's recommendation for a thorough review every two years because the 6-month reviews will provide sufficient opportunity to address MCC's concern regarding updates related to performance measurements.

Other issues in Section 16 not addressed by Antonuk:

References to multistate reviews: The language in the 11/6/2001 version of the QPAP (Section 16.1) refers to multistate joint QPAP reviews. Because it is not known at this time whether such a multistate process will be established, the Commission finds the language should be revised to refer only to this Commission. A new provision should be added to state that nothing in the QPAP prohibits the Commission from joining a multistate effort to conduct QPAP reviews and developing a process whereby the multistate group would have the authority to act on the Commission's behalf.

Initial 6-month review: The first sentence of Section 16.1 provides that the first 6-month review will occur six months after Qwest obtains Section 271 approval from the FCC for the one of the nine states that participated in the multistate QPAP workshops. This language appears to contemplate a multistate review process that

is not yet in place. The Commission finds this language should be modified to provide for the first 6-month review to occur six months after the date Qwest obtains Section 271 approval from the FCC in Montana, unless the Commission agrees to a different date as a result of establishment of a multistate QPAP review process.

Qwest's agreement to changes: Section 16.1 continues to require that Qwest agree to any QPAP changes, except for the addition of new performance measures where disputes will be resolved elsewhere. Antonuk seemed to reject that position and Qwest indicated in its comments it had incorporated Antonuk's findings. The Commission finds that QPAP changes are subject to Commission approval and do not require Qwest's agreement.

B. Monthly payment caps (Section 13.9).

Antonuk agrees with CLECs that Qwest should not be allowed to place Tier 1 payments, that exceed a monthly cap, into escrow and found there is no basis to relieve Qwest of its obligation to pay amounts up to the annual cap.

C. Sticky duration (permanently freezing base QPAP payments at an escalated level).

Antonuk rejects Z-Tel's proposal for sticky duration as inappropriate, disingenuous, and draconian.

D. Low volume critical values.

Antonuk rejects Z-Tel's and WorldCom's proposal to apply the lower critical value of 1.04 to all low volume measures and not just the subset of them that was agreed to by compromise of most of the parties in the PEPP collaborative. (The PEPP agreement had

decreased the default critical value from 1.65 to 1.04 for certain low-volume measures and increased it to varying levels above 1.65 for progressively larger volume measures.)

E. Applying the 1.04 critical value to 4-wire loops.

Antonuk rejects AT&T's inclusion of assertion that 4-wire loops were supposed to be included as part of the 1.04 critical value compromise in the PEPP collaborative. He finds insufficient evidence to support AT&T's argument or to conclude that there is a very high rate of use of 4-wire loops for delivering high-value services; however, he finds that if, during a QPAP review proceeding, there is evidence that more than 75% of 4-wire loops are used for high-value services, the issue should be reconsidered.

F. Measures related to low-volume, developing markets (Section 10).

Antonuk rejects Z-Tel's proposal to replace the $5,000 per month aggregate payment to all CLECs with a minimum payment of $1,000 to individual CLECs for individual measures. (The QPAP provides for minimum payments of at least $5000 per month for noncompliant service in cases where aggregate CLEC volumes range between 11 and 99 orders.) Antonuk also rejects Covad's suggestion that all xDSL products be included in this higher-payment scheme for low-volume, developing markets.

G. Minimum payments.

Antonuk revises the QPAP to require annual payments to CLECs of $2,000 for each month in the year in which Qwest missed any measure applicable to low-order-volume CLECs (annual order volume of 1200 or less), less what was paid in QPAP payments to such CLEC. (For example, if Qwest paid a qualifying CLEC $5,000 in QPAP payments, but there were 9 months in the year in which Qwest failed to meet a Tier 1 measure for that CLEC, the added amount that Qwest must pay at the end of the year to that CLEC would be 9 x $2,000 - $5,000 = $13,000.) Antonuk concludes that minimum payments

should not be applied on a per measure basis. His proposed minimum payment calculation must be performed at the end of each year.

Qwest comments

Although Qwest vigorously disagrees with the need for any additional payment opportunities for small CLECs it agrees to Antonuk's making an annual minimum payment based on the number of months in which Qwest fails to meet performance standards and revises the QPAP (6.4) accordingly.

Commission preliminary finding: The Commission seeks comment on Qwest's revisions to the QPAP.

H. 100% caps for interval measures.

Antonuk rejects CLEC proposals to eliminate the QPAP provisions that cap payments at 100% on interval measures. (For example, a 3-day actual average interval for 100 events that are subject to a 2-day interval would produce a miss of 150%, but under the QPAP, the miss would be capped at 100%.)

AT&T comments

AT&T claims that Antonuk misunderstood the CLEC position on this issue as being that the per-occurrence scheme when applied to interval measurements should measure the number of individual misses and then assign a severity level to each miss. Based on this misunderstanding, according to AT&T, Antonuk then criticizes the CLECs for their failure to provide evidence about the number and severity of Qwest misses on interval measures. AT&T agrees with Z-Tel's argument that it is inappropriate to try to introduce the number of misses into an interval measure that does not use the number of misses to measure performance, but instead relies on the time interval taken by Qwest to provide service. AT&T comments that CLECs and Qwest all recognize that very poor Qwest performance to CLECs and the use of the per-occurrence QPAP scheme can result in the number of payment occurrences exceeding the number of CLEC orders in a month.

AT&T states the issue is whether the payment occurrences should be capped at the number of CLEC orders. Qwest says they should, because it would not make sense to pay CLECs on more orders than they actually submitted in a month. AT&T says no, because the worse Qwest's performance is, the more Qwest should pay. AT&T reiterates its argument that the 100% cap on interval measures protects Qwest against its own poor performance to CLECs.

Commission preliminary finding: The Commission adopts Antonuk's recommendation.

I. Assigning severity levels to percent measures.

Antonuk rejects Z-Tel's proposed payment formula that bases QPAP compensation on percent measures more proportional to the relative size of the "miss" involved. He found Qwest's QPAP adequate for now, but notes proposals like this one could be addressed fully in future QPAP review and amendments proceedings.

IV. SELF-EXECUTING MECHANISM

A. Dispute resolution (Section 18).

Antonuk rejects Qwest's proposal to add a dispute resolution provision specifically applicable to the QPAP that applies the general SGAT dispute resolution provisions to disputes arising only under certain QPAP sections. He found that the general SGAT dispute resolution sections apply as well to the QPAP section of the SGAT.

Qwest comments

Qwest states to incorporate Antonuk's recommended dispute resolution language into the QPAP (6.4).

Commission preliminary finding: Antonuk recommends, and Qwest has implemented, language that requires use of the SGAT dispute resolution procedure at section 5.18, which focuses on formal arbitration, to resolve disputes over the meaning of QPAP provisions and how they should be applied. The Commission rejects this recommendation because it is the Commission's responsibility to oversee and administer the operation of the QPAP. Therefore, dispute resolution concerning the meaning and application of QPAP provisions appropriately reside with the Commission.

B. Payment of interest.

Antonuk finds that the QPAP should provide for interest on late QPAP payments at the prime rate published daily.

Qwest comments

Qwest includes in the QPAP (11.1) the use of the "prime rate" to reflect the time value of money.

AT&T comments

AT&T recommends that the interest rate on late payments be whatever was set by the state commission in a Qwest rate case. (In the last Qwest general rate case, Docket 88.12.15, Order 5398a, the Montana PSC set Qwest's rate of return on equity at 12%.)

Commission preliminary finding: The Commission finds Antonuk's recommendation to be reasonable and adopts it.

C. Escrowed payments.

Antonuk includes in the QPAP provisions for one party to the QPAP to require the other party to make payments into escrow where the requesting party can show cause, perhaps

on grounds similar to those provided by the Uniform Commercial Code for cases of commercial uncertainty.

D. Effective dates.

1. Initial effective date. Antonuk agrees with Qwest that the QPAP effective date should be when Qwest gains 271 entry approval in a state and he revises the QPAP to require Qwest to provide monthly QPAP reports as if the QPAP became effective on October 1, 2001.

Qwest comments

Qwest is unopposed to providing reports for information reasons, but it finds unnecessarily complicated the requirement that it report information as if the QPAP were effective on October 1, 2001. Since no CLEC has opted into the QPAP, Qwest intends to provide Tier 2 reports and aggregate Tier 1 reports to Commissions and parties in this QPAP proceeding beginning with November 2001 payment reports and continuing until Qwest gains (271) approval from "the state."

AT&T comments

AT&T changes its position from the workshops, where it argued for implementation of the QPAP upon approval by the state commission, to agreement with the Utah Staff which has recommended QPAP implementation at the time Qwest files its Section 271 application at the FCC.

MCC comments

Just as the Colorado hearing examiner recommends effectiveness after 271 authority but that Qwest be required to generate "mock reports" in the interim for PUC staff review, the MCC holds that while the Report fails to mention when to implement the plan it should be immediate.

Commission preliminary finding: The Commission agrees with Antonuk's recommendation that the QPAP become effective on the date Qwest's application for 271 approval in Montana is approved by the FCC, but that Qwest immediately begin filing with the Commission and CLECs monthly "mock reports," with no monetary penalties attached, as if the QPAP (reflecting this Commission's findings) was in operation now. In this way, the Commission and CLECs will gain useful information about the operation of the QPAP prior to its actual implementation.

2. "Memory" at effective date. Antonuk rejects AT&T's proposal that when the QPAP becomes effective, Qwest should begin payments as if it had been in effect since the PSC action to approve it. As for his reasoning, Antonuk adds that the very reason cited by the FCC in support of the adoption of a PAP is the need for assurance that local exchange markets will remain open after Qwest receives the power to provide in-region interLATA service.

AT&T comments

AT&T disagrees with Antonuk's finding on this issue and calls it "illogical, inexplicable and ILEC-biased."[4] *AT&T points out that, under Antonuk's proposal, if Qwest is providing substandard service in the months prior to QPAP implementation, it will be wiped off the books once the QPAP becomes effective.*

MCC comments

The mock reports should not serve as memory once Qwest receives 271 entry authority.

Commission preliminary finding: The Commission agrees with Antonuk, Qwest and MCC that Qwest will have a clean slate as of the date of QPAP effectiveness.

[4] *AT&T's Exceptions to the Liberty Consulting Group's QPAP Report* (November 7, 2001), p. 41.

3. QPAP effectiveness if Qwest exits interLATA market. Antonuk rejects the proposal made by AT&T and ELI/Time Warner/XO Utah that the QPAP would continue to operate even if Qwest exited the in-region interLATA market.

Commission preliminary finding: To restate the effect of Qwest's intent as reflected in Antonuk's resolution: if interLATA entry is profitable, Qwest will make Tier 1 payments to CLECs and Tier 2 payments to a state, but if Qwest finds interLATA entry unprofitable, it will exit the interLATA market and cease making Tier 1 and 2 payments for any discriminatory service it provides to CLECs. The Commission seeks comment on why Qwest's right to cease making Tier 1 and, or, Tier 2 payments is consistent with congressional intent in The Telecommunications Act of 1996. The Commission seeks comment on whether any state recommendations to the FCC and any recent FCC approved 271 filings prohibit a RBOC from terminating its performance assurance plan concurrent with the RBOC's independent decision, or FCC requirement, to exit the interLATA market.

E. QPAP inclusion in SGAT and interconnection agreements.

Antonuk agrees with WorldCom that Qwest must address the question of how the QPAP should be made a part of the SGAT. He also asserts that there Qwest should clarify the scope of what a CLEC with an interconnection agreement would be required to elect. He directs Qwest to address these issues in its comments on his *Report*.

Qwest comments

Qwest asserts the QPAP will be included as Attachment K to the SGAT. Qwest adds that if a CLEC wishes to opt into the QPAP, it must do so through an amendment to its interconnection agreement which must include at a minimum, both Attachment K and Attachment B in lieu of other contractual standards and remedies. Additional elections depend on the specifics of the interconnection agreement.

Commission preliminary finding: The Commission requests participants to comment on Qwest's proposal for the method by which CLECs will opt into the QPAP. In addition, the Commission finds that a second sentence should be added to this provision (13.2) as follows:

> ***CLECs may seek amendments to their interconnection agreements to include the QPAP as soon as the Commission approves the QPAP, with the understanding that monetary penalties will not apply until the date Qwest receives Section 271 approval from the FCC.***

F. Form of payment to CLECs.

Antonuk rejects WorldCom's suggestion that Qwest make QPAP payments by cash or check; he accepts Qwest's provision that makes payments bill credits. A cash-equivalent transfer is required by Antonuk when there is insufficient amount due CLEC to offset the credit. Antonuk declined to address Covad's request for no offset if payments are due for unrelated debts of CLECs. He also asserts that the QPAP require Qwest to provide credit information in substantially the same format Qwest provides (Exh S-9-QWE-CTI-4).

Qwest comments

Qwest asserts to include a provision committing Qwest to provide payment information substantially similar to that which parties were apprised of (see QPAP 11.2).

Commission preliminary finding: The Commission invites participants' comments on the language submitted by Qwest at Section 11.2.

V. ASSURANCES OF REPORTED DATA'S ACCURACY

Qwest cites the following as assurances that the performance data underlying the QPAP will be reliable: (1) measures will be audited twice by the time the QPAP is effective; (2) the QPAP includes a root-cause analysis provision; (3) the QPAP includes a risk-based audit program; (4) CLECs may request raw data from Qwest in order to verify data and may request audits of

individual performance measures; and, (5) the QPAP provides for audits of Qwest's financial system used to calculate CLEC payments.

A. Audit program.

Antonuk expects that states will jointly oversee the QPAP auditing function, with each state retaining the ability to make sure its particular needs and circumstances are addressed. His recommendations regarding the adoption of an integrated audit program includes the following QPAP amendments:

Providing for a transparent Qwest process for changing the systems, processes, methods and activities of Qwest's measurement regimen and allowing an opportunity for others to challenge such changes.

- The independent auditor should meet quarterly with Qwest to learn of changes made in Qwest's measurement regimen. The auditor would then assess the materiality and propriety of any changes and reports to commissions. Other parties would make the auditor aware of their concerns about changes.

The QPAP should adopt a programmatic approach that allows both pre-planned and as-needed testing of Qwest's measurement regimen.

Approval of Qwest's acceptance of a two-year planning cycle to be conducted under the auspices of the participating commissions with detailed planning recommendations to be made by an outside auditor selected by the commissions and retained for two-year periods.

A recommendation that the auditor also determine the need for individual audits proposed by CLECs that are not otherwise addressed in the current cycle plan.

Allowing states to perform additional auditing if the joint approach is not sufficient.

Using Tier 2 payments to states to pay audit program costs. Qwest should fund the costs of the first 2-year cycle in advance, with the amount to be refunded once Tier 2 payments accumulate. If Tier 2 payments aren't enough to pay for program, then half of the cost will come from Tier 1 escalated payments and half from Qwest.

Qwest comments

Qwest submits the following comments and QPAP revisions on the "Audit Program." (1)While Qwest asserts to include Antonuk's required audit provisions in the QPAP, Qwest includes other "key concepts" that Antonuk excludes. (2) Qwest adds to the QPAP a section (15.1.3) requiring that the independent auditor coordinate audits to avoid duplication and to not impede Qwest's ability to meet other requirements in the QPAP. (3) Qwest is hopeful that states participate in a common audit, and prefers requiring common audits. (4) Qwest adds it is imperative that audit plans and operations not impede Qwest's day-to-day performance under the QPAP regime. (5) Qwest expresses concern with how disputes arising from audits will be processed. As regards CLEC proposed audits, Qwest asserts that Antonuk did not propose a "materiality decision criteria" and notes to add such criteria as the basis for an audit: small discrepancies alone are(sic) not (word and emphasis added)a reasonable basis for an audit. (6) Qwest asserts to add a provision disallowing audits during the pendency of dispute resolutions. (7) Last, and arguably consistent with QPAP 14.4, Qwest adds a provision that a CLEC may not propose auditing data older than three years (see QPAP 15.3).

Commission preliminary finding: For resource and efficiency reasons, the Commission agrees with Antonuk's recommendation that state commissions should jointly oversee the QPAP auditing function in a manner that allows each participating state to act independently on issues where it might differ from the other states. If such a joint regulatory oversight group is formed by some or all of

the Qwest states in order to conduct their QPAP review and auditing responsibilities, the Montana Commission likely will participate. However, QPAP Section 15 (concerning the audit program) is currently written as if there is a multistate oversight regime already in place and, therefore, does not take into account the possibility that states will not form a joint oversight body and the Commission will conduct its QPAP audit responsibilities on its own. Other provisions of Section 15 inappropriately dictate the method by which the multistate commission oversight group will resolve audit-related disputes and appeals of disputes. Additionally, the current Section 15 contains provisions that limit the Commission's discretion to determine the procedure, scope, timing and conduct of audits. The Commission revises Section 15.1 through 15.4 below to address these concerns.

15.1 Audits of the PAP shall be conducted ~~in a two-year cycle~~ under the auspices of the ~~participating Commissions~~ Commission in accordance with a detailed audit plan developed by an independent auditor and approved by the Commission ~~retained for a two-year period~~. The ~~participating Commissions~~ Commission shall select the independent auditor with input from Qwest and the CLECs.

~~15.1.1 The participating Commissions shall form an oversight committee of Commissioners who will choose the independent auditor and approve the audit plan. Any disputes as to the choice of auditor or the scope of the audit shall be resolved through a vote of the chairs of the participating commissions pursuant to Section 15.1.4.~~

15.1.2 The initial audit plan shall be conducted over two years, with audit periods subsequent to the initial audit to be determined by the Commission. The Commission will determine the scope of and procedure for the audit plan, which, at a minimum, will identify the specific performance measurements to be audited, the specific tests to be conducted, and the entity to conduct them. The initial audit plan will give priority to auditing the higher risk areas identified in the OSS report. ~~The two-year cycle will examine risks likely to exist across that period and the past history of testing, in order to determine what combination of high and more moderate areas of risk should be examined during the two-year cycle. The first year of a two-year cycle will concentrate on areas most likely to require follow-up in the second year.~~

15.1.3 The Commission will attempt to coordinate its audit plan ~~shall be coordinated~~ with other audit plans that may be conducted by other state

commissions so as to avoid duplication. The audit shall be conducted so as not to ~~shall not~~ impede Qwest's ability to comply with the other provisions of the PAP and should be of a nature and scope that it can be conducted in accordance with the reasonable course of Qwest's business operations.

15.1.4 Any dispute arising out of the audit plan, the conduct of the audit, or audit results shall be resolved by the Commission ~~oversight committee of Commissioners~~. ~~Decisions of the oversight committee of Commissioners may be appealed to a committee of the chairs of the participating Commissions.~~

15.2 Qwest may not make CLEC-affecting changes to the performance measurement and reporting system without Commission approval. Qwest may make non-CLEC-affecting changes to its management processes to enhance their accuracy and efficiency ~~more accurate or more efficient to perform without sacrificing accuracy~~. These changes are at Qwest's discretion, but will be reported to the independent auditor in quarterly meetings in which the auditor may ask questions about changes made in the Qwest ~~measurement regimen~~ management processes. The meetings, which will be limited to Qwest and the independent auditor, will permit an independent assessment of the materiality and propriety of any Qwest changes, including, where necessary, testing of the change details by the independent auditor. The information gathered by the independent auditor may be the basis for reports by the independent auditor to the ~~participating~~ Commissions and, where the Commissions deems it appropriate, to other participants. The Commission may review in the QPAP review process the propriety of any discretionary changes made by Qwest pursuant to this section.

15.3 In the event of a disagreement between Qwest and CLEC as to any issue regarding the accuracy of integrity of data collected, generated, and reported pursuant to the PAP, Qwest and the CLEC shall first consult with one another and attempt in good faith to resolve the issue. If an issue is not resolved within 45 days after a request for consultation, CLEC and Qwest may, upon a demonstration of good cause (e.g., evidence of material errors or discrepancies), request an independent audit to be conducted, at the initiating party's expense. The independent auditor will assess the need for an audit based upon whether there exists a material deficiency in the data or whether there exists an issue not otherwise addressed by the audit plan for the current cycle. The Commission will resolve any dispute by ~~The dispute resolution provision of section 18.0 is available to~~ any party questioning the independent auditor's decision to conduct or not conduct a CLEC requested audit and the audit findings, should such an audit be conducted. Audit findings will include: (a) general applicability of findings and conclusions (i.e., relevance to CLECs or jurisdictions other than the ones causing test initiation), (b) magnitude of any payment adjustments required and, (c) whether cost responsibility should be shifted based upon the materiality and clarity of any Qwest non-conformance with measurement requirements (no pre-determined variance is appropriate, but should be based

on the auditor's professional judgment). CLEC may not request an audit of data more than three years from the later of the provision of a monthly credit statement or payment due date.

15.4 Expenses for the audit of the QPAP and any other related expenses, except that which may be assigned under section 15.3, shall be paid first from the Tier 2 funds in the Special Fund. ~~The remainder of the audit expenses will be paid one half from Tier 1 funds in the Special Fund and one half by Qwest.~~ If Tier 2 funds are not sufficient to cover audit costs, the Commission will develop an additional funding method to include contributions from CLECs' Tier 1 payments and from Qwest.

B. PSC access to CLEC raw data (Section 14.2).

Antonuk rejects AT&T's suggestion that this provision, that allows a PSC to request CLEC specific raw data from Qwest, be eliminated. Antonuk recommends adding QPAP language related to confidentiality concerns.

C. Providing CLECs their raw data.

Antonuk finds that upon request Qwest should provide raw data to CLECs as soon as possible. He declines to set a deadline. He finds that the QPAP should require Qwest to allow payments to be recalculated retroactively for 3 years and it should require Qwest to retain sufficient records to demonstrate fully the basis for its calculations for long enough to meet this potential recalculation obligation. Thus, Antonuk finds it sufficient that Qwest maintain records in a readily usable form for one year while remaining records are retained in an archived format. He finds that the QPAP should require Qwest to distribute CLEC-specific data in a form that will allow CLECs to understand and verify them.

Qwest comments

Qwest states to include in the QPAP (14.2) a provision that modifies slightly that recommended by Antonuk. As for the provision of raw data to CLECs, Qwest incorporates into the QPAP (14.4) a requirement that documents be retained.

Commission preliminary finding: The Commission agrees with Antonuk's recommendations, but asks participants to comment on the relevant QPAP language submitted by Qwest.

D. Penalties for late and/or inaccurate QPAP reports.

Antonuk recommends revising the QPAP to impose a penalty if Qwest neglects to file QPAP information on a measure of $1/5^{th}$ the amount for failure to file a QPAP report at all (subject to a cap equal to the daily amount for failure to file any report). He finds that the best way to deal with report accuracy is to include the issue when formulating audit plans. For late QPAP reports, he finds that Qwest should pay $500/day for a report filed in the second week after it's due, $1000/day in the third week and $2000/day for anything later than that. (The QPAP allows Qwest to request a waiver of late report payments.)

Qwest comments

Qwest includes in the QPAP (14.3) payment obligations consistent with Antonuk's Report.

VI. OTHER ISSUES

A. Prohibiting QPAP payment recovery in rates.

Antonuk rejects AT&T's proposal adding that the FCC and state PSCs can decide the issue.

AT&T comments

AT&T continues to argue that the Commission should mandate that Qwest may not recover QPAP costs from ratepayers. In addition, AT&T proposes language for a new provision to be added to the QPAP that explicitly prohibits Qwest from including QPAP

payments as expenses in any Qwest revenue requirement or reflecting them in increased rates to CLECs.

Commission preliminary finding: As for the recovery of QPAP payments in rates, the Commission agrees with Antonuk as to jurisdiction and finds that no such recovery is allowed in rates this Commission regulates.

B. No-admissions clause (Section 13.4.1).

Antonuk finds that the QPAP restriction in this section does not constrain the use of the information contained within QPAP reports so there is no need to delete the clause.

C. Qwest's responses to FCC-initiated changes.

Qwest proposed 3 QPAP changes that were prompted by informal suggestions from the FCC: (1) eliminating 2 families of OP-3 submeasurements so that no missed order would go uncompensated; (2) removing the adjustment for two commission's rate orders (not Montana); (3) making two changes in the statistical values used to test Tier 2 parity. No one objected to these proposals so Antonuk adopted them.

Qwest comments

Qwest asserts to make appropriate deletions to the QPAP (7.2, but also see Attachment, footnote c and Attachment 3).

D. Specification of state commission powers (Section 12.3).

This section allows a state commission to recommend to the FCC that Qwest's 271 authority be revoked in the event Qwest reaches the annual cap. As it does not add to any power Commission do not already have, Antonuk eliminates this provision as it might be construed to limit a commission's authority to respond to circumstances that may arise other than in the QPAP.

Qwest comments

Qwest strikes from the QPAP Section 12.3 cited here.

Commission preliminary finding: The Commission agrees with Antonuk's resolution.

E. Issue deferred to QPAP from Final Report on Checklist Item # 4 – Unbundled Loops

Qwest's delays in making these loops available and the impact on competition led to the following conclusion in the Commission's preliminary report:

> *Issue 4 – Commission Preliminary Finding*
>
> *The Commission agrees with the facilitator's findings regarding the need for expeditious provision of infrequently ordered unbundled services. The Commission considers the fact that comparatively few of these loops were ordered does not necessarily indicate the losses to competition that may have occurred. The Commission will consider whether this issue should be added to the post-entry performance plan considerations*. (p. 43).

In its comments, Qwest argues that it is unnecessary to consider infrequently ordered services in QPAP because of the special request process (SRP) already approved by the facilitator. The Commission's final report finds:

> *[i]t is clear from many sources that Qwest has made substantial improvements in its provisioning of wholesale service and technical support for CLEC wholesale ordering activities including for the specific UNEs at issue here. The Commission's concern was over the time it appears to have taken for new or infrequent services to be provisioned and provisioned correctly by Qwest and the possible impact this may have on competition, especially the competition represented by smaller companies which may be more likely to be active over a sustained period in Montana. Once a product or service is well-developed and part of the performance measures there are means in the QPAP for monitoring performance and parity. The Commission agrees with Qwest that the procedures detailed in Exhibit F (of the SGAT) concerning the special request process go far to alleviating the Commission's concern over the impact of provisioning in the case of infrequently ordered UNEs. In addition, as a consequence of the CLEC Forum held January 9, 2002, parties have agreed to discuss and make proposals concerning processes on how Qwest and small CLECs can improve interaction. The Commission defers final closure of this issue pending the outcome of those discussions.*

The Commission invites comments on what it might do to facilitate better interaction between companies and therefore competition over the long-term in Montana. If the Commission should develop an expedited complaint procedure to resolve wholesale service disputes, what might it look like? If the Commission sponsors meetings, perhaps modeled on the CLEC Forum where parties can discuss issues and possibly resolve them prior to going to a complaint or dispute process, should they be, for example, annual or quarterly? How long would this need to go on e.g., one year after Qwest receives 271 approval, or two years?

QPAP LANGUAGE ISSUES NOT ADDRESSED IN ANTONUK'S REPORT

The Commission has reviewed the QPAP language in the current 11/6/2001 version and makes the following preliminary findings.

Section 2.1.1: This provision should be modified to reflect the finding that Tier 2 payments will be paid by Qwest into an interest-bearing escrow account set up by Qwest to hold the Montana Special Fund monies, and will not be paid to the state general fund. Every year, the Commission will determine whether the money in the Special Fund exceeds the amount of money the Commission expects to spend to perform its QPAP-related activities. If there is an amount in excess of what the Commission determines is necessary, the Commission will direct Qwest as to its disposition. (The Commission's direction will be to deposit the excess in the state general fund.)

Section 7.5: Everything after the first sentence should be deleted. The text to be deleted refers to the circumstance that would occur if the Commission was statutorily unable to direct the use of Tier 2 payments.

Section 10.3: Delete this provision entirely. The scope of the 6-month reviews is addressed in Section 16.

Section 11.3: Revise as follows:

> *A Special Fund shall be created for the purpose of funding the Commission's auditing, administration and oversight of the QPAP ~~(a) payment of an independent auditor and audit costs as specified in section 15.0, (b) payment of an independent arbitrator to resolve disputes arising out of the six-month review as described in section 16.0, and (c) payment of other expenses incurred by the participating Commissions in the regional administration of the QPAP~~. Nothing in this section prohibits the Commission from joining with other state commissions in a multistate effort to conduct and develop a method for joint funding for some or all of these activities.*

Sections 11.3.1 and 11.3.2: These provisions should be revised to reflect the current circumstances where this Commission will be acting on its own in its QPAP oversight activities, rather than participating in a multistate effort.

Section 13.1: This provision should state that the QPAP will be effective on the date Qwest receives section 271 approval from the FCC for Montana.

The Commission requests participants to review closely the language in the 11/6/2001 QPAP, as well as any language changes recommended by the Commission in this report. Participants should include in their comments on this report any concerns they have as to whether the language conforms to this Commission's findings, and propose substitute language where appropriate.

BY THE MONTANA PUBLIC SERVICE COMMISSION

_____
GARY FELAND, Chairman

_____
JAY STOVALL, Vice Chairman

_____
BOB ANDERSON, Commissioner

_____
MATT BRAINARD, Commissioner

_____
BOB ROWE, Commissioner

ATTEST:

Rhonda J. Simmons
Commission Secretary

(SEAL)