

BEFORE THE WASHINGTON UTILITIES AND
TRANSPORTATION COMMISSION

In the Matter of the Investigation Into)	
)	
U S WEST COMMUNICATIONS, INC.'s ¹)	DOCKET NO. UT-003022
)	
Compliance With Section 271 of the)	
Telecommunications Act of 1996)	
)	
)	
In the Matter of)	
)	
U S WEST COMMUNICATIONS, INC.'s)	DOCKET NO. UT-003040
)	
Statement of Generally Available Terms)	
Pursuant to Section 252(f) of the)	
Telecommunications Act of 1996)	
)	

THIRTIETH SUPPLEMENTAL ORDER

COMMISSION ORDER² ADDRESSING QWEST'S PERFORMANCE
ASSURANCE PLAN

¹ Since the inception of this proceeding, U S WEST has merged and become known as Qwest Corporation. For consistency and ease of reference we will use the name Qwest in this Order.
² This proceeding is designed, among other things, to produce a recommendation to the Federal Communications Commission regarding Qwest's compliance with certain requirements of law. This Order addresses some of those requirements. The process adopted for this proceeding contemplates that interim orders including this one will form the basis for a single final order, incorporating previous orders, updated as appropriate. The Commission will entertain motions for reconsideration of this Order so that issues may be timely resolved.

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I. SYNOPSIS

- 1 *In this Order, the Commission rejects certain recommendations made by the Multi-state Facilitator in his QPAP Report, adopts the remainder of the Facilitator's recommendations, and directs Qwest to make certain modifications to its performance assurance plan for Washington state.*

II. BACKGROUND

- 2 This is a consolidated proceeding to consider the compliance of Qwest Corporation (Qwest), formerly known as U S WEST Communications, Inc. (U S WEST), with the requirements of section 271 of the Telecommunications Act of 1996 (the Act),³ and to review and consider approval of Qwest's Statement of Generally Available Terms (SGAT) under section 252(f)(2) of the Act. The Commission allowed Qwest's SGAT to go into effect at its June 16, 2000, open meeting. The Commission is reviewing the provisions of the SGAT in this proceeding to determine whether the provisions comply with section 252(d) and section 251 of the Act, as well as requirements of Washington state law.
- 3 In this proceeding, the Commission must determine whether to recommend to the Federal Communications Commission (FCC) that Qwest be allowed to enter the interLATA toll market in Washington state. Through a series of workshops, hearings, and orders, the Commission has reviewed Qwest's compliance with a number of the requirements of section 271. Through hearings that are the subject of this Order, the Commission heard testimony and evidence on the subject of Qwest's Performance Assurance Plan (QPAP). The QPAP is designed as a self-executing remedy plan to ensure Qwest's continued compliance with the requirements of section 271 should the FCC grant an application by Qwest to provide in-region, interLATA service in Washington state.
- 4 Section 271 sets forth a number of requirements that a Bell Operating Company (BOC), such as Qwest, must meet before obtaining the FCC's approval to provide in-region, interLATA service in a state. In addition to demonstrating that the BOC has fully implemented the 14-point competitive checklist set forth in section 271(c)(2)(B), a BOC must show that it satisfies the requirements of section 271(c)(1)(A), referred to as "Track A," or section 271(c)(1)(B), referred to as "Track B," demonstrate that it is in compliance with section 272, and that the BOC's entry

³ Pub. L. No. 104-104, 110 Stat. 56, *codified at* 47 U.S.C. § 151 *et seq.*

into the in-region, interLATA market is “consistent with the public interest, convenience, and necessity.”⁴

5 The public interest requirement provides “an opportunity to review the circumstances presented by the application to ensure that no other relevant factors exist that would frustrate the congressional intent that markets be open, as required by the competitive checklist, and that entry will therefore serve the public interest as Congress expected.”⁵ One of the factors the FCC has considered is whether there is “sufficient assurance that markets will remain open after grant of the application,”⁶ and in particular, “whether a BOC would continue to satisfy the requirements of section 271 after entering the long distance market.”⁷

6 The FCC has relied on post-entry performance assurance plans developed collaboratively by the BOC, competitive carriers, and the states in finding that there are performance monitoring and enforcement mechanisms in place that would, “in combination with other factors, provide strong assurance that the local market will remain open after [the BOC] receives section 271 authorization.”⁸

7 In approving BOC section 271 applications, the FCC has applied a “zone of reasonableness test” in determining whether a performance assurance plan was “likely to provide incentives that are sufficient to foster post-entry performance.”⁹ The FCC has looked to the following five characteristics in applying its zone of reasonableness test:¹⁰

⁴ 47 U.S.C. §271(d)(3)(C); *see also*, *In the Matter of Application of Bell Atlantic New York for Authorization Under Section 271 of the Communications Act To Provide In-Region, InterLATA Service in the State of New York*, Memorandum Opinion and Order, CC Docket No. 99-295, FCC 99-404, ¶18 (rel. Dec. 22, 1999) (*Bell Atlantic New York Order*).

⁵ *Bell Atlantic New York Order*, ¶423.

⁶ *Id.*

⁷ *Id.*, ¶429.

⁸ *Id.*; *see also* *In the Matter of SBC Communications Inc., Southwestern Bell Telephone Company and Southwestern Bell Communications Services, Inc., d/b/a Southwestern Bell Long Distance Pursuant to Section 271 of the Telecommunications Act of 1996 to Provide In-Region, InterLATA Services in Texas*, Memorandum Opinion and Order, CC Docket No. 00-65, FCC 00-238, ¶¶ 422-23 (rel. June 30, 2000) (*SBC Texas Order*); *In the Matter of Joint Application by SBC Communications Inc., Southwestern Bell Telephone Company, and Southwestern Bell Communications Services, Inc., d/b/a Southwestern Bell Long Distance for Provision of In-Region, InterLATA Services in Kansas and Oklahoma*, Memorandum Opinion and Order, CC Docket No. 00-217, FCC 01-29, ¶¶269-70 (rel. Jan. 22, 2001) (*Kansas/Oklahoma Order*).

⁹ *Bell Atlantic New York Order*, ¶433; *SBC Texas Order*, ¶423.

¹⁰ *Bell Atlantic New York Order*, ¶433; *In the Matter of the Application of Verizon Pennsylvania Inc., Verizon Long Distance, Verizon Enterprise Solutions, Verizon Global Networks Inc., and Verizon Select Services Inc. for Authorization to Provide In-Region, InterLATA Services in Pennsylvania*, Memorandum Opinion and Order, CC Docket No. 01-138, FCC 01-269, ¶128, n.442 (rel. Sept. 19, 2001) (*Verizon Pennsylvania Order*).

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

8 While the FCC has never required BOC applicants to demonstrate that they are subject to performance assurance plans as a condition of section 271 approval, the FCC does consider such plans “probative evidence that the BOC will continue to meet its section 271 obligations and that its entry is consistent with the public interest.”¹¹ The FCC does not impose any structural requirements on a state developed plan. In fact, the FCC recognizes that “state commissions will continue to build on their own work and the work of other states” in developing plans.¹² Overall the FCC looks to see whether the plan is likely to be effective “in practice” in deterring and enforcing against backsliding behavior by the BOC.¹³

III. PROCEDURAL HISTORY

9 In August 2000, eleven states in Qwest’s region--Washington, Oregon, Iowa, Nebraska, North Dakota, South Dakota, Utah, Wyoming, Montana, Idaho, and New Mexico--formed a collaborative to discuss Qwest’s Post-Entry Performance Plan (PEPP), known as the Regional Oversight Committee (ROC) PEPP collaborative. After a number of workshops were held to determine the process and resolve substantive issues, Qwest ended its participation in the collaborative process in May 2001. Qwest stated its intent to prepare a Performance Assurance Plan (PAP) incorporating those agreements reached in the collaborative, and to file its PAP in separately in each state.

10 On June 27, 2001, after hearing comments from participants in the PEPP collaborative and the Multi-state Proceeding,¹⁴ Mr. John Antonuk, the facilitator for

¹¹ *SBC Texas Order*, ¶420; *Bell Atlantic New York Order*, ¶429; *Kansas/Oklahoma Order*, ¶269.

¹² *Verizon Pennsylvania Order*, ¶128.

¹³ *SBC Texas Order*, ¶421.

¹⁴ Seven states--Iowa, Utah, North Dakota, Wyoming, Montana, Idaho, and New Mexico—have held a joint proceeding similar to the proceeding in Dockets No. UT-003022 and UT-003040 to evaluate

the Multi-state Proceeding, issued Procedural Recommendations for Considering Qwest's PAP. In those recommendations, Mr. Antonuk determined that "there would be substantial efficiency in addressing Qwest's PAP" in a single proceeding as the factual issues raised by the PAP would be similar in each state. The Facilitator invited states participating in the PEPP collaborative to participate in the Multi-state Proceeding for purposes of considering Qwest's PAP.

- 11 On June 29, 2001, Qwest filed its PAP and a list of resolved and unresolved issues with the parties in the Multi-state Proceeding. This version of the QPAP has been admitted in this proceeding as Exhibit 1200. On July 9, 2001, the Commission sought comments from the parties on whether the Washington Commission should participate in the Multi-state Proceeding to consider Qwest's PAP.
- 12 On July 23, 2001, the Commission issued its *12th Supplemental Order*, notifying the parties that it intended to participate with a number of other states in the initial review of Qwest's proposed Performance Assurance Plan (QPAP) due to the efficiencies and continuity of process offered by a joint process. The Commission ordered the parties to follow the hearing schedule adopted by Mr. Antonuk. That schedule anticipated the issuance of a report at the conclusion of the hearings. The Commission explained that it considered the Facilitator's Report to be analogous to an initial order entered by an administrative law judge or hearing examiner, and that all findings and conclusions reached in the Report would be subject to review by the Commission.
- 13 Hearings in the Multi-state Proceeding were held on August 14-17, and August 27-29, 2001, in Denver, Colorado. The seven states participating in the Multi-state Proceeding were joined by the states of Washington and Nebraska. The transcripts of the hearing and exhibits admitted during the hearings were marked and admitted into this Commission's proceeding during hearings held on December 18-19, 2001. The Facilitator issued his Report on Qwest's Performance Assurance Plan (QPAP Report, Report, or Facilitator's Report) on October 22, 2001. *Ex. 1285*.
- 14 On October 11, 2001, the Commission issued a notice scheduling hearings for December 18-21, 2001 to discuss the QPAP for December 18-21, 2001. The Commission convened a prehearing conference on October 30, 2001 before administrative law judge Ann E. Rendahl to identify the issues to be presented during the hearings and establish a schedule for filing comments and exhibits in preparation for the hearings. By notice issued on October 24, 2001, the Commission sought comment from all parties concerning the QPAP Report, and posed several specific questions to the parties. On that same date, the Commission issued bench requests to Qwest concerning the QPAP Report, specifically requesting that Qwest file a new version of the QPAP, red-lined to reflect the Facilitator's recommendations.

- 15 The 21st *Supplemental Order, Prehearing Conference Order*, identifies four topics for the hearings in December: the QPAP Report, Compliance with Commission Orders, Qwest Performance Results, and Data Verification. However, the 23rd *Supplemental Order*, a prehearing conference order issued on December 14, 2001, granted a motion to continue hearing on Qwest's performance results and data verification until The Liberty Consulting Group had completed its report on the reconciliation of Qwest and CLEC operational reporting data.
- 16 Qwest filed responses to the bench requests on November 7, 2001, including its red-lined QPAP. *See Ex. 1217*. All parties filed responses to the Commission's questions and any comments on Qwest's responses to the bench requests on November 21, 2001. Parties filed responsive or rebuttal comments on December 5, 2001. The Commission heard comments and arguments from the parties concerning disputed issues arising from the QPAP Report on December 18 and 19, 2001, and admitted Exhibits 1200 through 1284, including exhibits and transcripts from the Multi-state hearings in August 2001. Subsequent to the hearing, the Administrative Law Judge admitted the responses to Bench Requests 39 through 42, and Qwest's illustrative payments pursuant to the QPAP, as Exhibits 1286 through 1289, and Exhibit 1223, accordingly.
- 17 This Order resolves the issues raised by the parties in briefs, comments, and oral argument to the Commission regarding the content of Qwest's Performance Assurance Plan for the state of Washington. As stated in the 12th *Supplemental Order*, the Commission deems the QPAP Report an initial order of the Commission. The QPAP Report stated findings and conclusions on all material facts inquired into during the course of the hearings on Qwest's Performance Assurance Plan. The Commission rejects certain findings and conclusions made in the QPAP Report, and adopts the remainder, with the modifications discussed below.

IV. PARTIES AND REPRESENTATIVES

- 18 The following parties and their representatives participated in the August 2001 hearings in the Multi-state Proceeding in Denver, Colorado concerning Qwest's Performance Assurance Plan: Qwest, by Lynn A. Stang, attorney, Denver, CO; AT&T, by Steven Weigler and John Finnegan, attorneys, Denver, CO; WorldCom, Inc. (WorldCom), by Tom Dixon, attorney, Denver, CO; Z-Tel Communications (Z-Tel), by Claudia Earls, attorney, Tampa Bay, FL; XO Utah, Inc., XO Washington, Inc. (XO), and Time-Warner Telecom of Washington (TWT), by Gregory J. Kopta, attorney, Seattle, WA; Covad Communications, Inc. (Covad) by Megan Dobernek, attorney, Denver, CO; Sprint by Barbara Young, attorney, Mount Hood, OR; SBC Communications, by Cheryl Boyd, attorney; New Mexico Advocacy Staff, by Marianne Reilly, attorney, Santa Fe, NM; Public Counsel, by Robert W. Cromwell, Jr., Assistant Attorney General, Seattle WA.

19 The following parties and their representatives participated in the December 2001 hearings concerning Qwest's Performance Assurance Plan: Qwest, by Lisa Anderl and Adam Sherr, attorneys, Seattle, WA, and Lynn A. Stang, attorney, Denver CO; AT&T Communications of the Pacific Northwest, Inc. and TCG Seattle (collectively AT&T), by Steven Weigler, attorney, Denver, CO; WorldCom, by Michel Singer-Nelson, attorney, Denver, CO; Time-Warner Telecom (TWT), XO Washington, Inc., and Electric Lightwave Inc. (ELI), by Gregory J. Kopta, attorney, Seattle, WA; Covad, by Megan Doberneck, Denver CO; and Public Counsel by Robert W. Cromwell, Jr., Assistant Attorney General.

V. THE QPAP

20 As stated above, the QPAP is intended to be a self-executing remedy plan to ensure Qwest's continued compliance with the requirements of section 271 should the FCC grant an application by Qwest to provide in-region, interLATA service in Washington state. Qwest intends the QPAP to be included in the SGAT as Exhibit K, and to be adopted as a part of a CLEC's approved interconnection agreement with Qwest.

21 The QPAP is a two-tiered plan, meaning Qwest must make payments to CLECs (Tier 1 payments) and/or to the state (Tier 2 payments) when Qwest fails to meet certain parity standards or benchmarks, on a per-occurrence or per-measurement basis. The payments, and calculation of the payments, as described in sections 6 through 9 of the QPAP. Section 12 of the QPAP establishes an annual limit or cap on the payments.

22 The parity standards and benchmarks were developed in the PEPP collaborative using statistical measurements, based on certain performance measurements. The statistical measurements are described in QPAP sections 4 and 5. The performance measurements included in the QPAP are defined by Performance Indicator Definitions, or PIDs, developed in the ROC's ongoing Operational Support System (OSS) collaborative.

23 Section 14 of the QPAP requires Qwest to make certain reports to state commissions and CLECs concerning its performance in previous months. As modified by the Facilitator, section 15 of the QPAP provides for joint audits and investigations of the QPAP by participating state Commissions, who would select an independent auditor. Expenses for such audits and investigations would be paid for by a combination of Tier 1 and Tier 2 funds. *Ex. 1217, Section 15.4*. In addition, section 16 of the QPAP provides for a review conducted every six months to determine whether any performance measurements should be added, deleted, or modified, whether the benchmark or parity standards should be modified, and whether the payment structure should be modified.

24 Finally, section 13 of the QPAP includes a set of limitations on the operation and administration of the QPAP, such as the effective date of the plan, when Qwest is excused from making payments, and a requirement that CLECs make an election of remedies, for CLECs.

VI. DISCUSSION

25 Following the discussion below concerning the standard of review and consideration of other state and BOC plans, the issues are organized according to the FCC's five characteristics for determining whether a performance plan falls into the "zone of reasonableness."

A. STANDARD OF REVIEW

26 The QPAP Report includes a section titled "Standard of Review," in which the Facilitator set forth the criteria for evaluating the sufficiency of the QPAP. *QPAP Report at 4-6*. The Facilitator included not only the FCC's five characteristics of its zone of reasonableness test, but also a number of "considerations," such as whether the incentives of the plan impose an "irrational price" on in-region, interLATA entry. *Id. at 6*. A number of CLECs object to the Facilitator's use of additional criteria, arguing that the Commission should reject and strike these additional criteria.

AT&T

27 AT&T does agree with the Facilitator's statement that "the task is not to decide how to increase incentives, but to decide upon the sufficiency of those proposed, which includes at least a full consideration of their comparability with those already reviewed by the FCC." *AT&T's Comments on the Liberty Consulting Group's QPAP Report at 4 (AT&T Comments)*. However, AT&T argues that the Facilitator's additional criteria do not provide a "clearly articulated standard" as required by the FCC's five-prong zone of reasonableness test. *Id. at 5*. Specifically, AT&T objects to the Facilitator's statements on page 6 of the Report that it is irrelevant whether greater burdens on Qwest would increase its incentives to comply with service obligations, and that making such an issue relevant "is not only fantastical, it is beyond any rational conception of fairness and propriety." *Id. at 5*. AT&T notes that the Staff of the Utah Division of Public Utilities issued its own version of the QPAP Report, striking this particular language.¹⁵ *Id.*

28 AT&T objects to the Facilitator's consideration of whether "the incentive aspects of the plan (i.e., those that go beyond compensating CLECs for actual harm) impose a price on in-region, interLATA entry that would be irrational for a BOC to pay for the privilege of such entry." *Id. at 4*. AT&T argues that the QPAP is intended to create

¹⁵ *Utah Division of Public Utilities QPAP Report* (October 26, 2001) (*Utah Staff Report*).

incentives for Qwest to perform, not to determine the “toll” a BOC should pay for the privilege of section 271 entry, or the “strain” upon a BOC for paying CLECs for its failure to perform. *Id. at 6.*

WorldCom

- 29 WorldCom echoes AT&T’s objections to the additional criteria as vague, ambiguous, and inconsistent with FCC orders. *WorldCom’s Comments on Liberty Consulting’s Report Regarding Qwest’s Performance Assurance Plan at 2 (WorldCom Comments)*. WorldCom recommends the Commission either ignore or strike the Facilitator’s additional criteria. *Id.* Further, WorldCom specifically objects to the Facilitator’s conclusion that it is irrelevant to answer the question of whether greater burdens on Qwest would increase its incentives to perform. *Id.* WorldCom asserts that the FCC has found the issue to be highly relevant, stating in its *Verizon Massachusetts Order* that “[d]amages and penalties should be set at a level above the simple cost of doing business.”¹⁶ *Id. at 3.*

Joint CLECs

- 30 ELI, TWT, and XO (Joint CLECs) object that the Facilitator created new legal standards for evaluating the QPAP. *ELI, TWT, and XO Comments on QPAP Report at 4 (Joint CLEC Comments)*. The Joint CLECs assert that the Facilitator imposed his own beliefs of the purpose of the QPAP, rendering the recommendations in the Report irreconcilable with the objective that a plan provide “a meaningful and significant incentive to comply with designated performance standards.” *Id. at 5.* The Joint CLECs also argue that the Facilitator departed from basic principles of administrative law by failing to require Qwest to pre-file testimony with its proposed QPAP, and by shifting the burden of proof to the CLECs to show that the QPAP was unreasonable. *Id. at 3.*
- 31 The Joint CLECs assert that the Commission should reject the QPAP Report in its entirety, and conduct its own independent analysis of the QPAP and the record evidence. *Id. at 6.*

Qwest

- 32 Qwest defends the process the Facilitator used to evaluate the QPAP, arguing that the Utah Staff concluded that the process was sufficient. *Qwest Corporation’s Rebuttal to Comments Filed on the Facilitator’s Report at 2-3 (Qwest Rebuttal)*. Qwest

¹⁶ *In the Matter of Application of Verizon New England Inc., Bell Atlantic Communications, Inc. (d/b/a Verizon Long Distance), NYNEX Long Distance Company (d/b/a Verizon Enterprise Solutions) and Verizon Global Networks Inc., For Authorization to Provide In-Region, InterLATA Services in Massachusetts*, Memorandum Opinion and Order, CC Docket No. 01-9, FCC 01-130, ¶240 (rel. April 16, 2001) (*Verizon Massachusetts Order*).

disputes the CLECs' criticism of the additional factors set forth by the Facilitator, arguing that the Facilitator was justified in asking questions about the extent of the burden Qwest must bear in making payments to the CLECs. *Id. at 4-5*. Qwest argues that the Commission should approve its revised QPAP as it is consistent with other plans approved by the FCC and satisfies the FCC's zone of reasonableness test. *Id. at 7*.

Discussion and Decision

33 As we stated in the 12th *Supplemental Order*, we will treat the Facilitator's Report as an initial order of the Commission. However, that does not mean that we must accept the analysis or recommendation made by the Facilitator on every issue. We will review the evidence of record and the arguments of the parties when reviewing the Facilitator's recommendations, just as we review the recommendations and decisions of administrative law judges in this and every other proceeding before us.

34 We do not find that the process was in any way in error, deficient, or compromised. The Facilitator established a process that provided an opportunity for the parties to be heard, for evidence to be gathered, and for issues to be joined. Evidence was admitted and a transcript prepared. Parties were given an opportunity to submit briefs prior to and after the hearing. This proceeding is a creature of the Telecommunications Act, not state law, and while we have endeavored to apply and follow our procedural rules, there is no requirement that we do so in this matter.

35 We find that the Facilitator correctly stated the five prongs of the FCC's zone of reasonableness test, but went too far in stating his own "considerations" for review of Qwest's QPAP and his comments on increasing Qwest's incentives. The Facilitator's considerations appear to focus primarily on the ongoing dispute between Qwest and the CLECs about Qwest's total payment liability, and how much is sufficient to create the proper incentive for continued compliance with section 271 requirements. This issue is addressed more fully below.

36 While Qwest is correct that the FCC's standards and zone of reasonableness are not a "straitjacket," they do provide sufficient guidance to evaluate Qwest's plan. No more is necessary to consider Qwest's proposed plan. We therefore reject the Facilitator's statements on pages 5 and 6 of the Report, beginning with the sentence: "The ultimate decision on the QPAP's sufficiency, as the FCC addresses the matter, should be one that takes into account the following considerations:"

37 We find that the FCC's "zone of reasonableness" test is the most appropriate in determining whether Qwest's proposed plan, as modified by the Facilitator, is sufficient to deter and enforce backsliding behavior and whether any of the changes proposed by the CLECs are necessary. While we will apply the FCC's standards in evaluating Qwest's proposed plan, we continue to believe that this Commission has

authority under state law and the Telecommunications Act to require Qwest to act if its performance results in service that is unfair, unreasonable or would stifle competition in the state. *See RCW 80.04.110, RCW 80.36.300.* The nature of the Commission's jurisdiction to require the QPAP and oversee its implementation and operation is discussed further below concerning the six-month review process.

B. CONSIDERATION OF OTHER STATE OR BOC PLANS

38 During the December hearings, we posed the question of whether the Commission should look solely to the language of the QPAP in resolving disputed issues, or whether the Commission may consider other state or BOC plans as a whole or in part to develop a plan for Washington. *Tr. 5934.*

39 For example, there was a great deal of discussion about a proposed plan under development before the Colorado Public Utilities Commission, referred to as the CPAP.¹⁷ The Colorado Commission did not join the other states in the ROC PEPP collaborative, but developed a plan independently through the use of a special master. *Tr. 5934-35.* We have recently learned that the Colorado Commission has approved a final plan. In addition, parties discussed that the Utah Staff had modified the recommendations in the Facilitator's Report and issued its own recommendations to the Utah Commission. *Tr. 5960-61.*

CLECs and Public Counsel

40 In its comments on the Report, and during the hearing, Public Counsel advocated adoption of the CPAP, asserting that it would provide the greatest benefit to the consumer. *Tr. 5943; Public Counsel's Comments on the QPAP Report at 2-3 (Public Counsel Comments).* AT&T, WorldCom and Covad also advocated adoption of the CPAP or use of the CPAP as a template plan. In addition, WorldCom advocated review of the Utah Staff Report.

Qwest

41 In its rebuttal comments and during the hearing, Qwest objected to the use or "importation" of any other proposed plan or portion of a plan in developing the QPAP for Washington. *Qwest Rebuttal at 6-7; Tr. 5956-57.* Specifically, Qwest argues that other plans, such as the CPAP, have been developed under different processes, using

¹⁷ The version of the CPAP referred to during the hearing, and in this Order, was provided by the Colorado Hearing Examiner as Attachment A to the Decision on Motions for Modification and Clarification. *See In the Matter of the Investigation Into Alternative Approaches for a Qwest Corporation Performance Assurance Plan in C Colorado*, Decision on Motions for Modification and Clarification of the Colorado Performance Assurance Plan, CPUC Docket No. 011-041T, Decision No. R01-1142-I (Nov. 5, 2001) (*November 5, 2001 Colorado Decision*).

a different record. Qwest objects that importing or using all or part of another plan violates any sense of procedural fairness before this Commission. *Id.*

Discussion and Decision

42 We agree with Qwest that it would not be appropriate to “disavow” the process of developing the QPAP in this state by wholly adopting another state’s proposed plan. However, we do not believe we are limited to looking solely to Qwest’s proposed plan to resolve the disputed issues. The FCC has noted that it expects “state commissions will continue to build on their own work and the work of other states” in developing plans.¹⁸ Further, the FCC has stated that “the development of performance measures and appropriate remedies is an evolutionary process that requires changes to both measures and remedies over time.”¹⁹ Therefore, we find it appropriate to look to other state plans, finalized or in progress, to determine whether elements of a performance assurance plan are sufficient for Washington state.

C. MEANINGFUL AND SIGNIFICANT INCENTIVE

1. Total Payment Liability

43 We look to the total payment liability established in the QPAP, as well as remedies, to determine whether Qwest has met the criteria of a plan that provides meaningful and significant incentives to comply with designated performance standards. In other plans, BOCs have established a revenue cap to limit the total amount of revenue the BOC must annually put at risk of payment to CLECs for failure to meet designated performance standards.

44 Section 12 of the QPAP establishes a cap on total payments. *Ex. 1217*. The parties remain in dispute over the following issues: (1) the percent of local exchange revenue that Qwest must put at risk; (2) the base year used to calculate the amount of revenue at risk; and (3) whether the amount of revenue at risk should be permitted to increase or decrease based on Qwest performance.

45 The QPAP Report recommends a 36 percent revenue cap, i.e., that Qwest should initially place 36 percent of its 1999 ARMIS Net Revenue²⁰ at risk of payment to

¹⁸ *Verizon Pennsylvania Order*, ¶128.

¹⁹ *Id.*

²⁰ The Automated Reporting Management Information System (ARMIS) was initiated in 1987 for collecting financial and operational data from the largest telecommunication carriers regulated by the FCC. Additional ARMIS reports were added in 1991 to collect service quality and network infrastructure information from local exchange carriers subject to price cap regulations, and in 1992 for the collection of statistical data formerly included in Form M. Today, ARMIS consists of ten public reports. For more information see <http://www.fcc.gov/wcb/armis/>. See also *Bell Atlantic New York Order*, n. 1332 for discussion of the calculation of “net return”.

CLECs and the state for failure to meet designated performance standards. *Report at 16*. The Report also allows the revenue cap to move up by as much as 8 percent or down by as much as 6 percent, depending on Qwest's performance. *Report at 18-19*.

a. The Revenue Cap

AT&T

46 AT&T agrees with the recommendation in the Utah Staff Report to use a 44 percent cap, based on their finding that a 36 percent cap did not provide sufficient incentive for the BOC in New York state. *AT&T Comments at 9*.

WorldCom

47 WorldCom opposes any cap on Qwest's total payment liability. WorldCom requests, at a minimum, that the Commission adopt the approach of the Utah Staff by setting the cap at 44 percent. *WorldCom Comments at 3-4*.

Joint CLECs

48 The Joint CLECs express the concern that any limitation on Qwest's obligation to make QPAP payments would make such payments nothing more than the cost of doing business. *Joint CLEC Comments at 19*.

Qwest

49 Qwest argues that the FCC has repeatedly approved a limit on BOC liability of 36 percent of the BOC's net revenue. Qwest argues that the FCC has found such an amount at risk to constitute a meaningful incentive. *Qwest Rebuttal Comments at 8*.

Discussion and Decision

50 The FCC established the first performance plan for Bell Atlantic – New York (BANY), now Verizon – New York, with a payment liability limit based on 36 percent of BANY's 1999 ARMIS Net Revenue.²¹ Since that time, the FCC has approved other section 271 applications that included performance assurance plans with a 36 percent liability limit.²² Where the FCC has not set a 36 percent cap, it has approved a limit on the amount at risk.²³ WorldCom asks the Commission to remove

²¹ *Bell Atlantic New York Order*, ¶436. The New York Commission later increased the amount to 44 percent to address certain issues that arose after the grant of section 271 authority.

²² *SBC Texas Order*, ¶424, n.1235; *Kansas/Oklahoma Order*, ¶274, n.837.

²³ *Verizon Pennsylvania Order*, ¶129; *Verizon Massachusetts Order*, ¶241, n.769; *In the Matter of Verizon New York Inc., Verizon Long Distance, Verizon Enterprise Solutions, Verizon Global Networks Inc., and Verizon Select Services Inc., for Authorization to Provide In-Region, InterLATA*

any limit on the amount of revenue at risk in the QPAP. Based on the FCC's determinations, we believe it is reasonable that the total amount of payments made by Qwest to CLECs and the state under the QPAP should be capped.

51 AT&T and WorldCom request, in the alternative, that the cap on total payment liability be set at 44 percent of ARMIS Net Revenue. We are not persuaded that setting the cap at 44 percent represents an improvement to the QPAP. In response to Bench Request No. 38, Qwest provided the Commission with data showing the amount of payments Qwest would have made under the QPAP from June through September of 2001. *Exs. 1219-C, 1221-C*. Qwest's response shows that on an annualized basis, the company would have made payments far below the \$81 million of revenue it proposes to put at risk based on the 36 percent cap. *Id.* Given the FCC's actions on this issue to date, and Qwest's current performance, there is no basis to modify the Facilitator's recommendation that Qwest place 36 percent of ARMIS Net Revenue at risk for payment to CLECs for failure to meet designated performance standards.

b. 1999 ARMIS Net Revenue

52 In other section 271 applications, the total amount of revenue liability has been calculated based on the amount of local exchange revenue reported to the FCC's ARMIS accounting system.²⁴ Qwest began developing the QPAP in the fall of 2000, at a time when 1999 ARMIS revenue data was the most current data available. Thus, Section 12 of the QPAP bases the revenue cap on 1999 ARMIS data. *Ex. 1217*. In the October 24, 2001 Notice, the Commission asked the parties to comment on the question of whether the cap should be based on 1999 ARMIS Net Revenue or more recent data.

53 The Report recommends the use of 1999 ARMIS data, finding that 1999 revenues are known, whereas revenue from any other year may create an unknown risk. *Report at 21-22*.

CLECs and Public Counsel

54 AT&T, WorldCom, and Public Counsel all assert that more current ARMIS data should be used to calculate the cap amount. *AT&T Comments at 43; WorldCom Comments at 4-5; Public Counsel Comments at 9*. During the hearings, WorldCom, AT&T, and Public Counsel agreed that the most current ARMIS data should be used even if the amount is less than the amount for 1999. *Tr. 5999-6001*.

Services in Connecticut, Memorandum Opinion and Order, CC Docket No. 01-100, FCC 01-208, ¶76 (rel. July 20, 2001) (*Verizon Connecticut Order*).

²⁴ See, e.g., *Bell Atlantic New York Order*, ¶436.

Qwest

55 In its initial comments, Qwest opposed any update to the 1999 ARMIS data stating that it agrees with the Facilitator that it is inherently speculative whether Qwest's local revenue will increase or decrease in future years. *Qwest Corporation's Response to Notice of Opportunity for File Comments at 3 (Qwest Initial Comments)*. In response to comments from the other parties, Qwest continues to oppose the use of more current ARMIS data and questions whether CLECs would still believe Qwest should use more current data if those results were less than the 1999 ARMIS results. *Qwest Rebuttal at 12*.

Discussion and Decision

56 We find that using current ARMIS data is important to achieving the FCC's goal of a plan that provides meaningful and significant incentive. Using the most current ARMIS data available provides a better match between the relative amount of revenue at risk and the prospective time period when the QPAP will be in operation. The CLECs and Public Counsel have stated that they do not object to current data even if it would result in a total amount at risk that is lower than in prior years. *Tr. 5999-6001*. We direct Qwest to update section 12 of the QPAP to reflect the use of current ARMIS data.

c. Raising or Lowering the Cap

57 The parties are in dispute over whether the revenue cap should stay constant or change over time. A cap that remains constant is referred to as a "hard cap," whereas a cap that can change over time is a "soft cap," or "procedural cap." The Report proposes a procedural type cap that would allow the 36 percent cap to increase by as much as 8 percent or decrease by 6 percent depending on Qwest's performance over two years. *Report at 18-20*.

AT&T

58 AT&T objects to the Facilitator's proposal, arguing that no party advocated the solution proposed in the Report, and that the standards for determining movement of the cap are too advantageous to Qwest. *AT&T Comments at 7-8*. Further, AT&T argues that the CLECs opting into the QPAP would be waiving their rights to all contractual remedies, and that the Facilitator's proposal could result in the denial of any remedies to CLECs. *Id at 8*. If Qwest's performance is so poor that the cap must be increased, some CLECs will not receive any payments for the harm they suffer. *Id.* AT&T also objects to the Facilitator's comment that this proceeding will determine the "toll" that Qwest should pay for entry into the long distance market. *Id. at 6*.

WorldCom

59 WorldCom argues that the FCC has not approved any plan that allows for a decrease in the revenue cap, and urges the Commission to reject this part of the Facilitator's proposal. *WorldCom Comments at 4*. WorldCom proposes that the Commission retain the procedural increase in the cap proposed in the Report. *Id.*

Public Counsel

60 Public Counsel opposes the Facilitator's recommendations, arguing that the proposal would limit this Commission's ability to review Qwest's failure to conform to the QPAP or modify the amount of the cap. *Public Counsel Comments at 4-5*. Public Counsel also objects to lowering the cap. Public Counsel objects to the Facilitator's concerns for the need for predictability and how capital markets may view the QPAP, asserting that the purpose of the QPAP is to deter anti-competitive activity. *Id. at 6*.

Qwest

61 Qwest initially proposed a hard cap, but accepted the Facilitator's proposal for a procedural cap and incorporated the mechanism into the red-lined QPAP filed with the Commission in response to Bench Request No. 37. *Ex. 1217, §12.2; see also Qwest Rebuttal at 11*.

62 Qwest defends the Facilitator's reasoning in establishing a flexible cap. However, Qwest states "if the CLECs are opposed to a flexible cap, Qwest has no objection to a flat 36 percent cap." *Qwest Rebuttal at 11*.

Discussion and Decision

63 We are concerned with the Facilitator's recommendation to allow the cap to move up or down. No party to the proceeding made such a proposal either in testimony or briefs. We agree with Public Counsel's concerns that the Facilitator's proposal may unnecessarily restrict our ability to review the operation of the QPAP. We find that Qwest's original proposal to use a flat 36 percent cap is appropriate to calculate the annual amount of revenue at risk of payment to CLECs. Qwest must revise section 12 of the QPAP accordingly.

2. Tier 1 Payment Escalation

64 Tier 1 payments are payments Qwest makes to individual CLECs when Qwest fails to meet performance standards when providing service to a particular CLEC. *Ex. 1217, §6.0*. Section 6.2.2 of Qwest's original QPAP provides that if Qwest fails to meet a performance standard for an individual CLEC for consecutive months, the payment amount for the measure automatically escalates. *Ex. 1200, Table 2*. For example, if

Qwest provides non-conforming performance in May, June, and July, the payment to the CLEC would increase each month as provided in Table 2. The Report recommended that after six consecutive months of payment escalation, no further escalation should be required, and that payments for subsequent consecutive failures should be capped at the six-month payment level. *Report at 44-45*. The Facilitator was not persuaded by CLEC arguments that a cap on payments would create a less effective incentive to perform. *Id. at 44*. Further, the Facilitator asserted that the payments would be uneconomical if not capped. *Id. at 45*.

AT&T

65 AT&T opposes the six-month cap on payment escalation, asserting that the Colorado Hearing Examiner and the Utah Staff both rejected a cap on escalation. *AT&T Comments at 23-24*. AT&T argues that escalation payments without a cap would deter Qwest from strategically paying penalties and slowing competition instead of meeting the performance measures. *Id. at 24*. AT&T takes exception to the Facilitator's rationale for a six-month cap, noting that the Facilitator relied on factors that were not based on any evidence of record. *Id. at 25-26*.

WorldCom

66 Like AT&T, WorldCom opposes the six-month cap on payment escalation. WorldCom objects to the Facilitator's finding that if Qwest continued to fail to perform after six months, the CLECs could bring the issue to the state commission. *Id. at 10-11*. WorldCom argues that this goes against the FCC's criteria that performance assurance plans provide a self-executing mechanism to limit litigation and appeal. *Id. at 11*. WorldCom notes that the Utah Staff recommends against a cap on the basis that the performance measures are the same as those developed in the ROC OSS test and that Qwest should be able to meet those measures. *Id. at 10, citing Utah Staff Report at 42*. Further, WorldCom notes that the Colorado Hearing Examiner decided against a freeze on escalated payments. *Id., citing November 5, 2001, Colorado Decision at 22*.

Joint CLECs

67 The Joint CLECs are opposed to the six-month cap on payment escalation, stating that "Qwest produced no evidence to demonstrate that QPAP payments at the six-month level are sufficient to provide Qwest with the financial incentive to improve its performance in successive months." *Joint CLEC Comments at 22*.

Public Counsel

68 Public Counsel asserts that escalating payments beyond six months will provide appropriate, meaningful and significant incentive for Qwest to perform. *Public*

Counsel Comments at 17. Public Counsel recommends the Commission adopt the approach of the Colorado Hearing Examiner not to limit payment escalation. *Id.*

Qwest

69 Qwest asserts that no party has provided evidence demonstrating that unlimited escalation is necessary to ensure that Tier 1 payments are compensatory to CLECs, or to provide Qwest sufficient incentive to meet the QPAP's performance standards. *Qwest Rebuttal at 19.* Qwest notes that the Facilitator found that continued non-performance could be due to a standard not operating properly, rather than Qwest's failure to perform. *Id. at 18-19.* Qwest further argues that, without a cap, CLECs may be substantially overcompensated and would not have the incentive to invest in facilities-based competition. *Id. at 19-20.* In addition, Qwest asserts that the FCC has approved plans for the states of Texas, Kansas, Oklahoma, Arkansas, and Missouri that contain a six-month cap on escalation payments. *Id. at 20-21.*

Discussion and Decision

70 We believe the six-month cap on escalation payments is appropriate. We understand the CLECs' objections to the six-month cap, and their concern for creating sufficient incentive for Qwest to perform. However, we are also concerned with the prospect that Qwest could find itself in a financial dilemma caused by continually escalating payments. We must find the proper balance between providing the correct incentive for Qwest and assurance for the CLECs. Under Table 2 of the QPAP, payments made to CLECs will be very substantial at the sixth month of escalation. We believe that even with the six-month cap, Qwest should have sufficient incentive to meet the performance standards for measures contained in the plan. As noted elsewhere in this Order, we retain the authority to look at this issue during the biennial or six-month review processes should the circumstances warrant.

3. Duration/Severity Caps

71 Payment measures in the QPAP use various metrics to measure performance, such as percents, ratios, and time intervals. Payments for the failure to meet the performance standards are based on the number of occurrences, or orders placed by the CLEC. Payment amounts owed to CLECs are calculated by determining the degree to which actual performance--as measured by the performance metric--deviated from the standard and applying it to the number of orders placed by the CLEC.

72 The QPAP proposes that the amount of deviation between actual performance and the performance standard not be allowed to exceed 100 percent for purposes of calculating the amount owed to the CLEC. As a result, sections 8 and 9 of the proposed QPAP contain provisions that limit the potential payments to CLECs for substandard performance to the total number of orders placed by the CLEC during the

month for each qualifying product and sub-measure times the per payment amount. *Ex. 1217*. This cap is referred to as the duration/severity, or 100 percent, cap.

73 AT&T, the Joint CLECs, and Z-Tel opposed the cap during the Multi-state Proceeding. The Facilitator rejected their request stating:

What we have here is a need for arithmetic compromise to fit the quality of the data we have to work with under this measure. It is clear the CLECs, despite what look like arguments for mathematical purity, in fact propose merely a different sort of impurity. There is not a factual or logical basis for believing that it comes closer to ultimate reality than does the one Qwest proposed. Notably, methods like those proposed in the QPAP here exist in other plans examined by the FCC.

74 *Report at 69*. AT&T and Z-Tel proposed to remove the cap on payments for performance measures calculated as averages or means. The Report concludes that no change is necessary, because the CLECs did not present evidence addressing the number and length of distribution on delayed orders. *Id. at 70*.

AT&T

75 AT&T asserts that the Facilitator did not understand the CLECs' arguments concerning the "application of the per-occurrence measurement scheme for interval measurements, and then criticized the CLECs for not providing evidence to support an argument they never made." *AT&T Comments at 35*. AT&T explains that the CLECs assert that "the per-occurrence scheme should be sensitive to both the monthly volume of the CLEC orders and the deviation of Qwest's average monthly performance to CLECs from the Qwest average monthly performance to itself." *Id. at 38*. AT&T asserts that the issue is whether or not payment occurrences should be capped at the number of CLEC orders. *Id. at 39*. AT&T argues that payment occurrences should not be capped, as such a cap would protect Qwest from its own poor performance to CLECs. *Id.* Finally, AT&T asserts that the CLECs' proposal is included in plans approved by the FCC. *Id.*

Joint CLECs

76 The Joint CLECs assert that it was inappropriate for the Facilitator to shift the burden of proof to the CLECs, since Qwest is the only party with such information. *Id. at 26*. The Joint CLECs argue that the recommendation lacks logical, factual, or legal support, since the Report recommends adoption of Qwest's proposal solely because the CLEC proposal was flawed. *Id. at 27*. The Joint CLECs recommend the Commission require Qwest to remove the cap on payments for duration measures. *Id.*

Qwest

77 Qwest asserts that the Facilitator's acceptance of Qwest's 100 percent limit on missing interval measurements has been accepted by the Utah Staff and the Colorado Hearing Examiner, and included in plans approved by the FCC. *Qwest Rebuttal at 33*. Qwest objects to the CLECs' rationale that the worse Qwest's performance is, the more Qwest should have to pay. *Id. at 34*. Qwest argues that payment occurrences should be capped to prevent CLECs being paid for orders that do not exist. *Id.*

Discussion and Decision

78 The concept of Qwest providing services to CLECs at parity with the services it provides to its own retail customers is key to the advancement of local service competition. Qwest's proposal is to make payments for its failure to provide service at parity up to the point where the CLEC has received a payment for non-performance for each order placed. Beyond that point, no matter how long it takes to provision service, Qwest argues that there should be no further compensation. The CLECs ask that the Commission remove the cap so that Qwest will have incentive to minimize any disparity in provisioning services between itself and CLECs. We agree with the CLECs and direct Qwest to remove the 100 percent cap from the performance measures calculated as averages or means contained in the QPAP.

79 Bench Request No. 42 directed Qwest to explain the apparent differences between the use of "parity value" in formulae used to calculate the number of misses for parity measures and the language in the QPAP explaining how misses are calculated for parity measures. Qwest responded that it had provided the formulae in response to Bench Request No. 37. *Ex. 1289*. Qwest's response indicates that there were no actual differences between the formulae and the intent of the language in the QPAP regarding the calculation of misses. *Id.* Nonetheless, we direct Qwest to clarify the language in the QPAP regarding the calculation of misses for parity to specifically incorporate the term "parity value" so that there will be no confusion at a later date as to how the calculations are performed.

4. Tier 2 Payments

80 Tier 2 payments are payments made to the state of Washington when Qwest fails to meet certain performance standards. *See Ex. 1217, §7.0*. Certain performance measures are subject to Tier 2 payments because the performance results are only available on a regional basis, such as Gateway Availability. CLECs receive no payment when Qwest fails to meet these performance standards. Other performance measures that are subject to individual CLEC payment are also subject to Tier 2 payments because of their importance to the CLECs' ability to compete. These measures are referred to as Tier 2 measures having Tier 1 counterparts.

81 The original QPAP required Tier 2 payments only after 3 consecutive months of non-performance. *Ex. 1200, §7.3*. The Report determined that Qwest should make Tier 2 payments in the event Qwest fails to meet the performance standard for any Tier 2 performance measure for any two months in any consecutive three-months “in any 12 month rolling period.” *Report at 43*. In addition, for Tier 2 measures with no Tier 1 counterpart, the Facilitator recommended that payments should escalate as provided for in the QPAP. *Id.*

AT&T

82 AT&T seeks clarification of the reference in the Report to Tier 2 payment escalation, noting that the QPAP does not include a provision for Tier 2 payment escalation. *AT&T Comments at 23*.

WorldCom

83 WorldCom opposes the findings in the Report and requests that the Commission require Tier 2 payments to be made in any month that Qwest fails to meet a Tier 2 performance measure. *WorldCom Comments at 9*. WorldCom also recommends that Tier 2 payments escalate by twice the prior month’s payment amount and be subject to a step-down function.²⁵ *Id.*

Public Counsel

84 Public Counsel opposes the Tier 2 payment trigger proposed in the Report as overly complicated. *Public Counsel Comments at 16*. Public Counsel recommends a more straightforward approach, in which Qwest would make a Tier 2 payment for each month of non-conforming performance. *Id.*

Qwest

85 Qwest argues that it is appropriate to allow a three-month correction period, because of the lag time involved in addressing continuing problems. *Qwest Rebuttal at 17*. Qwest explains that the Tier 2 payments work the same way in the Texas, Oklahoma, and Kansas plans. *Id.* Qwest argues that since those plans allow a longer correction period than the two-out-of-three month trigger proposed by the Facilitator, the shorter period would clearly be acceptable to the FCC. *Id.* With respect to the question of Tier 2 payment escalation, Qwest believes the Facilitator’s reference to payment escalation is simply a mistake. *Id. at 18*.

²⁵ A step-down function refers to decreases in escalated monthly payment levels in months when performance conforms with the standards.

Discussion and Decision

86 The purpose of Tier 2 payments is to provide sufficient incentive for Qwest to continue meeting its performance obligations once it receives section 271 approval. We question whether sufficient Tier 2 incentives will exist if Qwest can fail to meet the performance standards one-third of the time or more without consequence. We are puzzled by Qwest's reasoning for the Tier 2 payment lag as due to "lag time involved in addressing continuing problems." Given that the focus of the ongoing OSS test is to identify and correct problems with Qwest's OSS systems, it seems doubtful that Qwest could receive our approval or the FCC's section 271 approval in the presence of "continuing problems" with the OSS systems. Qwest must, therefore, modify section 7.3 of the QPAP to require Tier 2 payments in any month that Qwest fails to meet the Tier 2 performance standards.

87 With respect to the question of Tier 2 payment escalation, we are inclined to believe that the Facilitator's reference to payment escalation was intended to refer to Table 5 which shows payments for per-measurement performance measures that escalate as performance worsens. We therefore reject WorldCom's request to escalate Tier 2 payments for consecutive misses. Should the issue of escalating Tier 2 payments prove to be problematic, the parties may raise the issue during the six-month review process.

5. Collocation Payments

88 The Report requires Qwest to include in the QPAP an agreed-to proposal for determining collocation payments. *Report at 55-56*. Qwest modified section 6 of the red-lined QPAP to show proposed payments relating to the provision of collocation. *Ex. 1217, §§6.3, 6.4; Table 3*. In addition to the requirements in the QPAP, state rules establish standards and payments for collocation provisioning in Washington State. *WAC 480-120-560*. We requested comment from parties as to how we should address the differences between the proposed QPAP collocation standards and payments, and the standards and payments contained in *WAC 480-120-560*.

AT&T

89 AT&T asserts that it sees no reason why the collocation standards in *WAC 480-120-560* should not apply to the QPAP. *AT&T Comments at 42*.

WorldCom

90 WorldCom asserts that if collocation standards in Washington state rules and the QPAP differ, the Commission should adopt the more stringent standards. *WorldCom's Response to Commission Questions at 1*. WorldCom states that for forecasted collocations, the Washington rule allows 77 days while the collocation PID

standard in the QPAP provides for a 90-day period. *Id.* WorldCom requests that the Commission modify the QPAP to incorporate the Washington rule. *Id. at 2.*

Qwest

91 In initial comments, Qwest states that its Washington SGAT incorporates specific collocation standards and remedies, based on WAC 480-120-560, in section 8.4.1.10. *Qwest Initial Comments at 3.* Qwest argues that to maintain two distinct conflicting standards and remedies in the same contract would be inappropriate. *Id.* Qwest proposes replacing the collocation delayed installation provision in section 6.3 of the QPAP with the terms in section 8.4.1.10 of the SGAT, and eliminating the duplicative SGAT section. *Id. at 2-3.*

92 In reply comments, Qwest objects to AT&T and WorldCom's proposals. *Qwest's Reply to Parties' Comments on Commission Questions at 2.* Qwest asserts that CLECs should elect their remedies. *Id.*

Discussion and Decision

93 The CLECs request that the Commission incorporate the collocation rule, WAC 480-120-560, into the QPAP. Qwest proposes to adopt the payment portion of the collocation rule into the QPAP and use the provisioning intervals contained in performance measures CP-2 and CP-4, which are different than the provisioning times contained in the rule. We agree with the CLECs' request to incorporate the collocation rule into the QPAP. Qwest must modify the QPAP to reflect that the CP-2 and CP-4 business rules are applicable only to matters not addressed in WAC 480-120-560. In addition, we intend that section 6.3 of the QPAP and section 8.4.1.10 of the SGAT be consistent in applying the Washington rule.

6. Low Volume Critical Values

94 Section 5.1 of the original QPAP contains the critical Z values that are used for statistical testing.²⁶ *Ex. 1200.* Qwest initially proposed a critical Z value of 1.65 to be used for all CLEC volumes. The PEPP collaborative produced a partial agreement to use a critical Z value of 1.04 for low volume LIS trunks, and DS-1s and DS-3s that are UDITs, resale, or unbundled loops, and higher critical Z values for higher volumes. The Facilitator considered and rejected a request by WorldCom and Z-Tel to use the 1.04 critical Z value for all services with low volumes. *Report at 64.*

WorldCom

²⁶ The critical Z value is a statistical measure used to determine the point at which Qwest fails to meet a performance measure.

95 WorldCom notes that there was only partial agreement in the PEPP collaborative because WorldCom and Z-Tel did not agree with the proposal. *WorldCom Comments at 23*. WorldCom asserts that it is important to balance Type I and Type II errors. *Id.* WorldCom further argues that to support larger critical values at higher sample sizes, at a minimum, the 1.04 critical value for sample sizes 1-10 should apply to all services and not be limited to only the few listed in Qwest's proposal. *Id. at 23-24*. WorldCom recommends that the Commission reject the Report's recommendation and order that the QPAP apply the lower value of 1.04 to all low volume services. *Id. at 24*.

Qwest

96 In response, Qwest states that "the use of the 1.645 versus the 1.04 critical value for the specific calculations cited by WorldCom was a negotiated issue that reflected the 'give and take' process among the parties." *Qwest Rebuttal at 32*. Qwest argues that the Commission should accept the agreement from the collaborative and reject WorldCom's proposal. *Id.*

Discussion and Decision

97 The Report explains that, under the negotiated agreement, the use of the lower 1.04 critical value would benefit CLECs in the case of 1,519 measures and that in return, the higher critical Z values would apply to the benefit of Qwest in 1,917 cases, or "roughly the same number of parity measures." *Report at 64*. The Report finds that the proposal to extend the use of the 1.04 value to all services would destroy that balance by applying the lower 1.04 value to over 10,000 tests. *Id.* We note that the negotiated proposal, while it did not include all the parties in this proceeding, included a majority of the participants. We agree that there is no reason to change the critical Z values, and, therefore, reject WorldCom's proposal.

7. Exclusions from the Cap on Payments

98 Section 12 of the QPAP establishes caps on monthly and annual payments to CLECs and the state. *Ex. 1217*. Public Counsel argues that payments made by Qwest to uphold the integrity of the QPAP should be excluded from the caps. These include payments for late reporting and interest payments for late payments or underpayments. *Public Counsel Comments at 9*. Qwest agreed during the oral argument that payments made as a result of late reporting should be excluded from the cap. *Tr. 5998*. We agree that payments made to uphold the integrity of the QPAP should be excluded from the cap and direct Qwest to revise section 12 to reflect this decision.

8. Carry-Forward Provision

99 A carry-forward provision would address the circumstance where Qwest's payments to CLECs and the state reach a monthly or annual cap, and payments are still owed to CLECs or the state, but may not be paid due to the cap on payments. A carry-forward provision would allow any payments owed from any month the cap is reached to be paid in subsequent months when the cap is not reached. Qwest's proposed QPAP does not include such a provision.

100 The Facilitator rejected Qwest's proposal for monthly caps, and instead proposed a means of equalizing payments to CLECs when the annual cap is reached. *Report at 19-20, 62.* Qwest has included this proposal in its QPAP. *Ex. 1217, §12.3.*

Public Counsel

101 Public Counsel strongly recommends that if the Commission determines that the QPAP should have a revenue cap, the Commission should require Qwest to include a carry-forward mechanism to ensure that CLECs receive payments due them but not paid because of the cap. *Public Counsel Comments at 8.* Public Counsel argues that such a provision will ensure that Qwest has the appropriate incentive not to provide inferior service once the cap is reached. *Id.* Public Counsel recommends the Commission require Qwest to include in section 12 of the QPAP language based on section 11.3 of the proposed CPAP. *Id. at 8-9.*

Qwest

102 Qwest did not respond to this issue in comments filed with the Commission, nor was it discussed during the hearing.

Discussion and Decision

103 This Order determines that the QPAP must include a cap, but does not adopt the Facilitator's recommendation to allow the cap to move up or down. Section 12.3 of Qwest's proposed QPAP sets forth the Facilitator's recommended process for equalizing payments to CLECs in the event the annual cap is reached. *Ex. 1217.* If the monthly cap²⁷ is reached in any given month, but the annual cap is not exceeded, Qwest would not be required to make full payment to the CLECs for the month where the cap was reached. We decline to adopt Public Counsel's recommended carry-forward provision for the monthly cap because Public Counsel has not provided sufficient justification at this point in time. (Our review of the monthly mock payment reports filed by Qwest shows there is little likelihood that the monthly cap

²⁷ The monthly cap in section 12.3 is not a cap on payment per se, but a calculation of the annual cap on a cumulative monthly basis to track how close Qwest is in reaching the annual cap.

will be reached. *See Ex. 1223.*) If the circumstances warrant, parties may request that the Commission reconsider this issue at a later date, including during the biennial or six-month reviews.

9. Service Quality Payments

104 Section 13.8 of the QPAP provides that Qwest is not required to make Tier 2 payments and any other payments, penalties or sanctions for “the same underlying activity or omission” under a Commission order or service quality rules. The section limits any payments Qwest must make to the Commission to the payments it would make under the QPAP. Similarly, section 12.1 of the QPAP provides that the annual cap on payments includes all payments made by Qwest for “the same underlying activity or omission . . . under any other contract, order or rule.” *Ex. 1217.*

Public Counsel

105 Public Counsel argues that nothing in the plan should diminish the Commission’s jurisdiction over Qwest’s service quality. *Public Counsel Comments at 14-15.* Public Counsel argues that the Bell Atlantic New York plan includes a provision that does not limit state commission authority over service quality. *Id.* Public Counsel recommends that the Commission require Qwest to delete Section 13.8, and include the following: “Nothing in the Performance Assurance Plan can or will diminish Commission jurisdiction over Qwest service.” *Id.*

106 Similarly, Public Counsel recommends the Commission modify section 12.1 of the QPAP to retain Commission authority over service quality by including the following language: “Payments made by Qwest for retail service quality performance are not included in the cap on payments.”

Qwest

107 Qwest argues that sections 13.8 and 12.1 were designed to avoid double payment for the same activity and are consistent with plans adopted in Texas, Kansas, and Oklahoma. *Qwest Rebuttal at 16.* Qwest asserts that the QPAP is not intended to “deprive the Commission of existing jurisdiction to address either wholesale or retail performance issues,” but is designed to avoid paying twice for failing to meet the same standard. *Id.*

Discussion and Decision

108 We note that the proposed CPAP provides that “any penalties imposed by the Commission” are not subject to the cap. *CPAP, §11.2.* The CPAP also provides a process for Qwest to dispute any payments under state service quality rules that it perceives as duplicate payments under the plan. *Id., §16.8.*

109 At the heart of this issue is the Commission's independent authority to review Qwest's service. While Qwest may argue that the CLECs elect remedies by adopting the plan to the exclusion of all other alternatives, the Commission does not relinquish any authority, nor is it required to do so in approving the QPAP. Qwest must modify sections 13.8 and 12.1 to be consistent with section 11.2 of the CPAP to allow the Commission to assess penalties, where necessary, to address service quality issues, but to allow Qwest to dispute any payments it believes are duplicate.

D. CLEARLY ARTICULATED AND PREDETERMINED MEASURES

110 One of the characteristics the FCC considers in evaluating a performance assurance plan is whether a plan has clearly articulated and pre-determined measures and standards encompassing a range of carrier-to-carrier performance. Section 3.0 of the QPAP explains that the performance measurements used in the QPAP are included in Attachment 1. *Ex. 1217*. The QPAP further explains that "each performance measurement identified is defined in the Performance Indicator Definitions ("PIDs") developed in the ROC Operation Support System collaborative, and which are included in the SGAT at Exhibit B." *Id.*, §3.0.

1. Adding UNEs and Performance Measures to the QPAP

111 During the Multi-state Proceeding, several parties requested that other performance measurements be included in the QPAP, including special access circuits, canceled orders, diagnostic UNEs (including EELs, line sharing, and sub-loops), cooperative testing, address due-date changes, pre-order inquiry time-outs, change management measures, software test release quality, test bed measurement, and missing status notifiers. The Report rejected the addition of special access, canceled orders, cooperative testing, address due-date changes, pre-order inquiry time-outs, software release quality, test bed measurement, and missing status notifiers. *Report at 47-52, 56-58*. For Change Management, the Report found that Qwest has already added PO-16 and GA-7 to the QPAP, and for the diagnostic UNEs, the Report found that EELs, line sharing, and sub-loops should be added to the QPAP as soon as practicable. *Id. at 48, 50-51*.

a. Special Access Circuits

112 The Report denies WorldCom's and the Joint CLEC's request to include special-access circuits in the performance measurements in the QPAP. *Report at 57-58*. The Report finds that "the overwhelming majority of special-access circuits at issue here were purchased under federal tariff." *Id. at 57*. The Report finds that the FCC has jurisdiction over the issue, not the state. *Id.* The Report further states that Qwest has been ordered to ease its restrictions on converting special-access circuits to EELs, and

that if CLECs elect to do so, they will be protected under interconnection agreements. *Id.*

WorldCom

- 113 WorldCom requests that the Commission order Qwest to include performance measures for special-access services in its QPAP for the state of Washington. *WorldCom Comments at 22.* WorldCom argues that the Facilitator erred in rejecting the inclusion of special access in the QPAP on the basis that states did not have jurisdiction over special access circuits since over 90 percent of such circuits are purchased from the FCC tariff. *Id. at 17.* WorldCom relies on this Commission's decision in the *Special Access Order*,²⁸ as well as decisions by the FCC, and the states of Texas, New York, Massachusetts, Indiana, and Colorado requiring performance standards for special access. *Id. at 17-21.*

Joint CLECs

- 114 The Joint CLECs oppose the Facilitator's decision, noting that Qwest never refuted the testimony that CLECs "heavily rely on Qwest private line and special access circuits to provide local exchange service to their customers." *Joint CLEC Comments at 11.* The Joint CLECs also claim that Qwest never addressed their arguments that "CLECs are just as dependent on timely and proper provisioning by Qwest of special access as are CLECs that purchase equivalent high capacity services on an unbundled or resale basis." *Id.* The Joint CLECs assert that their inability to provide UNEs and special access circuits on the same facility, and Qwest's restrictions on converting special access circuits to EELs, results in a lack of alternatives to using special access circuits. *Id. at 12-13.*
- 115 The Joint CLECs point out that the Report also recommends that EELs not be subject to any payments and that high capacity loops be subjected to payment levels in some cases significantly below the profits on retail services provisioned with the facilities. *Id. at 16.* The Joint CLECs assert that these recommendations, if adopted, would exclude any effective performance assurance for high capacity circuits in the QPAP. *Id. at 16-17.* The Joint CLECs request that the Commission require Qwest to include such circuits subject to the same payment obligations applicable to comparable UNEs. At a minimum, the Joint CLECs request that the Commission require Qwest to measure performance for special access circuits and determine whether to apply payment obligations at the next QPAP review opportunity. The Joint CLECs argue that a QPAP "that does not provide an effective self-executing remedy for Qwest's

²⁸ *In re the Complaint of AT&T Communications of the Northwest, Inc. v. U S WEST Communications, Inc., Regarding the Provision of Access Services*, Tenth Supplemental Order, WUTC Docket No. UT-991292 (May 18, 2000) (*Special Access Order*).

failure to provision high capacity circuits cannot be in the public interest” by excluding incentives to provide nondiscriminatory service. *Id. at 17.*

Qwest

116 Qwest asserts that “the Commission lacks even the jurisdiction to address performance issues relating to the 97 [percent] of Qwest’s special access circuits that are purchased from the interstate tariff.” *Qwest Rebuttal at 23.* Qwest also argues that to the extent the Commission imposes special access obligations or remedies on Qwest, they would directly interfere with the FCC’s authority to govern matters within its jurisdiction and would be inconsistent with the filed rate doctrine. *Id. at 24.* Qwest also states that the FCC has expressed serious legal and policy concerns about including special access circuits within the scope of section 251 c (3) – unless the facilities involve significant local exchange service by CLECs, in which case they may be converted to UNEs and would be covered by the QPAP. *Id. at 26.* Finally, Qwest notes that on November 19, 2001, the FCC issued a Notice of Proposed Rulemaking and requested comments on whether the FCC should adopt a select group of performance measurements and standards for evaluating ILEC performance in provisioning of special access services. *Id. at 27-28.*

Discussion and Decision

117 As a threshold matter, Qwest asserts that the Commission does not have authority to order special-access reporting because it does not have jurisdiction over interstate services. We have previously considered this argument in Docket UT-991292, a complaint against Qwest’s predecessor U S WEST regarding the provision of access services. In the *Special Access Order* in that proceeding, we stated:

The Commission agrees with the parties that the FCC retains sole jurisdiction over the enforcement of rate terms in tariffs filed pursuant to federal statute. However, the Commission rejects U S WEST’s contention that its provision of intrastate services under federal tariffs within the 10% rule is totally free of state control in any manner. The FCC has not preempted state regulatory agencies from inquiring into the matters that AT&T raises. In the absence of clear authority that a customer’s election to take service under a federal tariff per the 10% rule preempts all state regulatory authority, we decline to so rule. The significance of intrastate traffic to the public and to the economy of the state, and the Commission’s need to ensure that intrastate services are free from discrimination and barriers to competitive entry, require us to assert jurisdiction when it is lawful for us to do so.²⁹

We assert our jurisdiction in this proceeding.

²⁹ *Special Access Order*, ¶28.

118 The Joint CLECs use special access circuits in the provisioning of facilities-based local exchange networks. The Commission encourages the development of competition in Washington by facilities-based providers. We are concerned with the potential lack of any incentive for Qwest after the grant of section 271 authority to provision and repair special-access circuits used by CLECs in a timely manner that provides CLECs a meaningful opportunity to compete. While Qwest asserts that CLECs can use EELs to perform the same function as special-access circuits, EELs are, as a practical matter, not available in Washington. *Tr. 6171; see also Joint CLEC Comments at 13.*

119 We find that the record in this proceeding supports a requirement that Qwest, at a minimum, report its monthly provisioning and repair intervals for special access circuits. We understand that Qwest is not currently able to provide such reports. However, the Special Master in Colorado recently issued a supplemental report in which he sets forth a process for the Colorado commission to follow that would result in developing reports for special access.³⁰ Rather than embark on a separate, duplicative process for special access reporting, we direct Qwest to begin filing monthly special access reports for Washington at the same time it begins special access reporting to the Colorado commission.

b. Adding New UNEs

120 Several new UNEs were created as a result of the *UNE Remand Order*,³¹ including EELs, sub-loops, and line sharing. A standard has not yet been defined for these UNEs because commercial experience with them has been too limited to support a benchmark or parity standard. These UNEs are currently designated as “diagnostic UNEs” or TBD (to be decided). The Report found that Qwest should add EELs, sub-loops, and line sharing to the QPAP payment structure “as soon as practicable.” *Report at 48.*

WorldCom

121 WorldCom argues that the recommendation in the Report is too vague. *WorldCom Comments at 11.* WorldCom requests that the Commission strengthen the recommendation in the Report and order that the EEL, line sharing, and sub-loop measures become part of the QPAP payment structure immediately upon being assigned performance standards. *Id. at 12.* WorldCom objects to Qwest’s statement

³⁰ *In the Matter of the Investigation into Alternative Approaches for a Qwest Corporation Performance Assurance Plan in Colorado*, Supplemental Report and Recommendation of the Special Master to the Public Utilities Commission of the State of Colorado, CPUC Docket No. 01I-041T, at 12-17 (February 19, 2002).

³¹ *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, Third Report and Order, CC Docket No. 96-98, FCC 99-238 (rel. Nov. 5, 1999) (*UNE Remand Order*).

that it will not automatically include UNEs currently designated as diagnostic or TBD in the QPAP once standards are determined and that further additions should be addressed in the six-month review process. *Id.*

Joint CLECs

- 122 The Joint CLECs oppose the Facilitator's finding that there is insufficient experience with EELs to assign a standard, and recommend that the Commission require Qwest to establish a standard based on the provisioning and repair standards set forth in Qwest's Service Interval Guide. *Joint CLEC Comments at 9-11.*

Qwest

- 123 Qwest has committed to providing payment opportunities for EELs when the ROC collaborative determines standards for the UNE. *Qwest Rebuttal at 38.* During the hearings, however, Qwest stated that these measures should not be included into the QPAP automatically, but discussed at the six-month review. *Tr. 6189.*

Discussion and Decision

- 124 We are concerned that Qwest opposes any further additions of measures to the QPAP until the six-month review. We believe that the QPAP must have sufficient measures in place that reflect a broad range of carrier-to-carrier performance at the time Qwest enters the long distance market, including EELs, sub-loops, and line sharing. The Regional Oversight Committee Technical Advisory Group (ROC-TAG)³² recently established a set of performance measures applicable to EELs that includes OP-3, OP-4, OP-5, OP-6, OP-15, MR-5, MR-6, MR-7 and MR-8. Qwest must provide payment opportunities in the QPAP for these measures as the standards are determined and not wait until a six-month review to do so. Qwest must also add the sub-loop and line sharing standards to the QPAP as the ROC collaborative establishes them.

c. Adding New Performance Measures

- 125 The CLECs request that the Commission order Qwest to establish several new performance measures in the QPAP, including PIDs for canceled orders, cooperative testing, and electronic order flow-through.

³² The ROC TAG consists of state commission staff, competitive local exchange carrier (CLEC) representatives, Qwest representatives, and other industry members. It has been active in the initial planning of the OSS test. The TAG collaboratively developed the Testing and Scoping Principles that will drive the testing effort. The TAG is also collaboratively developing the Performance Measurements for testing purposes, which are the same Performance Measurements used in the QPAP, and has had an extensive role in developing the Master Test Plan (MTP).

Joint CLECs

126 With respect to canceled orders, the Joint CLECs state that the Facilitator's Report erred in finding that the QPAP provides payments for orders that are delayed whether or not they are finally canceled, noting that Qwest's witness testified that Order and Provisioning measures only measure completed orders. *Joint CLEC Comments at 7-8*. The Joint CLECs request that the Commission require Qwest to include canceled orders among the orders eligible for payment for non-conforming performance in ordering and provisioning. *Id. at 8*.

Covad

127 Covad requests that Qwest be required to establish two new PIDs, a cooperative testing measure and a canceled order measure. *Verified Comments of Covad Communications Company on Qwest's Proposed Performance Assurance Plan at 41 (Covad Comments)*. Covad states that cooperative testing is the only method by which Covad can ensure that an xDSL-capable loop is delivered, and addresses Covad's ability to compete effectively and efficiently with Qwest. *Id.* Therefore, Covad argues that it is imperative that a cooperative testing measure be included in the QPAP. *Id.*

AT&T

128 AT&T requested during the hearing that the Commission include in the QPAP the electronic flow-through measure, PO-2(b), noting that the standard was currently at impasse and that AT&T has requested the ROC Steering Committee and Executive Committee to rule that PO-2(b) be included in the QPAP. *Tr. 6191-92*.

Discussion and Decision

129 Of the three new PIDs requested by CLECs, only one, electronic order flow-through (PO-2b) has been developed and standards agreed upon. We note that an electronic order flow-through measure is already included in the CPAP. We find that such a measure is important to a CLEC's ability to compete with Qwest. Therefore, we direct Qwest to add this measure to the QPAP in the Low Tier 1 and High Tier 2 payment categories.

130 With respect to the requests to establish PIDs for canceled orders and cooperative testing, we note that Qwest has not developed PIDs for these measures and that there is a ROC process for requesting new PIDs. Parties should use that process to pursue the development of new PIDs.

2. Changes to Measure Weighting

131 During the PEPP collaborative, the participants agreed to a scheme whereby performance measures were assigned high, medium, or low payment values depending on their relative importance to the parties. During the Multi-state Proceeding, AT&T proposed assigning higher payment amounts to certain “high-value” services. Qwest countered with an offer to accept the proposal if the CLECs agreed to move other performance measures to lower value categories. AT&T argued that Qwest’s proposal was unbalanced. The Facilitator found that since no other proposal was subsequently made or accepted, the weights should return to those proposed in the QPAP that Qwest initially filed. *Report at 53-54.*

WorldCom

132 WorldCom opposes the Facilitator’s decision, stating that it did not agree with Qwest’s counter-proposal to lower Tier 2 payment levels on certain measures because they are key provisioning and repair measurements that affect customer perception of new-provider performance. *WorldCom Comments at 13-14.* Citing a recent Michigan decision concerning SBC-Ameritech, WorldCom now proposes that the Commission require that all of Qwest’s measures have equal ranking. *Id. at 14-16.*

Joint CLECs

133 The Joint CLECs oppose the Facilitator’s decision, arguing that the record evidence does not support the finding that the original QPAP weighting was reasonable. *Joint CLEC Comments at 28.* The Joint CLECs point out that Qwest’s current DS-3 monthly rate in the FCC tariff for Washington is \$1,500, and that Qwest has proposed a rate of \$855 in the Part B UNE cost docket. *Id. at 29.* The Joint CLECs also note that the QPAP payment to the CLEC for not providing the DS-3 circuit is only \$150 and would not approach the monthly rate for the service until after five consecutive months of misses. *Id.* The Joint CLECs argue that payment levels that permit Qwest to continue to profit from retaining a retail customer while withholding facilities from competitors for five months should not be considered reasonable if the purpose of the payments is to ensure that Qwest provisions those facilities on a timely basis. *Id.* The Joint CLECs request that the Commission reject the Report’s recommendation and require Qwest to increase the payment levels for high capacity loops and transport, without corresponding decreases in payments for other services. *Id. at 32.*

Qwest

134 Qwest states that it is unclear what WorldCom is proposing in urging that all measures be weighted equally, but that the proposal appears to refer to actions in other proceedings which are not a part of this record. *Qwest Rebuttal at 22.* With respect to the proposal for higher payment for higher-value services, Qwest notes it

did not disagree with the principle, but pointed out that services costing less should then have lower associated payment amounts. *Id. at 21*. Qwest asserts that it introduced a proportionality analysis demonstrating that the AT&T proposal would create greater disparity than the Qwest proposal. *Id.* Finally, Qwest states that the Joint CLECs argue that existing high capacity loop and transport payments should be increased and continue to ignore the argument that payments for lower value services should be lowered commensurately. *Id.*

Discussion and Decision

135 We reject the Facilitator’s decision to retain the payment levels for high-value services at the levels initially proposed by Qwest. In this particular case, we find that higher payment levels for high-value services create a more appropriate incentive for Qwest to provide nondiscriminatory service, because they more closely correlate with one another. Qwest must amend the QPAP to include the payment table for high-value services proposed in Exhibit 1205 at page 12.

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

1. The Six-Month Review Process

136 Section 16 of Qwest’s original QPAP provides a means for amending the performance measurements in the plan at six-month intervals. *Ex. 1200, Attachment I, §16*. The scope of Qwest’s proposed six-month review process includes additions, changes and deletions of performance measurements, changes to benchmark standards, changes from benchmark to parity standards, changes to the classification of measurements from high, medium, or low, and Tier 1 to Tier 2, and changes in payment levels. *Id., §16.1*. Qwest’s proposed QPAP requires Qwest’s approval before any changes are made. *Id.*

137 The Facilitator recommended three changes to the proposed six-review process: (1) Provide for normal SGAT dispute resolution for disagreements regarding the addition of new measures to the plan (*Report at 62*); (2) Recognize and support a multi-state review process to resolve QPAP disputes, including funding through a special fund consisting of contributions of Tier 1 and Tier 2 payments (*Id. at 42, 62*); and (3) Provide for biennial reviews of the continuing effectiveness of the QPAP, that will incorporate all issues discussed during preceding six-month reviews (*Id. at 62*). The Facilitator did not recommend changing either Qwest’s “veto power” over any change in the plan, or the scope of the six-month review process, finding that Qwest requires such control to limit its financial liability under the plan. *Id. at 61*. The parties remain in dispute over these issues.

138 Qwest has modified its QPAP to reflect the Facilitator's recommendations, including developing language anticipating that the nine states participating in the Multi-state Proceeding would engage in a common review. *Ex. 1217, §16.1.*

AT&T

139 AT&T objects to the control Qwest has retained over changes to the plan, and also objects to the limited scope of changes to the plan. *AT&T Comments at 32-35.* AT&T argues that the proposed CPAP and the Utah Staff Report both leave to the state Commission, not Qwest, the decision of whether to make changes to the QPAP. *Id. at 33.* AT&T recommends the Commission adopt the language from section 18.6 of the proposed CPAP which would allow parties to suggest more fundamental changes to the plan, but only to address exigent circumstances. *Id.* Finally, AT&T objects to findings in the Report comparing the Texas plan and the QPAP, noting that the Texas plan provides for mutual agreement of the parties before changes are made to the plan. *Id. at 34.*

WorldCom

140 WorldCom opposes the requirement that Qwest agree before any changes can be made to the plan and opposes the limited scope of the six-month review. *WorldCom Comments at 22.* WorldCom requests the Commission include language in the QPAP similar to that in the Texas or Colorado plans. *Id. at 22-23.*

Public Counsel

141 Public Counsel objects to the Report's conclusion that Qwest must retain control over changes to the QPAP in order to limit Qwest's financial exposure. *Public Counsel Comments at 12.* Public Counsel argues that to deter anti-competitive behavior, and to create appropriate incentives, the QPAP should provide the Commission with authority to make changes. *Id. at 12-13.* Public Counsel strongly recommends modifying the QPAP to reflect that the Commission should retain the authority to modify the QPAP. *Id.*

Qwest

142 Qwest asserts that the Commission lacks authority to impose the plan on Qwest, and therefore does not have any authority to subsequently modify it. *Qwest Rebuttal at 30.* Qwest has challenged the Colorado and Utah plan proposals giving the state Commission authority to unilaterally amend the plan on the grounds that it is prohibited by state or federal law. *Id. at 29.* Qwest insists that its proposed plan and the Facilitator's recommendations are no different on this point than the plan approved in Texas. *Id. at 31.* Qwest states that "the FCC has recognized that an effective plan should allow the parties to modify and improve the plan's performance

metrics as necessary and that state commissions can and should have a prominent role in such improvements.” *Id.* However, Qwest denies that the FCC has allowed state commissions the sole authority to make changes to a performance plan. *Id.*

Discussion and Decision

a. Commission Authority

143 We disagree with Qwest that the Commission has no authority under state or federal law to order Qwest to amend the QPAP during the six-month review process. The Commission has broad authority to regulate the rates, services, facilities and practices of telecommunications companies in the public interest, and to promote competition in the provision of telecommunications services.³³ In addition, section 261(c) of the Act provides:

Nothing in this part precludes a State from imposing requirements on a telecommunications carrier for intrastate services that are necessary to further competition in the provision of telephone exchange service or exchange access, as long as the state’s requirements are not inconsistent with this part or the [FCC’s] regulations to implement this part.

144 Section 252(f) of the Act provides that a Bell Operating Company “may prepare and file with the state commission a statement of generally acceptable terms and conditions.” The SGAT is also a “voluntary” filing, yet Qwest has not disputed the Commission’s authority to order changes to the SGAT. Qwest intends to incorporate the QPAP into the SGAT as Exhibit K.

145 Finally, Qwest intends to offer the QPAP as evidence in its section 271 application that local exchange markets in Washington will remain open to competition after it receives section 271 authority from the FCC. The FCC expects state commissions to play a prominent role in modifying and improving the performance metrics in performance assurance plans.³⁴ Qwest acknowledges this. *Qwest Rebuttal at 31.* Qwest’s insistence on a unilateral right to reject any changes to the plan precludes any prominent Commission role in overseeing the plan.

146 Having reviewed the Texas plan, the CPAP, the Utah Staff Report, and recent orders from Wyoming and Montana,³⁵ we agree with the parties that Qwest must modify the

³³ *POWER v. Utilities and Trans. Comm’n*, 104 Wn. 2d 798, 808, 711 P.2d 319 (1985); RCW 80.01.040(3); RCW 80.04.110; RCW 80.36.080; RCW 80.36.140; RCW 80.36.160; RCW 80.36.170; RCW 80.36.180; RCW 80.36.186; and RCW 80.36.300.

³⁴ *Verizon Pennsylvania Order*, ¶¶127-32.

³⁵ *In the Matter of the Application of Qwest Corporation Regarding Relief Under Section 271 of the Federal Telecommunications Act of 1996, Wyoming’s Participation in a Multi-state Section 271 Process, and Approval of its Statement of Generally Available Terms*, First Order on Group 5A Issues,

QPAP to allow the Commission authority to determine whether changes ought to be made to the QPAP. Qwest must amend section 16.1 of the QPAP to strike “Changes shall not be made without Qwest’s agreement,” and add the following: “After the Commission considers such changes through the six-month process, it shall determine what set of changes should be embodied in an amended SGAT that Qwest will file to effectuate these changes.”

b. Scope of Changes to the QPAP

147

With respect to the question of the scope of six-month reviews, we note that neither Qwest, the CLECs, or the Commission has any experience, nor can they predict, how the plan will work once it is in operation in Washington. For this reason, we believe it would be unreasonable to preclude or limit the Commission’s authority to examine issues that may arise in the course of operation of the plan. However, the Commission is concerned that the six-month review process not become a forum for relitigating the essential terms of the plan. We believe the six-month review should focus on fine-tuning the performance metrics delineated above, while the other plan elements may be reexamined at the biennial review. However, consistent with the terms of section 18.7 of the CPAP, we will permit parties to request that the Commission review other issues if they can demonstrate that exigent circumstances exist. In addition, the Commission itself may identify issues for review. Qwest must modify section 16.1 to include the following language: “Parties or the Commission may suggest more fundamental changes to the plan, but unless the suggestion is highly exigent, the suggestion shall either be declined or deferred until the biennial review.”

c. Multi-state Review Process

148

The Facilitator’s Report envisions a multi-state review process for the six-month and biennial reviews, and a special fund that will cover the cost of the multi-state process. *Report at 62.* We support, in part, the Facilitator’s proposal for both a six-month and biennial review process. We support the concept of a multi-state process because of the efficiencies and administrative convenience that joint reviews can provide to the states. However, we are not prepared to commit ourselves, at this time, to the specific multi-state review process set forth in Qwest’s proposed plan. *Ex. 1217, §§16.1, 16.2.* We discuss separately below the issue of the Special Fund and contributions from Tier 1 and Tier 2 payments proposed in the QPAP.

Public Service Commission of Wyoming Docket No. 70000-TA-00-599 (Record No. 5924) (Jan. 30, 2001)(*Wyoming QPAP Order*); *In the Matter of the Investigation into Qwest Corporation’s Compliance with Section 271 of the Telecommunications Act of 1996*, Preliminary Report on Qwest’s Performance Assurance Plan and Request for Comments on Findings, Montana Public Service Commission Utility Division Docket No. D2000.5.70 (Feb. 4, 2002) (*Montana Preliminary QPAP Report*).

149 As noted in the recent Montana and Wyoming orders, the multi-state review process is still under development.³⁶ We believe it is this Commission's responsibility to consider any changes that need to be made, to ensure the effectiveness of the QPAP, and to resolve any disputes that may arise from its operation. Further, the ROC TAG is currently developing a post-271, long-term PID administration and review process. We prefer to wait and see how this process evolves before agreeing to a specific multi-state review process for the six-month and biennial reviews. We therefore will defer our decision on participation in any multi-state six-month review or biennial review process until a later date. We will determine, and advise the parties of our determination of, the process for the six-month review no later than 60 days after FCC approval of Qwest's application for section 271 authority.

150 Qwest must revise sections 16.1 and 16.2 to refer only to this Commission. Similar to the preliminary decision made in Montana, Qwest must include new language providing that nothing in the QPAP prohibits the Commission from joining a multi-state effort to conduct QPAP reviews and developing a process whereby the multi-state group would have the authority to act on the Commission's behalf.³⁷ Qwest must also delete the language in section 16.1 concerning the use of an arbitrator to resolve disputes; the Commission will conduct the six-month review process and resolve any disputes between the parties.

d. Response to Bench Request No. 39

151 In Bench Request No. 39, we asked Qwest for the basis of underlying language in section 16.1 that limits the reclassification of the payment level for measures during a six-month review to whether the actual volume of data points was less or greater than anticipated. In response, Qwest explained that the intent of the language was to provide a means to change the low, medium, or high designation of a performance measure if the measure turns out to be of greater or lesser importance than expected. *Ex. 1286*. We agree that payment levels for measures may need to be adjusted during a six-month review. However, we are concerned that relying solely on the volume of data points for that determination may unduly limit the scope of review. Causes may exist for changes to payment levels that are not related to the volume of data points. For instance, the volume of data points for a measure may turn out to be as expected, but Qwest's performance for the measure may not. In such a case, if volume were a constraint, the Commission would not be able to refocus incentives in the six-month review even if a new focus were warranted. Qwest must, therefore, remove the reference to the volume of data points from section 16.1.

³⁶ *Wyoming QPAP Order*, ¶13; *Montana Preliminary QPAP Report* at 35.

³⁷ *Montana Preliminary QPAP Report* at 35.

2. The Special Fund - Use of Tier 1 and Tier 2 Payments for Reviews and Audits

152 The original QPAP provides for payment to the state in the form of Tier 2 payments to be used for any purpose “that relates to the Qwest service territory that may be determined by the State Commission.” *Ex. 1200, §7.5*. Section 7.5 provides that the payments will be placed in a state fund determined by the Commission or in the state General Fund if the Commission is not authorized to receive such payments. *Id.*

153 The Report recommends certain changes to the language in section 7.5, expanding state power over the use of the payments. *Report at 41-42*. The Report also recommends that one-third of Tier 2 payments and one-fifth of the escalated portion of Tier 1 payments should be placed into a special fund to support the cost of multi-state six-month reviews, biennial reviews, audits, and QPAP administration. *Report at 42*.

154 Qwest has modified the QPAP to include this recommendation. *See Ex. 1217, §11.3*. Under QPAP section 11.3, the Special Fund would be an interest-bearing escrow account established by Qwest. Any Tier 1 payments to the Special Fund not used during a two-year period would be returned to CLECs. *Id., §11.3.2*. To the extent that Tier 1 and Tier 2 funds are not sufficient, Qwest will contribute funds to the Special Fund. *Id., §11.3.3*.

AT&T

155 AT&T disagrees with the creation of a funding system that uses Tier 1 payments, as no party made such a proposal during the proceeding. *AT&T Comments at 21-22*. Noting that CLECs already pay state taxes, regulatory fees and/or certification fees, AT&T believes that only Tier 2 funds should be used to fund future administration of the QPAP. *Id.*

WorldCom

156 WorldCom asks the Commission to reject a funding mechanism that uses a portion of CLEC Tier 1 payments to support state commission activities. *WorldCom Comments at 7-8*. WorldCom argues that CLEC payments are insufficient to compensate CLECs when Qwest provides poor wholesale performance, and that the recommendation in the Report to divert a portion of Tier 1 funds adds “insult to injury.” *Id.*

Joint CLECs

157 The Joint CLECs oppose the use of Tier 1 funds for future administrative costs of the QPAP, noting the lack of legal or evidentiary support on the record. *Joint CLEC Comments at 40-41*. In addition, the Joint CLECs note that Qwest would make no

contribution to the Special Fund or to the QPAP's administration. The Joint CLECs assert that such a proposal lacks any fundamental fairness or pretense of neutrality or nondiscrimination. *Id. at 41*. The Joint CLECs stated in hearing that since the Commission has not indicated what it anticipates doing in the six-month review or audit processes, the question of funding is better left for a future proceeding. *Tr. 6029*.

Public Counsel

158 Public Counsel recommends that Tier 2 funds be used to cover the costs of auditing and reviewing Qwest's performance under the QPAP, and that any remaining funds be used to enforce "the pro-competitive provisions of the Act as well as consumer education and protection." *Public Counsel Comments at 15*.

Qwest

159 Qwest asserts that it supports common administrative efforts, and that contributions to the fund must be consistent across the board if a collaborative approach is to work. *Qwest Rebuttal at 16-17*. Qwest further argues that the Tier 1 payment contribution is entirely appropriate, as CLECs will benefit from the collaborative approach. *Id.*

Discussion and Decision

160 As we discuss, above, concerning the six-month review process, and below concerning the audit process, we decline to commit to a specific multi-state process at this time. We will defer the issue of our participation in any multi-state process until after the FCC considers Qwest's application for section 271 authority. Similarly, we will defer any decision whether to contribute a portion of Tier 2 funds to a Special Fund, and whether to require Qwest to contribute any funds, including a portion of the escalated Tier 1 funds, to the Special Fund until we determine our participation level in a multi-state process. Any later decision to use Tier 1 funds will apply on a going-forward basis.

161 Consistent with our decision concerning participation in multi-state processes, we direct Qwest to modify the QPAP to include language stating that nothing in the QPAP prohibits the Commission from directing the establishment of an identified escrow account or other fund, and or contributing a portion of Tier 2 funds to the account for the purpose of funding a multi-state process to review and audit the QPAP.

162 Until we determine whether we will participate in any multi-state process, Qwest must modify section 7.5 of the QPAP to reflect that Qwest must maintain an identified escrow account and deposit any payments of Tier 2 funds for Washington

State into that account. We will review the proper placement of these funds based on our decision whether to participate in a multi-state process.

F. SELF-EXECUTING MECHANISM

163 Section 13 of the QPAP is titled “Limitations.” This section sets forth certain rules for implementation of the QPAP and provisions that limit Qwest’s obligations, or liabilities, under the QPAP. In this portion of the order, we address topics from section 13 of the QPAP such as when the QPAP should become effective, whether CLECs should be required to elect remedies, and when Qwest is excused from making payments, such as for force majeure events. In this portion of the order, we also discuss other QPAP sections that are intended to avoid unreasonable litigation and appeal, such as the method of payment, and recovery of payments from ratepayers.

1. Implementation of the QPAP/Effective Dates

164 The parties dispute several issues concerning when the QPAP should become effective, when Qwest should start to make payments and at what level, and when the QPAP should cease to be effective. The parties chose to rely on their pre-filed comments and did not address these issues during the hearing.

a. Effective Date of QPAP

165 Section 13.1 of the QPAP provides that the plan becomes effective only when Qwest receives section 271 authority from the FCC for that state. *Ex. 1217*. The Report recommends adopting this section of the QPAP. *Report at 74-75*. The Report also requires Qwest to file monthly reports of performance and presumed payment levels between October 2001 and the date the FCC grants section 271 relief.³⁸ *Report at 75*. The parties dispute whether the QPAP should become effective before or after the FCC approves Qwest’s application for section 271 relief for Washington state.

AT&T

166 Although AT&T advocated during the Multi-state Proceeding that the QPAP become effective immediately, AT&T now agrees with the Utah Staff proposal that the plan become effective in a state on the date Qwest files an application with the FCC for that state. *AT&T Comments at 40*. AT&T argues that Qwest should be prepared to comply with the QPAP at the same time that it asserts to the FCC that it is compliant with section 271 requirements.

³⁸ Qwest began filing such reports with the Commission in January 2002, reflecting payments that would have been made based on performance for November 2001. These reports will be admitted into the record as Exhibit 1223-C.

WorldCom

167 WorldCom argues that the QPAP should become effective as soon as the Commission approves the plan. WorldCom argues that doing so will allow the Commission to review evidence on the effectiveness of the plan prior to Qwest's entry into the long distance market. *WorldCom Comments at 24-25*. WorldCom argues that other states have adopted self-executing remedy plans to enforce section 251 requirements prior to section 271 approval. *Id.*

Covad

168 In comments filed in the Multi-state Proceeding, Covad argued that the QPAP should become effective immediately to prevent discriminatory conduct from occurring while the FCC considers Qwest's application. *Covad Comments at 11-12 (Covad Comments)*. Covad does not believe the QPAP is helpful in detecting discriminatory conduct. *Id.* Covad argues that the Commission has authority to implement the QPAP immediately based upon its authority to enforce service quality standards for wholesale services. *Covad Communications Company's Opening Brief on Qwest Corporation's Proposed Performance Assurance Plan at 4 (Covad Opening Brief)*. Covad further argues that Pennsylvania, Michigan, and Georgia have all ordered performance plans to be implemented immediately. *Id. at 7*.

Joint CLECs

169 The Joint CLECs argue that the QPAP should become effective immediately to encourage "nondiscriminatory service in the critical early stages of competition," citing the Georgia Public Service Commission's decision on BellSouth's performance plan. *ELI/Time Warner Telecom/XO's Opening Brief on Qwest's Performance Assurance Plan at 18-19 (Joint CLEC Opening Brief)*. The Joint CLECs also note that implementing the QPAP immediately would provide CLECs and the Commission with necessary information about how the QPAP will operate and its impact on CLECs. *Id. at 20*.

Qwest

170 Qwest asserts that the QPAP is voluntary and not a mandatory requirement of section 271. *Qwest Rebuttal at 36*. Qwest asserts that the Commission has no independent state authority to implement a QPAP. *Id. at 37*. Qwest also argues that its efforts to obtain section 271 relief are sufficient incentive to perform well. *Id. at 36*. Qwest has agreed to make monthly filings of performance data to the Commission as directed in the Report.

Discussion and Decision

171 Similar to the Facilitator's Report, the Colorado Hearing Examiner has proposed that the plan become effective upon FCC approval of an application, but that Qwest must begin to file immediately performance reports and a calculation of the payments it would make if the plan were effective. *November 5, 2001 Colorado Decision at 12.* The November decision explains the if the plan were to go into effect upon state approval, the six-month review would possibly occur at the time of Qwest's application to the FCC and the Commission's comments on the application, causing resource issues for the Commission. *Id. at 11-12.*

172 This Commission is currently reviewing Qwest's performance data, as well as projected payments due to any performance failures. Further, the FCC will receive all evidence of Qwest's pre-application performance. We agree with Qwest that providing such information is a sufficient incentive to perform well prior to filing its application and receiving section 271 authority. Thus, we adopt the Facilitator's recommendation that the plan should become effective upon the date the FCC grants Qwest section 271 relief for the state of Washington. The Colorado Hearing Examiner's reasoning is also compelling: The Commission may not have the resources to conduct a six-month review at the same time a recommendation is due to the FCC on Qwest's application.

b. Memory of Payments at Effective Date

173 Sections 14.1 and 14.2 of the QPAP provide that, upon the effective date, Qwest will file reports of its monthly performance with CLECs and the state Commission. Given that the QPAP provides that Qwest must file monthly reports tracking its performance, some CLECs argue that Qwest should begin making payments at an escalated level once the QPAP becomes effective. The Report rejected the CLECs' proposal that the QPAP should include a "memory" of past performance upon the effective date. *Report at 75.* The parties continue to dispute whether payment levels should begin at an escalated level when the QPAP becomes effective.

AT&T

174 AT&T argues that the slate should not be wiped clean upon the effective date of the QPAP, ignoring Qwest's past poor performance. *AT&T Comments at 41.* Similar to its arguments concerning the proper effective date, AT&T argues that this creates a disincentive to performing well prior to obtaining section 271 approval.

Covad

175 Covad argues that the payments, or "penalties," are an essential part of the QPAP. *Covad Opening Brief at 8.* Covad asserts that if Qwest's performance has been so

poor that escalated payments would have been in effect, that Qwest should begin making payments at the escalated, or historical, level. *Id.*

Qwest

- 176 Qwest argues against a memory of payments on the effective date for the same reasons it opposes an immediate effective date. *Qwest Rebuttal at 36; see also Reply Brief of Qwest Corporation in Support of its Performance Assurance Plan at 44.*

Discussion and Decision

- 177 We adopt the Facilitator's recommendation on this issue. Payment levels should start at the one month level when the QPAP becomes effective. The reasons the CLECs state to justify requiring payments to begin at escalated levels are (1) to create additional incentive for Qwest to perform better, (2) to create a more open local market, and (3) to compensate CLECs. As we have discussed above, Qwest's performance records and mock payment levels are currently available to the Commission, as well as to the FCC. We do not believe the threat of escalated payments at the effective date will significantly increase Qwest's incentive to comply with section 271 requirements. If Qwest wants section 271 authority from the FCC, it stands to reason that Qwest has sufficient incentive to perform well now.

c. Termination of QPAP if Qwest Exits Long Distance Market

- 178 Section 16.2 of the QPAP provides that the plan will be rescinded immediately if Qwest exits the interLATA market. *Ex. 1217*. The Report recommends adopting this section of the QPAP, and allowing Qwest to terminate the QPAP when it exits the long distance market. *Report at 75*. The parties remain in dispute about whether the QPAP should remain effective if Qwest exits the long distance market.

Joint CLECs

- 179 The Joint CLECs object to the Facilitator's recommendation, arguing that the QPAP provides the only wholesale service quality rules and remedies in Washington. *Joint CLEC Comments at 42*. The Joint CLECs note that the Commission has not adopted such rules, choosing to look first to this proceeding for wholesale service quality issues. The Joint CLECs are concerned that, in the absence of rules adopted by the Commission, CLECs will have no remedy for anti-competitive behavior by Qwest if Qwest leaves the long distance market and focuses its efforts solely on the local market. *Id.*

Discussion and Decision

180 We share the Joint CLECs' concerns that CLECs may be without remedy if the QPAP were to automatically terminate if Qwest leaves the long distance market. The proposed Colorado plan provides that the plan will expire in six years, except that payments to individual CLECs will continue subject to a review of their necessity. *CPAP, Section 18.11*. We find the Colorado Hearing Examiner's determination appropriate and require Qwest to modify the QPAP to mirror the CPAP provision on this issue. This will allow Qwest to eliminate certain payments upon leaving the market, but allow for Commission review of the necessity of certain payments, as well as provide time to implement any necessary wholesale service quality rules.

2. Election of Remedies

181 Section 13.6 of the QPAP requires CLECs to elect a remedy for poor performance. If CLECs choose to receive payments under the QPAP, the QPAP provides that those payments are in the form of liquidated damages, and that the remedies are exclusive. The QPAP requires CLECs to waive their rights to seek alternative remedies for poor performance. The version of the QPAP that Qwest filed in the Multi-state Proceeding included an exception allowing CLECs to seek remedies for non-contractual causes of action. *See Ex. 1200*. The Report requires Qwest to modify portions of section 13.6 to further limit the exceptions, and to limit recovery under non-contractual remedies to any additional amount not recovered through QPAP payments. *Report at 32*.

182 The Facilitator recommended modifying section 13.6 of the QPAP by adding the following:

By electing remedies under the PAP, CLEC waives any causes of action based on a contractual theory of liability, and any right of recovery under any other theory of liability (including but not limited to a regulatory rule or order) to the extent such recovery is related to harm compensable under a contractual theory of liability (even though it is sought through a non-contractual claim, theory, or cause of action).

Ex. 1217.

AT&T

183 AT&T first objects to the Facilitator's statements that the QPAP is a liquidated damages plan that is intended to replace costly litigation. *AT&T Comments at 11, citing Report at 28*. AT&T stresses the difference between the QPAP and a bilateral contract between commercial parties. *Id. at 11-12*. While AT&T agrees that QPAP payments will, in some circumstances, remedy the harm caused by Qwest's poor

performance, AT&T asserts that QPAP remedies should not be the exclusive remedy. *Id. at 14.*

184 During the Multi-state Proceeding, AT&T objected to Qwest's original QPAP sections 13.5 and 13.6 as limiting a CLEC's alternative remedies. *Id. at 21-22; see also Ex. 1225 at 7-8; Ex. 1227 at 19.* AT&T strenuously objects to the Facilitator's modifications to QPAP section 13.6. *AT&T Comments at 17.* AT&T asserts that the Facilitator's modifications would preclude a CLEC from bringing any contractual cause of action, or damages from any non-contractual cause of action, something that Qwest itself had never intended. *Id. at 17-18.* In particular, AT&T argues that the Facilitator's language would preclude a CLEC from receiving any remedy in an anti-trust matter except for the "adder." *Id. at 18.*

185 AT&T requests that the Commission adopt section 16.6 of the CPAP. That section would require an election of remedies, but allows CLECs to seek additional remedies for substantial harm not contemplated by the QPAP by seeking permission through the dispute resolution process to proceed with the action. Section 16.6 of the CPAP provides, in part:

Tier 1X payments are in the nature of liquidated damages. Before 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 CPAP, CLEC must first seek permission through the Dispute Resolution Process set forth in section 17 to proceed with the action. This permission shall be granted only if CLEC can present a reasonable theory of damages for the 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 address the extent of the competitive harm. If CLEC can make this showing, it shall be permitted to proceed with the action.

186 AT&T argues that an exclusive election of remedies provision is inequitable, and that CLECs should be able to sue for additional contract damages to protect themselves against extraordinary losses that may result from Qwest's poor performance. *AT&T Comments at 17-18.*

187 Alternatively, AT&T and WorldCom propose to substitute the Facilitator's proposal in section 13.6 of the QPAP with the following: "A CLEC may elect either: (a) the remedies otherwise available at law, or (b) those available under the QPAP and other remedies as limited by the QPAP." *WorldCom and AT&T Comments on Qwest's Responses to the Bench Requests at 2 (World Com and AT&T Joint Comments).*

WorldCom

188 During the Multi-state Proceeding, WorldCom objected to language in QPAP sections 13.5 and 13.6 that precludes payment of double recovery for “analogous” acts. *WorldCom Opening Brief of WorldCom, Inc. Regarding Qwest Corporation’s Proposed Performance Assurance Plan at 18; see also Ex. 1241 at 53.* WorldCom notes that it does not object to precluding double recovery, but believes “analogous” is too vague a term. *Id.*

189 As noted above, WorldCom and AT&T proposed alternative language to include in QPAP section 13.6. *WorldCom and AT&T Joint Comments at 2.*

Covad

190 Covad objects to any provision in the QPAP, in particular sections 13.5 and 13.6, that may preclude “CLECs from exercising their rights to pursue any legal or regulatory action, with attendant remedies.” *Covad Opening Brief at 43.* In particular, Covad objects to provisions that would limit “CLEC rights to pursue Section 251/252 remedies that supplement the PAP, state law regulatory enforcement actions, federal enforcement action under Section 271(d)(6), or any applicable antitrust, tort, contract, or state consumer protection remedies.” *Id. at 42.*

Joint CLECs

191 The Joint CLECs oppose the Facilitator’s proposed modification to QPAP section 13.6 that limits a CLEC’s alternative remedies. *Joint CLEC Comments at 37-39.* Further, the Joint CLECs oppose that portion of the Facilitator’s Report justifying the modification. *Id. at 37.* Specifically, the Joint CLECs argue that making the QPAP payments the exclusive remedy would deny CLECs the rights to pursue alternative remedies for harm caused by certain performance not measured by, or provided for under the QPAP, e.g., EELS and canceled orders. *Id. at 38.* The Joint CLECs recommend that the Commission modify the QPAP to allow CLECs to adopt the QPAP as a whole, without waiving their rights to seek alternative remedies for harm caused by Qwest’s violation of contractual or statutory requirements. *Id. at 39.*

Qwest

192 Qwest asserts that the Facilitator’s proposed language allows CLECs to pursue non-contractual remedies, but, in conjunction with the offset provision, also in section 13.6, precludes a CLEC from obtaining a double recovery. *Qwest Rebuttal at 12.* Qwest agrees with the Facilitator that allowing CLECs to pursue alternative remedies is “substantially unbalanced.” *Id. at 13, quoting Report at 11.*

Discussion and Decision

193 After reviewing the parties' arguments, pleadings, and the proposed QPAP and CPAP, we agree with the CLECs that the modifications proposed in the Report to QPAP section 13.6 are not acceptable. The Report finds that portions of sections 13.5 and 13.6 may be contradictory and then eliminates any alternative remedies for CLECs. *Report at 32.* QPAP section 13.5 and CPAP section 16.4 are similar in that they allow CLECs to pursue other non-contractual legal and non-contractual regulatory claims and remedies, in addition to obtaining payments under the QPAP. However, in contrast to CPAP section 16.6, QPAP section 13.6, as modified by the Facilitator, severely, and inequitably, limits the alternative remedies available to CLECs. As discussed by the Joint CLECs, there are certain matters not yet covered by QPAP payments which could lead to severe inequities if QPAP payments were the sole remedy available.

194 AT&T and WorldCom's proposed election of remedies language is clear and straightforward. We also find the language in section 16.6 of the proposed CPAP to be clear and explicit about the types of alternative remedies available to CLECs, and believe it may avoid needless or protracted litigation about what remedies are available. In addition, the procedural exception in the CPAP is appropriate, given that we do not know how Qwest will perform or behave in the face of CLECs seeking alternative remedies.

195 Therefore, Qwest must strike the last sentence in QPAP section 13.6, as shown in Exhibit 1217. Qwest must add the election of remedies language proposed by AT&T and WorldCom, and include a portion of section 16.6 of the CPAP as shown below.

13.6 This PAP contains a comprehensive set of performance measurements, statistical methodologies, and payment mechanisms that are designed to function together, and only together as an integrated whole. To elect the PAP, CLEC must adopt the PAP in its entirety, in its interconnection agreement with Qwest. A CLEC may elect either: (a) the remedies otherwise available at law, or (b) those available under the QPAP and other remedies as limited by the QPAP.

13.6.1 Before 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 CPAP, CLEC must first seek permission through the Dispute Resolution Process set forth in section 5.18 to proceed with the action. This permission shall be granted only if CLEC can present a reasonable theory of damages for the 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 address the extent of the competitive harm. If CLEC can make this showing, it shall be permitted to proceed with the action.

3. Offsetting Remedies

196 As originally filed in the Multi-state Proceeding, QPAP section 13.7 allowed Qwest itself to offset any award “for the same or analogous wholesale performance covered by this PAP.” *Ex. 1200, Att. 1*. The Facilitator modified section 13.7 to clarify when an offset should be made, and to preclude an offset for payments relating to CLEC or third-party damage to property or personal injury. *Report at 36*. However, the Facilitator did not modify language allowing Qwest the right to make the offset. *Id. at 35*.

AT&T

197 AT&T argues that section 13.7 as originally drafted, and modified by the Facilitator, gives Qwest unilateral control over offsets. *AT&T Comments at 20*. AT&T does not object to the concept of offsets. *Tr. 6102-3*. AT&T is concerned that allowing Qwest the right to offset, subject to the dispute resolution process in the SGAT, would create an additional layer of litigation. *Id. at 21*. As such, AT&T argues that the provision is contrary to the FCC’s criteria for reviewing a performance assurance plan. *Id.* AT&T argues that the Texas plan and proposed CPAP both give the power to offset an award to the finder of fact, whether it be a state regulatory commission or a court. *Id.; see also Tr. 6121*. AT&T requests that the Commission adopt the language in the Texas plan, CPAP or Utah Staff Report relating to offsets. *AT&T Comments at 21-22*.

WorldCom

198 WorldCom asserts that Qwest improperly inserted a sentence into QPAP section 13.7 concerning offsets of portions of damages allowed by non-contractual theories of liability that are not also recoverable under contractual theories of liability. *WorldCom and AT&T Joint Comments at 2*. WorldCom requests the Commission order Qwest to remove the sentence, as the Facilitator did not recommend its addition. *Id.*

Covad

199 Like AT&T, Covad objects to any unilateral right of Qwest to offset an award granted to a CLEC. *Covad Opening Brief at 42*. Covad is concerned that a Qwest right to offset would effectively deny a CLEC the right to pursue alternative legal remedies. *Id. at 43*.

Joint CLECs

200 The Joint CLECs object to the Report and QPAP section 13.7 for two reasons: first, the Joint CLECs reject the notion that offsets should be allowed, and second, that Qwest has any right to unilaterally offset an award, as opposed to reserving that right to the entity determining the award. *Joint CLEC Comments at 33-34*. The Joint CLECs note that the Utah Staff rejected the concept of offsets, noting that Utah rules do not allow for offsets. *Id. at 34*. The Joint CLECs request that the Commission order Qwest to remove section 13.7 from the QPAP, or in the alternative, modify the section to preclude Qwest from unilaterally making the offset. *Id. at 36*.

Qwest

201 Qwest asserts that the issue is whether Qwest has more than the right to argue for an offset. *Qwest Rebuttal at 15*. Qwest asserts that it needs to clearly state its rights in the QPAP. *Id.* In the Multi-state Proceeding, Qwest argued that any payment offset disputes could be handled through the dispute resolution process or arbitrated. *Brief of Qwest Corporation in Support of its Performance Assurance Plan at 70, n.230*. Qwest also expressed the concern that a court may not interpret the QPAP in the same manner as a regulatory commission, and that it, therefore, wishes to retain control over offsets. *Id. at 69*.

Discussion and Decision

202 Allowing Qwest to make the sole decision about what to offset is inappropriate. The QPAP is intended to provide self-executing payments for poor performance and to avoid needless and protracted litigation. Giving Qwest the right to determine whether to offset and the amount of offset may add another level of litigation when the offset could be addressed within a single case, be it before a court or regulatory commission. We find that the language in section 16.7 of the proposed CPAP appropriately addresses the issue. Qwest must modify QPAP section 13.7 to incorporate the language in section 16.7 of the proposed CPAP and delete the last sentence of section 13.7 as requested by WorldCom.

4. Force Majeure Language

203 Section 13.3 of the QPAP provides a set of circumstances that would excuse Qwest from making Tier 1 and Tier 2 payments. As described in the Report, the CLECs raised a number of issues with Qwest's proposed language concerning force majeure events. *Report at 36-38*. The Report recommended referencing SGAT section 5.7 which defined force majeure events, allowing state commissions to resolve disputes over force majeure events, and adding language proposed by AT&T to further define the connection between the force majeure event and Qwest's performance,

determining that such events applied to benchmark, but not parity measurements. *Id.* at 39-40.

204 Qwest modified its QPAP to incorporate the Report's recommendations, but failed to delete language referring to parity measurements. *Ex. 1217; Qwest Response to AT&T and WorldCom's Comments on Qwest's Response to Bench Request No. 37 at 2 (Qwest Response re: Bench Request No. 37).*

AT&T/WorldCom

205 AT&T and WorldCom filed comments noting that Qwest included AT&T's force majeure language as required by the Facilitator, but inappropriately included a reference to parity measures in the last sentence of section 13.3. *AT&T and WorldCom Joint Comments at 2-3.*

Public Counsel

206 Public Counsel agrees with the Report's recommendation that Qwest provide notice of a force majeure event within 72 hours of learning of the event. *Public Counsel Comments at 14.* However, Public Counsel requests that the Commission require Qwest to modify section 13.3 to provide (1) that the Commission is the entity that determines whether a request for waiver of payment obligations should be granted, and (2) that Qwest must file any waiver request with the Commission "no later than the last business day of the month after the month in which payments are being disputed." *Id.*

Qwest

207 Qwest does not respond to Public Counsel's request to modify section 13.3. Qwest initially agreed with AT&T and WorldCom that the reference to parity measures at the end of section 13.3 in the red-lined QPAP should be deleted. *Qwest Response re: Bench Request No. 37 at 2.* Qwest later asserted that the reference to the term "parity" in the last sentence of section 13.3 in Exhibit 1217 is correct and should not be stricken. *Supplement to Qwest's Response to AT&T and WorldCom's Comments on Qwest's Response to Bench Request No. 37 at 1-2.* Qwest asserts that the sentence at issue applies not just to force majeure events, but also to other excusing events, and that the reference is appropriate and should remain in the QPAP. *Id.*

Discussion and Decision

208 We find Public Counsel's request to be reasonable. The Facilitator notes that Qwest agreed during the Multi-state Proceeding that state commissions were the appropriate entity to resolve disputes over requests for waivers. *Report at 39.* Qwest must modify section 13.3 to reflect Public Counsel's requests.

209 As to the reference to parity in section 13.3 of the QPAP, we note, as did Qwest, that AT&T's proposed language for the force majeure section does include a reference to parity. *See Ex. 1225 at 12*. However, we also find the Facilitator's arguments persuasive that "parity . . . requires that parity measures may not be subject to force majeure payment exclusions." *Report at 40*. Qwest must strike the reference to "parity" in the last sentence of section 13.3 of the QPAP.

. Does QPAP or SGAT Language Prevail

210 Qwest intends to incorporate the QPAP into the SGAT as Exhibit K to the SGAT. *Qwest Initial Comments at 4*. Several parties raised concern that incorporating the QPAP into the SGAT creates a question as to which document prevails over the other.

AT&T

211 AT&T points out several inconsistencies between the QPAP and the SGAT, notably where the SGAT requires Qwest to pay penalties or compensate the CLEC for failure to take some act, and the QPAP, which limits CLEC remedies and requires that CLECs elect remedies. *AT&T Comments at 43-44; Tr. 6140-41*.

Qwest

212 Qwest asserts that to the extent the SGAT and the QPAP both provide for a payment to a CLEC for failure to perform, the CLEC must elect remedies between the SGAT and QPAP. *Tr. 6144*. Qwest also asserts that there should not be conflicts between the SGAT and QPAP. *Tr. 6146*.

Discussion and Decision

213 The SGAT sets forth Qwest's and the CLEC's obligations to each other when interconnecting their networks to provide intraLATA service. The QPAP is a set of performance measurements and agreed-to payments for Qwest's failure to meet those measurements. Understandably, the CLECs who have negotiated certain language in the SGAT argue that the SGAT should prevail, or at least that inconsistencies should be addressed before the QPAP goes into effect. As the QPAP is being incorporated into the SGAT, it ought to conform to the SGAT, not trump the SGAT. The terms of the SGAT should prevail in any conflict between the QPAP and the SGAT.

214 In response to the Commission's question as to whether the QPAP is consistent with existing provisions in the Washington SGAT and interconnection agreements, AT&T, WorldCom, and other parties noted several inconsistencies, but had not completed their review. During the oral argument, the administrative law judge acknowledged

that the Commission would establish a process to determine compliance between the QPAP and the Facilitator's Report. *Tr. 6243*. Given that the parties do not yet know if there is conflict between the SGAT and the QPAP, we believe it will be necessary to also determine consistency with the SGAT at the same time.

6. Payment Method

215 Section 11.2 of the QPAP provides for payments to CLECs to be made by bill credit rather than cash or check. The Report found Qwest's proposal appropriate, stating that CLEC arguments about the administrative convenience of requiring the equivalent of cash were not persuasive. *Report at 76*.

WorldCom

216 WorldCom opposes the Facilitator's decision, referring to the Colorado Hearing Examiner's decision which found that bill credits are more difficult to administer than cash equivalent payments and noted several circumstances where Qwest would be required to make cash payments anyway, despite the use of the bill credit method. *WorldCom Comments at 26-27*. WorldCom asks the Commission to require payments to CLECs under the QPAP in the form of cash rather than bill credit. *Id.*

Covad

217 Covad asserts that using bill credits will create serious administrative difficulties for CLECs and will likely delay the CLECs' ability to use the payment because the payment will become entangled with other billing issues. *Covad Opening Brief at 26*.

Public Counsel

218 Public Counsel asserts that the use of bill credits may result in additional disputes related to billing issues which would be counterproductive for all parties and contrary to the goal of having a PAP that is self-executing. *Public Counsel Comments at 17*. Public Counsel recommends the Commission adopt the Colorado approach of providing for cash payments to CLECs, but allowing Qwest to credit the payments for bills that are more than 90 days past due. *Id.*

Qwest

219 Qwest states that bill credits are not complex to administer and the form in which the credits are issued is not at all confusing. *Qwest Rebuttal at 37-38*. Qwest is also concerned with its growing accounts-receivable from CLECs and believes cash payments would be tantamount to providing CLECs unjustified cash subsidies. *Id.*

Discussion and Decision

220 We are persuaded that the Colorado Hearing Examiner's approach to the form of payment provides the appropriate balance between the competing positions of the parties. That is, Qwest will make cash equivalent QPAP payments to CLECs except when a non-disputed CLEC payment to Qwest is more than 90 days past due. Qwest must amend section 11.2 of the QPAP to adopt the language from section 12.2 of the CPAP which states: "All payments shall be in cash. Qwest shall be able to offset cash payments to CLEC with a bill credit applied against any non-disputed charges that are more than 90 days past due."

7. Recovery of Payment From Ratepayers

221 During the Multi-state Proceeding, AT&T requested that the QPAP include specific language prohibiting Qwest from recovering in rates from its regulated ratepayers the payments made under the QPAP. *AT&T's Brief Regarding Qwest's Proposed Performance Assurance Plan at 29*. The Facilitator recommended against including such a provision, agreeing with Qwest that such a provision is unnecessary, given that state and federal case law already precludes a BOC from recovering plan payments in rates. *Report at 86*.

AT&T

222 In comments filed with the Commission, AT&T disagreed with the Facilitator that the FCC and state commissions did not need guidance in the QPAP on this issue. *AT&T Comments at 42*. AT&T urges the Commission to include specific language precluding Qwest from recovering QPAP payments in its revenue requirement, or from wholesale customers. *Id.*

Public Counsel

223 Public Counsel requests the Commission include a provision stating that Qwest may not recover QPAP payments in rates from its retail or wholesale customers. *Public Counsel Comments at 15-16*.

Qwest

224 Qwest argues that the QPAP's function is not a state ratemaking document. Further, Qwest argues that a provision concerning recovery in rates is not necessary as the FCC has prohibited BOCs to seek such recovery in rates. *Qwest Rebuttal at 40*.

Discussion and Decision

225 We adopt the Report's recommendation that there is no need to include a provision in the QPAP precluding Qwest from recovering QPAP payments in rates. To the extent there is state and federal case law addressing the issue, we believe that is sufficient to govern Qwest's behavior and provide this Commission with guidance in the event a question should arise about Qwest's actions.

8. Recalculation of Payments

226 Upon the CLECs' request, the Report recommends that Qwest retain records of the underlying performance and payment data for a three-year period. *Report at 83*. The Report also recommends a QPAP provision that would allow payments to be recalculated retroactively for a three-year period. *Id.* As recommended in the Report, Qwest modified its QPAP to include section 14.4, which allows Qwest to recalculate payments made under the QPAP for up to three preceding years. *Ex. 1217*.

227 In Bench Request No. 40, the Commission asked Qwest whether other state plans contained a similar section and why Qwest believes the section should be included in the QPAP. Qwest responded that this section is unique to the QPAP, and that the Facilitator directed Qwest to add the language. *Ex. 1287*.

228 The FCC requires that performance plans have a self-executing mechanism that does not open the door unreasonably to litigation and appeal.³⁹ We are concerned that the language in this section is too vague. The section does not state whether the recalculation would take place as a result of any exclusion permitted under section 13.3, or for some other reason, such as Qwest discovering it has somehow been calculating payments incorrectly over a several-year period, or as a result of an audit under section 15 of the QPAP.

229 We concur with the Facilitator that the QPAP should include a retention period. However, the vagueness of the section detracts from the certainty that this plan is supposed to provide to the parties. If Qwest or any party believes there is a problem with a calculation, such concerns should be raised and dealt with by the Commission contemporaneously. Qwest must strike the first three sentences in section 14.4, and replace them with the following: "Qwest shall retain for a three-year period (measured from the monthly payment due date) sufficient records to demonstrate fully the basis of its calculations for making payments under this PAP."

³⁹ *Bell Atlantic New York*, ¶433.

G. ASSURANCES OF REPORTED DATA'S ACCURACY

1. Multi-state Audits/Investigations

- 230 The audit program in the QPAP is intended to provide “sufficient assurance that a high level of confidence can be placed in the performance results that Qwest measures – results that will drive QPAP payments and will serve as a primary basis for [commission] oversight of wholesale performance.” *Report at 78-79*. The Facilitator found that the audit program in Qwest’s original QPAP was not sufficient, as it (1) made it difficult to track significant changes in the systems, methods, and activities by which Qwest measures performance, (2) did not provide assurances for tracking data accuracy into the future, and (3) allowed Qwest too much control over the program of auditing its own system of performance measurement. *Id. at 79*.
- 231 The Report recommended a multi-state process for audits, noting that there would be substantial commonality among issues, and that Qwest would face significant costs if all 14 states in its region were to conduct individual audits. *Id. at 79*. The Report also recognized that states will need to retain the ability to conduct their own audits to meet the particular needs and circumstances of the state. *Id.*
- 232 The Report proposes an audit approach that allows for both pre-planned and as-needed testing of Qwest’s measurement program. *Id. at 80*. The Report expresses concern that the audit program focus on particular performance measurements that appear to be unstable or of particular risk. *Id.* Finally, the Report recommends that the states jointly retain an independent auditor for a two-year period to conduct the audit, and assess the need for individual audits requested by individual CLECs. *Id. at 81*. The Report recommends use of Tier 2 funds to support audit costs, as well as a portion of Tier 1 escalated payments should the Tier 2 funds prove insufficient. *Id. at 82*.
- 233 Qwest has modified the QPAP consistent with the Facilitator’s recommendations. The red-lined QPAP provides for a two-year audit cycle and a “detailed audit plan developed by an independent auditor retained for a two-year period.” *Ex. 1217, §15.1*. The QPAP identifies the scope of the audit plan as “identifying specific performance measurements to be audited, the specific tests to be conducted, and entity to conduct them,” with specific attention to “higher risk areas identified in the OSS report.” *Id., §15.1.2*.
- 234 The QPAP proposes that a committee of Commissioners from different states would have oversight over the auditor’s activities, and would resolve disputes arising from the audit. *Id., §§15.1.1, 15.1.4*. The QPAP requires Qwest to report any changes it makes to management processes to ensure the propriety of the changes. *Id., §15.2*. Any disagreements between Qwest and CLECs about accuracy or integrity of data will be referred to the auditor. *Id., §15.3*. CLECs may not request an audit after three

years have elapsed from the payment date. *Id.* The audit program expenses are to be paid first from Tier 2 payments to the “Special Fund,” and then one-half from Tier 1 funds in the Special Fund, and one-half by Qwest. *Id.*, §15.4.

235 Qwest made no changes to section 15.5 of the QPAP which addresses investigations by Qwest into whether CLECs were responsible for Tier 2 misses.

CLECs

236 The participating CLECs did not comment on the multi-state audit and investigation process contemplated in the Report and red-lined QPAP, other than to object strongly to the proposed use of Tier 1 funds for multi-state efforts. Their comments are discussed in more detail below concerning the Special Fund.

Public Counsel

237 Public Counsel objects to the Facilitator’s recommendation for a multi-state audit, investigation and review process. Public Counsel argues that performance issues may differ in each state, because CLECs use different modes of entry in each state, each state experiences different levels of competition, and that wholesale service quality will also likely differ in each state. *Public Counsel Comments at 10*. Public Counsel also objects to the “delegation of state regulatory authority to an unofficial, informal body.” *Id. at 11*. Public Counsel recommends that the Commission retain sole authority over reviews, audits, and monitoring of Qwest’s performance in Washington under the QPAP. *Id.*

Qwest

238 Qwest argues that the Commission recognized in its 12th *Supplemental Order* the commonality of issues and the efficiencies that would be gained through a multi-state review process. *Qwest Rebuttal at 38-39*. Qwest responds to Public Counsel’s concerns of delegation of state authority by referring to statutory authority in RCW 80.01.070 for the Commission to participate in joint hearings outside of the state of Washington. *Id. at 39*. Qwest recommends the Commission adopt the recommendations in the Report for multi-state audit and investigation processes. *Id.*

Discussion and Decision

239 We concur in the Report’s findings that Qwest’s original proposed audit program in section 15 of the QPAP is not sufficient to ensure a high level of confidence in the performance results that Qwest measures. However, as we have discussed above concerning the six-month review process and the creation of a Special Fund, we are

not prepared to commit ourselves, at this time, to the specific multi-state review process set forth in Qwest's red-lined QPAP.

240 Consistent with our discussion above concerning Commission jurisdiction for continued oversight over the QPAP, we believe it is the state's responsibility to evaluate any issues that may arise over performance results or performance measures, including changes in the way Qwest produces performance results. However, should we determine that it is appropriate to join the efforts of other states in a multi-state auditing or investigation process, we do not believe it is a delegation of state authority to do so, given our statutory authority to engage in joint hearings outside of the state. *See RCW 80.01.070.*

241 We prefer to wait and see how the ROC-TAG process develops before agreeing to a specific multi-state review process for an audit process. Therefore, we defer our decision on participation in any multi-state audit process until a later date. To that end, Qwest must replace the language in sections 15.1 through 15.4 of the red-lined QPAP, Exhibit 1217, with the following:

- 15.1 Any party may request that the Commission conduct an audit of performance results or performance measures. The Commission will determine, based upon requests and upon its own investigation, which results and/or measures should be audited. The Commission may, at its discretion, conduct audits through participation in a collaborative process with other states.
- 15.2 The costs of auditing will be paid for from Tier 2 funds. If such funds are insufficient, the Commission may require that a portion of Tier 1 escalated payments be set aside for auditing programs.
- 15.3 Qwest must report to the Commission monthly any changes it makes to the automated or manual processes used to produce performance results including data collection, generation, and reporting. The reports must include sufficient detail to enable the parties to understand the scope and nature of the changes.
- 15.4 In the event of a dispute between Qwest and any CLEC regarding the accuracy or integrity of data collected, generated, and reported pursuant to the QPAP, Qwest and the CLEC will first consult with one another and attempt to resolve the dispute. If the issue is not resolved within 45 days, either party may request that the Commission consider the matter.

242 Further, we are concerned that section 15.5 of the QPAP is not clear as to who would conduct the investigation and more importantly, who would make the determination

regarding CLEC responsibility. We are also concerned that this section addresses only investigation into Tier 2 misses, but not Tier 1 misses. Based on these concerns, Qwest must modify section 15.5 as follows:

- 15.5. *Any party may petition the Commission to request that Qwest investigate any consecutive Tier 1 miss or any second consecutive Tier 2 miss to determine the cause of the miss and to identify the action needed in order to meet the standard set forth in the performance measurements. Qwest will report the results of its investigation to the Commission, and to the extent an investigation determines that a CLEC was responsible in whole or in part for the Tier 2 misses, Qwest may petition the Commission to request that it receive credit against future Tier 2 payments in an amount equal to the Tier 2 payments that should not have been made. Qwest may also request that the relevant portion of subsequent Tier 2 payments will not be owed until any responsible CLEC problems are corrected. For the purposes of this sub-section, Tier 1 performance measurements that have not been designated as Tier 2 will be aggregated and the aggregate results will be investigated pursuant to the terms of this agreement.*

2. Monthly Reports to Public Counsel

243 Sections 14.1 and 14.2 of the QPAP require Qwest to provide monthly reports to CLECs and the Commission of Qwest's performance for the measurements set forth in the QPAP. Public Counsel requests that the Commission modify the QPAP to allow Public Counsel to receive monthly QPAP performance reports provided to the Commission. *Public Counsel Comments at 13; see also Tr. 6229-6230.* Qwest did not respond to Public Counsel's request.

244 We find it appropriate that Public Counsel should receive copies of the monthly reports filed with the Commission. We note that the CPAP requires that Qwest provide such reports to the Colorado Office of Consumer Counsel. *CPAP, Section 13.2.* Qwest must modify section 14.2 of the QPAP as follows: "Qwest will also provide to the Commission, *and relevant parties upon request*, a monthly report of aggregate CLEC performance results . . ."

VII. FINDINGS OF FACT

245 Having discussed above in detail the oral and documentary evidence received in this proceeding concerning all material matters, and having stated findings and conclusions upon issues at impasse between the parties and the reasons and bases for those findings and conclusions, the Commission now makes and enters the following summary of those facts. Those portions of the preceding detailed discussion that state

findings pertaining to the ultimate findings stated below are incorporated into the ultimate findings by reference.

- 246 (1) Qwest Corporation, formerly U S WEST Communications, Inc., is a Bell operating company (BOC) within the definition of 47 U.S.C. § 153(4), providing local exchange telecommunications service to the public for compensation within the state of Washington.
- 247 (2) The Commission is an agency of the State of Washington vested by statute with the authority to regulate the rates and conditions of service of telecommunications companies within the state, to verify the compliance of Qwest with the requirements of section 271(c) of the Telecommunications Act of 1996, and to review Qwest's Statement of Generally Available Terms, or SGAT, under section 252(f)(2) of the Act.
- 248 (3) Section 271 of the Act contains the general terms and conditions for BOC entry into the interLATA market.
- 249 (4) Pursuant to 47 U.S.C. § 271(d)(2)(B), before making any determination under this section, the FCC is required to consult with the state commission of any state that is the subject of a BOC's application under section 271 in order to verify the compliance of the BOC with the requirements of section 271(c).
- 250 (5) The FCC has relied on performance assurance plans developed collaboratively by the BOC, CLECs, and the states in determining whether the BOC has met in part, the public interest requirement of section 271(d)(3)(C).
- 251 (6) Pursuant to 47 U.S.C. § 252(f)(2), BOCs must submit any statement of terms and conditions that the company offers within the state to the state commission for review and approval.
- 252 (7) On June 6, 2000, the Commission consolidated its review of Qwest's SGAT in Docket No. UT-003040 with its evaluation of Qwest's compliance with the requirements of section 271(c) in Docket No. UT-003022.
- 253 (8) On July 23, 2001, the Commission issued the *12th Supplemental Order* in this proceeding, directing the parties to participate in the Multi-state Proceeding for the initial review of Qwest's Performance Assurance Plan, or QPAP.
- 254 (9) During hearings held on August 14-17 and August 27-29, 2002, in the Multi-state Proceeding in Denver, Colorado, Qwest, a number of CLECs, and Public Counsel submitted testimony, exhibits, and briefs to allow the Facilitator to evaluate the sufficiency of Qwest's Performance Assurance Plan.

- 255 (10) On October 22, 2001, the Facilitator for the Multi-state Proceeding issued his Report on Qwest's Performance Assurance Plan. Consistent with our decision in the 12th Supplemental Order, the Facilitator's Report is an initial order of the Commission.
- 256 (11) In preparation for hearings held before the Commission on December 18 and 19, 2001, in Olympia, Washington, Qwest, a number of CLECs, and Public Counsel submitted written comments on the Facilitator's Report, as well as responses to bench requests and questions, to allow the Commission to evaluate the sufficiency of Qwest's Performance Assurance Plan as modified by the Report.
- 257 (12) The QPAP is intended to be a self-executing remedy plan to ensure Qwest's continued compliance with the requirements of section 271 should the FCC grant an application by Qwest to provide in-region, interLATA service in Washington state.
- 258 (13) Qwest intends to incorporate the QPAP into the SGAT as Exhibit K, and to require CLECs with approved interconnection agreements to adopt the QPAP as a part of their agreement.
- 259 (14) Under the QPAP, Qwest must make payments to individual CLECs (Tier 1 payments) or the state (Tier 2 payments) if Qwest fails to meet certain performance standards. The standards are based on performance measurements that were defined by Performance Indicator Definitions (PIDs) developed in the ROC OSS collaborative.
- 260 (15) The Colorado Commission has not approved a final performance assurance plan. A hearing examiner has issued recommendations and proposed a draft plan, the CPAP, for consideration by the full Commission. The parties have asked a Special Master to consider several issues before the full Commission considers the plan as a whole.
- 261 (16) The Staff of the Utah Department of Public Utilities modified the recommendations in the Facilitator's Report and issued its own recommendations to the Utah Commission.
- 262 (17) The record in this proceeding is replete with references to other state performance assurance plans, finalized or in progress.
- 263 (18) Section 12 of the QPAP establishes a revenue cap on total payments of 36 percent of Qwest's 1999 ARMIS Net Revenue, and allows the cap to increase by as much as 8 percent, or decrease by as much as 6 percent, depending upon Qwest's performance.

- 264 (19) The CLECs and Public Counsel do not object to using current ARMIS revenue data, even if that data would result in a total amount at risk that is lower than in prior years.
- 265 (20) Table 2 of Qwest's QPAP incorporates the Facilitator's recommendation that, if Qwest fails to meet a performance standard for an individual CLEC for consecutive months, the payment amount for the measure escalates each month up to six months, and is then capped.
- 266 (21) Sections 8 and 9 of the proposed QPAP contain provisions that limit the potential payments to CLECs for substandard performance to the total number of orders placed by the CLEC during the month for each qualifying product and sub-measure.
- 267 (22) Qwest modified section 7.3 to include the Facilitator's recommendation that Qwest should make Tier 2 payments in the event Qwest fails to meet the performance standard for any Tier 2 performance measure for two consecutive months in any consecutive three month period, during any 12 month rolling period.
- 268 (23) The Facilitator recommended that payments for Tier 2 measures with no Tier 1 counterpart should escalate as provided for in the QPAP.
- 269 (24) Qwest modified section 6 of the QPAP to show proposed payments relating to the provision of collocation.
- 270 (25) In addition to collocation requirements in the QPAP, the SGAT and WAC 480-120-560 establish standards and payments for collocation provisioning in Washington State.
- 271 (26) Section 5.1 of the QPAP contains the critical Z values that are used for statistical testing.
- 272 (27) Section 12 of the QPAP establishes caps on monthly and annual payments to CLECs and the state.
- 273 (28) Qwest's proposed QPAP does not include a carry-forward provision. Qwest has included in section 12.3 of the QPAP the Facilitator's proposal for equalizing monthly payments to CLECs when the annual cap is reached.
- 274 (29) Section 13.8 of the QPAP provides that Qwest is not required to make Tier 2 payments and any other payments, penalties or sanctions for "the same underlying activity or omission" under a Commission order or service quality

rules. Similarly, section 12.1 of the QPAP provides that the annual cap on payments includes all payments made by Qwest for “the same underlying activity or omission . . . under any other contract, order or rule.”

- 275 (30) Section 11.2 of the CPAP provides that “any penalties imposed by the Commission” are not subject to the cap, and section 16.8 of that plan provides a process for Qwest to dispute any payments under state service quality rules that it perceives are duplicate payments under the QPAP.
- 276 (31) The Report rejected the addition of new performance measurements for special access, canceled orders, cooperative testing, address due-date changes, pre-order inquiry time-outs, software release quality, test bed measurement, and missing status notifiers, found that Qwest had already added certain change management measures to the QPAP, and found that diagnostic measures for certain UNEs, i.e., EELs, line sharing, and sub-loops, should be added to the QPAP as soon as practicable.
- 277 (32) Performance standards have not been developed for EELs, sub-loops, and line sharing because commercial experience with them has been too limited to support a benchmark or parity standard. These UNEs are currently designated as “diagnostic UNEs” or TBD (to be decided).
- 278 (33) The Facilitator rejected a request by AT&T to assign higher payment amounts to high-value services.
- 279 (34) Section 16 of the QPAP provides a process for amending the performance measurements in the plan at six-month intervals. The Facilitator recommended three changes to the proposed process, including the SGAT dispute resolution process, a multi-state review process, including funding through a special fund consisting of contributions of Tier 1 and Tier 2 payments, and biennial reviews of the continuing effectiveness of the QPAP.
- 280 (35) Bench Request No. 39 asked Qwest to provide for the basis of underlying language in section 16.1 of the QPAP that limits the reclassification of the payment level for measures during a six-month review to whether the actual volume of data points was lesser or greater than anticipated.
- 281 (36) Section 7.5 of the QPAP provides that Tier 2 payments to the state will be placed in a state fund determined by the Commission or in the state General Fund if the Commission is not authorized to receive such payments, and states the purpose for using the funds.
- 282 (37) Qwest added section 11.3 to the QPAP to include the Facilitator’s recommendation to create a Special Fund comprised of one-third of Tier 2

payments and one-fifth of the escalated portion of Tier 1 payments to support the cost of multi-state six-month reviews, biennial reviews, audits, and QPAP administration.

- 283 (38) Section 13.1 of the QPAP provides that the plan becomes effective only when Qwest receives section 271 authority from the FCC for that state. The Report recommends adopting this section of the QPAP, and requires Qwest to file monthly reports of performance and presumed payment levels between October 2001 and the date the FCC grants section 271 relief.
- 284 (39) Section 16.2 of the QPAP provides that the plan is rescinded immediately if Qwest exits the interLATA market.
- 285 (40) Section 13.6 of the QPAP requires CLECs to elect a remedy for poor performance. If CLECs choose to receive payments under the QPAP, the QPAP provides that those payments are in the form of liquidated damages, and that the remedies are exclusive. The Report requires Qwest to modify portions of section 13.6 to further limit the exceptions, and to limit recovery under non-contractual remedies to any additional amount not recovered through QPAP payments.
- 286 (41) As modified by the Facilitator, QPAP section 13.7 allows Qwest itself to offset any award for similar acts or omissions, and precludes an offset for payments relating to CLEC or third-party damage to property, or personal injury.
- 287 (42) Section 13.3 of the QPAP provides a set of circumstances that would excuse Qwest from making Tier 1 and Tier 2 payments..
- 288 (43) Section 11.2 of the QPAP provides for payments to CLECs to be made by bill credit rather than cash or check.
- 289 (44) Qwest modified its QPAP, as recommended in the Report, to include section 14.4 which allows Qwest to recalculate payments made under the QPAP for up to three preceding years.
- 290 (45) The Report modified the audit process in section 15 of the QPAP, recommending a multi-state process for audits, and proposing an audit approach that would allow for both pre-planned and as-needed testing of Qwest's measurement program. Qwest incorporated the Facilitator's recommendations in section 15.
- 291 (46) Sections 14.1 and 14.2 of the QPAP require Qwest to provide monthly reports to CLECs and the Commission of Qwest's performance for the measurements set forth in the QPAP.

VIII. CONCLUSIONS OF LAW

- 292 Having discussed above in detail all matters material to this decision, and having
stated general findings and conclusions, the Commission now makes the following
summary conclusions of law. Those portions of the preceding detailed discussion
that state conclusions pertaining to the ultimate decisions of the Commission are
incorporated by this reference.
- 293 (1) The Washington Utilities and Transportation Commission has jurisdiction over
the subject matter of this proceeding and the parties to the proceeding.
- 294 (2) The administrative process in the Multi-state Proceeding was not deficient, in
error, or compromised in any way. The Facilitator established a process that
provided an opportunity for the parties to be heard, for evidence to be gathered,
and for issues to be joined.
- 295 (3) The FCC's "zone of reasonableness" test is the most appropriate basis for
determining whether Qwest's proposed plan is sufficient to deter and enforce
backsliding behavior. The Facilitator correctly stated in the Report the five
prongs of the FCC's zone of reasonableness test, but went too far in stating his
own "considerations" for review of Qwest's QPAP and his comments on
increasing Qwest's incentives.
- 296 (4) We reject the Facilitator's statements on pages 5 and 6 of the Report,
beginning with the sentence: "The ultimate decision on the QPAP's
sufficiency, as the FCC addresses the matter, should be one that takes into
account the following considerations:"
- 297 (5) The Commission has authority under state law and the Telecommunications
Act to require Qwest to act if it fails to perform such that it provides service
that is unfair, unreasonable or would stifle competition in the state.
- 298 (6) While procedural fairness requires that the Commission begin with Qwest's
proposed QPAP, it is appropriate for this Commission to consider the
provisions of other state plans to determine whether elements of Qwest's
performance assurance plan are sufficient to deter and enforce backsliding
behavior in Washington state.
- 299 (7) Given the FCC's actions in approving performance assurance plans, and
Qwest's current performance, there is no basis to modify the Facilitator's
recommendations that Qwest's payments to CLECs and the state under the
QPAP should be capped, or that 36 percent of Qwest's ARMIS Net Revenue

should be put at risk for payment to CLECs for failure to meet designated performance standards

- 300 (8) Using the most current ARMIS data provides a provides a meaningful and significant incentive for Qwest by creating a better match between the relative amount Qwest must place at risk and the prospective time period that the QPAP will be in operation.
- 301 (9) The Facilitator's proposal for a flexible revenue cap may unnecessarily restrict the Commission's ability to review the operation of the QPAP. Qwest's original proposal to use a flat 36 percent cap is appropriate to calculate the annual amount of revenue at risk of payment to CLECs.
- 302 (10) Table 2 of the QPAP demonstrates that payments made to CLECs will be very substantial at the sixth month of escalation. The threat of such payments should create sufficient incentive for Qwest to meet the performance standards for measures contained in the plan, and thus, sufficient assurance for CLECs that Qwest will meet the standards.
- 303 (11) Parity of service between CLECs and Qwest's retail customers is key to the advancement of local service competition. Qwest will not have sufficient incentive to minimize any disparity in provisioning services between the retail customers and CLECs unless Qwest removes the duration/severity, or 100 percent, cap from the performance measures in the QPAP calculated as averages or means.
- 304 (12) Neither Qwest's nor the Facilitator's proposals for when to trigger Tier 2 payments creates sufficient incentive for Qwest to perform. Qwest's argument that a time lag is necessary to correct continuing problems is doubtful, given the military style testing in the ongoing OSS test based on the same performance measures.
- 305 (13) The Facilitator's reference to payment escalation for Tier 2 payments is most likely to Table 5 which shows payments for per-measurement performance measures that escalate as performance worsens.
- 306 (14) WorldCom's argument for modifying the critical Z values is not persuasive.
- 307 (15) Payments made to uphold the integrity of the QPAP, such as late payment penalties, should be excluded from the cap.
- 308 (16) The monthly mock QPAP payment reports filed by Qwest shows there is little likelihood that the monthly cap will be reached, and provides no basis for including a carry-forward provision in the QPAP at this time.

- 309 (17) The Commission has independent authority to review Qwest's overall service quality. The Commission will not relinquish its authority over service quality, nor is it required to do so in approving the QPAP.
- 310 (18) We assert our jurisdiction over intrastate special access services, consistent with our decision in paragraph 28 of the *Special Access Order*, in the interest of ensuring that intrastate services are free from discrimination and barriers to competitive entry.
- 311 (19) The record in this proceeding establishes the need for Qwest to report its monthly provisioning and repair intervals for special access circuits.
- 312 (20) The QPAP must have sufficient measures in place that reflect a broad range of carrier-to-carrier performance at the time Qwest enters the long distance market, including measures for EELs, sub-loops, and line sharing.
- 313 (21) An electronic order flow-through measure is important to a CLEC's ability to compete with Qwest.
- 314 (22) Parties should use the ROC process for requesting new PIDs to pursue the development of new PIDs for inclusion in the QPAP.
- 315 (23) Higher payment levels for high-value services create a more appropriate incentive for Qwest to provide nondiscriminatory service.
- 316 (24) The Commission has authority under state and federal law to order Qwest to amend the QPAP during the six-month review process. In addition, the FCC stated in its *Verizon Pennsylvania Order* that it expects state commissions to play a prominent role in modifying and improving the performance metrics in performance assurance plans.
- 317 (25) It would be unreasonable to preclude or limit the Commission's authority to examine issues that may arise in the course of operation of the plan, as neither Qwest, the CLECs, nor the Commission has any experience, nor can they predict, how the plan will work once it is in operation in Washington.
- 318 (26) The scope of the six-month review should focus on fine-tuning the performance metrics in the plan, allowing other plan elements to be re-examined at the biennial review.
- 319 (27) This Commission is responsible for considering any changes to the plan to ensure the effectiveness of the QPAP and to resolve any disputes that may arise from its operation in Washington. We are not prepared to commit

ourselves, at this time, to the specific multi-state review process, or the Special Fund proposal set forth in the Report or Qwest's proposed plan.

- 320 (28) Relying solely on the volume of data points to determine whether payment levels should be adjusted may unduly limit the Commission's scope of review, as there may be other reasons to change payment levels that are not related to the volume of data points.
- 321 (29) The requirement that Qwest provide monthly performance data and projected QPAP payments to the Commission will provide a sufficient incentive for Qwest to perform well prior to filing its application with the FCC and receiving section 271 authority, and negates the need to make the QPAP effective upon state approval, or to require that payments should begin at an escalated level on the effective date.
- 322 (30) CLECs may be without remedy if the QPAP were to automatically terminate once Qwest leaves the long distance market. Section 18.11 of the CPAP provides an appropriate alternative, allowing the plan to expire in six years, but allowing payments to individual CLECs to continue subject to a review of their necessity.
- 323 (31) The recommendations in the Report to modify section 13.6 would severely and inequitably limit the alternative remedies available to CLECs. The language in section 16.6 of the CPAP is clear and explicit about the types of alternative remedies available to CLECs, and will likely avoid needless or protracted litigation about what remedies are available. In addition, the procedural exception in the CPAP is appropriate, given that we do not know how Qwest will perform or behave in the face of CLECs seeking alternative remedies.
- 324 (32) Allowing Qwest to determine whether to offset remedies and the amount of offset is inappropriate, as it may add another level of litigation when the offset could be addressed within a single case, be it before a court or regulatory commission. The language in section 16.7 of the CPAP appropriately addresses the issue.
- 325 (33) Public Counsel's request to modify section 13.3 to include a waiver process is reasonable.
- 326 (34) The concept of parity requires that parity measurements not be subject to force majeure payment exclusions.
- 327 (35) The terms of the SGAT should prevail in any conflict between the QPAP and the SGAT. The QPAP is being incorporated into the SGAT, and must conform to, not trump, the SGAT.

- 328 (36) The Colorado Hearing Examiner's approach to the form of payment provides the appropriate balance among the competing positions of the parties, such that Qwest will make cash equivalent QPAP payments to CLECs except when a non-disputed CLEC payment to Qwest is more than 90 days past due.
- 329 (37) There is no need to include a provision in the QPAP precluding Qwest from recovering QPAP payments in rates, because state and federal case law are sufficient to govern Qwest's behavior and provide this Commission with guidance.
- 330 (38) The QPAP should include a retention period, however, the language in section 14.4 of the QPAP is too vague and detracts from the certainty that this plan is intended to provide.
- 331 (39) Qwest's audit program in the QPAP, as originally proposed, is not sufficient to ensure a high level of confidence in the performance results that Qwest measures.
- 332 (40) Section 15.5 of the QPAP is not clear as to who would conduct an investigation, and more importantly, who would make the determination regarding CLEC responsibility, and only addresses investigation into Tier 2 misses, but not Tier 1 misses.
- 333 (41) It is appropriate for Public Counsel to receive copies of the monthly reports filed with the Commission.

IX. Order

- 334 THE COMMISSION ORDERS That Qwest must alter its proposed Performance Assurance Plan consistent with the following orders, prerequisite to securing a recommendation that its Performance Assurance Plan complies with the FCC's guidelines, and in order to ensure Qwest's continued compliance with the requirements of section 271 should the FCC grant it authority to offer in-region, interLATA service in Washington state:
- 335 (1) Qwest must modify section 12 of the QPAP to incorporate a flat 36 percent revenue cap, and to reflect the use of current ARMIS net revenue data.
- 336 (2) Qwest must modify section 6 of the QPAP to incorporate the Facilitator's recommendation for a six-month cap on Tier 1 escalation payments.

- 337 (3) Qwest must remove the 100 percent cap from the performance measures calculated as averages or means and contained in sections 8 and 9 of the QPAP.
- 338 (4) Qwest must clarify the language in the QPAP regarding the calculation of misses for parity to specifically incorporate the term “parity value” so that there will be no confusion at a later date as to how the calculations are performed.
- 339 (5) Qwest must modify section 7.3 of the QPAP to require Tier 2 payments in any month that Qwest fails to meet the Tier 2 performance standards.
- 340 (6) Qwest must incorporate the Washington state collocation rule into the QPAP, and ensure that the reference in the QPAP to CP-2 and CP-4 business rules is applicable only to matters not addressed in WAC 480-120-560. Qwest must also ensure that section 6.3 of the QPAP and section 8.4.1.10 of the SGAT are consistent in applying the Washington rule.
- 341 (7) Qwest must revise section 12 to reflect that payments made to uphold the integrity of the QPAP, such as late payment penalties, should be excluded from the cap.
- 342 (8) Qwest must modify sections 13.8 and 12.1 of the QPAP to be consistent with the sections 11.2 and 16.8 of the CPAP, to allow the Commission to assess penalties where necessary to address service quality issues, but allow Qwest to dispute any payments it believes are duplicate.
- 343 (9) Qwest must begin filing monthly special access reports in Washington in the same month that Qwest begins special access reporting to the Colorado commission.
- 344 (10) Qwest must provide payment opportunities in the QPAP for the set of performance measures applicable to EELs, including OP-3, OP-4, OP-5, OP-6, OP-15, MR-5, MR-6, MR-7 and MR-8, as the standards are determined and must not wait until a six-month review to do so. Qwest must also add the sub-loop and line sharing standards to the QPAP as the ROC collaborative establishes them.
- 345 (11) Qwest must add an electronic flow-through measure to the QPAP in the Low Tier 1 and High Tier 2 payment categories.
- 346 (12) Qwest must amend the QPAP to include the payment table for high-value services proposed in Exhibit 1205 at page 12.

- 347 (13) Qwest must modify section 16.1 of the QPAP to strike “Changes shall not be made without Qwest’s agreement,” and add the following: “After the Commission considers such changes through the six-month process, it shall determine what set of changes should be embodied in an amended SGAT that Qwest will file to effectuate these changes.”
- 348 (14) Qwest must modify section 16.1 to include the following language: “Parties or the Commission may suggest more fundamental changes to the plan; but, unless the suggestion is highly exigent, the suggestion shall either be declined or deferred until the biennial review.”
- 349 (15) Qwest must revise section 16.1 and 16.2 of the QPAP to refer only to this Commission. Qwest must include new language in that section providing that nothing in the QPAP prohibits the Commission from joining a multi-state effort to conduct QPAP reviews. Qwest must delete the language in section 16.1 concerning the use of an arbitrator to resolve disputes, as well as language referring to the volume of data points.
- 350 (16) We defer our decision to participate in any multi-state six-month review, biennial review, or audit process until a later date. We will determine, and advise the parties of our determination of, the process for the six-month review, biennial review, and audit process no later than 60 days after FCC approval of Qwest’s application for section 271 authority.
- 351 (17) Similarly, we defer any decision whether to contribute a portion of Tier 2 funds to a Special Fund, and whether to require Qwest to contribute any funds, including a portion of the escalated Tier 1 funds, to the Special Fund until we determine our participation in a multi-state process. Until we determine whether and how we will participate in any multi-state process, Qwest must modify section 7.5 of the QPAP to reflect that Qwest must maintain an identified escrow account and deposit any payments of Tier 2 funds for Washington state into that account.
- 352 (18) Qwest must modify the QPAP to strike the language in section 11.3, and include language stating that nothing in the QPAP prohibits the Commission from directing the establishment of an identified escrow account or other fund, and or contributing a portion of Tier 2 funds to the account for the purpose of funding a multi-state process to review and audit the QPAP.
- 353 (19) We adopt the Facilitator’s recommendations that the QPAP should become effective upon the date the FCC grants Qwest section 271 relief for the state of Washington, and that payment levels should start at the one month level when the QPAP becomes effective.

- 354 (20) Qwest must modify section 16.2 of the QPAP to mirror section 18.11 of the CPAP, allowing CLEC payments to continue, subject to review, upon Qwest exiting the long-distance market.
- 355 (21) Qwest must strike the last sentence in QPAP section 13.6, as shown in Exhibit 1217. Qwest must add the election of remedies language proposed by AT&T and WorldCom, and include the portion of section 16.6 of the CPAP, as described above in paragraph 195 of this Order.
- 356 (22) Qwest must modify QPAP section 13.7 to incorporate the language in section 16.7 of the CPAP.
- 357 (23) Qwest must modify section 13.3 of the QPAP to provide (1) that the Commission is the entity that determines whether a request for waiver of payment obligations should be granted, and (2) that Qwest must file any waiver request with the Commission no later than the last business day of the month after the month in which payments are being disputed. Qwest must also delete the reference to “parity” in the last sentence of section 13.3 of the QPAP.
- 358 (24) Qwest must amend section 11.2 of the QPAP to adopt the language from section 12.2 of the CPAP which states: “All payments shall be in cash. Qwest shall be able to offset cash payments to CLEC with a bill credit applied against any non-disputed charges that are more than 90 days past due.”
- 359 (25) Qwest must strike the first three sentences in section 14.4 of the QPAP, and replace them with the following: “Qwest shall retain for a three year period (measured from the monthly payment due date) sufficient records to demonstrate fully the basis of its calculations for making payments under this PAP.”
- 360 (26) Qwest must modify section 15 of the QPAP as set forth in paragraphs 241 and 242 of this Order.
- 361 (27) Qwest must modify section 14.2 of the QPAP as follows: “Qwest will also provide to the Commission, *and relevant parties upon request*, a monthly report of aggregate CLEC performance results.”
- 362 (28) The Commission retains jurisdiction to implement the terms of this Order.

DATED at Olympia, Washington and effective this day of April, 2002.

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

MARILYN SHOWALTER, Chairwoman

RICHARD HEMSTAD, Commissioner

PATRICK J. OSHIE, Commissioner

NOTICE TO PARTIES: This is an Interim Order, and, as such, is not subject to the post-Order review processes of the Administrative Procedure Act. The Commission will, however, entertain all requests for clarification or for revision of any substantial error of fact and law. Because the opportunity is afforded at this juncture, parties will be foreclosed from raising such matters on the issues resolved herein without a showing of good cause for failure to raise the matter at this time