BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

In the Matter of the Investigation into U S WEST Communications, Inc.'s Compliance with § 271 of the Telecommunications Act of 1996	Docket No. UT-003022
In the Matter of U S WEST Communications, Inc.'s Statement of Generally Available Terms Pursuant to Section 252(f) of the Telecommunications Act of 1996	Docket No. UT-003040 QWEST CORPORATION'S PETITION FOR RECONSIDERATION

Qwest Corporation ("Qwest") through its undersigned counsel hereby respectfully petitions for reconsideration of certain aspects of the Commission's Thirtieth Supplemental Order in this docket, an Interim Order addressing Qwest's Performance Assurance Plan (the "QPAP").[1]

Introduction

In its petition, Qwest identifies below those aspects of the Decision that it believes to be inconsistent with the legal standards governing FCC review of the QPAP, or with the record evidence before the Multistate Facilitator, whose report serves as an initial order of the Commission in this case.[2] Qwest asks the Commission to reconsider those aspects of its Decision.

As to these limited provisions, Qwest respectfully submits that the Decision begins with an incorrect premise. As the Commission recognizes, this proceeding "is a

[1] Thirtieth Supplemental Order: Commission Order Addressing Qwest's Performance Assurance Plan, Docket Nos. UT-003022, 003040 (April 5, 2002) ("Decision" or "Commission Decision").

[2] *See* Commission Decision ¶¶ 17, 33.

creature of the Telecommunications Act, not state law."[3] And the Commission further acknowledges that its recommendations to the FCC here, under Section 271 of that federal statute, must be governed by the FCC's five-factor standard for whether the plan that Qwest has proposed lies within a "zone of reasonableness."[4] Yet the Commission then proceeds to accept the invitations of AT&T and others to ignore Qwest's two-year effort to model the QPAP upon a framework *already repeatedly found by the FCC to satisfy that federal standard*. Indeed, it appears to dismiss Qwest's further efforts in the ROC PEPP collaborative and multistate workshop to make substantial *improvements* on what the FCC has previously required – at the request of numerous CLECs and state staffs.[5]

Qwest initially designed the QPAP by reference to a similar SBC plan, found by the FCC to satisfy its zone of reasonableness standard in *SBC Texas.*[6] The Commission suggests that the Facilitator "went too far" in applying his own "considerations" to reject

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3 Commission Decision ¶ 34.

4 *Id.*

5 At the ROC PEPP collaborative, for example, Qwest agreed to changes to the statistical methodology crucial to the parity measurements on which the plan is based, the plan's de-escalation of payments following months of conformance, its payment caps on individual performance measurements, and its classification of payments as "medium" or "high." Report on Qwest's Performance Assurance Plan, *In the Matter of the Investigation into US WEST Communications Inc.'s Compliance with Section 271 of the Telecommunications Act of 1996* (Oct. 22, 2001) (Multistate Facilitator's Report") at 1. Following the Facilitator's recommendations, Qwest supplemented these changes. It agreed to provide additional restrictions on force majeure defenses, acceleration of the trigger for Tier 2 payments to the state, increased payment opportunities for small order volumes and minimum payments for small CLECs, and strengthened procedures for auditing the accuracy of its performance data. These changes are reflected in Qwest's revised QPAP, filed with the Commission in November 2001.

6 Memorandum Opinion and Order, *Application by SBC Communications Inc., Southwestern Bell Telephone Company, and Southwestern Bell Communications Services, Inc. d/b/a Southwestern Bell Long Distance Pursuant to Section 271 of the Telecommunications Act of 1996 to Provide In-Region, InterLATA Services in Texas*, 15 FCC Rcd 18354 ¶ 423 (2000) ("*SBC Texas Order*").

efforts to increase potential CLEC payments under the QPAP.[7] In fact, virtually all of the principal features of the QPAP endorsed by the Facilitator and rejected in the Decision at the behest of AT&T and other CLECs are equivalent to or *more generous* than provisions repeatedly accepted by the FCC in *SBC Texas* and its ensuing progeny: the "100% cap" on per occurrence measurements, the first or second month trigger imposed by the Facilitator for Tier 2 payments, the provisions against double recovery by CLECs (QPAP § 13.7) or the Commission (QPAP § 13.8), the exclusion of special access circuits used by WorldCom *not* for the local competition purposes of section 251 and 271, and the limitations on rewriting the carefully negotiated provisions of the QPAP at the six-month review.[8]

As to certain of these important features of the QPAP (though not others), the Commission Decision does make reference to interim decisions in Colorado and elsewhere in support of its actions. These references, as noted below, often ignore the different overall structure, record, and negotiating history of those other state proposals. And the Decision never explains why these provisions repeatedly accepted by the FCC when proposed by other BOCs in other states should now be rejected by the FCC for Washington. Indeed, the Commission's Decision does not explain why the FCC's previous determinations that similar (and *less onerous*) plans are sufficient should not control the outcome here. This question cannot be answered by references to state law

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7 Commission Decision ¶ 35.

8 *See* Tex. PAP §§ 6.2 (Tier 1 offset), 6.3 (Tier 2 offset), 6.4 (six-month review), 9.2 (three-month Tier 2 trigger), 11.1.2.1 (100% cap); Okla. PAP §§ 6.2 (Tier 1 offset), 6.3 Tier 2 offset), 6.4 (six-month review), 9.2 (three-month Tier 2 trigger), 11.1.2.1 (100% cap); Ark. PAP §§ 6.2 (Tier 1 offset), 6.3 (Tier 2 offset), 6.4 (six-month review), 9.2 (three-month Tier 2 trigger), 11.1.2.1 (100% cap); Mo. PAP §§ 6.2 (Tier 1 offset), 6.3 (Tier 2 offset), 6.4 (six-month review), 9.2 (three-month Tier 2 trigger), 11.1.2.1 (100% cap); Kan. PAP §§ 6.2 (Tier 1 offset), 6.3 (Tier 2 offset), 6.4 (six-month review), 9.2 (three-month Tier 2 trigger) 11.1.2.1 (50% rather than 100% cap).

authority "to require Qwest to act if its performance results in service that is unfair, unreasonable or would stifle competition in the state."[9] That undoubted authority is not at issue here. This docket involves the Commission's recommendation to the FCC with respect to one aspect of Qwest's impending federal application for interLATA authority under federal law. And the FCC has made clear that it has preempted any state commission efforts to delay or condition interLATA authority (even as to intrastate service) with "requirements inconsistent with sections 271 and 272 and the [FCC's] rules under those provisions."[10]

Equally important, the Commission's determinations on the issues addressed below fail to accord any regard to the two years of compromise and negotiation already engaged in by Qwest during the ROC PEPP collaborative and multistate workshop. Those processes have led Qwest to accept a number of provisions in the QPAP that pose the risk of substantial financial liability, solely in order to move this process toward a fair conclusion. As the Facilitator recognized, "where agreement was reached through compromise, we nee[d] to be careful not to support an improvement in what [a] party got

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[9] Commission Decision ¶ 37. Nor is it answered by the Commission's citation to the FCC's Verizon Pennsylvania order. *See id.* ¶ 8 (quoting Memorandum Opinion and Order, *Application of Verizon Pennsylvania Inc., Verizon Long Distance, Verizon Enterprise Solutions, Verizon Global Networks Inc., and Verizon Select Services Inc. for Authorization to Provide In-Region, InterLATA Services in Pennsylvania*, 16 FCC Rcd 17409 ¶ 128 (2001)). The statement in that case is simply an acknowledgement that plans are submitted in different states and by different BOCs, and thus that they may vary from state to state and BOC to BOC. It is not an effort to disregard the Commission's own prior approval of the provisions in prior plans under the zone of reasonableness standard.

[10] *See* First Report and Order and Further Notice of Proposed Rulemaking, *Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as Amended,* 11 FCC Rcd 21905 ¶ 47 (1996) ("*Non-Accounting Safeguards Order*").

without considering what had been given in return, . . . lest we risk disrupting important balances."[11]

As the Multistate Facilitator also recognized, and as the FCC's decisions accepting many of the provisions contained in the QPAP demonstrate, this concern should not be overridden simply by a default rule that "more" is always "better" in the way of incentives to Qwest, or payments to CLECs.[12] Indeed, contrary to the suggestion in the Decision, the Facilitator's consistent concerns about creating additional financial exposure – in the absence of any demonstration in the record of this proceeding of its actual effect on Qwest's behavior – are fully consistent with those of the FCC. Such exposure would threaten to convert the QPAP into a CLEC subsidy scheme, and in doing so would be at odds with the fundamental goal of the 1996 Act, which the FCC has emphasized is to promote *facilities-based* competition in local exchange markets.[13] The Commission's review of the QPAP should be concerned primarily with the sufficiency of the plan as a whole; the recommended changes here simply do not undermine Qwest's showing that, like those plans already approved by the FCC, the QPAP is sufficient.

Argument

Qwest addresses below the specific provisions of the Commission Decision as to which Qwest seeks reconsideration, in the order addressed therein.

1. Duration/Severity Caps

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[11] Multistate Facilitator's Report at 2.

[12] *Id.* at 15.

[13] *See* Third Report and Order and Fourth Further Notice of Proposed Rulemaking, *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996,* 15 FCC Rcd 3696 ¶ 110 (1999): "consumers benefit when carriers invest in their own facilities because such carriers can exercise greater control over their networks, thereby promoting the availability of new products that differentiate their services in terms of price and quality."

The QPAP's 100% cap provision sets forth the method for calculating payments for misses of those performance measures that involve average intervals for multiple orders by a CLEC. This provision is one that was added to the Texas plan at the first six-month review and that has been included in each of the subsequent SBC plans approved by the FCC.[14] The Commission nevertheless directs Qwest to remove the 100% cap on interval measures "so that Qwest will have incentive to minimize any disparity in provisioning services between itself and CLECs."[15] The Commission apparently believes that elimination of the 100% cap is necessary so that QPAP payments take into account the severity of misses, but Qwest believes that the 100% cap already takes severity into account.

Among the five states that have issued preliminary staff decisions or final Commission decisions on the QPAP – Colorado, Montana, Wyoming, Arizona, and Idaho – not a single one has disagreed with the 100% cap.[16] Nor did the Multistate Facilitator, who examined this issue in some detail. As the Commission recognizes, the Multistate Facilitator concluded that, in the absence of any more acceptable CLEC counterproposal, the 100% cap represents a reasonable "arithmetical compromise" between the need to conform to the plan's basic structure based on actual order volumes,

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[14] *See* section 11.1.2.1 of the Texas, Oklahoma, Arkansas, and Missouri PAPs. The Kansas PAP has an even lower cap of 50%.

[15] Commission Decision ¶ 78.

[16] *See, e.g.*, Idaho Commission Decision on Qwest's Performance Assurance Plan, *In the Matter of US WEST Communications, Inc.'s Motion for an Alternative Procedure to Manage its Section 271 Application*, No. USW-T-00-3, at 8-9 (Mar. 7, 2002); Montana Commission Preliminary Report on Qwest's Performance Assurance Plan and Request for Comments on Findings, *In the Matter of the Investigation into Qwest Corporation's Compliance with Section 271 of the Telecommunications Act of 1996*, Docket No. D2000.5.70, at 37-38 (Feb. 4, 2002).

and the goal (referred to by the Commission here) of increasing payments for more severe misses.[17]

The Commission Decision addresses neither the reasons for departing from these FCC views nor the basis for rejecting the Facilitator's approach, which *does* create real incentives to minimize the severity of Qwest's misses, while dealing as well with the very real problem of otherwise making payments for more orders than actually exist. The following two examples show how the 100% cap addresses severity by increasing payments for more severe misses. As these examples show, wide variations in intervals (*i.e.,* severe misses) serve by reason of the averaging process dramatically to affect Qwest's per order payment obligations.

First, assume that Qwest's average retail installation interval parity result[18] is 3 days, and that a CLEC has 10 orders, for which its average interval is 4.5 days. Then further assume that these 10 orders include two "misses," one severe (20 days) and one not (4 days), with the remaining orders meeting the retail standard (3 in 2 days and 5 in 3 days). Here, under the formula in Section 8.2.1.2, the payment calculation is as follows:

$$\frac{\text{4.5 day CLEC average – 3 day Qwest average parity result}}{\text{3 day Qwest average}} = 50\%$$

$$50\% * 10 \text{ orders} * 800 = \$4{,}000$$

Because only two CLEC orders (the ones with 20-day and 4-day intervals) were above the average Qwest interval parity result, Qwest effectively paid an average of $2,000 per CLEC order ($4,000 / 2 orders). A payment of $2,000 per order is certainly a premium

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17 Multistate Facilitator's Report at 69.

18 The parity result is the interval for Qwest's retail customers, after statistical adjustments for sample size and standard deviation.

over the standard $800 per occurrence payment. That higher payment number is directly attributable to the severity of the 20-day miss and the fact that the formula requires multiplication by the total number of orders, not simply the two missed ones.

Indeed, if Qwest missed the interval by an even greater amount on any of these orders, the payments would continue to escalate, up to the 100% cap. For example, assume that the 20-day interval order used above were increased to a 26-day interval, and that the 4-day interval order were increased to a 13-day interval. The total days interval would increase by 15 days, for a new total of 60 days. This, in turn, would result in a CLEC average interval of 6 days (60 days / 10 orders). The new payment calculation would be as follows:

$$\frac{\text{6 day CLEC average} - \text{3 day Qwest average parity result}}{\text{3 day Qwest average}} = 100\%$$

$$100\% * 10 \text{ orders} * 800 = \$8{,}000$$

Once again, because only two CLEC orders (the ones with 26-day and 13-day intervals) were above the average Qwest interval, Qwest would have paid an average of $4,000 per CLEC order ($8,000 / 2 orders). Thus, the additional 6-day delay on one order and the additional 9-day delay for the other would result in significant payment escalation: $2,000 *more* per order.

These examples show that there *is* sufficient severity built into a payment structure that is capped at 100%. Additionally, there is a very real possibility that some of these orders also would have caused payments to be generated for OP-3, Missed Commitments, further adding to the total payment liability for each order. In the absence of any demonstration to the contrary, there is no basis for departing from the clear

recognition by the FCC and all other Commissions in Qwest's region that have addressed the matter that the 100% cap satisfies the governing FCC incentive criterion of its zone of reasonableness standard, in a way that avoids paying for orders that do not actually exist.

2. Tier 2 Payments

The Commission directs Qwest to "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."[19] This modification has not been required by the FCC. Indeed, the FCC has approved three-month triggers for Tier 2 payments in the Texas, Oklahoma, Kansas, Arkansas, and Missouri performance plans.[20] And notwithstanding such approval, the Multistate Facilitator recommended (and Qwest has agreed) that its Tier 2 trigger should be shortened to one or two months (after two misses in three consecutive months during the prior 12 months), depending on whether the Tier 2 measurements have a Tier 1 counterpart in Attachment 1 to the QPAP. Such triggers make sense in light of the basic differences between Tier 1 and Tier 2 payments. Tier 1 payments are intended in the first instance to compensate CLECs for nonconforming service. Because of the compensatory purpose, it is appropriate for Tier 1 payments to accrue immediately if Qwest's performance is below standard. Tier 2 payments, by contrast, are designed purely to provide an additional incentive to Qwest and have payment levels at least three times higher than Tier 1 base payment levels. As such it is appropriate that the payments are triggered only to incent Qwest to solve the problem once it has had an opportunity to do so.

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[19] Commission Decision ¶ 339.

[20] *See* Tex. PAP § 9.2; Okla. PAP § 9.2; Kan. PAP § 9.2; Ark. PAP § 9.2; Mo. PAP § 9.2;

It is only fair to provide Qwest with some opportunity to review and address its performance results before being subject to Tier 2 payments. Performance results are not known until almost 30 days after the end of the month to which the data relates.[21] Given this lag time, the one or two month trigger recommended by the Facilitator (which itself is a change from the three-month trigger previously and repeatedly approved by the FCC) lies well within the FCC's zone of reasonableness. If Qwest misses a performance measurement, it may not be aware of that fact until the end of the next month. Thus, a two consecutive month miss is a strong possibility before Qwest ever has a reasonable opportunity to take steps to fix the problem. Indeed, if correcting the problem requires adding new personnel, Qwest may not be able to meet performance standards until it has hired and trained additional employees, creating the likelihood of additional consecutive months of missed performance standards.

Because the object of Tier 2 payments is incentive rather than punishment, there is no basis in the record or prior FCC decisions for rejecting the Facilitator's strengthened Tier 2 triggers. Nevertheless, Qwest is willing to include the following provision from Qwest's stipulation with the Utah Advocacy Staff that would allow the triggers to change for specific areas of nonconforming performance, based on the level of overall performance:

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[21] The Commission suggests that it is unlikely that there would be a lag in identifying and solving problems, noting that because "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.'" Commission Decision ¶ 86. But the failure to achieve the performance standards might well result from any number of factors unrelated to Qwest's OSS. For example, Qwest has little control over the MR performance metrics that measure CLEC-submitted trouble reports. In fact, it should be noted that a significant percentage of such trouble reports result in "no trouble found" or "test okay," yet the metrics still require their inclusion in the payment calculations. Moreover, this provision will apply in the future through the life of the plan. New or changed measures that have not undergone the rigors of OSS testing will also be affected by this provision.

9.1.3 Notwithstanding the Tier 2 payment provision in section 9.1.2, if Qwest's monthly conforming measurement payment percentage (as measured by the percentage of measurement payment opportunities where the plan did not require Qwest to make a payment to CLECs to the total payment opportunities) falls below 85% for any 5 of 12 consecutive months, it will result in the removal of the Tier 2 "2 out of 3 consecutive month" provision for Tier 2 performance metrics, discussed in section 9.1.2, such that payments for Tier 2 measurements without a Tier 1 counterpart would be made with respect to the first month of nonconforming performance and payments for Tier 2 performance measurements with a Tier 1 counterpart would be made with respect to the second consecutive month of nonconforming performance. All other provisions in section 9.1.2 shall apply. This modification shall be limited to those performance measurements where the percentage of nonconforming sub-measures was below 85% during the same 5 months which invoked this provision. If Qwest's monthly conforming measurement payment percentage is above 90% for any 9 consecutive months following modifications required by this section, the plan provisions shall revert to their state prior to such modifications.

3. Collocation Payments

The Commission directs that Qwest "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."[22] According to the Commission, "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."[23] But as Qwest explained in its response to Bench Request #041, the provisions of interconnection agreements are incorporated in CP-2 and CP-4.[24] Since the collocation intervals in the Washington SGAT are consistent with those in WAC 480-120-560, they are available to all CLECs for inclusion in their interconnection agreements.

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22 Commission Decision ¶ 340.

23 *Id.* ¶ 93.

24 *See* CP-2 (providing that measure also applies to "intervals established in interconnection agreements.").

Consequently, by direct references to the provisions in interconnection agreements, CP-2 and CP-4 recognize WAC 480-120-560, because CLECs have the right to opt into the SGAT collocation provisions, which reflect the state rule. Accordingly, no additional changes are necessary to address the Commission's concerns.

4. Special Access Circuits

The Commission instructs Qwest to begin filing monthly special access reports for Washington at the same time that it begins filing such reports in Colorado.[25] As Qwest stated in its Rebuttal to Comments Filed on the Facilitator's QPAP Report, Qwest asserts that state commissions lack jurisdiction to address performance issues relating to special access circuits that are purchased from the interstate tariff.[26] While the Colorado Commission disagreed, Qwest has also explained that its systems currently are incapable of distinguishing between orders purchased by a carrier for provisioning local service and orders for other uses of special access services. Nor can Qwest distinguish between any of those carriers and its own retail customers who purchase special access.[27] The

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[25] *See* Commission Decision ¶ 343.

[26] *See* Qwest Corporation's Rebuttal to Comments Filed on the Facilitator's QPAP Report, *In the Matter of the Investigation into US WEST Communications Inc.'s Compliance with § 271 of the Telecommunications Act of 1996*, Docket Nos. UT-003022, 003040 (Dec. 5, 2001) ("Rebuttal Comments") at 23-28. As Qwest stated in its Rebuttal Comments, the FCC has issued a Notice of Proposed Rulemaking to address whether it should adopt federal performance measurements for ILEC special access provisioning. *See* Rebuttal Comments at 27-28; Notice of Proposed Rulemaking, *Performance Measurements and Standards for Interstate Special Access Services*, 16 FCC Rcd 20896 ¶ 1 (2001). This FCC proceeding specifically incorporates Qwest's pending petition for the FCC to preempt Washington regulation of special access. *See id.* ¶ 3. Particularly in light of the substantial legal and policy issues surrounding inclusion of special access in the QPAP, and the FCC's consideration of whether to preempt the Washington proceeding addressing this issue, Qwest believes the Commission should allow the FCC to address this issue rather than including special access in the QPAP.

[27] In fact, the Colorado Special Master recently recognized that because of this lack of information, Qwest might not be able to discriminate between its customers even if it wanted to do so. *See* Supplemental Report and Recommendation of the Special Master to the Public Utilities Commission of the State of Colorado, *In the Matter of the Investigation into Alternative Approaches for a Qwest Corporation Performance Assurance Plan in Colorado*, Docket No. 01I-041T, at 15 (Feb. 15, 2002).

Commission recognizes "that Qwest is not currently able to provide [monthly special access] reports."[28]

Notwithstanding the multitude of practical problems, the Colorado Commission insisted that Qwest measure CLEC-identified orders for special access used in lieu of UNEs. Qwest set forth many objections to the special access measures proposed in Colorado including, but not limited to, the lack of any substantiated need, the inability of the CLECs to support their use of the circuits for local traffic, and the inability of Qwest to measure maintenance and repair measurements in the manner envisioned by the Commission. The measurements sought by Colorado are fraught with flaws and inadequacies, and the time and effort required to develop the ability to produce additional measurements is of dubious value given the limited usefulness of the measures.

Without prejudice to its position on these issues, Qwest, however, as a means of resolving PAP issues, would be willing to provide monthly special access reports for Washington upon a reasonable implementation schedule, so long as the measurements are not included in the PIDs or the PAP, as is the case in Colorado.[29]

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28 Commission Decision ¶ 119.

29 The Colorado Special Master recognized that Qwest does not currently have the capability of measuring its special access provisioning and he observed that "there are still a number of implementation details to be worked out" before Qwest can begin measuring special access. Supplemental Report and Recommendation of the Special Master to the Public Utilities Commission of the State of Colorado, *In the Matter of the Investigation into Alternative Approaches for a Qwest Corporation Performance Assurance Plan in Colorado*, Docket No. 01I-041T at 17 (Feb. 15, 2002). Nonetheless, the Colorado Hearing Commissioner rejected the Special Master's recommendations to develop a "fully detailed implementation plan." Instead, the Hearing Commissioner ordered Qwest to begin such measurements within 60 days. *See* Decision on Remand and Other Issues Pertaining to the Colorado Performance Assurance Plan, *In the Matter of the Investigation into Alternative Approaches for a Qwest Corporation Performance Assurance Plan in Colorado*, Docket No. 01I-041T, at 26 (Mar. 27, 2002).

Although the Hearing Commissioner stated that "the record contains sufficient information" to support his decision, *id.* at 30, the only evidence in the Colorado record on this issue – both from Qwest and from WorldCom – demonstrated that impediments to implementation of these measures remain. *See* Affidavit of Michael G. Williams, Attachment A to Qwest Corporation's Reply to Responses Regarding

5. Adding New Performance Measures

The Commission concludes that an electronic flow-through measure (PO-2b) should be included in the QPAP because "such a measure is important to a CLEC's ability to compete with Qwest."[30] Qwest believes that PO-2b should not be considered for inclusion in the QPAP until the six month review. This issue was not raised in the Multistate proceeding; indeed, as the Commission noted, it was not raised until the Washington hearing.[31] As the Commission Chairwoman recognized, "somewhere along the line you've got to cut things off."[32]

Moreover, because of the uncertainty regarding flow-through in the existing record, it is far from clear that its inclusion is appropriate at this time. This measurement is affected by CLEC behavior because a large part of flow-through depends on accurate order submission. Qwest, and in fact the whole industry, is still evaluating how to make this a more effective measurement. The FCC has stated that it does not consider flow-through to be "a 'conclusive measure of nondiscriminatory access to ordering functions,' but as one indicium among many of the performance" of Qwest's OSS.[33] The FCC also recognized that CLECs can impact heavily the flow-through rates that can be achieved:

Issues Remanded to Special Master, *In the Matter of the Investigation into Alternative Approaches for a Qwest Corporation Performance Assurance Plan in Colorado*, Docket No. 01I-041T (Jan. 29, 2002); Affidavit of Marilyn Haroutunian ¶ 3, Attachment A to Response of WorldCom, Inc., to Qwest's Statement of Objections, *In the Matter of the Investigation into Alternative Approaches for a Qwest Corporation Performance Assurance Plan in Colorado*, Docket No. 01I-041T (Jan. 25, 2002) (acknowledging that making the necessary changes could "take a year or longer . . . .").

[30] Commission Decision ¶ 129.

[31] *Id*. ¶ 128.

[32] *Tr.* 6193.

[33] Memorandum Opinion and Order, *Application of Verizon New England Inc., Bell Atlantic Communications, Inc. (d/b/a Verizon Long Distance), NYNEX Long Distance Company (d/b/a Verizon Enterprise Solutions) And Verizon Global Networks Inc., For Authorization to Provide In-Region, InterLATA Services in Massachusetts*, 16 FCC Rcd 8988 ¶ 77 (2001) (internal citation omitted).

efficient CLECs can achieve high flow-through rates, while other less-efficient CLECs have lower flow-through rates.[34] Thus, the FCC has focused less on actual flow-through rates than on whether the BOC's OSS are capable of flowing orders through.[35] As long as there are aspects of this measurement that are beyond Qwest's control, Qwest does not believe it is appropriate at this time to include it in the QPAP and be subject to self-executing payments for it.

6. The Six-Month Review Process

The Commission recommends that Qwest amend section 16.1 by deleting "Changes shall not be made without Qwest's agreement" and by adding "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."[36] The Commission also directs Qwest to amend section 16 to allow parties to suggest fundamental changes to the plan during the six-month review and to eliminate the language in section 16.1 and 16.2 obligating the Commission to participate in a multistate review process.[37] The issue of what Qwest must agree to in terms of future changes is obviously the most critical of these.

Qwest does not oppose allowing the Commission to conduct its own six-month review. However, it is extremely problematic for the Commission to expand the scope of

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[34] *See id.* ¶¶ 78 and 80.

[35] *See id.*

[36] Commission Decision ¶ 347. Many of the changes here were based on CLEC comments regarding the Colorado proceeding. However, the Colorado plan has been further revised so that it is similar to the proposed language below.

[37] *Id.* ¶¶ 348-49.

the six-month review and require language in which Qwest is asked to agree in advance to incorporate changes made at the six-month review. Section 16.1, including the provision limiting the scope of the six-month reviews, is based on the Texas plan, which was approved by the FCC. Section 6.4 of the Texas plan similarly requires "mutual agreement" for any changes to "this remedy plan." As the Multistate Facilitator has recognized, Qwest will face substantial financial risk under the terms of the QPAP, and Qwest is entitled to a minimum level of certainty and finality regarding the extent of its obligations.[38] Giving the Commission the unlimited authority to change every facet of the QPAP in the future would remove any sense of certainty from the plan. It would also render meaningless all of the workshops that have been devoted to developing the QPAP terms.

Indeed, these issues and Qwest's objections to the proposals, were the subject of remand to Special Master Phil Weiser in Colorado and negotiations with the Utah Advocacy Staff. Both the Remand and the Stipulation resulted in suggested modifications to the proposed PAPs in those states.

As Qwest has argued before this Commission and others, Qwest cannot cede to the Commission future unlimited authority that the Commission otherwise would not have. The Commission suggests that its power to revise the QPAP is encompassed within its "broad authority" to regulate telecommunications companies.[39] As noted earlier, however, this Commission has recognized that this proceeding "is a creature of

[38] *See* Multistate Facilitator's Report at 10.

[39] Commission Decision ¶ 143.

the Telecommunications Act, not state law,"[40] and the Commission's authority is circumscribed by section 271 and governing FCC standards. The Commission asserts that it has authority under section 261(c) of the Act, which allows a state to impose requirements that are "necessary to further competition."[41] But that authority is limited: any state requirements may not be "inconsistent" with federal law. The FCC has made it clear that it will preempt state commission attempts to condition interLATA authority on "requirements inconsistent with sections 271 and 272 and the [FCC's] rules under those provisions."[42] Any proposal to obtain unlimited discretion to impose additional obligations on Qwest as a condition of QPAP approval is inconsistent with the FCC's well-established zone of reasonableness test, as applied in Texas and subsequent SBC applications. The Commission also suggests that the QPAP is analogous to an SGAT and that Qwest has not disputed the Commission's authority to order changes to the SGAT.[43] However, the Commission's authority to order changes to the SGAT is inextricably intertwined with its authority under sections 251 and 252 to review, arbitrate, and approve interconnection agreements. Qwest's proposal of the QPAP to accompany its section 271 application is not part of the section 252 arbitration process. Finally, the Commission claims that the FCC, and even Qwest, have recognized that state commissions will play a prominent role in "modifying and improving the performance metrics in performance assurance plans."[44] But Qwest and the FCC's Pennsylvania

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40 Commission Decision ¶ 34.

41 *Id.* ¶ 143.

42 *Non-Accounting Safeguards Order*, ¶ 47.

43 *See* Commission Decision ¶ 144.

44 *Id.* ¶ 145.

Order recognize only that state commissions will play an important role in administering such plans; neither suggests that states may retain unlimited authority to rewrite such plans in the course of administering them.

Qwest has agreed to provisions that specifically allow the plan to evolve in the future. And in order to resolve any lingering concerns over the breadth of changes, Qwest is willing to adopt the same approach to the six-month review that it has recently developed jointly with the Utah Advocacy Staff. The Utah proposal is consistent with the Commission's "focus on fine-tuning the performance metrics" and its recognition that such fine-tuning should not be a forum for relitigating essential terms, absent "highly exigent" circumstances.[45] That proposal would limit the six-month review to the subject of the performance measurements, but the Commission would have the authority to resolve any disputes concerning the addition, deletion, or modification of the measurements. In order to provide Qwest with some financial certainty with regard to changes made at the six-month review, a payment "collar" would limit Qwest's liability resulting from any changes arising out of the review to 10% of the total monthly payments that Qwest would have made in lieu of such changes. Under this provision, at the six-month review, the Commission could modify the terms of the agreements between CLECs and Qwest so that the PAPs would be consistent, subject of course to reversal or modification upon judicial review. The language Qwest proposes to incorporate into its Washington QPAP is provided below. It is identical to language contained in the Utah stipulation with the addition of the italicized section. Qwest is willing to add this language in order to address the Washington Commission's concern

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[45] *Id.* ¶ 147.

over the criteria for making changes to performance measures. Again, Qwest is trying to make reasonable changes from FCC-approved terms in order to resolve PAP issues.

> 16.1 Every six (6) months, beginning six months after the effective date of Section 271 approval by the FCC for the state of Washington, Qwest, CLECs, and the Commission shall participate in a review of the performance measurements to determine whether measurements should be added, deleted, or modified; whether the applicable benchmark standards should be modified or replaced by parity standards; and whether to move a classification of a measurement to High, Medium, or Low, Tier 1 or Tier 2. *Criteria for review of performance measurements shall be whether the actual volume of data points was less or greater than anticipated, whether there exists an omission or failure to capture intended performance, and whether there is duplication of another measurement.* Any reclassification of performance measurements must be approved by Qwest. Any disputes regarding adding, deleting, or modifying performance measurements shall be resolved pursuant to a proceeding before the Commission and subject to judicial review. No new performance measurements shall be added to this PAP that have not been subject to observation as diagnostic measurements for a period of 6 months. Any changes made at the six-month review pursuant to this section and as a result of a final non-appealable decision shall upon finality apply to and modify this agreement between CLEC and Qwest.
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> Qwest shall not be liable for making any payments under the QPAP that result from changes made pursuant to the preceding paragraph and section 16.3, that exceed 10% of the monthly payments that Qwest would have made absent the effect of such changes as a whole. Such payment limitation shall be accomplished by factoring the payments resulting from the changes to ensure that such payments remain within 10% of the payments Qwest would have made absent such changes.
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> 17.0 Voluntary Performance Assurance Plan
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> This PAP represents Qwest's voluntary offer to provide performance assurance. Nothing in the PAP or in any conclusion of non-conformance of Qwest's service performance with the standards defined in the PAP shall be construed to be, of itself, non-conformance with the Act. Except for those changes expressly provided in sections 9.1.3 and 16.1, no changes shall be made to this QPAP.

Although it is not currently a part of the Utah Stipulation, Qwest is willing to agree that *agreed to* changes that arise from an industry forum, such as that which the ROC might conduct, would become part of the PAP at the time that they are agreed to,

subject to the 10% collar as well. This would provide for the expedient incorporation of non-controversial changes to the PAP. Qwest offers the following language for that purpose.

> Notwithstanding section 16.1, if any agreements on adding, modifying or deleting performance measurements as permitted by section 16.1 are reached between Qwest and CLECs participating in an industry Regional Oversight Committee (ROC) PID administration forum, those agreements shall be incorporated into the QPAP and modify the agreement between CLEC and Qwest at any time those agreements are submitted to the Commission, whether before or after a six-month review. Any changes made pursuant to this section shall be subject to and included in the calculation and application of the 10% payment collar identified in section 16.1.

7. Special Fund and Multistate Audits/Investigations

Because the Commission has deferred its decision whether to participate in a multistate review process, the Commission instructs Qwest to strike section 11.3 relating to a multistate special fund, and to modify the QPAP to require Qwest to maintain an identified escrow account and deposit Tier 2 payments into that account.[46] The Commission also orders Qwest to replace sections 15.1 through 15.4 which relate to a multistate audit program with new language that does not require a joint audit process.[47]

Qwest believes that the Commission, Qwest, and CLECs would all benefit from a regional audit. The ROC OSS test has demonstrated the great similarity in the production of performance results across Qwest's region. Moreover, fourteen separate audits of Qwest's performance measurements would be unreasonable given the impact on Qwest's resources. The same group that would be involved in audits is responsible for producing

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[46] *See id.* ¶ 162.

[47] *See id.* ¶ 241.

the performance results. Unlimited auditing would place in jeopardy Qwest's ability to provide timely and accurate reports.

Qwest and the Staff of the Utah Commission recently agreed to modify the Utah PAP to provide for discretionary and special funds and an audit program that provide the state commission discretion whether to join a multistate review process. Qwest believes that this language would resolve the Commission's concerns and would be willing to include these modifications in the QPAP.[48] This language is as follows:

> 11.3 Upon the execution of a memorandum of understanding with the Washington Commission, a Washington Special Fund and a Washington Discretionary Fund shall be created for the purposes and in accordance with section 11.0. The Washington Commission shall appoint a person designated to administer and authorize disbursement of funds. All claims against the funds shall be presented to the Commission's designate and shall be the responsibility of the Washington Commission.
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> 11.3.1 Qwest shall establish the Washington Special Fund and the Washington Discretionary Fund as separate interest bearing escrow accounts. Upon Qwest receiving effective section 271 authority from the FCC for the state of Washington, the Commission shall determine and direct Qwest to deposit into the Washington Special Fund either 1) one-fifth of all Tier 1 payments that exceed the month 1 payment amounts in Table 2 and one-third of all Tier 2 payments or 2) 50% of all Tier 2 payments. Qwest shall deposit any other Tier 2 payments into the Washington Discretionary Fund. The costs of the escrow accounts will be paid for from the accounts' funds.
>
> 11.3.2 The Washington Special Fund shall be created to pay the independent auditor and audit costs for the purpose of a regional audit as specified in section 15.0-15.4 or audit costs associated with a state audit pursuant to section 15.5, and to pay expenses incurred by the Commission in participating in any regional review of the PIDs. Disbursements from the Washington Special Fund shall first be from Tier 2 funds and second from Tier 1 funds. Not less than every two years, Tier 1 funds that are not needed to meet the continuing obligations of the Special Fund shall be returned on a pro-rata basis to CLECs, including any

[48] The Commission also directs Qwest to insert language to the effect 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." Commission Decision ¶ 161. Qwest would be willing to include language to that effect.

interest not used for fund administration. Other than the transfer of funds allowed in section 11.3.2.1, disbursements from the Washington Discretionary Fund shall be limited to Washington telecommunications initiatives. Any excess funds in the Washington Special Fund may be transferred to the Washington Discretionary Fund at the Commission's discretion.

11.3.2.1 If the Washington Commission chooses not to participate in the regional audit pursuant to sections 15.0-15.4 and the account balance of the Washington Special Fund escrow account is less than $50,000 at the time of any annual audit described in section 15.5, a transfer of funds from the Washington Discretionary Fund to the Washington Special Fund shall be allowed in the amount necessary to bring the Washington Special Fund balance to $50,000.

11.3.3 Notwithstanding the provisions herein, Qwest shall advance sufficient funds to any consolidated Special Fund established by participating states, set up for the purpose of a regional audit as specified in sections 15.0-15,4, not to exceed $200,000 (or $500,000 in the event 6 or more states participate in the regional audit) in order to meet initial claims against that Fund to the extent that contributions from Tier 1 and/or Tier 2 payments are insufficient. Qwest shall be allowed to recover any such advances plus interest at the rate that such an escrow account would have earned from future Tier 2 payments.

15.0 Integrated Audit Program/Investigations of Performance Results

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

15.1.2 The participating Commissions shall form an oversight committee of Commissioners who will choose the independent auditor and approve the audit plan. Any disputes as to the choice of auditor or the scope of the audit shall be resolved through a vote of the chairs of the participating commissions pursuant to Section 15.1.5.

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

15.1.4 The audit plan shall be coordinated with other audit plans that may be conducted by other state commissions so as to avoid duplication, shall not impede Qwest's ability to comply with the other provisions of the PAP and should be of a nature and scope that it can be conducted consistent with the reasonable course of Qwest's business operations.

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

15.2 Qwest may make management processes more accurate or more efficient to perform without sacrificing accuracy. These changes are at Qwest's discretion but will be reported to the independent auditor in quarterly meetings in which the auditor may ask questions about changes made in the Qwest measurement regimen. The meetings, which will be limited to Qwest and the independent auditor, will permit an independent assessment of the materiality and propriety of any Qwest changes, including, where necessary, testing of the change details by the independent auditor. The information gathered by the independent auditor may be the basis for reports by the independent auditor to the participating Commissions and, where the commissions deem it appropriate, to other participants.

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

15.4 Expenses for the regional audit of the PAP and any other related expenses, except that which may be assigned under section 15.3, shall be paid first from the Tier 2 funds in the Special Fund. The remainder of audit expenses will be paid one half from Tier 1 funds in the Special Fund and one half by Qwest.

15.5 If the Washington Commission chooses not to participate in the regional audit described in sections 15.0-15.4 it may conduct an audit with the monies contained in the Washington Special Fund pursuant to the following:

A. The audit shall be limited to (1) problem areas requiring further oversight as specifically identified in a previous audit; (2) any submeasurements changed or being changed from a manual to an electronic system; (3) any submeasurement responsible for at least 20% of the payments paid by Qwest over the prior year, and (4) whether Qwest is exercising due diligence in evaluating which, if any, performance data can be properly excluded from its performance measurements.

B. The first audit pursuant to this section 15.5 shall be conducted no sooner than twelve months after Qwest receives effective 271 authority from the FCC for the state of Washington and may be conducted every twelve months thereafter. Any audits conducted pursuant to this section 15.5 shall be conducted by the same auditor retained to conduct the regional audit unless the Commission, for good cause (i.e., conflict, price, integrity, or viability of the firm), finds the regional auditor is unacceptable.

C. No investigation or audit of any performance measurement shall be conducted within 12 months of any audit of the same performance measurement or submeasurement, including any audit conducted under the regional audit program or by another state or by a CLEC so long as the results of the other audits are made available to the Commission and such audit is applicable to Washington specific data. If any audit has been conducted but does not include Washington specific data, the Commission may audit the performance measurement to the degree necessary to verify Washington specific results without duplicating relevant parts of the prior audit, unless the Commission finds the data produced by a performance measurement to be unreliable.

D. Any audit conducted pursuant to this section must be designed and conducted to specifically address the perceived problem or condition that triggers the audit.

E. No audit or investigation requested pursuant to this section 15.5 shall be duplicative of any other audit. Any audit requested pursuant to this section shall be coordinated with other audits including audits planned or conducted by the regional audit program or pursuant to any other PAP, shall be planned and conducted so as to avoid duplication and interference

> with Qwest's ability to comply with the other provisions of the PAP, and shall be of a nature and scope that it can be conducted within the reasonable course of Qwest's business. Qwest shall not be required to audit more than three performance measurements at the same time and Qwest's resources shall be allocated first to any ongoing regional audits.

Qwest also asks the Commission to reconsider certain of its modifications to section 15.5.[49] Root cause analyses are both time-consuming and costly to conduct. Section 15.5 already covers the field for measurements under the PAP in that it requires root cause analyses for consecutive month misses for all Tier 2 measurements and for aggregate Tier 1 measurements for which there are no Tier 2 counterparts. This means that there is no PAP measurement that will not be subject to a root cause analysis after two consecutive months of aggregate non-conforming performance. The Commission's modification that "[a]ny party may petition the Commission to request that Qwest investigate any consecutive Tier 1 miss . . ."[50] substantially broadens this provision such that Qwest could be consumed with investigating isolated consecutive misses based on individual CLEC results. The very nature of root cause analyses are such that they be conducted in light of systemic problems exemplified by deficient industry-wide performance, which would be effectively captured by the current provision's tracking of two consecutive month misses for Tier 2 and aggregate Tier 1.

Regarding the Commission's other proposed modifications to the section, Qwest does not oppose posting results of the root cause analyses to a web site so long as it is not required to provide any confidential information. Finally, Qwest does not take issue with

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[49] Commission Decision ¶ 242.

[50] *Id.*

the Commission's proposed language that Qwest petition the Commission to receive credit against future payments or to withhold payments from CLECs.

8. Termination of the QPAP if Qwest Exits Long Distance Market

Section 16.3 of the QPAP provides that "in the event Qwest exits the interLATA market, that State PAP shall be rescinded immediately."[51] The Commission is concerned that "CLECs may be without remedy if the QPAP were to automatically terminate if Qwest leaves the long distance market."[52] The Commission therefore concludes that section 16.3 should be replaced with section 18.11 of the Colorado PAP, which provides that the PAP will remain in effect for six years regardless of whether Qwest exists the interLATA market.

The Commission's conclusion misconstrues the purpose of a PAP.[53] A BOC offers a PAP to satisfy its half of section 271's quid pro quo: the BOC must demonstrate that it will not "backslide" after obtaining 271 authority and in exchange, the BOC obtains the right to provide in-region interLATA service. It would be inconsistent with the purpose of the PAP, and unfair to Qwest, to continue to enforce the QPAP if Qwest is no longer in the interLATA market.[54] The Commission is also incorrect that termination of the QPAP would leave CLECs "without remedy."[55] In such instance, CLECs could

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[51] The Commission mistakenly refers to this provision as section 16.2.

[52] Commission Decision ¶ 180.

[53] The Commission's position also stands in contrast to the conclusion of the Multistate Facilitator, *see* Multistate Facilitator's Report at 74-75, and is inconsistent with PAPs approved by the FCC in a number of other states, such as New York (§ II-H), Connecticut (§ II-H), and Massachusetts (§ II-I).

[54] *See* Multistate Facilitator's Report at 75.

[55] Commission Decision ¶ 180.

resort to all of the non-QPAP remedies that are available to them today. If Qwest exits the interLATA market, termination of the QPAP would leave CLECs in no worse a position than they would be in had the QPAP never taken effect.

The Commission's decision to insert section 18.11 of the Colorado PAP into the QPAP demonstrates the pitfalls of trying to pick and choose from provisions contained in other plans, created in other proceedings, on different records, without regard to whether such provisions are necessary to ensure the sufficiency of the plan and bring it within the FCC's established zone of reasonableness. That provision was developed to work in conjunction with the CPAP's other provisions and cannot simply be written into the QPAP. For example, while section 18.11 states, "Only Tier 1A submeasures and payments will continue beyond six years, and these Tier 1A submeasures and payments shall continue until the Commission orders otherwise," the Washington PAP does not contain Tier 1A submeasures and payments.[56]

Consequently, Qwest asks the Commission to reconsider its decision and allow Qwest to retain in section 16.3 of the QPAP termination of the plan in the event Qwest exits the interLATA market. Notwithstanding this provision, Qwest would be willing to modify QPAP section 16.3 as follows:

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[56] CPAP section 18.11 also contains language requiring a review of the PAP to be conducted five and one-half years after 271 approval "with the objective of phasing-out the CPAP entirely." The CPAP states that "[t]his review shall focus on ensuring that phase-out of the CPAP is indeed appropriate at that time, and on identifying any submeasures in addition to the Tier 1A submeasures that should continue as part of the CPAP." The Commission expressed interest in including this language in the QPAP because it "will allow Qwest to eliminate certain payments upon leaving the market, but allow for Commission review of the necessity of certain payments." Commission Decision ¶ 180. Section 16.3 of the QPAP, which the Commission seeks to replace, already includes a similar provision. That section states that when Qwest eliminates its section 272 affiliate, "the Commission and Qwest shall review the appropriateness of the PAP and whether its continuation is necessary."

> 16.3 The QPAP will expire six years after Qwest receives section 271 approval. Five and one-half years after section 271 approval, the Commission and Qwest shall review the appropriateness of the PAP and whether its continuation is necessary. However, in the event Qwest exits the interLATA market, the QPAP shall be rescinded immediately.

9. Election of Remedies and Offsetting Remedies

The liquidated damages, election and offset provisions of the QPAP are based upon sound legal and policy principles. Section 13.6 of the QPAP contains the exact same language as that contained in the FCC-approved Texas plans. As the Facilitator recognized, the PAP "represents a comprehensive payment structure for compensating CLECs for harm."[57] As a form of liquidated damages, it liquidates damages "for both sides."[58] In recognition of this principle, five other PAPs have contained the same liquidated damages concept that is included in the QPAP.[59] Each of them was approved by the FCC as an appropriate "self-executing mechanism that does not leave the door open unreasonably to litigation and appeal."[60] This approval reflects the FCC's recognition that public policy is not offended by requiring treatment of Tier 1 damages as liquidated damages – which are made without any finding of any violation of any law, or any demonstration of any actual damage to any CLEC.

The election provision in section 13.6 is consistent with the FCC-approved liquidated damages provision and is completely appropriate. It is intended only to require

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[57] Multistate Facilitator's Report at 33.

[58] *Id.* (emphasis added).

[59] *See* Tex. PAP § 6.1; Kan. PAP § 6.1; Okla. PAP § 6.1; Ark. PAP § 6.1; Mo. PAP § 6.1.

[60] *SBC Texas Order* ¶¶ 423 n.1230, 427; *SBC Kansas/Oklahoma Order* ¶¶ 273 n.835, 277; *SBC Arkansas/Missouri Order* ¶ 130.

an election of remedies compensable in contract that are available to the CLECs for activity covered by the PAP, including standards and remedies that are contained in rules. Under this approach, it is clear which standards and remedies apply to Qwest's provisioning of service to that CLEC and it prevents duplicative recovery.

Disregarding the FCC's prior guidance, the Commission appears to reject the QPAP language on liquidated damages and election of remedies in favor of a replacement provision that the CLECs claim to have derived from the CPAP and which was cobbled together and proposed at the eleventh hour without the benefit of any discussion. In fact, the language is not a full and accurate excerpt from the CPAP nor does it accurately reflect the concepts and limitations inherent in that proposed document. This points out the great inequity that arises from last-minute borrowing from other state proceedings, particularly where the plans and records are very different and the Commission relies on the CLECs to provide the full explanation of the provisions they put forth from those other cases.

Indeed, even the Colorado Commission acknowledged the appropriateness of an election and recommended language that states

> 16.3 This CPAP contains a comprehensive set of performance submeasures, statistical methodologies, and payment mechanisms that are designed to function together, and only together, as an integrated whole. To elect the CPAP, CLEC must adopt the CPAP in its entirety, into its interconnection agreement with Qwest in lieu of other alternative standards or relief, except as stated in Sections 16.4, 16.6, and 16.7.[61]
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> 16.4 In electing the CPAP, CLEC shall surrender any rights to remedies under state wholesale service quality rules (in that regard, this CPAP shall constitute an "agreement of the parties" to opt out of those rules,

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[61] Section 16.4 is identified below; section 16.6 is the language that allows CLECs to pursue claims for additional contractual remedies if they can overcome the substantive and procedural hurdles, and section 16.7 is language that permits an offset.

as specified in 4 CCR 723-43-10 of those rules) or under any interconnection agreement designed to provide such monetary relief for the same performance issues addressed by the CPAP. The CPAP shall not limit either non-contractual legal or non-contractual regulatory remedies that may be available to CLEC.

As to the treatment of payments as liquidated damages, the CLECs' proposed section 13.6.1 purports to but does not even represent what the Colorado Commission recommended in section 16.6. The CLECs simply omit the statement in 16.6 that states that if CLECs are able to overcome the substantive and procedural hurdles to filing a contractual claim, they must disgorge payments made under the CPAP.[62] Qwest did identify this omission in the hearing before the Commission, but no CLEC has bothered to explain or correct the omission.

Moreover the election language in the proposed section 13.6 is extremely vague and ambiguous. This suggests that CLECs may have their cake and eat it too by electing, on a case-by-case basis, to collect the liquidated damages when they can prove no harm and to pursue some higher amount *without limit* when they do claim harm. This proposal would transform QPAP payments simply into a floor for further litigation, and in the words of the Commission, would impose a "severe and inequitable" result on Qwest.

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[62] Section 16.6 provides:

Tier 1X and Tier 1Y payments to CLECs 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 17.0 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 redress the extent of the competitive harm. If CLEC can make this showing, it shall be permitted to proceed with this action. Any damages awarded through this action shall be offset with payments made under this CPAP. If the CLEC cannot make this showing, the action shall be barred. To the extent that CLEC's contract action relates to an area of performance not addressed by the CPAP, no such procedural requirement shall apply.

The Commission also rejects QPAP section 13.7, asserting that "[a]llowing Qwest to make the sole decision about what to offset is inappropriate."[63] Nothing in section 13.7 gives Qwest the authority to make the "sole decision" regarding offset. The effect of that provision is merely to allow Qwest to choose the forum in which it enforces the offset right.

Under section 13.7 of the QPAP, if a CLEC seeks noncontractual relief "for the same underlying activity or omission," Qwest has one of two mutually exclusive choices. First, it may obtain an offset of the amount that would be recoverable under a contractual theory. Qwest would enforce this right by raising the offset as a defense to the CLEC's noncontractual claim. The court would then determine whether the claims involve the same underlying activity or omission, and if and to what extent the damages sought would have been recoverable under contractual theories. Second, Qwest may alternatively reduce its QPAP payments by the amount of the award. Here, too, the ultimate arbiter of whether the QPAP conditions for offset have been met is not Qwest, but rather this Commission or any other forum provided for in section 18.0, the dispute resolution provision of the QPAP. Thus, in either case, as the Facilitator recognized, "If Qwest's language is adopted, nothing in it gives Qwest the right to make an unreviewable decision about whether an offset is allowable."[64]

Qwest would be willing to replace sections 13.6 and 13.7 with provisions that Qwest prepared together with the Staff of the Utah Commission. This language is as follows:

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63 *Id.* ¶ 202.

64 Multistate Facilitator's Report at 35.

> 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 in lieu of other alternative standards or relief. Where alternative standards or remedies for Qwest's wholesale performance are available under rules, orders, or contracts, including interconnection agreements, CLEC will be limited to either PAP standards and remedies or the standards and remedies available under rules, orders or contracts and CLECs choice of remedies shall be specified in its interconnection agreement.
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> 13.7 Qwest shall be entitled to seek an offset against any recovery by CLEC under any noncontractual theory of liability (including but not limited to tort and antitrust claims). Nothing in this PAP shall be read as permitting an offset related to Qwest payments related to CLEC or third-party physical damage to property or personal injury.

The Commission also proposes to modify QPAP section 13.8 to be consistent with section 16.8 of the CPAP.[65] Qwest and the Utah Staff developed a provision that is almost identical to CPAP section 16.8, and Qwest would be willing to replace QPAP section 13.8 with that provision. This proposed language is as follows:

> 13.8 To the extent Qwest believes that some Tier 2 payments required to be made under this PAP would duplicate payments that have been assessed by or on behalf of the Commission pursuant to any service quality rules or Commission orders, Qwest may make such Tier 2 payments to a special interest bearing escrow account and then dispute the payments before the Utah Commission. If Qwest can show that the payments relate to the same underlying activity or omission, it may retain the Tier 2 payments and any interest accrued on such payments.

10. Force Majeure Language

At the suggestion of AT&T,[66] Qwest included language section 13.3 of the QPAP that establishes the time frame

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[65] *See* Commission Decision ¶ 109.

[66] *See* AT&T and Ascent's Verified Comments on Qwest's Proposed Performance Assurance Plan, *In the Matter of the Investigation into US WEST Communications, Inc.'s Compliance with § 271 of the Telecommunications Act of 1996*, Seven State Collaborative Section 271 Workshops, at 12 (July 27, 2001) ("If a Force Majeure event or other excusing event recognized in this section only suspends Qwest's ability to timely perform an activity subject to Performance Measurement, the applicable time frame in which

in which "Force Majeure event[s] or other excusing event[s]" apply to benchmark and parity measures. The Commission concludes that force majeure events should not apply to parity standards, and therefore orders Qwest to strike the reference to "parity" in section 13.3.[67] Qwest agrees that force majeure events should not apply to parity measures. Section 13.3 already reflects this principle by explicitly limiting the application of force majeure events "to performance measures with a benchmark standard."[68] As Qwest has previously explained,[69] however, the reference to parity in section 13.3 is appropriate and necessary because the *other* categories of excusing events covered by section 13.3 (CLEC bad faith and problems associated with third-party systems or equipment) *do* apply to parity measures. No other party has suggested that application of these other excusing events to parity measures is inappropriate, and the Commission has failed to provide any rationale for limiting application of these excusing events to benchmark standards. The Commission should reconsider its decision to remove the "parity" reference in section 13.3.

Qwest's compliance with the parity or benchmark criterion is measured will be extended on an hour-for-hour or day-for-day basis, as applicable, equal to the duration of the excusing event.").

[67] *See* Commission Decision ¶ 209.

[68] The first sentence of section 13.3 states in full, "Qwest shall not be obligated to make Tier 1 or Tier 2 payments for any measurement if and to the extent that non-conformance for that measurement was the result of any of the following: 1) *with respect to performance measurements with a benchmark standard*, a Force Majeure event as defined in section 5.7 of the SGAT." QPAP § 13.3 (emphasis added).

[69] *See* Supplement to Qwest's Response to AT&T and WorldCom's Comments on Qwest's Response to Bench Request No. 37, Docket Nos. UT-003022, 003040 at 1-2.

The Commission also concludes that Qwest should be required to seek a waiver from the Commission before its performance is excused by a force majeure event.[70] The Commission's only rationale for its decision is that "[t]he Facilitator notes that Qwest agreed during the Multi-state Proceeding that state commissions were the appropriate entity to resolve disputes over requests for waivers."[71] But the QPAP already contains a mechanism for the Commission to resolve disputes over Qwest's application of force majeure events. Section 13.3.1 provides that any party may petition the Commission to review whether a force majeure event should excuse Qwest's performance. Qwest then bears the burden of demonstrating that its non-conforming performance was properly excused, and during the pendency of the Commission's review, Qwest must deposit the disputed QPAP payments into an escrow account.

Section 13.3 also contains another device to protect CLECs against unwarranted application of force majeure events. In response to the Facilitator's recommendations, Qwest included language in section 13.3 that requires it to provide notice within 72 hours of the occurrence of a force majeure event. This requirement is intended to ensure that Qwest is unable to search for possible excusing events after it discovers that its performance was nonconforming. In

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70 *See* Commission Decision ¶ 208.

71 *Id.* ¶ 208.

light of this protective measure and the dispute mechanism contained in section 13.3.1, a waiver requirement would constitute nothing more than an unnecessary administrative hurdle. It would increase litigation over force majeure events without providing any additional protection against unwarranted application of the force majeure provision.

11. Payment Method

The Commission directs Qwest to amend section 11.2 of the QPAP by adopting language from section 12.2 of the CPAP stating that: "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." There is simply nothing in the record that supports a requirement that payments be made in cash and that Qwest must wait until bills are more than 90 days past due before making payments through bill credits.

As Qwest noted in its rebuttal, the FCC has approved PAPs in New York, Connecticut, and Massachusetts even though those plans provided for payments to be made *exclusively* in the form of bill credits.[72] There is simply no reason to force Qwest to wait 90 days to make payments via bill credits, especially where CLEC charges are undisputed. On average, CLEC charges that are more than 30 days past due represent a significant portion of current month billings, with a much smaller amount involving billing disputes. The Multistate Facilitator recognized this problem. In recommending that payments be made via bill credits, the Multistate Facilitator stated that "it would be

[72] *See* § II(C)(2), (D)(2) of those plans.

inappropriate to require Qwest to make payments to CLECs in cases where CLECs were not current in paying Qwest for the same kinds of services."[73]

There is nothing to support CLEC assertions that payments should be made in cash because credits are hard to administer. In fact, paying CLECs via bill credits is less costly, is compatible with existing processes, and requires fewer manual operations, thus allowing payments to be processed more quickly and more accurately. And given that it is Qwest that will be administering the credits, Qwest should be the judge of which payment method is harder to administer, not the CLECs.

12. Monthly Reports to Public Counsel

The Commission orders Qwest to modify section 14.2 of the QPAP to provide that "Qwest will also provide *to* the Commission, *and relevant parties upon request*, a monthly report of aggregate CLEC performance results." Qwest has no objection to providing the report to the Commission on a monthly basis. However, in light of the size of these files, Qwest should be allowed to provide the state aggregate information as it currently does, on its public website.

Conclusion

The QPAP falls well within the FCC's zone of reasonableness identified in prior 271 orders. In each of the key areas – the 100% cap on per occurrence measurements, trigger for Tier 2 payments, six-month review, the provisions against double recovery, and countless other provisions – the QPAP either meets or exceeds the provisions included in performance assurance plans approved by the FCC (and the respective state commissions).

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[73] Multistate Facilitator's Report at 76.

Accordingly, Qwest respectfully requests that the Commission reconsider those aspects of its Decision addressed above, and issue a recommendation to the FCC determining that the QPAP satisfies the FCC's zone of reasonableness criteria under the public interest standard of section 271.

Respectfully submitted on April 15, 2002.

Qwest Corporation

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