Exhibit A

Service Date: April 19, 2002

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

* * * * *

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

FINAL REPORT ON QWEST'S PERFORMANCE ASSURANCE PLAN

AND

RESPONSES TO COMMENTS RECEIVED ON PRELIMINARY REPORT

TABLE OF CONTENTS **Page**

INTRODUCTION

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

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

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

Qwest's performance assurance plan was addressed by the participants in written comments, in two separate in-person workshops in August 2001, and in briefs. John Antonuk, the consultant hired by the nine states participating in the QPAP proceeding to conduct the workshops, issued his *Report on Qwest's Performance Assurance Plan* on October 22, 2001. Antonuk was hired to conduct these workshops after the predecessor post-entry performance plan (PEPP) collaborative

process had ended without Qwest and competitive local exchange carriers (CLECs) achieving a consensus plan. In his *Report*, Antonuk reviewed the issues raised by the participants and made recommendations regarding the QPAP for Commission consideration. Participants in the Montana PSC docket that filed comments in response to Antonuk's *Report* were Qwest, AT&T, Covad Communications, Montana Consumer Counsel (MCC) and WorldCom. Qwest attached to its comments a redlined version of the QPAP which, according to Qwest, incorporated Antonuk's recommendations into the plan. This redline version of the QPAP is posted on the Commission's internet website at this location: http://psc.state.mt.us/tcom/tcom.htm.
The Commission issued its preliminary report on the QPAP on February 4, 2002. The preliminary report summarized Antonuk's *Report* as well as the comments filed on the *Report*. Participants in this proceeding were invited to comment on the preliminary findings in the preliminary report. Qwest, AT&T, Touch America (TA), Montana Telecommunications Association (MTA) and the Montana Consumer Counsel (MCC) submitted comments on the preliminary report. In this final report, the Commission revises the preliminary report to add summaries of participants' comments followed by the Commission's final decisions on the QPAP issues.

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

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

The more general comments of the parties regarding Antonuk's *Report* include the following. In its comments WorldCom concurs in the exceptions AT&T takes to the report and joins in the arguments AT&T raises to support WorldCom's positions taken herein. The MCC filed comments that take exception to several aspects of the Antonuk's *Report*. Covad asserts that the sole criterion by which to measure the QPAP is by whether it "fosters competition in the local

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

exchange market." Achieving this goal depends on a finding that Qwest's entry into the long distance market is in the public interest. In regards to this Montana PAP, the public interest test is met only when a mechanism is in place to ensure that the local market is irreversibly open to competition and that wholesale service quality will not deteriorate after Qwest receives 271 relief. As incumbents lack the incentive to help competitors, Covad adds that the FCC strongly encourages monitoring of post-entry wholesale service performance by a PAP and the ultimate question Commission must address is whether to accept Antonuk's resolutions or adopt positions advanced by others.

Participants also submitted general observations regarding the Commission's preliminary report. According to Qwest, the Commission should evaluate the QPAP based on the FCC's established criteria under Section 271's public interest standard, not based on the Commission's own view of what the QPAP should include. Qwest asserts that several of the Commission's preliminary findings should be reversed in light of FCC precedent, the absence of record support for rejecting Antonuk's recommendations, and the compromises Qwest agreed to in the plan in order to achieve consensus. MCC says the Commission's preliminary findings are reasonable and balance the interests of Qwest the competitive local exchange carriers (CLECs). MTA asserts the Commission must give itself the tools to preserve and promote competition and the means to redress unfair practices. MTA adds that the Commission should bring common sense to implementation of the Act and avoid legalistic obfuscation. TA claims the proposed QPAP does not meet the FCC's expectations because the proposed penalty levels are too low to keep Qwest from engaging in anticompetitive behavior, the plan does not accurately measure the harm that Qwest's noncompliant performance can cause CLECs, and it underestimates Qwest's ability to act anticompetitively, even though Qwest may be in apparent compliance with the plan. TA characterizes the QPAP in its current form as "window dressing" that hides the truth that there is no regulatory backstop to prevent Qwest from anticompetitive behavior. TA objects to the use of parity as the principal standard for measuring performance and alleges they do not accurately reflect harm to CLECs by Qwest's actions, claims many of the plan's performance measures are meaningless, proposes that billing measurements be weighted the same as ordering and repair measurements, and recommends elimination of all caps in the plan. In its comments AT&T

states to agree with most of the Commission's preliminary findings. AT&T adds that the FCC has indicated that the Commission, not Qwest, has authority to implement and control the QPAP.

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

I. MEANINGFUL & SIGNIFICANT INCENTIVE

A. Total payment liability.

1. 36% of intrastate net revenues standard. Antonuk agreed with Qwest that the appropriate amount of revenue to place at risk each year under the QPAP is 36% of Qwest's 1999 net intrastate revenues as reported to the FCC on its ARMIS return. For Montana, the 36% standard results in Qwest having $16 million at risk each year under the QPAP. Antonuk reasons that the FCC has approved this amount as it provides a meaningful incentive to provide adequate performance in its 271 orders in other states. He finds the 36% standard an appropriate starting point, to be examined again in the context of all the other QPAP provisions affecting Qwest's incentive to perform.

Covad comments

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

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

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

- The Commission could order the 36% cap to increase by no more than 4 percentage points when the cap is exceeded by 4 percent or more for any 24-month consecutive period, if:
    - the Commission finds Qwest could have stayed under the cap through its reasonable and prudent efforts, and
    - that finding has been made after the Commission reviews the results of root-cause analyses and has provided Qwest the opportunity to be heard.
- The Commission could order the cap to decrease by no more than 4 percentage points when Qwest's total payment liability is 8 or more percentage points (i.e., 26% or less) below the cap amount for 24 consecutive months, if:
    - the Commission finds the performance results occurred because of an adequate Qwest commitment to provide adequate service, and
    - that finding is made after all interested parties have an opportunity to be heard.
- The sliding cap applies to the next 24-month period beginning at the completion of the first 24-month period, provided that the maximum cap increase is 8 percentage points and the maximum cap decrease is 6 points.

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

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

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

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

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

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

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

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

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

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

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

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

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

Comments on Commission's preliminary report Parties commenting on these issues include AT&T, MCC, MTA, TA and Qwest.

AT&T supports the concept of a procedural cap but would still modify the Commission's preliminary report. In place of the 36% procedural cap, AT&T

recommends the Bell South and Louisiana PUC's approach. That approach applies a 36% procedural cap to net revenues for both Tier I and II remedies. With this approach the BOC pays up to the procedural cap, if otherwise exceeded, and then must file a petition, within 30 days, to show why it should not pay amounts in excess of the procedural cap. The Commission could decide "…to absolutely cap the payments at 36%, set a higher cap or to allow the payments to continue until Qwest provides nondiscriminatory service." However, AT&T notes, the Louisiana PUC ordered a rolling twelve-month, not an individual monthly, cap.

MCC concurs with the Commission's 36% procedural cap and adds that the cap should apply on an annual basis and that a change in the cap should only be considered after the first year of operation and only then if a party demonstrates just cause.

As regards the presence of meaningful and significant incentives, MTA's general comments include that the incentive to comply with performance standards must be considered in light of "natural" market incentives of competitors to prevail in markets they serve. Whereas Qwest must satisfy The 1996 Act's checklist, it is unnatural in competitive markets for a company to welcome competition. As evidenced in the CLEC Forum, Qwest keeps its retail customers when it provides insufficient wholesale service to competitors. MTA reasons that the incentive to perform must at least be equal to the incentive to "beat the competition" as otherwise Qwest is rewarded by maintenance of a hold on retail markets. In turn, QPAP is about Qwest's ability to keep open its markets in the face of incentives to do the reverse and while MTA commends Qwest for efforts to meet The 1996 Act's checklist, the QPAP must ensure that progress is sustained. Thus, the "public interest test is met only when a mechanism is in place to ensure that the local market is irreversibly open to competition and that wholesale service quality will not deteriorate after Qwest receives 271 relief." MTA next recites the essence of the Commission's concern (see I. A. 7 below) about the relation

between the cap (liability limit) and tax deductibility of payments. MTA estimates that if the effect is to reduce tax obligations by one third, the actual liability that correlates to Qwest's $16 million annual risk is only about $10.5 million. MTA questions whether this liability is significant enough of an incentive for Qwest to perform in compliance with QPAP. In this regard, MTA concurs with AT&T's and Covad's argument that the result will be that Qwest will not compensate CLECs harmed by Qwest's noncompliant performance. To avoid Qwest's "maxing out" its liability, after which it may "underperform with relative impunity", MTA recommends no limit on Qwest's total payment liability. MTA notes that Colorado's Commission imposes no cap on Tier 1 payments.

TA asserts that the Commission's penalty proposal will not dissuade Qwest from behaving anticompetitively. TA likens the proposed penalty level to a $5 parking ticket and adds that the Commission should reconsider its 36% cap particularly in the early stages and delete all caps from the plan. It is in the "early stages" that Qwest's performance may cause the most harm for competitors. Once Qwest has a record of good performance, that is better for CLECs than Qwest provides its own customers, then a 36% procedural cap may be reconsidered. This issue can be revisited during the periodic review.

Qwest comments that the Commission's review of the four options is misplaced. Instead, what is relevant is whether the method of capping falls within a "zone of reasonableness", as established by FCC precedent generally and the FCC's approval of a 36% hard cap in the Texas plan. Qwest adds that the Commission's choice is unexplained. Qwest notes that due to the incentive Qwest would then have to favor CLEC customers that the MCC supports a 36% hard cap and strongly opposes increasing the cap above that level. Finally, Qwest holds that a procedural cap is no cap at all and it has the potential for unlimited financial exposure and adds it needs assurance of the uppermost limit of its liability. Qwest concludes this item by asserting to not object to Antonuk's proposal or to a 36% hard cap but asserts the Commission's elimination of the cap is unjustified.

Commission's finding: The Commission finds merit in staying the course of a 36% initial procedural cap. The Commission agrees that it is also reasonable to make the 36% cap an annual cap. So long as Qwest maintains adequate performance, Qwest does not risk exceeding the cap. If however, Qwest's performance is not adequate and the cap would otherwise be exceeded on an annual basis, then upon petition the Commission will consider raising the ceiling, and it will do so on an expedited basis. The Commission notes also the MCC's support for the 36% procedural cap in the Commission's preliminary order. The Commission declines requests to eliminate the Tier 1 cap.

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

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

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

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

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

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

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

Comments on Commission's preliminary report Parties commenting on this issue include AT&T, MTA, TA and Qwest.

AT&T interprets the Commission's preliminary filing to allow only Qwest to comment. AT&T adds, however, that if a procedural cap is instituted, the need for equalization principles wanes and when the Commission conducts an inquiry after Qwest attains a cap, payment equalization can be determined, if any is appropriate. If a hard cap is set and the Commission finds that equalization is appropriate, the QPAP needs revising to indicate that equalization will be considered in a procedural cap hearing.

MTA comments that the net effect of the complex percentage equalization formula is that Qwest's liability varies inversely with the harm it causes. Once a cap is reached the more Qwest underperforms the less CLECs individually and collectively receive. This is the opposite effect the PAP is designed to achieve. MTA disagrees with Antonuk's view that equalization is a solution as it fails to provide meaningful and significant incentives. And once the cap is achieved

Qwest may "underperform without additional incentives to perform" with negative consequences on CLECs. The solution is no cap, not a complicated percent equalization formula.

TA asserts that if Qwest is serious about opening local exchange market to competition, then it should embrace no cap. Since Qwest favors limiting its liability it clearly does not plan to offer quality service to competitors. TA finds no need for the complexity of caps and the Tier 1 equalization. The heart of the issue is not addressed by equalization but by the removal of caps.

Because QPAP payments may exceed the monthly cap intermittently Qwest comments that the balancing account must be performed using year-to-date payments and a cumulative monthly cap. Qwest believes that its modifications of Antonuk's proposal achieve this purpose. Qwest adds that AT&T, COVAD and WorldCom do not object to Qwest's recommendation in a Washington State PUC proceeding.

Commission's finding: The Commission finds merit in equalization. Tier 1 equalization is not designed to be an incentive to perform. Rather, it serves the purpose of equity: no CLEC is denied Tier 1 payments if and when Qwest payments would exceed the cap on a monthly basis. If on an annual basis the cap would also be exceeded, then upon petition and based on good cause it may be increased. Thus, the need for equalization does not wane when combined with a procedural cap. The cap is a binding constraint on Qwest's risk during any particular year, a constraint that may be lifted if performance is woefully inadequate.

4. Qwest's marginal costs of compliance. Because he found no evidence to enable its use, Antonuk rejects the New Mexico Staff's proposal to inquire about Qwest's marginal costs of noncompliance and not the size of the payments to CLECs.

Comments on Commission's preliminary report Although the Commission's Report makes no preliminary finding on Qwest's marginal compliance costs, MTA takes issue with Antonuk's rejection of the New Mexico staff proposal. New Mexico Staff asserts that a proper inquiry is about Qwest's marginal costs of noncompliance and not the size of the payments to CLECs. MTA adds that the PAP is about incentives to perform.

Commission's finding: The Commission disagrees with MTA that the above mechanisms for establishing caps, apportioning penalty payments between Tier 1 and 2 etc., should be reconsidered and that the New Mexico Staff proposal should be implemented. The proposal by the New Mexico Staff was in lieu of Qwest's hard cap, not the procedural cap adopted herein. The procedural cap can be increased if good cause exists to do so.

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

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

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

Comments on Commission's preliminary report Qwest comments that Antonuk correctly recognizes that by updating the cap each year will not keep Qwest's

liability constant and that it "appears" preferable to rely on a firm dollar amount instead of taking unknown and unknowable risks. Qwest notes Antonuk's recognition, that Qwest's net intrastate revenue is as likely if not more likely to decrease rather than increase in future years, and that a higher cap may result if based on 1999 amounts. Qwest prefers a cap that is based on known data so that its maximum potential exposure is known. Qwest adds that the plans for Texas, Kansas, Oklahoma, Arkansas and Missouri provide for annual reviews and decreases in the cap – the most recent FCC approved plan relies on 1999 ARMIS data. If, however, the Commission is not persuaded by Antonuk's rationale for a fixed cap, Qwest does not object to an annual recalculation so long as the following language is included in the QPAP:

> *The cap shall be recalculated each year based on the prior year's Montana ARMIS results. Qwest shall submit to the Commission the calculation of each year's cap no later than 30 days after submission o f ARMIS results to the FCC.*

Commission's finding: The Commission continues to find merit in an annual update to reflect Qwest's most recently reported intrastate revenues. The QPAP language Qwest suggests appears congruent with this finding.

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

Comments on Commission's preliminary report In its comments, MTA links this issue with another that is discussed below (II. H. Low volume CLECs). Although the Commission's Report makes no preliminary finding on the issue of payments in low volume states, MTA submits that the minimum payment appears to be $5,000, except that the "resulting total payment amount to CLECs will be apportioned to the affected CLECs based upon each CLEC's relative share of the number of total service misses." MTA is concerned that the combined effect of

three provisions all serve to limit Qwest's liability in low volume, developing markets. The three provisions include: (1) QPAP's addressing CLEC volumes in the "range of 10 to 100" (2) that parity or benchmark standards will use the aggregate volumes of participating (PAP) CLECs and (3) that the QPAP addresses low volumes by adding sufficient consecutive months of data so as not to require a 100% performance result. To expand, MTA disagrees with Antonuk's finding that the so-called "one-miss" standard occurs only 8% of the time: CLECs should not be penalized due to their newness and small size in developing markets. Rather, MTA holds that it is the nascent and small competitors that need protection from the occasional but significant "miss." Therefore, MTA recommends either eliminating the qualifiers in "Sections 10 and 2", that aggregate volumes and that add consecutive months so that a 100% performance result is not required, or adding language that provides minimum payments or other remedies in low-volume situations under an expedited dispute resolution process.

Commission's finding: In response to MTA's comments, several Commission findings are relevant. First, in his *Report*, Antonuk states that the QPAP's provision for minimum payments is the direct way to address the New Mexico staff concern (see Section 10.2). In the case of developing markets there is a minimum payment of $5,000 per sub measurement (see QPAP Section 10.0), an amount that is apportioned among CLECs based on relative shares of the number of total service misses. Given these three products and seven sub-measurements, the combined payments to CLECs in Montana could, based on these minimum payments alone, amount to a total of $1.26 million per year. Second, the minimum payment to any particular CLEC for which Qwest missed any measure applicable to a low-order volume CLEC is $2,000 times the number of months in which at least one payment was made to the CLEC (see, however, QPAP Sections 6.2 and 6.4, and III. G *infra*). Therefore, there are minimal payments to CLECs collectively and individually in the case of a low-order-volume CLEC. Third, the Commission is not persuaded by MTA's recommendations. The "qualifiers"

MTA suggests be eliminated as one option refer generally to sections "10 and 2" but provide no specific and clear connection to the balance of the QPAP. The Commission does not agree that these parameters, and the purposes they serve, should be reopened to debate along with the balance of the QPAP. As for MTA's alternative, an "expedited dispute resolution process," to provide minimum payments seems to shelve the QPAP nearly in its entirety and open up to dispute how much money MTA wants a CLEC to get. There already are minimum payments for CLECs. The Commission notes here that there must be escalation for payments involving consecutive month misses as required by Antonuk (*Report*, p. 59, and QPAP Section 6.2.1) for low-volume CLECs (see Section 2.4).

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

Commission preliminary finding: The Commission sees a relation between the income tax deductions Qwest may take for QPAP payments and the earlier issue of Qwest's total payment liability. Qwest appears to assert that if a 36% cap is combined with 1999 ARMIS net revenues, it will face about a $16 million dollar exposure in Montana. However, the net impact of such a penalty is less due to Qwest's apparent right to tax offsets for Tier 1 and Tier 2 payments.[2] If payments to CLECs or to a state are offsets to tax obligations, then while the purpose of such payments is, in part, achieved, unless the consequence on Qwest of such payments was designed to account for tax effects, the objective is not achieved.[3] This, in part, is one reason a 36% hard cap is favored less than a procedural cap. The Commission is interested in further explanation on how the tax offsets are shared between state and federal tax obligations, by how much Montana tax revenue might decrease with the offset and if there is a rollover provision in the tax code that permits Tier 1 and/or Tier 2 payments to offset tax obligations in years subsequent to the year in which the payments were actually made.

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

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

Comments on Commission's preliminary report MTA, TA and Qwest comment on the Commission's finding. MTA comments that deductions render an insufficient exposure even less significant and meaningful (see I. A. 1.and 2.).
If, as Antonuk argues, a PAP is to "sanction poor performance," then TA asserts that penalty payments should not be deductible such that Qwest's sanction is lessened by a taxpayer subsidy. TA adds that Qwest's ability to deduct payments argues against the existence of a cap.
In its comments, Qwest asserts that the FCC has found useful a yardstick based on ARMIS pre-tax revenue data. Qwest finds the FCC action a controlling precedent for Montana. If the Commission chose a $16 million post-tax liability, Qwest risks $56 million of Montana net revenues. Qwest concludes that no party suggests Qwest put at risk more than 36% of revenues, and as evident in MCC comments "precisely the opposite is true."

Commission's finding: The Commission finds that its concern over the deductibility of payments for tax purposes remains one reason to adopt a 36% procedural cap. No party responded to the Commission's invitation to comment on the relation between federal and state tax obligations in relation to Tier 1 and 2 payments.

B. Magnitude of payout levels.

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

C. Issues related to compensation for CLEC damages.

1. Relevance of compensation as a QPAP goal. Antonuk rejects arguments (Z-Tel's and others') that the purpose of a PAP is to create incentives to detect and sanction poor performance, not to compensate CLECs for harm, and that the

payments to CLECs are not liquidated damages. Antonuk adds that the FCC couches its test in terms of incentives, but an elementary legal principle in the field of remedies is the public interest in holding parties responsible for the damages they cause to induce them to behave in ways to avoid such harm. Antonuk concludes it is appropriate for the QPAP to address the issue of CLEC compensation for contractual damages, and it is appropriate that the QPAP liquidate such damages.

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

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

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

Comments on Commission's preliminary report MTA and Qwest comment on the Commission's finding. Qwest argues that the QPAP is not different from any other liquidated damages contract, that it is designed to provide a self-executing payment mechanism that will not unreasonably lead to litigation, and that the FCC has approved other performance assurance plans where the payments were expressly characterized as "liquidated damages." Qwest notes that AT&T's argument in response to Antonuk's report that Qwest is required to negotiate in good faith is not relevant here. Qwest claims the QPAP is not mandated by the Telecommunications Act. Rather, Qwest asserts it offers the QPAP to the FCC as

a condition for interLATA entry. According to Qwest, the attachment of the QPAP to the SGAT does not mean that established principles of contract law regarding liquidated damages can be disregarded.

MTA concurs in the preliminary finding, but notes there are several QPAP provisions that limit Qwest's liability and, therefore, dilute or eliminate the QPAP's incentive goals. MTA argues that Antonuk conceded that the FCC "couches its test in terms of incentives," but then disregarded this statement and reverted to legalistic principles. MTA suggests the Commission keep in mind the need to maintain QPAP incentives.

Commission's finding The Commission's finding remains the same. The QPAP is similar to a typical liquidated damages contract between two parties, but also serves other purposes. The finding here goes hand in hand with the finding below regarding CLEC remedies. Here, the Commission continues to find that, while the QPAP is similar to a liquidated damages contract, there are important differences as cited in AT&T's and Covad's earlier comments and in the Commission's preliminary finding. In the related finding below regarding CLEC remedies, the Commission finds that the QPAP should not preclude CLECs from seeking to recover extraordinary losses that result from Qwest's alleged failure to provide service in compliance with the QPAP. If the Commission agreed with Antonuk's conclusion and Qwest's argument that the QPAP is strictly a liquidated damages contract, CLECs would be precluded from seeking such recovery.

In its comments, Qwest points to the FCC's approval of the Texas and other states' Texas-based performance assurance plans which included express characterizations of the payments to CLECs as "liquidated damages." The Commission responds that the FCC has also made clear in its 271 orders that states retain discretion as to the structure of performance assurance plans and that individual state plans may vary. For example, when considering the Pennsylvania

performance assurance plan for Verizon, which included significant differences from both the New York and Texas plans, the FCC said:

> *As stated above, we do not require any monitoring and enforcement plan and therefore, we do not impose requirements for its structure if the state has chosen to adopt such a plan. We recognize that states may create plans that ultimately vary in their strengths and weaknesses as tools for post-271 authority monitoring and enforcement.*[4]

In another Section 271 order, the FCC said:

> *As the Commission has recognized, individual state PAPs may vary, and our task is to determine whether the PAP at hand falls within a zone of reasonableness and is "likely to provide incentives that are sufficient to foster post-entry checklist compliance."*[5]

The Commission's finding here is in accordance with the FCC's conclusions that individual plans may vary from state to state and that there are no set requirements for plans' structures, as long as they meet the FCC's "zone of reasonableness" test and provide sufficient incentives to foster continued checklist compliance.

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

AT&T comments

AT&T claims that once Antonuk decided the QPAP is a liquidated damages contract, as opposed to being similar to one, he then took the CLECs to task for failing to quantify their damages. AT&T argues this is a burden placed on it inappropriately by Antonuk, but even so, claims it was prohibited in this proceeding from providing evidence of damages it suffers when Qwest's service is noncompliant. According to AT&T, examples of damages include the costs of unutilized or underutilized AT&T personnel, equipment and marketing due to Qwest's failure to provide service to AT&T, goodwill costs, and customer service cancellations, including possible cancellations of other services such as cable,

[4] *Verizon Pennsylvania Order*, FCC 01-269 (rel. September 19, 2001) at ¶ 128.

[5] *Verizon Connecticut Order*, FCC 01-208 (rel. July 20, 2001) at ¶ 77 (footnote omitted).

wireless, toll and cable modem. AT&T argues it is not possible to quantify CLEC damages.

Commission preliminary finding: No finding or comment is necessary.

Comments on Commission's preliminary report Qwest reiterates its support for Antonuk's rejection of AT&T's claim that it was prohibited at the QPAP workshop from introducing evidence of the harm it had experienced as a result Qwest's alleged discriminatory treatment.

Commission's finding: Again, no finding or comment is necessary here.

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

theories of liability (e.g., federal enforcement under 271(d)(6), antitrust, tort and consumer protection remedies).

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

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

Covad comments
Covad asserts Antonuk's conclusions are fatally flawed as they ignore the fact the QPAP will be incorporated into the SGAT as well as the fact that damages not compensated under the QPAP should be recoverable. Covad recommends rejecting his conclusions and accepting the Colorado PUC's approach. That approach finds, in part, that concerns about backsliding justify the risk that Qwest may overcompensate CLECs on occasions for damages while preserving the rights of CLECs to sue when under compensated. In turn, the Colorado PUC finds appropriate a provision that permits the assertion of "contractual theories of relief" where extraordinary losses are sustained as a result of Qwest's poor service quality.

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

following slightly revised language recommended by the Colorado PUC at CPAP section 16.6:

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

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

Comments on Commission's preliminary report In its comments, Qwest strongly objects to the Commission's rejections of Antonuk's approach regarding remedies in favor of the Colorado PUC's recommended approach. Qwest argues that the FCC has approved plans that require a CLEC to elect exclusive remedies in exchange for the benefits of receiving self-executing payments. According to Qwest, it is the FCC's opinion, not this Commission's, that matters when it comes to public interest issues. Qwest claims this Commission's consultative role does not extend to the public interest demonstration. Qwest says the Commission's replacement language for Section 16.6 omits a critical provision of the Colorado plan that requires any damages awarded to a CLEC to be offset with Tier 1 payments.

AT&T, MTA and TA support the preliminary finding. AT&T asserts the language of Section 13.6 that was stricken by the Commission conflicted with FCC and other state commission precedent and insulated Qwest from any possibility of liability other than what is expressly stated in the QPAP. MTA takes issue with the requirement to use the dispute resolution process unless that process is improved to make it less burdensome, time consuming, and more accessible.

Commission's finding: The Commission affirms its preliminary finding. Should a CLEC experience extraordinary losses due to Qwest's poor performance in an area covered by the QPAP, the CLEC should not be barred by the QPAP from seeking recovery of those losses. Contrary to Qwest's argument, the Commission's finding does not ignore FCC authority. As noted above in the finding at I.C.1, the FCC has clearly stated that state plans may vary. Just because the FCC approved the Texas plan, as well as all the other Texas-based plans, does not mean every provision in those plans must be included in every state's plan. The Commission is puzzled by Qwest's argument that the Commission has no consultative role on public interest issues and, therefore, only the FCC's opinion of the QPAP is relevant. The Commission responds that the FCC's 271 orders are replete with references to states' roles in creating and revising PAPs and in administering and enforcing them after states have adopted them.

The Commission's replacement of the final sentence of QPAP Section 13.6 with the Colorado PUC language as directed herein does not open the floodgates to unreasonable litigation and appeal. Rather, the added provision requires a CLEC seeking QPAP contract damages over and above the payments awarded to it by the QPAP to first obtain permission to do so via the SGAT's dispute resolution process, in which the CLEC

must demonstrate the QPAP payments received were not sufficient to redress the alleged harm. Only then will permission be granted for the CLEC to proceed with the action. Regarding MTA's objection to the dispute resolution requirement as burdensome and time-consuming, the Commission responds that this provision appropriately puts the burden on the CLEC to make the necessary demonstration before the CLEC may seek additional contractual remedies outside of the QPAP payments. This provision is meant to erect a hurdle for the CLEC to clear.

Concerning Qwest's comment that the Commission's replacement language omitted the sentence in the Colorado CPAP provision that required any damages awarded to a CLEC in this type of action to be offset with QPAP payments, the Commission responds that offset is addressed in its own section (13.7) in the Montana QPAP.

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

5. Offset provision (Section 13.7) AT&T objects to Qwest's provision that allows it to reduce damages a court or regulatory agency orders it to pay a CLEC by the amount of QPAP payments to that CLEC, if the damages are based on the "same or analogous" wholesale performance. As regards the issue of Qwest's right to an offset, Antonuk finds that this issue is really about where to resolve disputes that concern offsets. He finds the QPAP dispute resolution process to provide parties an opportunity to challenge any Qwest decision to reduce QPAP payments under the offset language. He includes in the QPAP a provision for interest on awards so that Qwest does not have a time-value-of-money advantage

while resolving disputes. As regards disputes about the "same or analogous performance" provision, he finds the Qwest revised language generally appropriate as it limits the offset provisions to the portion of damages that represent compensatory recovery by CLECs. In finding the term "analogous" too vague he prefers the phrase "same underlying activity or omission for which Tier 1 assessments are made under this QPAP." While the QPAP has nothing to do with compensation for physical property or personal injury damages, to preserve the effect of other SGAT provisions that do, he revises Section 13.7 to prohibit offsets against CLEC payments that relate to third-party physical damage to property or personal injury.

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

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

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

Commission preliminary finding: The Commission rejects Antonuk's recommendation that permits Qwest to offset damages a court or other agency orders it to pay a CLEC by the amount of QPAP payments to that CLEC when the damages are based on the same wholesale performance. The Commission does not believe double recovery by a CLEC for the same poor performance is proper,

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

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

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

Comments on Commission's preliminary report Qwest comments that the Commission's preliminary finding conflicts with its acceptance of Antonuk's finding that CLECs seeking noncontractual relief should not be permitted to recover damages they are also able to recover under contractual theories of liability. Qwest claims Section 13.7 merely allows Qwest to choose the forum in which it enforces the offset right. According to Qwest, under Section 13.7, when a CLEC seeks noncontractual relief for "the same underlying activity or omission," Qwest may either obtain an offset of the amount that would be recoverable under contractual theory by raising the offset as a defense to the CLEC's noncontractual claim in court, or may reduce its QPAP payments by the amount of the award, an action that is subject to the dispute resolution process in the SGAT. In either case, Qwest argues, Qwest is not able to make an unreviewable decision about an offset. Qwest asserts the Commission's added language is flawed because it will encourage litigation by CLECs to obtain multiple recovery for the same damages and because the language regarding a court's or adjudicatory body's offset authority is permissive ("may offset") rather than mandatory ("shall offset").

AT&T, MTA and TA support the Commission's tentative finding. AT&T comments that the offset provision preliminarily adopted by the Commission is analogous to the Texas plan's offset provision at § 6.2, as well as being in accordance with the recent clarification regarding this issue made by Special Master Phil Weiser for the Colorado PUC, and with the positions of the Wyoming PSC and the Utah Staff. MTA notes the Commission can and should be one of the adjudicatory bodies referred to in the Commission's suggested language.

Commission's finding: The Commission continues to find that it is up to the court or agency that awarded damages to a CLEC to determine whether those damages should be offset with QPAP payments. It is not appropriate for Qwest to make that determination, which is what the 11/6/2001 QPAP provides at Section 13.7. The Commission does not see a conflict between this finding and its acceptance of Antonuk's finding that CLECs seeking noncontractual relief should not be permitted to recover damages they are also able to recover under contractual theories of liability. This finding simply assigns responsibility for the determination of offset to the same court or agency that awarded damages to the CLEC.

6. Exclusions (Section 13.3).

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

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

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

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

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

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

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

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

Comments received on Commission preliminary report While the Commission considered issues concerning exclusions to be resolved because no participant

objected to Antonuk's findings in response to his report, both MTA and TA submitted comments relating to this section.

TA objects to three provisions in the force majeure section: (1) the term "work stoppage" is undefined and should be limited to strikes by Qwest employees; (2) the exclusion for "equipment failure" should be removed because it is Qwest's responsibility to maintain its equipment and its failure to do so should not exempt it from QPAP payments; and (3) the exclusion for Qwest's "inability to secure products or services of other persons" should be revised to require Qwest to promptly secure or try to secure the needed products or services.

MTA points out that the force majeure provision at Section 13.3 adopts by reference the force majeure definition at SGAT Section 5.7.1. MTA objects to that section's broad definition of force majeure events, which basically defines them as events outside Qwest's control, and expressly includes, among others things, "government regulations." MTA notes that all FCC and Commission rules implementing the Act, and perhaps the QPAP itself, are government regulations. MTA recommends "government regulations" be stricken from this SGAT provision, or alternatively, that the term be clarified as to what government regulations it refers.

Commission's finding: The Commission finds TA's objections are moot because, in the current 11/6/2001 version of the QPAP, the force majeure terms to which TA objects, along with several others, are deleted. The Commission rejects MTA's proposal to revise SGAT Section 5.7.1 because issues concerning SGAT general terms and conditions, including this provision, were discussed, considered and resolved in the 271 checklist workshop process.[6]

[6] See the Montana PSC's *Final Report on SGAT General Terms & Conditions and Responses to Comments Received on Preliminary Report*, December 20, 2001. See also John Antonuk's *General Terms & Conditions, Section 272, and Track A Report*, September 21, 2002, p. 23.

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

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

Comments received on Commission's preliminary report MTA concurs with the finding here, but argues the amendment recommended by Antonuk does not accomplish the objective he stated in his report. MTA recommends Antonuk's amendment be replaced by this sentence from his report:

> *Qwest's liability for property damage and personal injury should not be limited by QPAP payments, just as QPAP payments should not be limited by payments for property damage and personal injury.*

Commission's finding: The Commission agrees with MTA, but for simplicity's sake, directs Qwest to change the Antonuk-recommended sentence as follows:

> *Payments pursuant to the QPAP should not be counted against the limit provided for in this SGAT section, and payments pursuant to this section should not be limited by payments made pursuant to the QPAP.*

D. Incentive to perform.

1. Tier 2 payment use (Section 7.5). AT&T would eliminate the section that requires using Tier 2 payments for purposes that relate to the Qwest service territory. Antonuk prefers language that allows a PSC to direct the use of the

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

Qwest comments

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

AT&T comments

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

Covad comments

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

Commission preliminary finding: The Commission rejects Antonuk's proposal to divert a portion of CLECs' Tier 1 escalation payments to a fund to be used by the Commission in its efforts regarding QPAP oversight and wholesale service quality. The Commission intends at this time to fund its QPAP oversight activities through the use of Tier 2 payments. If Tier 2 payments prove to be insufficient to cover the cost of QPAP oversight, the Commission will revisit this issue.

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

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

Comments on Commission's preliminary report Parties commenting on these items include AT&T, MTA and Qwest. AT&T asserts "the concept of creating a funding mechanism utilizing Tier 1 payments was never discussed in any proceeding and was *sua sponte* created by Antonuk…" AT&T adds that Tier 2 is the most appropriate for plan administration and AT&T does not object to a multi-state effort: had CLECs known of this decision, they would have objected or sought higher payments. MTA agrees that Tier 1 payments should only be paid to CLECs. MTA questions whether state law sanctions the use of Tier 2 payments for QPAP oversight activity and MTA is skeptical about a multistate QPAP effort as the 271 effort has been expensive, burdensome and not accessible to small Montana CLECs. Qwest's comments on the use of Tier 1and 2 payments. First, Qwest does not agree that using part of Tier 1 payments to administer the QPAP will impair CLECs or diminish Qwest's incentives. Qwest argues that it demonstrates, as Antonuk recognizes and CLECs do not rebut, that "total Tier 1 payments would likely be far in excess of the value of the service to

CLECs, amounting to years of free service to them."[7] Second, Qwest endorses the multi-state oversight effort to administer the QPAP. Third, Qwest recommends retention in the QPAP language that provides for Tier 2 payments to be placed in the state of Montana's general fund if it not otherwise lawful for the Commission to receive such funds. Qwest adds that it is unclear if Montana law permits such receipt. Without reference to either of the four parts of I.D. "Incentive to perform", TA states to support the Commission's preliminary finding.

Commission's finding: The Commission affirms its finding that it does not plan to use any portion of CLECs' Tier 1 payments to fund the Commission's QPAP oversight activities. However, if Tier 2 payments prove to be insufficient to cover the cost of QPAP oversight, the Commission will revisit this issue. The Commission continues to support Antonuk's recommendation that Montana and other state commissions in Qwest's service area join together to participate in a multistate QPAP oversight effort. If the various multistate Qwest 271 projects were inaccessible and burdensome for Montana CLECs as MTA contends (and as the Commission does not concede), it is the Commission's expectation that the multistate QPAP oversight activities will not require the same intense level of involvement over a sustained period of time as may have been required of participants in the previous projects. Finally, the Commission notes that Montana law requires that the Commission obtain legislative authority to spend Tier 2 funds for QPAP oversight activities.

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

[7] This reasoning supposes a $20 loop UNE cost and base payments of between $25 and $150.

Tier 2 payments will begin in the second consecutive month of noncompliance, provided that the same "two-out-of-three month condition" is met.

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

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

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

Comments on Commission's preliminary report Qwest comments that the Commission is correct, there is no escalation of Tier 2 payments.

Commission's finding: The Commission affirms its preliminary finding and this issue is closed.

3. Limiting escalation to 6 months. Qwest favors limiting escalation to six months while CLECs (AT&T, ELI/Time Warner/XO Utah, WorldCom, Z-Tel, and Covad) and the New Mexico Advocacy would not limit escalation. Antonuk rejects the CLECs' and New Mexico Advocacy staff's proposal for several reasons. First, he asserts it is not clear that poor performance past six months means Qwest methodically calculated that the continuing costs of compliance exceeds the continuing costs of violation. He adds that many of the measures at issue are not parity measures but rather benchmark measures and this record does not demonstrate with certainty that those levels of performance can be met and sustained at any cost within the realm of economic reason. However, they generally relate to services about which little experience existed when the measures were adopted. Thus, the correlation between long-term non-compliance and insufficiency of inducements is not self evident as some have argued. If non-compliance continues for six months in the face of stiff financial consequences,

one of the issues that would bear consideration is the achievability of the established benchmark. Second, parity measures, while based on a substantiated and common belief that there are no material differences between serving retail and wholesale customers, cannot be said to rest upon an absolute certainty that growing experience with the CLEC community will not show otherwise. Third, calculated comparisons of the marginal costs of compliance versus non-compliance are not the only reason problems can persist. Antonuk finds the logic of extended escalation to depend profoundly upon the certainty of propositions like these. He finds it speculative to conclude that insufficiently increasing payments, as opposed to other factors, such as: (a) a less than optimally crafted standard, (b) a series of extenuating external circumstances, (c) buyer efforts to induce failure, (d) management's performance decisions and actions (that may have been soundly believed sufficient to improve performance, but proven inadequate only as time passed), or even other reasons, cause or contribute to a failure to provide compliant performance.

Antonuk concludes that if it can be shown that six months of escalation creates payment levels judged to be far enough in excess of both the value of CLECs and the costs of calculating decisions to continue to under perform, then a six-month cutoff of escalation is reasonable. This conclusion is appropriate in light of three other factors: (1) there are provisions for root cause analysis of continuing problems; (2) there exists the option of ending 271 authorization where that measure is shown to be appropriate to the circumstances and (3) there exists the ability under non-271 sources of regulatory authority to examine the causes and consequences of structural failures or weaknesses in the facilities, management, systems, processes, activities, or resources by which regulated providers of utility services, such as Qwest, satisfy their service obligations.

AT&T comments

AT&T disagrees with Antonuk's finding and points out that both the Colorado commission and the Utah Staff rejected limits on payment escalation. AT&T claims that Qwest's argument that unlimited payment escalation would overcompensate CLECs misses the point because the purpose of payment

escalation is to balance CLEC compensation for their losses and to ensure the penalty is higher than the amount Qwest is willing to absorb as a cost of doing business. AT&T cited the Colorado commission's reasoning that continuing escalation of payments for continuous poor performance should help prevent the possibility that Qwest might evaluate whether it would rather absorb QPAP penalties and deter competition or avoid penalties and comply with the law.

Covad comments

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

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

Comments received on preliminary report Qwest reiterates that the FCC has approved a six-month escalation limit in every Texas-based plan it has considered (Texas, Kansas, Oklahoma, Arkansas, and Missouri). Qwest argues that unlimited escalation would unreasonably overcompensate CLECs without increasing incentives for Qwest to comply with the performance standards. Qwest claims the record in this proceeding does not support the premise of the Commission's finding – that unlimited escalation is necessary to ensure Qwest payments under the plan are higher than the amount Qwest is willing to absorb as a cost of doing business. Qwest repeats Antonuk's observations from his *Report* that repeated misses by Qwest could result as much from poorly designed standards as anything else and that there is no evidence at this point that proves

with certainty that Qwest can meet the performance standards and sustain that compliance over time.

AT&T, TA and MTA support the Commission's tentative finding. AT&T responded to the Commission's request for proposals to change Table 2 within QPAP Section 6.2.2 to reflect the Commission's decision not to limit escalation to 6 months. AT&T proposes that after 6 missed months in a row, the per-occurrence payment amount increase in each subsequently missed consecutive month by an increment of $100. The payment would be calculated by subtracting six from the number of consecutively missed months, multiplying the remainder by $100, and adding to that amount increments of $800 for measures classified as high, $600 for measures classified as medium, and $400 for measures classified as low. (Example: In month 7 of 7 consecutive misses on a measure, the per-occurrence payment due for a measure classified as high would be $900. [7-6=1, x $100 + $800 = $900.] In month 8 for the same missed measure, the payment would be $1000; in month 9, the payment would be $1100, etc.) Regarding per-measurement payments, AT&T proposes that after 6 missed months in a row, the per-measurement payment for low-weighted measures would continue to increase by $5,000 each month, for medium-weighted measures, payments would continue to increase by $10,000 each month, and for high-weighted measures, payments would continue to increase by $25,000 each month. The per-measurement payment would be calculated by subtracting six from the number of consecutively missed months, multiplying the remainder by $25,000, $10,000, or $5,000 for measures classified as high, medium and low, respectively, and adding to that amount increments of $150,000 for measures classified as high, $60,000 for measures classified as medium, and $30,000 for measures classified as low. (Example: In month 7 of 7 consecutive misses on a measure, the per-measurement payment due for a measure classified as low would be $35,000. [7-6=1, x $5,000 + $30,000 = $35,000.] In month 8 for the same missed measure, the payment would be $40,000; in month 9, the payment would be $45,000.

TA and MTA propose that, after six missed months, the penalty amounts should double in each successive missed month. MTA disagrees with Antonuk's reasoning that Qwest's continued failures to meet a performance measure would indicate the performance is beyond Qwest's control and continued payment escalation would be ineffective. MTA argues that continued performance failures indicate something is wrong and that Qwest should not be given an incentive to "wait out" the six months and face no increased consequences after that.

Commission's finding: The Commission's preliminary finding remains unchanged. Even though, as Qwest points out, the FCC has approved payment escalation limits when it approved all the Texas-based plans, the Commission reiterates here that the FCC has recognized that individual state plans may – and do -- vary. If, as Qwest posits could happen, continued deficient performance is not Qwest's fault, but rather caused by poorly designed performance measurements, there will be the opportunity to correct the PIDs at the six-month reviews.

The Commission adopts AT&T's proposal for continued Tier 1 payment escalation after 6 months. The proposal is reasonable and fair because it continues escalation in the same increments after 6 months of deficient performance as those which occur prior to 6 months. The Commission rejects as unreasonable the proposal by TA and MTA to double the penalty amounts in each successive month of deficient performance.

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

between the states and CLECs. Antonuk finds that Tier 1 payments already provide adequate compensation to CLECs.

II. CLEARLY ARTICULATED AND PRE-DETERMINED MEASURES

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

B. Adding measures to the payment structure.

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

Comments on Commission's preliminary report TA and MTA recommend the Commission reconsider Antonuk's resolution. If due to Qwest's inability to serve, or to delay serving, a CLEC, a customer cancels an order with the CLEC, TA asserts Qwest should be penalized. If excused, Qwest may selectively target a CLEC's higher valued customers for poor service and may, in turn, thwart a CLEC's effort to take customers from Qwest. MTA argues that a CLEC's reputation is damaged beyond the loss of one customer when a Qwest due-date miss results in the customer canceling the order and that, meanwhile, Qwest is able to retain that customer.

Commission's finding: The Commission declines to modify the QPAP as TA and MTA recommend. That said, the Commission advises CLECs to document their experiences and in the proper forum apprise the Commission of the instances involving the sort of behavior they predict here.

2. Requiring payments for "diagnostic" PIDs. Antonuk finds that EELs, line sharing and sub-loops should be included in the QPAP payment structure as soon

as practicable. He notes that firm benchmarks or parity standards will have to be adopted first.

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

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

Comments on Commission's preliminary report Both MTA and Qwest filed comments. MTA concurs with the Commission's preliminary finding and would only encourage the Commission to include diagnostic PIDs in its six-month progress review of the QPAP.

Qwest comments that the Commission misapprehends the issue that is raised in Antonuk's *Report*. Qwest asserts to have been asked whether "diagnostic *submeasurements* of PIDs that were already in the QPAP would be added and eligible for payment." Qwest asserts to commit to add them if they received "a standard through the ROC OSS collaborative before that process ended." It is that recommendation Qwest holds Antonuk adopts. Qwest, however, never asked and did not commit to include all diagnostic PIDs in the QPAP prior to the six-month review and nor did any party advance a contrary position.

Commission's finding: The issue here may be confused but for good reason: there is no mention of diagnostic "submeasurements" of PIDs in Antonuk's report that were already in the QPAP. The discussion there references EELs, line sharing and sub-loops. His report summarizes Qwest's position including that line sharing and sub-loops are excluded from the QPAP payment structure because the performance measures for them are diagnostic in nature, but as the ROC OSS collaborative changes measures from diagnostic to a firm benchmark

or parity standard, they would be included in the QPAP. If the dispute in Qwest's comments is over "all", as it appears, and if by "all", Qwest means other than EELs, sub-loops and line sharing, then there appears no disagreement. Still, over the life of the QPAP as new services emerge in conjunction with diagnostic measures, these services may be added to the QPAP for penalty purposes. For example if a diagnostic PID exists for special access, the Commission is not foreclosing the likelihood that that PID may become a benchmark or parity measure. The six-month review process is the designated forum for consideration of adding new performance measures to the QPAP.

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

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

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

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

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

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

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

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

D. Measure weighting.

1. Changing measure weights. Antonuk recommends adopting the measure weighting initially proposed in the QPAP and not adopting either the weighting

increases sought by CLECs for certain "high-value" services (collocation, LIS trunks, UDIT, unbundled loops, resold DS-1 and DS-3) or the weighting decreases Qwest sought in return (residence & business resale, 2-wire loops, analog loops).

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

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

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

E. Collocation payment amounts.

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

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

F. Including special access circuits.

WorldCom requests inclusion of special access circuits in the performance measures while ELI/Time Warner/Xo considered payments important due to CLEC use of special access to provide local exchange service. Qwest asserts there is agreement by the ROC-OSS collaborative to drop special access circuits from discussions. Because the evidence

demonstrates that most special access circuits at issue here were provided under Qwest's interstate FCC tariffs, Antonuk concludes that such circuits do not merit QPAP inclusion as PID performance measures, as requested by ELI/Time Warner/XO Utah and WorldCom. Unless inappropriate barriers exist that have the practical effect of requiring tariff purchases where interconnection purchases should be available, Antonuk reasons that the FCC should address failures to meet tariff requirements.

WorldCom comments

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

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

Comments on Commission's preliminary report The only commenter, Qwest, concurs with Antonuk that the Commission lacks jurisdiction given the percent of special access circuits that are purchased from interstate tariffs. The FCC has exclusive jurisdiction to address special access related performance issues. If the Commission would impose on Qwest obligations and remedies different from those that are interstate, the Commission

would interfere with FCC authority and such action is inconsistent with the filed rate doctrine. Qwest adds that the FCC has complaint procedures. Under the public interest requirement, that includes PAP, the New York PSC found no need to consider special access. Unless special access facilities involve significant "local exchange service by CLECs," in which case they may convert to UNEs, the FCC expressed legal and policy concerns about applying 251(c)(3) to such circuits. Qwest also notes that at AT&T's urging the FCC began a rulemaking on whether it should adopt a select group of performance measures and standards to evaluate how ILECs provide special access services; in its petition, AT&T recognized that the FCC has unique responsibility and special access problems cannot be addressed adequately by state commissions. Qwest asserts that because this FCC proceeding addresses the role of states, including the same issue in the QPAP is of greater concern. Qwest adds that the FCC questions the costs and benefits of providing meaningful special access measures in lieu of UNE purchases. Qwest concludes that the Commission should not veer from Antonuk's resolution.

Commission's finding: The Commission finds that it is not timely to require Qwest to include in the QPAP, for penalty purposes, PIDs for special access circuits. This final decision does not rule out the likelihood of a future change in this policy. Subsequent decisions must be informed and timely vis-à-vis ongoing FCC investigations, actions taken by other state Commissions and state-specific circumstances. Opportunities will emerge to revisit this decision and the above unanswered questions may be revisited in subsequent processes.

G. Proper measure of UNE intervals.

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

H. Low-volume CLECs.

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

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

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

Comments on Commission preliminary report MTA and Qwest filed comments. Although related MTA comments were reviewed earlier (see I. A. 6), MTA again notes its skepticism that the QPAP provisions are sufficient to meet the "meaningful and significant incentive" test in low-volume situations. As low volumes render each occurrence more significant to small CLECs, MTA recommends an "expedited dispute resolution process" to address low volume and other situations that arise in the QPAP for which non-standard solutions are preferable and more equitable. Qwest asserts that it modifies Antonuk's recommendation because inclusion of the prior 11 months of performance results may not solve the "small numbers problems." With a 90%

benchmark, the minimum number of CLEC "business units" to avoid a requirement of perfection is ten. Although it is likely to reach the requisite number of data points with less than 11 months of accumulated performance, in rare cases it may be necessary to include more than 11 months. Qwest's modification of Antonuk's recommendation would "pull data" from only the necessary number of months of performance results.

Commission's finding: It is unclear to the Commission what kind of non-standard solutions MTA suggests and, for that matter, what other CLECs may pursue. The Commission believes the 6-month review process that serves to review the addition/deletion of performance measures should suffice. If it does not suffice, then the two-year review of the adequacy of the QPAP to induce Qwest to perform is another alternative. Because MTA ties its response here to that in Section I.A.6 (supra, "Likely payments in low-volume states"), the Commission refers to its response in that section. The Commission agrees with MTA about the need for an expedited dispute resolution process to speedily resolve disputes over wholesale issues between Qwest and CLECs, however that process, as discussed earlier in I.A.6, is not a re-opener for CLECs to circumvent the payment mechanisms for CLECs collectively or individually; as noted earlier, that aspect of MTA's proposal is denied. Once the Commission approves the QPAP, its basic elements, such as this compensation provision for low-volume CLECs, will not be subject to change in the "expedited dispute resolution process" fashion that MTA recommends as an option for larger penalty payments.

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

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

The QPAP (Section 16) provides for the occasions when the QPAP may be amended. Antonuk finds Qwest's QPAP to limit reviews similarly to how the Texas PAP and the Colorado PAP limits reviews. AT&T had noted that the New York and Texas plans allow any aspect to be examined at six-month intervals and urged the same in

consideration of the public interest. Qwest objects to opening the QPAP generally to amendments. Antonuk reviews what revisions the Colorado Special Master's Report allows at 6 month and at 3 year intervals. The purpose of the latter review is to determine the PAP's effectiveness at "inducing compliant performance." He finds this process should be adopted (*Report*, p. 61). Antonuk reasons that due to uncertainty on the continued role of the ROC in performance measure development and administration, the Texas arbitration provision is therefore appropriate to assure that the QPAP meets the applicable standards without unduly exposing Qwest to indeterminate increases in its financial exposure. He also recommends three changes to the QPAP review section:

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

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

3. Provide for biennial reviews of the QPAP's continuing effectiveness for the purpose of allowing state commissions to regularly report to the FCC on the degree to which there are adequate assurances that Qwest's local exchange markets remain open.

Qwest comments

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

AT&T comments

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

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

Commission preliminary finding: The QPAP calls for reviews every six months for the purposes of determining: (1) whether performance measurements should be added, deleted or modified; (2) whether to change benchmark standards to parity standards; and whether to modify the weighting and/or tiers assigned to measurements. A major review by an independent third party of the continuing effectiveness of the QPAP is scheduled for two years after the QPAP takes effect. In addition, there is a provision that provides that the QPAP will be available to CLECs until Qwest eliminates its Section 272 affiliate, at which time the Commission and Qwest will review the continuing necessity of the QPAP. The same provision calls for the QPAP to be rescinded if Qwest exits the interLATA market. The Commission addresses each of Antonuk's recommendations for changes to the QPAP review section below:

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

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

Comments on Commission preliminary finding Qwest recommends that the Commission adopt Antonuk's recommendation, which was based on his recognition that the FCC-approved Texas-based plans provide well-defined criteria for six-month reviews. Qwest objects to the Commission's suggested language as giving broad, unlimited discretion to

the Commission to add any topic to the 6-month reviews, whether or not it is related to performance measurements or their classifications.

AT&T and MTA agree with the Commission's preliminary finding that it retain the discretion to add topics and criteria to the six-month reviews. AT&T claims there is precedent in Qwest's region for this finding because Wyoming PSC, the Colorado hearing examiner, the Colorado PUC special master, and the Utah Staff all advocated the same Commission discretion. AT&T adds that the FCC has recognized state commissions' role in administering and creating performance plans.

MTA recommends the Commission broaden its recommended language here to enable other parties as well as the Commission to raise any issues related to performance assurance at the six-month review or at any other time. MTA suggests the Commission hold CLEC forums at which Qwest and CLECs can discuss problems. MTA argues it is essential for the Commission to maintain change control over the QPAP, including establishing new enforcement mechanisms, to ensure Qwest maintains the actions it has taken to open up its local service markets to competition.

Commission's finding: The Commission believes it is necessary to revise and clarify its preliminary finding on the issue of topics for the 6-month review. While it is the Commission's expectation that performance measures as described in the existing QPAP review provision will be the only topics for discussion at these reviews, the Commission finds that the QPAP must provide the Commission with discretion to broaden the review to respond to circumstances that may arise as experience is gained with the operation of the QPAP. Regarding Qwest's argument that the FCC has approved several Texas-based plans that included this existing review provision, the Commission responds again that the FCC has recognized that individual state plans may vary and that states have a role in creating, administering and enforcing PAPs. Regarding MTA's suggestion that parties other than the Commission be able to add topics to the review agenda, the Commission responds that the Commission will set the agenda for the reviews, but that agenda-setting process is likely to occur in a multistate collaborative process with participation from

representatives of state commissions, Qwest, CLECs and other interested parties. Regarding MTA's suggestion that the Commission sponsor periodic CLEC forums, this issue was resolved in the Commission's recent report on the Montana CLEC forum. The Commission agrees that it should maintain "change control" over the QPAP, as discussed below.

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

Comments received on Commission's preliminary report Qwest disagrees with the preliminary finding and prefers the current QPAP language that requires the use of AAA arbitration as described in SGAT section 5.18.3 for resolution of disputes concerning the addition of new performance measurements to the plan. (Changes other than addition of new measurements resulting from the 6-month review would require Qwest's agreement. This issue is discussed later in this report.) Qwest argues that AAA arbitration is quick, inexpensive, avoids litigation delays and is suited to resolution of issues that might

involve multiple jurisdictions. AT&T and MTA support the Commission's preliminary finding. AT&T asserts there is significant authority in FCC 271 decisions to support the Commission's tentative decision to handle QPAP-related disputes, including those arising from 6-month reviews. MTA argues that disputes over addition of performance measures, or disputes over any QPAP change at all, should not be subject to the SGAT dispute resolution process, but should be brought to the Commission. MTA asserts the Commission has primary jurisdiction for ensuring Qwest's continued compliance with Section 271. MTA proposes the Commission establish an expedited dispute resolution process along the same lines as the PSC arbitration process already in place, only using expedited time frames. MTA urges the Commission to retain its responsibility for QPAP dispute resolution even if it joins a multistate effort to conduct QPAP oversight activities, and not to cede its authority to a multistate group.

Commission's finding: The Commission affirms its preliminary finding. As it is the Commission's responsibility to administer and oversee the operation of the QPAP, the responsibility to resolve disputes arising out of 6-month reviews resides with the Commission. The Commission continues to support the establishment of a multistate effort to conduct QPAP oversight activities, including dispute resolution arising out of the 6-month reviews, with the understanding that any participating state commission could act independently on issues where it differs from the multistate decision or recommendation. Regarding MTA's suggestion that the Commission develop an expedited dispute resolution procedure, the Commission responds that it supports development of a multistate process to conduct QPAP-related dispute resolution and urges Montana CLECs and other interested parties to participate in that process. As for wholesale service dispute resolution in general, the Commission notes that any party may submit at any time a petition for rulemaking that proposes an expedited dispute resolution procedure.

Biennial reviews of the QPAP: Antonuk recommended the Commission review the QPAP's continuing effectiveness every two years instead of after three years. MCC recommended an annual review in order to update performance measurements and

penalties, with a thorough review after three years. The Commission adopts Antonuk's recommendation for a thorough review every two years because the 6-month reviews will provide sufficient opportunity to address MCC's concern regarding updates related to performance measurements.

Other issues in Section 16 not addressed by Antonuk:

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

Initial 6-month review: The first sentence of Section 16.1 provides that the first 6-month review will occur six months after Qwest obtains Section 271 approval from the FCC for the one of the nine states that participated in the multistate QPAP workshops. This language appears to contemplate a multistate review process that is not yet in place. The Commission finds this language should be modified to provide for the first 6-month review to occur six months after the date Qwest obtains Section 271 approval from the FCC in Montana, unless the Commission agrees to a different date as a result of establishment of a multistate QPAP review process.

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

Comments on Commission preliminary report Qwest, AT&T and MTA submitted comments. Qwest argues the Commission has no authority under the Telecommunications Act or under state law to impose changes to the terms of the QPAP without Qwest's consent and that doing so would raise due process concerns. Qwest claims that allowing the Commission to unilaterally amend the QPAP would violate the contract law principle that makes unenforceable a contract which provides one party the right to modify it. Qwest reiterates its position that the QPAP is a voluntary offering, not a required one. AT&T comments that, with all the relevant precedent supporting state commission control of performance assurance plans, it agrees with the Commission's tentative decision to strike the language at Section 16.1 that would require Qwest's agreement to any QPAP changes, except for those related to additions of performance measures. MTA objects to QPAP Section 16.1 if the language in that section precludes the Commission from exercising change control and gives Qwest the exclusive right to determine if and when QPAP changes will be made.

Commission's finding: The Commission continues to find that QPAP change control should rest with the Commission, not with Qwest. Qwest's argument that the QPAP is voluntary and is not required as a condition of 271 approval by the FCC ignores two facts: (1) this Commission will not recommend that the FCC grant Qwest's 271 application unless Qwest has in place a performance assurance plan approved by this Commission; and (2) no 271 application has been submitted to and approved by the FCC without inclusion of a PAP as a safeguard against backsliding after 271 entry. Qwest's insistence on maintaining the QPAP requirement that gives Qwest veto power over any QPAP change, except for additions of performance measurements, would make a mockery of the multistate collaborative approach this Commission envisions for QPAP reviews because Qwest could and would nix any change not to its liking. Similarly, if the QPAP were revised to require mutual agreement by Qwest and CLECs electing the QPAP, there would likely be issues where mutual agreement was not possible, with the result being an unworkable process that failed to resolve issues at all. The Commission finds, as it did in the preliminary report, that it is its responsibility to administer the QPAP and oversee its operation. The Commission, whether acting on its own or as a

member of a multistate QPAP oversight group, will develop a QPAP review process that ensures the due process rights of Qwest and CLECs alike are protected.

B. Monthly payment caps (Section 13.9).

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

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

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

D. Low volume critical values.

Antonuk rejects Z-Tel's and WorldCom's proposal to apply the lower critical value of 1.04 to all low volume measures and not just the subset of them that was agreed to by compromise of most of the parties in the PEPP collaborative. (The PEPP agreement had decreased the default critical value from 1.65 to 1.04 for certain low-volume measures and increased it to varying levels above 1.65 for progressively larger volume measures.)

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

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

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

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

G. Minimum payments.

Antonuk revises the QPAP to require annual payments to CLECs of $2,000 for each month in the year in which Qwest missed any measure applicable to low-order-volume CLECs (annual order volume of 1200 or less), less what was paid in QPAP payments to such CLEC. (For example, if Qwest paid a qualifying CLEC $5,000 in QPAP payments, but there were 9 months in the year in which Qwest failed to meet a Tier 1 measure for that CLEC, the added amount that Qwest must pay at the end of the year to that CLEC would be 9 x $2,000 - $5,000 = $13,000.) Antonuk concludes that minimum payments should not be applied on a per measure basis. His proposed minimum payment calculation must be performed at the end of each year.

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

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

Comments on Commission preliminary report The MCC comments that whereas minimum payments are not necessary, as Qwest maintains, because the QPAP is changed to make annual minimum payments based on the number of months in which Qwest fails to meet performance standards, the language revisions are acceptable. Qwest adds that in

a Washington PUC case, neither WorldCom, AT&T, nor Covad objects to Qwest's implementation of this recommendation.

Commission's finding: The Commission finds merit in and accepts Qwest's revisions to the QPAP.

H. 100% caps for interval measures.

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

AT&T comments
AT&T claims that Antonuk misunderstood the CLEC position on this issue as being that the per-occurrence scheme when applied to interval measurements should measure the number of individual misses and then assign a severity level to each miss. Based on this misunderstanding, according to AT&T, Antonuk then criticizes the CLECs for their failure to provide evidence about the number and severity of Qwest misses on interval measures. AT&T agrees with Z-Tel's argument that it is inappropriate to try to introduce the number of misses into an interval measure that does not use the number of misses to measure performance, but instead relies on the time interval taken by Qwest to provide service. AT&T comments that CLECs and Qwest all recognize that very poor Qwest performance to CLECs and the use of the per-occurrence QPAP scheme can result in the number of payment occurrences exceeding the number of CLEC orders in a month. AT&T states the issue is whether the payment occurrences should be capped at the number of CLEC orders. Qwest says they should, because it would not make sense to pay CLECs on more orders than they actually submitted in a month. AT&T says no, because the worse Qwest's performance is, the more Qwest should pay. AT&T reiterates its argument that the 100% cap on interval measures protects Qwest against its own poor performance to CLECs.

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

Comments on Commission preliminary report AT&T requests reconsideration of the Commission's preliminary finding that there should be a 100% cap on the number of payment occurrences for interval measures. AT&T adds that since the time of the Commission's preliminary finding on this issue, the FCC has provided some guidance

that supports AT&T's argument that there should be no cap. A per occurrence payment mechanism similar to the one in the QPAP, but without a 100% cap on the number of payment occurrences, is part of the SBC/Ameritech Merger Agreement and SBC sought permission to add the 100% cap. The FCC's response to SBC's request was:

> *SBC first argues that the performance gap (sic) calculated in the second step should be limited to 100%. To do otherwise, SBC claims, would require the company to pay on more that the actual number of data points, i.e., applying a 200% performance gap to 150 data points would cause the company to pay on 300 data points. Capping the performance gap at 100% would reduce the example payment to $135,000.*
> *I find this argument unpersuasive. Failing the performance standard by a wide margin, which is often within SBC's control, creates a large performance gap. A large performance gap does not mean SBC pays on more that the actual number of data points, as SBC argue. Rather, SBC would simply be paying for a larger disparity on the specified number of occurrences.*

AT&T adds that the arguments the FCC finds unpersuasive are the same ones that Qwest makes and while the FCC eventually approved SBC's 100% cap, the approval was granted for reasons of "administrative efficiency" not that there could be more payment occurrences than orders. The FCC granted SBC's request because the Texas PUC approved such a plan with a 100% cap. AT&T argues in "this situation" administrative efficiency has no role and it urges the Commission to follow the FCC's guidance and not cap the number of payment occurrences at the number of orders. AT&T would delete the following from Section 8.2.1.2, Step 2:

> *The percent difference shall be capped at a maximum of 100%. In all calculations of percent differences in sections 8.0 and 9.0, the calculated percent differences is capped at 100%.*

Commission's finding: The Commission finds merit in affirming its preliminary decision, for the time being. However, this decision is a candidate for review no later then in the first two-year review of the sufficiency of the QPAP to induce the right behavior. If in addition to providing lesser quality service to wholesale customers relative to retail customers there is a significant disparity, then the need for appropriate penalties shall be revisited.

I. Assigning severity levels to percent measures.

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

IV. SELF-EXECUTING MECHANISM

A. Dispute resolution (Section 18).

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

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

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

Comments on Commission preliminary finding Qwest, AT&T, MTA and MCC commented. Qwest disagrees with the Commission's finding and points out that SGAT Section 5.18 specifically states it is not intended to limit the Commission's or FCC's lawful authority and provides parties with the option of taking disputes to a court, agency or regulatory authority with jurisdiction.

AT&T agrees with the Commission's tentative decision and cites as support the same argument AT&T made regarding resolution of disputes arising out of the 6-month review process, which is the claim there is sufficient authority in FCC 271 decisions and other plans that support the Commission's finding.

In its comments on Section III.A.3 of the preliminary report, MTA agrees with the tentative finding in this report section that the Commission administer the operation of the QPAP and manage dispute resolution over its provisions. MTA recommends establishment of an expedited Commission dispute resolution process.

MCC recommends the Commission adopt a formal dispute resolution procedure using formal arbitration similar to interconnection and UNE arbitrations and require arbitration agreements to be filed with the Commission. MCC notes that parties could not use arbitration to modify the QPAP and asserts only the FCC or Commission has that authority.

Commission's finding: The Commission affirms its preliminary finding. It is the Commission's responsibility to oversee and administer the QPAP, including resolving disputes over the meaning and application of QPAP provisions. Given that finding, it is not appropriate then for these disputes to be handled using the SGAT dispute resolution process, which provide for processes that do not include the Commission. It would be possible for the Commission to develop either a formal arbitration process of its own for this purpose, as MCC recommends, or an expedited dispute resolution process, as MTA recommends. At this time, however, the Commission intends to pursue the same multistate approach for QPAP dispute resolution as it plans for QPAP reviews, audits and administration of performance measurements. (In such a process, each state commission will preserve its right to act independently on issues where it may differ from the multistate group's decisions.) It seems unlikely that disputes over the meaning or application of the QPAP could be Montana-specific, but in that event, it may be necessary to resolve the dispute on a Montana-only basis.

B. Payment of interest.

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

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

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

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

C. Escrowed payments.

Antonuk includes in the QPAP provisions for one party to the QPAP to require the other party to make payments into escrow where the requesting party can show cause, perhaps on grounds similar to those provided by the Uniform Commercial Code for cases of commercial uncertainty.

D. Effective dates.

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

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

2001 payment reports and continuing until Qwest gains (271) approval from "the state."

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

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

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

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

AT&T comments
AT&T disagrees with Antonuk's finding on this issue and calls it "illogical, inexplicable and ILEC-biased."[8] AT&T points out that, under Antonuk's proposal, if Qwest is providing substandard service in the months prior to QPAP implementation, it will be wiped off the books once the QPAP becomes effective.

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

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

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

Commission's finding: The Commission affirms the preliminary finding because no participant commented on it.

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

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

Comments on Commission preliminary report MCC and Qwest filed comments. MCC comments that competition can only be preserved by continuing the QPAP and that competition cannot exist without competitors. In this regard The 1996 Act could not be clearer:

> *To promote competition and reduce regulation in order to secure Lower prices and higher quality services for American telecommunications Consumers and encourage the rapid deployment of new Telecommunications technologies.*

MCC comments that once the QPAP is established and approved by this Commission, it only has the right to alter or terminate the plan. Any party should be "permitted to petition" the Commission for a change in the plan if it files a complaint. Qwest could petition to terminate the plan if it exits the interLATA market. However, it should make no difference that Qwest later exits the market: Qwest's participation in the interLATA market could be profitable and it could sell its interLATA carrier to another.

Qwest comments that Section 271 of The 1996 Act is the quid pro quo for the right to provide in-region interLATA service. Qwest adds there is no justification to require QPAP's extraordinary self-executing payments to CLECs if Qwest is not providing in-region interLATA service. Further, in the absence of the QPAP, CLECs have recourse to other legal remedies for actual violations of state or federal law. Qwest is not aware of any state recommendation or FCC-approved 271 filing that prohibits a BOC from withdrawing its PAP if it exists the interLATA market.

Commission's finding: The Commission finds merit in MCC's comments: the intent of Congress is clear. Allowing Qwest to withdraw its QPAP upon exit, for whatever reason, from the interLATA market appears inconsistent with Congressional intent. If and when Qwest decides to exit the interLATA market, it will be appropriate to allow Qwest to petition the Commission, if it so chooses, to withdraw the QPAP. Qwest's QPAP obligations will continue until Commission action on a petition favors Qwest's request to discontinue the PAP.

E. QPAP inclusion in SGAT and interconnection agreements.

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

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

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

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

Comments on Commission preliminary finding Qwest suggests amending the recommended language to clarify that no provision of the QPAP, including monetary penalties, will apply until Qwest receives Section 271 approval. AT&T proposes additional language to be inserted after the Commission's language:

> *CLECs may seek amendments to their interconnection agreements to include the QPAP and the related Performance Indicator Definitions (PIDs) as soon as the Commission approves the QPAP, with the understanding that monetary penalties will not apply until the date Qwest receives Section 271 approval from the FCC. CLECs will not be required to accept any other terms from the Qwest SGAT in order to incorporate the QPAP into their interconnection agreements. If at any time during the term of such interconnection agreements, the remedies under the QPAP are not available to CLECs (e.g., if Qwest has not obtained 271 approval from the FCC yet), then all terms and conditions in their interconnection agreements that may provide remedies to CLEC shall be available. At all times, remedies under interconnection agreements shall remain available for matters not addressed by the QPAP.*

Commission's finding: The Commission agrees with Qwest's suggestion that language be added to clarify that no QPAP provision, not just those requiring monetary penalties, will apply until the date Qwest wins 271 approval from the FCC. The Commission also finds merit in the language proposed by AT&T that would not require CLECs to adopt SGAT terms into their interconnection agreements in order to elect the QPAP and would require that remedies available to CLECs under their interconnection agreements will continue to be available until Qwest obtains 271 approval and the QPAP remedies take effect. It may not be necessary to include the final sentence of AT&T's proposed language because it may be stated elsewhere, either in the QPAP or in the SGAT. The Commission directs Qwest to submit language for this provision in its QPAP compliance filing that incorporates the Commission's findings here.

F. Form of payment to CLECs.

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

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

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

Comments on Commission's preliminary report AT&T and Qwest comment on the form of payments issue. AT&T notes that the Colorado Commission requires payment by cash or check, which Qwest did not subsequently dispute.[9] AT&T does not take issue with the new Colorado language found in CPAP §12.2 which reads: *"All payments (under the PAP) 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."*

Qwest asserts that before the Washington State UTC neither AT&T, WorldCom nor Covad objected to Qwest's "format" and the issued should remain settled.

Commission's finding: The Commission finds merit in Antonuk's resolution which appears to differ from the approach used in Colorado to the extent "cash" and "cash equivalent" payments differ, that bills are 90 past due versus 30 days due and that the amount that would otherwise be credited is in dispute.

[9] *See Decision on Motions for Modification and Clarification of the Colorado Performance Assurance Plan, In the Matter of the Investigation into Alternative Approaches for a Qwest Corporation Performance Assurance Plan in Colorado*, Decision No. R01-1142-I, Docket No. 01I-041T (rel. November 5, 2001) at p. 20.

V. ASSURANCES OF REPORTED DATA'S ACCURACY

Qwest cites the following as assurances that the performance data underlying the QPAP will be reliable: (1) measures will be audited twice by the time the QPAP is effective; (2) the QPAP includes a root-cause analysis provision; (3) the QPAP includes a risk-based audit program; (4) CLECs may request raw data from Qwest in order to verify data and may request audits of individual performance measures; and, (5) the QPAP provides for audits of Qwest's financial system used to calculate CLEC payments.

A. Audit program.

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

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

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

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

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

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

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

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

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

Commission preliminary finding: For resource and efficiency reasons, the Commission agrees with Antonuk's recommendation that state commissions should jointly oversee the QPAP auditing function in a manner that allows each participating state to act independently on issues where it might differ from the other states. If such a joint regulatory oversight group is formed by some or all of the Qwest states in order to conduct their QPAP review and auditing responsibilities, the Montana Commission likely will participate. However, QPAP Section 15 (concerning the audit program) is currently written as if there is a multistate oversight regime already in place and, therefore, does not take into account the possibility that states will not form a joint oversight body and the Commission will conduct its QPAP audit responsibilities on its own. Other provisions of Section 15 inappropriately dictate the method by which the multistate commission oversight group will resolve audit-related disputes and appeals of disputes. Additionally, the current Section 15 contains provisions that limit the Commission's

discretion to determine the procedure, scope, timing and conduct of audits. The Commission revises Section 15.1 through 15.4 below to address these concerns.

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

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

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

15.1.3 The Commission will attempt to coordinate its audit plan ~~shall be coordinated~~ with other audit plans that may be conducted by other state commissions so as to avoid duplication. The audit shall be conducted so as not to ~~shall not~~ impede Qwest's ability to comply with the other provisions of the PAP and should be of a nature and scope that it can be conducted in accordance with the reasonable course of Qwest's business operations.

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

15.2 Qwest may not make CLEC-affecting changes to the performance measurement and reporting system without Commission approval. Qwest may make non-CLEC-affecting changes to its management processes to enhance their accuracy and efficiency ~~more accurate or more efficient to perform without sacrificing accuracy~~. These changes are at Qwest's discretion, but will be reported to the independent auditor in quarterly meetings in which the auditor may ask questions about changes made in the Qwest ~~measurement regimen~~

management processes. The meetings, which will be limited to Qwest and the independent auditor, will permit an independent assessment of the materiality and propriety of any Qwest changes, including, where necessary, testing of the change details by the independent auditor. The information gathered by the independent auditor may be the basis for reports by the independent auditor to the ~~participating~~ Commission~~s~~ and, where the Commission~~s~~ deems it appropriate, to other participants. The Commission may review in the QPAP review process the propriety of any discretionary changes made by Qwest pursuant to this section.

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

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

Comments on Commission preliminary findings Qwest, AT&T, TA and MTA commented. Qwest comments it has agreed to a multistate audit process, not separate state audits, and therefore generally objects to Commission-modified language that would implement a Montana-specific audit. Qwest objects to Commission-modified language at

15.1 and 15.1.2 (that deletes the requirements for a two-year audit cycle), to the deletion of 15.1.1 (establishing the multistate auditor selection process), to the modifications to 15.1.3 (requiring the Commission to coordinate its audit plan with those of other states), and to the deletion of 15.1.4 (delegating audit dispute resolution to a multistate committee of commissioner representatives). Qwest objects to Commission-modified language at 15.2 that requires Qwest to obtain Commission approval before making "CLEC-affecting changes" to the performance measurement and reporting system because it does not define the term "CLEC-affecting" and could prohibit Qwest from making necessary changes to report data. Qwest objects to the Commission's amendments of 15.3 that provide for Commission resolution of audit-related disputes rather than turning to the provisions of QPAP Section 18. Qwest recommends the Commission revisit its tentative decision to delete the provision in Section 15.4 that would provide for the use by the Commission of a portion of Tier 1 escalated payments to help fund the Commission's QPAP oversight activities.

AT&T seeks reconsideration of the tentative finding to add language to Section 15.4 that allows the Commission to fund some audit costs with CLECs' Tier 1 payments if Tier 2 funds are not sufficient to pay audit costs. AT&T proposes instead this language:

> *If Tier 2 funds are not sufficient to cover audit costs, the Commission will develop an additional funding method to ~~include contributions from CLECs' Tier 1~~ payments ~~and~~ from Qwest. The Commission reserves the right to use Tier 1 escalation payments due to CLECs to fund audit cost shortfalls. Should Tier 1 escalation payments be used to fund audits, after the completion of the audit, future Tier 2 payments will be used to reimburse CLECs that had their Tier 1 escalation payments diverted to audit funding.*

TA argues the QPAP audit section is flawed because there is no provision that requires Qwest to cooperate with audits by supplying requested information to the auditor. TA claims its concern arises from its firsthand experience with Qwest, which TA says occurred when Qwest denied TA's billing consultants access to pertinent information. TA recommends adding language to prohibit Qwest from obstructing the auditor, to prohibit Qwest from managing the audit process, to give the auditor the right to determine information needs, and to require Qwest to save billing and operational records

for two years. TA comments that, in order to ensure the independence of the auditor, the Commission must select and guide the auditor.

Citing CLEC comments at the Montana CLEC forum that audits are fine, but that the performance measurements themselves may not be capturing the correct performance, MTA recommends the Commission retain authority to review what is being measured, as well as how it is measured and audited.

Commission's findings: The Commission revises its preliminary findings regarding the QPAP audit section somewhat in an effort to clarify its intentions. First, the responsibility to determine the scope and procedure of the audit program, and for resolving disputes over audit decisions, rests with the Commission. The Commission will not approve QPAP provisions that limit or eliminate the Commission's ability and discretion to carry out its auditing responsibilities. It would not be prudent at this time to establish the exact parameters of the audit program in a way that would hamstring the Commission's ability to fashion a program that meets its needs in the future. Second, the Commission fully supports the establishment by state commissions of a multistate QPAP oversight program, which this Commission envisions as including: ongoing administration of performance measures; joint 6-month and 2-year QPAP reviews, as well as resolving disputes arising out of those reviews; and the audit program; and any QPAP-related dispute resolution. However, the QPAP needs to include a "fallback" provision that will allow the Commission to act on its own in the event efforts to establish a multistate oversight group are not successful, or that the Commission declines to participate in it for some reason. The Commission will not approve provisions in this section that dictate the manner in which the multistate group of commissions, if established, will resolve audit disputes because that is a matter for the participating state commissions to decide. Third, the Commission revises a preliminary finding and approves the provision in the current version of the QPAP that allows Qwest to make discretionary changes to its performance measuring and reporting system, but continues to retain for the Commission the right to review as part of the 6-month review process –

and possibly to disapprove -- changes to the performance measuring and reporting system that Qwest has made.

Regarding Qwest's and AT&T's comments related to Section 15.4 (paying for audit expenses), the Commission affirms its preliminary finding, which provides that Tier 2 funds will be used to pay audit costs, but if they are insufficient to cover the costs, the Commission will develop a method to supplement Tier 2 funds with contributions from CLECs' Tier 1 payments and from Qwest. The Commission prefers not to specify at this time in what manner it will obtain contributions from Tier 1 payments and from Qwest so that, in the event it becomes necessary to do so, the Commission's options will not be limited.

In response to TA's concern that the QPAP does not contain a provision that requires Qwest to cooperate with the auditor, the Commission notes that there are QPAP provisions that require Qwest to provide raw performance data to CLECs and to the Commission, as well as record retention requirements. The Commission has no reason to believe Qwest will not cooperate with the auditor and expects Qwest will provide the records necessary for the audit to the auditor.

MTA's suggestion that the Commission should retain the right to review what is being measured by the performance measurements included in the QPAP is addressed in Section III.A of this report regarding the scope of the 6-month reviews.

Rather than rewriting this section to accomplish these objectives, the Commission directs Qwest to submit revisions to the current version of the QPAP to incorporate the Commission's findings.

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

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

C. Providing CLECs their raw data.

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

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

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

Comments on Commission preliminary report In response to the Commission's request for comments on the QPAP language, Qwest asserts that AT&T, WorldCom and Covad did not object to this language when they had the opportunity to do so in the Washington QPAP proceeding.

Commission's finding: The Commission accepts Qwest's proposed language.

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

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

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

VI. OTHER ISSUES

A. Prohibiting QPAP payment recovery in rates.

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

AT&T comments
AT&T continues to argue that the Commission should mandate that Qwest may not recover QPAP costs from ratepayers. In addition, AT&T proposes language for a new provision to be added to the QPAP that explicitly prohibits Qwest from including QPAP payments as expenses in any Qwest revenue requirement or reflecting them in increased rates to CLECs.

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

Comments on Commission's preliminary report Since the Commission asserts jurisdiction on this matter AT&T asks that the following language, which is found in other FCC plans and that Qwest agrees is appropriate, be included in the QPAP:

> *§ 13.10 Any payments made by Qwest as a result of the PAP should not: 1) be included as expenses in any Qwest revenue requirement, or 2) be reflected in increased rates to CLECs for services and facilities provided pursuant to Section 251(c) of the Telecommunications Act of 1996 and priced pursuant to Section 252(d) of the Telecommunications Act of 1996.*

In its comments, Qwest asserts that because the Commission states to agree with Antonuk Qwest's recovery of QPAP costs from ratepayers should not be addressed in the QPAP.

Commission's finding: The Commission finds merit in and accepts AT&T's recommendation to insert the above 13.10 language into the QPAP. While the reference to Qwest's agreement is not apparent, the intent is consistent with the Commission's policy on cost recovery.

B. No-admissions clause (Section 13.4.1).

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

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

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

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

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

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

Qwest comments
Qwest strikes from the QPAP Section 12.3 cited here.

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

Commission's finding: The Commission affirms its preliminary finding.

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

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

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

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

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

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

Comments received on wholesale service dispute issue Qwest, AT&T and MTA commented. Qwest claims the issue of developing an expedited complaint procedure for wholesale service disputes is irrelevant to the QPAP discussion and, at any rate, would require a rulemaking to implement. Regarding the idea of Commission-sponsored forums for CLECs and Qwest to discuss wholesale service issues, Qwest notes this is an issue in the Montana CLEC forum proceeding upon which Qwest will provide comments.

AT&T states it does not support a Montana-specific CLEC forum because it believes Qwest's change management process will provide a region-wide process for all CLECs to raise and resolve wholesale issues. According to AT&T, that process as currently designed allows parties to pursue dispute resolution at a state commission. AT&T supports development by the Commission of an expedited complaint procedure for wholesale disputes and attached to its comments a proposed procedure that AT&T says is modeled after the Colorado Rules on Accelerated Complaints. AT&T also comments on long-term PID administration and attaches as an exhibit its comments on this subject that were submitted to the ROC-OSS technical advisory group.

MTA refers to the recommendation it made in the Montana CLEC forum proceeding that the Commission hold regularly scheduled forums like the CLEC forum to bring Qwest and Montana CLECs together to address issues. MTA also reiterates its call for an expedited dispute resolution process at the Commission, and supports the idea of an

expedited complaint process at the Commission for QPAP issues that would result in a Commission decision in 30 to 60 days.

Commission finding: This issue was resolved in the Commission's April 3, 2002 CLEC Forum Report.

F. QPAP language issues not addressed in Antonuk's Report

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

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

Comments received on Commission preliminary report Qwest declines to support a Tier 2 special fund that holds Tier 2 payments for unspecified purposes.

Commission's finding: The Commission reverses its finding and directs no change to this provision at Section 2.1.1.

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

Comments received on Commission preliminary report Qwest objects to the Commission's deletion of text subsequent to the first sentence because the deleted text contains a fallback provision that Tier 2 funds would be paid into the state general fund if the Commission lacks the statutory authority to receive or administer these payments.

Commission's finding: The Commission reverses its finding and directs no change to Section 7.5.

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

Section 11.3: Revise as follows:

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

Comments received on Commission preliminary report Qwest prefers retaining the language in this section that says the Commission will try to join a multistate effort for QPAP oversight.

Commission's finding: The Qwest-established "special fund" for the Commission's QPAP oversight activities contemplated in this provision and in 11.3.1, 11.3.2 and 11.3.3 appears to run afoul of Montana law because the Commission must obtain legislative authority to use these funds. The Commission will seek the necessary legislative authority. In light of this statutory requirement, however, these provisions with references to a special fund are inappropriate and must be removed from this section. The Commission continues to find that, consistent with the 11.3 language it suggested in the preliminary report, this provision must be revised to provide that the Commission will create a special fund for the general purpose of conducting its QPAP oversight activities, and that nothing in the QPAP prevents the Commission from joining with other state commissions to fund on a multistate basis their QPAP oversight activities that are conducted jointly. The Commission reiterates that it supports the current effort to establish a multistate approach to QPAP oversight activities. Qwest is directed to submit revisions to this section in accordance with the Commission's findings.

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

Commission's finding: See the Commission's finding regarding Section 11.3. Both of these provisions should be deleted.

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

Commission's finding: No participant commented on this finding. The direction to Qwest is unchanged.

CONCLUSION

The Commission directs Qwest to submit for Commission review a revised version of the 11/6/2001 QPAP that incorporates the findings in this report. Any preliminary findings that are not further addressed in this report are affirmed. All revisions made to the 11/6/2001 version must be interlined and/or underlined as appropriate so that changes are readily identifiable. The QPAP compliance filing must be submitted to the Commission no later than April 30, 2002.

BY THE MONTANA PUBLIC SERVICE COMMISSION

_____
GARY FELAND, Chairman

_____
JAY STOVALL, Vice Chairman

_____
BOB ANDERSON, Commissioner

_____
MATT BRAINARD, Commissioner

_____
BOB ROWE, Commissioner

ATTEST:

Rhonda J. Simmons
Commission Secretary

(SEAL)