SUPPLEMENTAL REPORT AND RECOMMENDATION OF THE SPECIAL MASTER TO THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

DOCKET NO. 01I-041T

IN THE MATTER OF THE INVESTIGATION INTO ALTERNATIVE APPROACHES FOR A QWEST CORPORATION PERFORMANCE ASSURANCE PLAN IN COLORADO

As requested by the Hearing Commissioner, I asked for briefing from and held a series of meetings with all interested parties as part of a limited remand to refine the proposed Colorado Performance Assurance Plan (PAP or Plan). Through this process, I worked towards a greater understanding of the four issues specified in the Hearing Commissioner's Order and identified a series of other implementation issues that warrant the Hearing Commissioner's attention. This Supplemental Report and Recommendation thus reflects my effort to develop a rough consensus and a sound approach on each of these issues. The six parts to this report address (I) Requirements for Data Management Processes; (II) Change Management Requirements; (III) Assorted Implementation Issues; (IV) The Escalation Function; (V) The "Special Access Issue"; and (VI) The Changeability of the PAP.

I. Requirements for Processes Used to Generate Data Measurement, Collection, and Reporting

The PAP's ability to ensure non-discriminatory wholesale performance relies on an effective "measurement system." By "measurement system," I mean all of the functions and processes necessary to enable Qwest to collect, manage, and report data regarding the wholesale performance governed by the PAP as well as the relevant retail performance results that are used to provide a parity measure -- i.e., those that set the standard for non-discriminatory performance. To that end, Liberty Consulting conducted an audit to ensure that Qwest's measurement system can collect and report reliably the relevant data as of the date of the audit's completion. Consequently, any changes to Qwest's measurement system after the audit's completion have the potential to alter its reliability, particularly because some changes may alter Qwest's measurement system such that a later audit could not reconstruct what reports would have been generated under the old (that is, an unchanged) model.

In considering the appropriate regulatory oversight of Qwest's measurement system, the Commission must be mindful not to restrict unnecessarily Qwest's flexibility in managing ongoing system development. As an initial matter, it bears mention that the method that Qwest uses to collect data is, by definition, internal to Qwest and does not impose any direct burden on CLECs. To the extent that changes would be "CLEC-affecting," as defined by any Commission-approved change management rules, those changes should be addressed under the approach outlined in Part II. As for internal systems changes, however, Qwest shall need, from time-to-time, to modify its measurement system in any number of ways that will enhance its efficiency. If the Commission were to oversee all such changes through a "pre-clearance procedure," that could impede the efficiency and effectiveness of Qwest's measurement system. Nonetheless, for the reasons noted above, it is clear that the Commission must maintain some oversight to ensure that Qwest's system is reliable.

Under the language presently used in the PAP, Qwest must seek approval for any changes to its measurement system that are "CLEC affecting."[1] In challenging this approach, Qwest suggests that the concept of "CLEC affecting" leaves open substantial questions as to the extent of its flexibility to change its measurement system. To address this concern and to ensure an effective measurement system, I suggest a two-pronged approach. Under the first prong, which governs system changes for which the relevant performance data can be replicated under the old approach (i.e., the *status quo ante*), Qwest should not be subject to any pre-clearance requirement. Rather, Qwest shall be required merely to note all changes on a publicly available website. In addition, the Commission-approved auditor shall, at the appropriate interval, evaluate all changes made to Qwest's measurement system to decide which, if any, should be scrutinized through a process that entails a reconstruction of the data that would have been reported under the prior approach.

Under the second prong, for changes that would alter Qwest's measurement system in a manner whereby the relevant data could not be reconstructed under the prior approach (i.e., a fundamental change to its measurement system), I recommend a two-step procedure. First, before making any proposed "fundamental changes," Qwest shall be required to notify the auditor and request an evaluation of the proposed change. If the auditor concludes that the change would not threaten the integrity of the data collection process, it shall inform the Commission accordingly. Upon receiving the auditor's conclusion that a proposed change is acceptable, the Commission shall have 15 days to take action to prevent Qwest from making such a change and to decide on a process for resolving the issue. If the Commission takes no action on the issue, Qwest shall be free to make the proposed change. If the auditor concludes that the change would be averse to the integrity of the data collection process, Qwest shall be prohibited from making the proposed change.

[1] In particular, Section 14.1 provides that:

> Qwest shall not make any competitor-affecting changes in its performance measurements and reporting system unless changes are made in the six month review process as described in section 18. Qwest may make changes to the underlying data collection and gathering process implementing its measurement or reporting systems so long as the performance measurements are implemented as required. If Qwest makes such changes, it will document material changes on a website developed for the purpose of reporting its results.

With respect to the regulatory oversight of Qwest's measurement system, I recommend several important consequences for failing to follow the procedures set out above. First, if Qwest makes a fundamental change to its data management processes without following the procedure set forth herein, it should be liable to the Special Fund in the amount of $100,000. Second, if Qwest, for whatever reason, cannot produce reliable performance data, it shall be up to the Independent Monitor to determine, as best can be concluded, what payments are due based upon the data collected by the affected CLECs, along with any appropriate interest or late payment obligations. Finally, any failure by Qwest to document accurately on its website non-fundamental changes to its measurement system shall result in a $2500 fine.[2] (Note: This requirement of notifying CLECs via postings on its website of all changes related to performance measurement and reporting applies whether or not the specific change is transparent – say, results in a different looking report – to the CLECs.) The fines related to performance measurement requirements shall be payable to the Special Fund and shall not count against the cap.

II. Regulatory Oversight over Change Management and "CLEC-Affecting Changes"

As presently written, the language in the PAP's Sections 14.1, 14.2 and 14.3 do not clearly distinguish between and treat separately the regulatory oversight afforded to changes to Qwest's measurement system and changes that affect CLECs' access to Qwest's wholesale systems. On the former, the appropriate regulatory treatment should be the procedure set out in Part I above. For the latter, the PAP currently provides only that all unapproved changes to Qwest's wholesale systems that are "CLEC affecting" shall result in a $1000 fine per incident.

By all accounts, the current PAP regime of "one fine size fits all" approach for change management oversight is inadequate. Qwest might, for example, make without approval certain process changes that are "CLEC affecting," but impose minimal harm on CLECs (say, because there is an easy and quick "work around" solution). On the other hand, again without approval, Qwest might also make certain changes to its processes or its system's interfaces that would result in all CLEC orders for maintenance and repair being rejected for a particular period of time. In the first case, a $1000 penalty to each affected CLEC would be a windfall; in the second, it might well fail to compensate competitors for what would be a large set of dissatisfied customers.

The purpose of instituting a payment regime for failing to follow change management requirements is both to ensure reliable performance of Qwest's change management responsibilities and to compensate CLECs who are affected by a Qwest failure to do so. At present, there is no Commission-approved change management regime that can provide further definition for and sub-categorization of what types of "CLEC affecting" change management requirements could trigger different levels of penalties. In theory, there should be some symmetry between the levels of notice and

[2] Section 14.1 specifies that this change log "must contain, at a minimum, a detailed description of the change (in plain English), the effects of the change, the reasons for the change, the dates of notification and of implementation, and whether the change received Commission approval."

opportunity to comment requirements for certain types of changes – say, those requiring systems changes on the CLEC side – and the level of penalties associated with the failure to follow prescribed requirements.

Once the Commission develops and approves a definition and classification regime for "CLEC-affecting" changes in the change management context, it should modify the PAP accordingly. In so doing, it should alter the penalty regime set out in Section 14.3 to ensure that it is better tailored to its dual role in ensuring adherence to the change management rules and providing a rough approximation for any CLEC harm for Qwest's failure to do so. This alteration should include a tiered system of fines. My understanding is that Qwest accepts this premise in principle, with only the exact amounts left to be worked out. If necessary, this alteration can occur at a six-month review. In making these changes, it will be important to ensure that the existing change management obligations – as embodied in PO-16 (release notification), GA-7 (software quality) and PO-18 (versioning) – do not, taken together with the payment obligation for failing to follow the change management rules, result in more than one payment for the same harm.

III. Assorted Implementation Issues

In consulting with the various parties to this proceeding, a number of implementation issues rose to the fore. In each case, the issue arose because a party other than Qwest raised it or I raised the issue in conversations with Qwest. In cases where I raised new issues with Qwest, I attempted to later discuss with other interested parties the desirability – and, in some cases, the necessity – of addressing these issues. To the extent that it is necessary to state so explicitly, I concluded that these issues are within the scope of those that I can recommend changes on my own initiative to the Commission (i.e., even if not raised by a CLEC as an initial matter). For the most part, these issues are largely ministerial and are unlikely to give rise to controversy. This Part sets forth each such matter in turn, explaining the nature of the issue and the proposed resolution.

A. Variance Factors and the "One Free Miss" Rule

Upon close examination, it became clear that several areas of wholesale performance governed by Tier 1A of the PAP could be readily improved. The first such area, as AT&T pointed out, is that the current variance table uses two rules where one could do. In particular, the current table includes lower than otherwise appropriate variance amounts on the understanding that Qwest was permitted "one free miss" before it would be required to pay CLECs for deficient performance. To be sure, the "one free miss" rule makes sense for performance measures that rely on a benchmark to set the standard for performance, but is redundant for parity measures where the variable table itself provides for the necessary "slack factor."

To address this problem, I recommend that the Commission remove the one free rule from the PAP -- i.e., from its use in Tier 1A, 1B, and 1C (except where used in association with performance measures where a benchmark sets the standard) -- and adjust the variance table as follows:

(1) LIS trunks (OP-3) – 21% to 25% (1-5); 17% to 18% (6-15)
(2) LIS trunks (OP-4) – 15% to 18% (1-5); 11% to 12% (6-15)
(3) LIS trunks (OP-6) – 20% to 24% (1-5)
(4) LIS trunks (MR-5) – 18% to 22% (1-5)
(5) LIS trunks (MR-6) – 180 to 220 (1-5)

(6) PO-9b – 14 to 20 (1-5).

(7) NI-1 -- leave alone existing variance table.

(8) UBL (OP-3) – 18% to 25% (1-5); 15.5% to 18% (6-15)
(9) UBL (OP-4) – 10% to 14% (1-5); 8.5% to 10% (6-15)
(10) UBL (OP-6) – 20% to 28% (1-5); 16% to18% (6-15)
(11) UBL (MR-5) – 20% to 28% (1-5); 16% to 18% (6-15)
(12) UBL (MR-6) – 300 to 500 (1-5); 240 to 300 (6–15)
(13) UBL (MR-7) – 20% to 28% (1-5); 16% to 18% (6 –15)
(14) UBL (MR-8) – 20% to 28% (1-5); 16% to 18% (6 –15)

B. Missing Variance Factors

As became evident upon close examination, the current Plan is missing variance factors for several parity measures contained in Tier 1A. This highlights a long-term and a short-term problem. The long-term problem is how to address the inclusion of new variance factors as new Tier 1A PIDs are added. For the most simple solution, I recommend that where a variance factor has yet to be calculated (or where there is not sufficient data to use in developing one), the relevant Tier 1A measures should rely on the same statistical methodology used for Tier 1B and 1C (i.e., that contained within Sections 4 and 5 of the Plan). The short-term concern is how to address the currently missing variance factors. To address this point, I recommend the following steps:

(1) For NP-1 (NXX Code Activation) – For this measure (and this measure alone), the Plan should rely on the "one free miss" rule. Consequently, the first failure will not result in any penalty, but each one afterwards would constitute a "miss" for purposes of triggering payments.

(2) For OP-5 (new installation service quality) – This measure should use the same variance table as used for PO-9b.

(3) MR-11 should use the following variance table:

	1-5	6-15	16-23	23-30	31-40	41-60	61-90	91-150	151-300	301-500	501-1000	1001-1500	1501-2000	2000+
% subtract	16	9	7	6	5	4	3	2	2	1.5	1	.75	.5	0

(4) MR-12 should use the following variance table:

	1-5	6-15	16-23	23-30	31-40	41-60	61-90	91-150	151-300	301-500	501-1000	1001-1500	1501-2000	2000+
mins add	600	300	250	200	175	150	125	100	75	50	40	25	15	0

(5) OP-5-Line Sharing should use the following variance table:

	1-5	6-15	16-23	23-30	31-40	41-60	61-90	91-150	151-300	301-500	501-1000	1001-1500	1501-2000	2000+
% add	22	17	13	11	10	8	7	5	4	3	2	1.5	1.25	1

(6) OP-6-Line Sharing should use the following variance table:

	1-5	6-15	16-23	23-30	31-40	41-60	61-90	91-150	151-300	301-500	501-1000	1001-1500	1501-2000	2000+
days add	12	6	5	4	3	3	2	2	1	1	.7	.6	.5	.25

(7) MR-3-Line Sharing should use the following variance table:

	1-5	6-15	16-23	23-30	31-40	41-60	61-90	91-150	151-300	301-500	501-1000	1001-1500	1501-2000	2000+
% subtract	22	12	9	8	6	5	4	4	3	2	1.5	1	.75	.5

(8) MR-6-Line Sharing should use the following variance table:

	1-5	6-15	16-23	23-30	31-40	41-60	61-90	91-150	151-300	301-500	501-1000	1001-1500	1501-2000	2000+
mins add	500	400	300	250	200	175	150	125	120	90	60	30	25	20

(9) MR-7-Line Sharing should use the following variance table:

	1-5	6-15	16-23	23-30	31-40	41-60	61-90	91-150	151-300	301-500	501-1000	1001-1500	1501-2000	2000+
% add	25	18	14	12	10	8	7	5	4	3	2	1.5	1.25	1

C. Other Variance Issues

In evaluating the modifications proposed above, it bears notice that the substitution of the variance table for the statistical methodology is not a perfect step. The benefits of the variance table approach are that they afford smaller CLECs in particular the luxury of a more "user-friendly" regime that is more transparent, predictable, and will enable them to plan on levels of performance or certain payments. The costs, however, stem both from the novelty of this approach as well as the fact that it is fixed and thus not as dynamic as the statistical methodology used elsewhere in the Plan.

To address the lack of dynamism in the variance table method, I recommend that the Plan include a provision that calls for a "shadow method" of calculating payments for small sample sizes (1-30) based on the permutation test used for such cases in Tier 1B (as set out in Section 4.3.1 (which cross-references the critical values from Section 5.1)). In practice, this means that the CLECs will be provided with the results for both the variance factor method as well as the shadow one and will receive payments based upon whichever one is more beneficial to them. Finally, in a step to guard against the lack of predictability for Qwest that results from these changes, Section 10.3 (which governs the special severity for Tier 1A) should be amended to provide for payments on the lower of the amount generated by the old variance factor method (with the one free miss rule) – i.e., the ones set out in the Commission's earlier orders – or the new variance factors as set forth herein.

D. Language Clarification

To ensure that the language adopted in the PAP does not become subject to future misunderstandings, I propose the following refinements of the existing version. In so doing, I have underlined the proposed additions.

(1) In Section 4.1, it should read "Qwest will be in conformance with <u>Tier 1A, Tier 1B, Tier 1C, and Tier 2</u> benchmark submeasures . . ."

(2) In Section 4.2, it should read "For <u>Tier 1B and 1C</u> parity submeasures, Qwest uses a statistical test . . . between the results for Qwest and CLEC. <u>For the purpose of this section, the Qwest results will be the Qwest monthly retail results as specified in the performance indicator definitions filed with the CPAP as approved by the Colorado Public Utilities Commission.</u> The modified z-test shall be applicable . . . "

(3) Under Section 5, add the following Section 5.2:

"<u>When the CLEC sample size is greater than or equal to 30, Qwest's performance to a CLEC for a Tier 1B or Tier 1C parity submeasure will be considered conforming in a month when the z-score calculated pursuant to section 4.2 is equal to or less than the appropriate critical z-value identified in Section 5.1, Table 1</u>."

(4) In Section 6.1, the following line should be added after the first sentence:

"<u>The average retail performance over the prior six months shall be calculated by summing the six individual monthly numerator values and dividing that amount by the sum of the six individual monthly denominator values</u>."

(5) In Section 6, the following should be added as 6.3:

"<u>Qwest's performance to a CLEC for a Tier 1A submeasure will be considered conforming in a month when the CLEC performance result is better than or equal to the Qwest standard performance result</u>."

(6) In Section 7.1, make the following additions:

For interval submeasures, the CPAP uses the following formula:

CLEC Occurrences = Absolute value of <u>(</u>(CLEC result – standard)/standard<u>)</u> multiplied by CLEC volume.

<u>For the above formulas, for Tier 1A parity submeasures, the standard is the average of prior six month retail performance adjusted by the variance factor in Section 6.1, Table 2. For Tier 1B and Tier 1C parity submeasures, the standard is the current month retail performance, as adjusted for sample size and variance. For Tier 1A, 1B, and 1C submeasures with a benchmark, the standard is the benchmark.</u>

(7) In Section 13.6, which addresses the ability of Qwest to self-correct performance data in advance of audits, the PAP should include language that makes clear that the relevant audits are ones that "<u>focus on the relevant measurements in question</u>." This clarification will ensure that to the extent that an audit is going on – as may sometimes be the case – it will not preclude Qwest from revising the reported data without incurring the fines set out in 13.4 and 13.5 if the audit is focused on a different area of performance measurement.

E. Computation Issue Regarding The Combination of Zone 1 and Zone 2

My original Report and Recommendation called for a disaggregation of performance data to the greatest extent possible. As such, the relevant wholesale performance focused on the geographic categories of zone 1 and zone 2 separately. Similarly, the PAP developed by the multi-state facilitator also adopted a geographically disaggregated approach. This approach stemmed, in large part, from the suggestion by rural-based carriers (e.g., New Edge) that there might be a "compensation effect" -- i.e., that by combining rural and urban performance, "good" urban performance could compensate for "bad" rural performance. The current version of the CPAP, however, does not require geographic disaggregation.[3]

The current approach of aggregating the performance across geographic zones may well reflect a sound model. In particular, it is quite possible that the affected rural carriers would be better off with a geographically aggregated approach on the theory that any "compensation" effect will be outweighed by the fact that the lower sample sizes resulting from disaggregration will mitigate against recovery by raising the threshold before a CLEC is eligible to recover any payments. At this point, however, the ultimate interplay of these two factors is uncertain. As such, I recommend that the PAP follow the suggestion of the rural-based CLECs and the model set out in the multi-state PAP if, for no other reason, than Qwest only need develop a single model for this issue.

To address this issue, the Commission should add the following language to the last paragraph of section 4.3:

"<u>When performance submeasures disaggregate to zone 1 and zone 2, the CLEC volumes in both zones shall be combined for purposes of statistical testing.</u>"

With this change, the last sentence of section 5.1 (which addresses the same issue) can now be struck. Finally, section 7.5 should be modified as follows:

For purposes of severity and duration penalties (Tier 1Y), a "measure" shall be at the <u>most granular</u> level of ~~product reporting~~ disaggregation, <u>except where otherwise specified.</u> For purposes of statistical comparison and occurrence calculation, a measure

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[3] In particular, Section 5.1 calls for Qwest to combine, for purposes of statistical testing, results reported separately for zone 1 and 2. Similarly, Section 7.5 calls for statistical testing, calculation of occurrences, and application of severity and duration to focus at the product level of disaggregation, i.e., not to focus on geographic disaggregation where available.

shall be at the most granular level of ~~product reporting~~ disaggregation, except where otherwise specified.

In offering this recommendation, I want to highlight the importance of making possible subsequent refinements. In particular, it is noteworthy that, for certain Performance Indicator Definitions (PIDs) specified in Section 4.3, Qwest shall combine the zone submeasures on account of the small sample sizes for those PIDs. As should be evident, there is nothing talismanic about the particular measures chosen for such treatment and this list can most certainly be expanded if warranted. More generally, should the compensation effect prove illusory and/or the smaller sample size issue prove formidable, the Commission can – and should – revisit this issue at a six-month review by combining the geographic zones for all submeasures. Similarly, as noted in Section 7.5, the Commission should also consider combining other relevant submeasures – say, for very similar products – if that step proves warranted as a means of creating more meaningful, but still accurate, sample sizes.

F. Unnecessary Measures

In Appendix A, both PO-3A-2 (LSR Rejection Notice Interval – IMA -- Auto) and PO-3B-2 (LSR Rejection Notice Interval – EDI -- Auto) are listed as ones to be included in the PAP under Tier 1B. These measures, as currently reported by Qwest, are calculated on a 14 state basis. As contemplated in my original Report and Recommendation, these measures were not ones that needed to be included in the PAP. After all, unlike PO-3A-1 and PO-3B-1, these measures focus on automated processes that are far less likely to result in deficient performance. As such, they should be excluded from the PAP. To the extent that they later become an area of concern, they could be included at a later date.

G. The Establishment of The Special Fund

To ensure that the administration of the Special Fund contemplated by the PAP (specifically Section 10.4) works as intended, the Commission should designate a specific employee to direct Qwest on how to manage the escrow fund set up for this purpose. Similarly, the Commission should work with Qwest to set up an auditing procedure to ensure the integrity of this fund and the disbursement process. In this procedure, which might be embodied in a memorandum of understanding, the Commission should also make clear that the expenses associated with this fund and any tax liability resulting on interest accrued would be paid from the fund.

H. Miscellaneous Administrative Issues

There are a number of administrative issues that warrant clarification or refinement. First, with respect to the reports listing CLEC-specific performance results (as contemplated by Section 13.2), the Commission should order Qwest to file such reports upon request by Commission staff so that Qwest can share information with them that would otherwise be confidential and proprietary to the individual CLECs. Second, with respect to the reporting of the necessary payments, Qwest should be permitted to provide CLECs with this information via secure websites, which avoid some of the difficulties that may be encountered with electronic mail.[4] Third, Qwest should be authorized to use wire transfers – as opposed to checks – to make disbursements when so directed by the Commission.

I. The Legal Operation of the PAP

Sections 16.6 and 16.7 of the PAP contain two points worth clarifying. First, with respect to Section 16.6 -- which governs the showing necessary to bring an action outside the PAP (i.e., for a violation of an interconnection agreement) on a matter addressed, at least in part, by the PAP -- the relevant payments for this purpose should be both the amount paid to the CLEC under Tier 1X payments *and* its share of any Tier 1Y payments. The current language only focuses on Tier 1X payments even though both they and the CLECs' share of Tier 1Y payments compensate CLECs for their incurred harms. Accordingly, the relevant Tier 1X payments as well as any associated Tier 1Y payments made to the CLECs should provide the amount that would be offset in the event of a related dispute. Finally, with regard to the offset provision (as addressed in Section 16.7), it merits mention that only the relevant finder of fact – and not Qwest in its unilateral discretion – can judge what amount, if any, of PAP payments should be offset from any judgment for a CLEC in a related action.

J. The Addition of New Measures for EELs

In a final fine-tuning step, the PAP also should be amended in the near future to include some obligations related to Qwest's wholesale performance related to the Enhanced Extended Loop (EEL) product. In particular, the Regional Oversight Committee's Technical Advisory Committee (ROC TAG) determined that the following set of measures should be included: OP-3, OP-4, OP-5, OP-6, OP-15, MR-5, MR-6, MR-7, MR-8. Notably, this list does not include any measures from the pre-ordering category. Thus, unless Qwest provides a compelling reason to the contrary, the Commission should provide for some such oversight; in particular, using PO-5 and PO9 for this purpose would appear to be appropriate. In so doing, I recommend that all such measures – i.e., the ones agreed upon in the ROC TAG as well as PO-5 and PO-9 -- be introduced into Tier 1.A, as EELs represent essentially a form of an "extended loop" that saves CLECs the difficulty of collocating in a separate central office to gain access to local loops. Finally, while I acknowledge the desirability of developing an appropriate set of variance factors for EEL measures, the statistical methodology that would be provided for loops as contemplated in Sections 4 and 5 can suffice until one is developed.

IV. Escalation

In this proceeding, Qwest argued that the lack of any cap on the escalation function creates the possibility for some adverse, unintended consequences. In particular,

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[4] To achieve this change, section 13.2 of the CPAP should be changed along the following lines:

"Qwest shall deliver the individual monthly report to the Commission and the Office of the Consumer Counsel ~~via email~~ <u>by posting the CLEC results to a secure website and posting the aggregate results to the Qwest wholesale website</u> on or before the last business day of each month following the relevant performance period."

Qwest points to two possible results: a windfall for CLECs who would recover far in excess of any actual harm to them and a continuing, and increasing, liability from PIDs that are ill-defined. On the first issue, Qwest raises a valid point that warrants the addition of a rule that any continuing escalation after twelve months should be contributed entirely to the Special Fund. This change reflects the principle that, roughly speaking, the twelve-month level of escalated (i.e., the Tier 1Y) payments as divided 50/50 between the CLECs and the Special Fund will fully compensate the CLECs for any harm that will occur for continuing, deficient performance. Moreover, requiring that escalation payments continue to be made under the PAP will ensure that it retains its full deterrence commitment to provide a sufficient incentive for Qwest to address any continuing deficient performance.

The concern about escalation payments resulting from ill-defined PIDs requires a different approach. As an initial matter, it merits attention – as will be emphasized further below – that PIDs should not be instituted without an appropriate opportunity for careful development. While not a categorical rule, the sound practice for introducing PIDs should be to work through a collaborative forum (such as the Regional Oversight Committee's (ROC) Technical Advisory Group (TAG)) before bringing a proposed PID addition (or change) to the Commission. Moreover, the preferred approach should also be to introduce new PIDs as "diagnostic" measures, allowing for some reporting of actual data before determining the relevant standard and appropriate penalties. Even with these precautions, however, it is still possible that ill-defined PIDs could lead to unwarranted payments.

Ultimately, the possibility of some unwarranted escalation payments as a feature of the PAP underscores the importance of careful and attentive six-month reviews. In practice, any faulty PIDs can and should be corrected at such intervals. By not providing a prophylactic safeguard against escalating payments, the PAP actually increases the incentive for Qwest to ensure that this process works as intended and refines PIDs as an ongoing matter. Moreover, to introduce such a prophylactic safeguard (as requested by Qwest) would interfere with the continuing escalation of payments that might be necessary to provide the sufficient incentive to deter continuing deficient performance that would otherwise be acceptable as "a cost of doing business."

To minimize the deleterious consequences resulting from possibly ill-defined PIDs, I propose two slight modifications to the PAP. First, to the extent that a PID continues to trigger an escalating payment past six months, the Colorado Commission should automatically examine this measure as part of a six-month review to consider whether it reflects continuing deficient performance or some quirk resulting from a poorly defined measure. Second, as an accommodation to the possibility that some PIDs may escalate unnecessarily, I recommend the slight change that once an escalated payment reaches the nine-month mark, the PAP should provide for an accelerated step down method. In particular, I recommend that after at least nine months or more of continuing deficient performance, three consecutive months of acceptable performance should bring the base penalty level to that of the six-month mark; after three more consecutive months of acceptable performance (for a total of six consecutive months of complying performance), the payment level should go back to the base amount.

V. The "Special Access" Issue

In the Hearing Commissioner's Order setting out the scope of this remand proceeding, he made clear that the principle that special access performance should be monitored is decided, with only the matter of implementation to be developed.[5] Before outlining my recommendations as to how the Commission could proceed to require Qwest to measure and report on its performance as to pre-ordering, ordering, provisioning, and repair and maintenance of special access lines, it is important to clarify the nature of this issue. Thus, I have divided this issue up into four sections: (A) Background; (B) Quintessential Cases for Regulatory Oversight; (C) Overview Considerations; and (D) Two Possible Regulatory Responses.

A. Background

In my original Report and Recommendation, I noted that the use of special access circuits by local competitors raises an important and thorny issue for state agencies to investigate. This issue is particularly complicated because it involves a series of factual permutations and complicated legal issues, which makes it dangerous to rely simply on the broad category of the "special access issue." Nonetheless, because these issues all relate to the question of whether – and, if so, how – this Commission should oversee Qwest's performance as to a "retail service" provided under an interstate tariff, this Commission (as others) has understandably framed this issue under a single, and broad, category. Moreover, despite the various factual permutations, the essential issue for present purposes is whether – and if so why – the Colorado Commission should monitor the performance of a retail service (i.e., a "private line" or "special access" connection) that provides the identical functionality to a combination of an unbundled dedicated interoffice transport (UDIT) circuit and a local loop.

The current status of and appropriate regulatory treatment for special access services remains a much disputed issue. At least from a pricing perspective, the Federal Communications Commission (FCC) continues to relax its regulatory oversight, allowing the incumbent providers additional flexibility in setting the relevant rates, terms, and conditions. *See WorldCom, Inc. v. FCC*, 238 F.3d 449, 460 (D.C. Cir. 2001) (noting trend). But from a performance perspective, the FCC has recently moved in the opposite direction, asking whether some monitoring and/or penalty requirements would be appropriate. *See* Notice of Proposed Rulemaking, *Performance Measurements and Standards for Interstate Special Access Services*, 16 FCC Rcd 20896 (2001) (available at

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[5] In particular, the Hearing Commissioner stated that, with regard to special access, the matter is:

> remanded for the limited purpose of making the CPAP language more practicable, or devising solutions for monitoring Qwest's special access services performance . . . while accommodating Qwest's concerns on how that will be implemented. The remand is not for the purpose of removing these features from the CPAP.

Scheduling Order, Decision No. R02-41-I, at 3 (January 10, 2002).

http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-01-339A1.pdf). In so doing, the FCC specifically asked how any such enforcement regime could be superintended by state agencies pursuant to a federal delegation of regulatory authority. *See id.* at para 11.

For simplicity purposes, there are two basic reasons that might conceivably justify the Colorado Commission's regulatory oversight of special access performance. The first reason, and the one pressed most vigorously last spring, is that discrimination in special access performance would occur in the wake of Qwest's entry into the interLATA long distance (LD) market. To ensure that Qwest's entry into the LD market is truly in the public interest, this concern, as advanced by some parties, warrants state regulatory oversight of special access as a condition of support for Qwest's Section 271 application. The second reason for overseeing special access reflects the marketplace reality that, for whatever reason, local entrants are using special access in lieu of unbundled network elements – in particular, the combination of an unbundled dedicated interoffice transport (UDIT) circuit and a local loop, the so-called "Enhanced Extended Loop" or "EEL."[6] As I understand it, the Hearing Commissioner embraced the second, but not the first, reason for investigating the nature of the special access market through the imposition of some monitoring regime.

B. Quintessential Cases for State Regulatory Oversight

Under the broad category of state oversight of special access where such circuits are used to provide local services, there are two quintessential scenarios that might warrant state regulatory attention as part of facilitating local competition. Although the parties to this proceeding have yet to distinguish clearly between these scenarios, it is important to analyze them separately. The first scenario involves providers who would like to use unbundled network elements (UNEs) to substitute for special access services used for both local and long distance service. Because special access services are regulated as a "retail" service, the price differential between these services and their UNE counterparts can be quite substantial so there is a formidable economic incentive to rely on or convert to UNEs in providing long distance service to retail customers.

In an effort to strike a compromise that would substantially protect the ILECs' special access revenues, the FCC instituted a set of rules that govern when CLECs can use UNEs – in particular, the Enhanced Extended Loop ("EEL") -- to serve customers to whom they provide long distance (or access) services. *See AT&T Corp. v. F.C.C*, 220 F.3d 607, 628-30 (D.C. Cir. 2000) (describing issue). Without getting into the specifics of the various limitations, it suffices to say that they limit the ability of competitors to use UNEs to provide access services except where the competitor self-certifies that it uses the UNEs to provide a significant amount of local service in addition to any access service. *See In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996,* 15 F.C.C. Rcd. 1760, 1760 ¶ 2 (1999), *clarified, In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996,* 15 F.C.C. Rcd. 9587, 9598 para. 21 (2000) (setting out three "safe harbor" scenarios); *see also In The Matter of Net2000 Communications, Inc.*

[6] Qwest's product description for this offering can be found at www.qwest.com/wholesale/pcat/eel.html.

v. Verizon, Inc., 2002 WL 21765, FCC 01-381 (January 9, 2002) (applying rules).[7] In line with these rules, Qwest's Statement of Generally Available Terms and Conditions includes a section that sets out the relevant preconditions for using an EEL to provide, among other things, access services to an end user. *See* Qwest SGAT, Section 9.23.3.7.2.

A second class of CLECs who are using special access circuits in lieu of UNEs are those who began using such circuits because of difficulties in provisioning UNEs and/or who purchase such circuits under a multistate, long term, and bulk contract. In particular, Time Warner Telecom (TWT) suggests that this reason explains its reliance on special access circuits to serve customers purchasing local services – i.e., those provided under tariffs filed with the Colorado Commission (and not the FCC). Put in economic terms, TWT explains that its reliance on special access reflects a version of the "lock-in effect" whereby decisions made under certain circumstances – i.e., where UNEs were not available in a stable environment – led it to adopt and continue certain practices that would not be rational were it to make these choices as an original matter today. *See* CARL SHAPIRO & HAL R. VARIAN, INFORMATION RULES 103-134 (1998) (explaining "lock-in" concept); *see also Eastman Kodak Co. v. Image Technical Servs., Inc.*, 504 U.S. 451, 465-78 (1992) (incorporating concept into antitrust law). (Apparently, TWT entered into a long-term and region-wide contract with Qwest that provides for special pricing for special access services so long as certain prerequisites are met.) Consequently, TWT's request for regulatory oversight of special access can also be understood as – and indeed recast as – a request for a "fresh look" and a "hold harmless" remedy that would enable it to begin ordering UNEs in Colorado. Implementing this principle would require that Qwest cooperate (or be ordered to cooperate) in provisioning and servicing the facilities in question as UNEs even if ordered via the access service request (ASR) interface (as it does for interconnection trunks). In addition, it would require that, by treating these facilities as UNEs in Colorado, TWT would not suffer adverse treatment in other states within Qwest's region as a result of not being able to comply with its region-wide contract with Qwest.

C. Overview Considerations

Before moving on to my proposed approach for implementing the Hearing Commissioner's Remand Order, let me offer three observations. First, with regard to the general issue of using special access in lieu of EELs, the question for any state commission is whether there are non-trivial amounts of special access used for local purposes that warrant regulatory oversight. At this point, the issue is unknown and, given the lack of measurement and reporting on this issue, unknowable. Conceivably, however, a state commission could decide that where a carrier relied on some minimum level of special access circuits for local service – say, using at least 10% of a circuit for this purpose – the state commission could impose some oversight regime to ensure that the incumbent provider's wholesale performance as to these circuits were non-discriminatory. In so doing, the state commission would necessarily conclude that the

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[7] The Federal Communication Commission opened a subsequent rulemaking to re-examine the appropriate regulatory treatment of EELs, but has yet to take any action. *See Comments Sought on Use of Unbundled Network Elements to Provide Exchange Access Service*, 2001 WL 55611, 16 FCC Rcd 2261 (Jan 24, 2001).

rules governing the conversion of special access circuits to EELs were not "talismanic" and did not automatically apply to the performance oversight context.

The second observation is that the two quintessential cases outlined above for overseeing special access performance both could be resolved or at least ameliorated through business-to-business negotiations. As for the "lock-in concern" voiced by Time Warner Telecom, this issue could be addressed by cooperation from Qwest that would ensure that TWT could convert its current reliance on special access circuits to UNEs as well as order UNEs in the future without jeopardizing its current operating environment, including the terms of its region-wide contract. As for the "EEL restrictions issue," raised most notably by WorldCom, it is quite plausible that negotiations that would facilitate some amount of conversion of existing customers would address, at least in part, WorldCom's concern that the EEL restrictions both preclude it from benefiting from both UNE pricing and UNE performance oversight. Given that WorldCom suggests that the restrictions imposed on the use of EELs for both local and long distance are, in some cases, infeasible or very difficult to implement in practice, some reasonable cooperation would appear to be highly preferable to continued regulatory disputes on this matter.

Finally, given Qwest's protest that this issue does not warrant attention as part of the Commission's Section 271 process and investigation into local competition, it merits mention why this issue is even relevant for examination. In short, Qwest's provisioning of certain UNEs related to transport – in particular, the ordering of EELs and UDITs – appears to be at very low volumes.[8] At a minimum, these low volumes suggest that there may be some reliance on special access for purposes of providing local services – a point underscored by the two scenarios outlined above.

D. Possible Regulatory Responses

In terms of a regulatory approach to address this issue, the first step – as the Hearing Commissioner recognized – is to begin to understand the scope of the matter. At present, there is little sunlight on to what extent carriers are actually using special access for local purposes and whether Qwest's special access services are provided on a non-discriminatory basis to rival carriers as opposed to retail customers (and, by extension, to its Section 272 affiliate in the wake of its long distance entry). As I mentioned in my initial report, this lack of sunlight could be a good thing to the extent that it also reflects a "structural parity" situation – i.e., that Qwest lacks the necessary information to be able to discriminate between its customers. But the affected local entrants who purchase special access clearly reject this scenario, so the Hearing Commissioner's decision to push ahead with the institution of a monitoring regime is understandable.

In devising an appropriate approach for monitoring special access services used for local competition, it is important to underscore that this decision does not mean that special access services have become part of the PAP. Rather, this decision reflects an effort to gather the necessary information to determine, at a later date, whether it would

[8] *See Qwest Performance Results for Colorado* 159 (January 16, 2002), *available at* http://www.qwest.com/wholesale/downloads/2002/020118/CO_271_Jan01-Dec01_Exhibit_Checklist-Final.pdf.

be appropriate to institute any PIDs, payments, and other steps (including audits to the extent that some self-reporting scheme is relied on) necessary to address the issue as part of the PAP. The current challenge is thus to institute a means of gathering the necessary data, which will demonstrate the scope of the alleged problem as well as the feasibility of measuring the relevant information, and will suggest what challenges, if any, arise as part of an effort to monitor special access services.

In terms of instituting a set of measures designed to measure Qwest's performance as to special access services used for local services, the critical challenge is to identify orders by customers who intend to use such circuits for a nontrivial amount of local service. Depending on how the Commission defines the scope of the problem – say, for only those used primarily for local services or those used to a nontrivial degree (e.g., 10%) – it will unearth a greater or lesser use of special access circuits for local services. As the current effort is investigative in nature, I shall assume that the Commission will take the broader approach. In either event, the methodology suggested below could be used for either approach.

Once the Commission defines the type of special access services eligible for monitoring oversight, it shall need to set forth the scope of any measurement and reporting obligations imposed on Qwest. In particular, Qwest shall need to develop the capability to measure its performance on the relevant pre-ordering, ordering, provisioning, and maintenance and repair functions for those CLECs who self-report that they are using special access for the requisite amount of local services. As discussed in this proceeding, there are two means that appear adequate to enable CLECs to self-certify that they are using special access circuits for local purposes: (1) the use of a project field that would be made available in both Qwest's ordering and maintenance and repair systems or (2) the use of different Access Carrier Name Abbreviation (ACNA) codes for carriers' use of special access for long distance and local services respectively. (Under the first approach, however, the CLECs would need to be responsible for entering the relevant field into both the ordering and the maintenance and repair systems, as Qwest's systems for those functions do not connect.) Under either approach, Qwest would be required to measure its performance for the relevant areas for: (1) carriers using special access, at least in some part, for local services; (2) its retail customers (and section 272 affiliate); and (3) carriers using special access for long distance distances (at least to a very great degree). The institution of a measurement system under either of the means set out above should establish both the degree to which the first category of special access usage (i.e., in lieu of UNEs to a nontrivial degree) exists as well as whether there are any significant differences in performance between this category and the second (i.e., for customers who are not competitors)

Unfortunately, the time available pursuant to this remand did not afford me an opportunity to develop fully all of the applicable rules to guide the implementation of the necessary measures for special access. It did become clear, however, that not all of the measures contemplated by the Commission could be translated to the special access context. Of the measures that the Hearing Commissioner suggested be established (i.e., ones along the lines used for PIDs PO-5, PO-9, OP-3, OP-4, OP-6, OP-8, MR-3, MR-5, MR-6, MR-7 and MR-9), there are good reasons for dropping OP-8, MR-3 and MR-9 from this list. In particular, OP-8 relates to number portability, MR-3 only applies to design services and MR-9 is not generally included in the PAP. But rather than simply eliminating those from that list, it makes even more sense to peg the appropriate measurement scheme to the PIDs used for EELs, which are an analogous service to special access. In particular, the relevant set of measures for EELs are: OP-3, OP-4, OP-5, OP-6, OP-15, MR-5, MR-6, MR-7 and MR-8. And, as noted above, PO-5 and PO-9 should be included in the set of performance measures used for EELs, unless there is a compelling reason for not doing so.

Within these contours, there are still a number of implementation details to be worked out (including a choice between one of the options set out above – i.e., reliance on a project field or ACNA codes). To develop a fully detailed implementation plan, I recommend that the Hearing Commissioner either ask for a joint submission of one or engage in a baseball-type arbitration so that he can adopt one -- provided, of course, that he does not conclude that a business-to-business agreement has not substantially addressed the concerns raised in one or both of the two quintessential cases set out above

VI. The Changeability of the CPAP and The Nature of the Six Month Review

As all who took part in the development of this PAP can attest, this undertaking reflects an in-depth examination into what framework can best guide performance measurement, reporting, and payment schedules for wholesale performance in Colorado. As such, I am deeply skeptical that, with respect to the core precepts of the plan, any changes made at six-month reviews can improve the Plan in these areas. In this respect, I recommend treating the core aspects of the Plan as presumptively fixed until a more careful three-year review can examine them with a similar level of care to that which went into creating the Plan in the first place. This approach also has the virtue of assuring all parties, in particular Qwest, as to what to expect from the Plan in the upcoming years. In addressing this issue, I first outline a set of structural safeguards to keep the Plan's basic framework in place and I then discuss the importance of maintaining the PAP as a dynamic regime.

A. Structural Safeguards Relating to Changeability

The presumptively unchangeable aspects of the Plan that should be "off the table" for discussion at the six month reviews fall into one of six categories. First, the statistical methodology used to assess what constitutes a miss for purposes of payment should not be revisited until the three-year review. (The exception to this point is the addition of new Tier 1.A measures where a variance table must be added. To the greatest degree possible, new variance tables should follow the method employ to create the existing ones.) Second, the rules regarding the cap (including the financial collar provision outlined below) and the duration of the PAP should be "off the table" for discussion. (In this instance, there is a second reason for "tabling" the issue: if they were open to change, the assurances provided by the cap regime and the limited duration of the PAP would be nullified.) Third, the entire structure for the payment regime, including the tier system, the base amounts, the system for escalating payments (and severity), and all specified payment amounts and fines, should not be open for discussion. (Note: To the extent that the Commission needs to add Tier II measures, the payment amounts for those measures would need to be determined by the Commission and the Commission would retain the authority to set those amounts. Similarly, to the extent that the refined payment schedule for violations of change management requirements is not developed before then, this topic would also be up for discussion at a six-month review.) Fourth, the legal operation of the PAP should not be on the agenda for discussion. Fifth, the Independent Monitor's operation should not be subject to change, with the exception that the Commission could decide to assign this function to an Administrative Law Judge (ALJ) if it so chose. Sixth and finally, any proposal that does not relate directly to measuring and/or providing payments for non-discriminatory wholesale performance should be "off the table." In particular, this means that any efforts that might be undertaken to assure improved performance, but which are not integral to the PAP – i.e., proposals for structural separation or to require Qwest to build certain OSS interfaces -- should be evaluated in other proceedings.

A second and related justification for narrowing the scope of the six-month reviews relates to the Commission's authority under the PAP and Qwest's concerns about limiting the scope of its potential liability under the PAP. At bottom, Qwest's decision to file the relevant terms and provisions for the PAP reflects a voluntary undertaking that, once made, enables the Commission to enforce all commitments therein regardless of whether the Commission would otherwise enjoy the legal authority to order such commitments.[9] As the Hearing Commissioner put it, "the CPAP derives its enforceability from the contract terms itself, not from some enforcement authority under state or federal law." Decision No. R01-1142-I at 29. Consequently, the filing of the initial PAP sets forth a framework that empowers the Commission to enforce its terms and – where anticipated by the foundational framework itself – to modify its terms.[10] As such, the filing of the PAP does not constitute any waiver by Qwest as to challenges related to subsequent changes (even though Qwest cannot later challenge the terms of its initial filing).

The legal authority perspective complements nicely the agenda-setting perspective. As I envision it, the compressed time period for and the value of resolving issues with a minimum of disagreement and potential judicial review will lead the Commission not to raise issues that are "off the table." To the extent that the Commission attempts to order a change of an "off-the-table" topic without Qwest's consent, CLECs should not be entitled to take advantage of and Qwest should not subject to any such obligations until a final, non-appealable order from any judicial challenge to such an order is upheld. Put differently, the PAP should contemplate that the effect of any such change should be stayed during the course of any judicial challenge to it.

[9] As the Hearing Commissioner noted, this scenario is familiar to regulatory lawyers, as it reflects the approach taken by the Federal Power Commission as outlined in the *Otter Tail* case. *See* Decision No. R01-1142-I at 30 (discussing *Otter Tail Power Co. v. United States,* 410 U.S. 366 (1973)).
[10] This regime of authority for enforcement and modification can be understood, as the Hearing Commissioner explained, as analogous to the use of "open contract terms." *See* Decision No. R01-1142-I at 29 (discussing issue and citing, among other authorities, U.C.C. § 2-305; § 4-2-305, C.R.S.; *see generally,* Mark P. Gergen, *The Use of Open Terms in Contract*, 92 Colum. L. Rev. 997 (1992)).

In its pleadings, Qwest emphasizes that the ability of the Commission to make changes at the six-month reviews – even in the "on the table" category – creates the potential for unbounded increased financial liability. To address this concern, the PAP should include a financial "collar" that would limit the potential for increased liability. In particular, this collar should require that Qwest calculate separately the liability owed to it under the prior regime (i.e., under the Plan before the changes made at a six-month review) as well as those owed under the revised PAP. If the revised PAP would require, as calculated on the relevant six-month basis, more than a 10% increase in total liability, Qwest should be authorized to scale down the payments to the affected CLECs (and to the Special Fund). Any CLEC affected by this mitigation of payments should then be eligible to have the "payments above the collar" paid to it from the Special Fund. (This issue highlights why it is import that the Commission develop its own internal guidelines for prioritizing how this Fund will be used.)

The collar will work as follows: To the extent that a revised PAP calls for payments above the collar, the prior regime (i.e., the old PAP) shall remain as the benchmark for purposes of setting a collar for the next six-month period. Only once a revised PAP triggers a total payment amount that is below the collar can a revised PAP become the new benchmark for setting a future collar. This approach has two central advantages. First, it allows some dynamism in the baseline – i.e., it does not require the continuation of the calculation scheme for the initial PAP, some of whose PIDs may no longer be reported after subsequent revisions to the PAP. Second, it assures Qwest that only a revised regime that is within the collared amount can set a new baseline.

Qwest's concerns about the Commission's use of six-month reviews as a "blank check" for creating new legal liabilities that are otherwise unlawful underscores the importance of understanding the framework for judicial review of later imposed PAP obligations. At bottom, PAP obligations are provisions of an interconnection agreement that are approved by this Commission under its authority pursuant to the federal Telecom Act. *See* 42 U.S.C. Secs. 251, 252. To the extent that a company undertakes voluntarily certain terms and conditions that competitors and the Commission accept, those obligations are not subject to judicial review. In the event that the Commission (or competitors) would like to impose terms relating to wholesale performance, the legality and appropriateness of those terms are subject to federal court review under the provisions of the Telecom Act that deal with the formation of interconnection connection agreement obligations. *See* 42 U.S.C. Secs. 251, 252; *see also US West Communications, Inc. v. Hix*, 57 F.Supp.2d 1112, 1121-22 (D. Colo. 1999) (upholding the imposition of a liquidated damages provision designed to provide "new entrants ... with a meaningful opportunity to compete in local exchange markets.") (internal quotation and citation omitted).[11]

[11] At present, there is an ongoing dispute as to whether the enforcement of these obligations is to be had in federal or state court. *Compare, e.g.,* Starpower Communications Petition for Preemption of Jurisdiction of the Virginia State Corporation Commission, 15 F.C.C.R. 11,277, 11,278, 11,281 (2000) (concluding that Act provides federal authority to adjudicate interconnection agreement violations) *with* Bell Atl. Md., Inc. v. MCI Worldcom, Inc., 240 F.3d 279, 308-09 (4th Cir. 2001) (concluding that Congress conferred very

To the extent that the Commission imposes new obligations on Qwest as part of a six-month review, those obligations are subject to federal court review under Section 252 of the Telecom Act.[12] This review would ensure that the new interconnection agreement obligations conform to the standards of the Telecom Act. To require Qwest to waive its challenges to both the existing set of known obligations and to any future and unknown ones would be unsound as it would preclude Qwest from ever challenging and testing the scope of this Commission's authority to institute a performance oversight regime.[13]

B. The Nature of the PAP's Dynamism

In evaluating any possible limits on the Commission's authority to revise the PAP, I need to underscore the importance of viewing the PAP as a dynamic regime. From Qwest's perspective, the cost of allowing the six-month reviews to discuss all items not specifically enumerated as "off the table" creates the scenario of a possible "runaway train." Consequently, it would prefer an operating environment in which only predetermined "on the table" items are fit for discussion, with the possible addition of allowing other items that meet a legal standard – say, those changes necessary to ensure the continued sound operation of the PAP – as also open for discussion. But either a very detailed categorically-based limitation or a standard-based limitation will create possible grounds for quarrelling over what is even on the agenda.

The biggest challenge for the six-month reviews will be focusing intently and effectively on the PAP as an evolving regime. Unfortunately, I agree with the Hearing Commissioner that the Commission's institutional bias against any change will serve as a heavy status quo counterweight to even the most appropriate changes. To the extent that the Commission is inclined to use the PAP as a "runaway train," I do not believe that the type of limitations proposed by Qwest would stop it. Qwest's most effective limitations are ultimately the structural safeguard of the financial collar and the ability to challenge Commission actions in federal court, including the assurance of a stay on any attempt to make "off the table" changes at the six-month reviews.

I would be remiss not to discuss what topics are clearly "on the table." Put simply, any subject not deemed "off the table" is one that can be entertained during the six-month review. As a practical matter, however, the vast majority of the items that should be – and are likely – to be discussed at the six-month reviews are proposed

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limited federal jurisdiction under Act, and "otherwise it intended for the right of review to be exercised in state courts"). Presumably, this dispute shall be decided by the Supreme Court's decisions this term in the companion cases of Mathias v. WorldCom Technologies, Inc., 121 S.Ct. 1224 (2001) and U.S. v. Public Service Com'n of Maryland, 121 S.Ct. 2548 (2001).

[12] This review would, for example, afford Qwest an opportunity to challenge the imposition of obligations that Qwest believes are beyond the scope of the Commission's authority to mandate under either federal or state law. In particular, Qwest suggests that the imposition of any obligations relating to its delivery of "special access services" – an area not presently in the PAP – might well be subject to such a challenge.

[13] As I have explained, I believe that the Colorado Commission enjoys wide latitude under federal law to create and enforce interconnection agreement obligations, but I also recognize that the issue is not free of controversy. *See* Philip J. Weiser, *Cooperative Federalism, Federal Common Law, and The Enforcement of the Telecom Act*, 66 N.Y.U. L. REV. 1692 (2001).

additions, subtractions, reclassifications, and modifications of the existing set of PIDs. But other issues may arise as well. By way of example, Qwest suggests that there are important reasons to think that the auditing regime should be open for discussion. In particular, it may well become sensible to transition this system into a region-wide approach that would provide an equivalent level of assurance to that set out in the PAP. As part of or separate from this transition, Qwest also maintains that that the fines levied on Qwest for failing to report accurately – as based on a strict liability standard with no forgiveness for non-material errors -- may be too onerous and will lead to difficult debates about what inaccuracies are relevant and should trigger the sanctions. To the extent that the Commission gains a greater real world understanding of how this system works and identifies these or other shortcomings, it may need to examine whether any refinements would be appropriate at a six-month review.

In understanding the PAP's changeability, it merits notice that the three-year and six-year reviews will play critical roles in keeping the PAP up to date. In both cases, the Commission will have an important obligation to ensure that it takes a thorough look – presumably with the aid of a consultant – at the underpinnings and nature of the PAP. Among other things, this review will afford the Commission an opportunity to take any steps necessary to revisit the basic framework of the PAP as well as to refine the payment amounts in order to bring them into line with any evidence of the actual marketplace harm that results from the deficient performance at issue. At the three-year review, the Commission will not be able to require – at least under any authority granted by the PAP itself – Qwest to undertake any new obligations. Rather, the Commission will be able to give Qwest the option of filing the new, recommended regime or living under the old one. To the extent that Qwest does not agree to file the new one, the Commission can proceed to order it (or an aspect of it), subject to judicial review without the special stay guarantee provided to "off the table" changes.

At the six-year review, the Commission would go through a similar exercise to that undertaken at year three, but more fundamentally, the PAP appears to envision that the Commission would finally have to face the question of what authority it enjoys to impose parts of the PAP other than those set out in Tier 1A. To be precise, the Plan appears slightly ambiguous on this point, with executory language pointing in opposite directions. Under Section 18.11 of the Plan, "[o]nly Tier 1A submeasures and payments will continue beyond six years, and these Tier 1A submeasures and payments shall continue until the Commission orders otherwise." Later in that provision, however, it provides that the Commission may, at the six-year review, "revive this CPAP wholesale, sunset the entire plan, including Tier 1A payments, or allow more traditional contract and arbitration remedies to take the CPAP's place." In his September 26th Order, the Hearing Commissioner suggested two alternate readings of these two provisions: (1) that the presumption should be that the plan will sunset (with the exception of Tier 1A); or (2) that the Commission will need to "answer the question of its authority to require a CPAP." In The Matter Of The Investigation Into Alternative Approaches For A Qwest Corporation Performance Assurance Plan In Colorado, Docket No. 01T-041T, Decision No. R01-997-I, at 70 n.28 (September 26, 2001).

I will not issue a recommendation on the nature of the six-year review, but instead will merely recommend that the Commission clarify its intended resolution of this issue. It appears to me that the Hearing Commissioner envisioned that Qwest's initial filing of the PAP entailed a voluntary undertaking to leave Tier 1A in place until the Commission decided otherwise, but that the other payment provisions of the plan would sunset unless the Commission decided to require Qwest to adhere to them. This understanding would allow the Commission to keep in place Tier 1A as a result of Qwest's initial voluntary undertaking, but would require it to rely on its own authority for the imposition of any additional payment schedule. Of course, as part of Tier 1A, all other provisions of the PAP, including the six-month reviews, auditing scheme, Independent Monitor, etc. would remain in place as necessary parts of continuing the Tier 1A regime. Similarly, the Commission's wholesale performance measurement and reporting regime – which precede this PAP and presumably will be brought into alignment with it – will remain in effect until and unless the Commission decides otherwise.

Finally, I want to stress two critical points related to the PAP's dynamism. First, the PAP not only will form a critical regulatory tool for the Commission, but it will also set a default regime against which CLECs and Qwest can negotiate their own agreement for ensuring non-discriminatory performance. Ideally, this process will enable Qwest and CLECs to focus on what is actually more important than the assurances provided in this PAP, thereby making changes that are, as economists put it, *pareto optimal* – i.e., will make each party better off. (As to such privately negotiated substitutes for the PAP, it is important to recognize that the CLECs and Qwest cannot negotiate away – even as to the performance related to the particular CLEC – the Special Fund's share of the Tier1Y payments.)

Second, I must emphasize the practical significance of supporting the continuance of the ROC TAG or some industry forum along those lines.[14] In short, such a forum should provide Qwest and its competitors an opportunity to work out, in a constructively facilitated environment, what may well be the lion's share of the changes necessary to keep the PAP effective. To the extent that Colorado participates in such a forum, and I strongly encourage it to do so, the Special Fund provides a reserve for contributing to any administrative costs of this valuable part of maintaining the PAP. Significantly, the ROC TAG's approved changes would not automatically be incorporated into the Colorado PAP, but changes recommended by this body would warrant a close look by the Commission. (Allowing changes to be automatic would risk running afoul of the prohibitions on agency delegation of unreviewable authority to a private body.) On this point, it bears mention that Qwest will have an opportunity to file the most recent version of its PIDs (based on recent changes made by the ROC TAG) along with its final SGAT, provided that this Commission enjoys an opportunity to consider and ratify such changes.

[14] The ROC TAG appears to have just such a role in mind in asking for comments on how it should proceed in a post-Section 271 environment. *See* Request for Comments on Long Terms PID Administration (January 28, 2002) ("The TAG has determined that some level of on-going PID administration is required to support performance reporting and that the scope, form, and structure should be determined on a collaborative basis prior to the end of the OSS test and dissolution of the TAG. It is anticipated that this approach will provide for seamless PID administration going forward.").

CONCLUSION

Once again, I must commend all of the parties and the Commission staff that assisted me in this limited remand. The spirit of honest intellectual engagement, discussion, and reasonableness that pervaded this proceeding sets out an important model for how the PAP can provide a critical regulatory framework for the Colorado telecommunications marketplace. As a result, I believe that the changes set out above represent a "rough consensus" and will improve an already impressive piece of public policy. In short, the PAP can provide both a new substantive model for regulation as well as a procedural model that brings regulation closer to sound principles of contract law and economic reality. I am grateful for the opportunity to have been a part of such an effort.

Respectfully Submitted,

Philip J. Weiser
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