BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

In the Matter of the Investigation Into U S WEST Communications, Inc.'s Compliance With Section 271 of the Telecommunications Act of 1996	)	Docket No. UT-003022
In the Matter of U S WEST Communications, Inc.'s Statement of Generally Available Terms Pursuant to Section 252(f) of the Telecommunications Act of 1996	)	Docket No. UT-003040

JOINT ANSWER TO QWEST CORPORATION'S PETITION FOR RECONSIDERATION

AT&T Communications of the Pacific Northwest, Inc., AT&T Local Services on behalf of TCG Seattle and TCG Oregon (collectively "AT&T"), Time Warner Telecom of Washington, Electric Lightwave, Inc., WorldCom, Inc. and Covad Communications Company (collectively "CLECs") submit this Joint Answer to Qwest's Petition for Reconsideration of the Commission's Thirtieth Supplemental Order addressing Qwest's Performance Assurance Plan ("QPAP").

I. INTRODUCTION

On April 5, 2002, the Washington Utilities and Transportation Commission issued its Thirtieth Supplemental Order entitled "Commission Order Addressing Qwest's Performance Assurance Plan"[1] ("Commission's Order"). On the last page of the Commission's Order, the Commission explicitly states "(t)he Commission will…entertain all requests for clarification

[1] *In the Matter of the Investigation Into U.S. West Communications Inc.'s Compliance With Section 271 of the Telecommunications Act of 1996; In the Matter of U.S. West Communications Inc.'s Statement of Generally Available Terms Pursuant to Section 252(f) of the Telecommunications Act of 1996*, Dockets No. UT-003022, UT-003040, Thirtieth Supplemental Order-Commission Order Addressing Qwest's Performance Assurance Plan, (April 5, 2002).

or for revision of any **substantial error of fact and law**."[2] On April 15, 2002, Qwest Corporation ("Qwest") submitted "Qwest Corporation's Petition for Reconsideration" (hereinafter "Qwest's Petition"). In its Petition, Qwest voices its displeasure with almost every aspect of the Commission's Order, but fails to indicate how it is contrary to the facts or law in this matter. In fact, Qwest fails to mention, as explained in detail below, that the findings in the Commission's Order are supported both legally and factually by other state commissions' orders in the Qwest region regarding Qwest's Performance Assurance Plan, actual performance plans approved by the Federal Communications Commission ("FCC"), FCC dicta, and/or the Colorado Performance Assurance Plan ("CPAP" or "Colorado PAP") to which Qwest recently acquiesced. In fact, Qwest has brought forward no basis "for revision of any substantial error of fact and law" whatsoever.

In its Reconsideration Petition, Qwest indicates that the Commission "begins with an incorrect premise" in believing that the FCC and state law have provided the Commission with authority to require changes to the Qwest Performance Assurance Plan.[3] To the contrary, this Commission has articulated the position of the FCC, mandating state authority over the QPAP, as supported by numerous other state commissions in the Qwest region.

The FCC has unequivocally indicated that performance assurance plans are "generally administered by state commissions and derive from authority the states have under state law or under (the Telecommunications Act of 1996)."[4] The Federal Communications Commission has also clearly indicated:

> We recognize that states may create plans that ultimately vary in their strengths and weaknesses as tools for post-section 271 authority monitoring and enforcement. We also recognize that the development of performance measures and appropriate remedies is an evolutionary

[2] Commission's Order at p. 75.
[3] *Id.* at p. 2-3.
[4] Bell Atlantic/New York Order at ¶429 ftnte. 1316.

> process that requires changes to both measures and remedies over time. We anticipate that state commissions will continue to build on their own work and the work of other states in order for such measures and remedies to most accurately reflect commercial performance in the local marketplace.[5]

The FCC is clear that the Commission's authority to enact an appropriate performance assurance plan and enforce it is not only allowed but also encouraged based on authority under state law **or** federal Telecommunications Act of 1996 law. Thus, according to the FCC, the Commission's utilization of its authority pursuant to *RCW 80.04.110* and *RCW 80.36.300* is completely appropriate.

Furthermore, contrary to Qwest's argument, the Commission's actions are not contrary to §271 and 272 of the Telecommunications Act.[6] Nothing in §§271 and 272 prohibits the Commission from determining an appropriate performance assurance plan. In fact, again, it is required. The United States Congress has directed that the FCC, with the assistance of state public utilities commissions "assess whether the requested (271) authorization would be consistent with public interest, convenience and necessity."[7] The FCC has further commented, "the public interest analysis is an independent element of the statutory checklist and, under normal canons of statutory construction, requires an independent determination."[8] As part of a public interest determination, the FCC has looked at if "a BOC would continue to satisfy the requirements of section 271 after

---

[5] *In the Matter of the Application of Verizon Pennsylvania Inc. for Authorization to Provide In-Region, InterLATA Services in Pennsylvania,* CC Docket No. 01-138, FCC 01-269, released Sept. 19, 2001 at ¶ 128.
[6] *See* Qwest's Petition at p.4.
[7] Citing *In the Matter of Application by SBC Communications Inc., Southwestern Bell Telephone Company, and Southwestern Bell Communication's Services, Inc. d/b/a Southwestern Bell Long Distance Pursuant to Section 271 of the Telecommunications Act of 1996 to Provide In-Region, Inter-LATA Services in Texas,* CC Docket No. 00-65 (rel. June 30, 2000) which refers to 47 U.S.C. § 271 (d)(3)(C).
[8] *Id.* at ¶ 417.

entering the long distance market."[9] In doing so, the FCC has determined that effective performance monitoring and enforcement mechanisms (i.e. a performance assurance plan) would constitute probative evidence as to public interest being met in the particular state.[10] Thus, Qwest is proffering its QPAP to assure the FCC and this Commission that it would continue adhering to the requirements of 271 post-entry.[11] Thus, pursuant to Congressional mandate, this Commission must determine if the performance assurance plan proffered by Qwest meets the public interest determination.

Furthermore, clear Telecommunications Act of 1996 statutory authority allows this Commission to enact a performance assurance plan. There is no dispute that the QPAP will be part of an interconnection agreement. Interconnection agreements must be reviewed by the Commission as part of §252. Section 252 expressly provides the Commission the authority to create and enforce a performance assurance plan as part of an interconnection agreement. Section 252(e)(3) indicates "(n)otwithstanding paragraph (2) (related to rejection of interconnection agreements), but subject to section 253, nothing in this section shall prohibit a State commission from **establishing or enforcing other requirements of State law** in review of an agreement, including requiring compliance with intrastate telecommunications standards or requirements."[12] As referenced in §252 above, §253(b) of the Telecommunications Act specifically states "(n)othing in this section shall affect the ability of a State to…**ensure the continued quality of telecommunications services**, and safeguard the rights of consumers."

---

[9] *Id.* at ¶ 420.
[10] *Id.*
[11] *Id.*
[12] 47 U.S.C. §252(e)(3).

Thus, it is clear, the Commission possesses both state and federal authority to create and monitor a performance assurance plan that the Commission believes is appropriate. Accordingly, Qwest's argument regarding the Commission's authority fails.

In its Petition for Reconsideration, Qwest also indicates that the Commission "fail(s) to accord any regard to the two years of compromise and negotiation already engaged in by Qwest during the ROC PEPP collaborative and multistate workshop." As the Antonuk report reveals, there was no "collaboration" on the matters at issue in the Commission's Order. This was because in part, Qwest failed to negotiate essential parts of the QPAP now at issue, and in part, "the progress was halted abruptly (at Qwest's doing) – just two days after Qwest submitted a new PAP proposal (with Qwest subsequently proffering a new QPAP which) contain(ed) material changes from the last one provided to the PEPP collaborative."[13] Accordingly, as the record indicates, there was no *quid pro quo* or agreement to compromise the matters at issue.

Finally, Qwest argues that because the QPAP utilizes a "framework" found by the FCC to be sufficient in Texas and its progeny, the QPAP should be sufficient for this Commission. The Commission should reject this argument. First, the QPAP proffered by Qwest in this proceeding is not the Texas Plan. In fact, it is far more ILEC serving. Second, the QPAP should allow for state-specific requirements. As stated by the Wyoming Public Service Commission:

> [W]e agree with the FCC that the states are engaged in creating monitoring and enforcement tools which may legitimately differ according to local circumstance. We also agree that the FCC's criteria are well reasoned and should apply. We do not, however, agree with Qwest that this somehow forecloses us from considering how best to apply these criteria to obtain a positive and pro-competitive result for Wyoming. The size, character, composition and physical distribution of Wyoming's telecommunications

[13] The Liberty Consulting Group QPAP Report (October 22, 2001) at p.3. (hereinafter "Antonuk Report").

> markets, and the well understood high cost of providing service in the state, are clearly different from those of other states, including those cited by Qwest as being the subject of decisions useful to us for their precedential value. If the FCC's approval of other plans for other states constitutes binding precedent which forecloses our ability to contribute meaningfully to the process, the parameters discussed above are rendered, along with our state-specific process, the multi-state process and large portions of the federal Act, moot and ultimately useless.[14]

Thus, contrary to what Qwest has cited in its introduction, there is no legal or equitable basis to restrict the Commission's ability to require changes to the QPAP in order for the Commission to assure the adequacy of Qwest's wholesale service quality standards.

II. ARGUMENT

Each of the issues that Qwest raises for reconsideration will be addressed below, demonstrating that Qwest's request for reconsideration of the issues should be denied.

1. Duration/Severity Caps

Qwest asserted that the Commission's decision to remove the 100 percent cap from the performance measures calculated as averages or means contained in the QPAP is a departure from the FCC views on the 100% cap.[15] In fact, the FCC has previously endorsed having no cap on the number of payment occurrences resulting from a severe miss of a performance measurement expressed as mean or average. A per occurrence payment mechanism similar to the one ordered by the Commission, was part of the SBC/Ameritech Merger agreement. In clarifying how SBC should calculate payments for missing performance measurements identified in the SBC/Ameritech Merger Order the FCC provided the following guidance:

---

[14] *Order Denying Petition for Reconsideration and Setting Public Hearing and Procedure, In the Matter of the Application of Qwest Corporation Regarding Relief Under Section 271 of the Federal Telecommunications Act of 1996, Wyoming's Participation in a Multi-State Section 271 Process, and Approval of its Statement of Generally Available Terms*, Docket No. 70000-TA-00-599 (Record No. 5924) (Issued March 27, 2002) (Attachment 1).

[15] Qwest's Petition at p. 7.

Should the second component of the payment calculation – the extent to which SBC misses the performance standard – be limited to 100% regardless of whether SBC misses this performance standard by a higher percent?

No. Under the *Merger Conditions*, there is no limiting factor, or cap, imposed on the element of the calculation that measures the extent to which SBC misses a performance standard. **Indeed, capping this factor, which could exceed 100% in cases where SBC seriously underperforms, would be inconsistent with the Commission's objective to provide an incentive to SBC to provide excellent service to the CLECs.**[16] (emphasis added)

After the FCC's first letter to SBC on why there should be no 100% cap on the number of payment occurrences, the FCC provided additional guidance that further supports the Commission's decision that there should be no cap. SBC sought permission from the FCC to add the 100% cap.

The FCC's response to SBC's request is as follows:

SBC first argues that the performance gap 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.[17]

---

[16] *See* Letter from Carol Mattey, Deputy Chief, Common Carrier Bureau, to Sandra Wagner, Vice President, Federal Regulatory, SBC (Dec. 11, 2000) ("*Bureau Payment Calculation Letter*"). For ease of reference a copy of that letter is attached to these comments as Attachment 2.

[17] Letter from Carol E. Mattey, Deputy Chief, Common Carrier Bureau to Ms. Caryn D. Moir, Vice President – Federal Regulatory, SBC Telecommunications, Inc., Re: SBC/Ameritech Merger Order, CC Docket No. 98-141, ASD File No. 99-49, February 6, 2002, p. 3 (footnotes omitted). For ease of reference a copy of that letter is attached to these comments as Attachment 3.

Given the FCC's stated preference for no cap on the number of payment occurrences, it is not surprising that the FCC approved SBC's Texas performance assurance plan without a cap on the number of payment occurrences.[18] Qwest makes the same arguments in its Petition for Reconsideration that SBC made. The FCC found the arguments unpersuasive.

The FCC did eventually permit SBC to institute the 100% cap. However, that approval was granted not because there could be more payment occurrences than orders, but because of "administrative efficiency."[19] The FCC granted SBC's request because after the FCC had granted SBC Section 271 relief in Texas with a plan without a 100% cap, the Texas PUC had approved a plan with a 100% cap. Since the Texas PUC had already deviated from the FCC's stated preference of having no cap, the FCC agreed that the same formula could be used in the calculation of payments under the SBC/Ameritech Merger Order. Since the Commission's Order that there be no cap on the number of payment occurrences is already consistent with the FCC's stated preferences, "administrative efficiency" plays no role.

In its petition, Qwest greatly misrepresents how the Colorado Public Utility Commission dealt with the issue of severe misses from the standard. It is true that the Colorado PAP includes a provision that the number of payment occurrences shall not exceed CLEC volume for the particular submeasure.[20] However, the Colorado PAP includes a payment multiplier "to account for the severity of a missed standard."[21] In the Colorado PAP, the more that Qwest deviates from the performance standard, the higher

[18] Attachment 17, Performance Remedy Plan-TX (T2A), August 24, 2000, Section 11.1.2.
[19] February 6, 2002, Mattey letter to Moir at p. 4 (Attachment 3)
[20] Colorado Performance Assurance Plan ("CPAP"), Recommended SGAT Language, Redline Changes to Attachment A of R01-1132-I, Section 7.2 (Attachment 4).
[21] CPAP, Section 7.4.

Qwest payments. However, instead of increasing the amount of payments that Qwest must make for severe misses by allowing the number of payment occurrences to exceed the number of CLEC transactions, the Colorado PAP caps the number of payment occurrences at the number of CLEC transactions and then multiplies the payment occurrences by a "multiplier." The farther that Qwest's performance deviates from the performance standard, the higher the multiplier becomes. For interval measurements, the multiplier could increase Qwest's payment liabilities as much as 500% more than the number of orders.

The FCC, the Colorado Public Utility Commission and this Commission all share the same view on the severity of misses. The more severe the performance misses, the higher the payment liability. The Commission and the FCC implement this view using the same approach. The Colorado Public Utility Commission has chosen a different approach that achieves the same effect as the Commission's and FCC's approach.

It should also be noted that Qwest agreed with the Colorado Commission's approach of using a payment multiplier to increase the payment amount as Qwest's performance severely departed from the performance standard. For Qwest to now complain about this Commission achieving effectively the same result through the elimination of the cap on the number of payment occurrences is disingenuous.

It its petition, Qwest misrepresents the purpose of a performance measurement expressed as an average or a mean. An average looks at the CLEC and retail volumes in their entirety. An average can be worse than the standard performance level if many transactions miss the standard by a little. An average can be worse than the standard

performance level if a few transactions miss the performance standard by a large margin. An average looks at the entire volume of transactions.

Qwest's petition distorts the purpose of an average by suggesting that the results be examined in terms of "misses."[22] Qwest misapplies the concept of a "miss" to measurements expressed as averages. The concept of a "miss" is already covered in performance measurements such as Installation Commitments Met (OP-3) or Out-of-Service Cleared within 24-hours (MR-3). If Qwest were to miss its installation commitments or fail to clear a trouble within 24 hours, the misses would be appropriately captured by those measurements designed to capture misses. In contrast, measurements expressed as averages were never intended to capture "misses" on a per transaction basis.

Qwest provided examples that attempt to show the problem of "misses" and measurements expressed as averages.[23] As an initial matter, Qwest used the highest possible per occurrence payment amount to inflate as much as possible the dollar payments for its example. Qwest's example assumes that its performance for a Tier 1 High measurement had missed its performance standard for at least six consecutive months. In that situation, the per occurrence payment amount would be $800. Qwest's arguments would be much less hysterical if Qwest's examples used a Tier 1 Low measurement that had missed in only the first month (a $25 per occurrence payment amount). Notwithstanding Qwest's use of the worst case scenario in its examples, Qwest's concept of "misses" and averages can also be a benefit to Qwest.

For example, assume a performance standard of 10 days, and that Qwest installed 5 CLEC orders in 5 days and 5 CLEC orders in 15 days. In that case, the average

[22] Qwest's Petition at pp. 7–9.
[23] Qwest's Petition at pp. 7–8.

performance over the ten orders would be 10 days. Since the average performance met the standard performance, Qwest would not be liable for any payments for missing the OP-4 Average Installation Interval measurement. Using Qwest's logic, the CLECs should find that result outrageous since Qwest "missed" on five of the orders and no payment was due. That argument, like Qwest's argument, would not carry water since it is likely that the five "misses" would be identified and accounted for in the OP-3 Commitments Met measurement.

In Qwest's first example, assuming that the two "misses" were also missed commitments, those would be accounted for in the OP-3 Commitments Met measurement. Depending upon Qwest's retail performance, with such a low sample size, it is unlikely that Qwest would be liable for any OP-3 payment occurrences for missing two out of ten orders. What Qwest would be liable for would be the large performance gap between its performance and the standard performance. The FCC has already found what Qwest holds out to be an outrageous situation as quite appropriate. In refuting SBC's arguments, and Qwest's current arguments, the FCC stated:

> 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 than the actual number of data points, as SBC argues. Rather, SBC would simply be paying for a larger disparity on the specified number of occurrences.[24]

The fact that Qwest would simply be paying for larger disparity on the specified number of occurrences should not be a concern for the Commission. The Commission should reject Qwest's request to include a 100% cap on the number of occurrences in the PAP. As was evident when the FCC granted SBC section 271 relief in Texas with a plan that did not contain a cap on the number of payment occurrences, this Commission's

[24] Attachment 3 at p. 3.

decision to have no cap on in the Washington PAP is within the FCC's zone of reasonableness.

2. Tier 2 Payments

One of Qwest's primary arguments of why it should be allowed to provide discriminatory service to the CLEC industry in Washington in two out of every three months is that "[i]f Qwest misses a performance measurement, it may not be aware of that fact until the end of the next month."[25] Qwest is attempting to create the fiction that its operational staff manages Qwest's operations based upon the monthly regulatory reports required by the PAP. That is simply not true. Qwest's operations rely on performance measurement information that is available on a daily and weekly basis. For some trunk blocking and overall network monitoring, Qwest likely relies upon hourly information or even instantaneous information. Qwest's operational employees certainly do not wait for two months before they are able to identify or react to a problem. For some parts of Qwest's network, alarms ring the minute a performance problem is identified. The measurement systems that the operational employees rely on are much more sensitive and have considerably less lag time than the two months that Qwest would have the Commission believe exists.

This Commission is not the only commission that was concerned about "whether sufficient Tier 2 incentives will exist if Qwest can fail to meet the performance standards one-third of the time or more without consequence."[26] The Wyoming Public Service Commission expressed the same concerns and came to the same conclusion as this

[25] Qwest's Petition at p. 10.
[26] Thirtieth Supplemental Order, ¶ 86.

Commission. Specifically, in discussing the trigger for Tier 2 payments, the Wyoming Public Service Commission found:

> Therefore, if certain poor performance violates the QPAP, the penalty should attach at once rather than after a period of time has elapsed. We do not believe that a "meaningful" penalty is created when prohibited behavior is allowed to continue over a period of time before it is penalized.[27]

The Nebraska Public Service Commission also believes Tier 2 payments should be due in every month in which Qwest fails to provide acceptable performance. The Nebraska Public Service Commission found:

> The Commission does not concur with the reasoning behind differentiating between the trigger dates for Tier 1 and Tier 2 payments. As Qwest agrees that it must be in compliance with § 271 before entering the in-region long distance market, the Commission sees no reason to wait a number of months before Qwest would become liable for anti-competitive behavior and thus Tier 2 payments. To do otherwise, would provide Qwest an opportunity to act in an anti-competitive fashion for a number of months to correct it before a penalty would apply.
>
> Therefore, the Commission believes that both Tier 1 and Tier 2 payments shall begin simultaneously after the first month of non-conformance. Qwest is directed to modify its proposed QPAP accordingly.[28]

As a substitute for the Commission's decision to have Tier 2 payments due in every month in which Qwest's performance fails to meet the acceptable standard, Qwest proposes a complicated and self-serving approach that effectively permits Qwest to provide discriminatory service in two out of every three months. What the Utah Advisory Staff/Qwest stipulation does, is put in place conditions before Qwest is required to make Tier 2 payments for every month in which its performance to the CLEC industry as a whole is non-conforming. The conditions are so restrictive it is unlikely they will

[27] Wyoming QPAP Order, ¶ 8 (Attachment 1).
[28] In the Matter of Qwest Corporation, filing its notice of intention to file its Section 271 (c) application with the FCC and request for the Commission to verify compliance with Section 271 (c), Application C-1830, QPAP Approved As Amended, Entered April 23, 2002, ¶¶ 29 – 30 (Attachment 5).

ever be met. Before monthly payments for Tier 2 measurements without a Tier 1 counterpart are made for every monthly miss:

- Qwest's monthly conforming measurement payment percentage (as measured by the percentage of measurement payment opportunities where the plan did not require Qwest to make a payment to CLECs to the total payment opportunities) falls below 85% for any 5 of 12 consecutive months; and

- Individual performance measures where the percentage of nonconforming sub-measures was below 85% during the same 5 months, which invoked this provision.

Not only is the 85% success rate very low, but the requirement that the individual sub-measures fail in the same five months as the total measurements makes it quite unlikely that this complicated and unreasonable trigger will ever be tripped. The Joint CLECs believe that the Commission's order that Tier 2 payments are due in every month in which Qwest's performance fails to meet the performance standard is the best approach to ensure that the plan can "detect and sanction poor performance when and if it occurs." The Joint CLECs therefore request that the Commission reject Qwest's request to add the Tier 2 language from the Utah Advisory Staff/Qwest stipulation.

3. The Commission Should Require Qwest to Demonstrate How Each Requirement of Washington's Collocation Rule is Reflected in the SGAT.

The Commission directs that Qwest "incorporate the Washington state collocation rule into the QPAP, and ensure that the reference in the QPAP to CP-2 and CP-4 business rules is applicable only to matters not addressed in WAC 480-120-560."[29] Qwest argues that the provisions of interconnection agreements are incorporated in CP-2 and CP-4. Qwest further maintains that the collocation intervals in the Washington SGAT are consistent with those in WAC 480-120-560, and therefore, they are available to all

[29] Commission Order at ¶ 340.

CLECs for inclusion in their interconnection agreements. Accordingly, Qwest continues, no additional changes are necessary to address the Commission's concerns.[30]

While the Joint CLECs agree that the CP-2 and CP-4 are consistent with some of the collocation requirements in the rule, it is not clear from the language that all of the rule's requirements are incorporated into the SGAT. For instance, WAC 480-120-560 section (2) and SGAT section 8.2.1.9 both require ten calendar days for notice if sufficient space exists to accommodate the CLEC's collocation requirement. However, the SGAT does not appear to incorporate the section (2) language related to circumstances that may delay delivery of the ordered collocation space and related facilities, or the language in section 3(d) concerning notification of changes in circumstances and steps to avoid or minimize delay.

In addition, section 3(e) and the SGAT section 8.4.1.10 are consistent with regard to credits. However, the rule contains additional language that does not appear to be in the SGAT stating: "Recurring charges will not begin to accrue for any element until the ILEC delivers that element to the CLEC. To the extent that the CLEC self-provisions any collocation element, the ILEC may not impose any charges for provisioning that element." Section 4(d) of the rule also does not appear to be incorporated into the SGAT. Finally, some but not all, of the language in Sections 4(e) and 4(f) appears to be incorporated into SGAT sections 8.2.1.10 through 8.2.1.13.

To ensure compliance with the Commission's Order, Qwest should be required to demonstrate specifically how each requirement of WAC 480-120-560 is incorporated into the SGAT.

[30] Qwest's Petition at pp. 11-12.

4. Special Access Circuits

The Commission found that "the record in this proceeding supports a requirement that Qwest, at a minimum, report its monthly provisioning and repair intervals for special access circuits."[31] Qwest does not cite any record evidence to the contrary in this proceeding. Qwest, however, relies on pleadings and information it provided in Colorado to claim that the Commission lacks jurisdiction to impose such a requirement and to argue that "[t]he measurements sought in Colorado are fraught with flaws and inadequacies, and the time and effort required to develop the ability to produce additional measurements is of dubious value given the limited usefulness of the measures."[32] Qwest has provided no basis on which the Commission should, or even could, reconsider its decision to require Qwest to provide special access reporting.

None of the information Qwest cites in its Petition is included in the record in this proceeding. On that basis alone, the Commission should deny Qwest's Petition with respect to this issue. Qwest's arguments and evidence, moreover, failed to convince the Colorado Commission, which actually had the information before it. In an order adopted on March 27, 2002 and mailed on April 10, 2002 – well before Qwest filed its Petition with this Commission – the full Colorado Commission (not merely the Hearing Commissioner as Qwest asserts) rejected Qwest's arguments and required Qwest to report on its special access provisioning. The Commission was sufficiently unmoved by Qwest's appeal that it rejected the Special Master's recommendation of a collaborative process or arbitration proceeding to establish special access reporting and ordered Qwest

[31] Order at 32.
[32] Qwest's Petition at pp. 12-13.

to begin providing reports within 60 days.[33] Qwest has formally agreed to incorporate this requirement into its Colorado Plan.[34]

Qwest claims that "as a means of resolving PAP issues, [Qwest] would be willing to provide monthly special access reports for Washington upon a reasonable implementation schedule, so long as the measurements are not included in the PIDs or the PAP, as is the case in Colorado."[35] The Commission should reject Qwest's offer to do less than it has agreed to do in Colorado. Qwest has agreed to begin reporting special access performance results by mid-June in Colorado, not "upon a reasonable implementation schedule" as Qwest has offered here. While the Colorado Commission concluded that special access would not be subject to any payments under the PAP for now, that commission has never indicated that special access measurements would not be included in the PIDs or the PAP.

To the contrary, *Qwest* includes measures of its special access performance in the PIDs. Qwest's witness Michael Williams confirmed during the recent hearings on Qwest's performance that the "retail" services to which Qwest compares its high capacity UNE loop and transport performance include special access services.[36] Mr. Williams also testified that those "retail" services are measured using the same PID definitions and requirements that Qwest uses to measure its UNE performance.[37] Qwest thus already measures its special access service performance in Washington. The only issue is the extent to which Qwest is able to disaggregate its "retail" service measurements to report

---

[33] *In re Investigation Into Alternative Approaches for a Qwest Corporation Performance Assurance Plan in Colorado*, CPUC Docket No. 01I-041T, Decision No. C02-399, Decision on Remand and Other Issues Pertaining to the Colorado Performance Assurance Plan at 26 (Adopted March 27, 2002, Mailed April 10, 2002) (Attachment 4).
[34] *Id*., Verification of R. Steven Davis (Attachment 6).
[35] Qwest's Petition at 13.
[36] Tr. at 6983 (Qwest Williams); Exs. 1362-64 (Qwest Responses to ELI/TWTC/XO data requests).
[37] Tr. at 6983 (Qwest Williams).

special access circuits separately. Qwest has provided no basis for the Commission to change its requirement that Qwest provide special access reporting "at the same time it begins special access reporting to the Colorado Commission."

The Commission has reasonably adopted a minimum requirement that Qwest provide monthly reports on its provisioning and repair intervals for special access circuits within the time frames established by the Colorado Commission. The FCC is exploring more extensive reporting requirements, and CLECs may need to seek additional reporting requirements from this Commission, as the Commission implicitly has recognized. At least for the present, the Commission should not reconsider or otherwise weaken the special access reporting requirements it adopted in the Order.

5. Adding New Performance Measures

In arguing against the Commission's decision to add the PO-2B measurement to the list of PIDs covered in the QPAP, Qwest attempts to portray the request to have that measure in the QPAP as a last minute request. As Qwest certainly knows, establishing a benchmark for the PO-2B measurement and having the PO-2B measurement included in the QPAP has been under discussion since at least September of 2001. In fact, on September 12, 2001 Michael Williams of Qwest sent an email to the ROC TAG identifying the PIDs that had diagnostic standards that Qwest would consider having parity or benchmark standards applied.[38] In the attachment to that email, Michael Williams identifies the PO-2B measurement as a "candidate" to have a benchmark or parity applied. Qwest also knows that the CLECs have been seeking through ROC to have the PO-2B measurement added to the QPAP performance measurements since the

[38] For ease of reference, a copy of Michael Williams' September 12, 2001 email and the accompanying attachment is attached as Attachment 7.

early Fall of 2001. Impasse documents provided on November 2, 2001 by Qwest and the CLECs to the ROC Steering Committee on the PO-2B impasse included arguments by the CLECs to include the PO-2B measurement in the QPAP and arguments by Qwest to not include it.[39] Having the PO-2B measurement in the QPAP is by no means the last minute request that Qwest attempts to portray it as.

While Qwest is complaining about having the PO-2B measurement in the Washington QPAP, Qwest has no such objection to its inclusion in the Colorado PAP. In Colorado, the PO-2B performance measurement has been part of the CPAP since April 6, 2001.[40] While Qwest filed a motion to modify many aspects of the Colorado Performance Assurance Plan, Qwest did not seek to remove the PO-2B measurement from CPAP payment consideration.[41] If having the PO-2B measurement subject to CPAP payments in Colorado is acceptable to Qwest, then it also should be acceptable to Qwest to have the PO-2B measurement subject to QPAP payments in Washington.

Qwest's argument that the PO-2B measurement should not be included in the Washington QPAP because it is too much affected by CLEC behavior and accurate order submission is far off the mark.[42] The PO-2B PID permits Qwest to exclude from the results "Rejected LSRs and LSRs with CLEC-caused non-fatal errors." So if a CLEC sent in an inaccurate order, that order would be appropriately excluded from the PO-2B results. It should also be noted that the PO-2B measurement covers flow-through eligible orders only. If CLEC behavior were to render an order ineligible for flow-through

[39] For ease of reference a copy of the November 2, 2001 PO-2 Impasse Document is attached as Attachment 8.
[40] Colorado Performance Assurance Plan, Recommended SGAT Language, Docket No. 01I-041T, Decision No. R01-997-I, p. 39.
[41] Qwest Corporation's Motion to Modify Hearing Commissioner's Decision on Qwest's Colorado Performance Assurance Plan, Docket No. 01I-041T, October 9, 2001.
[42] Qwest's Petition at p. 14.

processing, that order would not be counted in the PO-2B measurement. Finally, the ROC benchmarks for the PO-2B measurement do not expect perfection. Depending upon the product, the range of the flow-through benchmarks is 70% - 90%. That 10% to 30% margin for error can also absorb any CLEC orders that have no fatal or non-fatal errors and are flow-through eligible yet fall out for some unidentified reason attributable to the CLEC. The Joint CLECs request that the Commission reject Qwest's request that the issue of including PO-2 in the Washington CPAP be deferred until the six month review.

6. The Six-Month Review Process

In its brief, Qwest argues that it must have ultimate change control authority because "Qwest cannot cede to the Commission future unlimited authority that the Commission would otherwise not have."[43] Qwest's argument fails in that there is significant statutory and FCC authority that would allow the State commission, as opposed to Qwest, to enjoy authority to modify **any** aspects of the performance assurance plan.[44]

Most telling is the fact that there are plenty of **FCC approved** performance assurance plans that mandate unilateral commission change control on any part of the Plan. The Joint CLECs attach examples of those performance assurance plans for the Commission's review.[45]

Furthermore, no commission in the Qwest region that has reviewed the QPAP has allowed Qwest to maintain ultimate change control authority of the six-month review. The Montana Commission's recent Final Order includes language, which allows the Montana Commission to add other topics of interest to the six-month review and

[43] Qwest's Petition at p.16.
[44] *See* Introduction at p. 2-6 above.
[45] *See Bell Atlantic Performance Assurance Plan for Pennsylvania* (attached as Attachment 9); *Verizon Performance Assurance Plan for Massachusetts* (Attachment 10).

requiring Montana Commission approval to change any aspect of the Qwest Performance Assurance Plan.[46] That Commission indicated:

> 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.[47]

The Montana Commission also indicated:

> The (Montana) Commission continues to find that QPAP change control should rest with the (Montana) 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.[48]

---

[46] Final Report on Qwest Performance Assurance Plan and Responses to Comments Received on Preliminary Report, *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 (April 19, 2002) at p.56-57 (Attachment 11).

[47] Attachment 11 at pp. 33-36.

[48] *Id*.

The Wyoming Public Service Commission also maintained change control indicating:

> The Commission has only the public interest to look after and is not a partisan force in the process. We have also developed considerable familiarity and experience with the issues so ably presented by the parties to the Wyoming and multi-state Section 271 process. The better model for modification of the QPAP is a proceeding before the Commission which preserves the due process and other rights of the parties and retains the Commission's ability to act in the public interest regarding this document.[49]

The Idaho Public Utilities Commission also thwarted the idea of Qwest maintaining change control indicating:

> The QPAP should leave open the possibility that the Commission may broaden the review if necessary to respond to circumstances arising from actual experience with the QPAP. In addition, Section 16.1 of the QPAP describing the six-month review does not permit changes without Qwest agreement. That language must be modified to state that Qwest will make changes if the Commission so directs, whether Qwest agrees or not with the changes.[50]

Finally, the Nebraska Public Service Commission in a recent order, indicated explicitly:

> The Commission finds that it is in the public interest to assure that the Commission has the ultimate authority to determine if and when changes should be made to the QPAP. Therefore, this Commission reserves the right to initiate a proceeding regarding the QPAP at any time. While the normal review should be periodic and the six-month interval will generally suffice, parties should be able to raise serious issues before the Commission at any time. The Commission will decide if such issue needs to be immediately addressed or if it should be considered in the next six-month review. Finally the Commission wants to make clear that it should also have the ultimate authority to change any provisions of the QPAP after notice and hearing."[51]

[49] Wyoming First Order at p.6 (Attachment 12).
[50] Idaho Order at p.7-8 (Attachment 13).
[51] Attachment 5 at p.11.

Qwest references the Colorado PAP § 18.6, which, contrary to Qwest's statements, still gives the Commission ultimate change control on any aspect of the CPAP with some restriction. There were six issues including statistical methodology, caps, payment regime, legal operation, dispute resolution, and measures that do not relate directly to measuring and/or providing payments for non-discriminatory wholesale performance that if the Commission made changes to would be stayed during any judicial review.[52] Regarding any other change, the Commission would have ultimate change control.[53] As the Commission has significant legal authority to modify the QPAP, the CLECs are opposed to allowing any change even in these limited areas, to await years of legal processes.

Qwest finally indicates that it would "accept" the stipulation it worked out with a member of Utah's Advocacy Staff, Judith Hooper. It is important to note that in Qwest's Petition for Reconsideration, it faults the Commission for reviewing other states' performance assurance plans where there is "a different overall structure, record and negotiating history."[54] Nonetheless, it then urges this Commission to rely on a stipulation that it reached with the Utah Commission Staff, through negotiations in which the CLECs were not allowed to participate. In addition, the Utah Commission has yet to address the stipulation. The Joint CLECs request that the Commission reject this request.

The Utah stipulation language regarding six-month review is worse in many respects than the original Qwest language at issue. The Commission certainly does not get the final say on **anything** related to the QPAP. First, the stipulated language makes

[52] *Id.* at p. 18.
[53] *Id.*
[54] *See* Qwest's Petition at p.3.

crystal clear that no changes can be made to the QPAP (except by Qwest) except for "adding deleting, or modifying performance measurements."

Then, related to "adding, deleting, or modifying performance measurements, would not be put in place until there was a **final non-appealable review** to a court of law." (emphasis added). Thus, if Qwest did not like the change that the Commission was mandating, it could challenge the PID change in U.S. District Court, which could conservatively tie up the change for about a year. Next, if Qwest lost, it could appeal to the U.S. Court of Appeals for the 9th Circuit, which takes at least another year. Then, it could petition for *certiorari* review by the U.S. Supreme Court (or the same scenario for Washington Courts). Accordingly, Qwest could tie up the only change that the Commission would be allowed to make for years.

The CLECs also note that Qwest "compliance language" includes a 10% "collar." Thus, any change in the QPAP could **never** increase Qwest's liability over 10% of what it was before the change. Thus, even if the Commission could make a change, which it effectively cannot under the Qwest proposed language, Qwest would only be liable for a 10% increase of what the payment was without the change. This has never occurred in any performance assurance plan **period.** What this appears to be is a Qwest serving significant modification of what was done in Colorado (again Qwest purportedly borrows from another plan when convenient while admonishing this Commission from reviewing other plans) where the Special Master indicated created a collar as follows:[55]

> 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

[55] Colorado Remand Report from Weiser at p.19, (Attachment 14) Colorado Order on Remand. Qwest has indicated to this Commission that it will not implement aspects of the Colorado Plan because it was "a completely different plan." However, now that it finds something that it likes from the Colorado Plan, it embraces it.

> 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 (i.e. Tier II)."[56]

As one can see, the Colorado Collar only applies to the relevant six-month period,[57] as opposed to *ad infinitum* in the stipulation. Regardless, the CLECs do not believe a collar is necessary, as Qwest can always petition the Commission for changes to the plan during the six-month review.

In summary, there is a plethora of authority allowing the Commission to assert complete change control authority at the six-month review. Qwest's Petition should be denied on this issue.

7. Qwest's Proposed Changes To and Language for QPAP Sections 11 and 15 Should Be Rejected.

The central thrust of Qwest's arguments regarding the Commission's decision on Section 15 (audits) and contribution to/participation in a multi-state audit proceeding (Section 11) is that Washington should be required to contribute to and participate in a multi-state audit that will conduct only a limited review of the QPAP and the PIDs. Qwest reinforces its attempt to force the Commission to participate in a regional audit by making an independent audit as unattractive an option as possible for the Commission by (1) imposing a number of procedural and logistical difficulties to independent review, and (2) virtually ensuring that any state-specific review will be even more limited than a regional review. From there, Qwest urges the Commission to adopt the audit and multi-state fund portions of a stipulation from Utah *in toto*, even though many of those

[56] *Id.*
[57] *Id.*

provisions directly conflict with what the Commission in its *Thirtieth Supplemental Order* ordered Qwest to include in the QPAP.

Qwest provides no principled reason to compel the Commission to undo or change in any manner its decisions on Sections 11 and 15 (special fund and multi-state audits/investigations).[58] Indeed, the basis for Qwest's disagreement with the rulings in the Commission's Order are in no way grounded in any "substantial error of fact and law,"[59] or even arguably applicable authority. Rather, Qwest's argument is nothing more than an *ad nauseum* recitation of the terms of a stipulation (many of which the Commission has already rejected, but some of which are brand new) into which it entered with Utah Commission Staff because it prefers those terms to the terms the Commission ordered here. Because Qwest has failed to provide (1) any new evidence suggesting that changed circumstances warrant the "re-adoption" of previously rejected language or the adoption of the brand new Section 15.5 language it proposes now, or (2) any cogent or compelling authority that suggests that the Commission's decisions were in error, its arguments should be rejected.

a. To the Extent that Qwest's Proposed Language for Section 11 Previously Has Been Rejected by the Commission, It Has Provided No New Evidence or Argument Requiring the Acceptance of that Language.

By and large, the language Qwest proposes in its Petition for Reconsideration for Section 11 has already been rejected by the Commission. In fact, a number of the Section 11 provisions set forth in Qwest's Petition, including Sections 11.3.1-11.3.3, contain the identical regional participation concepts that the Commission specifically rejected in the *Thirtieth Supplemental Order*. Yet, despite that fact, Qwest re-proposes the Section 11

[58] *See Thirtieth Supplemental Order*, ¶¶ 230-242.
[59] I*d*., p. 75.

concepts in its Petition for Reconsideration even in the complete absence of any new evidence or law suggesting that the Commission should reconsider its decision to defer a commitment, if any, to a regional audit process. Consequently, Qwest has provided no grounds that even begin to justify its Petition, much less warrant Commission reconsideration of an issue of which it has firmly disposed. Thus, Qwest's Petition is without any factual or legal merit and should be rejected.

b. Because Qwest Was Dilatory In Raising its Argument Regarding Mandatory Participation in a Multi-State Audit and Proposing New Language for Sections 11 and 15, The Argument and Proposal Should Be Disregarded.

Qwest's argument regarding mandatory participation in a multi-state audit effort is too little, too late.[60] In its Comments on the Facilitator's QPAP Report, Qwest explicitly recognized the possibility that states could choose to undertake their own audits.[61] Yet, even as it recognized that possibility, Qwest urged only coordination among the various states.[62] Had Qwest believed that the only appropriate means by which an audit should be conducted was under the auspices of an "audit ROC TAG," it should have said so from the outset, rather than waiting until it was too late for parties to adequately respond to Qwest's latest argument. The egregiousness of Qwest's "PAP about-face" at the eleventh hour is underscored by the fact that some of the language it now proposes is dramatically different than the language originally included in the redlined Exhibit K it filed with the Commission in November 2001. For instance, Qwest now proposes:

---

[60] Petition for Reconsideration, p. 20 ("the Commission also orders Qwest to replace sections 15.1 through 15.4 which relate to a multi-state audit program with new language *that does not require a joint audit process*").
[61] *See* Qwest Comments at p. 14.
[62] *Id.* ("coordination of audits [should] be required").

The execution of a memorandum of understanding (11.3);

The creation of two separate funds, instead of one (11.3);

Differing sources of contribution to the two funds (11.3.1);

A different method of requiring and making payments (11.3.2);

The disbursement of unused funds to "telecommunications initiatives" and nothing else (11.3.2);

An entirely new provision designed to circumscribe the Commission's ability to initiate, and limit the availability of funds for purposes of an independent audit (11.3.2.1);

New terms regarding funding of regional audit efforts (11.3.3);

Payment sources for regional audits only (15.4); and

An entirely new section regarding Washington-only audits (15.5A-E)

The time for Qwest to propose these changes to the QPAP was back in August, when the QPAP was under consideration by the Facilitator and, later, in November and December 2001, by the Commission. Further, Qwest has proposed brand new language and concepts at a time when there is no possibility for adequate and thorough review or even any discovery regarding the impact of these proposed terms. Thus, it is unfair and improper for Qwest to raise issues that should have been fleshed out, briefed and argued previously and which are now only possible because, as described below, Qwest has extracted, in a procedurally unfair manner and under duress, from the Utah Staff potentially favorable concessions.

Second, Qwest's concerns about audit multiplicity and conflict are without basis. The Commission's initial preference for an independent, rather than regional, audit, does not preclude state coordination. Indeed, coordination is necessarily ensured because, just

as Qwest will struggle if numerous audits are on-going, so too will CLECs – who are necessary participants to any audit and who have far fewer resources to participate in numerous competing audits.

Third, and as evidenced by the numerous competing scheduling issues the parties have encountered in connection with the hearings on Qwest's Section 271 applications, the Washington Commission is mindful of the fact that the parties are subject to competing commitments and does coordinate to the fullest extent possible with other states.

Fourth, the Commission has not precluded the possibility of joining in a multi-state audit proceeding. Indeed, the language the Commission ordered for Section 15.1 states that the Commission "may, at its discretion, conduct audits through participating in a collaborative process with other states" -- much as it did in connection with the hearings on the QPAP in August 2001. Thus, Qwest's concerns regarding multiplicity of audits may come to naught since there exists the reasonable possibility that Washington may opt to participate in a multi-state proceeding.

Finally, as the Commission correctly recognized, prudence dictates that any decision as to participation in a multi-state audit should be withheld until the process is developed and all issues surrounding long-term PID administration are resolved. Until that time, there is no basis upon which the Commission can determine whether participation in a multi-state proceeding is appropriate or whether such participation would effectively eviscerate its ability – and legal obligation – to act in the best interest of Washington residents and to ensure that Qwest provide service in a manner that is fair,

reasonable and in furtherance of competition in this state.[63] For all these reasons, therefore, Qwest's arguments regarding Sections 11 and 15 should be rejected.

c. The Utah Stipulation Does Not Provide A Reasonable Alternative.

The stipulation that Qwest proffers in lieu of the language the Commission specifically ordered for Sections 11 and 15 is a flawed, faulty instrument.[64] Qwest fails to mention, as discussed more fully below, that the stipulation that it entered into with Utah Staff (1) was entered into only after Qwest explicitly and deliberately excluded CLECs from participation in discussions regarding Qwest's objections to Staff's proposed changes to the PAP (in violation of Commission order); (2) has been entered into over explicit CLEC objection and challenge on procedural due process and substantive grounds; and (3) has not yet been approved by the Utah Commission.

First, the Joint CLECs had no opportunity to effectively participate in any aspect of the stipulation at issue and strongly objected to both the process and substance of the stipulation. The net result of the inequitable manner in which the stipulation was negotiated is the formulation of terms and conditions containing the most ILEC favorable

[63] *Thirtieth Supplemental Order*, ¶ 37.
[64] *See* Qwest's Petition at p. 21.

language in a performance assurance plan to date,[65] which is why Qwest is attempting to have this Commission adopt that language.

Moreover, there is no public policy or public interest justification behind the stipulation. In part because there was no constructive adversary in the negotiations, the stipulation reflects a significant weakening of Utah Commission Staff's initial recommendations in its October 26, 2002 Report. Moreover, the stipulation does not, and cannot address why such a weakening of the Department's position on significant issues related to a performance assurance plan is good public policy period, especially in light of the precedent set for a strong anti-backsliding performance assurance plan enacted by many of the various other states in the Qwest region.

Most concerning, and completely debilitating to any validity or credibility of the stipulation is ¶15, which states that:

> Advocacy Staff and Qwest reserve the right to withdraw from this Stipulation or to advocate or support positions different than those set forth in this Stipulation if the Commission rejects all or any portion of the proposed language contained in Attachment 1, **recommends any different or additional conditions with respect to such issues or is not**

[65] Compare generally Colorado Performance Assurance Plan including filings entitled *Colorado Performance Assurance Plan,* Decision No. R01-997-I (Attachment 15), *Decision on Motions for Modification and Clarification of the Colorado Performance Assurance Plan,* Decision No. R01-1142-I (Attachment 16), *Supplemental Report and Recommendation of the Special Master to the Public Utilities Commission of the State of Colorado* (Attachment 14), *In the Matter of the Investigation into Alternative Approaches for a Qwest Corporation Performance Assurance Plan in Colorado,* Docket No. 01I-041T; *Thirtieth Supplemental Order, Commission Order Addressing Qwest's Performance Assurance Plan, In the Matter of the Investigation into U.S. West Communications, Inc.'s Compliance with Section 271 of the Telecommunications Act of 1996 et al.*, Docket No. UT-003022, UT-003040, Washington Public Utilities Commission (April 5, 2002); *Preliminary Report on Qwest's Performance Assurance Plan and Request for Comments on Findings*, Utilities Division Docket No. D2000.5.70, Montana Public Utilities Commission (February 4, 2002) (Attachment 17); *First Order on Group 5A Issues,* (Issued January 30, 2001) (Attachment 12); *Order Denying Petition for Reconsideration and Setting Public Hearing and Procedure,* (Attachment 1), *In the Matter of the Application of Qwest Corporation Regarding Relief Under Section 271 of the Federal Telecommunications Act of 1996, Wyoming's Participation in a Multi-State Section 271 Process, and Approval of its Statement of Generally Available Terms,* Wyoming Public Utilities Commission, Docket No. 70000-TA-00-599 (Record No. 5924); *Commission Decision on Qwest's Performance Assurance Plan, In the Matter of U..S. West Communications, Inc.'s Motion for an Alternative Procedure to Manage its Section 271 Application,* Case No. USW-T-00-3, Idaho Public Utilities Commission (March 7, 2002) (Attachment 13).

able to make a positive recommendation to the FCC based on the November 15, 2001 PAP as modified by Attachment 1.

With this language, Qwest was able to secure an all or nothing deal with Commission Staff, along with an ultimatum that no additional changes be made to the QPAP, or Qwest will renege on the changes to which it agreed. In essence, therefore, Qwest "strong-armed" Utah Staff into agreeing to unfavorable PAP terms, including those provisions regarding the multi-state fund and audit, in order to secure Qwest acquiescence in the PAP. Adoption of stipulation language – by either the Utah Commission (which has not yet approved the stipulation) or this Commission -- would condone Qwest's unsavory tactics and therefore should not be permitted.

At the end of the day, the Commission has significant FCC authority to create and monitor an effective performance assurance plan. Thus, the Joint CLECs urge the Commission to stand by its decision to refrain from committing itself to a multi-state proceeding until it can determine whether that proceeding will meet the public interest standard by assuring that Qwest "would continue to satisfy the requirements of section 271 after entering the long distance market"[66] to protect against discriminatory wholesale services in the State of Washington.

d. The Substance of Qwest's Proposed Language for Sections 11 and 15 Is Unacceptable.

At no point does Qwest provide any justification whatsoever for the language that it now proposes for inclusion in the QPAP for Washington. Moreover, while Qwest couches its proposed language as a method by which to ensure regional audits, it in fact contains a number of provisions that explicitly conflict with the *Thirtieth Supplemental Order*. Thus, in addition to Qwest's unabashed refusal to adhere to the Commission's

[66] *FCC Texas Order* at ¶420.

proposed language for Section 15, provisions that conflict with the Commission-ordered language include:

Sections 11.3.1 and 15.4 (requiring deposit and use of Tier 1 Funds). The Commission determined in Paragraph 160 that it would defer any decision regarding the use of Tier 1 Funds until after it decided whether it will participate in a multi-state process, and further stated in Paragraph 241 (Section 15.2) that, unless a shortfall occurs, "costs of auditing will be paid from Tier 2 funds."

Sections 15.1.3 and 15.2 (limiting the audit to performance measurements). The Commission determined in Paragraph 240 that it retained the right to review any issues that "arise over performance results or performance measures, including the way Qwest produces performance results."

Section 15.3 (requiring an independent audit at initiating party's request where accuracy or integrity of data is at issue). In Paragraph 241 (Section 15.4), the Commission made clear that it will resolve disputes over data accuracy and integrity.

Section 15.5 (Washington-only audit). The entirety of Section 15.5 conflicts with Commission-ordered language because it (1) limits the audit to four specified areas rather than allowing a broader scope of audit to include both performance measures and reported performance as required by Paragraph 241 (Section 15.1); (2) permits audits to take place only every year rather than upon party request determined to have merit by the Commission; (3) precludes the Commission from undertaking the audit itself even though the Commission in its *Supplemental Order* specifically retained that right for itself; (4) affirmatively precludes any state-specific audit of the same performance measurements if requested within twelve months of *any* other audit, rather than upon party request

determined to have merit by the Commission; and (5) includes numerous caveats, provisos and limitations that the Commission specifically did not include in the language it ordered Qwest to adopt.

The Commission should not accept Qwest's proposed language. Not only is it untimely and in direct conflict with the Commission's *Order*, but, as the identification of the more direct conflicts points out, it also effects a significant limitation on CLEC rights to seek redress for well-founded concerns over Qwest's reported performance and performance measurements. Of even greater concern is that Qwest's proposed language does not comport with the Commission's perception of what will permit it to ensure that the public interest is met. Because Qwest has provided no foundation or basis for the acceptance of its new language or how it comports with the Commission's requirement that it act in the public interest, the language should be rejected.

e. Qwest's Root Cause Argument Is Misplaced.

Qwest's request for reconsideration of the Section 15.5 language permitting a party to petition the Commission for an order requiring Qwest to undertake a root cause analysis of any consecutive Tier I miss is nothing more than a thinly veiled request for Commission endorsement of Qwest's ability to discriminate between CLECs. It is entirely possible that Qwest can routinely and uniformly discriminate against a particular CLEC without ever triggering the Tier II payments. Thus, in the absence of an ability to petition for a root cause analysis, a CLEC can be unfairly and improperly discriminated against by Qwest. Thus, the Commission should insist that Qwest include the root cause language for consecutive Tier I misses.

Moreover, Qwest's purported concern about being inundated with root cause analyses is without merit. Because the CLEC must petition the Commission for an order requiring Qwest to undertake a root cause analysis, Qwest will have ample and procedurally fair opportunity to lay out for the Commission the reasons as to why a root cause analysis should not be ordered, including the fact that the misses are not "systemic problems exemplified by industry-wide performance." Thus, Qwest is provided with ample substantive and procedural protection from the "analysis floodgates."

More importantly, there is nothing about a root cause analysis that necessarily requires that it be limited to just industry-wide poor performance. To the contrary, since non-discrimination is the touchstone of the Act, root cause analyses more appropriately should be used to investigate consistent, individualized misses to ensure that the discriminatory treatment promptly will be rectified. Thus, Qwest's argument regarding Section 15's root cause analysis provision should be rejected.

8. Effect on QPAP if Qwest Exits Long Distance Market.

CLECs challenged Qwest's proposal to terminate the QPAP immediately if Qwest exits the interLATA market. The Commission adopted the Colorado Commission's compromise position that the QPAP remain in effect for six years, but that payments to CLECs would continue after that time subject to a review of their necessity.[67] Although as discussed above, Qwest has agreed to implement the Colorado Commission's order, Qwest asks the Commission to reconsider this requirement and adopt either Qwest's original language or alternative language that is even more favorable to Qwest.[68] The Commission should deny Qwest's request.

[67] Order at 47.
[68] Qwest's Petition at 26-28.

The QPAP is more than a "quid pro quo" for Qwest's entry into the interLATA market as Qwest asserts.[69] The Commission has declined to require wholesale service quality standards in proceedings ranging from individual arbitrations, to the wholesale service quality rulemaking, to the merger of Qwest and U S WEST, but has relied on this proceeding to establish appropriate measures, reporting, and remedies. Qwest's claim that in the absence of the QPAP, "CLECs could resort to all of the non-QPAP remedies that are available to them today," rings hollow when for all practical purposes no such remedies exist.[70] Qwest also contends that the Commission's decision "demonstrates the pitfalls of trying to pick and choose from provisions contained in other plans" because the Colorado PAP uses different terminology than the Washington QPAP.[71] The Commission required Qwest to incorporate the *concept* in the Colorado Commission order, not necessarily the exact language.

The Commission reasonably required Qwest to incorporate the Colorado Commission's resolution of this issue. Qwest has agreed to that resolution in Colorado, and the Commission should require Qwest to do no less in Washington.

9. Election of Remedies and Offsetting Remedies

a. Election of Remedies

In order to address Qwest's argument on this issue and demonstrate that it has no precedential support, it is important to note that Section 13.6 of the Qwest proffered QPAP does not contain "the exact same language that is contained in the FCC-approved Texas plan" as misstated by Qwest in its Petition for Reconsideration.[72]

[69] Qwest's Petition at 26.
[70] Qwest's Petition at p. 26.
[71] Qwest's Petition at p. 27.
[72] Qwest's Petition at p. 28.

Qwest's §13.6 QPAP language at issue explicitly states:

> § 13.6 By electing remedies under the PAP, CLEC waives **any causes of action based on a contractual theory of liability, and any rights of recovery under any other theory of liability (including but not limited to a regulatory rule or order) to the extent such recovery is related to harm compensable under a contractual theory of liability (even though it is sought through a noncontractual claim, theory or cause of action.)**

The Texas QPAP does not at all contain this troubling language.[73]

Qwest's argument is also contrary to FCC precedent that states, "(l)iability under the plan is not the only mechanism to offset the BOC's incentive to discriminate. Other incentives of continued compliance include possible federal enforcement actions under 271(d)(6); **liquidated damages** under interconnection agreements; and remedies associated with antitrust and other legal actions."[74] Accordingly, the FCC is clear that CLECs and the Commission should be able to pursue other enforcement mechanisms. State commissions, with the exception of Idaho, have joined with Washington in taking strong positions against Qwest's attempt to limit other available remedies significantly.

The requirement that Qwest include language in the QPAP making clear that it is not the exclusive remedy for the CLECs was mandated by the Montana Commission, which adopted the Colorado language at issue, stating that "the Commission rejects as unreasonable (QPAP language) 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."[75] The Montana Commission further stated:

> The Commission's replacement of the final sentence of QPAP Section 13.6 with the Colorado PUC language does not open the floodgates to unreasonable litigation and appeal. Rather, the added provision requires a

[73] *See Lexus QPAP at §6.1.*
[74] FCC TX Order at ¶424; FCC NY Order at ¶435.
[75] Attachment 11 at p.15.

> 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.[76]

The Nebraska Public Service Commission also adopted the same Colorado language that this Commission adopted indicating:

> The Qwest proffered QPAP language differs from the FCC mandate, as well as the Texas Plan that Qwest indicates it models its plan after. Under the QPAP language, there can be no liquidated damages under interconnection agreements as a CLEC would have to pick the QPAP as its exclusive remedy. Furthermore, Qwest would seemingly be allowed to unilaterally limit remedies associated with antitrust and other legal actions pursuant to §13.6 and §13.7. Also, under the Qwest proposed QPAP, contrary to FCC precedent, CLECs cannot sue for contractual remedies including for measures not even measured by the proposed QPAP. For non-contractual remedies, CLECs can sue, but they cannot recover. If the CLECs were able to obtain a judgment in a court of law, Qwest would be able to withhold that payment claiming that it was already paid under the QPAP.[77]

The Nebraska Commission also agreed with the findings of the Colorado Public Utilities Commission that the QPAP was not a normal bilateral contract requiring strict liquidated damage analysis. Citing Colorado, the Nebraska Commission opined:

> The Colorado Commission took the FCC mandate on the topic into consideration and further explained:
>
> > It is true that, in an ordinary commercial contract, parties would not have the ability to supplement liquidated damages. The SGAT, though, is not an ordinary commercial contract. Rather it is a regulatory hybrid of a contract and a tool for furthering public policy. This Commission has the

[76] Attachment 11 at pp. 27-28.
[77] Attachment 5 at pp. 8-11.

> authority to ensure that Qwest's interconnection agreement with CLECs promote competition and adhere to the Act. This Commission also has the authority to levy fines on Qwest for providing poor retail and wholesale service. These principles, combined with the broad concern about post-271 backsliding, justify the risk that occasionally Qwest may overcompensate the CLECs for their damages, while preserving the right of the CLECs to sue when they are under compensated. The risk to Qwest is mitigated substantially by the probability that a court would not allow double recovery and would require an offset of any amount the CLEC received under the CPAP.[78]

The Nebraska Commission then adopted the same language that the Commission is adopting on exclusivity.

> The Wyoming Commission also opined as follows:
>
> It is possible that litigation between Qwest and a local service competitor could arise if problems could not be otherwise resolved under the QPAP or the SGAT. The QPAP draft removes the ability of a competitor to go into court and sue Qwest for contract damages or damages that could be proven under a contractual theory of liability. It would force the competitor to elect the QPAP as a "liquidated damages" remedy. It would be a mistake to consider the QPAP or the SGAT in general as a simple contract; and it would be a further mistake to require simple precepts of general contract law to limit its effectiveness. The QPAP is a document based on the requirements of federal telecommunications law, and its formation is driven not by a mutual desire to engage in local exchange telecommunications service competition but by the legal requirement that Qwest's local markets be fairly opened to competition. Qwest's goal is not simply to open its local markets but to be allowed into the lucrative in-region interLATA originating long distance market now denied to it by law. Thus the analysis of this case and the QPAP has public policy and public interest dimensions beyond simple contract law. None of the parties to either the Wyoming or the multi-state proceeding could produce evidence showing that there could not be instances in which the QPAP might be an inadequate remedy for unfair, anticompetitive or monopolistic behavior by Qwest. We also do not believe that we, or any of the parties, can foretell the future with sufficient accuracy to say that the QPAP is now a perfect remedy and that it suffices in all cases. Therefore, we will not allow the QPAP to limit the ability of a competitor to go into court on *any* theory of liability or with regard to any element of damages. The avenues to recovery should be open for Qwest and its competitors. Even though QPAP payments should suffice to compensate CLECs, there may be instances in which poor performance by Qwest causes unusually high

[78] Attachment 5 at p.9 citing Colorado Public Utilities Commission Order.

> losses by competitive local exchange carriers. The QPAP and the SGAT should allow CLECs to recover these losses through court action if there is a valid cause of action.[79]

The CLECs are also concerned that Qwest would accept such language in Colorado and then contest it in Washington.[80] There is no difference in the two plans regarding exclusivity. In Colorado, the commission drafted plan mandates that CLECs could pursue contractual remedies if it could establish that the

> CLEC could present a reasonable theory of damages for the deficient performance at issue and evidence of real world economic harm that, as applied over the last six months, establishes that actual penalties collected for deficient performance in the relevant area do not redress the extent of the competitive harm. If a CLEC can make this showing (to the relevant Commission), 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.[81]

Regarding any other cause of action, the Commission observed that the CLEC is not barred from pursuing remedy in a court of law.[82] Also, the Colorado Commission noted that a CLEC is foreclosed from receiving wholesale service quality remedies **only "for the same performance issues addressed by the CPAP**."[83] That is precisely that this Commission has mandated.

Qwest then indicates that it "would be willing" to submit the Qwest language it negotiated behind closed doors with Judith Hooper of Utah Advocacy staff. The CLECs note that no commission, including the Utah Commission, has approved such language. Futhermore, for reasons stated below, they should not.

---

[79] Attachment 12 at p.5.
[80] See Attachment 6.
[81] Exhibit B at § 16.6; Qwest has never objected to such language in Colorado.
[82] *Id.* at §16.4.
[83] *Id*.

Qwest and Mr. Hooper negotiated the following language related to exclusivity:

> 13.6 This PAP contains a comprehensive set of performance measurements, statistical methodologies, and payment mechanisms that are designed to function together, and only together, as an integrated whole. To elect the PAP, CLEC must adopt the PAP in its entirety~~,~~ in its interconnection agreement with Qwest~~. By electing~~ **in lieu of other alternative standards or relief. Where alternative standards or** remedies **for Qwest's wholesale performance are available** under ~~the PAP~~**rules, orders**, **or contracts, including** interconnection agreements**,** CLEC ~~waives any causes of action based on a contractual theory of liability,~~**will be limited to either PAP standards** and ~~any right of recovery under any other~~ **remedies or the standards and remedies available under rules, orders or contracts and CLEC's choice of remedies shall be specified in its interconnection agreement.**

As one can see, language analogous to the language that was stricken, above, was then added in the "Caps" section at §12.1 indicating "these provisions will result in a maximum annual cap, that shall apply to the aggregate total of Tier I liquidated damages, including any such damages paid pursuant to this Agreement, any other interconnection agreement, **or any other payments made for the same underlying activity or omission under any other contract, order or rule**. (emphasis added).

First, these terms in the aggregate appear both ambiguous and contrary. As the term "order" could be construed to include a court order, under the stipulated language, CLECs will be forced to forgo **any** remedy period pursuant to §13.6. If a CLEC can clear that hurdle, the CLEC's maximum damages for any cause of action would be the "cap" discussed below. Quite frankly, such position is contrary to the FCC mandate and any approved performance assurance plans, which all allow for additional remedies. Furthermore, the CLEC must "adopt the PAP…**in lieu of other alternative standards or relief** (for Wholesale Services)." Again, such language would foreclose a CLEC from receiving any type of remedy, including court remedy, except for the limited QPAP payment, for **any** Qwest wholesale performance service regardless if that service is

measured in the QPAP. Thus, Qwest would be absolved of the Commission's wholesale service quality rules and court action for services that are not even measured in the QPAP such as EELs and DSL. The CLEC would again not be allowed to pursue remedies in a court of law including under tort and anti-trust. This is expressly contrary to the FCC mandate.

In summary, no plan precludes a party from pursuing causes of action unrelated to the performance in the QPAP or sounding in statute or tort, as it is poor public policy and contrary to FCC precedent, to allow the BOC to do so. There is thus overwhelming precedent for maintaining this Commission's required changes on exclusivity. To do otherwise would be contrary to FCC precedent.

b. Offset

As it has done in the past, Qwest completely manipulates the concept of offset in its Petition for Reconsideration.

Offset is a judicial concept for the finder of fact to consider to ensure that a party does not receive double recovery.[84] Thus, relevant law and Commission findings would allow Qwest to **argue** offset to the finder of fact and have that body make the decision. Certainly, if Qwest is going to decide when and when not to offset, it will "leave the door open unreasonably to litigation and appeal," precisely what the FCC has prohibited in a performance assurance plan.[85]

The Texas Plan, which Qwest indicates it modeled its performance assurance plan after, spells out the relevant concept in common law in its § 6.2 in which it states "whether or not the nature of damages sought by CLEC is such that an offset is

[84] *See e.g.* CJI 6:14 (1988).
[85] *See FCC New York Order* at ¶ 433.

appropriate will be determined in the relevant proceeding."[86] Likewise the Colorado CPAP, the Montana Commission, and the Wyoming Commission do not preclude Qwest from *arguing* for offset in the relevant court of law. However, as the Montana Commission indicated, "the Commission rejects Antonuk's (and Qwest'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 ad judicatory 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 ad judicatory body hearing such claim may offset the damages resulting from such claim against payments made for the same harm.*"[87]

In fact, Professor Weiser (the drafter of the CPAP) made this crystal clear in his recent supplemental report, indicating with regard to the offset provision, "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

[86] Texas Plan at § 6.2.
[87] Attachment 11 at p.18.

offset from any judgment for a CLEC in a related action."[88] The Colorado Commission has since adopted such language, [89]and Qwest has acquiesced. The CLECs are again concerned that Qwest has agreed to this language in Colorado, but is contesting it in Washington.

Qwest has indicated that it would be "willing to replace" the QPAP language with the same controversial stipulated language. That language is as follows:

> 13.7 Qwest shall be entitled to seek an offset against any recovery by CLEC under any noncontractual theory of liability (including but not limited to tort and antitrust claims). Nothing in this PAP shall be read as permitting an offset related to Qwest payments related to CLEC or third-party physical damage to property or personal injury.
>
> 13.8 To the extent Qwest believes that some Tier 2 payments required to be made under this PAP would duplicate payments that have been assessed by or on behalf of the Commission pursuant to any service quality rules or Commission orders, Qwest may make such Tier 2 payments to a special interest bearing escrow account and then dispute the payments before the Utah Commission. If Qwest can show that the payments relate to the same underlying activity or omission, it may retain the Tier 2 payments and any interest accrued on such payments.[90]

As one can see, this stipulated language is hardly in the public interest. Instead of correcting Qwest's concept of offset, which was contrary to both relevant law, Commission and FCC findings, the stipulation allows Qwest to escape paying Tier II payments or fines to the Commission if Qwest can show "that the payments relate to the same underlying activity or omission."[91] Again, the FCC has indicated: "(l)iability under the plan is not the only mechanism to offset the BOC's incentive to discriminate. Other incentives of continued compliance include possible federal enforcement actions

[88] Attachment 14 at p.10
[89] Attachment 4 at §6.7.
[90] *See Department/Qwest Stipulation.*
[91] *See* §13.8 above.

under 271(d)(6); liquidated damages under interconnection agreements; and remedies associated with antitrust and other legal actions."[92]

An example of the problem with this language is best demonstrated utilizing the following example. Qwest intentionally fails to provide service to one particular CLEC in order to win back an essential customer of that CLEC, even though service to the CLEC community as a whole is adequate resulting in only minimal Tier II payments. The Commission opens an investigation. After the hearing, the Commission then imposes a penalty. Under the language contemplated between Qwest's newly proffered language, Qwest would be able to avoid paying Tier II remedies equal to the amount of the penalty because "the payments relate to the same underlying activity or omission" i.e. failure to perform adequate services measured by the PIDs and QPAP.

The CLECs believe that Qwest has manipulated a simple concept. The QPAP should not allow for Qwest unilaterally to attempt to opt out of payment under any circumstance. Instead, as articulated in Texas and Colorado (and adopted by this Commission, Montana, Wyoming, Nebraska and Idaho)[93] whether the nature of damages sought by CLEC is such that an offset is appropriate will be determined in the relevant proceeding and nothing should preclude Qwest from arguing such offset is appropriate. [94] Again, Qwest's Petition for Reconsideration should be denied related to offset.

[92] FCC TX Order at ¶424; FCC NY Order at ¶435.
[93] *See* Exhibit H at p.6.
[94] Texas plan at § 6.2.

10. Force Majeure Language

a. The Commission Should Require that the QPAP Language Clearly Exclude Parity Measures from Force Majeure Events.

Qwest included language in QPAP section 13.3 that establishes the time frame in which "Force Majeure event[s] or other excusing event[s]" apply to benchmark and parity measures. The Commission concludes that force majeure events should not apply to parity standards, and therefore orders Qwest to strike the reference to "parity" in section 13.3.[95] Qwest agrees that force majeure events should not apply to parity measures and contends that section 13.3 reflects this by explicitly limiting the application of force majeure events "to performance measures with a benchmark standard." Qwest argues that the reference to parity in section 13.3 is appropriate and necessary because the *other* categories of excusing events covered by section 13.3 (CLEC bad faith and problems associated with third-party systems or equipment) *do* apply to parity measures.[96]

The language in question in section 13.3 provides:

> If a Force Majeure event or other excusing event recognized in this section merely suspends Qwest's ability to timely perform an activity subject to a performance measurement that is an interval measure, the applicable time frame in which Qwest's compliance with the parity or benchmark criterion is measured will be extended on an hour-for-hour or day for-day basis, as applicable, equal to the duration of the excusing event.

To minimize ambiguity and CLEC confusion with apparent inconsistency in the QPAP language, if the Commission chooses to leave the parity reference in section 13.3, the Joint CLECs request that language be added after the word "parity" to clarify that

[95] *See* Commission Order at ¶ 209.

[96] Qwest Petition at pages 32-34.

Force Majeure events do not apply to parity measures. This could simply read "parity (excluding Force Majeure events) . . . ."

b. The Commission Should Reject Qwest's Petition to Reconsider its Decision on Waiver.

The Commission also concludes that Qwest should be required to seek a waiver from the Commission before its performance is excused by a force majeure event.[97] Qwest argues that the QPAP already contains a mechanism for the Commission to resolve disputes over Qwest's application of force majeure events.[98]

The Commission made the appropriate decision in requiring Qwest to modify section 13.3 to reflect Public Counsel's requests to provide that (1) the Commission is the entity that determines whether a request for waiver of payment obligations should be granted, and (2) Qwest must file any waiver request with the Commission "no later than the last business day of the month after the month in which payments are being disputed." Qwest argues that section 13.3.1 provides that any party may petition the Commission to review whether a force Majeure event should excuse Qwest's performance. This inappropriately places the burden on CLECs and state commissions. The proper burden should be on Qwest in the first instance to demonstrate the need for a waiver. The CPAP, to which Qwest has now agreed, supports this in sections 15.1 and 15.2:

> 15.1 Qwest may seek a waiver of the obligation to make payments pursuant to this CPAP by seeking an exception from the Independent Monitor on any of the following grounds:
>
> (1) *Force majeure*, as defined in SGAT Section 5.7 (as to benchmark standards, but not as to parity submeasures);
>
> (2) A work stoppage (as to benchmark standards, but not as to parity submeasures);

[97] *See* Commission Decision ¶ 208.
[98] Qwest Petition at page 34.

(3) An act or omission by CLEC that is in bad faith and designed to "game" the payment process; or

(4) A material failure by CLEC to follow the applicable business rules.

15.2 Any waiver request must contain an explanation of the circumstances that justify the waiver, and any and all relevant documentation relied upon to support the request. To establish that the circumstances warrant granting of a requested waiver, Qwest must show the existence of those circumstances by a preponderance of the evidence. For any such action, Qwest shall be required to pay the disputed credits or place the disputed amount of money into an interest-bearing escrow account until the matter is resolved. CLEC must respond to any such waiver requests within 10 business days and the Independent Monitor shall have 10 business days after the response is filed to rule on the requested waiver, subject to review by the Commission as specified by the Dispute Resolution Process in Section 17.0.[99]

The Joint CLECs request that the Commission reject Qwest's Petition for Reconsideration on Force Majeure.

11. The Commission Should Reject Qwest's Request to Change Its Decision on the Payment Method.

The Commission directs Qwest to amend section 11.2 of the QPAP by adopting language from section 12.2 of the CPAP stating that: "All payments shall be in cash. Qwest shall be able to offset cash payments to CLEC with a bill credit applied against any non-disputed charges that are more than 90 days past due."[100]

The Commission was persuaded by the Colorado Hearing Examiner's reasoning that requiring cash instead of a bill credit "provides the appropriate balance between the competing positions of the parties."[101] Qwest has now acquiesced in the Colorado Commission's approach to payments. The agreed to language in the CPAP provides:

[99] See Colorado PAP, Attachment 4.
[100] Commission Order at paragraph 220.
[101] *Id.*

> 12.2 All payments shall be in cash. Qwest shall be allowed, after obtaining the individual agreement of CLEC, to make such cash payments through the use of electronic fund transfers to CLEC and the Special Fund. However, once Qwest and CLEC agree on a method of payment (*i.e.*, wire transfer or check), Qwest shall not change the method of payment without the permission of CLEC. Qwest shall be able to offset cash payment to CLEC with a bill credit applied against any non-disputed charges that are more than 90 days past due.

The Joint CLECs request that the Commission reject Qwest's petition for reconsideration on this issue for the reasons stated by the Commission in its Order. Qwest has raised nothing new that should cause this Commission to change its decision.

III. CONCLUSION

For the above-stated reasons, the Washington Utilities and Transportation Commission should deny Qwest's Petition for Reconsideration in its entirety.

Respectfully submitted on May 1, 2002.

AT&T COMMUNICATIONS OF THE PACIFIC NORTHWEST, INC. AND AT&T LOCAL SERVICES ON BEHALF OF TCG SEATTLE AND TCG OREGON

By:_____

Mary B. Tribby
Steven H. Weigler
AT&T Law Department
1875 Lawrence Street, Suite 1500
Denver, CO 80202
(303) 298-6957

WORLDCOM, INC.

Michel Singer Nelson
707 17th Street, Suite 4200
Denver, CO 80202
(303) 390-6106

COVAD COMMUNICATIONS COMPANY

K. Megan Doberneck
Senior Counsel
7901 Lowry Boulevard
Denver, Colorado 80230
(720) 208-3636

TIME WARNER TELECOM OF WASHINGTON

ELECTRIC LIGHTWAVE, INC.

Gregory J. Kopta
Davis Wright Tremaine LLP
2600 Century Square, 25th Floor
1501 Fourth Avenue
Seattle, WA 98101-1688
(206) 628-7692