**ATTACHMENT 1**

Lynn Anton Stang
Qwest Corporation
1801 California Street, Suite 5100
Denver, CO 80202
Phone: 303/672-2734
Fax: 303/295-7069
lxstang@qwest.com

Gregory B. Monson (2294)
Ted D. Smith (3017)
STOEL RIVES LLP
201 South Main Street, Suite 1100
Salt Lake City, UT 84111
Phone: 801/328-3131
Fax: 801/578-6999
gbmonson@stoel.com
tsmith@stoel.com

*Attorneys for Qwest Corporation*

**BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH**

| | | |
|---|---|---|
| In the Matter of the Application of QWEST CORPORATION for Approval of Compliance with 47 U.S.C. § 271(d)(2)(B) | : | Docket No. 00-049-08 |
| | : | **QWEST'S REPLY TO JOINT CLEC COMMENTS ON STIPULATION REGARDING PERFORMANCE ASSURANCE PLAN** |

Qwest Corporation ("Qwest"), pursuant to the Commission's "Notice of Comment Period on Stipulation on Performance Assurance Plan" issued March 28, 2002, as amended by "Order Extending Time To Respond to Stipulation on Performance Assurance Plan" issued April 4, 2002, hereby replies to the "Joint CLEC's [sic] Comments Re: Stipulation Between Advocacy Staff and Qwest Regarding Performance Assurance Plan" served on April 10, 2002 ("Comments").

In addition to demeaning the Commission and Advocacy Staff,[1] the Comments mischaracterize the Stipulation.[2] The Comments further evidence the CLECs'[3] objective to delay and undermine Qwest's entry into the interLATA long distance market by creating as many roadblocks as possible and by increasing the costs to Qwest of competition with them in that market, confirming Qwest's view that negotiations with the CLECs would not have been productive. Studiously ignored by the Comments is the benefit to the public that will accrue from meaningful competition in the interLATA market, which the CLECs undoubtedly fear will reverse the current trend of increasing long distance rates.[4]

The Stipulation was encouraged by the Commission and is the product of months of painstaking, arm's-length negotiations. The Commission's dispassionate review of the Stipulation will demonstrate that it is a reasonable resolution of differences between the Staff

---

[1] For example, with respect to the Commission, the Comments state that "[i]nstead of deciding the salient issues . . . as many other state commissions in the Qwest fourteen state region have done . . ., the Commission issued a Procedural Order." Comments at 2. "The Joint CLECs note that other commissions in the Qwest region have mandated a significantly stronger QPAP than that which is stipulated between Qwest and the Department [sic], in part because those commissions followed FCC precedent . . . instead of *kowtowing* to the BOC in an attempt to get the BOC to acquiesce to one." *Id.* at 5-6 (emphasis added).

With respect to Advocacy Staff, the Comments claim that "there was *no constructive adversary* in the negotiations" between Qwest and Advocacy Staff. *Id.* at 4 (emphasis added). The Comments further imply in several instances that Advocacy Staff did not understand the issues.

[2] "Stipulation Between Advocacy Staff and Qwest Regarding Post-entry Performance Assurance Plan" dated March 27, 2002 ("Stipulation").

[3] The competitive local exchange carriers ("CLECs") joining in the Comments are AT&T Communications of the Mountain States and TCG Utah, Covad Communications Company and WorldCom, Inc. Prior to joining in the Comments, Covad has not participated in this Docket on Post-entry Performance Assurance Plan ("PAP") issues.

[4] In addition to being CLECs, AT&T and WorldCom are the largest interexchange carriers in the United States and will be most impacted by Qwest's entry into the interLATA long distance market.

Report[5] and the Facilitator Report[6] on Qwest's Post-entry Performance Assurance Plan ("PAP") and, contrary to the distorted view of the Comments, is consistent in many ways with the principles and concepts embodied in the decisions of other Qwest states cited in the Comments.

## BACKGROUND

In order to obtain approval to enter the interLATA long distance market, Qwest must demonstrate that it has opened its local exchange market to competition in compliance with its obligations under 47 U.S.C. § 251, that it is in compliance with 47 U.S.C. § 272 and that such entry is in the public interest. In describing the public interest prong of the test, the Federal Communications Commission ("FCC") has said:

> In prior orders, the Commission has explained that one factor it may consider as part of its public interest analysis is whether a BOC would have adequate incentives to continue to satisfy the requirements of section 271 after entering the long distance market. Although it is not a requirement for section 271 authority that a BOC be subject to such performance assurance mechanisms, the Commission previously has stated that the existence of a satisfactory performance monitoring and enforcement mechanism would be probative evidence that the BOC will continue to meet its section 271 obligations after a grant of such authority.[7]

Following a collaborative multi-state process of over a year to develop a PAP, a handful of issues were still at impasse. Although the Facilitator Report recommended a PAP more

---

[5] "Staff Report on the Qwest Post Entry Assurance Plan (QPAP)" issued by Utah Staff, composed of the Commission's advisory staff and the Division of Public Utilities for purposes of this Docket, on October 26, 2001 ("Staff Report").

[6] "Report on Qwest's Performance Assurance Plan" issued by John Antonuk of The Liberty Consulting Group, the facilitator selected by the Commission and the commissions from six other states to conduct multi-state workshops on issues arising under 47 U.S.C. § 271 ("Facilitator") on October 22, 2001 ("Facilitator Report"). The Facilitator Report was not filed in this Docket; however, a redlined comparison between the Facilitator Report and the Staff Report was filed in this Docket as an attachment to "Qwest's Comments on the Staff Report on Qwest's Performance Assurance Plan" filed November 6, 2001.

[7] *Application of Verizon Pennsylvania Inc.*, Docket No. 01-138, Memorandum Opinion and Order, FCC 01-269 (rel. September 19, 2001) ("*Verizon Pennsylvania Order*") at ¶ 127.

onerous to Qwest than prior PAPs accepted by the FCC, Qwest supported the resolution of impasse issues recommended in the Facilitator Report. The CLECs and other CLEC parties supported the resolution of the issues recommended in the Staff Report with certain exceptions. The exceptions supported by CLECs would have made the PAP more onerous for Qwest than the PAP recommended in either the Facilitator or Staff Report.

After receiving comments and hearing argument of the parties at a technical conference on November 19, 2001, the Commission issued an order appointing a member of Utah Staff that issued the Staff Report as Advocacy Staff for the purpose of determining whether agreement could be reached on the remaining issues. Apparently, the Commission saw merit in at least some of Qwest's arguments and believed that compromises between the two Reports would be an acceptable solution. At the only meeting mandated by the Commission, Advocacy Staff made clear that negotiations would be bounded by the Staff and Facilitator Reports. Contrary to that direction, certain CLECs proposed positions more onerous to Qwest than those in the Staff Report during the meeting. In addition, Qwest was dealing with the CLECs on PAP issues in many other states.

On the basis of the first meeting and what was happening in other states, Qwest determined that it would not be worthwhile or productive to negotiate with Advocacy Staff and CLECs. Therefore, Qwest advised Advocacy Staff that it would only continue negotiations with Advocacy Staff. Because parties discuss possible compromises to their positions in settlement discussions, Qwest also reminded Advocacy Staff that settlement discussions were confidential. Advocacy Staff was free to negotiate with CLECs and to solicit the views of CLECs on issues, but was not free to share specific Qwest proposals with CLECs.

After over three months of difficult, arm's-length negotiations, Advocacy Staff and Qwest were able to reach agreement on modifications to the PAP that resolved all differences between the Staff and Facilitator Reports in a fair and reasonable manner in the public interest. The Commission can rest assured that Advocacy Staff did not kowtow to Qwest's desired results and that each of the impasse issues was thoroughly examined. In Qwest's view, the modifications to the PAP are much closer to the Staff Report than the Facilitator Report. Certainly, they address the policy concerns raised in the Staff Report.

While negotiations were taking place in Utah, the PAP was under review in several other states. Each state has taken its own approach to PAP issues. The results vary from Idaho, which accepted the PAP essentially as recommended by the Facilitator Report, to Wyoming, which has recommended draconian changes in the PAP that are unacceptable to Qwest. Colorado did not participate in the multi-state process. The PAP being considered in Colorado has therefore evolved on its own and is very different in structure than the PAP before this Commission.

## DISCUSSION OF ISSUES RAISED BY THE COMMENTS

### I. THE PROCESS IN ARRIVING AT THE STIPULATION HAS BEEN APPROPRIATE AND ITS GENERAL TERMS ARE UNREMARKABLE.

In their Comments, the CLECs reiterate an argument that because Qwest was unwilling to negotiate with Advocacy Staff with them in the room, the process is tainted and in violation of FCC precedent and Utah procedure. Comments at 3. Qwest has already responded to this argument and will not reiterate that response here.[8] The point is that Qwest had already negotiated with the CLECs on PAP issues for over a year and had already become anemic from the blood loss. Given the CLECs' insatiable appetites and their penchant for delay, Qwest

[8] *See* "Qwest's Response to AT&T's Notice of Violation of December 6, 2001 Order and Motion To Remand" dated January 24, 2002.

assumed that no good would come from including them in further negotiations. In addition, Qwest never foreclosed Advocacy Staff from considering settlement proposals generated by the CLECs. In fact, had the CLECs made any settlement proposal to Qwest indicating that they were willing to settle on positions between the Staff and Facilitator Reports, Qwest would have gladly considered it. However, none was ever made.

Rather, as illustrated by the Comments, one of the CLEC's major objections to the Stipulation is that it does not address issues outside the bounds of the Staff and Facilitator Reports. Comments at 39. It is obvious that negotiations to resolve differences could never be successful if the list of differences were continually an issue.

Despite the fact that the CLECs did not participate in negotiations with Qwest after December 12, 2001, Qwest understands that the CLECs continued to provide input to Advocacy Staff on the issues, pointing out their status in other states and otherwise making their views known. The Stipulation provides that

> Although the CLEC parties have not entered into this Stipulation, Advocacy Staff believes it has given serious consideration to the positions they have expressed in both their filed comments and positions taken during this negotiation period, and has attempted to accommodate these positions to the extent possible consistent with the public interest.[9]

Advocacy Staff never gave Qwest any reason during the negotiations to doubt the veracity of that statement.

In any event, to the extent that the CLECs do not believe their views have been given sufficient consideration in the Stipulation, they have now provided lengthy comments on the Stipulation to the Commission. They have had the opportunity to make their views known and can claim no injury as a result of the process followed.

---

[9] Stipulation at ¶ 13.

In addition to the claim of impropriety from the process followed, the Comments allege that the inclusion of a paragraph in the Stipulation allowing the parties to withdraw from it if it is not accepted in its entirety causes even more concern. Comments at 5. The paragraph is similar to one in every stipulation Qwest has entered into in Utah in recent memory. It is simply a logical and widely accepted means of allowing a party to withdraw from a stipulation if the careful balancing of interests that resulted in an acceptable compromise is upset. There is nothing sinister or remarkable about it.

## II. IT IS INAPPROPRIATE AND MISLEADING TO PICK AND CHOOSE PROVISIONS FROM OTHER STATES AND TO MAKE INCOMPLETE COMPARISONS OF THEM AS PROPOSED BY THE COMMENTS.

The foundation of the Comments is a process of comparison of certain provisions in the Stipulation with certain provisions in the PAPs under consideration in other states. This is misleading and inconsistent with arguments made by CLECs in the multi-state proceeding. As noted in both the Staff and Facilitator Reports:

> it remains true that each plan addressed heretofore by the FCC, and the one before us, contains unique elements. Some give more to CLECs in some areas, and some give the BOC greater advantages in others. All presumably reflect the kind of balancing that results from cooperative efforts to develop them. As the CLECs have stated articulately and persuasively here, arguments that QPAP burdens on Qwest are equal to or greater than those of some other plan in some respect must be tempered by recognition of those areas where the QPAP eases burdens that BOCs elsewhere are bound to carry.[10]

If the objective of the exercise were to find the most onerous provision on each issue accepted by any state or the FCC, as apparently assumed by the CLECs, there would be no limit on the cost that might be imposed on Qwest to enter the long distance market. But that is not the objective. As noted in the Staff Report:

---

[10] Staff Report at 5; Facilitator Report at 5.

> our task is not necessarily to decide how to increase incentives, our task is rather to design a workable plan that provides *sufficient* incentives to meet policy objectives.[11]

The concept of sufficiency is enough but not too much. Staff correctly recognized that the objective of this process is to fashion a PAP that imposes the least burdens on Qwest sufficient to provide it with incentives to continue to meet its section 271 obligations after entry into the long distance market. This is the objective because competition by Qwest and other BOCs in the long distance market, assuming the local market is open to competition which is a given if 271 relief is granted, is in the public interest; it is not an evil to be avoided or unnecessarily discouraged.[12]

## III. THE COMMENTS MISCHARATERIZE THE STIPULATED PROVISIONS. THE PROVISIONS, FAIRLY INTERPRETED, ARE REASONABLE AND CONSISTENT WITH THE FCC'S EXPECTATIONS.

### A. TOTAL PAYMENT LIABILITY—CAP

As a result of Staff and CLEC concern over the cap, Qwest and the Staff agreed to modify section 12.0 of the QPAP. Under the stipulated provisions, the cap increases to 44% of Qwest's ARMIS net return -- a result endorsed by all of the CLECs who commented on the Facilitator's Report.[13] It also provides *the Commission* with the authority to determine the circumstances under which Qwest's annual liability would or would not be limited under the QPAP. Under the Stipulation, there is a 24% "initial procedural cap." To obtain relief from amounts over 24% up to 44%, Qwest must seek relief from the Commission. The Stipulation

---

[11] Staff Report at 5 (emphasis added).

[12] *Verizon Pennsylvania Order* at ¶ 125.

[13] AT&T's Exceptions to the Liberty Consulting Group's QPAP Report at 6-10 (Nov. 1, 2001). WorldCom endorsed AT&T's position. Worldcom's Exceptions to Report on Qwest's Performance Assurance Plan at 1 (Nov. 1, 2001). Covad also endorsed a 44% cap. Covad

requires that determination to be based on "a public interest standard." Among the primary considerations would be "whether Qwest could have remained below the cap through reasonable and prudent efforts," a factor as to which Qwest would have the burden of proof.

Qwest does not agree with the CLECs' modification that Qwest make any payments that have been suspended pending the Commission's investigation into an escrow account until the Commission decides whether it will lift the initial cap or leave it in place. This modification would be redundant with the requirement that "[i]f the Commission determines that Qwest should make payments in excess of the existing cap, Qwest shall be required to make any and all payments that were suspended with interest . . ." In other words, a de facto escrow provision is already in place.

The other modifications to the stipulated cap provision suggested by the CLECs are, with one exception, also inappropriate. The CLECs essentially request that there is no standard for the Commission to use in determining whether to lift the cap. However, the QPAP is clearly a public interest related requirement and the proposed provision simply requires that the Commission apply that standard in its evaluation of total payment liability under the plan. Furthermore, it is eminently reasonable that one of the **primary** considerations the Commission should consider in its deliberations is whether Qwest could have remained below the cap through reasonable and prudent efforts. It is inconceivable that the Commission would not consider this information to be of utmost importance in making its determination.

In the interests of resolving issues between the parties, Qwest is willing to accept one of the CLECs' proposed modifications to the section 12.2 regarding the operation of the procedural

---

Communications Company's Comments on the Report on Qwest's Performance Assurance Plan at 11 (Nov. 1, 2001).

cap. Qwest will accept the CLECs' deletion of the language that would have allowed Qwest to petition the Commission if the initial cap "is projected to be exceeded", prior to the end of any plan year. The result of the modification is that the initial cap be exceeded before Qwest can file a petition with the Commission for retention of the initial cap.

**B. Incentive to Perform**

**1. Tier 2 Triggers**

The CLECs complain that the Tier 2 trigger conditions proposed by Qwest and Staff sets too high a bar for the removal of the trigger proposed by the Facilitator. It should be noted at the outset that the starting point for these triggers is the Facilitator's modification of a 3 month Tier 2 trigger which has been approved by the FCC many times. Nonetheless, Qwest and Staff devised a performance gate that would remove the Facilitator's already modified trigger if Qwest's overall conforming performance falls below 85%. The parties theorized that performance should be the key factor in determining whether to modify the plans to increase payment opportunities. With no evidence whatsoever, the CLECs claim that 85% is "very low". Although Qwest would hope that it never allows its overall performance to fall below 85%, it would certainly contend that it is more than a remote possibility that such a situation could develop. Furthermore, based on Qwest's experience to date, if such a situation did occur, it is very reasonable to assume that it would be the result of non-conforming performance for a relatively small percentage of total measurements. It also logically follows that the conforming performance level for this sub-group of measurements would be at or below the overall percentage of conforming performance for the total measurements. The CLECs' fuzzy math does not add up and their rhetoric about the low probability of meeting such a condition is pure

speculation. Finally, where Qwest and Staff present a compromise solution, the CLECs revert back to their prior position and offer nothing new.

### 2. Escalation

The CLECs present a specter of escalation hurdles that simply do not exist. The standard of review for the Commission is quite simple and, in the Commission's estimation, either Qwest will meet its burden of proof, or it will not. If Qwest fails to meet its burden, it is probably a relatively short philosophical distance for the Commission to conclude that it is in the public interest to allow payments to continue to escalate. This is clearly not the moral dilemma that the CLECs shrill pleading presents, and their position is completely inconsistent with their prior view that it is the Commission that should have discretion to review such questions under the plan.

The CLECs further obsess over the fact that some measures that have reached six months of escalation the month after a 6-month review would have to wait five more months prior to Commission evaluation for continued escalation. This is hardly a major issue given the fact that PAPs previously approved by the FCC have absolute 6 month limits on escalation and that during that 5 month period Qwest would paying at least $400 to $800 per month[14] for each missed occurrence for Tier 1 measures alone.[15] These are significant payment levels for non-conforming performance for which no proof of harm is required for payment. The important point for the Commission to remember after reading the CLECs' "more-is-better" mantra is that Qwest and the Staff have proposed a reasonable compromise that allows the Commission the

---

[14] Depending on the measurement payment level – i.e., high, medium or low.

[15] Additional Tier 2 payments of $200-$500 per month may also be due for the same occurrences.

ability to remove escalation limits after an evaluation of the issues involved. Joint CLECs propose no compromise, but rather just re-assert their prior position.

**C. Compensation for CLECs**

The CLECs mischaracterize the meaning of sections 13 of Attachment A to the Stipulation and incorrectly claim that these sections result in some inappropriate "exclusivity." This not the case.

As a result of Staff's concern over section 13.6, as amended by the Facilitator, Qwest and Staff agreed to use the original QPAP language related to elections of service standards and remedies available to CLECs. Joint CLECs oppose this language, just as they opposed the Antonuk language. However, Joint CLECs are flatly wrong in stating that the language was designed so that "CLECs could not pursue any other remedy *period*." Joint CLEC Comments, p. 7 (Italics added). The language doesn't support such an interpretation as it specifically and expressly addresses alternative standards and remedies from those provided in the QPAP. Moreover, in the multistate proceeding, Qwest explained the intent of the language in section 13.6 of the Stipulation in response to discovery requests and requests for admissions. The intent of the QPAP language is to require an election of service standards and remedies so that Qwest is not being held to duplicative and inconsistent standards, and so that CLECs cannot recover more than once for the same service or harm resulting from Qwest's performance.[16] Section 13.5 of

[16] See Qwest Corporation's responses to ELI, Time Warner, Telecom and XO Request for Clarification of Qwest PAP, pp. 9-10:

> "ELI/TWTC/XO 11. Please define or explain the term "same or analogous performance" in QPAP Sections 13.7 and 13.8, including but not limited to whether Qwest intends to preclude CLECs from recovering damages for Qwest's performance that fails to comply with Qwest's obligations under the parties' interconnection agreement or otherwise applicable Commission service quality requirements but for which the QPAP does not provide a payment opportunity (*e.g.*, special access circuits or installation and repair of EELs. Please explain the legal rationale for your response.

the QPAP which is not at issue in the Staff's Report, treats Tier 1 payments to CLECs under the PAP as liquidated damages but specifically provides that "the application of the assessments and damages provided for herein is not intended to foreclose other noncontractual legal and noncontractual regulatory claims and remedies that may be available to a CLEC." [17] Accordingly, section 13.5 and 13.6 together provide for CLECs to elect their standards and remedies that are contractual in nature and if they elect the PAP to treat the payments as liquidated damages.

CLECs' assertion that the use of the word "order" creates a requirement that CLECs forego any remedy outside the PAP is preposterous. By the express language in section 13.6, orders are only included as a part of the election if they contain, impose or make available alternative service standards and remedies. The election language clearly does not include *any* order as CLECs suggest. CLECs' additional concern that "Qwest would be absolved from 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" is unfounded.[18] Again, section 13.6 addresses

---

The QPAP does not apply to special access service, and thus does not limit complaints or potential damage claims associated with performance. Similarly, special access is not covered by interconnection agreements. In comparison, Mr. Williams testified that EELs will be included in the QPAP once a standard is determined. Qwest does not intend to preclude CLECs from recovering damages for activities that are not covered in the QPAP or precluded by election under section 13.6. Section 13.7 (and section 13.8) are intended to allow Qwest to offset against compensatory awards for the same activity for which payments are available under the QPAP, notwithstanding how the CLEC obtained the award), August 21, 2001."

[17] Indeed, Joint CLECs support this provision and state that the Texas language—which is the same as the Qwest language--is a model of simplicity. Joint Comments, p. 12.

[18] Contrary to the CLECs assertion, EELs and DSL services are either in the QPAP or will be included in the QPAP once standards are identified. In the multi-state proceeding, Qwest made a commitment to add the submeasurements as they are changed from diagnostic to a standard. Subsequently, the Regional Oversight Committee Technical Advisory Group ("ROC TAG")—which includes the Joint CLECs-- considered which of the EELs submeasurements should have standards. The result was that the parties agreed to provide a standard for the provisioning of EELs in OP-3 (Commitments Met) and intentionally left the remaining EELs measurements as diagnostic. As to DSL measurements, there is no question that DSL capable loops and DSL resold services are currently in the QPAP.

*alternative standards and remedies for wholesale performance.* This language was intended to provide elections for services covered by the PAP and Qwest made this clear in the multistate proceeding. However, in order to resolve any lingering concern, Qwest and Staff are willing to alter their Stipulation to include the following additional clarifying language consistent with its previous statements.

> 13.6 This PAP contains a comprehensive set of performance measurements, statistical methodologies, and payment mechanisms that are designed to function together, and only together, as an integrated whole. To elect the PAP, CLEC must adopt the PAP in its entirety in its interconnection agreement with Qwest in lieu of other alternative standards or relief for the same wholesale services governed by the QPAP. Where alternative standards or remedies for Qwest's wholesale performance are available under rules, orders, or contracts, including interconnection agreements, CLEC will be limited to either PAP standards and remedies or the standards and remedies available under rules, orders or contracts and CLECs choice of remedies shall be specified in its interconnection agreement.

Joint CLECs don't oppose an election provision—just the language discussed above. Indeed, even a similar provision in the Colorado plan, which the CLECs endorse, contains language that requires CLECs to elect between the PAP and the other contractual remedies, such as wholesale rules and standards contained in interconnection agreements.[19] The modified language should resolve CLECs objections to this provision in the stipulation.

The Stipulation changed two other provisions in a manner requested by the CLECs and the Staff, notwithstanding the clear precedent established by one of these provisions being incorporated into the FCC approved SBC plans. Section 13.7 addresses Qwest's ability to offset

---

[19] See, Section 16.4 of the Colorado Performance Assurance Plan which reads: "In electing the CPAP, CLEC shall surrender any rights to remedies under state wholesale service quality rules (in that regard, this CPAP shall constitute an "agreement by the parties" to opt out of those rules, as specified in 4 CCR 723-43-10 of those rules) or under any other interconnection agreement designed to provide such monetary relief for the same performance issues addressed in the CPAP. . . ."

QPAP payments if CLECs pursue actions under other theories of liability. In the stipulated section 13.7, Qwest did exactly what the CLECs had been requesting, Qwest agreed to change the provision so that any it would have to seek offsets from CLEC recovery in the forum in which CLEC obtained an award, rather than take the offset subject to CLEC challenge before the Commission. It is absolutely incredible that the CLECs continue to oppose this provision. On what legal or public interest grounds can the CLECs support their substitution of the phrase "Qwest shall be entitled to argue offset" for the Stipulated language "Qwest shall be entitled to seek an offset." This illustrates the CLECs' real motive, which is to confuse issues and create delay. Another example is the CLECs' opposition to the Stipulated section 13.8. Before the stipulation, section 13.8 stated: Qwest shall not be liable for both Tier 2 payments under the PAP and assessments, sanctions, or other payments for the same underlying activity or omission pursuant to any Commission order or service quality rules. This language was taken directly from the FCC approved SBC plans. Nonetheless, as a part of the Stipulation, Qwest agreed to remove the FCC approved Texas language and substitute it with language that placed greater constraints on Qwest's ability to avoid making duplicative Tier 2 payments. The stipulated language reads:

The Stipulated language is very similar to the language on this issue in the Colorado plan, which CLECs have proffered to this Commission as authority.[20] Accordingly, CLECs have no legitimate opposition to this provision.[21]

---

[20] The Colorado language in section 16.8 reads: If Qwest believes that some Tier 2 payments duplicate payments that are made to the state under other service quality rules, Qwest may make the payments to a special interest bearing escrow account and then dispute the payments via the Independent Monitor. If Qwest can show that the payments are indeed duplicative, it may retain the money (and its interest) that are found to duplicate other state payments.

**D. Six-month Review**

In the Stipulation, Qwest and the Staff agreed to increase considerably the ability of the Commission to consider changes to the PAP at the six-month review. The Joint CLECs urge the Commission to reject the Stipulated language claiming that the Stipulation "allow[s] Qwest as opposed to the Commission, the unilateral right to alter the QPAP." Joint Comments, p.18. CLECs further argue that "there are plenty of FCC approved performance assurance plans that mandate unilateral commission change control." *Id*. at 24. Neither statement is true.

The modifications in the stipulation allow the Commission to resolve all disputes arising out of the six-month review, with the exception of the classification of new measurements. This is a dramatic and fundamental change from the multiple SBC plans in which only the addition of new measurements can be resolved the Commission. Any other changes must be consensual.[22] This change also recognizes Qwest's legitimate concern in facing unknown and unlimited

---

[21] CLEC's claim that Qwest and staff added language from section 13.6 to section 12 is completely unfounded. The language in section 12 to which CLECs refer has always been in the plan *in section 12.1*, was in the Texas plan, and has never been contested by any party, including the CLECs.

[22] Section 6.4 of the Texas Plan states: "Every six months, CLEC may participate with SWBT, other CLECs, and Commission representatives to review the performance measures to determine whether measurements should be added, deleted, or modified; whether the applicable benchmark standards should be modified or replaced by parity standards; and whether to move a classification of a measure to High, Medium, Low, Diagnostic, Tier-1 or Tier-2. The criterion for reclassification of a measure shall be whether the actual volume of data points was lesser or greater than anticipated. Criteria for review of performance measures, other than for possible reclassification, shall be whether there exists an omission or failure to capture intended performance, and whether there is duplication of another measurement. Performance measures for 911 may be examined at any six month review to determine whether they should be reclassified. The first six-month period will begin when an interconnection agreement including this remedy plan is adopted by a CLEC and approved by the Commission. Any changes to existing performance measures and this remedy plan shall be by mutual agreement of the parties and, if necessary, with respect to new measures and their appropriate classification, by arbitration. The current measurements and benchmarks will be in effect until modified hereunder or expiration of the interconnection agreement."

financial obligations in the future while allowing for reasonable plan evolution.[23] Moreover, neither of the ***two*** plans Joint CLECs cite, constitute "plenty of precedent" for CLECs' proposition that the Commission mandate unilateral control of the plan and Qwest relinquish rights to contest disputes addressed by the Commission.

The two plans cited by the Joint CLECS do not mandate the Commission can dictate changes without challenge by the BOC. For example, the Verizon Massachusetts plan states that each year the Department and Verizon MA will review the Performance Assurance Plan to determine whether any modifications or additions should be made."[24] Qwest understands that Verizon has, subsequent to the filing cited by CLECs, adopted the New York plan in which there is nothing that establishes a unilateral *right* for the commission to make changes or requires the BOC to give up its right to judicial review as the CLECs suggest in their proposed language. See *eg*. Joint CLEC Comments, p. 27-28. And as the Texas plan and its progeny accepted by the FCC make clear, there is no FCC requirement that BOCS accept broader provisions related to plan changes than are in the Texas plan.

Qwest and Staff believe that the changes to section 16.0 arising from the stipulation represent a fair compromise and are well within the parameters of other plans. However, upon review of the CLECs comments related to one sentence in section 16.0, Qwest and Staff are willing to modify this sentence to address a CLEC concern. Included in section 16.1 is language that states: "Any changes at the six month review pursuant to this section and as a result of a

---

[23] This very concept was the subject of remand and accepted by the Special Master as well as the Colorado Commission.

[24] See Memorandum Opinion and Order, Application of Verizon New England Inc., Bell Atlantic Communications, Inc. (d/b/a Verizon Long Distance), NYNEX Long Distance Company (d/b/a Verizon Enterprise Solutions) and Verizon Global Networks Inc., for Authorization to Provide In-Region, InterLATA Services in Massachusetts, 16 FCC Rcd 8988 247 (2001) ("Verizon Massachusetts Order").

final non-appealable decision shall upon finality apply to and modify this agreement between CLEC and Qwest." Contrary to the CLECs' claim, this benefits either CLECs or Qwest--whichever challenges the Commission--in that it allows for review prior to the change becoming effective. However, Qwest and Staff are willing to modify the language, so that it does not operate as an automatic stay of the Commission's decision pending appeal. Rather the decision would be subject to parties seeking a stay from the appropriate reviewing forum. The Stipulated change reads as follows: "Any changes at the six month review pursuant to this section shall apply to and modify this agreement between Qwest and CLEC, subject to a stay, modification or reversal on appeal or judicial review."

The CLECs objection to Qwest's proposed 10% collar is unfounded. After Joint CLECs wrongly claim that a 10% collar "has never occurred in any performance assurance plan **period**"[25], they reference the obvious exception in Colorado, where the Special Master recommended just such a collar that would work very similar to the one in the Utah Stipulation.

> The Colorado Collar provides:
>
> Qwest shall calculate separately, payments owed under the CPAP that do not include changes made at the six-month review ("baseline CPAP") and payments owed under a CPAP revised to reflect changes made at the six-month review ("revised CPAP"). If payments calculated under the revised CPAP are more than 110% of payments calculated under the baseline CPAP, Qwest shall limit payments to the affected CLECs and to the Special fund to a 10% increase ("10% collar") above the total baseline CPAP payment liability.
>
> The Utah Stipulation Collar provides:
>
> Qwest shall not be liable for making any payments under the QPAP that result from changes made pursuant to the preceding paragraph and section 16.3, that exceed 10% of the monthly payments that Qwest would have made absent the effect of such changes as a whole. Such payment limitation shall be accomplished by factoring the payments

[25] JC Comments at 25

resulting from the changes to ensure that such payments remain within 10% of the payments Qwest would have made absent such changes.

The CLECs further wrongly claim that ". . . the Colorado Collar only applies to the relevant six month period."[26] The Colorado Collar, like the Utah Collar, is based on the baseline PAP payments (i.e., PAP payments with no 6-month review changes) such that it limits payments for a PAP that includes changes made at the 6-month review to 110% of the baseline PAP changes. As the PAPs in either Colorado or Utah continue to change during further 6-month reviews, the collars will continue to operate to limit any additional changes. Consequently, the CLEC's claim that the Colorado collar applies only to the relevant 6-month period is not true. Once there has been a change at a 6-month review the presence of the collars would effect future payment calculations for either the Colorado or Utah plans until termination of the PAPs.

**Conclusion**

The scrutiny of the Qwest performance plan has been exhaustive. And Qwest's has demonstrated its willingness to accommodate state and CLEC concerns. With the changes agreed to between Qwest and the Utah Advocacy Staff, the Commission can determine that the QPAP is an adequate anti-backsliding mechanism and that with it, Qwest's application is in the public interest.

DATED this 17th day of April, 2002.

_____

Gregory B. Monson

[26] *Id.*

Ted D. Smith
STOEL RIVES LLP

*Attorneys for Qwest Corporation*

**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the **QWEST'S REPLY TO JOINT CLEC COMMENTS ON STIPULATION REGARDING PERFORMANCE ASSURANCE PLAN** was served upon all parties on the Utah Service List For Docket No. 00-049-08 by Electronic Mail on the 17th day of April, 2002.

_____