STATE OF IOWA

DEPARTMENT OF COMMERCE

UTILITIES BOARD

IN RE: U S WEST COMMUNICATIONS, INC., n/k/a QWEST CORPORATION	DOCKET NOS. INU-00-2 SPU-00-11

CONDITIONAL STATEMENT REGARDING
QWEST PERFORMANCE ASSURANCE PLAN

(Issued May 7, 2002)

On February 10, 2000, the Utilities Board (Board) issued an order initiating an investigation relating to the possible future entry of U S WEST Communications, Inc., n/k/a Qwest Corporation (Qwest), into the interLATA market. The investigation was identified as Docket No. INU-00-2.

In a filing dated May 4, 2000, Qwest encouraged the Board to consider a multi-state process for purposes of its review of Track A (competition issues),[1] various aspects of each item on the 14-point competitive checklist, section 272 (separate subsidiary) issues and public interest considerations. The Board considered the concept of a multi-state process for purposes of its review of a Qwest application to provide in-region, interLATA services, sought comment, and subsequently issued an order dated August 10, 2000, indicating that its initial review of Qwest's compliance with the requirements of 47 U.S.C. § 271 would be through participation in a multi-state workshop process with the Idaho Public Utilities

[1] *See*, 47 U.S.C. § 271(c)(1)(A).

Commission, North Dakota Public Service Commission, Montana Public Service Commission, Wyoming Public Service Commission, and the Utah Public Service Commission. Since the time of that order, the New Mexico Public Regulation Commission has also joined in the workshop process.

On October 22, 2001, The Liberty Consulting Group (Liberty) filed its Report on Qwest's Performance Assurance Plan (QPAP) and Public Interest. This conditional statement addresses only the QPAP. Public Interest was previously addressed in the Board's conditional statement dated January 25, 2002.

In August of 2000, a collaborative process was initiated with 11 of the 14 Qwest state public service commissions participating. The process was known as the Post-Entry Performance Plan (PEPP) collaborative. Between October of 2000 and May of 2001, five separate multi-day workshops were convened, numerous conference calls were placed, and a large quantity of information, proposals, and supporting data were exchanged and reviewed in an attempt to create a "consensus plan."

The PEPP collaborative ended in May of 2001 when Qwest representatives indicated a reluctance to continue with further meetings in the current format, expressing a belief that no further consensus could be reached. A final collaborative summary was prepared by MTG Consulting (MTG) and the National Regulatory Research Institute (NRRI) and distributed on June 5, 2001. This summary document

contained a list of agreements that had been reached through the collaborative process as well as a list of unresolved issues.[2]

A telephonic procedural conference was held on August 3, 2001, by Liberty to discuss the possibility of utilizing the multi-state checklist compliance proceedings (seven state commissions were at that time participating) to consider the 271-affecting aspects of the performance assurance plan that Qwest intended to file in each state. Ultimately, the seven multi-state workshop participants became a nine-state workshop collaborative, with the Washington and Nebraska commissions joining the effort.

The results of that conference were used to establish a set of procedures and an appropriate schedule for producing a report that would provide the nine commissions with a series of proposed conclusions and recommendations addressing the public interest issues raised by the QPAP. The procedures allowed all participants to file comments and testimony in response to the proposed QPAP, which Qwest filed on or about July 16, 2001, in substantially the same form with all nine commissions. Qwest was then permitted to file pre-hearing responses to those comments.

Hearings were scheduled and held during the weeks of August 13 and August 27, 2001. Those hearings included direct, rebuttal, and surrebuttal testimony. In all, 11 witnesses testified during seven days of hearings. Testimony was received from

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[2] This "Final Collaborative Summary" can be viewed at http://www.nrri.ohio-state.edu/oss/Post271/Post271/final_report.pdf.

Carl Inouye, Michael Williams, Karen Stewart, and Nancy Lubamersky of Qwest, George Ford of Z-TeL Communications, Inc. (ZTEL), John Finnegan of AT&T Communications of the Mountain States, Inc., AT&T Communications of the Midwest, Inc., AT&T Communications of the Pacific Northwest, Inc., and AT&T Local Services on behalf of its TCG Affiliates (collectively AT&T), Chad Warner of WorldCom, Inc. (WCOM), Marlon Griffing on behalf of the New Mexico Advocacy Staff (NMAS), Rex Knowles of XO Utah, Inc., and XO Washington, Inc. (XO), Tim Kagele of Time Warner Telecom of Washington, LLC (Time Warner), and Timothy Peters of Electric Lightwave, Inc. (ELI). (XO, Time Warner, and ELI filed joint briefs and are referred to collectively herein as ELI/Time Warner/XO.) Main briefs, due to be filed by September 13, 2001, came from the Wyoming Consumer Advocacy Staff (WCAS), Washington Public Counsel, ZTEL, Covad Communications Company (Covad), ELI/Time Warner/XO, NMAS, WCOM, AT&T, and Qwest. Reply briefs, due by September 20, 2001, came from the WCAS, ZTEL, Covad, ELI/Time Warner/XO, NMAS, WCOM, AT&T, and Qwest.

In addition to the scheduled filings, AT&T has filed four "supplemental authority" pleadings. These appear to be intended to bring to the Board's attention other state commission actions on these issues. Attached to AT&T's February 1, 2002, filing were copies of a preliminary report and request for comments issued by the Montana Public Service Commission and a "First Order" issued by the Wyoming Public Service Commission that included issues related to the QPAP. With its April 10, 2002, filing, AT&T included a copy of the Washington Utilities and

Transportation Commissions "Thirtieth Supplemental Order" which addressed the QPAP issues. With its "additional statement of supplemental authority," filed April 23, 2002, AT&T provided the Board with copies of the Montana Public Service Commission's final report on Qwest's performance plan and a "Decision on Remand" from the Public Utilities Commission of the State of Colorado. Attached to its final filing on May 2, 2002, was a copy of an order issued by the Nebraska Public Service Commission on April 23, 2002.

The Federal Communications Commission (FCC) has delineated five general characteristics that must be part of a section 271-performance assurance plan as part of a "zone of reasonableness" analysis. These include:

- Meaningful and significant incentive to comply with designated performance standards.
- Clearly articulated and pre-determined measures and standards encompassing a range of carrier-to-carrier performance.
- Reasonable structure designed to detect and sanction poor performance when and if it occurs.
- Self-executing mechanism that does not open the door unreasonably to litigation and appeal.
- Reasonable assurance that the reported data are accurate.[3]

Liberty's report outlined a total of 68 issues relating to Qwest's proposed performance assurance plan (PAP) that remained at impasse following the multi-

[3] *See* Memorandum Opinion and Order, *Application by Bell Atlantic New York for Authorization Under Section 271 of the Communications Act To Provide In-Region, InterLATA Service in the State of New York,* 15 FCC Rcd 3953 ¶ 433 (1999) (*New York Order), aff'd sub nom. AT&T Corp. v. FCC,* 220 F.3d 607 (D.C. Cir. 2000).

state workshops. From those impasse issue discussions, Liberty made recommendations for 29 separate changes to the QPAP.

This conditional statement addresses those issues that were identified as being at impasse and incorporates into the discussion a recommendation related to each of the separate recommended changes. Where Liberty's resolution of an issue was not disputed after the issuance of the report, the Board has provided a very short summary discussion of the issue and has adopted Liberty's resolution. For issues remaining at impasse after the issuance of Liberty's report, position summaries, analysis, and the Board's determination is given. This conditional statement will follow the same general outline that is found in the October 22, 2001, report.

To the extent that some of these issues are to be further evaluated in the Regional Oversight Committee (ROC) operational support system (OSS) test or some other proceeding, the Board will incorporate that evidence into its final recommendation to the FCC as to whether Qwest has fully complied with a checklist requirement. To the extent that an issue requires performance of some duty or activity on Qwest's part, Qwest will need to demonstrate that it adequately performs as expected in order for the Board to make a positive recommendation to the FCC following an application filed by Qwest.

IMPASSE ISSUES

I. IS THERE MEANINGFUL AND SIGNIFICANT INCENTIVE?

A. Total Payment Liability

1. The 36 Percent of Net Revenues Standard (Report pp. 12-16; Qwest initial brief pp. 3, 11-12; Qwest PAP filing pp. 5, 6; WCOM initial comments p. 32; Covad initial brief p. 36; Qwest reply brief pp. 11; ELI/Time Warner/XO initial PAP brief pp. 7, 12; AT&T verified comments p. 15; AT&T reply brief p. 7)

The QPAP places at risk each year a total of $306 million, which represents 36 percent of Qwest's 1999 net intrastate revenues (as reported to the FCC by Qwest on its ARMIS reports[4]) in the nine states combined. The ARMIS return is measured as total operating revenue less operating expenses and operating taxes. The proposed QPAP uses the 1999 figure for all at risk calculations.

Qwest argued financial risk does not have to be unlimited in order to be significant. In nine of ten section 271 applications approved by the FCC to date, the Bell operating company's (BOC) PAP had a cap on the "total" liability. In each case, the FCC found that placing 36 percent of the BOC's net return at risk constituted a meaningful incentive, despite being a cap on the level of payments. In no event has

[4] The ARMIS reports contain highly aggregated financial data reflecting the results of accounting, rate base, and cost allocation requirements prescribed in Parts 32, 64, 65, 36 and 69, of the FCC Rules. ARMIS report 43-01 is filed on a study area (jurisdiction) basis. ARMIS report 43-02 is filed on an operating company basis and collects the operating results of the carrier's total activities for every account in the USOA, as specified in Part 32 of the FCC Rules. ARMIS report 43-03 contains the breakdown of the reporting carrier's costs between regulated and nonregulated activities as defined in their Cost Allocation Manuals and Part 64 of the FCC Rules. ARMIS report 43-04 shows the separation of the reporting carrier's regulated revenues and costs between the state and interstate jurisdictions, as defined in Part 36 of the FCC Rules, and the distribution of interstate amounts among the access charge categories, as defined in Part 69 of the FCC Rules. ARMIS report 43-05 is a service quality report filed annually. ARMIS report 43-06 is a customer satisfaction report that gives the percentage of customers that are dissatisfied with various aspects of the reporting carrier's service. ARMIS report 43-07 provides data regarding the infrastructure of the reporting carrier. ARMIS report 43-08 contains statistical schedules covering individual state activities. ARMIS report 495-A displays forecasts of expected regulated and nonregulated investment usage at the study area level, for the current calendar year and the subsequent two calendar years. ARMIS report 495-B is a companion to Report 495-A and displays the actual usage of regulated and nonregulated investment at the study area level for the prior calendar year.

the FCC determined that unlimited risk of payments was necessary to provide a meaningful financial incentive to a BOC.

According to ELI/Time Warner/XO, Qwest's purported justification for caps is that the caps represent the payment level that is sufficient to provide Qwest with the necessary financial incentive to improve its performance. ELI/Time Warner/XO argues the position lacks even common sense. No cap would be necessary if the caps are set at the levels necessary to compel Qwest to perform because by definition, payments would not exceed that level. If quantifications of penalties exceed the cap, however, the payment levels obviously were not sufficient financial incentive for Qwest to improve its performance.

ELI/Time Warner/XO argues that Qwest will be able to incorporate a low QPAP cap as a cost of doing business. The total dollars represented by 36 percent of net revenues is less than the profits Qwest generates from intrastate services under its authorized rate of return in Washington and former rate of return in Utah (which Qwest now exceeds under price cap regulation). Qwest thus could continue to provide local exchange service at a profit while making the maximum payments under the QPAP for providing poor service to its competitors – without even considering the profits Qwest generates from "deregulated" services and would generate from providing interLATA services.

Under a definitive cap, AT&T contends Qwest can calculate the net cost of discrimination in order to gain market share. In addition, absolute caps send the signal that once Qwest's performance deteriorates to a particular level (i.e., reaching

the absolute cap) then further deterioration is irrelevant. The whole notion of absolute caps is antithetical to the concept of backsliding or an incentive plan. The practical application of absolute caps is that once Qwest's performance decreases to a chronic woefully deficient level, Qwest gets rewarded by no longer having to pay any financial consequences.

While AT&T opposes any absolute cap on penalties, a procedural cap for Tier 2 penalties may be useful if properly implemented. Procedural caps could establish a preset level at which Qwest could seek regulatory review of the consequences that are due. However, the cap would not automatically absolve Qwest of liability of the consequences that are due. Procedural caps avoid both problems of absolute caps. They do not provide Qwest with the opportunity to evaluate the "cost" of retaining share through non-compliance. Likewise, they do not absolve Qwest from consequences for unchecked performance deterioration.

Accordingly, AT&T believes that the QPAP Section 12.1 and 12.2 should be stricken in its entirety and changed to the following:

> There should be no cap on the total payments made by Qwest for Tier 1 or Tier 2 penalties in a calendar year. However, as to Tier 2 payments, if Qwest payments meet a figure equivalent to thirty six percent (36 percent) of the latest ARMIS Net Returns for (insert state) in a twelve-month period, Qwest shall pay the relevant payments up to the procedural cap and put the amount in excess of the cap in a escrow account earning at least the statutory interest rate for (insert state). The (insert state commission) shall decide whether and to what extent the amount in excess of the procedural cap should be paid in excess of the cap, after a public hearing commenced for that purpose. In such hearing the burden shall be on Qwest by a preponderance of the

> evidence to prove why damages shall not be paid above the set procedural cap. Pursuant to (insert State Commission) Order, Qwest shall then pay any amount in excess of the cap, including accrued interest that (insert State Commission) deems appropriate.

AT&T suggests that Qwest has deviated from the "blueprint" plan it cites (Texas Plan) on numerous occasions to the benefit of Qwest. Including, for example, provisions on offset, exclusions, dispute resolution, Tier 2 payments, late payments, six-month reviews, and audits. With all of these changes to Qwest's substantial benefit, it is hardly meritorious for Qwest to proffer that its plan passes muster to the FCC because other plans have had caps at 36 percent.

Liberty noted that the FCC considered the entire contents of the PAPs before it when deciding whether the 36 percent standard was sufficient to create a meaningful and significant incentive to other BOCs asking for the same relief as Qwest seeks here. Liberty reached the conclusion that the standard represents an appropriate starting point, to be examined again as all of the other provisions affecting Qwest's incentive to perform are addressed and determined.

Much of the debate over a cap on the obligation by Qwest centers on what the FCC has accepted in other successful 271 applications. Qwest states that its plan mirrors the approved Texas PAP. The FCC explained in the context of the Southwestern Bell Telephone Company (SWBT) performance plan that placing at risk $289 million, or 36 percent of net revenues, was adequate because:

> The performance plans adopted by the Texas Commission do not represent the only means of ensuring that SWBT continues to provide nondiscriminatory service to competing

> carriers. In addition to the $289 million at stake under this Plan, as noted above, SWBT faces other consequences if it fails to sustain a high level of service to competing carriers, including: federal enforcement action pursuant to section 271(d)(6); liquidated damages under dozens of interconnection agreements; and remedies associated with antitrust and other legal actions.[5]

Qwest, unlike SWBT, proposes its PAP as the *exclusive* remedy for any breach of its obligations under an interconnection agreement. Preclusion, offsets and liquidated damages are discussed in other parts of this conditional statement.

The Board agrees that the 36 percent figure arrived at by Qwest, is in line with other approved PAPs and appears to represent a reasonable starting point. The Board also agrees that even though this plan is similar to the other plans, there are differences between the plans that must be considered in connection to the 36 percent cap. That having been said, it must be noted that many of the differences between various approved plans (provisions on offset, exclusions, dispute resolution, Tier 2 payments, late payments, six-month reviews, and audits) were modified to some extent in Liberty's QPAP Report and included in the QPAP filed by Qwest on November 6, 2001. The specific changes related to these differences are discussed elsewhere in this conditional statement.

The 36 percent of net intrastate revenue from 1999 represents $306 million for the nine states with Iowa’s cap in real terms set at $31 million. Rather than set a percentage cap, the Board will direct Qwest to include a fixed dollar amount cap at

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[5] *Texas Order*, ¶ 424.

the projected $31 million mark, which is equivalent to Iowa's portion of the 36 percent cap recommended by Liberty, based on ARMIS revenue data from 1999.

2. Procedural Caps -

(1) Provisions for Changing the Cap (Report pp. 16-19; AT&T initial brief pp. 19-20; WCOM initial comments pp. 8, 33; ZTEL initial brief p. 19)

The FCC requires a plan that has potential liability and provides a meaningful and significant incentive to comply with the designated performance standards. Qwest witness Carl Inouye indicated that the "purpose of the QPAP is to create significant financial risk to insure that Qwest doesn't backslide on service performance. Creating financial risk does not have to be done by creating unlimited financial risk." AT&T, along with Covad, argued that a 44 percent cap was more appropriate than the 36 percent proposed by Qwest.

ZTEL contends that when a cap has been reached, it necessarily means performance has been poor. A cap could function as a reverse incentive to the extent it creates a safe haven after a period of poor performance where continued poor performance is without immediate financial consequences for Qwest.

Like the New Mexico Commission Staff, ZTEL supports what has been called a "procedural cap." That is, once a certain level of aggregate payments has been made, a proceeding or investigation at the state commission should be initiated. As a result, ZTEL proposed in its original comments that a procedural cap be invoked when payments reach 36 percent of net revenue. Notably, ZTEL does not oppose a procedural cap equal to a smaller percentage of net revenue.

Liberty reasoned that experience would tell us much more about whether a 36 percent cap is, or is not, appropriate. The following are just a few examples Liberty noted where additional information will be provided over time:

- BOC performance baselines will become more established.
- Root cause analyses will identify the actual causes of persistent, substandard performance.
- What needs to be measured and how those measurements should be used will be enriched by growing competition.
- The trend in local market penetration by competitive local exchange companies (CLECs) will tell us whether 1999 remains an appropriate year to use as the foundation for setting total financial exposure.

Because any combination of factors such as these could support movement of the 36 percent limit in either direction, Liberty recommended the inclusion of the following cap movement principles in the QPAP:

A. An increase in the cap of a maximum of 4 percentage points at any one time (i.e., first to 40 percent) shall occur upon order by a state commission that it is appropriate to do so in cases where performance the cap would have been exceeded for any consecutive period of 24 months by that same 4 percent or more, provided that:

a. the commission shall determine that the preponderance of the evidence shows Qwest could have remained beneath the cap through reasonable and prudent efforts, and

b. the commission shall have made that determination after

1. having available to it on the record the results of root cause analyses, and

2. providing an opportunity for Qwest to be heard.

B. A decrease in the cap of a maximum of 4 percentage points at any one time shall occur upon order by a state commission that it is appropriate to do so after performance for any consecutive period of 24 months which produces calculations of total payment responsibility that is 8 or more percentage points (i.e., 26 percent or less) below the cap amount for that period, provided that:

a. the commission shall determine that the preponderance of the evidence shows the performance results underlying those payment calculations results from an adequate Qwest commitment to meeting its responsibilities to provide adequate wholesale service and to keeping open its local markets, and

b. the commission shall have made that determination after providing all interested participants an opportunity to be heard.

C. The provisions of (A) and (B) above shall be applicable to the next 24-month period commencing at the completion of the first, provided that the maximum increase in the cap amount shall be 8 percentage points; the maximum decrease shall be 6 points.

As indicated in the discussion of the previous issue, the Board found the Iowa cap should be set at a fixed amount of $31million. The $31 million was the amount calculated at risk in Iowa based on Qwest's 1999 ARMIS data, with 36 percent applied and then divided among the states involved in the multi-state workshop collaborative for the QPAP issues.

Any change to a fixed dollar amount cap can be included in the six-month review of the QPAP. The Board finds that it would be appropriate for the fixed dollar amount to be revisited during any review of the QPAP so that the possible obligation can be kept in line based on new information and experience than will be gained during the operation of the QPAP.

The Board directs Qwest to eliminate any references to the Liberty recommended provisions for changing the cap from the Iowa specific QPAP.

(2) Foreclosing Recovery for CLEC Harm Occurring Late in the Year (Report pp. 19-20)

Liberty also considered that when the cap is reached, CLECs who have already suffered harm are compensated fully while those yet to suffer harm will not be compensated at all. This result is completely arbitrary and it could have devastating consequences for a CLEC that has given up its other rights to compensation in return for electing the QPAP provisions. There is a compelling public interest in assuring that compensation does not become a matter of one's place in the line – a position, by the way, that is not determined by the CLEC but by the performance that Qwest delivers. Therefore, when the cap is reached, each CLEC shall, as of the end of the year, be entitled to receive the same percentage of its total calculated Tier 1 payments. In order to preserve the operation of the cap, Liberty recommended that a percentage equalization take place as follows:

1. The amount by which any month's total payments exceeded 1/12th of the annual cap shall be calculated and apportioned between Tier 1 and Tier 2 according to the percentage that each bore of total payments for

the year to date. The result of this calculation shall be known as the "Tracking Account."

2. The Tier 1 excess shall be debited against the next ensuing payments due to each CLEC, by applying to the year-to-date payments received by each the percentage necessary to generate the required total Tier 1 amount.

3. The Tracking Amount shall be apportioned among all CLECs so as to provide each with payments equal in percentage of its total year to date Tier 1 payment calculations.

Liberty recommended that this calculation take place in the first month that payments are expected to exceed the annual cap and for each month of that year thereafter. Qwest should then recover any debited amounts by reducing payments due from any CLEC for that and any succeeding months, as necessary.

Having approved a fixed cap, this "equalization approach" seems to be a reasonable calculation to divide up the remainder of the capped amount. None of the interveners filed comments on Liberty's proposal.

Qwest accepted Liberty's approach but added clarifying language to the equalization technique to ensure all CLECs will receive an equal proportion of the payments that are due them in years where the annual cap is exceeded. Qwest states, because QPAP monthly payments may intermittently fall below or exceed the monthly cap, the calculations of the balancing account should be performed using year to date payments and a cumulative monthly cap. Additionally, Qwest proposes to apply equalization in the month when the year to date payment exceeds the monthly cumulative cap.

The Board will adopt Liberty's recommendation with the Qwest changes to the proposed language.

3. Qwest's Marginal Cost of Compliance (Report pp. 20-21; Qwest initial brief p. 14; ZTEL reply brief p. 11)

ZTEL argues that if the value to Qwest of maintaining its monopoly is **less** than the 36 percent figure, then the debate on this point is irrelevant. In that situation, there would be no difference to Qwest between a 36 percent 1999 net revenue cap and no cap at all because it would come into compliance **well before** the 36 percent cap is reached. As a result, from the standpoint of the public interest, consumers and the industry are no better off with Qwest's proposal than a procedural cap or no cap at all.

If, however, the other participants are right and the risk to Qwest of maintaining its monopoly is **greater** than 36 percent 1999 net revenues, there is considerable harm to the public interest if Qwest's proposal is accepted. At that point, Qwest would reach the absolute cap and pay this amount as a "cost of doing business." Further, because the cap is fixed at 1999 net revenues, the significance of this absolute cap actually diminishes over time in states where Qwest's revenues are growing rapidly.

CLECs claim that a procedural cap is necessary to prevent it from making an economic decision to continue to provide nonconforming service because it is financially advantageous. They assert that Qwest would be able to compare the level of QPAP payments to the level of operational cost that would have to be incurred to

meet the performance standards and/or the net cost of discrimination to gain market share.

Qwest responds to these claims by suggesting that such reasoning is flawed on several levels. First, such a CLEC claim would be valid only if 36 percent of net revenues were less than the marginal cost of meeting performance standards or less than the value of market share gain. CLECs have provided no evidence to show that this is the case. Without such evidence, the CLEC claim is purely hypothetical and deserves no weight. Second, Qwest argues that such a calculation cannot be a complete evaluation because of non-quantifiable costs such as regulatory risks that such noncompliance would pose to Qwest at both state and federal levels. Last, the CLEC claim ignores the cumulative effect of the cap over several years. The $306 million is not a one-time cap, but rather is an annual cap. Therefore, potential QPAP payments over five years would total $1.5 billion for the nine states.

Liberty noted that while there may certainly be theoretical appeal in the marginal cost analysis that the NMAS's witness discussed, a number of insurmountable problems are inherent in applying it. For example,

- No participant presented evidence of Qwest's marginal costs of compliance, making the equation impossible to perform from this record.

- Even with such evidence, the calculation would require the expected values of other risks faced by Qwest, such as revocation of section 271 approval, or parallel enforcement proceedings.

- Long-term investments by Qwest would reduce payments for a number of years, eliminating the possibility that the

> equation could be performed by a simple comparison of a single year's costs and reduced QPAP payments.

Liberty concluded that while the proffered equation had theoretical appeal, it was ultimately not a solution here, because there was no evidence that would enable its application. Moreover, it is unlikely that an attempt to gather evidence and to use it in an analytical model would yield particularly reliable results, given the subjective nature of the other applicable risks and the judgments that would be necessary to value (on a present basis) the multi-year benefits that long-term investments would yield.

The Board agrees with Liberty that the difficulty of trying to set the cap at a marginal cost figure makes it unworkable. The true marginal cap to Qwest to either comply with the QPAP or to make a business decision on the cost of maintaining its monopoly would be difficult, if not impossible, to determine.

The Board finds that this is not an issue for Iowa because it set a fixed dollar amount as a cap for the Iowa QPAP.

4. Continuing Propriety of a Cap Based on 1999 Net Revenues (Report pp. 21-22; ELI/Time Warner/XO reply brief p.7)

ELI/Time Warner/XO argues that the QPAP would be worthless if Qwest's costs to comply with the performance standards were higher than the payments for noncompliance. Rather, the record evidence demonstrates that Qwest's local exchange service offerings – considered in isolation from all other revenue sources – would remain profitable in Washington and Utah even if Qwest must pay 36 percent of its net revenues in QPAP payments. Although Qwest presented no evidence of

the interLATA market share it anticipates capturing, these CLECs contend that market share would not need to approach the initial 25 percent that Verizon achieved in New York to justify Qwest paying 36 percent of its other net revenues as QPAP payments in order to maintain its local market share. Qwest's proposal to freeze the net revenue calculation at 1999 (or 2000) ARMIS revenue data levels – *i.e.*, *before* Qwest begins to generate revenues from Section 271 interLATA services – for the life of the QPAP highlights Qwest's ultimate objective according to ELI/Time Warner/XO.

Liberty suggested that this argument rests upon the implicit premise that net intrastate operating revenue will continue to increase despite growth in competition for local exchange business. Liberty found this premise to be quite speculative. All other things being equal, the effects of access line growth would have to exceed those that result from loss of market share to CLECs. Moreover, it is not at all clear that all other things will remain equal. Liberty noted that many examples demonstrate the uncertainty:

- Local-exchange business retention strategies may produce broadly-based price concessions that lower per-access line net revenues.

- If there is cross-subsidization in certain elements of local-exchange service, current tariff prices that contain a premium above costs may not remain sustainable as competition increases.

- Financial, accounting, and operational restructuring of interstate versus intrastate services, which are by no means unlikely in the fluid marketplace and regulatory environments now existing, may alter materially how intrastate return is calculated and how much it ends up being in the future.

Liberty suggested that on the whole, it appeared preferable to rely upon the firm dollar amounts that the QPAP provides, as opposed to taking a ratcheting risk of unknown direction and unknowable magnitude.

The Board has determined that for Iowa a cap of $31 million dollars annually, based initially on a percentage of ARMIS revenue, is an appropriate starting point. As indicated in the previous discussion, invaluable information and knowledge about the working of the QPAP will be gained in the early months of the operation of the plan. Rather than changing the reference year, it would appear to be more appropriate to simply revisit the amount and appropriateness of a cap at the time of the six-month review, when the Board will have the information and experience from the actual operation of the plan to consider in making its determination on a going forward basis.

The Board directs Qwest to eliminate any language related to the automatic adjustment of the cap. Instead the Board will re-visit the appropriateness of a fixed dollar amount cap, as well as the specific amount of such a cap during the six-month review of the QPAP.

5. Likely Payments in Low Volume States (Report p. 22; Qwest reply brief p. 15; NMAS initial brief p. 25; Covad initial brief pp. 23-24)

NMAS noted that in comparison to the nine states average, New Mexico has little CLEC activity. Given the low level of CLEC activity in New Mexico, the QPAP liability amount has little significance. According to NMAS, for New Mexico, Qwest's representation that 36 percent of net revenues are at risk is hollow because low

CLEC volumes in New Mexico will prevent payments from ever approaching that amount, even if poor performance is widespread.

Qwest disagreed with the NMAS claims that a cap cannot possibly be reached in New Mexico because of alleged low CLEC volumes. Qwest argues the claim lacks any evidence or testimony to support it and appears to be pulled out of the air. Qwest suggests that low CLEC volume does not cause the QPAP to fall short of satisfying the public interest. Qwest points out that it cannot create volume; it can only respond to orders it receives.

Liberty determined that the NMAS argument, assuming its underlying factual basis is sound, does not bear directly on the sufficiency of the cap. If low CLEC order volumes comprise the reason that the cap would not be reached, then a higher hard cap or a procedural cap would likewise be unresponsive to such a concern. Those higher triggers would not be met either. In the circumstances postulated, the issues become whether the PAP will: (a) adequately compensate CLECs with low order volumes, and (b) induce Qwest not to provide substandard service in a state with low overall order volumes. The QPAP does contain a provision for minimum payments, which will be discussed later in this conditional statement.

Liberty concluded that such a provision for minimum payments is the direct way to address the NMAS concern that low order volumes might dilute the compensatory and incentive goals of the QPAP.

Although the Board agrees with Liberty that the NMAS that small states with little CLEC activity will suffer poor performance while still not reaching the cap is not

directly related to the sufficiency of the cap, and that a higher cap would do nothing under New Mexico's low CLEC order volume premise, this is not an issue that was brought in Iowa. The Board does agree that a change in the cap would not address the concerns of minimum payments where there are low CLEC order volumes.

6. Deductibility of Payments (Report p. 20; Qwest reply brief p. 4; WCOM initial brief p. 4)

WCOM argues that if the payments under the QPAP are tax-deductible, Qwest's exposure is borne by other taxpayers and not fully realized by Qwest. WCOM urges each state commission or board to properly characterize these payments as penalties and to determine if the payments are tax deductible as proper operating expenses of Qwest. Further, WCOM asks that a determination be made as to the sufficiency of the amounts under that scenario.

Qwest points out that the WCOM proposal that QPAP payments be defined as penalties is intended to heighten the financial impact of these payments on Qwest. Whether QPAP payments are tax deductible to Qwest is a matter properly determined by Internal Revenue Service (IRS) code, not state commissions. Furthermore, the flip side of the WCOM proposal would be a likely windfall to CLECs, *i.e.*, QPAP payments would not be taxable income to CLECs.

Liberty considered it safe to presume that the prior plans considered by the FCC were also conceived in the shadow of our ever-watchful federal government revenuers and saw no reason unique to Qwest that would justify a tax-netting factor here. Liberty expressed confidence that "what the thing is, as opposed to what those

interested in the result call it, is the more material fact bearing on the question of taxability."[6]

The Board agrees with Liberty that it is not necessary for there to be a declaration by the participants involved or for the Board to characterize the tax implications of these payments. This issue will be analyzed by and a determination made on the issue by the IRS.

The Board agrees with Liberty's position that the IRS more appropriately determines tax implications.

B. Magnitude of QPAP Payout Levels (Report pp. 22-25; Qwest initial brief pp. 7-9; AT&T initial brief pp. 22-23; Covad initial brief pp. 11-12)

Qwest presented an analysis of the payments that the QPAP would have produced for the months of February through May 2001, on the basis of the assumption that the QPAP had been in effect for at least six months prior to that February. Qwest considered these payment levels to be very substantial in light of the fact that Qwest measured its overall performance level under the applicable performance measures at 92 percent during this period. A principal premise underlying Qwest's belief in the utility of this analysis is that the prices that CLECs pay reflect a relevant measure of the value of the services that they receive for paying those prices. This premise takes the view that the price of goods or services in a free economy is a persuasive measure of their value.

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[6] Report, p. 20.

Qwest also presented analyses of the combined Tier 1 and Tier 2 payments it would have made for the 2001 months of February through May for unbundled loops and coordinated cuts. According to Qwest, the analysis showed that its QPAP payments for those measures would have exceeded the total revenue it would have received for the services measured by them.

Qwest additionally addressed the "significance" of payments for individual occurrences where it failed to meet the standards for which the QPAP requires payment. Qwest urged that the individual payments were significant in their own right, but suggested it is also necessary to recognize that the same order or activity could produce multiple payments. Thus, even if there were concerns that the payment set for an individual measure was insufficient to compensate a CLEC for damages, the provision of multiple payment opportunities for the same activity or closely related activities would mitigate any insufficiency.

AT&T once again argued the inadequacy of the payment structure, noting that Qwest would still have been paying substantial amounts even after escalation of payments for six months provides evidence of the inadequacy. AT&T also argued that the Qwest analysis of sample payouts for the February and March 2001 period was not truly indicative of payments that would have been made. Arguably, the calculations should have assumed that the QPAP began in February, which would have eliminated the accelerated payments and reduced the sample payouts by over 60 percent. AT&T asserts that the total payment amounts calculated by Qwest were paltry when compared with its third-quarter projected total revenue.

Covad argued that the baseline penalty amount neither compensates a CLEC for the financial ramifications of poor wholesale performance, including customer loss, nor for long-term harm to company reputation and business goodwill. Equally significant to Covad is the negative impact on its relationship with its end user customer when it tries to explain why the date for the delivery of its digital subscriber line (DSL) loop must be rescheduled.

Liberty dismissed AT&T's argument that the presentation used escalated payments beyond the six months called for in the QPAP, noting that the evidence showed that the Qwest analysis accounted for escalation, where appropriate, up to and including, but not in excess of six months.

Liberty pointed out that Qwest offered the payout information to show that its costs of noncompliance would be substantial under a fully operational and mature QPAP. Liberty concluded the calculations were useful, the intent and characteristics were overtly demonstrated, and the application of "memory" was appropriate to the use that Qwest intended.

Liberty concluded the payment presentation demonstrated that the magnitude of payout under the assumptions stated was considerable. Absent a showing to the contrary by the CLECs, the presentation spoke for itself under its outlined assumptions. The Board agrees that no evidence was presented by the CLECs to counter Qwest's presentation, and based on the evidence finds the payout levels to be adequate and appropriate at this time. However, because it is so speculative and the Board does not have the benefit of actual performance and payout information

under the QPAP as it is finally approved and operating, the Board will review this area during the six-month review, consistent with previous discussions on the appropriateness of revisiting any dollar amount cap.

C. Compensation for CLEC Damages

1. Relevance of Compensation as a QPAP Goal (Report pp. 26-28; AT&T post-report comments pp. 10-21; ZTEL initial brief pp. 27-33; Covad initial brief pp. 14, 16, 23)

ZTEL strongly disputed the characterizations that the payments provided for in the QPAP are fully compensatory. ZTEL claimed that there are several occasions in which provisions of the QPAP expressly limit payments without any reference to CLEC harm. ZTEL cited the following examples:

- The annual cap on payments (and its lack of specificity as to how CLECs would divvy up capped payments, as pointed out by Dr. Griffing and addressed in the Final Report) means that "compensation" paid to CLECs is directly limited by Qwest's net revenues – a figure entirely out of the control of the CLEC that bears no relationship to the damage incurred by the CLEC.

- Truncating interval disparities at 100 percent equates an average "miss" of two weeks to an average "miss" of two days.

- Failing to increase payments after six straight months of non-compliance fails to recognize that extended periods of non-compliance can severely whither CLEC business plans and deplete competitive entrant resources.

- The provisions of the plan that permit selective discrimination against a particular low-volume CLECs that can result in no (or very small) payments to that CLEC can nip the bud of entry and incur untold and uncompensated damage upon a new entrant.

AT&T listed a number of costs that are difficult to quantify and appears to argue that a compensation factor is needed for some of the harm. AT&T cites cost of unused AT&T personnel that would have performed the service, unused equipment cost, lost marketing costs for personnel, and literature that AT&T could not utilize due to lack of ability to perform services. Additionally, if a customer is affected, AT&T argues there are issues of goodwill, which could include a cancellation of services. If the damage to AT&T is significant enough, AT&T argues it could lose the customer for collateral services including cable, wireless (under an affiliated company with AT&T's brand name), inter/intraLATA toll, and high-speed cable Internet services. AT&T claims these damages cannot be quantified. AT&T's position is that it cannot predict the exact cost of certain damages until they occur.

Liberty reasoned that it is appropriate for the QPAP to address the question of compensating CLECs for contractual damages and it is appropriate that the QPAP liquidate such damages, given the difficulty in measuring them precisely and given that the QPAP payments approximate such damages. A central feature of this PAP, like others before it, is its ability to replace costly and protracted litigation and its uncertain results with a system that is more appropriate to creating and maintaining an efficient and balanced commercial relationship.

In addition to the goal of influencing Qwest's behavior, another purpose of the QPAP is to compensate the CLECs for contractual damages. Liquidated damages compensation relates to actions where the harm is difficult to calculate and cause difficult to assign. Unlike a liquidating commercial contract, the QPAP provides for

payments to participants other than the CLECs, in certain situations. AT&T and the CLECs argue this makes the QPAP analogous to a liquidated damages contract, but not a liquidating commercial contract. Further consideration of the QPAP as a liquidated damages contract is discussed later in this conditional statement in the context of precluding other remedies and the offsetting of other rewards.

The Board agrees with Liberty's conclusion that a relevant goal of the QPAP is to compensate the CLECs for contractual damages. However, the Board reserves the right to revisit the adequacy of the compensation at the six-month review when additional information and evidence will be available to make such a determination.

2. Evidence of Harm to CLECs (Report pp. 28-30; Qwest reply brief p. 10; AT&T initial brief p. 23; WCOM initial brief pp. 5-6)

WCOM argued that Qwest based its penalty amounts on its estimate of a CLECs loss of profit and the cost of the relevant services the CLEC requested Qwest to provide while it noted that Qwest's lost profit figure was based upon the annual loss of profit for a single analog business line (1FB) without the inclusion of any lost profits that might be derived from that single business line if that service was bundled with other services or where the CLEC customer had more than one 1FB.

AT&T contends it is impossible to quantify its intangible losses, asserting its rationale that the QPAP should not be the exclusive remedy for CLECs. According to AT&T, Qwest witness Inouye's conclusions on "price-outs" did not take into account any costs or any intangible losses that a CLEC might incur related to the goodwill of its end-user customers, for example. AT&T notes that witness Inouye admitted there

was a lot of analysis that he was unable to do because he did not have access to the data necessary to his analysis. AT&T also raised concern that Qwest's evidence of the robust nature of price-outs was based on the fact that that one "miss" would invoke up to ten performance indicator definition (PID) measures. AT&T witness Finnegan indicated that the mathematical chance of that occurring is extremely low, approximately one in 96 billion.

AT&T argued that because the nature of CLEC damages are far more than the price that CLECs pay Qwest for wholesale services, Qwest’s price-outs contemplate a substantial amount of memory (escalating payments), and because of structural issues (exclusions, caps), there are numerous barriers to CLEC recovery, Qwest's price-out conclusions should carry little weight.

Qwest responded that there is no justification for payment to a CLEC unless those payments are compensation. Whether payments to CLECs are sufficiently compensatory is a matter that price-outs naturally bear upon. Only Qwest provided explanatory evidence of hypothetical price-outs. Every CLEC participating in this proceeding had access to data to price out their own performance results or the performance results of other consenting CLECs.

Covad claims that Tier 1 payments do not provide full compensation. Covad’s only support is a recitation of alleged costs incurred by Covad and damage to Covad’s reputation. At no time has Covad brought forth a simple accounting of its costs, real or intangible, and compared them to estimated payments under the

QPAP. Without doing so, Covad has absolutely no way of demonstrating whether its economic costs are greater or less than QPAP payments.

Covad and ELI/Time Warner/XO claim some missed orders receive no compensation under the QPAP. This argument is spurious. It apparently refers to the fact that the QPAP does not calculate payments on misses that fall within the benchmark standard. In other words, if the benchmark is 90 percent and the CLEC receives 90 percent performance, payments are not calculated on the 10 percent difference between 100 percent and 90 percent, because at 90 percent, Qwest is deemed to have met the proxy for parity. Covad and ELI/Time Warner/XO argue that compensation should be made for the 10 percent that exceeds the parity threshold; in other words, compensation for service that would exceed that which Qwest provides to itself. This argument ignores that the purpose of the QPAP is to ensure against differences between the levels of service Qwest provides to CLECs versus the levels of service it provides itself. This concept has also been referred to as the "100 percent factor" or the "one free miss."

CLECs and the NMAS claim Tier 2 payments are not high enough to provide incentive to Qwest to meet performance standards. None of these participants, however, provided any reasoned demonstration that the overall level of payments -- the combination of Tier 1 and Tier 2 -- is an insufficient financial incentive. A claim that payment levels are insufficient incentive requires identification of the level that **is** sufficient, as well as evidence that would support that level before the Board can consider some other level.

Liberty found Qwest's analysis to be largely based not on its own knowledge, but upon what another participant had said about CLEC profits and gave it only marginal weight in its analysis. In its complete absence, Liberty would have concluded that the suitability of the QPAP payment levels as an approximation of CLEC damages was sufficient. Thus, Liberty noted the CLEC criticisms would have made little difference in its analysis even had the argument been better developed. Liberty noted that its conclusion might have been different had CLECs chosen to present their own quantification of lost profit and other harm for comparison to the QPAP payments, indicating the record clearly would have benefited from CLEC presentations of a structured and comprehensive attempt to measure their harm. Uniformly, however, the CLECs chose not to do so. Liberty also noted that any CLEC who determined the QPAP payments to be insufficient, retained the opportunity to choose not to elect them.

The Board agrees with Liberty that determination of the suitability of QPAP payment levels, as an approximation of CLEC damages, would have benefited by a presentation by the CLECs of actual harm. The Board will endorse Liberty's conclusion that the QPAP payments appear to represent a reasonable approximation of the harm that CLECs suffer, absent evidence to the contrary.

3. Preclusion of Other CLEC Remedies (Report pp. 30-32; Qwest initial brief pp. 66, 69; AT&T reply brief p. 9)

According to AT&T, it should not have to waive any other contractual remedy to provide Qwest with the incentive to perform under the QPAP, and suggested

CLECs should be allowed to seek a contractual remedy that flows from an alleged failure to perform in an area specifically measured and regulated by the PAP once it underwent dispute resolution. Additionally the CLEC must establish to the mediator/arbiter that the CLEC can prove 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 the actual penalties collected for deficient performance in the relevant area do not redress the extent of the competitive harm. This is an equitable solution, as it would allow CLEC recovery while protecting against frivolous and/or excessive lawsuits.

Like traditional liquidated damages provisions, the QPAP establishes in advance payments that constitute appropriate compensation for damages due to Qwest's nonconformance. Qwest argues that this payment structure satisfies the FCC's express requirement that a performance assurance plan contain, a self-executing mechanism that does not leave the door open unreasonably to litigation and appeal. CLECs that opt into the QPAP therefore will receive payments from Qwest for nonconformance with the QPAP metrics without ever having to claim, prove, or incur any harm.

As with many contractual promises for liquidated damages, this remedy is designed to be the only remedy under rules, orders, or other contracts, including interconnection agreements, arising from the same or analogous wholesale performance. This is nothing more than the logical implication that courts have traditionally recognized of any liquidated damages provision. The intent of fixing an

indisputable amount for damages would be completely frustrated if the CLEC were entitled simply to use the liquidated damages provision as a floor in litigation seeking a more favorable amount.

Qwest's reply brief reflected a general commitment not to preclude non-contractual actions. Qwest cited the last sentence of QPAP Section 13.5, which provides that the application of the assessments and damages provided for is not intended to foreclose other non-contractual legal and non-contractual regulatory claims and remedies that may be available to a CLEC.

Liberty determined that when considered alone, this section provides protection that is comparable to that set forth in the Texas plan and in the Colorado Special Master's Report. However, Section 13.6 contains language that could be construed as contradictory:

> 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. In no event is CLEC entitled to remedies under both the PAP and under rules, orders, or other contracts, including interconnection agreements, arising from the same or analogous wholesale performance. Where alternative remedies for Qwest's wholesale performance are available under rules, orders, or other contracts, including interconnection agreements, CLEC will be limited to either the PAP remedies or the remedies available under rules, orders, or other contracts and CLEC's choice of remedies shall be specified in its interconnection agreement.

Ultimately the CLECs should have the ability to recover for those additional forms of remedies, whatever the action brought to secure them. At the same time, Liberty found a need to make sure that from any such recovery there is deducted the

contract damages amount, for which the QPAP provides. Liberty recommended language should be added to accomplish the following:

- Prohibits all causes of action based on contractual theories of liability.
- Prohibits the recovery of amounts related to the harm compensable under contractual theories of liability under non-contractual causes of action that also permit the recovery of damages recoverable under contractual theories of liability.
- Allow for the recovery under noncontractual theories of liability those portions of damages allowed by the applicable theory that are not recoverable under contractual theories of liability.

To make the QPAP conform to these principles, Liberty recommended that all the quoted portions of Section 13.6, following the phrase "in its interconnection agreement with Qwest" be stricken and replaced with a simple provision requiring a CLEC to elect either: (a) the remedies otherwise available at law, or (b) those available under the QPAP and other remedies as limited by the QPAP.

Qwest filed the following changes to Section 13.6 to comply with Liberty's recommendations:

> 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 remedies under the PAP, CLEC waives any causes of action based on a contractual theory of liability, and any right 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). When CLEC elects the PAP, the PAP shall

> replace any other service standards and/or accompanying liquidated damages contained in the contract for the same underlying activity or omission.

This language comports with the overall intent to make the QPAP an efficient way to quickly resolve issues that are contractual in nature between the participants. Dispute Resolution is available to the participants on issues that are contested pursuant to section 18.0 of the QPAP or section 5.18 of the statement of generally available terms (SGAT).

The Board should adopt the recommendation of Liberty and accept the language proposed by Qwest shown above.

4. Indemnity for CLEC Payments Under State Service Quality Standards (Report p. 33; AT&T initial brief p. 18; ELI/Time Warner/XO initial brief p. 11)

AT&T indicated in its comments, there is no provision requiring Qwest to remunerate CLECs for fines and penalties imposed by a governmental agency when the CLEC because of Qwest's wholesale service quality failure fails to comply with state or federal service quality rules.

According to ELI/Time Warner/XO, Qwest claims that the QPAP precludes any such indemnity because the QPAP provides the exclusive remedies "arising from the same or analogous wholesale performance." Qwest, however, produced no evidence to demonstrate that the payment levels in the QPAP account for any CLEC obligations to pay retail service quality penalties or credits to their end user customers. To the contrary, such penalties or credits easily could exceed the QPAP payment levels, particularly for credits based on retail charges for multiple services

and/or customers provisioned over a high capacity circuit or via collocation. This issue provides yet another illustration of the unreasonableness of Qwest's proposal to make the QPAP the exclusive remedy for any and all violations of its legal obligations.

Further, ELI/Time Warner/XO claim that Qwest contends that indemnification under these circumstances "would be administratively unworkable and likely lead to litigation, in contravention of one of the FCC's principal goals – certainty in application." The Joint CLECs agree that indemnification may not be self-executing and that disputes may arise, which is why this form of indemnification, like other forms of indemnification, should be governed by a separate provision of the SGAT or interconnection agreement. The issue should only arise in the context of the Commission's evaluation of the QPAP to the extent necessary to ensure that the QPAP does not preclude such indemnification.

Liberty noted that the merits of requiring such indemnification were fully addressed in prior workshops. AT&T's reasons for supporting such indemnification here are not materially different from those it advanced in earlier workshops. There is sufficient justification for precluding such indemnity in the QPAP, as it was precluded elsewhere in the SGAT.

The Board concurs in Liberty's conclusion that the issue of indemnification was already covered in Section 5.9 Indemnity of the SGAT.

5. Offset Provision (Section 13.7) (Report pp. 34-36; Qwest initial brief pp. 68-69; AT&T initial brief pp. 4-5; Covad initial brief p. 29;

WCOM initial brief p. 18; ELI/Time Warner/XO initial brief pp. 23-24; ELI/Time Warner/XO reply brief p. 11)

QPAP Section 13.7 states:

> If for any reason Qwest is obligated by any court or regulatory authority of competent jurisdiction to pay to any CLEC that agrees to this QPAP compensatory damages based on the same or analogous wholesale performance covered by this PAP, Qwest may reduce such award by the amount of any payments made or due to such CLEC under this PAP, or may reduce the amount of any payments made or due to such CLEC under this PAP by the amount of any such award, such that Qwest's total liability shall be limited to the greater of the amount of such award or the amount of any payments made or due to such CLEC under this QPAP. By adopting this QPAP, CLEC consents to such offset.

AT&T has argued that Qwest's apparent intent is to allow offsets against compensatory awards for the same activity for which payments were made or are owed under the QPAP, without consultation with the CLECs or any relevant commission. Throughout the history of the common law, the finder of fact in a judicial setting determines and contemplates what is to be offset, not the non-performing participant in a contract dispute. AT&T suggests that this is a clear example of Qwest deviating from the Texas Plan in an attempt to protect itself from paying possible appropriate remedies.

According to Qwest, any non-contractual remedies would be subject to the offset provision of the QPAP. Thus, if a CLEC were to obtain both a QPAP award and an alternative non-QPAP award for the "same or analogous wholesale performance," section 13.7 would entitle Qwest to offset the awards in either of two ways, but not both. First, Qwest may reduce such an award by liquidated amounts

already paid or due under the QPAP. Second, Qwest may reduce liquidated payments made or due under the QPAP by the amount of the compensatory portion of any such award. This second alternative is included because Qwest recognizes that a court or other body making an award may not permit that award to be offset by the amount of prior payments under the QPAP. The intent of these two offset options is to limit Qwest's total liability to the greater of the amount of the non-QPAP award or the amount of liquidated payments made or due under the PAP. Such offset provisions are well established under the law of damages. As with the election of liquidated damages under the QPAP, the offset ensures that a CLEC does not receive multiple recovery windfalls for the same underlying conduct.

Although WCOM agrees that CLECs should not be entitled to double recovery for the same conduct by Qwest, it argues that Qwest's plan proposes no recovery for analogous activity, which is too broad and will result in many disputes over what constitutes "analogous" activity. WCOM suggests that the reference to analogous activity should be deleted because it is ambiguous, undefined, and will inhibit the self-executing nature of the QPAP.

ELI/Time Warner/XO argues that if Qwest is entitled to an offset, the Commission, FCC, court, or arbitrator making the award should make that determination, not Qwest. Any offset, moreover, would be appropriate only if the QPAP payments have compensated the CLEC for the same, not "analogous" performance – again, a question of fact for the Commission, FCC, court, or arbitrator. ELI/Time Warner/XO urge that this section be removed from the QPAP or

substantially revised to provide that Qwest may request that any award of compensation for the same wholesale service covered by the QPAP be subject to an offset by QPAP payments, but that any such offset must be ordered by the entity making the award to be offset.

Liberty indicated that nothing in Qwest's proposed language gives it the right to make a nonreviewable decision about whether an offset is allowable. The issue is more accurately described as one of determining where any dispute about offsets will be resolved. Liberty concluded that the QPAP dispute resolution provisions should give adequate opportunity to challenge a decision by Qwest to reduce its QPAP payments under the offset language, while adequate interest provisions would address any time-value-of-money issues associated with delays in payments while disputes get resolved.

Liberty found that Qwest’s proposed language was confusing, both in its use of the terms "analogous" and "performance." Double recovery is only an issue where the conduct that gives rise to it is the same; the use of the term "analogous" introduces vagueness and uncertainty. For example, an activity can be entirely distinct, but, for some purposes, analogous.

If the activity is distinct, it may well produce separate harm or damage, some of which should not be precluded.[7] There should be consistency between the language allowing other damages and the language addressing offsets. Liberty recommended that changing the phrase "same or analogous wholesale performance" to "same

underlying activity or omission for which Tier 1 assessments are made under this QPAP" would solve the problem.

Liberty also noted one other technical problem with the Qwest language that should be addressed. The same performance might produce liability for: (a) CLEC business loss and incentives for Qwest to perform, and (b) physical damage to property or personal injury. The QPAP has nothing to do with compensation for physical property damage or personal injury, but other SGAT provisions recommended in an earlier report from these workshops do. In order to preserve the effect of those sections, QPAP Section 13.7 should contain a provision stating:

> Nothing in this QPAP shall be read as permitting an offset related to Qwest payments related to CLEC or third-party physical damage to property or personal injury.

The Board agrees with Liberty's recommendation related to the offset issue. Section 13.7 should be modified to include the language shown above.

The Board endorses Liberty's recommendation and adopts the language of section 13.7 as filed by Qwest on November 6, 2001, which included this addition.

6. Exclusions (Section 13.3)

- Excluding Qwest Payment Responsibilities in the Case of CLEC Bad Faith (Report pp. 38-39; Qwest initial brief p. 75; AT&T initial brief p. 6; Covad initial brief pp. 30-33; ELI/Time Warner/XO initial brief pp. 13, 22)

AT&T wants to strike the exclusion for bad-faith CLEC acts or omissions on the grounds that it was ambiguous. Pursuant to QPAP Section 13.3, Qwest will not

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[7] *See* I.C.3. Preclusion of Other CLEC Remedies.

afford remedies to the CLEC "for an act or omission by a CLEC that is contrary to any of its obligations under its interconnection agreement with Qwest, or under the Act or state law." The section continues that Qwest would exclude CLEC payments if acts or omissions by CLECs were in "bad faith" which includes actions such as "failure to provide timely forecasts." Qwest could also withhold payment for "problems associated with third party systems or equipment, which could not have been avoided by Qwest in the exercise of reasonable diligence…" Qwest witness Inouye indicated that he could not think of a situation that did not involve a third-party vendor. However, when presenting this section, Qwest witness Inouye implied that the CLECs should not worry about any of these exceptions because SWBT has invoked the exclusion in Texas only once.

According to ELI/Time Warner/XO, all agreements are subject to the duty of both participants to operate in good faith and an express condition on Qwest's payment obligations that the CLEC operate in good faith is unnecessary. This provision is particularly problematic in its use of terms like "dumping" as an indication of CLEC bad faith, which are undefined and not subject to objective determination.

Qwest argued that this provision is necessary to shield Qwest from actions that have the foreseeable effect of causing Qwest to miss a performance standard. Qwest argued that Section 13.3(2) of the QPAP properly shields Qwest from Tier 1 and Tier 2 payments when the nonconformance results from a situation that is beyond its control: an act or omission by a CLEC that is contrary to its obligations or an act of bad faith. For example, Qwest would not be required to make payments if a

CLEC were to "dump" orders or applications at or near the end of a business day or in "unreasonably large batches." These terms would be interpreted on a case-by-case basis, in light of the factual circumstances. As a general matter, however, they are intended to refer to situations in which a CLEC submits orders or applications in large quantities that has the foreseeable effect of causing Qwest to miss a performance standard or where CLEC had the ability to submit the orders over multiple days or through project management.

Similarly, Section 13.3(2) provides that if a CLEC "fail[s] to provide timely forecasts to Qwest," Qwest will be excused from its Tier 1 and Tier 2 payments if the forecasts "are required to reasonably provide services or facilities." Qwest does not contend, however, that any failure to provide timely forecasts would be deemed an act of bad faith — just those that are so required.

Liberty noted that now that Qwest has described its intent in designing the QPAP section in question, we are forewarned about how Qwest may intend to apply it. Liberty suggested that we should be wary of the fact that our failure to respond to such a foreseeable application could be construed as an acceptance of a particular construction of the words that the provision uses.

Liberty recommended that the proposed language of ELI/Time Warner/XO be adopted as follows:

> Notwithstanding any other provision of this QPAP, it shall not excuse performance that Qwest could reasonably have been expected to deliver assuming that it had designed, implemented, staffed, provisioned, and otherwise provided for resources reasonably required to meet foreseeable

> volumes and patterns of demands upon its resources by CLECs.

Liberty concluded that the insertion of this provision as a new subsection following QPAP Section 13.3 is appropriate to assure that there is not a material dilution of the operation of the QPAP as a meaningful and significant incentive to Qwest.

The Board agrees with Liberty's assessment of the Section 13 limitations. Concepts such as good faith between participants to a contract, though presumed are not hurt by a listing in a contract of actions what would constitute a bad faith action. If listing of bad faith actions for CLECs is appropriate, then the Board also agrees with Liberty that including the language that notes a reasonable expectation of Qwest abilities to handle "foreseeable volumes and patterns of demands." Qwest has included the language in the current QPAP.

The Board endorses the recommended inclusion of the language proposed by ELI/Time Warner/XO.

- <u>Differing SGAT and QPAP Force Majeure Provisions</u> (Report pp. 36-39; AT&T initial brief p. 6; WCOM initial brief p. 16; ELI/Time Warner/XO reply brief p. 14)

ELI/Time Warner/XO argues that Qwest fails to justify the language, if not the substance, of the exclusions in QPAP Section 13.3. Qwest claims that the force majeure clause "comports with similar, standard clauses in commercial agreements" and is included as a stand-alone definition "because the QPAP was intended to be self-contained and not to require extensive cross-reference to other provisions of the

SGAT." If the clause is "standard," however, there is no need to include two force majeure clauses in the same interconnection agreement. The QPAP force majeure clause, moreover, materially differs from the force majeure clause in SGAT Section 5.7. The SGAT force majeure clause includes "equipment failure" as a force majeure event and provides that delays caused by third parties will always be considered force majeure events – Qwest agreed to change both of these provisions in SGAT Section 5.7 during the general terms and conditions workshops. Qwest provided no explanation, much less justification, for departing from that agreement when drafting the QPAP or for incorporating two materially different force majeure clauses in the same agreement.

WCOM suggests that under Section 13.3, Qwest has not used the force majeure language already found in Section 5.7.1 and agreed to in the SGAT. Additionally, Qwest has provided no reasons for having different force majeure language. Therefore, WCOM requests Section 13.3 be modified to cross-reference Section 5.7.1.

AT&T sought to strike the equipment failure exclusion from Section 13.3 as ambiguous, broad, and duplicative of the Section 5.7 force majeure provisions.

Liberty indicated that Qwest has not made a convincing argument that the QPAP requires its own separate and different force majeure provision. The issue is not at all about whether cross-referencing to other QPAP sections will be "extensive." It will not; what would suffice is a simple replacement of clause (1) of QPAP Section 13.3 with the following phrase: "a Force Majeure event as defined in Section 5.7 of

the SGAT." More than this has been commonly done in the SGAT on other subjects, in order to provide proper cross-referencing.

Qwest has made the changes in the QPAP to refer to the Force Majeure definition in section 5.7 of the SGAT as recommended by Liberty, rather than the definition language in the QPAP. The Force Majeure definition deleted from Section 13.3 of the QPAP is substantially the same language referenced in the SGAT Section 5.7. The Board agrees with Liberty and the CLECs on the need for one location for the Force Majeure definition.

The Board will adopt the recommendation of Liberty to exclude a separate definition of Force Majeure in the QPAP.

- <u>Timing of Force Majeure Event Notices</u> (Report pp. 36-39; Qwest post-report comments pp. 7-8; WCOM initial brief p. 16)

WCOM suggests that Qwest should provide notice to CLECs when a force majeure occurs and Qwest intends to exercise this exclusion to performance. Apparently, Qwest intends to provide some notice after the fact in its bill credit statement; however, such a notice is too late and does not give a CLEC a timely opportunity to challenge Qwest's use of the force majeure exclusion.

Liberty agrees that Qwest should be required by the QPAP to provide notice of its claims of the occurrence of force majeure events within 72 hours of learning of them or after it reasonably should have learned of them. It would not be appropriate to allow Qwest to search back in time for excuses after it discovers that it will not

meet standards, nor is it appropriate to require CLECs to research facts surrounding events that have become stale.

Qwest has included Liberty's recommended provision that Qwest provide notice of the force majeure events within 72 hours of the time that they occurred or that Qwest could have reasonably expected to learn of them. Qwest has added that provision in Section 13.3 of the QPAP.

The Board supports the inclusion of the force majeure notification into section 13.3 of the QPAP. The appropriateness of a force majeure exceptions claim will in all likelihood be challenged at some point, and the closer the notification is to the event triggering the claim the better a determination can be made on a challenge. The following language was added to section 13.3:

> 1) with respect to performance measurements with a benchmark standard, a Force Majeure event as defined in section 5.7 of the SGAT. Qwest will provide notice of the occurrence of a Force Majeure event within 72 hours of the time Qwest learns of the event or within a reasonable time frame that Qwest should have learned of it

The Board endorses the recommendation of Liberty and adopts the language added to section 13.3 as shown above.

- <u>Impact of Force Majeure Events on Interval Measures</u> (Report pp. 36-39; AT&T initial brief p. 7; WCOM initial brief pp. 16-18; Qwest post-report comments p. 8)

As the QPAP substantially deviates from a strict dispute resolution provision where only the relevant Commission would determine the appropriateness of Qwest claiming an exclusion, AT&T argues that it is especially important that there be

language establishing a nexus between the actions when Qwest would be excused from its performance and the actual Qwest performance. Qwest witness Inouye agreed that there should be a relationship between the excluding event and Qwest's performance. The issue is that there is no language actually requiring that nexus. In its comments, AT&T offered language that provided that nexus.

The Board notes that Section 13.3 has already been altered to refer back to section 5.7 for a definition of Force Majeure events. AT&T's additional proposed language is as follows:

> If a Force Majeure event or other excusing event recognized in this section only suspends Qwest's ability to timely perform an activity subject to Performance Measurement, the applicable time frame in which 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.

WCOM asserts that a force majeure event should only apply to benchmark measures, rather than parity measures, because a force majeure event should affect Qwest and CLEC results in the same manner. Any such force majeure action should not allow Qwest to provide its retail customers with better than parity service compared to wholesale customers and then be excused from making payments. To the extent Qwest believes that the force majeure event will not affect Qwest and CLECs in the same manner, it can seek a waiver under WCOM's proposed language shown below.

WCOM contends that Qwest has the burden of proving a force majeure event. Although Qwest does include language that indicates Qwest will have the burden to

demonstrate the reason for any exclusion, it is too general and limited. More detailed and appropriate language as proposed in the Colorado final report would be more acceptable to WCOM. The following language is proposed:

> If Qwest desires a waiver of its obligation to pay any penalties it must file an application with the Commission. Any waiver request must, by a preponderance of the evidence, establish the circumstances that justify the waiver, stating any and all relevant documentation to support the request. CLECs and other interested participants would have a full opportunity to respond to any such waiver request prior to the Commission ruling. Qwest shall be required to pay any disputed amounts or place the disputed amount of money into an interest-bearing escrow account until the matter is resolved. In addition, any such waiver should only apply to a narrow period of time when the activity occurred, not months after the activity has ended.

Liberty pointed out the likelihood that in many instances Qwest could still perform up to standard, or at least closer to it, if it were to undertake extraordinary efforts that do not consider economy of resources. The burden on Qwest should be to undertake reasonable efforts to mitigate, not to accomplish the extraordinary, whatever the cost. Liberty construed the existing language to already provide for this. In addition, establishing a fixed duration on any force majeure event is: (a) not consistent with the nature of such events, (b) as likely to be over-protective as under-protective, and (c) is otherwise unnecessary, because the burden on Qwest is not only to show the existence of an event, but to show its nexus to performance failure and to demonstrate the time period during which the event and this nexus existed.

Liberty did find merit in the AT&T proposed language specifying the method for calculating the impact of a force majeure event on interval measures and

recommended that it be added to clarify the method for calculating QPAP payments when a force majeure event should have less than a completely excusing impact. Qwest has added the AT&T recommended language verbatim at the end of Section 13.3 of the QPAP.

The Board supports the inclusion of the language proposed by AT&T for the purpose of calculating the impact of a force majeure event on interval measurements. The Board agrees with Liberty and AT&T that it is important that there be language establishing a nexus between the actions when Qwest would be excused from its performance and the actual Qwest performance. The specific language added to the end of Section 13.3 in Qwest's November 6, 2001, filing is as follows:

> If a Force Majeure event or other excusing event recognized in this section merely suspends Qwest 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 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.

The language inserted by Qwest is similar to the proposed AT&T language. The language proposed by Qwest only addresses interval measurements. This substitute language addresses directly the concerns noted by Liberty, without being overly broad.

The Board endorses Liberty's recommendation and adopts the language proposed by Qwest in its November 6, 2001, filing, for Section 13.3 of the QPAP.

- Applying Force Majeure Provisions to Parity Measures (Report pp. 38-40; AT&T initial brief p. 7; WCOM initial brief p. 16; Qwest post-report comments p. 8)

AT&T argues there is no reason Qwest should be able to claim a force majeure exception when the relevant standard is parity. If Qwest can perform the function for itself, it can perform it for the CLECs. The AT&T language proposed above also addresses this issue. (These are the same language changes offered by AT&T in the preceding issue Impact of Force Majeure Events on Interval Measures.)

WCOM maintains that any such force majeure action should not allow Qwest to provide its retail customers with better than parity service compared to wholesale customers and then be excused from making payments. To the extent Qwest believes that the force majeure event will not affect Qwest and CLECs in the same manner, it can seek a waiver under WCOM's proposed language. Qwest has the burden of proving any force majeure event.

Liberty agrees that Qwest is undoubtedly correct in observing that a force majeure event could have differential effects on the services it provides for its own end users and the services that it provides for CLECs, but suggests that nevertheless it requires that the question be asked why it should be presumed that the differential effect must always work in one direction. The differential effect would, on a basis relative to CLEC performance, sometimes lessen the quality of Qwest's service for itself and sometimes increase it.

With that in mind, Liberty suggests that it would be correct to observe that Qwest's provision only allows itself the benefit of choosing when to apply the QPAP's

force majeure provisions. While the reasonableness of declaring the necessary conditions to exist will be reviewable, nothing would allow a decision not to declare to be reviewed. That difference is sufferable as a general rule. However, it simply would deny basic fairness to permit Qwest both to: (a) avoid parity-measure payments when it decided that the impairment to service for its own end users was lesser, while (b) meeting parity standards that it might otherwise have failed when the impact on its own end users was greater. Liberty recommended that Qwest not be permitted to apply a force majeure exception to parity measurements. Qwest has incorporated the recommended changes into section 13.3 of the QPAP

The Board agrees that it would be unfair for Qwest to both (a) avoid parity-measure payments when it decided that the impairment to service for its own end users was lesser, while (b) meeting parity standards that it might otherwise have failed when the impact on its own end users was greater.

The Board endorses Liberty's recommendation and adopts the language Qwest has incorporated into Section 13.3 of the QPAP, which prohibits Qwest from applying a force majeure exception to parity measurements.

- <u>CLEC Failures to Forecast as a Qwest Performance Excuse</u> (Report pp. 38-41; WCOM initial brief p. 18; Covad initial brief p. 55; Qwest post-report comments p. 8)

WCOM questions Qwest's proposed exclusion in the event CLECs fail to provide required forecasts. In his oral testimony, Qwest witness Inouye admitted he did not know where the forecasting requirements were found. He agreed that CLECs should be provided the requirements, but disagreed that those requirements should

be detailed in the QPAP. WCOM suggests that this exclusion must be further defined. For example, the only mandatory forecasting requirements now found in the SGAT relate to LIS trunks and collocation. Therefore, to the extent this exclusion is retained it should be clarified to reflect that the forecasting requirements are those found in the SGAT or in an interconnection agreement.

Covad also urges that Section 13.3 be revised to make clear that any forecasts required for purposes of Section 13 of the QPAP are those forecasts required under the SGAT.

Particularly troublesome to Liberty is the provision about forecasts under state rules. Liberty notes that those rules could change over time and could involve forecasts that address interests much broader than those considered to warrant forecasts under the SGAT. There could also be arguments about whether information required in the future would constitute a "forecast" as the term is contemplated by the SGAT and the QPAP. Liberty opines it would be much better to limit the exclusion to the failure to provide properly those forecasts that are "explicitly required by the SGAT" of which the QPAP will form a part.

This change will deal as well with Liberty's other material concern about Qwest's proposed language. By definition the SGAT cannot be read to require any forecast whose provision would be "unreasonable." Therefore, Qwest's use can only be logically read as implying that the SGAT can be read as reasonably requiring additional forecasts in this particular context. It would create far too much ambiguity to include a provision that may be interpreted as authorizing the compulsion of

additional, yet unspecified forecasts under the terms of the SGAT. Identifying the specific forecasts that were to be required formed much of the debate in prior workshops. Liberty found it unacceptable to introduce a troublingly undefined and shadowy provision that might do indirectly what was intentionally prohibited.

Qwest has modified Section 13.3 of the QPAP in accordance with Liberty's recommendation.

The Board agrees with Liberty and the CLECs concern about the need to clarify the forecasts. The language change deleted the language, "such forecasts are required to reasonably provide service or facilitates," and added new language, "such forecasts are explicitly required by the SGAT," in its place.

The Board endorses Liberty's recommendation and adopts the language of modified Section 13.3 of the QPAP as filed by Qwest in its November 6, 2001, compliance filing.

7. SGAT Limitation of Liability to Total Amounts Charged to CLECs (Report p. 41; ELI/Time Warner/XO initial brief p. 25; Qwest post-report comments p. 17)

ELI/Time Warner/XO argues that the SGAT limits each participants's liability, other than for willful misconduct, "to the total amounts charged to CLEC under this Agreement during the contract year in which the cause accrues or arises," although this limitation "shall not limit the amount due and owing under any Performance Assurance Plan."[8] As currently drafted, however, QPAP payments would be

[8] *See* SGAT § 5.8.1.

included in the amounts subject to the limitation of liability, threatening to insulate Qwest from liability for any other violation of the interconnection agreement.

According to ELI/Time Warner/XO, Qwest's own evidence demonstrates that QPAP payments could exceed the total amounts a CLEC (particularly a small CLEC) pays to Qwest under its interconnection agreement. Under those circumstances, the QPAP payments would maximize Qwest's liability under Section 5.8 of the SGAT, including any obligation to pay compensation for Qwest's negligence, non-willful misconduct, or any other violation of the interconnection agreement. QPAP payments thus would be the only compensation the CLEC would receive from Qwest, even though the QPAP provides payments only for missing specified PID measures, and Qwest presented no evidence to demonstrate that such payments include compensation for any other breach of Qwest's obligations to CLECs.

Liberty concluded that the payments addressed by SGAT Section 5.8.1 and by the QPAP are mutually exclusive. Qwest's liability for property damage and personal injury should not be limited by QPAP payments, just as QPAP payments should not be limited by payments for property damage and personal injury. Therefore, SGAT Section 5.8.1 should include a provision stating that:

> payments pursuant to the QPAP should not be counted against the limit provided for in this SGAT section.

Qwest agreed to add the language proposed by Liberty to section 5.8.1 of the SGAT Limitation of Liability.

The Board agrees with Liberty's conclusion that the payments addressed by SGAT Section 5.8.1 "Limitation of Liability" and by the QPAP are mutually exclusive. The pertinent part of Section 5.8.1 incorporating the new language is as follows:

> Each participants's liability to the other Participant for any other losses shall be limited to the total amounts charged to CLEC under this Agreement during the contract year in which the cause accures or arises. Payments pursuant to the QPAP should not be counted against the limit provided for in this SGAT Section. (New language underlined)

The Board endorses Liberty's recommendation that additional language is necessary to remove any ambiguity concerning the payments and adopts the language as shown above.

D. Incentive to Perform

1. Tier 2 Payment Use

- Tier 2 Payment Use (Report p. 41; AT&T initial brief p. 10; Covad post-report comments p. 19)

According to AT&T, QPAP Section 7.5 indicates, "payments to a state fund should be used for any purpose that relates to the Qwest service territory that may be determined by the State Commission." There is no such provision in the Texas Plan. Qwest witness Inouye indicated the reason that the restriction was there is so only customers in the areas where Qwest performed services will reap the benefit of the monies.

AT&T argues that Qwest should not be allowed to determine where Tier 2 penalties should be applied by suggesting that expenditures should only be made in its service area, therefore possibly bolstering Qwest service quality. Accordingly,

Qwest should be required to strike this language, which is contrary to the FCC requirement that any plan "provide a meaningful and significant incentive to comply with the designated performance standards."

Covad suggests that a state commission permissibly may use Tier 2 funds for any purpose it believes is necessary and appropriate. That position, however, is subject to one caveat; any use to which the Tier 2 funds are put should not benefit Qwest either directly or indirectly. It would be incongruous, at best, to compel payment from Qwest and then to apply it to a purpose from which Qwest would benefit either directly or indirectly. Indeed, permitting Qwest to benefit from Tier 2 funds could create a perverse incentive on the part of Qwest in providing wholesale services to CLECs.

Liberty reasoned that the proper construction of the Qwest language is that the restriction applies only to payment amounts to be administered by a state commission. Should a state commission administer those funds, the restriction is generally appropriate given the statutory role that state commissions typically have. However, even in that case, it should not be presumed that state commission powers are so limited. There should also be no restriction on payments made to the general fund. Therefore, Liberty recommends QPAP Section 7.5 be replaced with the following:

> Payment of Tier 2 Funds:
>
> Payments to a state fund shall be used for any purpose determined by the commission that is allowed to it by state law. If the Commission is not permitted by state law to

> receive or administer Tier 2 payments to the state, the payments shall be made to the general fund or to such other source as may be provided for under state law.

Qwest points out that the language recommended by Liberty broadens both the sources for depositing Tier 2 funds and the use of Tier 2 funds. Qwest does not object to the suggested language and has incorporated it into Section 7.5 of the QPAP as filed on November 6, 2001.

The Board, although in general agreement with the Liberty recommendation from a conceptual standpoint, determines that some changes are necessary to be useful in Iowa. Rather than payments to a "state fund," the Board directs Qwest to deposit such Tier 2 funds into a separate, Qwest controlled account, to be identified as the Iowa Tier 2 payment account, to be used to fund long-term administrative expenses of oversight activities as discussed in greater detail in the following issue (Funding Commission/Qwest/CLEC Oversight Activities). Once those expenses are met, Qwest should periodically deposit any remainder to the state's general fund.

The Board directs Qwest to propose language for Section 7.5 incorporating the provision for Tier 2 funds in Iowa as discussed above.

- Funding Commission/Qwest/CLEC Oversight Activities (Report p. 42; AT&T post-report comments pp. 22-23)

Liberty noted that these multi-state workshops have demonstrated many, if not all, of the Qwest states can find it efficient to address wholesale telecommunications services issues on a combined basis. More critically, some states simply may not have the resources necessary to carry out the many burdens that the SGAT,

interconnection agreements, QPAP, federal law, and FCC regulations impose upon them. Liberty concluded that the creation of a funding mechanism to support state commission activities represents a proper use of a portion of Tier 2 payments and, if necessary, of a fraction of the escalated portion of Tier 1 payments.

Liberty suggested the QPAP provide that one-fifth of the escalation portion of payments (Tier 1 payments) otherwise due to CLECs for non-compliant service in each participating state and one-third of the state's Tier 2 payments be made to a special fund that would be available for states participating in a common administration effort to use for: (a) administrative activities, (b) dispute resolution, and (c) other wholesale telecommunications service activities determined by the participating commissions to be best carried out on a common basis. The Tier 2 payments should be first used to carry out these purposes, with any excess remaining Tier 1 payments returned to the CLECs who contributed them, on a pro-rata basis, not less than every two years. Liberty recommended that Qwest also be required to make an advance payment against future Tier 2 obligations in an amount reasonably determined by the participating state commissions to fund the preceding listed activities on an interim basis.

The Colorado Special Master's Report recommended a particular form of administrative structure for carrying out the activities listed above. Given the multi-state nature of the effort envisioned here, as opposed to the single-state process addressed in the Colorado Report, it is preferable to allow the states interested in

participating to give consideration to the best means for designing and implementing a common administrative structure.

AT&T expressed concern with the suggestion that a funding mechanism utilizing Tier 1 payments to the CLECs be used to create a "special fund" that would be available for states participating in a common administration effort to use for: (a) administrative activities, (b) dispute resolution, and (c) other wholesale telecommunication service activities determined by the participating commissions to be best carried out on a common basis.

AT&T argues that such a proposal exists nowhere in the record in this proceeding, and that the proposal involves skimming off one-fifth of certain escalation remedies that a CLEC would otherwise be entitled to. AT&T suggests this is inappropriate. CLECs already pay state taxes, certification fees, and/or regulatory fees to support the activities of the relevant state commissions. Requiring CLECs (as opposed to Qwest) to pay part of its exclusive "remedies" under the QPAP to support a vaguely articulated "common administration effort" reeks of inequity.

The Board is of the opinion that a Special Fund as described by Liberty is a practical way to fund the administrative tasks such as the arbitration, audit review, hiring of auditors, and state commission travel and time expenses. The Board does not agree that a contribution of funds by CLECs from Tier 1 payments is reasonable. Tier 1 payments to CLECs are designed to address claims of the CLECs. If Tier 2 payments are inadequate for administration of the QPAP, funding shall be

contributed as described in section 15.4 and discussed later in this conditional statement at V.A. Audit Program.

Section 11 of the QPAP outlines the payment to states of the Tier 2 funds and the funds to the Special Fund. For clarification purposes The Board proposes that the formula for the calculation of Tier 2 payments include an additional step. The "Special Fund" monies should be subtracted from the calculated Tier 2 payment, with only the remaining amount labeled as Tier 2 funds. This step would make it clear that the funds going into the state general fund are Tier 2 payments separate from the "Special Fund" monies.

The Board directs Qwest to incorporate language into Section 11 of the QPAP that will provide for the additional calculation to split the total Tier 2 funds into "Special Fund" monies for the payment of administrative expenses related to the QPAP with the remainder going to the states general fund.

2. Three Month Trigger for Tier 2 Payments (Report pp. 42-44; Qwest initial brief p. 25; AT&T initial brief pp. 11, 14; NMAS initial brief p. 11; Qwest post-report comments p. 11; AT&T post-report comments p. 23)

AT&T argued that payment should begin after a single month of non-compliant performance, in order to assure that there are effective sanctions for poor performance on Tier 2 measures.

Qwest contends that because Tier 2 payments provide additional incentives and operate at a different level (*i.e.*, CLEC aggregate level) than Tier 1, it is perfectly reasonable that Tier 2 not mirror Tier 1 in terms of the trigger for payments or the

structure of the payment table. Tier 1 payments serve the dual function of compensation and incentive. Tier 2 payments, by contrast, are purely for the purpose of providing incentive. The nature of this additional payment is to motivate behavior and as such it is appropriate that the payments are triggered after a period of time in which Qwest has had an opportunity to solve nonconforming service. As Qwest pointed out during the hearings, the time delay involved in reporting results makes it all but impossible for Qwest to react to nonconforming performance until the third month after the first month miss.

The NMAS argued that Qwest's proposed limitation on Tier 2 payments would permit Qwest to provide discriminatory service to the aggregate CLEC community in two out of every three months, with no liability for payments. In that respect, Qwest's proposed QPAP is deficient. A plan that permits Qwest to maintain unsatisfactory performance to CLECs in the aggregate for two of every three months does not represent a significant incentive to provide satisfactory service.

Liberty agreed that one compliant month out of every three should not be considered adequate for measures that have no Tier 1 payment. In any 12-month rolling period in which there have been two non-compliant months out of any consecutive three months, payments for those Tier 2 payments without a Tier 1 payment obligation should be triggered by a single additional month of non-compliance.

Qwest's principal defense of the QPAP provision at issue was two-fold: (a) the need for time to identify and resolve long-term problems, and (b) consistency with

other plans that the FCC has reviewed. The time-lag issue would be resolved by the adoption of Liberty's recommended approach for triggering Tier 2 payments for measures without a Tier 1 payment counterpart. However, it does appear that the Texas plan adopts the same three-consecutive-month trigger for Tier 2 payments. Nevertheless, given the emphasis placed on Tier 2 payments as an inducement, it remains difficult to place much faith in their contribution to a performance incentive plan when they can be avoided (even under measures where there are Tier 1 payments) by concerted efforts to bring performance to minimum acceptable levels during only four months each year.

Such a program appears more likely to lead to frequent underperformance than it does to encouraging routine compliance. In the case of Tier 2 payments that have Tier 1 counterparts, the QPAP should trigger Tier 2 payments in the second consecutive month of non-performance, provided that the same two-out-of-three month condition (recommended immediately above for Tier 2 measures that have no Tier 1 counterpart) is met.

The Board agrees that the structure originally proposed for triggering Tier 2 payments could have the possible effect of eight non-compliant months out of 12. Distinguishing between Tier 2 payments that are, or are not, tied to a Tier 1 payment appears to miss the point that the triggering of a Tier 2 payment requires a serious miss by Qwest. The Board finds that all Tier 2 payments should be triggered on a monthly basis after the threshold of two out of three consecutive month of misses in a 12-month period.

Qwest has agreed to Liberty's proposed changes to the trigger of Tier 2 payments with and without a related Tier 1 payment. The language in Section 7.3 of the QPAP currently states:

> Tier 2 payments are calculated and paid monthly based on the number of performance measurements failing performance standards for a third consecutive month, or if two out of three consecutive months in the 12 month period have been missed, the second consecutive month for Tier 2 measurements with Tier 1 counterparts and one month for Tier 2 measurements that do not have Tier 1 counterparts.

The Board directs Qwest to submit new language triggering all Tier 2 payments on a monthly basis once the initial threshold of two out of three consecutive months of misses in a 12-month period has been met.

3. <u>Limiting Escalation to 6 Months</u> (Report p. 44; Qwest initial brief p. 21; AT&T initial brief p. 26; ELI/Time Warner/XO initial brief p. 13; ZTEL initial brief p. 18; Covad initial brief pp. 13, 32; WCOM initial brief p. 7)

Qwest provided evidence demonstrating that continuous escalation beyond the six-month $400, $600, and $800 per occurrence payment levels in the QPAP would substantially over-compensate CLECs and give them an incentive not to invest in the facilities-based competition that forms the ultimate goal of the 1996 Act. Qwest demonstrated that the total financial incentive of the QPAP — the combination of Tier 1 and Tier 2 payments — is equivalent to giving away wholesale service for seven to 15 years. The majority of that payment will go directly to CLECs. Qwest states that, "payments at these levels in relation to the number of years of revenues

that would be generated to break even will be both compensatory to CLECs and sufficient financial incentive to Qwest."

AT&T argues that the QPAP should contain no provisions, which protect Qwest from paying appropriate penalties for chronic poor performance. In its comments, AT&T discussed that there is no reason that the QPAP caps the penalties for Qwest deficient performance at six months except for Qwest to protect itself from its own chronically poor behavior.

AT&T suggests that if Qwest could not provide non-discriminatory service, within a six-month period (pre-271) when it has substantial incentive, there is no reason to anticipate an appropriate incentive, post-271. Accordingly, the QPAP should not reward Qwest for deficient service by limiting payment amounts after six month's worth of deficient performance.

ELI/Time Warner/XO agree that payments to CLECs provide some compensation, but suggest that they serve principally to encourage Qwest to improve its performance, particularly in light of the fact that Qwest finds paying CLECs any money especially distasteful. If there is a concern that CLECs might be overcompensated, these Joint CLECs would propose, along with ZTEL, that Tier 1 payments stop escalating after six months but that Tier 2 payments begin to escalate at that time. Under that structure, payments for nonperformance would continue to increase after six months, but the state, rather than the CLECs, would receive the increase.

Qwest concedes that this proposal would address its concerns with overcompensating CLECs, but Qwest rejects the proposal because the result, in Qwest's view, would be over-deterrence. Qwest offered no evidence to support its view or to explain why Qwest would continue to fail to perform after six months of making escalating QPAP payments if those payment levels provide Qwest with sufficient incentive to perform. Common sense, as well as record evidence, demonstrates that Qwest will not perform unless it is more painful not to perform, and continuing to increase payment levels for successive months of failure is necessary to increase the financial pain to Qwest until that level is reached.

ZTEL indicates that when a PAP is proposed, there is no way to determine *ex ante* whether payment levels proposed will provide sufficient incentive for compliance. If the initial payment levels are too low, the ILEC will continue to provide inadequate service until those payment levels are subsequently increased. The best means of developing a comprehensive plan that seeks out and determines the proper level of incentive payments is to implement a PAP that does not contain artificial caps on payments or escalations.

ZTEL agrees that, as proposed, the QPAP does provide some correction for this possibility, but suggests that Qwest's proposal contains artificial caps and limitations on payments and escalations that undermine the effectiveness of the plan. For example, Qwest proposes to increase payment levels for each of the first six months. After six straight months of non-compliance, however, the payment levels would cease increasing – even though the frozen levels are clearly not enough to

incent compliance if non-compliance continues to be observed. Qwest also proposes that if it misses for several months in a row, but then comes into compliance, the plan should abandon the payment level that incented the performance and instead drop back to a lower level. Finally, Qwest proposes that regardless as to how poor its performance may be in any state, an absolute and arbitrary maximum cap on its payments should apply, based on a percentage of its revenues in that state.

According to Covad, there is no principled reason pursuant to which the escalated penalties should cease at some arbitrary point in time, as Qwest contends. As the Special Master to the Colorado Public Utilities Commission correctly recognized, "the incentive payment are not wholly punitive in nature because CLECs may well suffer increased harm to customer goodwill when problems continue [and, further] the initial payments may not adequately reflect harm imposed on the CLECs."

WCOM suggests that if Qwest's performance continues to be poor, remedy payments should continue to provide the relevant incentive for Qwest to fix a problem. Qwest has missed certain PID requirements for six months or more, as was addressed by witness Inouye in his discussions of and cross examination regarding Exhibit S9-CEW-CTI-2, Confidential Slides CTI-2 and CTI-3 and the corresponding slides in Exhibit S9-CEW-WCM-CTI-5 (Inouye presentation).

WCOM points out that since Qwest **has** missed measures for more than six months, Qwest's position that continued poor performance requires no increase in remedy payments is not borne out by the evidence. Witness Inouye clearly acknowledged that Qwest failed some measures for more than six months.

Apparently, the threat of proposed penalties did not induce Qwest to correct the problems that resulted in these persistent misses.

Liberty indicated that if non-compliance continues for half a year in the face of stiff financial consequences, one of the issues that would bear consideration is the achievability of the established benchmark itself. Moreover, even the parity measures, while based on a substantiated and common belief that there are no material differences between serving retail and wholesale customers, cannot be said to rest upon an absolute certainty that growing experience with the CLEC community will not show otherwise.

Liberty also noted that merely calculating comparisons of the marginal costs of compliance versus non-compliance are clearly not the only reason why problems can persist for extended periods of time. If it can be shown that six month’s of escalation would create payment levels that we can generally judge to be far enough in excess of both the value of CLECs and the costs of calculating decisions to continue to under perform, then we should consider reasonable a six-month cutoff of escalation.

The Board agrees with the CLECs that a cap at six months on the escalation of the payment amounts is contrary to the hoped for incentive benefit of a QPAP. The Board disagrees with the Liberty's apparent fears that the PIDs may be, in some way, unreachable by Qwest. Qwest has never argued that it cannot meet these PIDs. Qwest should know through its military style OSS testing and its involvement in establishing the PIDs if it can reach the required compliance. This only leaves it to Qwest to decide if it is more beneficial to pay a penalty or fix a problem. An artificial

six-month cap on Tier 1 allows Qwest to make a business decision on meeting a PID they helped design and test or miss it and with its decision to miss, hinder competition. Only Qwest can decide when the level of payment penalties becomes an incentive. The Board would hope that Qwest would not let any PID be missed, and thus pay no penalties at any level. The Board is not convinced from the record that CLEC harm from lost business can be accurately measured, so the policy goal should be a QPAP that precludes any Qwest business decision that relies on an escalation cap. Moreover, the QPAP gives Qwest an ability to reduce the escalation step they are making current payments based on by simply meeting the standards in any one month.

The Board has determined that the rate of increase and decrease in the Per Occurrence and the Per Measurement for high, low, and medium payouts should change by the same amount following month six as it did from month five to month six, shown in Table 2 of the QPAP. For example, following month six in the per occurrence portion, high would increase or decrease each month by $100, medium by $100, and low by $100 for all months following the sixth month. The Per Measurement Cap of payments to any CLEC should increase/decrease in a like manner. That would mean an increase or decrease in high of $25,000, medium of $10,000, and low of $5,000 following month six.

The Board directs Qwest to filed proposed language that will eliminate any limitation on the escalation of per occurrence and per measurement payments as discussed above.

4. Splitting Tier 2 Payments between CLECs and the States (Report p. 45; Qwest initial brief p. 28)

Covad proposed that 50 percent of Tier 2 payments go to CLECs, relying entirely upon the Colorado Special Master's Final Report and Recommendation for its support. Qwest points out that the Covad quote is drawn from that portion of the Special Master's report that relates to *Tier 1.Y* payments, not Tier 2 as claimed by Covad. The QPAP equivalent of Colorado Tier 1.Y payments is the escalation portion of Tier 1 payments, which already go 100 percent to CLECs.

Liberty noted that the Colorado Special Master's Report does not support a division of Tier 2 payments between the states and CLECs. Neither does any other plan that exists under a section 271 application previously addressed by the FCC. Tier 1 payments under the QPAP are adequately compensatory for CLECs. Those CLECs that conclude otherwise may retain their rights to damage recovery through other actions. The goals of the Tier 2 payments are best served by continuing to provide that they be paid to the states.

The Board agrees with Liberty that the Tier 2 payments should go to the states. If Tier 1 payments are allowed to escalate as discussed in the previous impasse issue and Qwest fails to meet its performance commitments, CLECs will receive higher payments as long as the poor performance continues, while Tier 2 payments will be available for the states and for any administrative functions related to the QPAP.

The Board endorses the recommendation of Liberty that Tier 2 payments should not be shared with CLECs.

II. CLEARLY ARTICULATED AND PRE-DETERMINED MEASURES

A. Measure Selection Process (Report p. 46; Qwest initial brief pp. 3-4)

The PID document setting forth wholesale performance measures was developed through an extended collaborative process involving Qwest, CLECs, and state commission staff under the ROC OSS Process. The PID performance measures take into consideration the following interactions between Qwest and CLECs in the context of resale, transport, interconnection, unbundled loops, and other wholesale services:

- Gateway
- Pre-Ordering
- Ordering
- Service
- Provisioning
- Repair
- Network Performance
- Billing

No participant disputed the breadth or comprehensiveness of the PID measures that were agreed upon during the PEPP collaborative, nor that the collaborative sought to achieve a broad set of measures to include within the QPAP

payment structure. The primary dispute is whether additional measures are appropriate for inclusion.

The Board supports the PID document that was developed through the ROC OSS testing process. Suggested PID additions will be discussed individually.

B. Adding Measures to the Payment Structure

1. Requiring Payments for Canceled Orders (Report pp. 47-48; Qwest initial brief pp. 48-51; ELI/Time Warner/XO initial brief pp. 4-6)

ELI/Time Warner/XO recommended that the QPAP provide payments for canceled orders in certain circumstances, arguing that a CLEC's loss of a customer was both significant economically and not otherwise compensated under the QPAP payment structure. In order to implement their recommendation, they would count as a late installation any order canceled after Qwest misses a due date.

Covad argued that there be created a performance measure that would identify the number of orders that CLECs cancel in response to expected service cancellations by Covad customers due to long waits for orders that Qwest places in "held" status due to its lack of facilities.

Qwest responded that it cannot be fairly held responsible for all the reasons why CLECs cancel orders. Qwest argued that the QPAP already sufficiently measures order-filling performance, for so long as orders remain active. Qwest cited, for example, OP-6, which the QPAP includes and which captures Delayed Days.

Liberty noted that the QPAP should hold Qwest responsible for the consequences of its failures to perform and agreed that without question there is

some correlation between the length of delays in providing services to end users and decisions by those users to cancel requests for services from CLECs. Liberty concluded that several conditions should have to be met before deciding that added compensation is necessary to make CLECs whole in such cases. Liberty suggested that each of the following conditions should be considered.

- The degree of correlation should be shown to be high enough to demonstrate cause and effect to a reasonable degree of certainty
- It should be reasonably clear we would not be adopting a program that would provide CLECs compensation for their own business decisions to cancel orders
- The compensation for any interim sources of delay should be shown to be insufficient, given the degree of the correlation (the weaker the correlation, the more comforted we can be that payments made by Qwest already under the QPAP are sufficient).

Liberty determined that these conditions were not shown to exist. CLECs presented no evidence to demonstrate the strength of the relationship between Qwest performance and canceled orders. Liberty noted that not enough evidence was presented to demonstrate that canceled orders, whatever the reasons, are material in number. In any event, Liberty determined that there is no apparent way to craft a provision that would exclude compensation for CLEC decisions to cancel or for end user decisions to cancel for reasons unrelated to performance. The CLECs proposing this measure certainly offered no specific proposal for doing so.

The QPAP already provides for compensation for delays during the period in which orders remain open, whether or not they are finally canceled. The record indicates that the QPAP will already serve to compensate CLECs adequately for delays in processing orders, whether or not those orders are ultimately filled.

Liberty indicated that Covad made a sound argument about the special circumstances regarding orders "held" for lack of facilities, but noted that it is not clear that such an identification should produce a separate payment responsibility, given that Covad will continue to receive interval-based payments, despite its internal policy to cancel orders 30 days after their initial due date. It just will not get them for periods of more than 30 days. The usefulness of a held order measure, which we would see as having principally and perhaps solely diagnostic use, should be addressed by presenting a proposal in the forum established for considering new and revised performance measures.

The Board should endorse Liberty's conclusion that CLECs will be adequately compensated for delays in processing orders, without requiring payments for cancelled orders.

2. Requiring Payments for "Diagnostic" UNEs (Report p. 48; Qwest initial brief p. 34; Qwest reply brief p. 23; Covad initial brief pp. 16-18; ELI/Time Warner/XO initial brief p. 10)

Several CLECs noted the importance of enhanced extended loops (EELs) to CLECs, observing that, while the QPAP provides for payments in the case of poor performance for loops and for transport, none exist for EELs, which are a combination of the two. There are no benchmark or parity standards that are applied

to EELs at present. All performance measures related to them are diagnostic in nature.

Qwest acknowledged that, as the ROC OSS collaborative changes measures from diagnostic to a firm benchmark or parity standard, they would be included in the QPAP. Qwest noted that currently line sharing and sub-loops are also excluded from the QPAP payment structure, because the performance measures for them are diagnostic in nature. Qwest stated that there had been general agreement among the CLECs to exclude line-sharing measurements for the present, but to include them under the nascent service provisions of QPAP Section 10 when a benchmark or parity standard might be adopted.

Prior workshops have made clear the importance of EELs to CLECs. Prior to those workshops, there was not an extensive experience base with EELs. The ROC OSS collaborative properly determined that EELs should be measured on a diagnostic basis for some period of time. Once EEL ordering activity increases, this measure should be subjected to a measurement base that will allow for its prompt addition to the payment structure of the QPAP.

Liberty noted that the use of a diagnostic standard reflects the fact that experience with line sharing and sub-loop elements was too limited to support a benchmark or parity standard and the same is true of EELs. Liberty recommended that EELs be included in the QPAP payment structure as soon as is practicable.

The Board endorses Liberty's recommendation that EELs should be included in the QPAP payment structure as soon as the ROC OSS collaborative changes the measures from diagnostic to a firm benchmark or parity standard.

3. Cooperative Testing (Report p. 49; Qwest initial brief p. 52; Covad initial brief pp. 51-52)

Covad noted in its brief the existence of an agreement under which Qwest will perform acceptance testing in cooperation with Covad for all xDSL loops that Covad leases. Covad testified that Qwest is failing to perform this testing in a significant number of cases. Covad argued that its need for trouble reporting after installation could be diminished if defective loops were discovered, as contemplated, beforehand, during the agreed upon testing and recommended a cooperative testing performance measure as the most effective means of minimizing trouble reports for the xDSL unbundled network element (UNE) loops that it takes from Qwest.

Qwest responded to Covad's request by noting that Covad failed to raise the cooperative testing issue at the PEPP collaborative. Further, Qwest indicated that it was not raised when the ROC OSS collaborative designed the performance measures set forth in the PID. Qwest argues that given the failure of Covad to offer any substantial reason for adding it now, the addition of a cooperative testing PID should be rejected.

Liberty noted that while it is reasonable to require measures appropriate to validate the delivery of a UNE within specifications in those cases where it cannot be taken for granted that the specifications have been met, Covad has not demonstrated

a difference in QPAP payments that would result from calculating them under maintenance and repair performance measures as opposed to calculating them under installation interval performance measures. In addition, the record doesn't indicate how direct and efficient it would be to create a cooperative testing measure that would provide for effective performance measurements and not duplicate the payments to be obtained under existing installation or repair measures.

Although Liberty agreed that it is better to prevent and detect problems at the earliest possible point, Covad should raise the issue in the forum where new or changed performance measures are identified, discussed, and resolved. Should that forum determine that a cooperative testing measure is appropriate, there can then be consideration of how its introduction into the PID should affect Qwest payment responsibilities, if at all after considering the other compensable installation and repair intervals.

The Board endorses Liberty's recommendation that any cooperative testing performance measure should be raised in a forum where new performance measures are identified, discussed, and resolved.

4. Adding PO-15 D to Address Due Date Changes (Report pp. 49-50; Covad initial brief pp. 53-54)

Covad argued that performance measure PO-15 D, which measures the number of due date changes per order, should be included in the Tier 1 payment structure. Covad said that due date changes injure CLECs, because they must

subsequently undertake efforts to re-establish reasonable expectations with customers about when service can be initiated.

Qwest noted that this performance measure is diagnostic in nature, and that neither Covad nor any other participant has heretofore offered a parity or benchmark standard that would change it to a benchmark or parity standard, which is required to allow development of a payment calculation basis.

Liberty noted that Covad offered no recommendation for what the standard should be. Without this, a diagnostic measure cannot provide a payment calculation basis. Covad needs to address this concern by raising the issue in the context of the ROC OSS testing collaborative.

The Board endorses Liberty's conclusion that Covad must address this concern in the context of the collaborative ROC OSS testing.

5. Including PO-1C Preorder Inquiry Timeouts in Tier 2 (Report p. 50; AT&T initial brief pp. 11-12)

AT&T suggested that performance measure PO-1C should be separately included as a Tier 1 payment item. This measure calculates the number of inquiries that "time out." Such an event ceases the query function that is already underway, thus requiring CLEC representatives to initiate it again. AT&T testified that some timeouts occurred after about 2.5 to 3 minutes of waiting.

Qwest found AT&T's position that its failure to raise this issue earlier was an oversight difficult to understand. The PO-1A and B payment structure is based on

intervals, while PO-1C is a percent measurement, which is structurally very different and not compatible for payment purposes.

The QPAP already provides for compensation for measures PO-1A and PO-1B, which measure response times. There was a logical basis for excluding this percent measurement from the duration measurements that were included in Tier 1. The QPAP treatment of the overall measurement (which includes 1A, 1B, and 1C) reflects a proper treatment of the issue of response times for the present. Liberty concluded that incorporating sub-measure 1C would take more information and analysis than the current record supports. It would also raise the question of how total payments, which now consist of the combination of existing 1A and 1B combined payments, should be changed, if at all, to reflect the addition of 1C.

Liberty concluded it was reasonable to construe the PAP collaborative agreement as intending not to include 1C separately. Additionally, Liberty found no reason to disturb that agreement. However, Liberty did note that should the OSS testing now underway demonstrate a high enough number of timeouts to give concern about the impact on PO-1A and 1B response times, it would be appropriate to revisit the issue.

The Board endorses Liberty's conclusion that it is currently inappropriate to incorporate sub-measure 1C into the QPAP payment structure.

6. <u>Adding Change Management Measures</u> (Report pp. 50-51; Covad initial brief p. 51; Qwest reply brief p. 31)

Covad requested that change management process (CMP) performance measures be added to the QPAP. Qwest has agreed to add two CMP measures, GA-7 (Timely Outage Resolution) and PO-16 (Release Notifications), after the ROC OSS collaborative establishes benchmark measures for those PIDs. Those measures are now diagnostic, but would be included as "High" Tier 2 measurements.

Liberty agreed that it is appropriate to include the measures as Qwest has proposed after benchmarks are established, given their importance and the region-wide nature of their operation and impact.

The Board concurs in Liberty's recommendation that the CMP measures, GA-7 (Timely Outage Resolution) and PO-16 (Release Notifications), be included as "High" Tier 2 measurements after the ROC OSS collaborative establishes benchmark measures.

7. <u>Adding a Software Release Quality Measure</u> (Report p. 51; Qwest reply brief p. 31; WCOM initial brief p. 10)

WCOM argued that the propriety of adding a software Release Quality Measure should be reviewed at the QPAP's first six-month review. Qwest objected to the addition of a software-release quality measurement (GA-7), which the ROC OSS Steering Committee rejected adding to the PID. Qwest argued that it duplicated other measures, it would tend to discourage ILECs from introducing software updates, and that such a measure is not included in any other BOC PAPs.

Liberty noted that no participant sought the inclusion of the measure at this point. The request was only to address it under established QPAP review procedures. All of WCOM's arguments in support of such a measure and all of Qwest's arguments against it can be raised in the context of the established procedures for addressing PID and QPAP changes.

The Board concurs in Liberty's conclusion that consideration of a software release quality measure should be raised in the context of the established procedures for addressing PID and QPAP changes.

8. Adding a Test Bed Measurement (Report pp. 51-52; Qwest initial brief p. 50; WCOM initial brief p. 11)

WCOM asked that a Test Environment Responsiveness measure (included in its brief as proposed performance measure PO-19) be included in the QPAP payment structure after its adoption.

Qwest argued it is premature to discuss WCOM's suggested test bed measurement because:

- The test bed has only been in existence since August 1, 2001.
- There have only been preliminary discussions about defining a performance measurement for it.
- The FCC did not consider the Texas application defective for failing to include such a measure.

Qwest's current proposal under discussion in the ROC OSS collaborative specifically provides that the measure would remain diagnostic until the six-month review.

Liberty concluded there is no basis for predicting whether a measure will be approved, what its final content might be, whether it would lay a proper foundation for a QPAP payment, or what payment level might be appropriate. It is premature to express opinions about the future inclusion of a measure that is in this state of development. There should be no presumption for or against its eventual inclusion in the QPAP under the applicable procedures for modifying the plan.

The Board endorses Liberty's conclusion that it is premature to consider the future inclusion of a test environment responsiveness measure.

9. Adding a Missing-Status-Notice Measure (Report p. 52; Qwest initial brief p. 51; Qwest reply brief p. 31; WCOM initial brief p. 11)

WCOM proposed adding a performance measure, based on a missing status notice measurement similar to one adopted in New York, to the QPAP payment structure. Qwest noted that neither WCOM nor any other CLEC proposed this measure for inclusion in the payment structure during the PEPP collaborative. Moreover, the measure currently exists in the PID only in diagnostic form. Qwest also noted that this measure (PO-10) has only been adopted in New York for a temporary period and is scheduled for deletion by the end of this year.

Liberty concluded that no proper basis was laid for establishing a measure designed to respond (and to respond only temporarily) to circumstances existing in New York. The inclusion of such a measure may be requested later and in accordance with the applicable procedures for modifying the plan.

The Board concurs in Liberty's conclusion that consideration of a missing status notice measure should be raised in the context of the established procedures for addressing PID and QPAP changes.

C. Aggregating the PO-1A and PO-1B Performance Measures (Report pp. 52-53; Qwest initial brief pp. 45-49; AT&T initial brief p. 21)

Qwest argued that the PEPP collaborative reached agreement on collapsing the seven individual measurements under PO-1A (response times for transactions under Qwest's electronic transaction interface (known as IMA-GUI) and PO-1B (response times for the same transaction types under electronic data interchange (EDI)) into two that would be subject to QPAP compensation, by averaging the response times for all seven PO-1A measures and all seven (and identical) PO-1B measures.

EDI and IMA-GUI are two different means by which CLECs can gain access to the OSS that manages the processing of CLEC orders and requests. AT&T argued at the QPAP hearings that the collapse of the individual measurements as intended by the agreement was to aggregate each of the PO-1A measurements with their PO-1B counterparts, thus producing seven compensable QPAP measures.

Qwest maintained that its interpretation of the agreement is supported by the agreement in Arizona mirroring its proposed approach. According to Qwest, the Arizona agreement was adopted without objection by any participating CLEC there. In addition, the same approach was included in the Colorado Special Master’s Final Report and was not objected to by AT&T.

AT&T alleges that Qwest’s interpretation of the agreement would allow Qwest to mask poor performance in certain transaction types.

Liberty concluded that the provision as proposed by Qwest provides for escalation in payments as response times increase. Qwest will still be required to report performance under each of the seven transaction types and for each of PO-1A and PO-1B. The source of any deficient performance will be known with particularity. The real issue therefore is not about masking performance, but the reasonableness of combining the types of transactions into a single payment "opportunity." The seven transaction types involved are:

- Appointment scheduling
- Service availability information
- Facility availability
- Street address validation
- Customer service records
- Telephone number
- Loop qualification

Testimony shows that the longest standard for any of these transaction types is 25 seconds; the shortest is ten seconds. The QPAP calls for maximum payments of $210,000 per month per measure; under Qwest’s two collapsed measures the total monthly exposure would therefore be $420,000.

AT&T’s approach of aggregating each PO-1A measure with its PO-1B equivalent would produce a maximum monthly exposure of $1,470,000. Liberty

concluded that the recommended AT&T exposure appeared to be out of balance with the Tier 2 payment amounts for other failings (e.g., how long the electronic gateways are out of service, which can mean no transactions at all, not just responses delayed by seconds). The AT&T approach would also have the greater tendency to mix unrelated performance types. It would average response times produced through two different systems. At issue are small response-time variances for each system with the maximum penalty being reached after a delay of ten seconds. These two systems are likely to produce delays for largely independent reasons.

Liberty viewed the evidence to show that the agreement reached was on the terms represented by Qwest; moreover, those terms establish both significant and balanced payment responsibilities for failure to meet standards.

The Board endorses Liberty's conclusion that the seven individual measurements under PO-1A should be collapsed into one aggregated measure and the seven individual measurements under PO-1B should similarly be collapsed into one aggregated measure as proposed by Qwest.

D. Measure Weighting

1. Changing Measure Weights (Report pp. 53-54; Qwest initial brief p. 35; Qwest reply brief p. 24; AT&T initial brief p. 25; ELI/Time Warner/XO initial brief p. 15-16)

Some CLECs requested that the weighting (and therefore the QPAP payment amounts) be increased for certain high capacity loop (DS1 and DS3) measures.

Qwest said that it could accept the AT&T approach of applying different payment structures to what AT&T called high value services (in which AT&T included

collocation, LIS trunks, unbundled dedicated interoffice transport, unbundled loops, and resold DS-1 and DS-3 services), but only if PAP payments would remain in reasonable proportion to the monthly rates that Qwest charges for those services. Qwest also specifically objected to including 4-wire unbundled loops in the high value category.

AT&T argued that it was appropriate to increase the high capacity measures, but not to decrease any others in response and maintained that Qwest's response to its request to increase the weighting on certain services was inappropriate. AT&T said that the reduced weighting on residence resale, unbundled 2-wire loops, unbundled analog loops, and business resale represented high volume CLEC services, while the services whose weight was increased were low volume. Therefore, according to AT&T, Qwest's proposal would significantly drop its overall payments under the QPAP.

Conceptually, there was no error in Qwest's efforts to rebalance payments among measures as a way of responding to AT&T's request for a higher weighting on certain services of value to AT&T. Qwest's proportionality analysis was also an appropriate overall gauge for comparing the financial consequences associated with different measures. Liberty reasoned that the issue of financial exposure here is not merely one of what a total cap might be, but also one of how fast one progresses to that cap and how likely it is that the cap will be reached. Obviously, moving measures to a higher weighting will cause a faster progression to the cap and it increase the chances that it will be met.

AT&T argued that Qwest overcompensated when it rebalanced the payments. A number of CLECs go further, implicitly arguing that there is no reason not to increase the net rate of progression toward the cap. Liberty declined to discuss that argument related to this impasse issue, deferring resolution of that issue until the six-month plan review limitations.

Liberty noted that as to the overcompensation issue, AT&T, which requested the change in the first place, failed to propose any better alternative. Therefore, given AT&T's opposition to what Qwest did to meet its stated needs and given a concern that Qwest may have overcompensated (and perhaps even to the detriment of CLECs other than AT&T, for whose benefit Qwest made this change), the best course is not to make either the weighting increases requested by AT&T or the weighting decreases that Qwest offered to address those concerns.

Liberty concluded that the QPAP was reasonable in this respect before Qwest agreed to change certain weights. It would be fair to give CLECs a choice between the two, but it would be imbalanced to allow them to take the benefit of Qwest's offer, while denying the compensating benefit sought by Qwest to keep payments in balance. As a principal supporter of the changed weights, AT&T found Qwest's change in to be imbalanced. Since no other reasonable proposal was made or accepted, the weights should return to those proposed in the QPAP that Qwest initially filed in these proceedings.

The Board adopts Liberty's recommendation that the weights for measures should be those proposed by Qwest in its initial proposal.

2. Eliminating the Low Weighting (Report pp. 54-55; Qwest initial brief p. 27; ELI/Time Warner/XO initial brief p. 18; Covad initial brief p. 34; ZTEL initial brief p. 34)

ELI/Time Warner/XO argued that all measures should be at least a medium weight, rather than being split into three groups of weighting (low, medium, and high), and further, that some should move from medium to high. Covad contended that no measures should be considered low. ZTEL suggested averaging the low and medium payment amounts to reduce the weights from three classes to two classes.

Qwest argued that no evidence was presented to support a change in measurement weighting for QPAP purposes. According to Qwest, these changes would not improve the QPAP, but would merely provide increased payments to CLECs.

Liberty found that little support was provided for these requested changes. Certainly, no case was made that the QPAP may be found inadequate for failing to incorporate them. Liberty also noted that the various proposals suffered from the same balance problem addressed in the immediately preceding section. Liberty concluded that the three categories of weights that came out of the PEPP collaborative process should remain.

The Board endorses Liberty's conclusion that the three categories of weights that came from the PEPP collaborative process should remain.

3. LIS Trunks Weighting (Report p. 55; Qwest reply brief p. 25; AT&T initial brief p. 25; ELI/Time Warner/XO initial brief p. 17)

AT&T argued link interface shelf (LIS) trunks should be considered as particularly high value services and, therefore, should carry higher non-performance payments. AT&T said that it could not sign up new customers where Qwest failed to deliver LIS Trunks. ELI/Time Warner/XO also urged LIS Trunks to be of high value.

Qwest responded that the argument that CLECs are "out of business" without LIS trunks is applicable only to the first LIS trunk order, which is not the common order. The much more typical order is for added trunks where the trunk blocking measure, N-1, would already provide payments in cases where Qwest cannot provision incremental trunks on time.

From a broad perspective, Liberty noted that it is a significant overstatement to say that LIS trunks are of particularly high value because CLECs are "out of business" if Qwest fails to deliver them. Qwest correctly indicated that trunk blocking, as opposed to an inability to take on new customers, is the more common issue. In that regard, orders for incremental LIS trunks are not categorically different from other services that Qwest may be slow to deliver. Liberty pointed out that a review of the CLEC testimony makes it appear as if what LIS trunks mean to AT&T and ELI/Time Warner/XO, high capacity loops or line sharing mean to others.

Liberty reasoned that the QPAP should address value in a more balanced way, because taking each CLEC's claim of particular importance at face value would inevitably make all measures of high weight. Liberty opined that the QPAP payment structure already reflected an adequate treatment of measure weights and recommended that no change be made.

The Board concurs with Liberty's recommendation that no change be made in the weighting of LIS trunks.

E. Collocation (Report pp. 55-56; NMAS initial brief p. 25)

The NMAS proposed that an approach similar to either the Michigan or the Georgia approach be used to determine collocation payment amounts. Qwest responded by indicating that the CLECs had represented during a May PEPP collaborative workshop that the CLEC proposal did reflect the Michigan approach. Qwest later accepted that proposal. No CLEC has argued in its briefs that Qwest's acceptance of the cited proposal is in any way inadequate.

Liberty concluded that the undisputed evidence presented by Qwest demonstrated that the collocation proposal whose acceptance it acknowledged at the hearings was both based on the Michigan proposal and acceptable to the CLECs who responded to it. No objection was made to the proposal by any CLEC. There is no reason to question the QPAP treatment of collocation payments.

The Board endorses Liberty's conclusion that no change is necessary to the approach used to determine collocation payment amounts.

F. Including Special Access Circuits (Report pp. 56-58; Qwest initial brief pp. 52-56; Qwest reply brief pp. 33-34; WCOM initial brief pp. 18-20; ELI/Time Warner/XO initial brief pp. 6-9; ELI/Time Warner/XO reply brief pp. 2-6)

WCOM requested that special access circuits be included in the PID performance measures as one of the product disaggregations and that the QPAP be changed to provide for payments associated with such circuits.

ELI/Time Warner/XO also maintained that it was important to include payments for special access circuits, in order to provide proper incentives for Qwest to support this important means by which some CLECs provide local exchange service. ELI/Time Warner/XO claimed that Qwest did not dispute the evidence that comprises the key factual support for its position. This evidence shows that

- Special access circuits are a widespread means of providing local exchange service.
- It is impracticable to procure UNEs, such as EELs, as an alternative means of providing local exchange service.
- There will be post-271 approval problems with the service that Qwest provides through special access circuits.

According to Qwest, there had been agreement to drop special access circuits from discussions by the ROC OSS collaborative that designed the PID, because section 251 did not include them. Qwest also noted that special access circuits cannot be considered a checklist item at all, according to the FCC and a number of state commissions. Qwest cited the FCC's current consideration of the complex issues involved in extending unbundling obligations to special access circuits. Qwest cited the Colorado Special Master's Report as supporting the exclusion of special access from PAP or other section 271 consideration.

In response to the claim of ELI/Time Warner/XO that Qwest failed to contest the factual issues surrounding special access, Qwest cited testimony from its

witnesses stating that virtually all-special access circuits had been purchased out of interstate tariffs.

ELI/Time Warner/XO argued that nothing that the FCC has said in prior contexts should be read as contrary to its request here. While agreeing that the ruling in the *New York Order* provided that special access circuits should not be considered in the context of a 271 review, they argue that the issue here is different. This is an issue of adopting an appropriate payment structure. These participants maintain that the structure needs to include special access circuits; in order to assure that the QPAP gives meaning to Qwest parity obligations, by encouraging adequate provisioning and repair of high-capacity Qwest facilities that serve CLECs. ELI/Time Warner/XO note that the FCC has not precluded QPAP treatment of special access circuits in any prior decision and that a number of states are now expressing concern about the issue of poor special-access-circuit service and are considering remedies.

Liberty noted that considerable time was spent examining CLEC use of special access circuits to provide local exchange service. The August 20, 2001, *Unbundled Network Elements Report* in these workshops detailed the contest over the relevant facts and the standards under which those facts should be considered.

Liberty concluded that special access circuits do not merit the treatment recommended by a number of CLECs. The evidence of record supports the conclusion that the overwhelming majority of special access circuits at issue here were purchased under federal tariffs. Remedies for failure to meet the requirements of that tariff should be addressed by the agency with jurisdiction under such tariffs;

i.e., the FCC, not state public service commissions. Similarly, the QPAP need not address failures to meet existing state tariffs; CLECs can appeal directly to state commissions for any necessary relief.

Liberty articulated that the only apparent reason for overriding the sound principle of letting the FCC and the state commissions police their own tariffs would be if there existed some inappropriate barrier that had the practical effect of requiring tariff purchases where interconnection agreement purchases should have been available. This issue was addressed in prior workshops, where some of the same CLECs arguing this issue here disputed the propriety of Qwest's historical limitations on allowing access to EELs as UNEs.

In the August 20, 2001, report, Liberty recommendations substantially eased restrictions on the conversion of special access circuits to EELs, making it possible for CLECs to bring services under the terms and conditions of an interconnection agreement or an SGAT, should they elect to do so. In that case, CLECs would have all the rights and expectations applicable under such agreements, rather than, as they would effectively do here, mixing tariff and agreement and federal and state jurisdictional purchase rights and remedies.

The Board endorses Liberty's conclusion that it is not appropriate to include special access circuits in the payment structure of the QPAP.

G. Proper Measure of UNE Intervals (Report p. 58; Qwest reply brief p. 40; Covad initial brief p. 23)

Covad argued that QPAP payments should be based on the intervals of SGAT Exhibit C, rather than on the intervals set forth in the PID. Qwest responded that there is a logical relationship between SGAT Exhibit C and the PID performance measures.

Liberty noted that this issue is similar to the one addressed as the first unresolved Loops issue (Standard Loop Provisioning Intervals) in the August 20, 2001, report. As was discussed in that document, consistency exists between PID performance measure OP-3 (percent of installations completed on or before the due date) and PID performance measure OP-4 (number of days to complete installations), and SGAT Exhibit C (Qwest's Standard Interval Guide). For the reasons expressed in the August 20, 2001, report, Liberty concluded it is appropriate for the QPAP to apply the PID performance measures, not SGAT Exhibit C, as the payment standard.

The Board endorses Liberty's conclusion that the PID performance measures are the appropriate intervals to be applied by the QPAP.

H. Low Volume CLECs (Report pp. 58-59; Qwest initial brief pp. 29-34; Qwest reply brief pp. 20-22; Covad initial brief pp. 27-30)

Covad argued that Qwest designed the QPAP primarily to compensate high-volume CLECs. The result is that lower volume CLECs, such as itself, will be under-compensated. Covad objected more particularly to the QPAP provision that it said would provide Qwest with one free miss each month in the case of CLECs with small order volumes. In order to compensate for that phenomenon, Covad recommended

setting minimum payments at five times the baseline amount for CLECs subjected to the free miss standard.

Qwest argued that the evidence refutes any claim that the QPAP's reliance upon a per-occurrence compensation structure would disadvantage CLECs with small wholesale-service volumes. Qwest presented evidence showing that a number of smaller CLECs, including Covad, would for the period from February through March of 2001 have received payments much larger than CLECs of greater size.

Qwest defended its "one free miss" provision as a necessary adjustment to provisions that would make its performance standard one of perfection in the case of very small order volumes, because even one miss would put Qwest below the required level of performance. For example, for order volumes of five, the best Qwest could do, unless it were perfect, would be to reach 80 percent, i.e., four out of five. Qwest said its analysis of the February to May 2001 period showed that the so-called "one free miss" standard would only have come into play 8 percent of the time, which falls far short of justifying minimum payments 100 percent of the time.

Liberty found that as a general matter, Qwest provided substantial evidence that the QPAP would not serve to under-compensate smaller volume CLECs. Qwest's evidence, which was credible and which was not rebutted by CLEC evidence to the contrary, demonstrated that, for the sample period of February through May of 2001, it could not be demonstrated that there was any disturbing correlation between QPAP payment levels and CLEC order volumes, thus disproving the claim that would be relative under compensation to those with lower order volumes.

Liberty concluded that the goal of excluding one miss from compensation was to prevent (in the case measurements with CLEC volumes of five or fewer) turning a 90 percent benchmark into a 100 percent one. The flip side of Qwest's point about the problem of rounding "up" is that rounding "down" turns a 90 percent standard to an 80 percent one. Liberty reasoned that a rolling average, applied yearly, would serve much better to correct the problem of rounding. It would not, however, alone solve the issue of escalating payments for consecutive-month misses. That problem can be solved by providing that the escalation provision will be applicable in any month where any miss occurred for CLECs with order volumes at the level in question and where the annual calculation shows violation of the applicable requirement. Liberty concluded that the SGAT should incorporate these changes.

Qwest implemented the "spirit" of Liberty's recommendation in Section 2.4 of the SGAT. It did make a minor adjustment to the recommended calculation to determine missed performance measures for benchmark standards where low CLEC volumes are such that a 100 percent performance result would be required to meet the standard.

Qwest's proposed language will use the current month's results, plus a sufficient number of previous consecutive months' performance data so that 100 percent performance is not required to meet the standard. The proposed language accomplishes the goal described in Liberty's recommendation.

The Board endorses the recommendation of Liberty and adopts the proposed changes to Section 2.4 as filed by Qwest in its November 6, 2001, filing.

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

A. Six-Month Plan Review Limitations (Report pp. 59-60; AT&T initial brief p. 14; ELI/Time Warner/XO initial brief p. 27; WCOM initial brief p. 9; Qwest post-report comments p. 13)

AT&T's most fundamental issue with the six-month review process is that Qwest would be able to control what changes would be made, or even addressed, in the six-month review. Pursuant to Colorado Performance Assurance Plan (CPAP) §18.5, the six-month CPAP review process shall focus on refining, shifting the relative weighting of, deleting, and adding new PIDs. After the Commission considers such changes through the six-month process, it shall determine what set of changes should be embodied in an amended SGAT that Qwest will file in order to effectuate these changes. "CPAP Sec. 18.6 allows participants to "suggest more fundamental changes to the plan; but unless the suggestion is highly exigent, the suggestion shall either be declined or deferred until the three-year review."

The Texas PAP includes the provision, "[a]ny changes to existing performance measures and this remedy plan shall be by mutual agreement of the participants and, if necessary, with respect to new measures and their appropriate classification, by arbitration." (Emphasis added) The proposed QPAP includes the statement, "[c]hanges shall not be made without Qwest's agreement."

ELI/Time Warner/XO argues that the QPAP should be treated no differently than any other provision of the SGAT or a Commission-approved interconnection agreement. Either participant may request a change, and if the participants cannot

agree on that change, a participant may request Commission resolution of the dispute. As a result of the periodic review process, therefore, either Qwest or CLECs may request changes to the QPAP. If the participants can agree on changes, the Commission should approve them for implementation in the SGAT and interconnection agreements. If the participants cannot agree, the Commission should resolve the dispute and require that resolution to be implemented in the SGAT and interconnection agreements. Section 16.1 should be modified accordingly.

WCOM contends that from the language in the QPAP, Qwest wants no substantive changes to the QPAP. Rather, Qwest limits changes to the QPAP to changes in performance measures and reclassification of performance measures. Nowhere in the QPAP does Qwest establish a process to review the actual QPAP or language found in the QPAP. Finally, with the limited six-month review, Qwest retains for itself a "veto" for any change.

The Commission and participants should have the ability to modify or seek modification of the QPAP. In the event the Commission approves the QPAP or a modified QPAP, the Commission should retain the power to further modify the QPAP in the future and participants should be able to seek modification of the QPAP if it is not meeting the expectations of the Commission or the CLECs. An obvious example is if the QPAP payments are not, in fact, inducing Qwest to correct problems or systems that continue to produce failures of PID requirements. The QPAP as written does not allow the Commission to retain any power to substantively modify the QPAP.

In Liberty's opinion, the QPAP is not fundamentally different from either the Texas plan or the Colorado Special Master's Report in the matter of changing the plan. With the following changes, Liberty concluded that the present QPAP provisions could function effectively to respond to external changes, without creating insufficiently defined financial exposure to Qwest. The changes include:

- Provide for normal SGAT dispute resolution procedures in the event that there is disagreement with a six-month review process recommendation regarding proposed addition of new measures to the QPAP payment structure.

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

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

Liberty agreed that Qwest should not be subjected to unknown changes to the QPAP, recommending only that Qwest adopt a provision similar to the Texas Plan requiring it to arbitrate disputes over the addition of new measurements arising out of the six-month review.

Liberty recommended that any disputes should be resolved through arbitration as provided for in the SGAT. Qwest has added language in Section 16.1 that implements that recommended changes. In addition, Liberty also suggested that the six-month review be conducted on a collaborative basis. Qwest has also incorporated language to implement that recommendation into its QPAP at Section

16.1 and has incorporated the recommendation for a two-year review into Section 16.2 of the QPAP.

The Board is concerned with the language of Section 16.0, which requires Qwest's agreement to any addition, deletion, or change of a PID. In both the Texas Plan and the Colorado Plan, the state commission is the final authority, not the BOC. In the November 6, 2001, QPAP Qwest has added language to include making the review a common review involving all the states and further limits the changes to be considered to add/deletions, classification of only PIDs.

Section 18.7 of the Colorado Plan states:

> Participants may suggest more fundamental changes to the plan; but unless the suggestion is highly exigent, the suggestion shall either be declined or deferred until the three-year review.

In order to avoid frivolous proceedings to make changes to the QPAP, the Board will require language similar to Section 18.8 of the Colorado Plan. However, the Board is concerned that the specific language of the Colorado Plan is likely to cause unnecessary disagreements and the resultant wasted time and energy of all participants. It is only logical that any suggested modification will be for the benefit of the party making the suggestions. This provision appears to exist to **avoid** disagreements. Therefore, the Board directs Qwest to incorporate language as follows:

> If CLEC or Qwest repeatedly suggests modifications to the plan, without a reasonable level of evidentiary support for the modification, that are not for the effectiveness of the plan

> itself, that Participant may be subject to sanctions at the discretion of the Commission.

The Board directs Qwest to submit for approval the addition of similar language along with deletion of the Qwest veto over changes and limitations of what may be considered in a review of its QPAP, which are currently contained in Sections 16.1 and 16.2.

B. Monthly Payment Caps (Report p. 62; AT&T initial brief p. 20; WCOM initial brief p. 53; ELI/Time Warner/XO initial brief p. 24)

AT&T argues that pursuant to QPAP Section 13.9, once the Qwest Tier 1 payment to the participating CLECs exceeds the monthly cap or $3 million per month, Qwest can place funds over the $3 million or monthly cap in escrow and file "an application demonstrating why it should not be required to pay any amount over the threshold amount in escrow."

Then, after "contractually" waiving the remedies, the CLEC may never receive any remuneration because either Qwest has exceeded the yearly cap or the money is sitting in escrow, *ad infinitum,* when the participants work through a "dispute resolution process" with an infinite number of loopholes for Qwest to avoid payment. Accordingly, AT&T (and as expressed in the proceeding, other CLECs) has substantial concerns about participating in a plan where their contractual rights would be waived with the possibility of never receiving remuneration.

Qwest proposes to be able to challenge payments under the QPAP if those payments exceed a monthly cap. ELI/Time Warner/XO expresses its opinion that, "the only reason the level would be 'too high' is because Qwest's performance is too

poor, and CLECs should not be required to incur additional time and resources, including attorneys fees, to obtain allegedly 'self-executing' remedies." This section should be revised to delete this provision. If Qwest believes the payment levels are the result of something other than Qwest's excessively poor performance, it can raise that issue in the periodic review process.

Liberty found that except for the problem of a CLEC that first experiences deficient performance late in the year, which was addressed earlier, there is no reason under the QPAP for calculating or using monthly caps. There is not a basis for relieving Qwest of the obligation to pay amounts up to the total annual cap, regardless of how quickly those amounts accumulate. There should be no other reference to the calculation or use of monthly caps in the QPAP.

The Board endorses Liberty's recommendation that the monthly caps be removed, which was incorporated by Qwest in its November 6, 2001, filing.

C. Sticky Duration (Report pp. 62-63; Qwest initial brief pp. 22-23; ZTEL initial brief p. 20)

A goal of a PAP should be to find the "right" incentive payment level that encourages Qwest to devote sufficient resources to **maintain** its performance at acceptable levels, according to ZTEL. ZTEL's sticky duration proposal accomplishes this goal, because once a payment level is found to have incented compliance on multiple occasions that payment level will remain in place. This result would require Qwest to find long-term solutions and devote sufficient resources to resolving this chronic issue. Qwest's proposal, in contrast, does not provide that incentive.

Instead, Qwest would have an incentive to selectively deploy its resources on sporadic, wholesale performance "fire drills" that are designed to bring it into compliance for certain measures for a few months so as to minimize its payment levels.

Qwest responded by pointing out that ZTEL proposes an escalation method in which Tier 1 payments **never** de-escalate or revert to the original level, notwithstanding even perfect service after the escalation, no matter how long the period of perfect service. The ZTEL proposal to freeze Tier 1 payment levels at these permanently high levels is dependent upon ZTEL's contention that payment levels should rise until Qwest achieves 100 percent compliance with all performance standards.

Qwest argues the premise underlying ZTEL's argument is wrong: The FCC has never required a BOC to provide 100 percent compliant performance across the board. There are hundreds of measurements and sub-measurements subject to payments under the QPAP. Many may address provisioning of the same service in different ways. Accordingly, Qwest may be providing perfect service under one measurement, and have problems meeting the standard of another. The fact that one measurement was not achieving 100 percent compliance with its standard would not evidence discrimination. The FCC has noted:

> The Commission may find that statistically significant differences exist [between the BOC's provision of service to competing carriers and its own retail customers], but conclude that such differences have little or no competitive significance in the marketplace. In such cases, the

> Commission may conclude that the differences are not meaningful in terms of statutory compliance. Ultimately, the determination of whether a BOC's performance meets the statutory requirements necessarily is a contextual decision based on the totality of the circumstances and information before the Commission.

The presumption that consecutive monthly misses are a priori evidence that payment levels are insufficient completely ignores the reality of the business world.

Liberty agreed that the ZTEL proposal is wholly inappropriate, noting that it purports to spring from the premise that the best test of the sufficiency of a payment structure is Qwest's performance while operating under it. Then it proceeds to add penalties for multiple failures by Qwest no matter how far apart in time they occur. It is disingenuous because it would ignore entirely successful performance by Qwest however long Qwest provided it. The proposal is draconian because its new baseline payment levels, when multiplied by the still applicable escalation levels, could produce payments by Qwest that are an order of magnitude higher than those contemplated by the QPAP before ZTEL's amendment.

Qwest and CLECs participating in the ROC PEPP collaborative agreed to a reasonable escalation of payments and appropriate symmetrical de-escalation in subsequent months when Qwest provides conforming performance. This provision is more stringent than the Texas PAP provision, in which the escalated payments revert to the first-month level after just one month of conforming performance. The Board finds this change to the current escalation structure unnecessary to provide Qwest with adequate incentives if the escalations are capped at six months or not. Part of

the incentive to Qwest is the possibility of lowering the payment levels when performance is improved. Sticky duration would take this carrot and stick approach and remove the carrot.

The Board endorses the current escalation structure without incorporating the sticky duration proposal of ZTEL.

D. Low Volume Critical Values (Report pp. 64-65; Qwest initial brief p. 41; WCOM initial brief p. 32; ZTEL initial brief p. 23).

According to ZTEL's brief, in response to its proposal to apply the 1.04 critical value consistently across all measures, rather than arbitrarily applying 1.04 to select measures, Qwest has responded once again with the same tired refrain: Qwest would pay more. ZTEL's response is the same: this fact is not relevant. ZTEL is adamant that the QPAP must contain a methodology consistent with its public policy goal, which is to deter and prevent discriminatory conduct. This goal is better served if robust and statistically valid procedures are adopted, rather than potentially adequate procedures applied in an arbitrary fashion.

Qwest argues that the statistical agreement reached in the ROC PEPP collaborative process is fair to Qwest and the CLECs because it is balanced. On the one hand, the K-Table was eliminated from the QPAP and the 1.04 critical value will be applied to 1,519 parity tests. On the other hand, critical values higher than 1.645 will be applied to 1,917 parity tests. Acceptance of the WCOM and ZTEL proposal would create a dramatic imbalance given the distribution of CLEC volumes: The 1.04

critical value would apply in 10,368 parity tests, while critical values higher than 1.645 would continue to apply in 1,917 parity tests.

ZTEL wishes to frame the issue as being strictly an issue of statistical theory, which, according to Qwest, is far from the case. As noted above, the statistical agreement was not born solely from statistical theory, but rather included consideration of the distribution of CLEC volumes. Putting the broader consideration aside, it is worth noting that in the Verizon-New York 271 application, the FCC considered arguments to balance Type I and Type II errors at an 85 percent confidence level and concluded that there was not sufficient evidence "to determine that setting the confidence level at 85 percent will in fact balance the probability of Type I and Type II errors."

As Liberty pointed out, the need to reach some compromise in this case appears not to arise from a dispute about statistical theory per se, but rather about what to do in cases where statistical theory may fail those who must deal with practical realities. As ZTEL noted in its comments, certain statistical errors occur when statistical techniques are applied to small sample sizes. These are not errors in the data, but errors in what the application of statistical techniques indicates that we should conclude from the data. The use of the alternate 1.04 (versus 1.65) value does not even eliminate those errors; as ZTEL said in its comments, it merely provides a "rough approximation."

No participant disputed the fact that those participants who did agree to the modified statistical approach at the PEPP collaborative did so in major part to

balance out, in terms of numbers of measures, cases where the value to be used increased from 1.65 with cases where the value to be used was reduced from 1.65. In other words, what ZTEL and a number of others (including some who apparently were in accord with the agreement reached at the PEPP collaborative) appear to want to do now is to apply economic theory to adjust a decision reached through compromise. That is not fair. It would require this process to begin again, without the compromise solution previously reached in the ROC PEPP process, if we are to resolve this through debates about the relative superiority of competing theories. There was no suggestion in reply briefs that Qwest misread the FCC decision with respect to the application of statistical methods in prior cases. No reason presented convinced Liberty that it was appropriate to upset the balanced, compromise approach that met with substantial agreement at the PEPP collaborative.

The Board endorses Liberty's conclusion that the compromise approach for small sample sizes agreed upon at the ROC PEPP collaborative should be incorporated into the QPAP absent evidence showing the approach is inappropriate.

E. Applying the 1.04 Critical Value to 4-Wire Loops (Report pp. 65-66; Qwest initial brief p. 44; AT&T reply brief pp. 17-18)

AT&T assets that Qwest is applying revisionist history to its view of whether the 1.04 critical value applies to 4-wire unbundled loops, arguing that Qwest willingly and voluntarily agreed in ROC that the retail analog for a non-loaded loop (4-wire) is parity with Retail DS1 private line. Qwest now strains credulity by arguing that what it agreed to in ROC was not that DS-1 private line was the retail analog for a non-

loaded loop (4-wire), but that it agreed that DS-1 "stands as a proxy for a retail analog and is the retail comparable to the 4-wire unbundled loop, because it represents an acceptable provisioning interval, without any regard to the value of the service to the CLEC."

AT&T translates what it refers to as "Qwest's mumbo jumbo," by insisting Qwest was fine with agreeing that the retail analog to a 4-wire unbundled loop was a DS1 private line when it meant that the standard for the 4-wire loop would be the longer interval DS1 private line rather than the shorter interval plain old telephone service (POTS). When the standards and retail analogs were being established in ROC, Qwest made no complaint that the retail analog for unbundled 4-wire loops should not be DS1 private line and instead should be a POTS type service. Now when it is time to establish payment levels, Qwest wants to treat 4-wire unbundled loops like a POTS service.

Urging the Board to apply the 1.04 critical value to 4-wire loops, AT&T complains that Qwest cannot have it both ways by arguing that for the purpose of setting provisioning and repair standards the 4-wire unbundled loop retail analog is DS1 but for the purpose of setting payment levels and statistical tests a 4-wire unbundled loop should be treated like a POTS type service. For the purpose of statistical testing and payment levels, the QPAP should treat 4-wire unbundled loops like the other unbundled loops that CLECs use for DS1 services.

Pointing to a Qwest statement that "it would be impossible for Qwest to even implement AT&T's proposal," AT&T argues that Qwest has apparently

misunderstood what is a very simple AT&T proposal. AT&T's proposal is that for sample sizes less than 11, the 1.04 critical value would apply for all 4-wire unbundled loops. To implement that proposal for 4-wire unbundled loops is no more or less difficult than in implementing it for other services.

Qwest dismisses AT&T's argument as untenable, because not all 4-wire loops are used at the DS-1 rate. It is the CLEC that determines how the 4-wire loop can be, or is, used by adding electronics to the loop. Qwest cannot control or even know when a CLEC chooses to turn a 4-wire loop into a high capacity service. Thus, it would be impossible for Qwest to even implement AT&T's proposal.

The evidence shows that the agreement made in the ROC PEPP collaborative was to apply the 1.04 critical value to various types of high-value services. Four-wire loops could be used at DS-1 levels or they could not. Whether or not DS-1 loops are or are not the correct analog for 4-wire loops with respect to provisioning intervals does not have a self-evident connection with the reason why special groupings were established for purposes of applying the 1.04 critical value. What is relevant are the answers to the two following questions: (a) is there a feasible way to include 4-wire loops that are used at the DS-1 level into the identified group, which would make it logical to conclude that such loops were intended to be included under the agreement to be reached; and (b) if not, whether there is a sound reason for including them anyway.

The answer to the first question is that, unlike loops provisioned by Qwest with the capability to provide DS-1 services, 4-wire loops take after-the-fact action by

CLECs to make them DS-1 capable. Qwest has neither knowledge nor control over those actions; therefore, the only way feasibly to include them would be to assume that all (or the overwhelming majority at least) of the 4-wire loops are made DS-1 capable by CLEC additions of electronics to them. This assumption has not been supported by evidence; therefore, we should not make it. The agreement made should be read as excluding 4-wire loops, particularly since the participants were knowledgeable enough of the capabilities issue to have addressed it had they wished to do so.

As to the second question, no sound reason for adding 4-wire loops has yet been shown to exist. Increasing payment levels to CLECs is not per se a sound reason. Their addition would either impose undue PAP administration requirements or require an unsound assumption that all 4-wire loops are DS-1 loops.

Liberty underscored that its conclusion was based upon the lack of evidence from AT&T to show that there is a very high rate of use of 4-wire loops for delivering high value services. Should there later be clear and convincing evidence during application of the QPAP amendment procedures that such use is made of 4-wire loops in excess of 75 percent of such loops leased as UNEs, the issue should be reconsidered during the application of the QPAP amendment procedures.

The Board endorses the conclusion reached by Liberty. The current record does not indicate a good way to determine if a 4-wire UNE will be used as DS-1 special access circuits, something that is within the control of the CLEC, not Qwest.

F. Measures Related to Low Volume, Developing Markets (Report p. 66; Qwest initial brief p. 29; Covad initial brief pp. 34-37; Qwest reply brief p. 23)

In Section 10.1 of the QPAP, Qwest limits its determination of "low volume, developing market" measures/sub-measures to CLEC aggregate data. Covad maintains that Qwest's aggregation approach is improper. If Qwest's concern in drafting this section is to ensure that CLECs with low volume order for "developing market" services receive some compensation in Tier 1, then the focus should be on Qwest's performance for each individual CLEC rather than on an aggregate basis. Not only does this ensure that each individual CLEC actually receive the appropriate Tier 1 compensation, but also it eliminates Qwest's ability to discriminate between CLECs and yet mask such discrimination by focusing only on CLEC aggregate performance.

Qwest responds to Covad's argument by suggesting that Section 10.0 of the QPAP ensures that certain services in "developing markets" receive extra compensation by application of a $5,000 minimum payment if Qwest misses a performance standard when aggregate CLEC volumes are greater than ten, but less than 100. Covad and ZTEL propose that the provision apply when individual CLEC volumes, as opposed to the aggregate CLEC volume, are less than 100. Covad's and ZTEL's proposal defies the distribution of CLEC volumes that was discussed extensively in the ROC PEPP collaborative and would cause the low volume, developing market provisions to apply long after markets are neither low volume nor developing, and, therefore, is not appropriate. For example, the actual CLEC data

(from February to May 2001) demonstrate that 96 percent of the time ordering and provisioning (OP) and maintenance and repair (MR) performance measurements have a CLEC volume of less than 100. The proposal is thus inconsistent with the concept of low volume, developing markets and is simply another attempt to extract additional money from Qwest. ZTEL's proposal is unprincipled and would result in what could be seen as discriminatory conduct, compensating some CLECs under one QPAP provision and other CLECs according to another QPAP provision merely because their monthly volumes are different.

Liberty concluded Section 10.0 of the QPAP has been designed to provide a minimum level of compensation in developing markets. The section provides for minimum payments of at least $5,000 per month for non-compliant service in cases where aggregate CLEC volumes are between 11 and 99. The ZTEL and Covad proposals would serve to change the nature of QPAP Section 10.

Aggregating CLEC volumes keeps the provision focused on developing markets. Making minimum payments to individual CLECs based on their individual order volumes would extend its applicability to small CLECs operating in very well developed markets.

Liberty concluded Qwest's design for Section 10 is an appropriate method for providing Qwest with an added incentive to perform in developing markets.

The Board endorses Liberty's conclusion that using aggregate volume numbers, under current Section 10.0, is a reasonable approach to keeping the focus of the compensation on developing markets.

G. Minimum Payments (Report pp. 67-68; Qwest initial brief pp. 32-34; WCOM initial brief pp. 34-35; Qwest post-report comments p. 13)

Small order counts will not produce significant payments under Qwest's PAP, according to WCOM. However, such discrimination may not have small consequences and could be a significant impediment to competition. A simple solution is to incorporate a minimum remedy of at least $2,500 per occurrence with no restrictions on sample size or products. Duration and severity factors would also be applied to allow for payments to adjust to the appropriate effective level.

Hypothetically, according to WCOM's argument, a CLEC having problems with Qwest's provisioning of its first 100 loops is going to delay a plan to launch 10,000 loops in two months and create even more customer dissatisfaction. The per occurrence remedies would be a small cost compared to what Qwest gains from slowing the competitor's ramp-up plans. In fact, Qwest may even make a profit from the CLEC even if it paid penalties for missing all of the 100 initial loop orders because of the monthly collocation charges that the CLEC pays whether the loops ever connect paying customers to those collocations sites.

A combined per occurrence and per measure approach is best for opening new markets to competition and ensuring that CLEC's new service offerings are not crushed at introduction with no substantial financial risk to Qwest.

Covad suggests, to the extent the state commissions permit Qwest "one free miss" for smaller sample sizes, such permission must be accompanied by the recognition that even one "miss" by Qwest easily could be enough to cause the

CLEC's customer to cancel service or decide not to initiate service with the CLEC. Thus, accommodation must be made in the QPAP for the fact that, for CLECs with fewer orders, the "miss" by Qwest is even more competitively significant. Without such accommodation, the QPAP will have limited utility to protect smaller CLECs from the adverse competitive impact of Qwest's discriminatory performance. At a minimum, therefore, where a CLEC has smaller sample sizes, the QPAP must include a minimum monthly payment to CLECs in the event there are any misses under a particular PID. Covad suggests that the particular Commission establish such minimum at five (5) times the baseline penalty amount selected.

Covad's justification for a minimum payment is based on its misconception of the QPAP provisions, according to Qwest. Covad claims that the QPAP gives Qwest "one free miss." The claim apparently refers to the mathematical adjustment in the QPAP that adjusts benchmark standards so as to prevent the standard from becoming 100 percent when CLEC volumes are five or less. For example, when there is a 90 percent standard but volumes of only five or less, a 90 percent performance level cannot be mathematically achieved. (At a monthly volume of five, only the performance levels of 100 percent, 80 percent, 60 percent, etc., are mathematically possible.) Under Covad's view, by not allowing one miss, the standard would effectively become 100 percent, *i.e.*, absolutely perfect performance.

Data from February to May 2001 showed that the "one miss" benchmark standard applied to less than 8 percent of all Tier 1 measurements. A situation that may or may not happen 8 percent of the time is no justification to apply a minimum

payment 100 percent of the time. Or put another way, Covad has offered no rationale whatsoever for applying minimum payments in 92 percent of the cases — quite apart from the well accepted statistical adjustment employed in the remaining 8 percent of the cases where it is applicable.

WCOM's proposal strays far from its small CLEC justification and is simply disingenuous. WCOM attempts to justify a minimum payment with speculation as to what might happen to a small CLEC with low volumes. However, its proposal is for a minimum payment that would apply to all CLECs, large and small, and for all ranges of CLEC volumes, low and high.

Moreover, a $2,500 per occurrence payment for the late installation of a service that sells for $20 per month would provide CLECs with a payment equal to over ten years of service for one miss. This would be equivalent to requiring a car dealer to give a customer the use of a leased vehicle for ten years if the dealer was a day late in delivering the car.

In its analysis, Liberty notes that it takes a relatively small number of instances of noncompliance to affect a very large portion of a small CLECs business operation. Thus, the ability to merely stay in business in Qwest's region can be more severely threatened by smaller numbers of noncompliant performance instances. However, compensating for that risk on a monthly basis and applying escalated payments to a higher base level of compensation are not rationally related to this risk factor. Thus, it would be appropriate to set an annual minimum payment that is a function of the number of months in which Qwest fails to meet performance standards.

Liberty noted that applying WCOM's revised 100 orders per month would produce a ceiling of 1,200 orders per year, above which minimum payment provisions should not apply. A minimum payment of $2,000 is more appropriate and should be applied per month for each month in which Qwest missed any measure applicable to such CLECs. The minimum payment should not be applied on a per measure basis. The minimum payment should also account for months in which volumes were more substantial, in order to assure that order placement is not influenced by month-end considerations. All QPAP payments to such CLECs for that month should count against that minimum. Liberty recommended the QPAP provide as follows:

> For each CLEC with annual order volumes of no more than 1,200, Qwest shall perform at the end of each year a minimum payment calculation. Qwest shall multiply the number of months in which at least one payment would be required to such CLEC by $2,000. To the extent that actual CLEC payments for the year are less than the product of the preceding calculation, Qwest shall make annual payments equal to the difference.

For example, if the total amount due to a qualifying CLEC before the application of this provision, counting escalation, were $5,000, and if there were nine months in which Qwest failed to meet a Tier 1 compensable standard for that CLEC, the additional amount that Qwest would pay to such CLEC at the end of the year (with other payments due for service during the month of December) would be 9 x $2,000 -$5,000 = $13,000. This approach also responds to the Qwest concern about the multiplying effect of escalation on minimum payments.

Qwest states that it vigorously disagrees with the need for any additional payment opportunities for small CLECs, but agreed to incorporate the changes into the QPAP at Section 6.4. The Board finds that Liberty's approach is a good balance between the relatively higher importance of each order for a small CLEC and over compensating all CLECs with some type of escalating minimum structure.

The Board should endorse Liberty's recommended change to QPAP Section 6.4 as incorporated by Qwest in its November 6, 2001, filing.

H. 100 percent Caps for Interval Measures (Report pp. 68-70; Qwest initial brief pp. 17-18; AT&T initial brief p. 26; ELI/Time Warner/XO initial brief p. 14; ZTEL initial brief p. 9; AT&T post-report comments pp. 35-39)

AT&T and ZTEL argue that the 100 percent cap on CLEC misses for interval measurements is unreasonable. However, Qwest suggests that both CLECs ignore that the 100 percent cap is intended to prevent CLECs from receiving payments for orders that they did not place. It is fundamental in a per occurrence payment structure that CLECs be compensated for no more than the number of units, *e.g.*, orders, firm order confirmations (FOCs), trouble reports, that they actually had. Otherwise CLECs would be compensated when these essential units never existed and at levels that are inconsistent with the pre-determined per unit payment amount. For example, if CLECs place 100 total orders and Qwest misses a two-day performance standard by three days for the entire batch, Qwest will be deemed to have missed the standard by 150 percent. Since the number of orders is then multiplied by the percentage of the miss (100 x 150 percent), Qwest will be liable for 150 missed orders, clearly an absurd result when CLECs only placed 100 orders.

Thus, the 100 percent cap merely prevents CLECs from recovering for orders that they did not place.

AT&T articulates the CLEC argument as being that the per-occurrence scheme for interval measurements should be sensitive to both the monthly volume of the CLEC orders and the deviation of Qwest's average monthly performance to a CLEC from the Qwest average monthly performance to itself. According to AT&T, the CLEC argument was not that the per-occurrence scheme should measure the number of individual misses and then to assign a severity level to each miss.

The issue at hand is with respect to the severity of Qwest's deviation of its average monthly performance to CLECs from its average monthly performance to itself. All participants recognize that severely poor Qwest performance to CLECs and the use of a per occurrence scheme can result in the number of payment occurrences exceeding the number of orders completed in a month. The issue is whether or not the payment occurrences should be capped at the number of CLEC orders. Qwest argues that they should be capped "to prevent the illogical result of CLECs being paid on more orders than they actually submitted." AT&T argued alternatively maintaining a cap "inappropriately protects Qwest from its own extremely poor and severe performance to CLECs."

The report recognizes ZTEL's argument that "eliminating Qwest's truncation is necessary to make sure that, as the severity of Qwest's non-compliant performance increases, so will the financial consequences associated with it." The CLEC's simple

argument, as indicated by AT&T's post-report brief, is that the worse the Qwest performance, the more Qwest should pay.

ELI/Time Warner/XO suggests that the AT&T and ZTEL proposals to eliminate caps are similar to service quality assessments that state commissions have used historically to encourage Qwest to improve its performance. Such assessments often take the form of a charge or credit (usually the recurring and/or nonrecurring rate for the service) that applies periodically (often every few days or hours, depending on the standard interval) until Qwest provisions the order or repairs the service. Far from demonstrating that that this well-established assessment mechanism results in excessive payments, Qwest's calculation of payment levels without caps demonstrates just how poor Qwest's performance has been. As is true of all payments under the QPAP, Qwest controls how much it makes in payments to CLECs. Once Qwest provides service to CLECs that is at least equal to the service Qwest provides to itself, Qwest will not have to make any payments for poor performance, including uncapped payments for held orders or delayed repairs.

ZTEL continues to argue that the QPAP places an artificial cap on its assessment of the severity of this disparity by truncating the difference in the means at 100 percent. In other words, consider OP-4, which will measure the average installation intervals for UNEs, a metric of critical concern to ZTEL, and assume that Qwest's average retail installation interval is one day. Under Qwest's proposal, its provision of service to CLECs an average of two days *would be treated the same* as providing service to CLECs an average of ten or even 20 days. Generally, the

sanction should be commensurate with the degree of severity. In the QPAP, that relationship does not exist.

According to ZTEL, Qwest justifies this irrational result with two arguments – both illegitimate. Qwest first argues that CLECs should not be compensated for more than 100 percent of its orders, as if the severity calculation for interval measures actually measured occurrences. As pointed out repeatedly by ZTEL's submissions, this argument is a *non-sequitor.* In short, the percentage difference between two averages *in no way* provides a measure of occurrences. Indeed, payment for a 400 percent means-difference (e.g., five days versus one day average installation interval) is quite different than paying a set amount for each "late" installation. Qwest's basis for objection simply makes no sense.

ZTEL continues by noting that Qwest's second argument articulates the core of their objection – they should not have to pay more than 100 percent disparity because CLECs are adequately compensated by that payment. This argument again is non-responsive. First, as discussed above, compensation to CLECs is not and should not be the focus of a PAP – providing an adequate incentive to comply with the law is the appropriate focus. As a result, a proper PAP should increase the penalties paid when Qwest's "miss" is "worse." Further, a simple solution to overpaying CLECs would be to direct funds to Tier 2. Qwest's failure to propose this obvious remedy is evidence that "overcompensating CLECs" is not a genuine concern – rather, Qwest simply wants to limit the effectiveness of the plan.

Volume issues make it necessary to somehow reflect in the payment calculations the number of occurrences involved. Liberty concluded that the CLECs who oppose the truncation incorporated into the QPAP implicitly accept this need, but they do not explicitly acknowledge it. In this regard, there is some irony in their allegations that Qwest's approach improperly seeks to introduce the concept of occurrences where it does not fit mathematically. According to Liberty, the better argument against Qwest's approach is that it fails to measure both the number of individual misses and then to assign a severity level to each of those individual misses.

Liberty noted that no CLEC who objected to the 100 percent truncation took this tack. Rather, having accepted the mathematical anomaly with which the QPAP begins, they chose instead a truncation approach as well; i.e., to cut off Qwest's continued use of per-occurrence based thinking on a measure that does not tell us anything about occurrences. Liberty suggested the following to demonstrate this problem: if a CLEC has ten orders and if the average Qwest interval for serving them is two days, we have no way of knowing (to list but two examples out of a vast number of possible ones) whether each of the ten was served in two days, or if nine were served in one day, while the other was served in 11 days. Yet this is precisely the kind of distribution information we would need to know if we were to accomplish what is the logically correct thing to do if the CLECs are right, which is to pay only for the misses and to create and pay for each miss according to an intelligently arrived at scale that escalates payments for the degree of the miss.

Liberty agreed that it may well prove to be the case that the actual distribution of numbers of misses and their extent makes the QPAP a less effective motivator of compliant performance than some other formula might. Evidence addressing number and length distribution would, in that presumed case, have gone a long way to supporting CLEC claims that different QPAP treatment would be appropriate to detect and to sanction poor performance. As we have none here, no change is yet appropriate. However, such distribution information and any recommended QPAP changes resulting from it should be open to consideration during plan amendment processes.

It appeared that Liberty missed the basic premise of the CLEC argument, which was that a 100 cap on interval measurements removes a payment increase factor that would incorporate the severity of the misses.

The Board directs Qwest to submit proposed language to remove the 100 percent cap on interval measurements from Section 8.2.1.2.

I. <u>Assigning Severity Levels to Percent Measures</u> (Report pp. 70-71; Qwest initial brief pp. 18, 20-21; ZTEL initial brief pp. 7, 12; Covad initial brief pp. 11, 16-17)

As discussed by Dr. Ford in his surrebuttal testimony, ZTEL argues that where a 99 percent benchmark has been established, it is to be expected that the CLEC will design its systems and processes on the assumption that Qwest will operate as specified with near certainty. Alternatively, with a 50 percent benchmark, the CLEC recognizes that the reliability of performance is akin to a coin toss, and the CLEC will design its systems and procedures accordingly. Obviously, Qwest's failure to deliver

on a 99 percent standard will wreck more havoc on the CLEC's systems and processes than a failure of the same difference magnitude on a 50 percent standard.

Further, ZTEL argues, the irrationality of Qwest's proposal is demonstrated if one simply re-states a benchmark from "percent on-time" to "percent late." That is, a "99 percent on-time" benchmark could just as easily be stated as a "1 percent late" benchmark. In this situation, being late on 5 percent of CLEC orders for this measurement indicates that Qwest had provided five times worse service than the benchmark prohibits, or 5x. In contrast, in the 50 percent benchmark measurement, a 5 percent miss represents only 0.1x – or fifty times less significant than a 5 percent miss on a 1 percent benchmark.

To account for this fact, ZTEL proposed a method to compute disparity for percent measures with the following equation:

$$\text{DISPARITY} = [A + B\ (X_Q - 0.50)] \times (X_Q - X_C)$$

Increased penalties based on both the severity of the missed performance, and the duration of the missed performance, are both required, according to Covad, because both are material. Severity increases clearly are necessary, but do not have to be complex to compute. For example, for severity increases for percentage measures, every additional 5 percent off the required percentage would get an increased penalty. Similarly, for interval measures every period past the interval would get an increased penalty. It is common sense that for bigger disparities in performance, there should be bigger penalties. Further, to recognize the severe impact to a CLEC of extremely high disparities in performance, once the severity gets

to a certain level (such as 30 percent worse than the required standard), the penalty should increase by a greater amount.

Covad urges no principled reason exists pursuant to which the escalated penalties should cease at some arbitrary point in time, as Qwest contends. The Special Master to the CPUC correctly recognized, "the incentive payments are not wholly punitive in nature because CLECs may well suffer increased harm to customer goodwill when problems continue [and, further] the initial payments may not adequately reflect harm imposed on the CLECs."

Qwest responded by noting that ZTEL proposes a specific mathematical formula to make Tier 1 payments more dependent upon the degree of miss from performance standards. ZTEL's suggested formula includes values equal to ten for "A" and 20 for "B." Qwest notes that at the hearing, ZTEL's witness, Dr. Ford, unequivocally disputed the notion that ZTEL proposed a specific formula with values for "A" and "B." Witness Ford described his testimony as merely putting forth "conceptual ideas." Qwest suggests this is the case because witness Ford has abandoned any defense of a specific recommendation and did not provide any rational economic justification for his formula or for the choice of numerical values for "A" and "B," the ZTEL proposal merits no consideration in this proceeding.

Qwest produced a quantitative analysis of the ZTEL proposal using actual CLEC performance results for the nine states that proves that the ZTEL proposal will produce nothing but a windfall to CLECs. Overall, applying the ZTEL mathematical formula and the ZTEL proposal to eliminate the 100 percent cap would have caused

annual Tier 1 payments alone to exceed the nine state 36 percent annual cap even though Qwest met 92 percent of all performance standards for the period February to May 2001. Qwest asserts its evidence proves without any doubt that the ZTEL proposals are entirely unreasonable and are designed solely to produce windfalls to CLECs. Witness Ford's attempt at the hearings to distance himself from the formula in his verified statement reflects his inability to refute the accuracy of Qwest's quantitative analysis. Qwest proposes that witness Ford's abandonment of his formula should end any consideration of the ZTEL proposal.

Liberty concluded that the dispute between Qwest and ZTEL over this measure did not focus on the correctness of ZTEL's formula in capturing the severity of misses of performance measures expressed as percentages. Rather, the problem appeared to be that the PEPP collaborative negotiated payment amounts that did not use this formula, and applying it now would have the effect of significantly increasing payment amounts. It would be inappropriate to graft the ZTEL formula as proposed onto base payment amounts negotiated at the collaborative. Had it been clear at the time of the PEPP collaborations that the base penalty amounts would be subjected to such a formula, it is reasonably certain to conclude that Qwest would not have agreed to those amounts.

Liberty agreed with ZTEL, that inserting different "A" and "B" values into the formula could substantially moderate its impact on the total payments that would be produced under Qwest's approach. Nevertheless, ZTEL made a specific proposal that has been shown to produce results that are: (a) out of keeping with the

negotiations at the PEPP collaborative, and (b) beyond reason in their financial impact. Had that proposal not so far overreached in its financial consequence, it might merit closer consideration for adoption at the present time. As it did, however, the forum for addressing QPAP changes on an ongoing basis should consider whether there are means for introducing the correlation ZTEL seeks between payments and severity of misses, without unduly altering the total payment expectations that came out of the PEPP collaborative process.

Liberty concluded it was not reasonable to expect the recommendation to be made by it to fine-tune the QPAP payment engine without the aid of input and comment from the whole range of interests who would be affected. In other words, open-ended, conceptual proposals were not looked on with favor. Liberty determined that in this case, the better approach was to allow that consideration to be made in a forum better suited to a full and detailed examination of how differing formulas would affect all of the participants. The Qwest proposal for the present provides an adequate means to detect and sanction poor performance in meeting measures expressed as percentages. For the future, QPAP review and amendment procedures will provide a suitable place for full debate about and consideration of a more adequately defined ZTEL formula.

The Board agrees with Liberty's conclusion that the addition of the ZTEL formula to the '"payment engine" without a thorough consideration and input from those it would affect should not be incorporated at the last moment. Additionally, as was demonstrated by Qwest, using the ZTEL formulas with the weights that ZTEL

had assigned, would have hit the 36 percent cap on Qwest payments within six months even if Qwest were at 92 percent compliance. The Board finds that adjustments to the weight factors could be made to lessen the impact of the formula but agrees with Liberty that the six-month review will allow the opportunity for a full debate and consideration of a more defined formula if needed.

The Board endorses Liberty's conclusion that it would be inappropriate to add the mathematical formula proposed by ZTEL to the quantification of Tier 1 payments.

IV. SELF-EXECUTING MECHANISM

The QPAP provides for self-executing Tier 1 payments to CLECs and Tier 2 payments to individual states (either state commissions or state general funds) in amounts that are based on monthly performance results. Qwest designed the Tier 1 payments to provide compensation to CLECS and to provide performance incentives to Qwest; the Tier 2 payments are intended to address the Qwest incentives goal. The payments under the QPAP are to be provided monthly, without any required showing of harm.

In each month, payments would first go to Tier 1, with any excess over those, up to 1/12th of the yearly cap amount (if a monthly cap is incorporated), going to Tier 2. Any excess Tier 1 and Tier 2 monthly amounts would roll forward for payment by the end of the year, subject to the annual cap.

A. Dispute Resolution (Section 18) (Report pp. 71-72; Qwest initial brief pp. 79-80; Qwest reply brief pp. 52-55; AT&T reply brief pp. 28-30; Qwest post-report comments p. 13)

Qwest added a dispute resolution provision specifically applicable to the QPAP. It would allow the general SGAT dispute resolutions to apply, but only in the event of disputes arising under QPAP Sections 13.3, 13.3.1, 13.7, 13.9, 15.1, 15.2, and 15.9.

ELI/Time Warner/XO argued that the limitations on the QPAP sections to which dispute resolution provisions would apply begs the question of how other disputes under the QPAP get resolved and recommended that all QPAP disputes to be resolved under the provisions of the SGAT or the applicable interconnection agreement. AT&T proposed that the Texas Plan language replace what Qwest proposed, and that the dispute resolution provision should apply to all the QPAP, not just the sections proposed by Qwest.

Qwest did not propose a dispute resolution mechanism for QPAP disputes that involve QPAP sections other than those it listed. All SGAT provisions, the QPAP included, require some method for independent resolution. Those resolution methods are not necessary (or appropriate) for changing the meaning of the SGAT or QPAP, but for interpreting what those provisions mean and how they should be applied when the participants differ.

Liberty noted that Qwest has accepted the use of the general SGAT dispute resolution provisions for the specified sections. Those provisions have no explicit exclusion for "de minimis" disputes, Qwest's indicated rationale for the separate

QPAP dispute resolution proposal, although there is no reason for concluding that disputes are likely to be less numerous or more substantial when applied to the SGAT.

Liberty found no reason the general SGAT dispute resolution sections are any less suitable for addressing QPAP provisions beyond those listed by Qwest. Therefore, it should be clear that the dispute resolution provisions of the SGAT apply to QPAP disputes involving CLECs who use the SGAT in its entirety or act to make the QPAP part of their interconnection agreements (i.e., the unique dispute resolution provisions of interconnection agreements should not apply).

Liberty concluded that AT&T's recommendation should not be accepted, because the Texas agreement refers to dispute resolution procedures that are a function of Texas Commission procedural rules and therefore may contemplate steps not applicable before the commissions participating here.

Qwest added the following language as Section 18.0 in its November 6, 2001, filing:

> For the purpose of resolving disputes over the meaning of the provisions of the PAP and how they should be applied, the dispute resolution provisions of the SGAT, section 5.18, shall apply whether the CLEC uses the SGAT in its entirety or elects to make the PAP part of its interconnection agreements (i.e., the unique dispute resolution provisions of interconnection agreements should not apply).

No participant filed comments following the report.

The Board adopts the recommendation of Liberty and approves the language of Section 18.0 shown above.

B. Payment of Interest (Report pp. 72-73; Qwest initial brief p. 39; Qwest post-report comments p. 16; AT&T post-report comments pp. 39-40)

As originally filed, the QPAP did not provide for interest on late payments. Qwest agreed that interest at the one-year Treasury rate would be appropriate on late payments, provided that the same rate would apply to overpayments and to underpayments. AT&T noted this agreement, but observed that Qwest had offered no provision incorporating it into the QPAP.

Liberty recognized that any payment delayed is certainly payment partially denied after the time value of money is considered, but determined that Qwest's proposal goes only part of the way to address the problem. It falls short insofar as it applies the United States Government's cost of money, when the value that must be replaced is that of commercial telecommunications entities. Their cost of money includes a mix of equity, long-term debt, and short-term debt. Short-term debt rates probably represent the best indicator of payments temporarily delayed through errors in billing or the pendency of disputes.

The need for a reliable pubic benchmark led Liberty to the conclusion that the QPAP interest rate should be the prime rate published daily by one of the numerous services or publications respected in the industry. Liberty opined the QPAP should provide for such interest as so posted for any payments made after the date due for any reason.

Qwest incorporated the recommended interest rate into Section 11.1 of its November 6, 2001, post-report comments.

AT&T argues that each state's statutory interest rate, or alternatively a rate set by the state commission as Qwest's cost of money, be inserted in lieu of the one-year Treasury rate, which AT&T said was likely to be low.

The Board directs Qwest to include language that provides for interest at the prime rate for payments made after the due date.

C. Escrowed Payments (Report p. 73; Qwest initial brief pp. 39, 77)

Covad argued that Qwest should either have to pay pending dispute resolution or to make payments to an interest-bearing escrow account. Having agreed to pay interest, Qwest objected to being required to place funds in escrow pending dispute resolution.

Liberty reasoned the provision for interest resolves the issue of the time value of money, absent concerns about credit-worthiness. Liberty did suggest there would be no harm and some potential benefit in including a provision that would allow a participant to require the other to make payments into escrow where the requesting participant can show cause, perhaps on grounds similar to those provided by the Uniform Commercial Code for cases of commercial uncertainty but did not include this as one of the recommended changes to the QPAP.

As determined in the immediately preceding issue, the Board directs Qwest to include language providing for interest for late payments. However, the Board does not see a need, at this time, for payments to be made into escrow.

D. Effective Dates

1. Initial Effective Date (Report pp. 73-75; Qwest initial brief pp. 80-83; Qwest reply brief pp. 27, 40-44; AT&T initial brief p. 28; WCOM initial brief p. 16; Qwest post-report p. 17)

AT&T and WCOM asked that the QPAP become effective when a state public service commission issues its consultative report to the FCC. The stated goal of such a requirement is to prevent backsliding while the FCC considers a Qwest 271 application. ELI/Time Warner/XO and Covad argued that the QPAP should become effective immediately.

Qwest proposed that the QPAP be effective state-by-state as of the date when FCC approval of an application for authorization to provide in-region interLATA services is received for that state. Qwest proposed this date because it offered the QPAP as a means for assuring compliance after it gets such approval, and because there are significant issues concerning the statutory authority of the state commissions to order its application under state law, independent of section 271 considerations. Qwest noted that the QPAP is self-executing; it does not even require a complaint.

There are sufficient methods for addressing Qwest performance pending FCC consideration of a 271 application. As Qwest pointed out, there already exists an opportunity for states and CLECs to supplement the record made in these workshops with evidence that is current through the comment period at the FCC. Qwest also argued that it will have more than sufficient incentive not to backslide while its 271 application is pending before the FCC.

Qwest suggests Covad erred in arguing that the Telecommunications Act of 1996 gives states authority to impose self-executing payment programs. Qwest also objected to Covad's claim that Qwest's consent to impose the QPAP generally could be inferred; Qwest cited the explicit condition it has placed on its agreement to be bound; i.e., its prior receipt of in-region, InterLATA authority under section 271.

ELI/Time Warner/XO claimed the issue of state commission authority to order institution of the QPAP was not material, because the state commission role in approving a SGAT and providing a consultative recommendation to the FCC would allow it merely to withhold approval or endorsement failing Qwest's agreement to make the QPAP effective immediately. As a minimum provision, ELI/Time Warner/XO suggested the state commissions should require monthly reports of payments that would have resulted under the QPAP had it been in effect earlier than 271 approval.

Liberty concluded that Qwest's consent to the immediate effectiveness of the QPAP could not be implied from any action it has taken, but did not see that such consent was necessary, because the issue is not whether state commissions can implement something like the QPAP under their own authority. The issue more accurately stated is whether the state commissions should tell the FCC that they consider the QPAP sufficient to meet the public interest standard even if it is not made effective prior to FCC approval of a 271 application.

Liberty noted that PAPs were not part of the landscape when BOC obligations were being addressed in the context of mediations, arbitrations, and SGAT

approvals. No participant has cited FCC support for such a thing outside the context of 271 approval. The very reason cited by the FCC in support of the adoption of a PAP is the need for assurance that local exchange markets will remain open **after** Qwest may receive the power to provide in-region interLATA service. Given the reasonably long history of operating without PAPs in the pre-271 context and given the purpose ascribed to them, it is logical to conclude that it should become effective when the QPAP proposes, absent special circumstances.

The only circumstances cited that might suggest that an early effective date is appropriate were by the NMAS, which argued that there is a risk of deteriorating performance because Qwest can present a dated record of more adequate performance to the FCC, while allowing more current performance to deteriorate. No other participant cited any special circumstances. The risk of short-term backsliding is mitigated by the fact that current information can and presumably will be provided to the FCC should it be relevant. The virtual certainty that such information will become a part of the FCC's deliberations means that there is no change in Qwest's current incentives.

Liberty next considered the issue of whether Qwest should report performance and presumed payment levels before any grant of 271 approval. Liberty found that recommendation to be sound, suggesting that it would provide focus to the interim performance information that was of concern to the NMAS. Liberty also opined that such interim reporting would be helpful in acclimating CLECs to the QPAP reports, to their independent confirmation efforts, and to the general relationship that exists

between the performance they are receiving and the payments they are getting. Liberty therefore recommended the QPAP require Qwest to provide monthly QPAP reports as if the QPAP had become effective on October 1, 2001.

Qwest has been providing, on a monthly basis, reports as recommended by Liberty. Attached to this memo as Attachment B are the most recent reports provided by Qwest for Iowa performance under its proposed QPAP (as filed November 6, 2001).

The Board agrees with the Liberty recommendation that Qwest provide monthly QPAP reports as if the QPAP were currently effective, but does not see the addition of this requirement to the language of the QPAP to be necessary. Adding a requirement to a document that something be provided **prior** to the effective date of that document would technically have no effect. Qwest has agreed and is providing the monthly reports. It would be more appropriate to simply direct Qwest to continue to provide the monthly reports, without requiring the addition of the requirement to the language of the QPAP.

The Board directs Qwest to continue to provide monthly reports as if the QPAP were currently in effect. No payments would be made, or obligation incurred, under the QPAP until it becomes effective following approval by the FCC of an application under section 271 of the 1996 Telecommunications Act.

2. "Memory" at Initial Effective Date (Report p. 75; Qwest initial brief pp. 83-84; Qwest reply brief p. 44; AT&T initial brief pp. 23-24; AT&T reply brief p. 31; AT&T post-report comments pp. 40-41)

AT&T argues that once the QPAP becomes effective it should effectively calculate performance for as many prior months as are necessary to provide that escalated, rather then baseline, payments apply from the first month. WCOM claims that without this "memory" of pre-effective date performance, there would be insufficient incentive to Qwest and a failure to meet the FCC requirement that poor performance be sanctioned when it occurs.

Qwest opposes such "memory" requirements as being no different conceptually from one recommending the imposition of QPAP payment requirements before 271 approval.

Having decided that the QPAP should be limited to performance post-dating section 271 approval and that other remedies apply before that time and thereafter for CLECs not opting into the QPAP for compensation purposes, Liberty determined it would be inappropriate to start the QPAP payment structure in "mid-stream." The Board agrees with Liberty's conclusion that the effect of such a requirement would be to mix remedies inappropriately, given that CLECs retain for the historical period in question (i.e., prior to Qwest's 271 approval) whatever remedies are applicable under their existing interconnection agreements.

The Board endorses Liberty's conclusion that it would be inappropriate to reach back to "pre-271" performance to provide for escalated payments in the first month the QPAP is effective.

3. PAP Effectiveness if Qwest Exits InterLATA Market (Report p. 75; AT&T initial brief p. 14; ELI/Time Warner/XO initial brief p. 21)

AT&T and ELI/Time Warner/XO recommended that Qwest be required to continue the QPAP payment obligations should Qwest exit the in-region, interLATA market.

For the same reasons that the QPAP should only be effective upon entry by Qwest into that market, Liberty determined the QPAP should terminate upon the end of Qwest's authority to serve that market. No participant filed comments following the issuance of Liberty's report.

The Board agrees with Liberty's conclusion that continuing QPAP payment obligations following an exit by Qwest of the in-region, interLATA market would be inappropriate.

E. QPAP Inclusion in the SGAT and Interconnection Agreements (Report p. 76; WCOM initial comments p. 3; Qwest post-report comments p. 17)

WCOM noted that Qwest failed to address the question of how the QPAP should be made a part of the SGAT in its initial QPAP proposal.

Liberty agreed with the need for some SGAT context for the QPAP. Liberty also suggested there should be clarity about the scope of what a CLEC with an interconnection agreement would be required to elect. Liberty recommended that Qwest's post-report comments address these issues.

Qwest responded in its post-report comments by indicating its intention that the QPAP will become Attachment K to the SGAT. Alternatively, if a CLEC wishes to

opt into the QPAP, Qwest suggests it must do so through an amendment to its interconnection agreement. The amendment must include both Attachment K (the QPAP) and Attachment B (in lieu of other contractual standards and remedies), at a minimum.

The Board adopts the process outlined in Qwest's post-report comment for inclusion of the QPAP in the SGAT as well as its stated process for adoption of the QPAP as an amendment to current interconnection agreements.

F. Form of Payment to CLECs (Report p. 76; Qwest initial brief p. 39; Qwest reply brief pp. 28-29; WCOM initial brief p. 14; Covad initial brief p. 40; Qwest post-report comments p. 16)

As initially proposed, the QPAP provided for QPAP payments to be made by bill credit, rather than by cash or check. Qwest argued that it would not be administratively efficient to provide for payment by check. Qwest agreed, in its reply brief, to commit to a sample bill credit format, which it said would obviate any concern about the ability to identify the source and calculation of the credits. Qwest also pointed out that the QPAP provides for the use of wire transfers in cases where a CLEC's PAP credit exceeds the amount it owes Qwest.

WCOM recommended that QPAP payments be made by monthly checks. Covad requested that payment forms be limited to cash or check. Covad also asked that there be no offset of any payments due for unrelated debts of CLECs.

Liberty concluded the CLEC arguments about the administrative convenience of requiring payment by the equivalent of cash were not persuasive, suggesting that the CLECs missed the point that it would be inappropriate to require Qwest to make

payments to CLECs in cases where CLECs were not current in paying Qwest for the same kinds of services. Liberty determined the QPAP provision was appropriate, in that it provides for a cash-equivalent transfer when there is not a sufficient CLEC amount due to offset the credit.

Liberty indicated its conclusion that Covad’s concern about other CLEC debts was not pertinent to this discussion. The crediting approach applies to the bills issued under the SGAT or interconnection agreement. Any other arrangements between Qwest and a CLEC must be addressed by the terms of those agreements, not the QPAP. Liberty recommended the QPAP require Qwest to provide credit information in substantially the form of the sample it provided as Exhibit S-9-QWE-CTI-4 during the multi-state workshop process, absent state commission consent to change it.

Qwest filed the following amended Section 11.2, incorporating Liberty's recommendation:

> Payment to CLEC shall be made via bill credits. Bill credits shall be identified on a summary format substantially similar to that distributed as a prototype to the CLECs and the Commissions. To the extent that a monthly payment owed to CLEC under this PAP exceeds the amount owed to Qwest by the CLEC on a monthly bill, Qwest will issue a check or wire transfer to CLEC in the amount of the overage. Payment to the State shall be made via check or wire transfer.

The Board adopts the recommendation of Liberty and approves the language submitted by Qwest in its November 6, 2001, post-report filing.

V. ASSURANCES OF ACCURACY OF REPORTED DATA

A. Audit Program (Report pp. 77-82; AT&T initial brief pp. 15-16; Covad initial brief pp. 34-36; Qwest post-report comments pp. 14-15)

AT&T suggests that quite possibly the most major deviation from the Texas Plan surrounds the issue of audits. Pursuant to § 6.6 of the Texas Plan, once the participants have consulted with each other in an attempt to resolve any data accuracy or integrity issues, the CLEC may have "an independent audit conducted, at CLEC expense, of (the ILEC's) performance measurement data collection, computing, and reporting processes." If the audit determines that there was a problem or issue with the ILEC data, the ILEC would reimburse the CLEC for the audit. This is in addition to the review and revision process found elsewhere in the Texas Plan.

The QPAP, as proposed by Qwest, would substantially limit "(the possibility of a performance data audit) to two audits per calendar year for the entire Qwest Region per CLEC." Further, the limitations would also be restrained to no more than two performance measurements per audit. Further, unlike the Texas Plan, "Qwest may request an independent audit."

Liberty reasoned that given the nature of Qwest services and performance measurement systems and processes, it is reasonable to conclude that there will be substantial commonality among the states making it appropriate for the QPAP to support common efforts to provide the assurances that Qwest's measurements remain reliable. Liberty recognized the need for each state to retain the ability to

assure attention to its particular needs and circumstances, noting that this objective could be met without unnecessary duplication of testing efforts by designing and implementing them on a common basis.

Liberty suggested there be a process for brief, regular meetings (i.e., once per quarter) between Qwest and the independent auditor (whose selection and responsibilities are more fully discussed below). The purpose of these meetings between Qwest and the independent auditor should be to allow Qwest to report on and the auditor to ask questions about changes made in the Qwest measurement regimen. The meetings should then produce reports by the auditor to the state commissions and, where the state commissions deem it appropriate, other participants.

Liberty suggests that the results of the meetings would permit the auditor to make an independent assessment of the materiality and propriety of any Qwest proposed change, including, where necessary, testing of the change details by the auditor. These meetings would supplement, but not replace, the other change management and notification methods by which Qwest would make other participants aware of what it considered to be significant changes to its measurement regimen. Other participants would be free to communicate with the selected auditor any concerns about such changes.

With respect to auditing and testing, Liberty noted that Qwest has accepted the two-year planning cycle proposed by Liberty as part of its performance measures audit (as part of the ROC OSS testing process). Liberty's recommended approach

contemplated the adoption of a formal plan identifying the specific aspects of performance measurement to be tested, the specific tests to be conducted, and the entity to conduct them. Central to the planned and cyclical approach is that higher risk areas should be audited more frequently, but that even lesser causes of risk should periodically be tested. Each two-year cycle would examine risks likely to exist across that period and the past history of testing, in order to determine what combination of high and more moderate areas of risk should be examined.

Liberty recommends that the audit planning and auditor retention work should provide for Qwest and CLEC input to the state commissions, in order to promote their confidence in the work to be performed and the resources performing it. In some cases, however, the audit plan might require confidentiality for certain test activities where advance notice could compromise their efficacy.

Another role of the auditor, recommended by Liberty, should be to assess the need for individual audits proposed by CLECs. Those audits should be available for CLEC-specific concerns or issues not otherwise addressed by the plan for the current cycle. Qwest's testimony recognized the need to avoid unnecessary duplication, but its method of minimizing it was arbitrary. The independent auditor should review CLEC requests for audits, with dispute resolution available to any participant questioning the auditor's recommendation. Absent dispute, the auditor would carry out any CLEC-requested audits whose need the auditor accepted; the participants could ultimately accept or challenge results or the determination of need for the audit

through available dispute resolution methods. The auditor's tasks should include determining:

- General applicability of findings and conclusions (i.e., relevance to CLECs or jurisdictions other than the ones causing test initiation).
- Magnitude of any payment adjustments required.
- Cost responsibility for the tests performed, with the test being the materiality and clarity of any Qwest non-conformance with measurement requirements (no pre-determined variance is appropriate, but should be based on the auditor's professional judgment).

Liberty suggested the states address their individual needs during the planning process and could, should they choose to do so, require additional testing in the event that a commonly derived plan fails to meet the state commissions needs, although Liberty would not anticipate that such a unilateral approach would be often requested or required.

Liberty concluded payment of audit program costs constitutes a sound use of Tier 2 payments and recommended Qwest fund in advance the costs of the first two-year cycle, with amounts to be refunded from Tier 2 payments as they accumulate. In the event that this Tier 2 funding should prove insufficient to meet the requirements of the program, half of any uncompensated amount advanced by Qwest should be returned from the ensuing two-year cycle's Tier 1 escalated payments, to be shared by CLECs according to their pro rata share of Tier 1 escalated payments from that prior cycle. Qwest should absorb any leftover amounts not capable of recompense out of Tier 2 and escalated Tier 1 payments as described above.

Qwest indicated in its post-report comments that it has incorporated the details and the spirit of the audit provisions outlined by Liberty. There are, however, specific areas of concern on Qwest's part, which resulted in the insertion of several key concepts in Qwest's November 6, 2001, filing which were not included in Liberty's recommendation.

Qwest added a section which requires the independent auditor to coordinate with other audits so as to avoid duplication and not impede Qwest's ability to meet the requirements of other provisions of the QPAP. Of greatest concern to Qwest is that an audit might impede Qwest's ability to operate under the time lines and due dates for collecting and processing data, publishing performance results, and calculating QPAP payments. Qwest stresses that it is imperative that the audit plan and its operation not be such as to impede Qwest's day-to-day performance under the QPAP regime.

The conduct of, and the results from, the independent audit certainly have the potential to be subject to disputes. It would appear reasonable that the audit provisions provide a process for handling such disputes.

With respect to decisions of the independent auditor as to whether to conduct or not conduct a CLEC proposed audit, Liberty did not propose a decision criteria based on materiality. Qwest added such a materiality criteria as it relates to data discrepancies. It would be reasonable that small data discrepancies, alone, should not be the basis for an audit.

While it was not specified in Liberty's recommendation, Qwest added a provision that a CLEC proposed audit would not begin while a dispute resolution process was pending. The Board agrees that such a provision would appear to be logical.

Qwest also added a provision that a CLEC may not propose an audit of data more than three years old. Such a provision is in keeping with the provision in Section 14.4 of the QPAP that Qwest not be required to keep data beyond three years. This addition appears to be appropriate.

The following is a summary of the various recommendations of Liberty and the insertion by Qwest of language into the QPAP on the various audit issues and suggestions:

- Audits of the PAP shall be conducted in two-year cycles under the Auspices of the Commissions. (15.1)
- The Commissions will form an oversight committee of Commissioners who will choose the independent auditor and decide any disputes over choice of auditor or disputes. (15.1.1)
- The audit plan will give priority to high risk areas identified in the OSS report. (15.1.2)
- Coordination with other audit plans being conducted by other state commissions to avoid duplication. (15.1.3)
- Qwest may make management processes more accurate or more efficient at Qwest discretion but must make the auditor aware of changes in quarterly meetings between only Qwest and the auditor, but the information from these meetings will be made available to the Commissions. (15.2)

- If Qwest or CLECs disagree on any issue regarding the accuracy or integrity of data collected, generated or reported pursuant to the PAP, Qwest and the CLEC will attempt in good faith to resolve the issue. After 45 days upon a demonstration of good cause (e.g., evidence of material errors), either participant at their expense may request an independent audit to be conducted. The dispute resolution provisions of section 18 are available to any participant questioning the independent auditors decision whether or not to conduct an audit. (15.3)

- Expenses for the audits will paid out of Tier 2 funds in the Special Fund and any remaining expenses will be paid by one half from Tier 1 funds in the Special Funds and one half by Qwest. (15.4)

With regards to the sections outlined above, the Board is in agreement. This audit structure allows for independence of the auditor and final review authority to the Board. The Board agrees with Liberty's conclusion that an oversight committee of the state commissions should coordinate the data audit.

The Board has concerns related to Section 15.5 as filed by Qwest in that it sets up Qwest to be the final judge of a Qwest initiated investigation of any second Tier 2 misses. Section 15.5 states:

> Qwest will investigate any second consecutive Tier 2 miss to determine the cause of the miss and to identify the action needed in order to meet the standard set forth in the performance measurements. To the extent an investigation determines that a CLEC was responsible in whole or in part for the Tier 2 misses, Qwest shall receive credit against future Tier 2 payments in an amount equal to the Tier 2 payments that should not have been made. The relevant portion of subsequent Tier 2 payments will not be owed until any responsible CLEC problems are corrected. For the purposes of this sub-section, Tier 1 performance measurements that have not been designated, as Tier 2 will

> be aggregated and the aggregate results will be investigated pursuant to the terms of this Agreement.

The Board is concerned about decision power being accorded to Qwest on Qwest's own investigation as well as the credits which Qwest would be given control over. The Board will direct Qwest to submit language that require findings from its investigations be submitted to the auditor who reports to the committee of state commissions and that the auditor then decide the merits of the Qwest findings.

The Board approves Qwest's proposed language as filed on November 6, 2001, which incorporates the goals, objectives and proposed procedures recommended by Liberty, except for the language of Section 15.5 related to Qwest's ability to incorporate bill credits based on its own investigations. The Board directs Qwest to file proposed language incorporating the additional requirement that it submit findings from its investigations to the auditor who would then make a determination regarding the appropriateness of bill credits.

B. PUC Access to CLEC Raw Data (Report pp. 82-83; Qwest initial brief p. 78; AT&T initial brief p. 28; Covad initial brief p. 33)

AT&T notes that in the QPAP proceeding, Qwest witness Inouye indicated that he did not have an issue with the need for CLEC-specific performance data to be protected and treated as confidential. In fact, witness Inouye agreed that there should be some provision in the QPAP to protect such CLEC data. AT&T raises concern that Qwest refused to strike the portion of QPAP Section 14.2 related to distributing individual CLEC raw data to the relevant state commission. AT&T is concerned that there are no provisions for the confidentiality of that data during or

after the transfer. AT&T argues that state commissions have provisions to obtain CLEC specific data directly from the CLECs, thus making it unnecessary for Qwest to provide such information. AT&T requests that the provision in question be stricken.

Pursuant to Section 14.2, the CLECs would authorize Qwest, upon a state commission's request, to provide the state commission with CLEC data so that the state commission is able to analyze the QPAP results and evaluate whether Qwest is performing adequately. AT&T argues that Qwest should not be permitted to provide the CLEC data to the state commissions; rather, the state commissions should be required to approach the various CLECs directly to gather this information.

Qwest suggests that since it is Qwest's compliance with the QPAP that will be at issue, Qwest must be allowed to provide the information directly, without the concern of tampering or a delay in the information being provided. Because Qwest recognizes that portions of these performance results may contain confidential CLEC information, however, Qwest did not oppose adding language to Section 14.2 to indicate that the information would be provided to the state commission on a confidential basis. Of course, once the state commissions receive the information, Qwest would have no control of, nor responsibility for, the Commission's continued treatment of the data as confidential.

Liberty acknowledged that state commissions have legitimate needs for the data at issue and found no sound reason for subjecting them to the potentially significant burdens of seeking such information from individual CLECs. Each state has existing procedures for the treatment of confidential information. Moreover, each

state should retain existing authority to determine what kinds of information ultimately will remain confidential. Liberty addressed a similar issue regarding the provision of confidential CLEC data to state commissions in connection with the unresolved issue Access of Qwest Personnel to Forecast Data in its September 24, 2001, report.[9] Liberty previously recommended language for SGAT Section 5.16.9.1.1, which the Board adopted. Liberty recommended that similar language be inserted into the QPAP, specifically:

> Pursuant to the terms of an order of the Commission, Qwest may provide CLEC-specific data that relates to the QPAP, provided that Qwest shall first initiate any procedures necessary to protect the confidentiality and to prevent the public release of the information pending any applicable Commission procedures and further provided that Qwest provides such notice as the Commission directs to the CLEC involved, in order to allow it to prosecute such procedures to their completion.

Qwest added the recommended language to Section 14.2 of the QPAP in its November 6, 2001, post-report comments. In addition, Qwest inserted the following sentence:

> Data files of participating CLEC raw data, or any subset thereof, will be transmitted, without charge, to the Commission in a mutually acceptable format, protocol, and transmission form.

No CLEC commented on Liberty's recommendations. The Board endorses the recommendation of Liberty, as well as the addition of the language in Section 14.2 of the QPAP by Qwest.

[9] Addressed by the Board in its Conditional Statement issued March 12, 2002, at pages 37-39.

The Board approves the new Section 14.2 as filed by Qwest on November 6, 2001.

C. Providing CLECs Their Raw Data (Report p. 83; Qwest initial brief p. 63; WCOM initial brief p. 14; AT&T reply brief p. 21; Covad reply brief p. 14)

WCOM argued Qwest should be required to store all CLEC records with specific data relevant for QPAP measurement and payments purposes, including exclusions, in an easy-to-access electronic form for three years after such records have been produced and for an additional three years in an archived format. According to WCOM, a CLEC should have the right to request access to the raw data and business rules used to generate the reports as part of the data reconciliation process.

AT&T raises concern that in its brief and throughout the proceeding, Qwest refused to place a timeframe on its proffering of raw CLEC data suggesting that Qwest compiles this data in many different formats apart from the regulatory context and a timeframe to provide the data is required. Without such a time requirement, AT&T argues the provision is meaningless since Qwest could provide the data three years from the date of request and still be in compliance. AT&T suggests the damage to CLECs is obvious. CLECs are requesting the data for a purpose, to assure that Qwest is complying with the requirements of its interconnection agreement and the Act. If Qwest prolongs the provision of the underlying data, CLECs will not have access to data that could establish the violation of Qwest's contractual and/or regulatory obligation. Accordingly, additional damages could be

accruing while the CLECs await the data. AT&T proposed that Qwest be required to provide the data within two weeks of a request.

Covad requests that "code and process" documentation be provided during the data reconciliation process arguing in the absence of the basic information that determines how Qwest captures its data and then reports it under the PIDs, there is no way by which a CLEC can reconcile its data with Qwest's data. Even more egregious, according to Covad, is that by refusing to provide this information, Qwest forces a CLEC to incur the costs of an audit to obtain basic information necessary to reconcile data, thereby creating the substantial possibility that Qwest will evade any data challenges due to CLEC financial resource constraints.

Qwest agreed to make CLEC raw data available upon CLEC request. However, Liberty determined that it is unreasonable to set an arbitrary deadline (and accompanying payment for failure to meet that deadline) by which Qwest must provide the data. The time needed to produce the raw data is dependent upon a number of factors, including ones beyond Qwest's control, including the circumstances of the request, the timing of the request, and the extent of data requested. AT&T has provided no evidence that Qwest's proposal to provide data within a mutually acceptable time frame is unreasonable. Moreover, AT&T has failed to identify any harm that a CLEC could incur if it receives the data after two weeks. AT&T's arbitrary two-week deadline and late report type payment is simply unreasonable and has no relationship to the FCC's expectation that a PAP will contain assurances of accurate data.

Liberty concluded that Qwest should be obligated to provide the data as soon as it feasibly can, but reasoned that more specific deadline language would not respond to the need for flexibility given the size or nature of the requests that Qwest may face. Nothing in the QPAP limits those requests sufficiently to justify firm response deadlines.

Liberty determined that the QPAP should provide retention periods for underlying records. In considering the appropriate period of retention, Liberty pointed out that the three years recommended by WCOM appeared at first blush to be a very long period, considering the kinds of information and the potentially vast amounts of it, but recognized that the auditing and testing work to be made a part of the QPAP may uncover not only needs for future changes, but may lay a basis for CLEC requests for recalculation of prior payments.

Liberty recommended the QPAP should allow payments to be recalculated retroactively for three years (from the later of the provision of a monthly credit statement or payment due date) and it should require Qwest to retain sufficient records to demonstrate fully the basis for its calculations for long enough to meet this potential recalculation obligation. CLEC verification or recalculation efforts should be made reasonably contemporaneously with Qwest measurements. Liberty concluded it is sufficient to require Qwest to maintain the records in a readily useable form for one year, with the remainder of the required records retained in archived format for another two years.

Liberty found Covad's request for computer code and process information to be overly broad, but did recommend that the QPAP include a provision that Qwest's distribution of CLEC-specific data be in a form that will allow CLECs to be able to identify its nature and content, and that it be in a form that will allow CLECs to undertake the same kinds of calculations performed by Qwest.

The Board agrees that Qwest should make the CLECs data available to it as soon as possible following a request for the data, to enable a CLEC to begin its own reconciliation of Qwest's calculation. Though Liberty states that Qwest is obligated to respond quickly to such requests, it recommended that specific timeframes should not be set. Liberty suggests that flexibility is required in response time to provide this data because of the possibility of a large number and size of requests. The Board will accept this approach, however, specific timeframes in the future may be necessary should this flexibility become problematic.

The Board agrees that a retention time of one year in a readily usable form followed by a period of retention in an archived format is sufficient. Qwest has agreed to this provision and has added language at Section 14.4 of the QPAP, as follows:

> To the extent that Qwest recalculates payments made under this PAP, such recalculations shall be limited to the preceding three years (measured from the later of the provision of a monthly credit statement or payment due date). Qwest shall retain sufficient records to demonstrate fully the basis for its calculations for long enough to meet this potential recalculation obligation. CLEC verification or recalculations efforts should be made reasonably contemporaneously with Qwest measurements. In any

> event, Qwest shall maintain the records in a readily usable format for one year. For the remaining two years, the records may be retained in archived format. Any payment adjustments shall be subject to interest rate provisions of section 11.1

The Board adopts the recommendation of Liberty and the language filed by Qwest as shown above.

D. Late Reports (Report pp. 84-86; Qwest initial brief pp. 37-38; ZTEL initial brief p. 34; Covad initial brief p. 45; AT&T reply brief p. 16; WCOM reply brief p. 3)

Qwest's proposed Section 14.3 included a provision for a per-day late report payment of $500, which it viewed as providing sufficient incentive to report on time. Qwest pointed to the number of states for which payments would be required and the relationship between payment amounts and the number of days that reports are late. Qwest cited as an example the $70,000 total payment that would apply across the 14 states for a report filed ten days after the end of the grace period provided for in the QPAP.

WCOM proposed the following payment schedule for late, incomplete, and incorrect reports:

- $5,000 per day for late reports
- $1,000 per day for incomplete reports
- $1,000 per day for reports later revised by Qwest
- $1,000 per day for reports for which a CLEC cannot gain access to its data underlying the reports due to reasons within Qwest's control.

WCOM argued that its proposal would not unduly penalize Qwest, noting that the QPAP contains a five-day grace period and an opportunity to escape penalties when it can show that the cause of the delay was outside its control. WCOM also noted that the Texas commission set a $5,000 per day payment for Texas alone, even though SBC also serves in other states that could apply additional penalties.

ZTEL urges the QPAP be modified to provide an incentive to provide all reports to CLECs on a timely basis suggesting the current proposal does not provide an incentive to complete as many reports as possible on-time. ZTEL insists that Qwest has the incentive to file all reports to a CLEC late when it becomes apparent that one report will be late. To repair this incentive, ZTEL has proposed that Qwest pay $100 for each day that each individual report is late.

Covad demanded that in addition to penalties for late reporting, the QPAP must be revised to require the imposition of mandatory penalties where Qwest provides inaccurate reports, even where later corrected. Covad states the cornerstone to an effective, reliable and durable PAP is accurate reporting. In the event that Qwest erroneously reports its results under the PIDs, whether intentionally or not, Qwest simultaneously opens the door to escaping the liability to which it is fully and fairly subject, while closing the door on competition in its local markets. Moreover, the potential for erroneous reporting, corrected by a CLEC but without the provision of any compensation, unfairly places the burden on CLECs to ensure correct and accurate reporting. Finally, without creating any incentive on the part of Qwest to ensure accurate and reliable reporting, Covad suggests CLECs are cast in

the roll of "bird dogging" Qwest, continually responsible for reviewing and monitoring Qwest's monthly performance reports.

AT&T proposed the adoption of the Texas approach, which would include higher payments and would eliminate the grace period provided for in the QPAP.

Qwest responded by noting that the CLEC proposal to apply the penalty to each report (counting unique CLEC and state reports) could produce a $4.2 million payment for the same ten-day example that would cost Qwest $70,000 under Section 14.3 as now written.

Qwest indicated that WCOM was in error in asserting that the Texas Plan included payments for the revision of data or for data access. Qwest also pointed out that the $5,000 per day payment would yield a $700,000 (ten times the QPAP amount as proposed) for a single monthly set of reports that were filed ten days after the end of the grace period and suggested the CLEC proposals provided compensation well out of proportion with the related harm, because QPAP payments were due independently of a report's filing. Qwest noted CLECs could still get access to their underlying data and request audits, regardless of whether reports arrived on time.

Liberty concluded that requiring payments for inaccurate reports was troublesome. Noting the vast number of measures required by the QPAP, Liberty reasoned it is not realistic to expect that no report would ever contain a measure that would later require restatement. Additionally, Liberty raised concern that the CLEC proposals provided no guidance in determining what is an adequate level of

accuracy; i.e., the level at which no payment would be required and the payment scale that would properly correlate to the severity of any inaccuracy.

Moreover, Liberty contended the QPAP should **encourage** correction where warranted, not discourage it by imposing potentially severe penalties. The better way to deal with the accuracy of reports is to include the issue of report accuracy into the risk analysis used to formulate audit plans.

Liberty was similarly skeptical of liquidated payments for an inability to meet deadlines for providing a CLEC with its specific data and concluded such payments were unwarranted. Liberty recommended the auditing program consider CLEC-specific and CLEC-aggregate data in its planning.

As to the appropriate payment levels, Liberty concluded that ZTEL's proposal would produce penalties that are unreasonable on its face. While it found the Texas payment approach to bear a much closer relationship to what is reasonable, it also considered the fact that Qwest, unlike SBC (which includes both the old Southwestern Bell and Ameritech states), is approaching its 271-authorization process on a regionwide basis. The Texas Commission and the FCC may not yet have considered the effect of accumulating payments from the same reporting process, but that does not mean that they will not consider this issue if the number of SBC states where 271 approvals have been granted grows.

Liberty thus found it reasonable to examine payments in the context of the way that Qwest will make reports, which is on a 14-state consolidated basis, rather than on an individual report basis. Assuming all 14 states, the payment levels that Qwest

proposes are substantial, but Liberty suggested that a question still existed about whether an inducement of even that magnitude would be sufficient. The $70,000 payment that Qwest used as an example is not large when compared with the amount of time and effort that will be necessary to produce QPAP monthly reports. Liberty concluded that payments at that level should be sufficient to deal with small delays, but should escalate over time. Recognizing that the QPAP already includes a grace period of one business week (five days), Liberty recommended the payments escalate as follows:

- Second-week reports: $500/day
- Third-week reports: $1,000/day
- Subsequent-week reports: $2,000/day.

Liberty reasoned that Qwest would still remain protected against undue growth in payments by virtue of its ability to seek a waiver of late-report payments.

The Board agrees with Liberty regarding the penalty assessment for reports that are on time but are missing performance results. Qwest would be required to pay to the State a total of one-fifth of the late report amount for each missing performance measurement, subject to a cap of the full late report amount. The Board also agrees that assessment for late reports should be limited to only one payment per report and not multiplied by the number of states and number of CLECs because the payment amounts clearly become too large.

The Board finds that assessments for inaccurate data would be difficult to set and might discourage corrections of inaccuracies discovered by Qwest. The Board is

in agreement that omissions and inaccuracies could be better addressed as part of the independent auditors area of coverage if this becomes an issue. The final payment scheme proposed by Liberty and incorporated into Section 14.3 by Qwest seems reasonable and provides an escalation process that should incent Qwest's performance.

The Board endorses the various recommendations of Liberty and approves the language of section 14.3 filed by Qwest on November 6, 2001.

VI. OTHER ISSUES

A. Prohibiting QPAP Payment Recovery in Rates (Report p. 86; Qwest initial brief p. 72; Qwest reply brief p. 47; AT&T initial brief pp. 29-30; AT&T post-report comments pp. 41-42)

In response to AT&T's argument that specific language should be added which would preclude Qwest from recovering any QPAP payments in rates, Qwest suggested such language is not necessary, because the FCC has already made it clear in prior 271 orders that PAP payments may not be recovered in interstate rates. Qwest also noted that the requirement that wholesale rates be set according to prescribed FCC pricing methods also precludes the inclusion of QPAP payments in SGAT or interconnection agreement prices.

Liberty concluded that neither the FCC nor the state commissions require guidance in how or when to determine what to do about QPAP payment recovery in rates and that no specific language need be added to the QPAP.

In its post-report comments, AT&T again urges the Board to require inclusion of the following language in the QPAP:

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

AT&T directs the Board's attention to the *New York Order* at paragraph 443, where the FCC concluded that any attempt by a BOC to recover PAP fines through increased rates would "seriously undermine the incentive meant to be created."

The Board agrees with Liberty's conclusion that no specific language is necessary to provide guidance in this matter. This is more properly an issue for consideration in a rate case. As such, a state commission or board should consider this issue on a case-by-case (state-by-state) basis and AT&T should make its arguments at that time.

The Board endorse Liberty's conclusion that no specific language relating to rate recovery is necessary within the QPAP.

B. No-Admissions Clause (Report pp. 86-87; ELI/Time Warner/XO initial brief pp. 22-23; Covad initial brief pp. 44-45; Qwest reply brief pp. 51-52)

ELI/Time Warner/XO and Covad argued that measurements under the PID document and payments based on them should be admissible as evidence in other proceedings. Covad suggests that the prohibition on use of evidence relating to Qwest's payments under the QPAP is nothing more than an attempt to impose a "gag order" on CLECs.

Liberty agreed that the objective information set forth in the performance reports is strong evidence of the characteristics of Qwest's performance and that the use of that information to show what Qwest's performance actually was should not be constrained. However, Liberty concluded the language included in the QPAP does not do so. Instead, the restrictions found in section 13.4.1 apply only to the existence of the QPAP and to the making of payments thereunder. Given the multiple purposes of the QPAP and given the availability of the underlying performance data for use as evidence, this narrowly drawn provision constitutes a reasonable approach.

The specific language of Section 13.4.1 is as follows:

> CLEC may not use: 1) the existence of this enforcement plan; or 2) Qwest's payment of Tier 1 "liquidated damages" or Tier 2 "assessments" as evidence that Qwest has **discriminated in the provision of any facilities or services** under Sections 251 or 252, or has **violated any state or federal law or regulation.** Qwest's conduct underlying its performance measures, however, are not made inadmissible by its terms.

The Board finds that the language of Section 13.4.1 specifically indicates that Qwest's conduct can be used by the CLEC to show Qwest's performance level. The restriction is very limited and specific and the Board finds the restriction to be appropriate. As Qwest notes, many of the standards used to determine payment obligations under the QPAP exceed obligations it would otherwise be required to meet.

The Board endorses the recommendation of Liberty and adopts the language of Section 13.4.1 as shown above.

C. Qwest's Responses to FCC-Initiated Changes (Report p. 87; Qwest initial brief pp. 40-41; Qwest post-report comments p. 16)

Qwest proposed three changes it maintained were the result of informal FCC input. These included:

- Eliminating two families of OP-3 sub-measurements, so that no missed order would go uncompensated (accomplishable by striking footnote "c" to QPAP Attachment 1).
- Removing the adjustment for Commission rate orders, which adjustments had the effect of reducing the total amount at risk under the QPAP.
- Making two changes in the statistical values used to test Tier 2 parity measurements.

There were no objections to these changes by any participant. They should be incorporated into the QPAP.

The Board should endorse the recommendation of Liberty that these changes be incorporated into the QPAP.

D. Specification of State Commission Powers (Report p. 87; Qwest post-report comments p. 16)

Section 12.3 provides that a state commission may recommend to the FCC that Qwest be prohibited from offering in-region interLATA services to new customers in the event that the annual cap is reached.

Liberty noted that apart from the QPAP, a state commission could recommend such relief for innumerable reasons other than the fact that Qwest reaches an

arbitrary cap in a performance plan. A state commission could also recommend some other relief when Qwest reaches a cap. Liberty viewed this section as utterly valueless in providing state commissions with any power that they do not already possess.

Further, Liberty suggested that it could only be read as an indication that a state commission approving the plan has agreed in advance that it would self limit its authority to respond to future circumstances. That not being the case, the provision should be stricken in order not to cloud the legitimacy of or weight to be given to any future state commission action other than the ones recited in the QPAP.

The Board endorses the recommendation of Liberty that Section 12.3 (as proposed by Qwest in its initial filing) be eliminated.

SUMMARY

Assuming Qwest implements each of the conclusions as directed by the Board throughout this conditional statement, the Board is prepared to indicate at this time that the QPAP will provide assurance that the local market will remain open after Qwest receives approval from the FCC to provide in-region interLATA service in Iowa. Additionally, the QPAP is likely to provide incentives that are sufficient to foster post-entry checklist compliance. This conditional statement indicating these

requirements are satisfied is subject to the same limitations noted earlier in this statement related to other proceedings and processes.

UTILITIES BOARD

/s/ Diane Munns

/s/ Mark O. Lambert

ATTEST:

/s/ Judi K. Cooper
Executive Secretary

/s/ Elliott Smith

Dated at Des Moines, Iowa, this 7th day of May, 2002.