BEFORE THE NEW MEXICO PUBLIC REGULATION COMMISSION

IN THE MATTER OF QWEST CORPORATION'S SECTION 271 APPLICATION AND MOTION FOR ALTERNATIVE PROCEDURE TO MANAGE THE SECTION 271 PROCESS	)	**Utility Case No. 3269**

and

IN THE MATTER OF QWEST CORPORATION'S STATEMENT OF GENERALLY AVAILABLE TERMS PURSUANT TO SECTION 252(f) OF THE TELECOMMUNICATIONS ACT OF 1996	)	**Utility Case No. 3537**

ORDER REGARDING QWEST'S PERFORMANCE ASSURANCE PLAN

TABLE OF CONTENTS

THIS MATTER comes before the New Mexico Public Regulation Commission (Commission) in this consolidated proceeding for our evaluation pursuant to section 271(d)(2)(B) of the Communications Act, as amended,[1] regarding whether Qwest Corporation ("Qwest") should be granted the authority to provide in-region, interLATA service originating in the state of New Mexico and to review and consider approval of Qwest's Statement of Generally Available Terms and Conditions (SGAT) pursuant to section 252(f) of the Act.

To be eligible to provide in-region, interLATA services, Bell operating companies (BOCs) such as Qwest must satisfy the competitive checklist and other requirements of the Act**.** This *Order* deals with one of those requirements, namely the forward-looking, predictive judgment aspect of the public interest inquiry pursuant to section 271(d)(3)(C)[2] that there be "sufficient assurance that the local and long distance markets remain open after grant of an application" and, more particularly, that a BOC will "continue to satisfy the requirements of section 271 after entering the long distance market."[3]

This *Order* therefore addresses Qwest's proposed Performance Assurance Plan (QPAP). The QPAP is intended to ensure Qwest's continued compliance with the requirements of section 271 upon the FCC's approval of an application by Qwest to provide in-region, interLATA service in New

---

[1] 47 U.S.C. § 271(d)(2)(B). The Communications Act of 1934, as amended, by the Telecommunications Act of 1996, is referred to hereafter as the "Act."

[2] Consistent with orders the Commission has entered in Utility Case No. 3269 and related proceedings, the other aspects of the public interest inquiry, including but not limited to the Facilitator's *Public Interest Report* (Oct. 22, 2001), will be addressed in a subsequent order.

[3] *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*, Memorandum Opinion and Order, 15 FCC Rcd 3953, 4162, 4164, ¶¶ 423, 429 (1999) (*BANY Order*), *aff'd*, *AT&T Corp. v. FCC*, 220 F.3d 607 (D.C. Cir. 2000).

Mexico. Qwest intends the QPAP to be included in its SGAT as Exhibit K, and to be adopted as part of a CLEC's approved interconnection agreement with Qwest.

The QPAP is a self-executing remedy plan with a two-tiered payment structure; it requires Qwest to make payments to competitive local exchange carriers (Tier 1 payments) and/or to the state (Tier 2 payments) when Qwest fails to meet certain performance measurements (parity standards or benchmarks), on a per-occurrence or per-measurement basis. The Tier 1 and Tier 2 payment structures and the methods for calculating payments are described in §§ 6 through 9 of the QPAP. Section 12 of the QPAP establishes an annual limit or cap on Tier 1 and Tier 2 payments.

The QPAP's performance measurements are defined in the Performance Indicator Definitions (PIDs) developed in the Qwest Regional Oversight Committee (ROC) Operational Support System (OSS) collaborative and included in the SGAT as Exhibit B. *See* QPAP § 3. The statistical measurements (modified "z-tests") for determining conformance with the parity and benchmark measurements are described in QPAP §§ 4 and 5.

The QPAP imposes on Qwest the duty to submit reports to state commissions and competitive local exchange carriers (CLECs) concerning Qwest's wholesale performance during prior months. The monthly reporting requirements are set forth in § 14 of the QPAP. Section 15 of the QPAP provides for integrated joint audits and investigations by participating state commissions. Participating commissions would choose an independent auditor and approve the audit/investigation plan. Expenses for such audits and investigations would be paid for out of a combination of Tier 1 and Tier 2 funds.

Section 16 of the QPAP provides for a six-month review to determine whether any performance measurements should be added, deleted or modified, whether the parity or benchmark measurements should be modified, and whether the payment structure should be modified. Finally,

§ 13 sets forth a series of limitations on the operation and administration of the QPAP, including the effective date of the QPAP, the circumstances under which Qwest would be excused from making Tier 1 or Tier 2 payments, and provisions requiring CLECs to make an election of remedies and to agree to allow Qwest to unilaterally offset compensation awarded to a CLEC for the same action or omission for which Tier 1 payments are made under the QPAP.

After the predecessor post-entry performance plan (PEPP) collaborative process ended without Qwest and CLECs having achieved a consensus plan, John Antonuk of the Liberty Consulting Group (hereinafter the "Facilitator") was retained by the seven states participating in the Multi-State Proceeding[4] to conduct the QPAP proceedings and issue his recommendations respecting the content and sufficiency of the QPAP. The Multi-State Proceeding participants addressed the QPAP in written testimony, comments, briefs, and in two separate in-person hearings held on August 14-17 and August 27-29, 2001 in Denver, Colorado. The Facilitator issued his *Report on Qwest's Performance Assurance Plan* (*QPAP Report*) on October 22, 2001.[5]

In the *QPAP Report*, the Facilitator reviewed the issues raised by the participants, identified those issues resolved during the proceedings as well as the issues remaining in dispute, and recommended resolutions of the disputed issues. Several Multi-State Proceeding participants, including Qwest, AT&T Communications of the Mountain States, Inc. ("AT&T"), WorldCom, Inc., Covad Communications

---

[4] The Nebraska and Washington commissions joined the original seven states participating in the Multi-State Proceeding – this Commission and the Idaho, Iowa, Montana, North Dakota, Utah, Wyoming commissions – for the purpose of addressing the public interest aspects of the QPAP. *QPAP Report*, at 1.

[5] The *QPAP Report* is available at http://www.libertyconsultinggroup.com/oss_and_pep.htm, the Internet website established for the Multi-State Proceeding, under the **OSS and PAP** heading found on the bottom of that Webpage. Also available at that link are the participants' Multi-State Proceeding filings with respect to the QPAP as well as the

Company (Covad), and the Commission's Utility Division Staff ("Staff"), filed with this Commission "10-day" comments or exceptions in response to the *QPAP Report*. Further, pursuant to the Commission's *Amended Third Procedural Order* in Utility Case No. 3269, Qwest, AT&T and Staff subsequently filed Commission-specific briefs. The Commission entertained oral arguments concerning the *QPAP Report* on January 8, 2002.

Having reviewed the *QPAP Report*, the parties' comments, briefs and arguments regarding the *QPAP Report's* recommendations, the record concerning this matter generally and being otherwise fully advised, the Commission **FINDS AND CONCLUDES**:

I. INTRODUCTION

1. Performance assurance plans have become the vehicle by which BOCs such as Qwest partially fulfill the section 271 requirement that an application to provide in-region interLATA service be found "consistent with the public interest, convenience and necessity" pursuant to section 271(d)(3)(C).[6] The public interest inquiry considers both whether a BOC has opened its local market to meaningful competition prior to garnering section 271 approval and that it provide assurances the local market will remain open after receiving section 271 approval.[7] In fulfilling the requirements of the latter part of the public interest test, every BOC obtaining section 271 authority to date has demonstrated anti-backsliding measures are in place to assure future compliance by implementing a performance assurance plan.

---

transcripts of the hearings in issue and the exhibits admitted during the hearings. The *QPAP Report* is also available for examination at the offices of the Commission (224 East Palace Avenue, Santa Fe, NM 87501, telephone: (505) 827-6940).

[6] 47 U.S.C. § 271(d)(3)(C).

[7] *See, e.g., Application of Verizon New England, Inc., Bell Atlantic Communications, Inc. (d/b/a Verizon Long Distance), NYNEX Long Distance Company (d/b/a Verizon Enterprise Solutions) And Verizon Global Networks Inc., For Authorization to Provide In-Region, InterLATA Services in Massachusetts*, FCC 01-130, 16 FCC Rcd 8988, at ¶ 233 (2001) (*Verizon Massachusetts Order*).

2. The FCC has identified five key characteristics for evaluating whether a performance assurance plan is within the "zone of reasonableness" and, hence, satisfies the "forward-looking," "predictive judgment" aspect the public interest inquiry.[8] According to the FCC, a plan should contain:

> 1. Potential liability that provides a meaningful and significant incentive to comply with the plan's performance standards;
> 2. Clearly articulated, pre-determined measures and standards that encompass a comprehensive range of carrier-to-carrier performance;
> 3. A reasonable structure that is designed to detect and sanction poor performance when it occurs;
> 4. A self-executing mechanism that does not open the door unreasonably to litigation and appeal; and
> 5. Reasonable assurance that the reported data are accurate.[9]

3. The FCC has made it clear that performance assurance plans are "generally administered by state commissions and derive from authority the states have under state law or under the federal Act."[10] For this reason, the FCC has observed that states have great latitude in determining what kind of post-entry performance plan provides adequate and persuasive assurance that the local market in a given state will remain open.[11]

---

[8] *BANY Order*, 15 FCC Rcd at 4166, n.1323.

[9] *Id*. 15 FCC Rcd at 4166, ¶ 433.

[10] *Id*. 15 FCC Rcd at 4165, n.1316. *See also Application of Verizon Pennsylvania, Inc., Verizon Long Distance, Verizon Enterprise Solutions, Verizon Global Networks, Inc., and Verizon Select Services, Inc., for Authorization to Provide In-Region, InterLATA Services in Pennsylvania*, Memorandum Opinion and Order, FCC 01-269, 16 FCC Rcd 17419 (2001) (*Verizon Pennsylvania Order*), at ¶ 128 (recognizing "that *states* may create plans that ultimately vary in their strengths and weaknesses as tools for post-section 271 authority monitoring and enforcement") (emphasis added).

[11] *See, e.g., BANY Order*, 15 FCC Rcd at 4166, ¶ 433; *Verizon Pennsylvania Order*, 16 FCC Rcd 17419, at ¶ 128.

4. The *QPAP Report* is organized, for the most part, around the five "important characteristics" for determining whether a performance assurance plan is within the "zone of reasonableness. This *Order* generally follows the same organizational format as the *QPAP Report*.

5. In the *QPAP Report*, the Facilitator made numerous recommendations that were uncontested by the participants in these proceedings. Unless otherwise addressed in this *Order*, the Commission accepts and adopts all such recommendations.

6. The Commission restates and incorporates the background findings and conclusions made by the Commission in previous interim orders in this case in lieu of repeating those background findings and conclusions here.

7. As with previous interim orders in this case, this interim order addresses only some of the requirements of section 271 of the Act. The Commission anticipates that a series of interim orders including this one will form the basis for a single final order, incorporating previous interim orders, updated as appropriate.

II. STANDARD OF REVIEW

8. The Facilitator laid out his standard of review on pp. 4-6 of the *QPAP Report*. The Facilitator included not only the five characteristics of the FCC's zone of reasonableness test, but also a number of additional "considerations," such as whether the incentives of the plan impose an "irrational price" on in-region, interLATA entry.[12] Several of the parties, including AT&T and Staff, object to the Facilitator's use of the additional criteria delineated in the *QPAP Report*.

[12] *QPAP Report* at 6.

9. AT&T begins by agreeing with the Facilitator that "the task is not to decide how to increase incentives, but to decide upon the sufficiency of those proposed, which includes at least a full consideration of their comparability with those already reviewed by the FCC."[13] Nevertheless, AT&T maintains the Facilitator's additional criteria do not provide a "clearly articulated standard" as required by the FCC's five-prong zone of reasonableness test.[14] AT&T takes exception to the Facilitator's position that it is irrelevant whether greater burdens on Qwest would increase its incentives to comply with its wholesale service obligations, and that making such an issue "relevant here is not only fantastical, it is beyond any rational conception of fairness and propriety."[15]

10. AT&T also takes issue with the Facilitator's consideration of whether "the incentive aspects of the plan (*i.e.*, that go beyond compensating CLECs for actual harm) impose a price on in-region, interLATA entry that would be irrational for a BOC to pay for the privilege of such entry."[16] AT&T stresses the QPAP is intended to create incentives for Qwest to perform, not to determine the "toll" a BOC should pay for the privilege of section 271 entry, or the "strain" upon a BOC for paying CLECs for its failure to perform.[17]

11. Moreover, insofar as the Facilitator's decision-making process is concerned, AT&T claims the Facilitator ignored relevant evidence, eschewed performance assurance plan precedent from other jurisdictions and/or the FCC, relied on facts or argument not in evidence, and skewed sections of the

---

[13] *Id*. at 4.

[14] *Id*. at 5.

[15] *Id*. at 6.

[16] *Id*. at 4.

[17] *Id*. at 6.

QPAP in an incumbent-biased direction even more than that proffered by Qwest in advance of the Multi-State QPAP hearings.[18]

12. Staff's views about the Facilitator's standard of review generally are congruent with those expressed by AT&T. Staff therefore urges the Commission to abide by the standard of review as set forth in the FCC's section 271 orders.[19]

13. For its part, Qwest apparently would have the Commission adopt the Facilitator's standard of review. Although it did not address the issue directly in the comments submitted to this Commission, Qwest states that we should find "that the QPAP, as modified by Qwest as the result of the Facilitator's Report, provides adequate assurance that Qwest will not backslide and that its section 271 application is in the public interest."[20]

14. As the Commission has done throughout these proceedings, we will assess the *QPAP Report* as we have all of the Facilitator's other reports, namely as a recommended decision akin to those issued by the Commission's hearing examiners. That being the case, we are not constrained to accept the analysis or recommendation made by the Facilitator on every issue, let alone any single recommendation. Consequently, as has been the Commission's consistent practice in these proceedings, we will review the evidence of record and the arguments of the parties in examining the Facilitator's QPAP recommendations in the same manner that we review the recommended decisions of the hearing examiners in every other proceeding before the Commission.

---

[18] AT&T's Exceptions to the Liberty Consulting Group's QPAP Report (AT&T's Exceptions), at 2.

[19] Staff's Updated Proposed Findings And Conclusions And Interim Order On Report On Qwest's Performance Assurance Plan (Staff's Proposed Findings), at 6.

15. That being said, we see no merit in AT&T's assertions that the Facilitator's decision-making process was flawed or compromised. Our review of the evidence of record and the parties' briefs persuades us that the QPAP proceedings before the Facilitator provided a full and fair opportunity for the parties to be heard, for evidence to be adduced, and for issues to be fully vetted both orally and in writing prior to and after the QPAP hearings before the Facilitator.

16. However, as to the standard of review employed by the Facilitator, the Commission rejects the Facilitator's additional considerations that go beyond the five prongs of the FCC's zone of reasonableness test. The zone of reasonableness test is an appropriate and adequate analytical tool for determining whether and to what extent Qwest's proposed plan and the Facilitator's recommended modifications of the plan are sufficient to deter backsliding behavior as well as for considering whether any of the modifications to the proposed plan suggested by the other parties should be made. Accordingly, we reject the Facilitator's additional criteria at pp. 5-6 of the *QPAP Report* that begin with the sentence: "The ultimate decision on the QPAP's sufficiency, as the FCC addresses the matter, should be one that takes into account the following considerations…."

17. While the Commission will apply the FCC's zone of reasonableness test in evaluating the QPAP, as addressed more fully later in this *Order*, the Commission possesses ample authority under state law as well as the Act to require Qwest to take remedial action or, for that matter, to refrain from acting in a particular manner if its performance results in wholesale service to CLECs that is deficient, unfair, unreasonable or otherwise would stifle competition in New Mexico.

---

[20] Qwest's Updated Proposed Recommendation Regarding Qwest's Performance Assurance Plan (Qwest's Proposed Findings), at 4.

18. Indeed, the FCC has plainly stated in previous section 271 orders that states retain discretion as to the contents and structure of performance assurance plans and that individual state plans may vary. For instance, in its consideration of the Pennsylvania performance assurance plan for Verizon, which contained significant differences from both the New York and Texas plans, the FCC said:

> In prior section 271 orders, the Commission has reviewed performance assurance plans modeled after either the New York Plan or the Texas Plan. Although similar in some respects, the current Pennsylvania plan, however, *differs significantly from each of these two plans*. As stated above, we do not require any monitoring and enforcement plan and therefore, we do not impose requirements for its structure if the state has chosen to adopt such a plan. We recognize that states may create plans that ultimately vary in their strengths and weaknesses as tools for post-271 authority monitoring and enforcement.[21]

19. The FCC reiterated this position in the *Verizon Connecticut Order* where it stated:

> As the Commission has recognized, *individual state PAPs may vary*, and our task is to determine whether the PAP at hand falls within a zone of reasonableness and is "likely to provide incentives that are sufficient to foster post-entry checklist compliance.[22]

20. We address the matter of our jurisdiction to modify the QPAP and oversee its implementation and operation in more detail below in our treatment of the QPAP's six-month review process.

---

[21] *Verizon Pennsylvania Order*, 17 FCC Rcd 17419, at ¶ 128 (emphasis added; internal citations omitted).

[22] *In the Matter of Application of Verizon New York Inc., Verizon Long Distance, Verizon Enterprise Solutions, Verizon Global Networks Inc., and Verizon Select Services Inc., for Authorization to Provide In-Region, InterLATA Services in Connecticut,* Memorandum Opinion and Order, FCC 01-208, 16 FCC Rcd 14147 (2001), at ¶ 77 (*Verizon Connecticut Order*) (emphasis added; internal citations omitted).

III. CONSIDERATION OF OTHER STATE AND/OR BOC PLANS

21. There was considerable discussion in the briefs as well as at the oral argument before us regarding the propriety and advisability of considering other state plans as well as BOC plans approved by the FCC.

22. Staff, AT&T, Covad and WorldCom support and indeed encourage the Commission to review and consider parts of other BOC plans and state plans such as the Colorado Performance Assurance Plan (CPAP),[23] and those approved recently by the Montana, Nebraska, Washington and Wyoming commissions.

23. Qwest objected to importing or "cherry picking" from other BOC or state plans, arguing other plans, such as the CPAP, were developed under different processes and using a different record.[24]

24. The Commission is not persuaded we should be confined, as Qwest would have it, to relying solely on Qwest's proposed plan to resolve the disputed issues. In fact, Qwest's argument is inherently inconsistent given that Qwest has advanced the adoption of its proposed plan on the grounds it is based on and improves on the FCC-approved Texas plan.[25] As reflected by certain of our findings below, even a cursory comparison of the QPAP and the Texas plan indicates that Qwest itself has engaged in a certain amount of the "cherry picking" practice it derides when employed by others in these proceedings.[26]

---

[23] *In the Matter of the Investigation Into Alternative Approaches for a Qwest Corporation Performance Assurance Plan in Colorado*, Public Utilities Commission of the State of Colorado, Docket No. 01I-041T, Colorado Performance Assurance Plan, Decision No. R01-997-I (Sept. 26, 2001) (*Colorado Order*).

[24] Transcript of Oral Argument (Jan. 8, 2002), at 123, lines 1-14, 125, lines 1-7; Qwest's Proposed Findings, at 6-9.

[25] Transcript of Oral Argument (Jan. 8, 2002), at 24, lines 18-21, 27, lines 3-13, 35, lines 14-24, 123, 4-21.

[26] *See e.g.*, ¶¶ 80, 92 *infra*; Transcript of Oral Argument (Jan. 8, 2002), at 123, lines 18-21.

25. In any event, as referenced above,[27] the FCC has anticipated that "state commissions will continue to build on their own work and the *work of other states*" in developing plans.[28] Moreover, the FCC has stated, "the development of performance measures and appropriate remedies is an evolutionary process that requires changes to both measures and remedies over time."[29] Consistent with its earlier conclusions in this regard, the FCC recently recognized

> that the development of performance measures and appropriate remedies is an evolutionary process that requires changes to both measures and remedies over time. We note that both the Georgia and Louisiana Commissions anticipate modifications to BellSouth's SQM [Service Quality Measurement Plan] from their respective pending six-month reviews. We anticipate that these state Commissions will continue to build on their own work and the work of other states in order for such measures and remedies to most accurately reflect actual commercial performance in the local marketplace.[30]

Finally, our review of the QPAPs developed by other states to date is consistent with what virtually every other state commission has done in relation to the key components of Qwest's proposed plan.

26. For these reasons, and given the Commission's statutory obligation to safeguard and promote the public interest, we find it is entirely apposite and, in point of fact, necessary for the Commission to review other state and BOC performance assurance plans and to adopt from them those elements and/or concepts we deem most appropriate for ensuring that the local marketplace for telecommunications services

---

[27] *See supra* ¶¶ 18-19.

[28] *Verizon Pennsylvania Order*, 17 FCC Rcd 17419, at ¶ 128 (emphasis added).

[29] *Id*.

[30] *In the Matter of Joint Application by BellSouth Corporation, BellSouth Telecommunications, Inc., and BellSouth Long Distance, Inc. for Provision of In-Region, InterLATA Services In Georgia and Louisiana*, Memorandum Opinion and Order, CC Docket No. 02-35, FCC 02-147 (rel. May 15, 2002) (*BellSouth Georgia/Louisiana Order*), at ¶ 294 (internal citations omitted).

remains open to competition in New Mexico. Indeed, given the relatively nascent nature of local competition in New Mexico, it is particularly incumbent on the Commission to ensure that the playing field remain as level as feasible in order to develop more robust and meaningful competition in the local marketplace for telecommunications services in this State.

IV. MEANINGFUL AND SIGNIFICANT INCENTIVES

27. The Facilitator identified eighteen issues in four categories involving the assessment of whether the QPAP creates potential liability that provides a meaningful and significant incentive for Qwest to comply with the designated performance standards. The four categories implicated are: (i) total payment liability, (ii) magnitude of QPAP payout levels, (iii) compensation for CLEC damages, and (iv) incentive to perform.

A. Total Payment Liability

28. The issues in this category involve the sufficiency of the overall payment liability proposed in the QPAP. The Facilitator identified six issues in this category:[31]

1) 36% of intrastate net revenues standard;
2) Procedural cap vs. absolute cap;
3) Qwest's marginal costs of compliance;
4) Continuing propriety of a cap based on 1999 net revenues;
5) Likely payments in low-volume states; and
6) Deductibility of payments.

29. Of these six issues, the Facilitator's recommended resolutions of the following three were not addressed by any party in their 10-day comments or the ensuing briefs filed with the Commission:

[31] *QPAP Report*, at 12-26.

Qwest's marginal costs of compliance, likely payments in low-volume states, and deductibility of payments. There having been no challenge to the Facilitator's findings and conclusions regarding the foregoing and having found no matters of particular concern in the Facilitator's recommended resolutions of these issues, the Commission hereby finds and concludes that the Facilitator's recommendations are appropriate, reasonable and resolved in a manner that is consistent with the public interest. Accordingly, the Commission accepts and adopts the Facilitator's resolutions of the total payment liability issues addressed in this paragraph.

30. We now turn our attention to the three total payment liability issues about which the parties raised points of contention in their post-*QPAP Report* comments and briefs.

1. The 36% of net revenues standard

31. The 36% of net revenues standard calls into question whether the amount Qwest places at risk through its QPAP every year should be capped at 36% of Qwest's 1999 ARMIS net interstate revenues. This issue is conceptually related to the question of whether the Commission should adopt a procedural cap. The procedural cap issue essentially involves whether or not a trigger should be established, based on the level of fines accrued by Qwest, which would cause the Commission to initiate an inquiry into Qwest's performance under the PAP.

32. The debate over the parameters of the cap essentially boils down to addressing the following issues that we do not perceive as being mutually exclusive: (i) should there be an absolute or "hard" cap, which may not be raised no matter how bad Qwest's performance may be; if so, at what percentage of net revenues should the cap be set such that an adequate incentive to avoid backsliding is created; or (ii) should the cap be a procedural or "soft" cap, which can be exceeded if Qwest's

performance under the plan is sufficiently poor that the procedural cap is reached; if so, at what percentage of net revenues should the cap be set.

33. The plan Qwest originally proposed featured a "hard cap" on total liability under the plan equal to 36% of the 1999 ARMIS Net Return for local service in New Mexico, which would result in Qwest having $38 million at risk each year under the QPAP.[32]

34. The Facilitator noted the FCC has found that 36% of net interstate revenues is sufficient to provide an adequate incentive in other contexts. The Facilitator found that the 36% cap represented "…an appropriate starting point, which needs to be examined again as all of the other QPAP provisions affecting Qwest's incentive to perform are addressed."[33] The Facilitator proceeded to recommend that the cap be made adjustable within a limited range – upward (to 44%) for poor performance and downward (to 30%) for good performance –based on performance over two consecutive years.[34]

35. Qwest supports the Facilitator's "adjustable cap" proposal.[35]

36. AT&T maintains the Facilitator's proposed cap is based on "movement principles" neither found in any other plan nor proposed by any of the parties in these proceedings.[36] The Facilitator's adjustable cap proposal allows for a 4% upward movement from 36% only after the cap would have been exceeded for the preceding twenty-four months. AT&T takes issue with this aspect of the Facilitator's

---

[32] *See* Exhibit K, Performance Assurance Plan (Nov. 7, 2001 revised version), § 12.1, at 13.

[33] *QPAP Report*, at 15.

[34] *Id*. at 18-20.

[35] Qwest's Proposed Findings, at 5.

[36] AT&T's Exceptions, at 5. It should be noted that AT&T was joined in its Exceptions by WorldCom, which stated in its 10-day comments, "WorldCom concurs in the Exceptions to this report filed by AT&T … and joins in the arguments raised by AT&T to support WorldCom's positions taken here." WorldCom's Exceptions and Comments Addressing Report on Qwest's Performance Assurance Plan (WorldCom's Exceptions), at 1.

proposal because Qwest would have to exceed the cap for twenty-four consecutive months, a period in which AT&T points out Qwest otherwise could have remained under the cap through reasonable and prudent efforts. AT&T therefore cautions that under the scenario recommended by the Facilitator, the Commission would be prevented from raising the cap, seeking to take corrective action or other measures, or even launching an investigation into why the cap was reached before Qwest's performance became so bad that it exceeded the cap for twenty-four months in a row.[37] AT&T also objects to the Facilitator's cap reduction mechanism, asserting the FCC has never allowed a plan to dip below a 36% cap and contending, therefore, that public interest principles combined with the lack of precedent make the Facilitator's position untenable.[38]

37. AT&T therefore urges the Commission to reject the Facilitator's adjustable cap and establish instead a procedural cap in the range of 20 to 40 percent. AT&T further recommends that the Commission direct Qwest to adopt QPAP language stating that once this cap is reached,

> the Commission shall have the authority to open a proceeding to determine the reason the cap was met. If the Commission determines that the meeting of the cap was performance related it shall lift the cap for that given calendar year. If the Commission determines the meeting of the cap was not performance related, it shall keep the cap in place for that calendar year."[39]

38. Covad likewise requests that we reject a "hard" cap, suggesting instead that we adopt a procedural cap set at 44%. Covad notes this is the cap currently set in the Verizon plan by the New York

---

[37] AT&T's Updated Proposed Order Re: QPAP (AT&T's Proposed Findings), at 5.

[38] *Id*. at 5.

[39] *Id*. at 7.

commission, which raised the cap after having found the initial 36% cap insufficient to provide an adequate BOC incentive to meet the requisite performance standards.[40]

39. Staff also recommends that the Commission reject the Facilitator's adjustable cap and adopt instead a procedural cap set at 25%. Under Staff's proposal, if the 25% cap is exceeded in any rolling twelve-month period, an investigation by the Commission would be automatically triggered. Staff argued that an absolute cap weakens Qwest's incentive to comply with performance standards. In addition, Staff argued that the existence of a 36% cap creates administrative problems that would be easily avoided in the absence of a cap. For example, Staff cautions a hard cap could operate to deprive CLECs, otherwise entitled to payments from Qwest under the QPAP, of payments that accrue after the fixed cap has been reached.[41]

40. Staff believes the service investigation called for in its proposal will serve as a diagnostic tool for Qwest, CLECs, and the Commission and will enhance the opportunity for "changes to both measures and remedies over time"[42] in New Mexico, as suggested by the FCC in the *Verizon Pennsylvania Order*.

41. Having weighed the relative merits of the parties' positions, the Commission has resolved to take a middle course that we believe arrives at a judicious balancing of the important interests articulated by the parties. We therefore will order the adoption of a 25% "soft" or procedural cap, which will trigger a service investigation in any rolling twelve-month period in which the procedural cap is reached. In addition

---

[40] Covad Communication Company's Comments on the Report on Qwest's Performance Assurance Plan (Covad's Comments), at 11.

[41] Staff's Proposed Findings, at 7.

[42] *Id*. at 14-15.

to the procedural cap, the Commission will require the institution of an "annual cap" of 44%, which is a "hard" or maximum cap of net intrastate revenues at risk.

42. We find both the 25% procedural cap and the 44% annual cap provide adequate incentives against backsliding and fall squarely within the zone of reasonableness; this is particularly true in light of the performance assurance plans approved by the FCC in the *BellSouth Georgia/Louisiana Order* just two weeks ago.[43]

43. The hybrid approach with respect to capping net revenues at risk we are hereby adopting will enable the Commission to intervene in a proactive manner if the 25% cap is reached in order to determine the reason or reasons the cap was met. If the cap is met as the result of performance-related problems, the Commission will have the ability to take corrective action in an expeditious manner. Moreover, this approach should avoid, or at least is intended to avoid, the problem of non-payment to CLECs occurring where there is solely a hard cap (such as 36% or 44%) in place and that cap is reached. Furthermore, this approach is entirely consistent with the Commission's authority and, indeed, duty to intercede at any time we may deem necessary and appropriate to administer and modify the QPAP.[44] At the same time, the 44% annual cap affords Qwest a degree of certainty as to the maximum amount of net revenues that will be placed at risk in any given year.

44. In sum, we consider our resolution with respect to capping payment liability to be a fair and balanced approach that provides adequate incentives against backsliding, takes into account the

---

[43] *See BellSouth Georgia/Louisiana Order*, FCC 02-147, at ¶ 296 (wherein the FCC endorsed both the Georgia Service Performance Measurements and Enforcement Mechanisms (SEEM) plan, which places at risk 44% of BellSouth's annual net revenues in Georgia, and the Louisiana SEEM plan, which features a 20% procedural cap).

[44] *See infra* our discussion of the six-month review process, ¶¶ 161-184.

Commission's authority as well as our duty to promote the public interest, addresses CLEC concerns over a hard cap being exceeded by a BOC that has decided it is more efficient to pay than obey, and affords Qwest certainty in terms of a hard cap (44%) that is squarely within the zone of reasonableness.[45]

45. Accordingly, Qwest is directed to modify its QPAP to reflect the Commission's determination with respect to capping payment liability as the same is articulated in the foregoing paragraphs.

2. Equalization under the annual cap

46. If the annual cap is reached in a given year, a problem may occur due to the operation of a cap – while CLECs who incur noncompliant service from Qwest up to the point the cap is reached receive compensation, CLECs who incur noncompliant service *after* the cap is reached receive no compensation. To address this problem, the Facilitator recommended the following method of Tier 1 payment equalization at the end of each year when the cap is reached:

> 1. The amount by which any month's total payments exceed $1/12^{th}$ of the annual cap shall be apportioned between Tier 1 and Tier 2 according to the percentage that each Tier bears of the total payments for the year to date. The Facilitator referred to the results of this calculation as the "Tracking Account."
>
> 2. Tier 1 excess will be debited against ensuing payments that are due to each CLEC by applying to the year-to-date payments received by each a percentage that generates the required total Tier 1 amount.

---

[45] The Commission also notes that our ruling comports with the Nebraska Commission's determination of this issue: "Such caps [24% procedural cap] are justified in Nebraska, as they will serve the public interest by creating a meaningful and significant incentive for Qwest to comply with designated performance standards, while providing a degree of certainty [with a 44% maximum cap] for Qwest regarding the total liability at risk." *In the Matter of Qwest Corporation, Filing its Notice of Intent to File Its Section 271(c) Application With the FCC and Request for the Commission to Verify Compliance with Section 271(c)*, Nebraska Public Service Commission Application No. C-1830, QPAP Approved as Amended (Apr. 23, 2002) (*Nebraska Order*), at 6-7, ¶ 14.

> 3. The tracking amount will be apportioned among all CLECs so as to provide each one with payments equal in percentage to its total year-to-date Tier 1 payment calculations.
>
> 4. This calculation begins in the first month that payments are expected to exceed the annual cap and continues in each month of that year. Qwest will recover any debited amounts by reducing payments due from any CLEC for that month and any succeeding months as necessary.[46]

47. Qwest does not oppose Tier 1 equalization. In fact, Qwest has incorporated the Facilitator's language into the QPAP at § 12.3, but with some changes it views necessary to clarify the operation of the complex equalization process. Because QPAP monthly payments may fall below or exceed the monthly cap, accounts must be balanced using year-to-date payments and a cumulative monthly cap. Qwest believes its modifications of the Facilitator's recommended language accomplish this purpose.[47]

48. Staff indicates that Tier 1 equalization is fair only to the extent it creates a process for CLECs to "share the pain" of not receiving full QPAP payments they would otherwise have been entitled to receive.[48] Staff maintains that, in any event, the removal of the 36% hard cap would obviate the need for equalization or "apportionment of pre-cap QPAP payments among CLECs."[49]

49. AT&T did not address the equalization principle in its New Mexico-specific briefs. However, it is on record at least in Montana as stating that "if a procedural cap is instituted, the need for

---

[46] *QPAP Report*, at 19-20.

[47] Qwest's Comments, at 3-4.

[48] Staff's Proposed Findings, at 10.

[49] *Id*. at 15.

equalization principles wanes and when the Commission conducts an investigation after Qwest reaches the cap, payment equalization can be determined then, if any is appropriate."[50]

50. The Commission believes Tier 1 equalization should be included in the QPAP. Payment equalization is not intended to motivate conforming performance. Instead, as the term implies, payment equalization promotes equitable principles inasmuch as no CLEC should be denied Tier 1 payments in the event Qwest payments would exceed the cap on a monthly basis. Moreover, the need for equalization is not obviated given the cap structure we are requiring for the New Mexico QPAP. Indeed, as set forth in the language we are adopting, Tier 1 equalization will be factored on the basis of the annual "hard" cap set at 44% of Qwest's net intrastate revenues. Therefore, we find merit in the Facilitator's recommendations for Tier 1 equalization, as implemented by Qwest in its QPAP revision dated November 7, 2001 and, accordingly, approve §§ 12.3 through 12.3.4 of the QPAP as they appear in that revision.

3. Procedural cap vs. absolute cap

51. This issue was addressed above in determining the parameters of the caps on Qwest's payment liability. Therefore, this issue has been resolved in accordance with the aforementioned findings and conclusions.

---

[50] *In The Matter Of The Investigation Into Qwest Corporation's Compliance With Section 271 Of The Telecommunications Act Of 1996*, Public Service Commission of the State of Montana, Utility Division Docket No. D2000.5.70, Final Report on Qwest's Performance Assurance Plan and Responses to Comments Received on Preliminary Report (Apr. 19, 2002) (*Montana Order*), at 14.

4. Continuing propriety of a cap based on 1999 net revenues

52. In basing the cap on Qwest's 1999 net intrastate revenues, the Facilitator reasoned it was preferable to rely on the firm amount represented by the 1999 net revenues than it would be to accept the uncertainty of the amount of the cap fluctuating up or down.[51]

53. Covad questions the Facilitator's reasoning, asserting that a more recent basis, such as ARMIS year 2000, is preferable. Covad's principal rationale for its position is the inability of the 1999 data to capture post Qwest-U S WEST merger efficiencies and economies. Covad concludes that the source data must be reviewed regularly to ensure Qwest's total exposure "remains constant."[52]

54. Various other CLECs criticized the freezing of the cap at 36% percent of 1999 net revenues, suggesting that if Qwest's net revenues increase in the future, the cap will represent less than 36% of Qwest's net revenues for any year in which revenues are greater than those reported for 1999.[53]

55. The Facilitator considered the implicit premise behind the CLECs' position – that net intrastate operating revenue will continue to increase despite growth in competition for local exchange business – to be speculative at best. For this reason, among others, the Facilitator found there was no reason to conclude that the ongoing use of 1999 net intrastate revenues was more likely to increase or decrease Qwest's net financial exposure and, consequently, he declined to recommend revisiting the base year for calculation of the cap.[54]

---

[51] *QPAP Report*, at 21-22.

[52] Covad's Comments, at 11-13.

[53] *QPAP Report*, at 21.

[54] *Id*. at 21-22.

56. Qwest supports the Facilitator's recommendation on this issue.[55]

57. Neither staff nor AT&T commented on this particular issue.

58. The Commission finds merit in staying at this time with the certainty of the 1999 ARMIS values. Consequently, we accept and adopt the Facilitator's recommendation respecting this issue.

B. Magnitude of QPAP Payout Levels

59. This issue involves the sufficiency of payments per event of non-compliance as opposed to the overall total liability exposure discussed above.

60. As the Facilitator found: "Total economic exposure addresses only part of the broader issue of the sufficiency of payments under the QPAP to provide a meaningful and significant incentive to Qwest. Equally material is the question of what level of event-specific payments apply. A total exposure of even much more that 36 percent of net intrastate revenues might not deter substandard performance, if payments per event of non-compliance are so low that:

- They do not compensate CLECs, as a baseline consideration, for the harm that poor performance causes them.
- Their accumulation is at so slow a rate as to make it improbable that they will rise to economically significant levels, no matter how bad performance becomes.
- They fail to communicate to Qwest that compliance is preferable to defiance.[56]

61. Qwest agreed with the Facilitator's recommendations on this issue and no other party raised objections to implementing them.

---

[55] Qwest's Proposed Findings, at 6.

[56] *QPAP Report*, at 23.

62. The Commission agrees with the Facilitator that the QPAP need not be revised to address this issue and, consequently, we accept and adopt the Facilitator's recommendations.

63. However, while we agree with the Facilitator that the QPAP is not in need of revision on this issue, we question the Facilitator's strict rejection of AT&T's calculations regarding the probability of payout for non-compliance in the event of the failure of a specific performance standard by Qwest.[57] The Facilitator reasoned that the probability of Qwest failing a performance standard may not occur independently of other performance measures due to the effect of a common underlying factor, thus greatly increasing the chances of simultaneous failure.[58] The Commission acknowledges the potential significance of AT&T's probability analysis and, therefore, we are inclined to be less dismissive of AT&T's calculations than the Facilitator was.

64. In any event, whatever relative merits or demerits may inhere in AT&T's statistical analysis, this much is abundantly clear: the probability of Qwest failing performance measures whether such failures are triggered by a common event or a truly independent variable will be demonstrated on a real-time basis once the performance data is reported to the Commission upon the QPAP taking effect. We believe we will be able to assess through the performance reporting and six-month review processes whether or not a specific measure should be modified or payments adjusted so that the performance measure in question provides Qwest a sufficient incentive to provide proper wholesale service to CLECs.

---

[57] *See* Staff's Proposed Findings, at 17-18.

[58] *QPAP Report*, at 25-26.

C. Compensation for CLEC Damages

65. The following issues were raised regarding the sufficiency of the QPAP's proposed compensation for CLEC damages:

1) Relevance of compensation as a QPAP goal;
2) Evidence of harm to CLECs;
3) Preclusion of other CLEC remedies;
4) Indemnity for CLEC payments under state service quality standards;
5) Offset provision (§ 13.7);
6) Exclusions (§ 13.3); and
7) SGAT limitations of liability to total amounts charged to CLECs.

66. Of these seven issues, the following four were not addressed in the parties' post-*QPAP Report* comments or briefs: (i) relevance of compensation as a QPAP goal, (ii) evidence of harm to CLECs, (iii) indemnity for CLEC payments under state service quality standards, and (iv) SGAT limitations of liability to total amounts charged to CLECs. There having been no challenge to the Facilitator's findings and conclusions regarding the foregoing and having found no particular matters of concern in the Facilitator's recommended resolutions of these issues,[59] the Commission hereby finds and concludes that the Facilitator's recommendations are appropriate, reasonable and resolved in a manner that is consistent with the public interest. Accordingly, the Commission accepts and adopts the Facilitator's resolutions of these four issues.

67. We now turn our attention to the three remaining issues about which the parties raised points of contention in their post-*QPAP Report* comments and briefs.

1. Preclusion of other CLEC remedies

68. The Facilitator found that §§ 13.5 and 13.6 of the QPAP treat Tier 1 payments as liquidated damages designed to provide for CLECs opting into the QPAP an exclusive remedy to compensate for damages resulting from Qwest service in fulfilling its wholesale performance obligations. That is, in return for receiving payments under the QPAP for non-conforming performance by Qwest without the necessity of proving harm, Qwest would require CLECs opting into the QPAP to agree to what it considers a commonly provided consideration, *i.e.*, the waiver of causes of action founded on theories of liability arising from the same, or analogous, non-conforming performance. Qwest stated that the election of remedies provisions in its proposed plan are based on the SBC Texas, Oklahoma and Kansas plans.[60] QPAP § 13.6, in its original form, provided as follows:

> 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.

69. The Facilitator found that this section, when read in conjunction with § 13.5, could not be interpreted consistently. The Facilitator consequently recommended revisions to the election of remedies provision designed to make clear that CLECs that elect the QPAP surrender other contractual remedies,

---

[59] *Id*. at 26-30, 33-34, 41.

but retain noncontractual remedies that would be subject to an offset for any damages that represent compensatory recovery.[61] Therefore, the Facilitator recommended that Qwest strike all of the quoted portions of § 13.6, following the phrase "in its interconnection agreement with Qwest" and replace it 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.[62]

70. Qwest does not oppose the Facilitator's approach, and, in fact, has stricken the language the Facilitator found to be objectionable.[63] However, Qwest notes that in implementing the Facilitator's recommendation, Qwest added language to § 13.6 providing that payments under Commission rules or orders would be considered contractual in nature and therefore precluded. Qwest claims this clarification is appropriate given the Facilitator's recognition that this is explicit in the Colorado Special Master's Report,[64] which states in pertinent part,

> the PAP shall not limit alternative remedies available to CLECs under… (2) state law regulatory enforcement actions that are not redundant with the PAP (e.g., any action by the state that does not result in payment of money to a CLEC would not be redundant to the PAP)…[65]

71. Qwest concludes by urging the Commission to adopt the Facilitator's recommen-dations along with its clarifying language.

---

60 *Id*. at 30.

61 *Id*. at 31-32.

62 *Id*. at 31.

63 Qwest's Comments, at 4-5.

64 *Id*.

65 Quoted in *QPAP Report*, at 31.

72. Staff asserts that, while it agrees with the Facilitator's analysis and the QPAP revisions he suggested, Qwest's clarifying language goes well beyond what he recommended. Staff takes exception to Qwest's assertion that the Commission's rules and orders are a matter of contract between Qwest and CLECs as Qwest's wholesale customers. "To the contrary," Staff maintains, "where the Commission has rulemaking authority and/or subject matter jurisdiction over an issue, the Commission is free to exercise its jurisdiction in the public interest. It is well beyond the purpose and scope of the QPAP to attempt to 'preclude' payments called for in Commission rules and orders as Qwest purports to do in its revision of the Facilitator's revision presented in Qwest's November 9, 2001 comments."[66]

73. Staff concludes by urging the Commission to require Qwest to strike its proposed clarifying language for QPAP § 13.6 and to revise it in conformity with the Facilitator's recommended language.[67]

74. AT&T asserts that Qwest's proposed language for § 13.6 differs from the FCC's general mandate, which does not require a performance assurance plan to be the sole remedy, as well as the Texas plan, which Qwest purportedly modeled its own plan after. According to AT&T, under Qwest's proposed language, there can be no liquidated damages under interconnection agreements because a CLEC would have to pick the QPAP as its exclusive remedy. Furthermore, Qwest would be allowed to unilaterally limit remedies associated with antitrust and other legal actions pursuant to § 13.6 combined with § 13.7.[68]

75. AT&T goes on to point out that under proposed QPAP language for § 13.6, contrary to FCC precedent, CLECs would not have the right to sue for contractual remedies, including for measures not even measured by the QPAP. AT&T also maintains a CLEC would not be able to avail itself of

---

[66] Staff's Proposed Findings, at 20-21.

[67] *Id*. at 21.

remedies found elsewhere in the SGAT. Additionally, AT&T avers that for non-contractual remedies, CLECs would have the right to sue, but would not recover based on the proposed language in § 13.6. Moreover, according to AT&T, if a CLEC were able to obtain a judgment in a court of law, Qwest would be able to withhold that payment claiming that it was already paid under the offset provision contained § 13.7.[69]

76. AT&T thus urges the Commission to reject Qwest's proposed language for QPAP §13.6 and to substitute for that the following language found in the Texas plan:

> By electing remedies under the PAP, CLEC waives any causes of action based on a contractual theory of liability. (T)he application of the assessments and damages provided for herein is not intended to foreclose other noncontractual legal and regulatory claims and remedies that may be available to the CLECs.[70]

77. For its part, Covad asserts the Facilitator's recommendations would effectively eviscerate valid and legitimate claims for relief and recovery of damages. Covad thus recommends that the Commission adopt the approach taken by the Colorado Commission and require Qwest to adopt language for QPAP § 13.6 that mirrors the language found in §16.6 of the CPAP.[71]

78. Having given this matter due consideration, the Commission rejects the Facilitator's recommendations, which would bar CLECs opting into the QPAP from pursuing other remedies when they sustain extraordinary losses as a result of Qwest's non-conforming performance. We believe the

---

[68] AT&T's Proposed Findings, at 8.

[69] *Id*. at 8-10.

[70] *Id*. at 11.

[71] Covad's Comments, at 16-18.

Facilitator's recommendations tip the balance of competing legitimate interests too far in the direction of limiting Qwest's financial exposure and away from adequately remedying poor wholesale performance.

79. Instead, consistent with the recent decisions of the Montana, Nebraska and Washington commissions, we find persuasive the findings of the Colorado Public Utilities Commission that the SGAT is not a normal bilateral contract involving traditional liquidated damage analysis. As the Colorado commission's Chairperson, Raymond Gifford, aptly stated,

> It is true that, in an ordinary commercial contract, parties would not have the ability to supplement liquidated damages. The SGAT, though, is not an ordinary commercial contract. Rather it is a regulatory hybrid of a contract and a tool for furthering public policy. This Commission has the authority to ensure that Qwest's interconnection agreement with CLECs promote competition and adhere to the Act. This Commission also has the authority to levy fines on Qwest for providing poor retail and wholesale service. These principles, combined with the broad concern about post-271 backsliding, justify the risk that occasionally Qwest may overcompensate the CLECs for their damages, while preserving the right of the CLECs to sue when they are under compensated. The risk to Qwest is mitigated substantially by the probability that a court would not allow double recovery and would require an offset of any amount the CLEC received under the CPAP.[72]

80. Moreover, Qwest's concerns about overexposure could be alleviated if Qwest merely adopted the same language found in the Texas plan on which Qwest repeatedly emphasized it modeled its proposed plan. The Texas plan language, approved by the FCC, makes it manifest that CLECs would not be able to receive duplicative damages for contractual claims but could receive damages if they could establish damages under other theories of liability.

---

[72] *Colorado Order*, at 65.

81. For these reasons, we direct Qwest to replace § 13.6 of the QPAP with the following, provisions which are derived directly from CPAP §§ 16.3, 16.4 and 16.6 and which strike a more just and reasonable balance between limiting Qwest's financial exposure and providing adequate remedies to CLECs for non-conforming performance:

> 13.6 This PAP contains a comprehensive set of performance submeasures, 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, into its interconnection agreement with Qwest in lieu of other alternative standards or relief, except as stated in Sections 13.6.1, 13.6.2, and 13.7.
>
> 13.6.1 In electing the PAP, CLEC shall surrender any rights to remedies under state wholesale service quality rules or under any interconnection agreement designed to provide such monetary relief for the same performance issues addressed by the PAP. The PAP shall not limit either non-contractual legal or non-contractual regulatory remedies that may be available to CLEC.
>
> 13.6.2 Tier 1 payments to CLECs are in the nature of liquidated damages. Before CLEC shall be able to file an action seeking contract damages that flow from an alleged failure to perform in an area specifically measured and regulated by the PAP, CLEC must first seek permission through the Dispute Resolution Process set forth in Section 5.18 of the SGAT. This permission shall be granted only if CLEC can present a reasonable theory of damages for the non-conforming performance at issue and evidence of real world economic harm that, as applied over the preceding six months, establishes that the actual payments collected for non-conforming performance in the relevant area do not redress the extent of the competitive harm. If CLEC can make this showing, it shall be permitted to proceed with this action. Any damages awarded through this action shall be offset with payments made under this PAP. If the CLEC cannot make this showing, the action shall be barred. To the extent that CLEC's contract action relates to an area of performance not addressed by the PAP, no such procedural requirement shall apply.

2. Offsetting remedies

82. As reflected above, integrally related to electing remedies under the QPAP is the issue of offsetting awards flowing from such remedies. Section 13.7 of Qwest's proposed plan states as follows:

> If for any reason CLEC agreeing to this PAP is awarded compensation for the same underlying activity or omission for which Tier 1 assessments are made under this PAP, Qwest may offset the award with amounts paid under this PAP or offset any future payments due under the PAP by the amount of any such award. This section is not intended to permit offset of those portions of any damages allowed by noncontractual theories of liability that are not also recoverable under contractual theories of liability. Nothing in this PAP shall be read as permitting an offset related to Qwest payments related to CLEC or third-party physical damage to property or personal injury.

83. The Facilitator recommended that the Commission adopt Qwest's offset provision. However, as reflected above, the Facilitator also recommended that the language of § 13.7 should be revised to provide that (a) Qwest is not entitled to reduce QPAP payments for damage awards for physical injury to persons or property, even where those awards arise from the provision of wholesale service to CLECs, and that (b) CLECs retain the ability to recover damages awarded on non-contractual theories, as discussed above in connection with § 13.6.[73] The Facilitator also concluded that SGAT § 5.8.1 should be changed in order to prevent an inappropriate limit from being placed on Qwest's liability for property damage and personal injury.[74]

84. Qwest accepted the Facilitator's recommended changes to § 13.7, and those changes are reflected in the language quoted above. Moreover, our review of Qwest's most recent SGAT filing indicates that Qwest has added the language to § 5.8.1 that the Facilitator recommended.[75]

85. Responding to AT&T's arguments that, as discussed below, are sharply critical of the Facilitator's recommendation concerning the offset, Qwest contends AT&T's concern that the offset

---

[73] *QPAP Report*, at 35-36.

[74] *Id*. at 41.

provision will be unilaterally applied by Qwest is miplaced. In support of this position, Qwest draws attention to the fact that the Facilitator recognized that

> It is ultimately not helpful here to cast the issue in terms of allowing Qwest a unilateral right to offset QPAP payments. If Qwest's language is adopted, nothing in it gives Qwest the right to make an unreviewable decision about whether an offset is allowable. . . . The AT&T approach would have a judicial authority, which we may presume to be much less familiar with the QPAP's context, purpose, and contents, decide how its intent can best be implemented in the circumstances. Under the Qwest approach, a commission much more familiar with the goals and features of the QPAP would make that decision. There can be no doubt that the decision to be made can be best made by the regulatory commission."[76]

86. Qwest closes by urging the Commission to adopt the Facilitator's recommendations.[77]

87. Staff also supports the Facilitator's recommendations.[78]

88. For its part, AT&T agrees that CLECs are not entitled to double recovery for the same damages. However, AT&T claims the offset issue is one that should be decided by the finder of fact before whom a CLEC has presented the successful theory or theories of recovery. AT&T points out neither the Texas plan nor the CPAP include provisions such as this one that allows Qwest to unilaterally offset payments awarded to CLECs using alternative remedies.[79] AT&T also notes that Qwest will have the opportunity to argue for an offset before the finder of fact, who will have a better understanding of the cause

---

[75] Qwest New Mexico SGAT, 6th Revision (April 12, 2002).

[76] Qwest's Proposed Findings, at 8 (quoting *QPAP Report*, at 35-36).

[77] *Id*.

[78] Staff's Proposed Findings, at 23.

[79] AT&T's Proposed Findings, at 11.

of action at issue, such as those sounding in tort or antitrust.[80] Further, emphasizing that § 13.7 speaks for itself, AT&T rejects as fatally flawed the Facilitator's reasoning that Qwest would not be able to use § 13.7 to offset legal judgments obtained against Qwest by a CLEC because CLECs are free to use the dispute resolution procedure in the SGAT to pursue claims before the state commissions.[81] AT&T therefore requests that the Commission reject the Facilitator's finding regarding the offset provision and instead adopt the offset language of the Texas or Colorado commissions, or that recommended by the Utah Staff.[82]

89. Covad concurs with AT&T.[83]

90. Having considered the relative merits of the positions presented, the Commission rejects the Facilitator's recommendation, which without sufficient legal or reasonable policy justification, would allow Qwest to unilaterally offset damages a court or other agency orders it to pay a CLEC.

91. In arriving at this conclusion, we recognize that double recovery for the same damages should be and is legally barred. However, the offsetting of remedies is a judicial concept for the trier of fact to determine in assuring that an aggrieved party does not receive a double recovery.

92. It also bears noting that, although Qwest repeatedly stated that its proposed plan is modeled on the Texas plan approved by the FCC and urged the Commission to not look to other state or BOC plans, Qwest did not adopt the Texas plan's offset language, which provides, at § 6.2, "whether or not the nature of damages sought by CLEC is such that an offset is appropriate will be determined in the relevant proceeding," instead of the BOC *unilaterally* making the offset, as Qwest would have it.

---

80 AT&T's Exceptions, at 21.

81 *Id*. at 21.

82 *Id. See* AT&T's Proposed Findings, at 11-12.

83 Covad's Comments, at 18-19.

93. Therefore, consistent with the Texas plan as well as the holdings of the Montana, Nebraska and Washington commissions on this issue, the Commission finds that the appropriate entity to determine whether an award to a CLEC should be offset is not Qwest, but is the same court or other adjudicatory body that awarded damages to a CLEC. Accordingly, the Commission directs Qwest to revise QPAP § 13.7 to read as follows:

> 13.7 Any liquidated damages payment by Qwest under these provisions is not hereby made inadmissible in any proceeding relating to the same conduct where Qwest seeks to offset the payment against any other damages a CLEC may recover; whether or not the nature of damages sought by the CLEC is such that an offset is appropriate will be determined in the related proceeding. Nothing in this PAP shall be read as permitting an offset related to Qwest payments related to CLEC or third-party physical damage to property or personal injury.

94. Inasmuch as we agree with the Facilitator's reasoning that prohibits offsets against CLEC payments related to third-party physical damage to property or personal injury, we see no reason to alter the final sentence of Qwest's proposed QPAP § 13.7, which is incorporated above. We also concur in the Facilitator's suggested additional provision for SGAT § 5.8.1, which as found above, Qwest has already inserted in its most recent SGAT filing.

3. Exclusions

95. Section 13.3 of the QPAP provides a set of circumstances that would excuse Qwest from making Tier 1 and Tier 2 payments. As described in the *QPAP Report*, CLECs raised a number of issues with Qwest's proposed language concerning force majeure events.[84] In resolving the issues before him, the

[84] *QPAP Report*, at 36-38.

Facilitator recommended the following: (i) referencing SGAT § 5.7 in the first clause of QPAP § 13.3 in defining force majeure events, (ii) making state commissions the judges of disputes over force majeure events, (iii) adding language proposed by AT&T to further define the nexus a force majeure event and Qwest's performance, (iv) determining that force majeure events should not excuse poor performance with respect to parity measurements, and (v) limiting the exclusion to the failure to provide properly forecasts that are "explicitly required by the SGAT."[85]

96. Qwest has agreed to make all the recommended changes, except for one modification that is discussed below.[86]

97. No party contested the Facilitator's recommendations regarding exclusions from payment liability.

98. There having been no challenge to the Facilitator's recommendations and having found no matter of particular concern, the Commission hereby finds and concludes that the Facilitator's recommendations are appropriate, reasonable and resolved in a manner that is consistent with the public interest. The Commission therefore accepts and adopts the Facilitator's recommended resolutions of the issues pertaining to exclusions from payment liability and instructs Qwest to modify QPAP § 13.3 accordingly. In this regard, we note that while Qwest has modified its QPAP to incorporate the Facilitator's recommendations, it has not deleted certain language referring to parity measurements. We further note that consistent with the Washington commission's recent findings on this issue,[87] Qwest does

---

[85] *Id*. at 39-40.

[86] Qwest's Comments, at 7-8.

[87] *In the Matter of the Investigation Into U S WEST Communications, Inc.'s Compliance with Section 271 of the Telecommunications Act of 1996* and *In the Matter of U S WEST Communications, Inc.'s Statement of Generally*

not oppose the Facilitator's recommendation that parity measures not be subject to force majeure exclusions; rather it is the fact that the last sentence of § 13.3 includes "or other excusing event" immediately after "a Force Majeure event" that causes Qwest to retain the subsequent reference to parity measures. Accordingly, in the interests of efficiently resolving lingering issues and in order to avoid a latent ambiguity in the language of § 13.3, we direct Qwest to add to QPAP § 13.3 the words "(excluding Force Majeure events)" after the word "parity".[88]

D. Incentive to Perform

99. The Facilitator considered four issues pertaining to the sufficiency of the QPAP's creation of incentives for Qwest to perform:

1) Tier 2 payment use (Section 7.5);
2) 3-month trigger for Tier 2 payments;
3) Limiting escalation to 6 months, and;
4) Splitting Tier 2 payments between CLECs and the states.

100. Of these four, only the fourth issue was not addressed in the parties' post-*QPAP Report* comments or briefs. There having been no challenge to the Facilitator's findings and conclusions regarding this issue and having no found matters of particular concern in the Facilitator's recommended resolution of it, the Commission hereby finds and concludes that the Facilitator's recommendation is appropriate, reasonable and resolved in a manner that is consistent with the public interest. Accordingly, the Commission

---

Available Terms Pursuant to Section 252(f) of the Telecommunications Act of 1996, Washington Utilities and Transportation Commission Docket Nos. UT-003022 & UT-003040, 33rd Supplemental Order; Order Denying in Part, and Granting in Part Qwest's Petition for Reconsideration of the 30th Supplemental Order, Commission Order Addressing Qwest's Performance Assurance Plan (May 20, 2002) (*33rd Supplemental Order*), at 17-18, ¶¶ 72-73, 78.

accepts and adopts the Facilitator's recommendation that the goals underlying the Tier 2 payments are best served by continuing to provide that they be paid to the states.[89]

101. We now turn our attention to the three remaining incentive to perform issues.

1. Tier 2 payment use and special fund

102. Tier 2 payments are payments made to the state of New Mexico when Qwest fails to meet certain performance standards. Certain performance measures are subject to Tier 2 payments because the performance results are only available on a regional basis, such as Gateway Availability. Consistent with our endorsement above of the Facilitator's recommended resolution of the fourth issue under this heading, CLECs receive no payment when Qwest fails to meet these performance standards. Other performance measures that are subject to individual CLEC payments are also subject to Tier 2 payments because of their importance to the CLECs' ability to compete. These measures are referred to as Tier 2 measures having Tier 1 counterparts.

103. Section 7.5 of the QPAP originally required that Tier 2 payments be limited to use for purposes related to Qwest's service territory. In reaction to AT&T's argument that the service territory requirement be eliminated, the Facilitator found that § 7.5 should 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.[90]

---

88 *See id.*

89 *QPAP Report*, at 45.

90 *QPAP Report*, at 42.

104. The Facilitator also recommended that this Commission and other state commissions in Qwest's region join together to participate in a multistate QPAP oversight effort featuring a common administrative structure. To this end, the Facilitator recommended that a percentage of certain QPAP payments should be paid into a special fund that would be available for states participating in a joint effort to use for: (a) administrative activities, (b) dispute resolution, and (c) other wholesale telecommunications service activities determined by participating commissions to be carried out on a common basis.[91]

105. Covad was the only party to have submitted specific comments on this issue. Covad requests that the Commission adopt language stipulating that any use to which the Tier 2 funds are put would not benefit Qwest either directly or indirectly. Covad contends it would be incongruous to compel payment from Qwest and then to apply it to a purpose from which Qwest would benefit. Covad argues such an outcome would likely create a perverse incentive on the part of Qwest in providing wholesale services to CLECs.[92]

106. The Commission accepts and adopts the Facilitator's recommendation regarding the language for QPAP § 7.5 and directs Qwest to modify the QPAP accordingly.

107. We fully support the Facilitator's recommendation that the state commissions in Qwest's territory work toward designing and implementing a common administrative structure for long-term oversight of Qwest's wholesale performance and related matters, including a dispute resolution process. To this end, the Commission has endorsed the *Resolution on Long-Term 271 Multistate Work Efforts* (*Resolution*)

---

91 *Id*.

92 Covad's Comments, at 19.

that was presented at the April 2002 Qwest ROC Spring meeting. The *Resolution* provides, in pertinent part, as follows:

> **Resolved,** The Qwest ROC in its April 2002 Spring meeting in Santa Fe, New Mexico, supports the use of a collaborative approach under the auspices of the ROC with a strong governance structure which may be similar to that used in the OSS test for the post-OSS test continuing multistate work efforts for long term performance measurement and reporting, auditing, Performance Assurance Plan reviews and modifications, and a process for dispute resolution; and be it further
>
> **Resolved,** That participation in any such collaborative approach by any state is voluntary and that each participating state Commission may act independently on issues where it might differ from the multistate group decision or recommendation.

The Commission takes this opportunity to reiterate our strong endorsement of the *Resolution* and incorporates the intent and purpose of the *Resolution* in this *Order*.

108. Regarding the disposition of Tier 2 funds, as we have observed on many occasions, New Mexico law requires that the Commission obtain legislative authority to spend Tier 2 funds for activities such as QPAP oversight. The Commission intends to address this issue in the next regular session of New Mexico Legislature where we plan on presenting proposed legislation that would create a Tier 2 Fund.

109. Insofar as the Special Fund provisions are concerned, the Commission notes that QPAP § 11.3 needs to be revised to reflect that the six-month review, as addressed below, will be conducted by the Commission and not an independent arbitrator. Accordingly, in conformity with our findings below, the Commission instructs Qwest to strike QPAP § 11.3(b) in its entirety.

110. The Commission also notes the QPAP oversight activities contemplated by §§ 11.3, 11.3.1, 11.3.2 and 11.3.3 may run afoul of New Mexico law because the Commission does not at this time posses the requisite authority to use these funds. For this reason, the Commission directs Qwest to revise all pertinent provisions of § 11.3 to provide that the Commission will seek to have the New Mexico Legislature create a special fund for the general purpose of conducting its QPAP oversight activities, and

that nothing in the QPAP prevents the Commission from joining with other state commissions to fund QPAP oversight activities that are conducted jointly. We further order Qwest to amend §11.3.1 and §11.3.2 to reflect the fact that the Commission will be acting on its own in its QPAP oversight activities unless and until it agrees to join a suitable and formal multi-state long-term administration and dispute resolution process.

111. Finally, the Commission is not persuaded that a stipulation regarding the use of Tier 2 funds along the lines advanced by Covad is necessary.

2. 3-month trigger for Tier 2 payments

112. The plan Qwest originally proposed required that non-conforming performance extend to three consecutive months before Tier 2 payments would be triggered. The Facilitator determined that in any twelve-month rolling period in which there have been two months of non-conforming performance 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-conforming performance. For Tier 2 measures with no Tier 1 counterpart, the Facilitator recommended that payments should escalate as provided for in the QPAP.[93]

113. Qwest supports the Facilitator's recommendation and has agreed to incorporate the Facilitator's changes into the QPAP at § 9.1.2.[94]

114. Staff believes the Facilitator's proposed resolution moves in the right direction but does not go far enough and is, in any event, unnecessarily complex. According to Staff, there is no reason to delay Tier 2 consequences, irrespective of whether a Tier 2 measure has a corresponding Tier 1 counterpart

---

[93] *QPAP Report*, at 43.

payment. Staff points out Qwest itself claims Tier 2 payments are intended to create a further performance incentive. Staff therefore requests that we reject the Facilitator's recommended approach and instruct Qwest to revise the QPAP to require that Tier 2 payments be made for any month in which Qwest fails to meet the applicable standard.[95]

115. Staff's position is well taken. We agree with Staff that the State of New Mexico has an interest in having Qwest perform adequately because it is consistent with State policy to encourage the promotion of competition. A blanket policy holding that Tier 2 payments do not start until numerous months of poor performance have occurred weakens Qwest's incentives. Therefore, we will reject the Facilitator's recommended approach.

116. Accordingly, the Commission instructs Qwest to revise QPAP §§ 7.3 and 9.1.2 to reflect that Tier 2 payments shall be made for any month in which Qwest fails to meet the applicable standard.

3. Limiting escalation to 6 months

117. The payment escalation process is one of two monetary caps structures in the QPAP. First, as discussed above, the QPAP will feature a procedural, investigation triggering cap as well as an annual, maximum cap on Qwest's liability for non-conforming performance. In contrast, the escalation issue goes to whether or not there should be a six-month limit on payment escalation for failure to meet any of the performance measurements identified in the PIDs. Qwest proposed, and the Facilitator concurred, that there should be a six-month limit on payment escalation.

---

94 Qwest's Comments, at 11.

95 Staff's Proposed Findings, at 26-27.

118. The Facilitator adopted Qwest's position for the following reasons: (1) it is not clear that poor performance past six months means Qwest methodically calculated that the continuing costs of compliance exceeds the continuing costs of violation; (2) 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; and (3) calculated comparisons of the marginal costs of compliance versus non-compliance are not the only reason problems can persist.[96]

119. AT&T opposes the Facilitator's recommendation, pointing out that both the Colorado commission and the Utah Staff rejected limits on payment escalation. AT&T maintains that if Qwest is currently meeting the standards to obtain section 271 relief, there is no reason it should not be able to meet them in the future. AT&T further contends that Qwest's assertion that unlimited payment escalation would overcompensate CLECs misses the point because the purpose of payment escalation is to balance CLEC compensation for their losses and to ensure the penalty is higher than the amount Qwest is willing to absorb as a cost of doing business. AT&T cited the Colorado commission's reasoning that continuing escalation of payments for continuous poor performance should help prevent the possibility that Qwest might evaluate whether it would rather absorb QPAP penalties and deter competition or avoid penalties and comply with the law.[97] AT&T concludes by requesting that the Commission order Qwest to remove the caps on escalation found in Table 2 of Qwest's proposed plan.[98]

---

96 *QPAP Report*, at 44-45; Qwest's Proposed Findings, at 10-11.

97 AT&T's Proposed Findings, at 12-14.

98 *Id*. at 13-14.

120. Covad also opposes the Facilitator's recommendation. Covad asserts the Facilitator's rejection as speculative that continued poor service past six months indicates the penalties are insufficient is inconsistent with the Facilitator's own surmise that poor performance beyond six months is beyond Qwest's control. Covad reasons that because military-style testing demonstrates Qwest's ability to meet all PIDs prior to interLATA authority being granted, the Commission should

deem unpersuasive Qwest's assertion, as supported by the Facilitator, that poor performance beyond six months is due to circumstances beyond its control. Covad argues that limiting payment escalation to six months would merely allow Qwest to discriminate against CLECs for extended periods of time. Covad cites the Colorado commission's Special Master's Final Report, which requires escalation beyond six months and recommends adopting such an approach.[99]

121. Like AT&T and Covad, Staff disagrees with the Facilitator. Staff believes that the six-month cap on escalation should be removed because continuing escalation is necessary to create the necessary incentive for Qwest to do what it takes to fix recurring performance problems. Staff points out that, as noted by the Facilitator elsewhere in the *QPAP Report*, a forum has been established for considering the need to add or revise performance measures should it be determined that a poorly designed performance measure is causing a problem.[100]

122. We decline to accept the Facilitator's recommendation for a six-month limitation on Tier 1 payment escalation. Instead, we find persuasive the reasons identified by AT&T, Covad and Staff for not limiting escalation: (i) to deter Qwest from providing poor service to CLECs for extended periods of time, and (ii) to help to ensure Qwest's payment for noncompliance is higher than the amount Qwest is willing to absorb as a cost of doing business.

123. Moreover, the Facilitator's suggestion that recurring problems might be due to poorly designed performance measures is, at best, speculative. For one thing, Qwest has been deeply involved in the process of developing the relevant performance measures and the ROC OSS test should be able to

---

[99] Covad's Comments, at 13-16.

[100] Staff's Proposed Findings, at 27-29.

identify any problems with performance measures. Further, as pointed out by several parties both before us and in the Multi-State Proceeding, Qwest is currently meeting the standards to obtain section 271 relief; there is no reason it should not be able to meet them in the future. Additionally, as mentioned by Staff, a forum has been established for considering the need to add or revise performance measures should it be determined that a poorly designed performance measure is the root cause of the problem.

124. As to Qwest's arguments that compliance may dwarf costs, the Commission agrees with Chairman Gifford of the Colorado commission that Qwest's argument "makes no logical sense" because

> payment escalations are meant to be a balance between compensating the CLECs for their losses and ensuring that the penalty is higher than the amount that Qwest is willing to absorb as a cost of doing business. Since the value to Qwest of suppressing competition in a particular market may dwarf the cost of the relevant services that Qwest should be selling, sometimes the escalation may have to be significant to motivate Qwest to perform. Although the idea that Qwest would rationally evaluate whether it is more valuable to absorb penalties and retard competition or to adhere to the law and avoid penalties is still purely speculative, one of the underpinnings of this performance plan is to ensure this type of strategic action is deterred. Continuous escalation of payments for continuous poor performance should help prevent this strategic activity.[101]

125. Therefore, insofar as resolving the payment escalation issue is concerned, the Commission finds merit in the approach taken by the Montana Commission. The Montana commission described the following process for extending payment escalation beyond the six months reflected in Table 2 within § 6.2.2 of Qwest's proposed plan:

> Table 2 was changed to reflect that after 6 missed months in a row, the per-occurrence payment amount increase in each

[101] *Colorado Order*, at 59-60.

> subsequently missed consecutive month by an increment of $100. The payment would be calculated by subtracting six from the number of consecutively missed months, multiplying the remainder by $100, and adding to that amount increments of $800 for measures classified as high, $600 for measures classified as medium, and $400 for measures classified as low. (Example: In month 7 of 7 consecutive misses on a measure, the per-occurrence payment due for a measure classified as high would be $900. [7-6=1, x $100 + $800 = $900.] In month 8 for the same missed measure, the payment would be $1000; in month 9, the payment would be $1100, etc.) For per-measurement payments, after 6 missed months in a row, the per-measurement payment for low-weighted measures would continue to increase by $5,000 each month, for medium-weighted measures, payments would continue to increase by $10,000 each month, and for high-weighted measures, payments would continue to increase by $25,000 each month. The per-measurement payment would be calculated by subtracting six from the number of consecutively missed months, multiplying the remainder by $25,000, $10,000, or $5,000 for measures classified as high, medium and low, respectively, and adding to that amount increments of $150,000 for measures classified as high, $60,000 for measures classified as medium, and $30,000 for measures classified as low. (Example: In month 7 of 7 consecutive misses on a measure, the per-measurement payment due for a measure classified as low would be $35,000. [7-6=1, x $5,000 + $30,000 = $35,000.] In month 8 for the same missed measure, the payment would be $40,000; in month 9, the payment would be $45,000.[102]

126. We agree with the Montana Commission that this approach is reasonable and fair because it continues escalation in the same increments after six months of non-conforming performance as those occurring prior to six months. Accordingly, Qwest is directed to revise the QPAP to allow for payment escalation for failure to meet any of the performance measurements identified in the PIDs in conformity with the preceding paragraph.

---

[102] *Montana Order*, at 41.

V. CLEARLY ARTICULATED AND PREDETERMINED MEASURES

127. The Facilitator identified 22 issues in eight categories involved in the analysis of whether Qwest's QPAP is based on clearly articulated and pre-determined measures. The eight issue categories are the following: (i) measure selection process, (ii) adding measures to the payment structure, (iii) aggregating the PO-1A and PO-1B performance measures, (iv) measure weighting, (v) collocation, (vi) including special access circuits, (vii) proper measure of UNE intervals, and (viii) and low volume CLECs.

A. Measure Selection Process

128. The Facilitator noted that no party challenged the measure selection process. He found that most disputes in this area went to the need for additional measures, which he addressed elsewhere. He concluded that the measures in use in the QPAP are generally a well-articulated set of pre-determined measures that span the range of carrier-to-carrier performance.[103] The Commission agrees with the Facilitator's conclusions and, therefore, accepts and adopts his recommendation as to the measure selection process.

B. Adding Measures to the Payment Structure

129. There were nine issues involving claims that performance measures should be added to the QPAP. These are:

1) requiring payments for cancelled orders;
2) requiring payments for "diagnostic" PIDs;
3) cooperative testing;
4) adding a new PID – PO-15D – to address due date changes;

---

[103] *QPAP Report*, at 46.

5) including PO-1C preorder inquiry timeouts in Tier 1;
6) adding change management measures;
7) adding a software release quality measure;
8) adding a test bed measurement; and
9) adding a missing-status-notice measure.

130. Of these nine issues only one, requiring payments for "diagnostic" PIDs, was addressed by any party in its 10-day comments. There having been no challenge to the Facilitator's findings and conclusions regarding the remaining eight issues[104] and having found no matters of particular concern in the resolution of those issues, the Commission hereby finds and concludes that the Facilitator's recommendations are appropriate, reasonable and resolved in a manner that is consistent with the public interest. Accordingly, the Commission accepts and adopts the Facilitator's recommended resolutions of these eight issues.

131. We now turn our attention to the sole outstanding issue in this category.

1. Requiring payments for "diagnostic" PIDs

132. The Facilitator recognized the importance of enhanced extended links (EELs) to CLECs and acknowledged 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. The PID applies no benchmark or parity standards for EELs at present; the performance measures related to them are diagnostic in nature. The Facilitator also noted Qwest's brief acknowledged that, as the ROC OSS collaborative changes

[104] *Id*. at 47-48, 49-52.

measures from diagnostic to a firm benchmark or parity standard, such measures are to be included in the QPAP.[105]

133. The Facilitator recommended that as ordering activity increases for EELs, line-sharing and sub-loop elements increases, these UNEs should be subjected as soon as practicable to a measurement base that will allow for their prompt addition to the payment structure of the QPAP.[106]

134. Covad requests that the Commission revise the Facilitator's recommendation such that any and all PIDs that are converted from a diagnostic status to a benchmark or parity standard prior to Qwest receiving section 271 authority will be incorporated into the QPAP as of the date such authority is granted.[107]

135. In response to Covad's request, Qwest indicates it has committed to incorporate product disaggregation of measurements into the QPAP, such as EELs and line sharing, when they receive standards through the ROC TAG.[108]

136. While we laud Qwest's commitment, we also find merit in Covad's proposal. Accordingly, we are revising the Facilitator's recommendation to provide that any and all PIDs that are converted from a diagnostic status to a benchmark or parity standard prior to Qwest receiving section 271 authority will be incorporated into the QPAP as of the date such authority is granted. Qwest is instructed to modify the QPAP accordingly.

---

105 *Id* at 48.

106 *Id*.

107 Covad's Comments, at 19.

108 Qwest's Proposed Findings, at 12.

C. Aggregating the PO-1A and PO-1B Performance Measures

137. Involved here is whether or not the PEPP collaborative reached agreement on collapsing the seven individual measurements under PO-1A (response times for transactions under IMA-GUI) and PO-1B (response times for the same transaction types under EDI) into two measurements 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.[109] The Facilitator found that the PEPP collaborative had reached agreement on collapsing the seven transaction types (appointment scheduling, service availability, facility availability, street address validation, customer service records, telephone number, loop qualification) into two individual measurements and that the terms of the agreement establish significant and more balanced payment responsibilities for failure to meet the standards.[110]

138. No party addressed this issue in its post-*QPAP Report* comments or briefs.

139. There having been no challenge to the Facilitator's findings and conclusions regarding the foregoing and having found no matters of particular concern in the Facilitator's recommended resolution of this issue, the Commission hereby finds and concludes that the Facilitator's recommendation is appropriate, reasonable and resolved in a manner that is consistent with the public interest. Accordingly, the Commission accepts and adopts the Facilitator's recommended resolution of aggregating the PO-1A and PO-1B performance measures.

---

[109] 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.

[110] *Id*. at 53.

D. Measure Weighting

140. There were three issues involved in measure weighting: (1) changing measure weights, (2) eliminating low weighting, and (3) LIS trunks weighting.

141. No party addressed these three issues in its post *QPAP Report* comments or briefs.

142. There having been no challenge to the Facilitator's findings and conclusions regarding the foregoing and having found no matters of particular concern in the Facilitator's recommended resolutions of these issues,[111] the Commission hereby finds and concludes that the Facilitator's recommendations are appropriate, reasonable and resolved in a manner that is consistent with the public interest. Accordingly, the Commission accepts and adopts the Facilitator's recommended resolutions of the three measure weighting issues.

E. Collocation Payment Amounts

143. This issue goes to whether or not a "days late" collocation payment schedule approach such as has been implemented in Michigan should be utilized in the QPAP for determining collocation payment amounts. Qwest agreed to adopt the Michigan approach and the Facilitator concluded that Qwest's proposal was responsive to the parties' requests and was otherwise reasonable. The Facilitator therefore concluded there was no reason to question the QPAP's treatment of collocation payments.[112]

144. No party addressed this issue in its post-*QPAP Report* comments or briefs.

145. There having been no challenge to the Facilitator's findings and conclusions regarding the foregoing having found no matters of particular concern in the Facilitator's recommended resolution of this

---

[111] *Id*. at 53-55.

issue, the Commission hereby finds and concludes that the Facilitator's recommendation is appropriate, reasonable and resolved in a manner that is consistent with the

[112] *Id*. at 56.

public interest. Accordingly, the Commission accepts and adopts the Facilitator's recommended resolution of determining collocation payment amounts.

F. Including Special Access Circuits

146. The Facilitator found 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 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.[113]

For these reasons, the Facilitator recommended that special access circuits should not be included in the PID performance measures as one of the product disaggregations and that the QPAP not be changed to provide for payments associated with such circuits.[114]

147. WorldCom is the only party on record as opposing the Facilitator's recommendation respecting special access circuits. WorldCom asserts the Facilitator erred in reasoning that because CLECs purchase the majority of special access trunks from federal tariffs, they should pursue remedies at the FCC. WorldCom contends that because the FCC has long held it will consider discriminatory and anticompetitive BOC conduct as part of the public interest inquiry, states should address such alleged conduct in exercising

---

[113] *Id*. at 57.

[114] *Id*. at 57-58.

their authority to take measures to prevent backsliding; this may occur, according to WorldCom, concurrent with FCC efforts.[115]

148. WorldCom adds that inclusion of special access is under consideration in Texas. WorldCom also notes that only 10% of traversing traffic need be interstate for a CLEC to order federally tariffed special access. WorldCom further asserts that the New York commission found special access services critical to business in their state. WorldCom proceeds to delineate how other states consider special access in performance reporting. As for service quality, WorldCom claims there is no federal-state conflict, there are no federal service quality standards and neither Congress nor the FCC has taken regulatory actions on "intrastate access" service quality.[116]

149. WorldCom therefore concludes that it is appropriate for the Commission to approve reasonable performance measures for special access.[117]

150. We believe it is not timely to require Qwest to include in the QPAP, for penalty purposes, PIDs for special access circuits. This action does not preclude the eventual addition of special access PIDs through the six-month review process if a definitive need for such an addition arises. Accordingly, the Commission accepts and adopts the Facilitator's recommendation that special access circuits not be included in the PID performance measures for the time being.

---

[115] WorldCom's Exceptions, at 1-6.

[116] *Id*.

[117] *Id*.

G. Proper Measure of UNE Intervals

151. At issue here is whether or not QPAP payments should be based on the intervals of SGAT Exhibit C, rather than on the intervals set forth in the PID performance measures. The Facilitator concluded that for the reasons expressed in his *UNE Report*, it is appropriate for the QPAP to apply the PID performance measures as the payment standard.[118]

152. No party addressed this issue in its post *QPAP Report* comments or briefs.

153. There having been no challenge to the Facilitator's findings and conclusions regarding the foregoing and having found no matters of particular concern in the Facilitator's recommended resolution of this issue, the Commission hereby finds and concludes the Facilitator's recommendation is appropriate, reasonable and resolved in a manner that is consistent with the public interest. Accordingly, the Commission accepts and adopts the Facilitator's recommended resolution respecting the proper measure of UNE intervals.

H. Low Volume CLECs

154. Covad argued in the Multi-State Proceeding that Qwest designed the QPAP primarily to compensate high-volume CLECs with the result that lower volume CLECs would be under-compensated.

155. The Facilitator concluded that Qwest had adduced substantial evidence that the QPAP would not under-compensate lower volume CLECs.[119] However, the Facilitator also concluded that

---

[118] *QPAP Report*, at 58.

[119] *QPAP Report* at 59.

changes to the QPAP were necessary to address the "free miss" issue.[120] To redress this problem, the Facilitator recommended the following:

> 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. The SGAT should incorporate these changes.[121]

156. Qwest has expressed a willingness to make changes to QPAP § 2.4 that implement the "spirit" of the Facilitator's recommendation. However, Qwest notes that a "minor adjustment" is necessary to avoid the functional equivalent of a 100% performance standard.[122]

157. We accept and adopt the Facilitator's recommendation regarding lower volume CLECs. To the extent that Qwest wishes to submit QPAP language that differs from the Facilitator's recommendation, Qwest should promptly do so in a separate filing referred to the Hearing Examiner in our consolidated SGAT docket, Utility Case No. 3537. Any such filing should include an explanation of all changes, with an opportunity for other parties to respond, as has been the practice with SGAT modifications generally.

---

[120] This refers to a QPAP provision that CLECs argued would provide Qwest with one "free miss" each month in the case of small volume CLECs. As the Facilitator notes, the goal of excluding one miss from compensation was to prevent (in the case measurements with CLEC volumes of 5 or fewer) turning a 90% benchmark into a 100% one. *QPAP Report*, at 59.

[121] *Id*.

[122] Qwest's Comments, at 12.

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

158. The Facilitator identified nine issue categories that address whether and to what extent Qwest's proposed plan is structured to detect and sanction poor performance as it occurs. The categories involved are the following: (i) six-month plan review limitations, (ii) monthly payment caps, (iii) sticky duration, (iv) low volume critical values, (v) applying the 1.04 critical value to 4-wire loops, (vi) measures related to low volume, developing markets, (vii) minimum payments, (viii) 100% caps for interval measures, and (ix) assigning severity levels to percent measures.

159. Of the nine categories addressed by the Facilitator, only one, six-month plan review limitations, was taken up by the parties in their post-*QPAP Report* comments and briefs. There

having been no challenge to the Facilitator's findings and conclusions regarding the remaining eight categories and having found matters of particular concern in the Facilitator's recommended resolutions of them,[123] the Commission hereby finds and concludes that the Facilitator's recommendations are appropriate, reasonable and resolved in a manner that is consistent with the public interest. Accordingly, the Commission accepts and adopts the Facilitator's recommended resolutions of these eight issue categories.

160. We now turn our attention to the sole remaining category that was engaged by the parties in their comments and briefs to the Commission.

A. Six-Month Plan Review Process

161. Section 16 of Qwest's proposed plan provides the process for amending the plan. As conceived by Qwest, only the following types of changes are allowed: (a) addition, deletion, or change of measurements (based on whether there was an omission or failure to capture intended performance); (b) change of benchmark standards to parity standards (based on whether there was an omission or failure to capture intended performance); (c) changes in weighting of measurements (based on whether the volume of "data points" was different from what was expected); and (d) movement of a measure from Tier 1 to Tier 2 (based on whether the volume of "data points" was different from what was expected). As proposed, § 16 requires any change to the plan to be approved by Qwest.

162. In the *QPAP Report*, the Facilitator determined that Qwest's proposed plan was, in almost all respects, comparable to the plan approved in Texas, including the power to veto changes to existing performance measures. He noted an important difference with respect to proposed additions of new

[123] *QPAP Report*, at 62-71.

measures, however, finding that in the Texas plan, disputes are resolved by arbitration. Moreover, comparing Qwest's plan to the CPAP, the Facilitator found that, like the plan proposed by Qwest, the CPAP would prohibit revisiting the statistical methods applicable to parity determinations, prohibit revisiting the payment structure and the categorization of payments by tiers, prohibit revisiting the methods for capping payments, allow measures to be added or deleted and allow shifts in the weighting given to existing measures. The Facilitator further found that like Qwest's plan, the CPAP would grant state commissions authority to determine the propriety of any identified changes, which the commissions would then ask Qwest to include in an amended SGAT filing. The Facilitator also noted that the CPAP likewise recommends a separate review process (assisted by an outside expert under funding provided through Tier 2 payments), which would take place after three years of plan operation, and which could examine broader changes to the plan.[124]

163. The Facilitator concluded that inasmuch as total financial liability under the QPAP should remain predictable and fixed, providing a too liberal mechanism for changes to performance measures would prove problematic. Nevertheless, he found the Texas approach of using arbitration to address the need for new performance measures preferable to Qwest's proposal that it must agree to all changes.[125]

164. The Facilitator also recommended approval of the three-year review process recommended in Colorado. However, he indicated that process should not be used to open the QPAP generally to

---

[124] *QPAP Report*, at 60.

[125] *Id*. at 61.

amendment, but would serve to assist the commissions in generally determining then existing conditions and reporting to the FCC on the continuing adequacy of the QPAP to serve its intended functions.[126]

165. The Facilitator therefore recommended changes to the QPAP that would: (i) provide for normal SGAT dispute resolution procedures in the event there is disagreement with a recommendation in the six-month review process regarding proposed addition of new measures to the QPAP payment structure; (ii) 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; (iii) 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.[127]

166. AT&T avers the Facilitator's recommendations still afford Qwest too much control over the six-month review process. AT&T believes the Facilitator misinterpreted the Colorado approach, perceiving limits in the CPAP that do not, in fact, exist. As AT&T describes it, the Colorado review and amendment process is considerably more flexible than the plan proposed by Qwest here, even after considering the Facilitator's recommended changes.[128]

167. Under the Colorado process, according to AT&T, all issues that implicate shifting the relative weighting of, deleting and adding new measures are routinely considered in the six-month review process. AT&T notes that it is the Colorado commission that determines what modified

---

[126] *Id*. at 61-62.

[127] *Id*. at 62.

[128] AT&T's Exceptions, at 32-33.

weights, additions or deletions are appropriate and Qwest is required to file an amended SGAT to reflect those commission-determined changes. Parties may suggest more fundamental changes to the CPAP but, unless it is established that the need for such change is "highly exigent," the matter will be deferred to the three-year review.[129]

168. AT&T further asserts it is not true, as suggested by the Facilitator, that SBC retains a virtual veto over all changes suggested in the Texas plan process. Rather, AT&T maintains that in contrast with the QPAP's statement that "changes shall not be made without Qwest's agreement," under the Texas plan, "changes to existing performance measures and the remedy plan shall be made by mutual agreement of the parties and, if necessary, with respect to new measures and their appropriate classification, by arbitration."[130] Moreover, AT&T contends the Facilitator erred in finding that the types of permissible changes are the same in both the Texas plan and Qwest's proposed plan. Although the two plans have in common four categories of changes, AT&T notes that the Texas plan also permits changes to the "remedy plan" whereas Qwest's proposed plan only permits changes of the sort identified on page 59 of the *QPAP Report*.[131] Also illustrative of what it considers a "material difference" between the Texas plan and Qwest's proposed plan, the Texas plan also allows issues going to changing the remedy plan to be resolved by arbitration.[132]

169. AT&T concludes by requesting that we reject the Facilitator's recommendations. AT&T urges the Commission to require to Qwest to change QPAP § 16.1 to reflect the following findings: (1) it is

---

[129] *Id*. at 33.

[130] *Id*. at 34 (emphasis in original).

[131] *Id*. at 35.

[132] *Id*.

in the public interest to assure that the Commission has the ultimate authority to determine if changes should be made to the QPAP; (2) this Commission should have the ultimate authority to change any provisions of the QPAP after notice and opportunity to be heard during the six-month review process; and (3) the Commission should hear any arbitrations regarding the six-month review.[133]

170. Staff also urges the Commission to reject the Facilitator's recommendations. Staff emphasizes that Qwest has repeatedly volunteered in these proceedings that, because the QPAP is a part of Qwest's SGAT, the Commission has authority to administer the QPAP. Staff submits that the ability to judiciously require changes to the QPAP on a showing of legitimate need is inherent in the authority to administer it.[134]

171. Staff therefore requests that Qwest be instructed

> to revise the 6-month review provisions of its QPAP to indicate that all issues of shifting the relative weighting of, deleting, adding and modifying performance measures are routinely and appropriately considered in the 6-month review process. The Commission shall determine what changes, additions or deletions, if any are appropriate and Qwest is required to file an amended SGAT to reflect those Commission determined changes. Parties may suggest more fundamental changes to the plan in the 6-month review process but, unless it is established that the need for such change is 'highly exigent', the matter will be deferred to the more comprehensive bi-annual review. Qwest may not retain the right to agree to all changes required by the Commission. Rather, the Commission retains authority to require changes in the review process.[135]

---

[133] AT&T's Proposed Findings, at 14.

[134] Staff's Proposed Findings, at 40.

[135] *Id*. at 40-41.

172. For its part, Qwest maintains the Facilitator's recommendations and Qwest's modifications to the plan in response to his recommendations are consistent with the scope of the six-month review in the Texas plan. Qwest has included a provision in § 16 of the QPAP that provides for arbitration under the SGAT to resolve disputes regarding addition of performance measurements in the six-month review.[136] To that end, Qwest changed § 16.1 to read, in part:

> Changes shall not be made without Qwest's agreement, except that disputes as to whether new performance measurements should be added shall be resolved by one arbitration proceeding conducted pursuant to section 5.18.3 of the SGAT, which shall bind CLEC and Qwest and all parties to the arbitration and determine what new measures, if any, should be included in Exhibit K to the SGAT. The administration expenses of the six-month reviews and of an arbitrator shall be paid from the Special Fund.

173. Nevertheless, Qwest persists in insisting the Commission lacks the inherent authority to propose modifications to the QPAP.[137] Qwest further avers its plan is a "voluntary" proposal by it to secure federal 271 approval, and is not a requirement of state or federal law and that the six-month review changes recommended by the Facilitator, as implemented by Qwest, are patterned after the FCC-approved Texas plan. Qwest believes the six-month review mechanism it has proposed strikes an appropriate balance, addressing Qwest's need for certainty regarding the obligations it is agreeing to undertake and at the same time providing an arbitration mechanism to allow appropriate evolution in the plan.[138] Qwest

---

[136] Qwest's Proposed Findings, at 14.

[137] *Id*.

[138] *Id*. at 14-15.

concludes by arguing that Staff's recommendation that the Commission should be able to review any aspect of the QPAP that affects Qwest's incentive to perform is "unfounded."[139]

[139] *Id*. at 15.

174. The Commission disagrees with Qwest's contention that we do not possess the inherent authority to modify the QPAP during the six-month review process and that all authority for so doing resides solely with Qwest. This is manifestly not the case. As Qwest by now should be well aware, the Commission has broad authority under New Mexico state law to regulate the rates, services, facilities and practices of public telecommunications carriers in the public interest, and to promote competition in the provision of telecommunications services.[140]

175. In addition, we find support in federal law for our authority to amend the QPAP. For instance, section 261(c) of the Act provides:

> Nothing in this part precludes a State from imposing requirements on a telecommunications carrier for intrastate services that are *necessary to further competition in the provision of telephone exchange service or exchange access*, as long as the state's requirements are not inconsistent with this part or the [FCC's] regulations to implement this part. (emphasis added).

176. Moreover, section 252(f) of the Act provides that a BOC "may prepare and file with the state commission a statement of generally acceptable terms and conditions." The SGAT is also a "voluntary" filing, yet Qwest has not questioned the Commission's authority to order changes to the SGAT.

---

[140] *See, e.g.*, N.M. Const. art. XI, § 2 (regulation of telephone companies); NMSA 1978, §§ 8-8-4(A) (duty to administer and enforce the laws with which we are charged and have every power conferred by law), 8-8-4(B)(5) (take administrative action "to assure implementation of and compliance with the provisions of law for which the commission is responsible"), 8-8-4(B)(7) (conduct investigations as necessary to carry out our responsibilities), 63-7-1.1(A)(1) (duty to fix, determine, supervise, regulate and control all rates and charges of telephone companies), 63-7-1.1(A)(2) (authority to determine any matters of public convenience and necessity with respect to matters subject to our regulatory authority as provided by law), 63-7-10 (authority to inspect the books, papers and records of all companies subject to our jurisdiction relating to any matter pending before or being investigated by the Commission), 63-9A-2 (encourage competition in the telecommunications industry), 63-9A-5 (regulation of public telecommunications service), 63-9A-8.2(B)(4) ("ensure the accessibility of interconnection by competitive [LECs] in both urban and rural areas of the state"), 63-9A-9 (regulation of individual contracts to facilitate competition), 63-9A-10 (examination of books and records), 63-9A-11 (determining complaint proceedings for alleged violation of any provision of the New Mexico Telecommunications Act), 63-9A-11 (complaint proceedings); 17.11.18 NMAC (rules governing interconnection facilities and UNEs); 17 NMAC 1.2.25 (rules regarding Commission investigations).

Inasmuch as Qwest intends to incorporate the QPAP into the SGAT, it is logical for us to infer that the Commission's authority to order changes to the SGAT must also extend to the QPAP upon its incorporation. No other reading would make sense.

177. In fact, Qwest has repeatedly stated throughout this process that, because the QPAP is a part of Qwest's SGAT, the Commission has authority to administer the QPAP. Inherent in the idea of judicious administration of any kind of performance assurance plan, especially one such as the QPAP that necessarily is a first cut, is the ability of the plan administrator to require changes to the plan on a showing of legitimate need by any interested party.

178. Further, as to the purportedly "voluntary" nature of the QPAP, no section 271 application has been approved by the FCC without inclusion of a performance assurance plan as a safeguard against backsliding after 271 entry. More to the point, we have no intention of recommending that the FCC approve Qwest's section 271 application unless and until Qwest has in place a performance assurance plan approved by the Commission. Thus, Qwest's decision to advance a performance assurance plan and to incorporate such a plan into its SGAT is only voluntary to the extent that pursuing section 271 authority is voluntary. After Qwest has been granted section 271 authority, the QPAP becomes mandatory, binding upon Qwest, and subject to the Commission's oversight authority as established under state and federal law.

179. Finally, Qwest intends to offer the QPAP as evidence in its section 271 application that local exchange markets in New Mexico will remain open to competition after it receives section 271 authority from the FCC. As the FCC has observed on many occasions, it expects state commissions to

play a significant role in modifying and improving the performance metrics in performance assurance plans.[141] Qwest's insistence on a unilateral right to reject any changes to the plan would preclude any meaningful Commission role in overseeing the plan. Indeed, if there was ever any reasonable doubt in any quarter regarding state commission authority to modify, refine and improve performance assurance plans, any such doubt should have been permanently dispelled by the FCC's most recent section 271 order, where the FCC observed as follows:

> We note that both the Georgia and Louisiana Commissions anticipate modifications to BellSouth's SQM from their respective pending six-month reviews. We anticipate that these *state Commissions will continue to build on their own work and the work of other states in order for such measures and remedies to most accurately reflect actual commercial performance in the local marketplace….*
>
> Both the Georgia and Louisiana Commissions will continue *to subject BellSouth's performance metrics to rigorous scrutiny in their on-going proceedings and audits; thus, it is not unreasonable for us to expect that these commissions could modify the penalty structure if BellSouth's performance is deficient post approval*.[142]

180. Accordingly, the Commission finds it is well within our authority as well as our responsibility to administer the QPAP and oversee its operation. Qwest is directed to change the QPAP in conformity with the foregoing findings and conclusions. Specifically, Qwest is instructed to amend § 16.1 of the QPAP to strike "Changes shall not be made without Qwest's agreement" and replace it with the following:

---

[141] *See, e.g., Verizon Pennsylvania Order*, 17 FCC Rcd 17419, at ¶¶ 127-32 (indeed, there the FCC took note of the fact that in response to certain commenters' assertions that the public interest requires Verizon to commit not to challenge the Pennsylvania Commission's authority to implement or modify the PAP, "the Pennsylvania Commission was satisfied by Verizon's withdrawal of its previous lawsuit challenged the Pennsylvania Commission's authority to implement the PAP").

[142] *BellSouth Georgia/Louisiana Order*, FCC 02-147, at ¶¶ 294, 300 (emphasis added; internal citations omitted).

> 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 to effectuate these changes.

181. As to the scope of the six-month reviews, neither the parties nor the Commission has any experience, nor can it be predicted, how the plan will work once it is in operation in New Mexico. For this reason, the Commission believes it would be unreasonable to preclude or limit the Commission's authority to examine issues that may arise in the course of operation of the plan. By the same token, however, the Commission has determined that the six-month review process not become a forum for relitigating the essential terms of the QPAP. In order to preclude this possibility, the Commission further determines that the six-month review process should focus only on fine-tuning the QPAP's performance metrics, while other QPAP elements may be reexamined at the biennial review. Nevertheless, the Commission will permit parties to request that the Commission review other issues if they can demonstrate that exigent circumstances exist. In addition, the Commission itself may identify issues for review. Accordingly, the Commission further instructs Qwest to modify QPAP § 16.1 to include the following language: "Parties or the Commission 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 biennial review."

182. As discussed above, the Facilitator recommended a multi-state review process for the six-month and biennial reviews, and a special fund to cover the cost of the multi-state process. Consistent with our endorsement of the ROC *Resolution* in this *Order*, we support, at least in principle, the Facilitator's proposal for both a multi-state six-month and biennial review process. However, the Commission declines at this time to commit itself to the specific multi-state review process set forth in Qwest's proposed plan (namely §§ 16.1, 16.2).

183. Consistent with the foregoing findings and conclusions, we note that it is the Commission's duty to consider any changes that need to be made, to ensure the effectiveness of the QPAP, and to resolve any disputes that may arise from its operation. Although we agree with the concept of a multi-state review and dispute resolution process in principle, the multi-state process is still under development under the auspices of the ROC. For this reason, we will defer our final determination regarding a specific multi-state review process for the six-month and biennial reviews pending the development of a final proposal for a multi-state process.

184. Accordingly, the Commission directs Qwest to revise §§ 16.1 and 16.2 to refer only to this Commission. Qwest should also include in this revision new language providing that nothing in the QPAP prohibits the Commission from joining a multi-state effort to conduct QPAP reviews and developing a process whereby the multi-state group would have the authority to act on the Commission's behalf. Qwest must also delete the language in § 16.1 concerning the use of an arbitrator to resolve disputes. As provided above, the Commission will preside over the six-month review process and resolve any disputes between the parties.

VII. SELF-EXECUTING MECHANISM

185. The Facilitator identified six issue categories involving the analysis of whether Qwest's QPAP is a self-executing mechanism. These six categories are: (i) dispute resolution, (ii) payment of interest, (iii) escrowed payments, (iv) effective dates, (v) QPAP inclusion in the SGAT and Interconnection Agreements, and (vi) and form of payment to CLECs.

186. Of these six categories, only two, effective dates and QPAP inclusion in the SGAT and interconnection agreements, were addressed by the parties in the post-*QPAP Report* comments and briefs.

Additionally, although no party specifically addressed the Facilitator's dispute resolution recommendation, the Commission deems it necessary to address that recommendation given the related findings and conclusions inherent in this *Order*. As for the remaining three categories of issues, there having been no challenge to the Facilitator's findings and conclusions and having found no matters of particular concern in the Facilitator's recommended resolutions of them,[143] the Commission hereby finds and concludes that the Facilitator's recommendations are appropriate, reasonable and resolved in a manner that is consistent with the public interest. Accordingly, the Commission accepts and adopts the Facilitator's recommended resolutions of the aforementioned self-executing mechanism issue categories.

187. We now turn our attention to the three remaining categories under the self-executing mechanism rubric.

A. Dispute Resolution

188. The Facilitator rejected Qwest's proposal to add a dispute resolution provision that would apply the general SGAT dispute resolution provisions to disputes arising only under specified QPAP sections. The Facilitator saw no reason why the general SGAT dispute resolution sections would be any less suitable for addressing QPAP provisions beyond the limited sections chosen by Qwest. Instead, the Facilitator recommended that Qwest make clear that the dispute resolution provisions of the SGAT are applicable to QPAP disputes involving CLECs who adopt the SGAT in its entirety or elect to make the

[143] *QPAP Report*, at 72-73, 76.

QPAP part of their interconnection agreements, *i.e.*, the unique dispute resolution provisions of interconnection agreements should not apply to QPAP disputes.[144]

189. Qwest made the modification recommended by the Facilitator, which appears in Qwest's proposed plan as § 18.

190. Given our findings and conclusions above respecting the six-month review process, we reject the Facilitator's recommendation. As we found above, it is our responsibility to oversee and administer the QPAP, including resolving disputes over the meaning and application of QPAP provisions. Therefore, it would not be appropriate for the QPAP to incorporate the SGAT dispute resolution process, which features processes that do not include the Commission. We recognize that it would be possible for the Commission to develop either a formal arbitration process of its own for this purpose or an expedited dispute resolution process. At this time, however, as we have expressed above, it is our intention to pursue and encourage the development of a multistate approach for dispute resolution that is part and parcel of a multistate process for QPAP reviews, audits and administration of performance measurements. In the multistate process we envision, consistent with the Multi-State Proceeding that spawned the *QPAP Report* and the Facilitator's other reports on checklist items and other section 271 issues, each state commission would preserve its right to act independently on issues where it may differ from the multistate group's decisions. We agree with the Montana commission[145] that it seems unlikely disputes over the meaning or application of the QPAP could be state-specific, but if such is the case, it may be necessary to resolve such disputes on a New Mexico-specific basis before the Commission.

---

144 *Id*. at 72.

145 *Montana Order*, at 64.

191. Accordingly, consistent with the foregoing findings and conclusions, Qwest is instructed to strike the entirety of § 18 from the QPAP.

B. Effective Dates

1. Initial effective date

192. The Facilitator agreed with Qwest that it was logical to conclude that the QPAP should become effective upon Qwest being granted section 271 authority by the FCC.[146]

193. Staff opposes the Facilitator's recommendation, contending the QPAP should become effective in New Mexico if and when the Commission makes a recommendation to the FCC that Qwest should be granted section 271 authority for New Mexico. In this way, according to Staff, the Commission can deter backsliding during the months when Qwest's application will be pending at the FCC.[147]

194. AT&T also believes that Qwest should be required to make the QPAP effective contemporaneous with the filing of its section 271 application with the FCC.[148]

195. Qwest points out the Facilitator considered the concern raised by Staff and concluded that no change in the effective date was required because 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."[149] Additionally, Qwest draws our attention to the fact that the Facilitator also recommended that Qwest be required to report performance data during the period before section 271 approval, which Qwest agreed to

---

146 *QPAP Report*, at 74-75.

147 Staff's Proposed Findings, at 45-46.

148 AT&T's Exceptions, at 40.

149 Qwest's Proposed Findings, at 18.

do[150] and has since been doing. In fact, the Commission notes Qwest has been submitting the performance data reports in this case since late December 2001 (beginning with the submission of its October 2001 monthly report).

196. According to the Facilitator "there were no claims that Qwest's wholesale performance history to date was of a nature that would require unique or special inducements."[151] As noted above, the Facilitator also found the risk of near term backsliding would be mitigated by the fact that current information can and likely will be provided to the FCC.[152] Furthermore, consistent with the Facilitator's recommendation, Qwest has been submitting wholesale performance data for every month beginning with October 2001. Additionally, as pointed out by the Facilitator, there already exists an opportunity for states and CLECs to supplement the record through the submission of additional comments directly to the FCC. Given the foregoing, we find that Qwest will have more than sufficient incentive not to backslide while its section 271 application is pending before the FCC.

197. For these reasons, the Commission accepts and adopts the Facilitator's recommendation that the QPAP become effective when section 271 authority is granted and that Qwest be required to provide monthly QPAP reports as if the QPAP had become effective on October 1, 2001.

2. "Memory" at initial effective date

198. Having decided the QPAP should be become effective upon Qwest receiving section 271 authority and that other remedies apply before that time for CLECs opting into the QPAP, the Facilitator

---

[150] *Id*.

[151] *QPAP Report*, at 75.

[152] *Id*.

proceeded to find it would be inappropriate to start the QPAP payment structure in "mid-stream." Otherwise, according to the Facilitator, the effect would be to mix remedies inappropriately, given that CLECs retain for the historical period in question whatever remedies are applicable under their existing interconnection agreements.[153]

199. AT&T points out that, under the Facilitator's proposal, if Qwest is providing substandard service in the months prior to QPAP implementation, it will be wiped off the books once the QPAP becomes effective. For this reason, AT&T submits the Facilitator's proposal is an "illogical, inexplicable and ILEC biased approach to the issue."[154]

200. AT&T's statements on this issue are a bit overwrought. As found above, there are adequate safeguards in place to ensure that the scenario envisioned by AT&T does not come to pass. Furthermore, as the Facilitator rightly pointed out, until such time as Qwest's section 271 application is approved, CLECs are able to avail themselves of whatever remedies are applicable under their existing interconnection agreements. To trigger the QPAP payment mechanisms while existing interconnection agreement remedies remain effective would, as the Facilitator rightly found, leave the door open to improperly mixing remedies.

201. For these reasons, the Commission accepts and adopts the Facilitator's recommendation respecting "memory" at initial effective date.

---

[153] *Id*.

[154] AT&T's Comments, at 41.

3. QPAP effectiveness if Qwest exits the interLATA market

202. Section 16.2 of the QPAP provides that the plan will be rescinded immediately if Qwest exits the interLATA market. The Facilitator recommended adopting this section, reasoning that for the same reasons that the QPAP should only be effective upon Qwest's entry into that market, it should terminated upon the end of Qwest's authority to serve that market.[155]

203. Staff concurred with the Facilitator's recommendation.[156] No other party addressed this issue.

204. The Commission is concerned that CLECs may be left without adequate remedies if the QPAP were to terminate automatically upon Qwest leaving the long distance market. Therefore, we will adopt the following language for the New Mexico QPAP, which is derived from CPAP § 18.11[157] and which the Washington commission recently ordered Qwest to implement:[158]

> Except as provided in this Section, this PAP will expire six years from its effective date. Only Tier 1 submeasures and payments will continue beyond six years, and these Tier 1 submeasures and payments shall continue until the Commission orders otherwise. Five and one-half years after the PAP's effective date, a review shall be conducted with the objective of phasing-out the PAP entirely. This review shall focus on ensuring that phase-out of the PAP is indeed appropriate at that time, and on identifying any submeasures in addition to the Tier 1 submeasures that should continue as part of the PAP.

---

155 *QPAP Report*, at 75.

156 Staff's Proposed Findings, at 46.

157 *In the Matter of the Investigation Into Alternative Approaches for a Qwest Corporation Performance Assurance Plan in Colorado*, Public Utilities Commission of the State of Colorado, Docket No. 01I-041T, Colorado Performance Assurance Plan, Decision No. CO2-399 (Apr. 10, 2002) (*Colorado Order on Remand*), Attachment A.

158 *33rd Supplemental Order*, at 14, ¶ 60.

205. This language will permit Qwest to eliminate certain payments upon leaving the market, but also allow for Commission review of the necessity of certain payments, as well as provide time to implement any necessary wholesale service quality rules to replace the QPAP, if such rules have not already been adopted. Qwest is directed to modify the QPAP accordingly.

C. QPAP Inclusion in the SGAT and Interconnection Agreements

206. Incorporation of the QPAP into the SGAT and interconnection agreements was not an issue raised by any of the parties in these proceedings. However, we believe this issue warrants attention given Qwest's intention to incorporate the QPAP into the SGAT as "Exhibit K" thereto and into individual interconnection agreements.[159] We are compelled to address the incorporation issue because it creates a question as to which document should prevail over the other in the event of a conflict between the two.

207. As we see it, the SGAT establishes the interconnection obligations Qwest and CLECs have to each other when interconnecting their networks. The QPAP, on the other hand, is a set of performance measurements designed to assure a competitive local market upon Qwest's entry into the interLATA market, coupled with agreed-to payments in the event Qwest fails to meet the specified performance metrics. Given that the language in the SGAT has been the product of intensive negotiations and disputes between Qwest and the CLECs who have participated in these proceedings, it stands to reason that inconsistencies between the SGAT and the QPAP should be addressed before the QPAP goes into effect. The Commission believes that inasmuch as the QPAP is being incorporated *into* the SGAT, it must conform to the SGAT and not the other way around. Therefore, the Commission finds that the terms of the SGAT

[159] Qwest's Comments, at 17.

shall prevail in any conflict between the QPAP and the SGAT. Qwest is directed to modify the QPAP accordingly.

VIII. ASSURANCES OF THE REPORTED DATA'S ACCURACY

208. The Facilitator identified four issue categories involved in determining whether Qwest's proposed plan provides sufficient assurances of the reported data's accuracy. The categories are: (i) audit program, (ii) PUC access to CLEC raw data, (iii) providing CLECs their raw data, and (iv) late reports.

209. The parties did not separately address any of the four issue categories in their post-*QPAP Report* comments or briefs. There having been no challenge to the Facilitator's findings and conclusions regarding the foregoing and having no matters of particular concern in the Facilitator's recommended resolutions of PUC access to CLEC raw data, providing CLECs their raw data, and late reports,[160] the Commission hereby finds and concludes that the Facilitator's recommendations are appropriate, reasonable and resolved in a manner that is consistent with the public interest. Accordingly, the Commission accepts and adopts the Facilitator's recommended resolutions of these three issue categories.

210. However, consistent with our findings and conclusions above, we do find matters of particular concern in the Facilitator's recommendations concerning the remaining issue category, the Audit Program.

A. Audit Program

211. The audit program is intended to provide "sufficient assurance that a high level of confidence can be placed in the performance results that Qwest measures – results that will drive QPAP payments and

[160] *QPAP Report*, at 82-86.

will serve as a primary basis for [state commission] oversight of wholesale performance."[161] The Facilitator found the audit program in Qwest's originally proposed plan was not sufficient, as it (i) made it difficult to track significant changes in the systems, methods, and activities by which Qwest measures performance, (ii) did not provide assurances for tracking data accuracy into the future, and (iii) gave Qwest too much control over the program of auditing its own system of performance measurement.[162]

212. As a consequence, the Facilitator recommended a multi-state process for audits, noting that there would be substantial commonality of issues, and that Qwest would face prohibitive costs if all 14 states in its region were to conduct individual audits. The Facilitator also recognized that states will need to retain the ability to conduct their own audits to meet the particular needs and circumstances of each state.[163]

213. Therefore, the Facilitator proposed an audit methodology that allows for both pre-planned and as-needed testing of Qwest's measurement program. The Facilitator emphasized that the audit program should focus on particular performance measurements that appear to be unstable or at particular risk. The Facilitator recommended that the states jointly retain an independent auditor for a two-year period to conduct the audit, and assess the need for individual audits requested by individual CLECs. Finally, the Facilitator recommended the use of Tier 2 funds to support audit costs, as well as a portion of Tier 1 escalated payments should the Tier 2 funds prove insufficient.[164]

214. Qwest indicates it has revised the audit provisions in its proposed plan to reflect the Facilitator's recommendations, with the "clarification or modification" that would require the independent

---

[161] *Id.* at 78.

[162] *Id*. at 78-82.

[163] *Id*.

[164] *Id*.

auditor to coordinate with other audits to avoid duplication, provide a process for contesting aspects of the audits; provide a materiality criterion to data discrepancies, prevent a CLEC proposed audit while dispute resolution is pending, and prevent a CLEC from proposing an audit of data older than three years.[165] Qwest made no changes to § 15.5 of its proposed plan, which addresses investigations to determine the root cause for consecutive Tier 2 misses.

215. Consistent with our findings and conclusions above regarding the creation of a special fund and six-month reviews, we support in principle the Facilitator's recommendation that state commissions should jointly participate in and oversee the QPAP auditing function in a manner that allows each participating state to act independently on issues where it might differ from other states.

216. However, we perceive several flaws in the audit program as it is currently delineated in Qwest's proposed plan, *i.e.*, the November 7, 2001 revision submitted in this case. For instance, Qwest's proposed § 15 is written as if there is a multistate oversight regime already in place and, therefore, does not take into account the unfortunate but nonetheless real possibility that states will not form a joint oversight body, which would necessitate that we conduct the QPAP's audit responsibilities on our own. Other provisions of § 15 inappropriately dictate the method by which the multistate commission oversight group will resolve audit-related disputes and appeals of disputes. Additionally, the current § 15 contains provisions that limit the Commission's discretion to determine the procedure, scope, timing and conduct of audits.

---

[165] Qwest's Proposed Findings, at 19.

217. We find the defects in Qwest's proposed § 15 to be unacceptable and, therefore, direct Qwest to revise QPAP §§ 15.1 through 15.4 as follows, which we note is consistent with what other commissions have ordered in resolving this issue:[166]

> 15.1 Audits of the PAP shall be conducted under the auspices of the Commission in accordance with a detailed audit plan developed by an independent auditor and approved by the Commission. The Commission shall select the independent auditor with input from Qwest and the CLECs. The Commission will determine, based upon requests and upon its own investigation, which results and/or measures should be audited. The Commission may, at its discretion, conduct audits through participation in a collaborative process with other states.
>
> 15.1.2 The initial audit plan shall be conducted over two years, with audit periods subsequent to the initial audit to be determined by the Commission. The Commission will determine the scope of and procedure for the audit plan, which, at a minimum, will identify the specific performance measurements to be audited, the specific tests to be conducted, and the entity to conduct them. The initial audit plan will give priority to auditing the higher risk areas identified in the Final OSS Report
>
> 15.1.3 The Commission will attempt to coordinate its audit plan with other audit plans that may be conducted by other state commissions so as to avoid duplication. The audit shall be conducted so as not to impede Qwest's ability to comply with the other provisions of the PAP and should be of a nature and scope that it can be conducted in accordance with the reasonable course of Qwest's business operations.
>
> 15.1.4 Any dispute arising out of the audit plan, the conduct of the audit, or audit results shall be resolved by the Commission.
>
> 15.2 Qwest may not make CLEC-affecting changes to the performance measurement and reporting system without

---

[166] *See* Montana Order, at 73-77; *In the Matter of the Investigation Into U S WEST Communications, Inc.'s Compliance with Section 271 of the Telecommunications Act of 1996* and *In the Matter of U S WEST Communications, Inc.'s Statement of Generally Available Terms Pursuant to Section 252(f) of the Telecommunications Act of 1996*, Washington Utilities and Transportation Commission Docket Nos. UT-003022 & UT-003040, 30th Supplemental Order; Commission Order Addressing Qwest's Performance Assurance Plan (Apr. 5, 2002) (*30th Supplemental Order*), at 60-61.

Commission approval. Qwest may make non-CLEC-affecting changes to its management processes to enhance their accuracy and efficiency. These changes are at Qwest's discretion, but must be reported to the independent auditor. Reports to the auditor will be presented at meetings in which the auditor may ask questions about changes made in the Qwest management processes. The reports must include sufficient detail to enable the auditor, and other parties, to understand the scope and nature of the changes. The meetings, which will be limited to Qwest and the independent auditor, will permit an independent assessment of the materiality and propriety of any Qwest changes, including, where necessary, testing of the change details by the independent auditor. The information gathered by the independent auditor may be the basis for reports by the independent auditor to the Commission and, where the Commission deems it appropriate, to other participants. The Commission may review in the PAP review process the propriety of any discretionary changes made by Qwest pursuant to this section.

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

> three years from the later of the provision of a monthly credit statement or payment due date.
>
> 15.4 Expenses for the audit of the PAP and any other related expenses, except that which may be assigned under section 15.3, shall be paid first from the Tier 2 funds in the Special Fund. If no Special Fund is in existence or Tier 2 funds are not otherwise sufficient to cover audit costs in whole or in part, the Commission will develop an additional funding method that will include contributions from CLECs' Tier 1 payments and from Qwest.

218. Moreover, the Commission is concerned that § 15.5 as the same appears in Qwest's proposed plan is not clear as to who will conduct the investigation and more importantly, where the authority resides to determine responsibility for misses. We are also concerned that this section focuses exclusively on Tier 2 misses, but not consecutive Tier 1 misses. Therefore, in order to redress our concerns, Qwest is directed to revise QPAP § 15.5 as follows:[167]

> 15.5. Any party may petition the Commission to request that Qwest investigate any consecutive Tier 1 miss or 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. Qwest will report the results of its investigation to the Commission, and to the extent an investigation determines that a CLEC was responsible in whole or in part for the Tier 2 misses, Qwest may petition the Commission to request that it receive credit against future Tier 2 payments in an amount equal to the Tier 2 payments that should not have been made. Qwest may also request that 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.

---

[167] *See 30th Supplemental Order*, at 60-61, ¶ 242; *33rd Supplemental Order*, at 13, ¶ 56.

IX. OTHER ISSUES

219. In this final catch-all category, the Facilitator identified four issues: (i) prohibiting QPAP payment recovery in rates, (ii) no-admissions clause, (iii) Qwest's responses to FCC-initiated changes, and (iv) specification of state commission powers.

220. The parties addressed only one issue, prohibiting QPAP payment recovery in rates, in their post-*QPAP Report* comments and briefs. There having been no challenge to the Facilitator's findings and conclusions regarding the remaining three issues[168] and having found no matters of particular concern in the Facilitator's recommended resolutions of those issues, the Commission hereby finds and concludes that the Facilitator's recommendations are appropriate, reasonable and resolved in a manner that is consistent with the public interest. Accordingly, the Commission accepts and adopts the Facilitator's recommended resolutions of the aforementioned issues.

221. We now turn our attention to the remaining issue about which concerns were expressed in post-*QPAP Report* comments or briefs.

A. Prohibiting QPAP Payment Recovery in Rates

222. During the Multi-State Proceeding, AT&T requested that the QPAP include specific language precluding QPAP payment recovery in rates. The Facilitator recommended against the inclusion of such a provision, agreeing with Qwest that it was unnecessary, given that the FCC and states have clearly held that the recovery of PAP payments in rates is prohibited.[169]

223. AT&T continues to maintain that the Commission should mandate that Qwest spell out in the QPAP that it may not recover QPAP costs from ratepayers. According to AT&T, because the FCC has concluded that any attempt by a BOC to recover those fines through increased rates would "seriously undermine the incentive meant to be created by the Plan," this is not just a matter of rate recovery, as the Facilitator implied. AT&T thus proposes language for a new provision to be added to the QPAP that

---

[168] *QPAP Report*, at 86-87.

would explicitly prohibit Qwest from including QPAP payments as expenses in any Qwest revenue requirement or reflecting them in increased rates to CLECs.[170]

224. AT&T avers the record indicates Qwest has agreed to incorporate the language appearing below if a commission so orders and, therefore, urges that we order Qwest to incorporate the following language into its approved 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.

225. Staff agreed with the Facilitator's recommendation.[171] No other party submitted comments on this issue.

226. The Commission agrees with the Facilitator that state and federal legal and administrative authority make it abundantly clear that PAP payments are not recoverable in rates; this is sufficient for now to govern Qwest's behavior and provide the Commission with guidance in the event a question should arise in future proceedings before us. Accordingly, the Commission accepts the Facilitator's recommendation that there is no need for a QPAP provision precluding Qwest from recovering QPAP payments in rates.

X. VERIFICATION OF COMPLIANCE WITH THIS ORDER

227. As provided above, the Commission will not recommend to the FCC that it grant Qwest section 271 authority unless and until Qwest has in place a performance assurance plan approved by the

---

169 *QPAP Report* at 86.

170 AT&T's Exceptions, at 41-42.

171 Staff's Proposed Findings, at 51.

Commission.[172] Accordingly, Qwest is directed to file with the Commission no later than June 14, 2002 a revised version of the November 7, 2001 QPAP that incorporates the modifications required by this *Order*. All revisions must be appear in redline and strikeout as appropriate so that all modifications are readily identifiable. The Commission thereafter will consider what proceedings, if any, may be necessary to determine whether Qwest's revised QPAP complies with this *Order* in all material respects.

IT IS THEREFORE ORDERED:

A. Consistent with the foregoing findings and conclusions and the Commission's other orders entered in these proceedings, before receiving a favorable recommendation of compliance with section 271 of the Act and in order to ensure Qwest's continued compliance with the requirements of section 271 should the FCC grant it authority to offer in-region interLATA service in New Mexico, Qwest shall adopt and implement a QPAP that is consistent with the above-mentioned directions and instructions.

B. To that end, Qwest shall file with the Commission no later than June 14, 2002 a revised version of the November 7, 2001 QPAP that incorporates the modifications required by this *Order*. All revisions must be appear in redline and strikeout as appropriate so that all of the modifications are readily identifiable. Subsequent to Qwest's filing of a QPAP that purports to comply with this *Order*, the Commission will consider what further proceedings, if any, are necessary to determine whether Qwest's revised QPAP is in compliance with all material aspects of this *Order*.

C. Copies of this *Order* shall be served on all parties of record in these consolidated cases and shall be promptly posted to portion of the Commission's website dedicated to this case.

D. This *Order* is effective immediately.

---

[172] *See supra* ¶ 178.

ISSUED under the Seal of the Commission at Santa Fe, New Mexico, this 29th day of May 2002.

NEW MEXICO PUBLIC REGULATION COMMISSION

_____

TONY SCHAEFER, CHAIRMAN

_____

LYNDA M. LOVEJOY, VICE-CHAIRWOMAN

_____

HERB H. HUGHES, COMMISSIONER

_____

RORY McMINN, COMMISSIONER

_____

JEROME D. BLOCK, COMMISSIONER