BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

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

JOINT COMMENTS ON QWEST'S QPAP COMPLIANCE FILING

AT&T Communications of the Pacific Northwest, Inc., AT&T Local Services on behalf of TCG Seattle and TCG Oregon (collectively "AT&T"), Time Warner Telecom of Washington, Electric Lightwave, Inc., WorldCom, Inc. and Covad Communications Company (collectively "CLECs") submit these Joint Comments on Qwest's QPAP Compliance Filing.

The CLECs have thoroughly reviewed the QPAP submitted by Qwest in May 28, 2002 entitled "Qwest's Compliance Filing." In doing so, they have found numerous issues, articulated below, where Qwest either completely and overtly did not comply with the Commission's order, or only partially complied, negating the effectiveness of the ordered changes.

I. COMMISSION'S ABILITY TO CHANGE AND CONTROL THE PERFORMANCE ASSURANCE PLAN

Qwest is simply non-compliant on this essential issue. The Commission's mandate to make **specific changes** to the Qwest Performance Assurance Plan language to allow the Commission unfettered change control during the various six month reviews was clear in both its Thirtieth and Thirty-Third Orders.

Specifically, in its Thirtieth Order, the Commission expressly stated:

> Having reviewed the Texas plan, the CPAP, the Utah Staff Report, and recent orders from Wyoming and Montana,[1] we agree with the parties that Qwest must modify the QPAP to allow the Commission authority to determine whether changes ought to be made to the QPAP. **Qwest must amend section 16.1 of the QPAP to strike "Changes shall not be made without Qwest's agreement," and add the following: "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**." [2]

In the same Order, the Commission made clear that it did not wish to relinquish any of its stated authority indicating:

> At the heart of this issue is the Commission's independent authority to review Qwest's service. While Qwest may argue that the CLECs elect remedies by adopting the plan to the exclusion of all other alternatives, the Commission does not relinquish any authority, nor is it required to do so in approving the QPAP.[3]

Then, in its Thirty-Third Order when rejecting alternative language that Qwest proffered regarding Commission change control and specifically referencing plans that allow unfettered change control, the Commission **rejected** any changes to its **ordered**

[1] Cites omitted.
[2] Thirtieth Supplemental Order at ¶146, ¶347 and ¶348.
[3] *Id*. at ¶ 109.

language indicating "**(w)e are not persuaded to modify our decision on this issue, and deny Qwest's request for reconsideration.**"[4]

Instead of complying with the Commission's clear mandate in both its Thirtieth and Thirty-Third Supplemental Orders, Qwest proffered a far less than literal translation of a recent Colorado Performance Assurance Plan in which Qwest significantly modified the Colorado language to its liking. Besides the fact that Qwest has flagrantly and overtly circumvented the Commission's direct Order, the acceptance of this language by this Commission would significantly alter the Commission's ability to make changes to the plan, period.

For example, in the Thirtieth Supplemental Order, the Commission indicated that among other things, it would and/or could revisit the issues of penalty escalation,[5] Tier 2 payment escalation[6] and a cap carry forward provision[7] at the six month review. Pursuant to the new Qwest language, the Commission would not have the ability to review any of these areas and a significant majority of all of the other areas of the plan at the six month review or at any other time. This is because the new Qwest proffered language expressly states Sections 4.0, 5.0, 6,7,8,9,10,11, 12, 13, and 14 in their entirety; Section 16.12 and "any proposal that does not relate directly to measuring and/or providing payments for non-discriminatory wholesale performance" "will not be eligible for review at the six month review."[8]

Considering that the remaining seven sections (there are only eighteen sections in the Qwest proffered QPAP) are either introductory, do not relate to the actual

[4] Thirty Third Supplemental Order at ¶46.
[5] Thirtieth Supplemental Order at ¶70.
[6] *Id.* at ¶87.
[7] *Id.* at ¶27-28.
[8] Qwest's Exhibit A at §16.7.

functionality of the plan, or incorporate the taboo sections,[9] under Qwest's proffered language, the Commission will have no ability to make changes to the plan whatsoever.

Qwest then introduces the concept of a judicial stay in §16.8. First, the Commission has expressly rejected the Utah Stipulation language including the concept of a stay in its Thirty-Third Supplemental Order.[10] Furthermore, as the CLECs have consistently argued, a stay could tie up any changes that this Commission wished to make for years. Even worse, now Qwest's proffered language makes any change that the Commission wished to make improbable to survive judicial review, as §16.7 expressly takes away the Commission's ability to make any changes to the fundamental elements of the plan during the six month review. Thus, all Qwest would need to do is point to a court of competent jurisdiction that such a change is outside of the four corners of the document.

Keeping in mind that Qwest was ordered by this Commission to change **a sentence** in QPAP §16.1, this Commission should also reject the remainder of the changes that Qwest has proffered which include:

> 1) Reintroduction the concept of the 10% collar even though this Commission expressly rejected such an idea in its Thirty-Third Supplemental Order.[11]
> 2) Qwest introduces an "out of the blue" mandatory six-year sunset provision even though such a provision was never proffered or contemplated by this Commission on the record.[12]

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[9] Section 1.0 is the introduction, § 2.0 exclusively discusses how 6.0 and 7.0 operates, § 3.0 is a declaration section, 15.0 exclusively relates to audit; § 16.0 is the six month review section that usurps the Commission's ability to make changes to the plan; § 17.0 merely indicates that it is a voluntary plan, and §18.0 indicates that there should be dispute resolution.

[10] *Id*. (possibly deferring it to the six month review).

[11] *Thirty-Third Supplemental Order* at ¶48 (possibly deferring it to the six month review)

[12] The CLECs (and from the record it appeared the Commission) believed that because the Commission was usurping change control authority away from Qwest, they could sunset the plan on terms and conditions that it felt were appropriate.

It is also important to note that Qwest's new language is an extremely bastardized version of the Colorado six-month review. Some essential differences are as follows:

1) In the Colorado plan, the subjects that are "off the table" are merely deferred to a three-year review.[13] Pursuant to Qwest's proffered Washington QPAP, they cannot be reviewed at any time.[14]
2) A comparison of the plans demonstrates that there is far more language "on the table" in the Colorado six month review than the Washington six month review due to Qwest's interpretation of what sections of the Washington QPAP fit into §16.7(1)(2)(3)(4)(5) and (6).[15]
3) The 10% collar in Colorado includes a prophylactic allowing CLECs to recover even if the 10% collar is exceeded. Qwest has struck such a provision.[16]
4) A provision in the Colorado plan allowing changes to PID modification outside the six-month review was stricken by Qwest.[17]
5) The entire three-year review provision including the ability to make changes on the "off the table" provisions in such a review was stricken[18] and a more limited two year review was put into place.[19]

The CLECs further note that Qwest recently acquiesced to analogous language that this Commission requested in North Dakota. Specifically, Qwest's filed §16.1 in North Dakota states as follows:

16.1 Every six (6) months, beginning six months after the effective date of the first Section 271 approval by the FCC of one of the states that participated in the

[13] *See Colorado Remand Order at* §18.7. (previously provided to this Commission).
[14] Qwest's Washington QPAP at §16.7.
[15] In a side-by-side comparison to the Colorado Plan, the CLECs have interpreted the "off the table" QPAP issues as follows:

(1) The statistical methodology (Sections 4.0, and 5.0) except for additions to the variance tables for new Tier 1 measures;
(2) The payment caps (Section 12.0);
(3) The duration of the QPAP ~~(Section 18.11);~~
(4) The payment regime structure (Sections 6.0, 7.0, 8.0, 9.0, ~~, 10.1, 10.2, 10.3, and 10.4~~) except for the addition of payment amounts for new Tier 2 measures ~~and of payment amounts for violations of change management requirements~~;
(5) The legal operation of the CPAP (Section 13.0 ~~s 15.0 and 16.0~~);
~~(6) The Independent Monitor (Section 17.0) with the exception of assignment of the Independent Monitor function to an Administrative Law Judge;~~
(7) Any proposal that does not relate directly to measuring and/or providing payments for non-discriminatory wholesale performance.

[16] *See* Qwest's QPAP Compliance Filing at p.5.
[17] *Id.*
[18] CPAP at §18.10.
[19] Qwest's Washington QPAP at §16.2.

multi-state QPAP ~~section 271~~**review** proceeding, Qwest, CLECs, and the ~~Commissions of those state~~**Commission** shall ~~participate in a common~~ review ~~of~~ the performance measurements **in the QPAP** to determine whether measurements should be added, deleted, or modified; whether the applicable benchmark standards should be modified or replaced by parity standards; and whether to move a classification of a measurement to High, Medium, or Low or Tier 1 to Tier 2. The criterion for reclassification of a measurement shall be whether the actual volume of data points was less or greater than anticipated. Criteria for review of performance measurements, other than for possible reclassification, shall be whether there exists an omission or failure to capture intended performance, and whether there is duplication of another measurement. ~~The first six-month period will begin upon the FCC's approval of Qwest's 271 application for that particular state. Changes shall not be made without Qwest's agreement, except that~~**Any** disputes ~~as to whether new~~**regarding adding, deleting, or modifying** performance measurements ~~should be added~~ shall be resolved by ~~one arbitration proceeding conducted pursuant to~~**the Commission. The NDPSC retains the right to add topics and criteria to the six-month review, retains the ability to order changes if the QPAP is not in the public interest, and retains the ability to hear any disputes regarding the six-month review. The Commission may conduct joint reviews with other states. Any changes at the six-month review pursuant to this** section ~~5.18.3 of the SGAT, which~~ shall ~~bind~~**apply to and modify this agreement between Qwest and** 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.~~.[20]

The CLECs are uncertain why the such language giving the Commission unfettered change control is acceptable to Qwest in North Dakota, but deemed inappropriate to Qwest in Washington.

In summary, Qwest's language is extremely problematic and definitely non-complaint with this Commission's order. As displayed by the plethora of in Qwest territory and out of Qwest territory Commission orders proffered in recent CLEC pleadings, this Commission is hardly "out in left field" in requiring such language.[21]

[20] North Dakota QPAP Compliance Filing (May 30, 2002) at §16.1. (Attached as Attachment A).
[21] As the Commission noted in its Thirty-Third Order, the language giving the Commission change control is found in the Massachusetts and New York plans.

Qwest should be found non-compliant, ordered to comply or fail the Commission's public interest inquiry.

II. PAYMENT CAP

This Commission indicated that there should be a 36% cap of the relevant "ARMIS Net Revenue at risk for payment to CLECs for failure to meet designated performance standards."[22]

A. 36% Cap

A review of Qwest's language indicates that Qwest contemplates that cap to be more than the cap for the plan. Specifically, §12.1 indicates "CLEC agrees that this amount constitutes a maximum annual cap that shall apply to the aggregate total of Tier I liquidated damages, **including any such damages paid pursuant to this Agreement, any other interconnection agreement, or any other payments made for the same underlying activity or omission under any other contract, order or rule and Tier 2 assessments or payments made by Qwest**."

Thus it is clear that Qwest's liability existing in or outside of the QPAP is capped at 36% of its net ARMIS revenue. The result is that Qwest has absolved itself of liability for any cause of action over 36% of its net ARMIS revenue, period.

This language is contrary to every performance assurance plan existing[23] and certainly does not reflect the Commission's intent. The language in bold should thus be stricken to reflect that the cap is the cap on the plan.

B. Most Recent ARMIS Data

In order to be compliant, Qwest must also modify its PAP to include its most

[22] Commission's Thirtieth Order at ¶51.
[23] For example, New York and Colorado set a cap for payments exclusively in the plan. Texas includes a cap for all liquidated damages but not all damages period.

recent ARMIS data.

Section 12.1 of Qwest's compliance filing reads, "There shall be a cap on the total payments made by Qwest for a 12 month period beginning with the effective date of the PAP for the State of Washington. The annual cap for the State of Washington shall be **$81,000,000 (36% of the 1999 ARMIS Net Return)."**

The Commission's 30th Supplemental Order at paragraph 56 directs Qwest to update section 12 of the QPAP to reflect the use of current ARMIS data. The ARMIS data for 2001 is now available. Attachment B to these comments is the updated version, with 2001 data added. To be compliant with the Commission's order on this issue, the above bolded language should be replaced with the following: "$94,861,000 (36% of the 2001 ARMIS Net Return)."

III. SPECIAL ACCESS REPORTING

The Commission directed Qwest "to begin filing monthly special access reports for Washington at the same time it begins special access reporting to the Colorado Commission." 30th Supp. Order, ¶ 119. The Commission reiterated that requirement in denying Qwest's petition for reconsideration on this issue:

> Our decision in the *30th Supplemental Order* requires Qwest to report its monthly provisioning and repair intervals for special access circuits at the same time it begins special access reporting to the Colorado commission. We did not require that a PID or PIDs be developed for performance in provisioning and repairing special access circuits, nor that payments be required under the QPAP. Qwest must report on special access measures for Washington using the same measures on which it reports to Colorado.

33rd Supp. Order ¶ 34.

Qwest's compliance filing is devoid of any reference to this requirement. As a result, neither the Commission nor the parties (especially those parties that are not

participating in the Colorado proceedings) know how Qwest will comply with its obligation to report on special access measures. Qwest has not specified when it will begin to provide the reports, the form of the reports it will provide, the information that will be included in the reports, how that information will be compiled, or to whom Qwest will provide the reports. Qwest should provide such information, particularly in light of Qwest's continuing reluctance to provide *any* reporting of special access service and Qwest's representations that it cannot comply with the Colorado Commission's – or this Commission's – requirements to do so. Qwest, at a minimum, should provide the Commission and the parties with Qwest's interpretation of the obligations that the Colorado Commission has adopted, along with a detailed explanation of how Qwest intends to implement those obligations in Washington. Indeed, the Commission recently imposed just such a requirement with respect to Qwest's compliance with the FCC's special access reporting requirements under Section 272(e)(1). 34th Supp. Order ¶¶ 125-27 & 189-91.

The Commission, therefore, should not find Qwest in compliance with the 30th and 33rd Supplemental Orders until Qwest provides the Commission and the parties with a detailed explanation of how Qwest will provide the same special access reporting in Washington that Qwest will provide in Colorado.

IV. SPECIAL FUND & MULTI-STATE AUDITS/INVESTIGATIONS

The Commission has made clear that it will not make any decision at this point as to whether it will contribute to, and/or participate in, a multi-state audit of Qwest's performance measures and performance data. *See 30th Supplemental Order*, ¶ 241 "we defer our decision on participation in any multi-state audit process until a later date");

33rd Supplemental Order, ¶55 ("the Commission will await the outcome of that process before deciding whether to participate in a multi-state process, as well as the extent of our participation and funding for the process"). Despite that twice-repeated statement, Qwest, in its "compliance" filing on the special fund and multi-state audits/investigations, *see* Exhibit K, Sections 11.3 and 15.1, attempts to backdoor a multi-state audit requirement into the QPAP. Because, as set forth more fully below, Qwest's "compliance" filing is nothing more than the same song and dance previously rejected by the Commission, certain portions of Qwest's compliance filing should be struck.

A. Qwest Has Improperly Included Sections 11.3.1 through 11.3.3.

The first area in which Qwest attempts to force the Commission into acquiescing in a multi-state audit is Section 11. At Paragraphs 11.3.1 through 11.3.3, Qwest spells out the precise same mechanism for Commission contribution to and participation in a multi-state audit as it did in the original QPAP it filed with the Commission following the issuance of the multi-state Facilitator's Report. Specifically, Qwest describes the method by which a "Special Fund" will be created, the monies that will be deposited into the Fund, how disbursements shall be made from the Fund, and the advances, if any, that will be made to the Fund. These provisions, however, are flatly inconsistent with the Commission's 30th and 33rd Supplemental Orders, which made clear that no provisions should be made or included in the QPAP regarding the creation or management of a special fund at this point in time:

> *We will defer any decision whether to contribute a portion of Tier 2 funds to a Special Fund* and whether to require Qwest to contribute any funds, including a portion of the escalate Tier 1 funds, to the Special Fund *until we determine our participation level in a multi-state process*. Any later decision to use Tier 1 funds will apply on a going-forward basis . . . .

> *Until we determine whether to participate in any multi-state process*, Qwest must … maintain an identified escrow account and deposit any payments of Tier 2 funds for Washington State into that account. *We will review the proper placement of these funds based on our decision whether to participate in a multi-state process*.[24]
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> ***
>
> the Commission will await the outcome of that process before deciding whether to participate in a multi-state process, as well as the extent of our participation and funding for the process.[25]

Rather than adhere to the Commission's clear directive, however, Qwest persists in injecting into the QPAP unwarranted and impermissible language. Qwest's attempt should be rejected, and QPAP Sections 11.3.1 through 11.3.3 should be struck in their entirety. Furthermore, any reference to a special fund including in Nonetheless, Qwest's compliance filing contains multiple references to the "special fund." To be compliant with the Commission's orders on this issue, Qwest must delete all references to the special fund, including those contained in sections 16.2, 16.9 and 16.12.

B. Qwest Yet Again Improperly Attempts to Shoehorn In Language That Will Result in the Commission Being Forced to Participate in a Multi-State Audit

The most egregious example of Qwest's refusal to obey the Commission's mandate with respect to the multi-state audit issue comes in Section 15.1, where the practical consequence of Qwest's proposed language is to preclude independent audit and

[24] *30th Supplemental Order*, ¶¶ 160-161
[25] *33rd Supplemental Order*, ¶ 55.

investigation.[26] As an initial matter, Qwest justifies its proposed language for Section 15.1 with the tired argument that multi-state audits are necessary to ensure that Qwest is protected from duplicative audits. Qwest's QPAP Compliance Filing, p. 7. Yet again, Qwest's proposed language is too little, too late. Moreover, it is the same argument Qwest has made twice before, albeit dressed up in new language. Qwest has known from the outset of the Commission's consideration of the QPAP that states could choose to undertake their own audits. Yet, even as it recognized that possibility, Qwest urged only coordination among the various states and not, as it now does, the inclusion of language making mandatory coordination among, planning and conduct of, audits and a severe circumscription of the scope of the audit. Had Qwest believed that this was the only appropriate method by which an audit should be conducted by an individual state commission, it should have said so from the outset, rather than waiting until it was too late for parties to adequately respond to Qwest's latest argument.

The time for Qwest to propose these changes to the QPAP was back in August, when the QPAP was under consideration by the Facilitator and, later, in November and December 2001, by the Commission. Further, Qwest has proposed brand new language and concepts at a time when there is no possibility for adequate and thorough review or even any discovery regarding the impact of these proposed terms. Thus, it is unfair and improper for Qwest to raise issues that should have been fleshed out, briefed and argued previously.

[26] Qwest also makes the misleading statement that "Qwest's system for producing performance measurements are the same for all states." Qwest's QPAP Compliance Filing, p. 7. Of course, that is not the case, as demonstrated by Liberty in the data reconciliation in which certain reporting and data integrity issues that Liberty documented occurred for some products, some states and some CLECs, and not others.

The egregiousness of Qwest's "PAP about-face" at the eleventh hour is underscored by the overreaching nature of its proposed language. As Qwest lays out quite plainly in its proposed language for Section 15.1, the Commission will never be able to independently conduct its own audit if (1) it does not coordinate with any and all other audits; (2) is not planned and conducted so as to ensure that there is no duplication of issues; and (3) is not planned and conducted so as to ensure that nothing about Qwest's business will be impacted. In reality, what this means is that:

> ***if*** the Commission wants to undertake an audit and any other Commission or multi-state body is merely planning to undertake an audit, regardless of scope or nature of either audit,
>
> ***if*** the Commission wants to undertake an audit and any other audit, regardless of scope or subject of either audit, is ongoing,
>
> ***if*** the Commission wants to undertake an audit and the scope of the audit includes any performance measure or performance data considered by any other planned or implemented audit at any time,
>
> ***if*** the Commission wants to undertake an audit and it in any way impairs Qwest's ability to comply with the provisions of any PAP (such as the audit provision of the Montana QPAP), or
>
> ***if*** the Commission wants to undertake an audit that requires work outside the scope of Qwest's regular course of business,

then, the Commission cannot perform that audit. Needless to say, the numerous and severe restrictions Qwest seeks to impose on the Commission's ability to conduct an independent audit cannot be squared with the 30th and 33rd Supplemental Orders, which explicitly reserve to the Commission the right and ability to conduct audits when and where it believes appropriate and necessary. Qwest's proposed language for Section 15.1 must be rejected and struck from the QPAP.

The sheer audacity and overreaching nature of Qwest's proposed language is mind-boggling. Take, for instance, the requirement that no audit can be conducted if it is outside the "reasonable course of Qwest's business." It is simply not possible to conduct an audit that is *within* the reasonable course of Qwest's business. That is to say, audits are not a reasonable or regular course of any company's business, and they can require companies to go outside the regular and reasonable course of their businesses simply because they require the production of, and access to, information that is not ordinarily utilized by a company in conducting its business. The Liberty data reconciliation best reflects this fact. More particularly, in order to reconcile the parties conflicting data, Liberty required the production of the underlying work log and other documentation maintained by both Covad and Qwest. While both companies create and compile that information in the regular and reasonable course of their respective businesses, it was neither regular nor reasonable to then turn around and dedicate the resources and man hours to produce these massive quantities of documents and subsequently answer any questions that flow from them, as Liberty required in order to undertake even the degree of reconciliation that it did. Thus, for Qwest to include a restriction that the audit cannot go beyond anything that would require work outside of the regular or reasonable course of its business is to eviscerate the purpose and terms of the QPAP's audit provisions.

Qwest's concerns about audit multiplicity and conflict are without basis. Simply because the Commission has expressed an initial preference for an independent, rather than regional, audit, does not mean that state coordination is precluded. Indeed, coordination is necessarily ensured because, just as Qwest will struggle if numerous audits are on-going, so too will CLECs – who are necessary participants to any audit and

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

Finally, as the Commission correctly recognized in its *30th Supplemental Order*, prudence dictates that any decision as to participation in a multi-state audit should be withheld until the process is developed and all issues surrounding long-term PID administration are resolved. Until that time, there is no basis upon which the Commission can determine whether participation in a multi-state proceeding is appropriate or whether such participation would effectively eviscerate its ability – and legal obligation – to act in the best interest of Washington residents and to ensure that Qwest provide service in a manner that is fair, reasonable and in furtherance of competition in this state. *Thirtieth Supplemental Order*, ¶ 37. For all these reasons, therefore, Qwest's proposed language for Sections 11.3.1-11.3.3 and 15.1 should be rejected and struck from the QPAP.

V. QWEST OMITTED LANGUAGE FROM THE CPAP THAT THE COMMISSION ORDERED IT TO INCORPORATE REGARDING SERVICE QUALITY PAYMENTS

Sections 13.8 and 12.1 of the QPAP relieve Qwest from an obligation to pay penalties under the QPAP where Qwest is subject to payments or penalties for the same activity under contract, order or rules. The Commission ordered Qwest to modify its original proposals for these sections to mirror the Colorado Performance Assurance Plan (CPAP) language *verbatim.*[27]

Section 11.2 of the CPAP provides:

> **11.2** The following shall not count toward the annual cap: any penalties imposed by the Independent Monitor to maintain the integrity of the CPAP; any penalties imposed by the Commission; any penalties imposed directly by the CPAP for failure to report, failure to report timely, or failure to report accurately; **any liquidated damages under another Interconnection Agreement; any interest payments; and any damages in an associated action.** (Emphasis added.)

Section 12.1 of Qwest's Compliance Filing reads, in pertinent part:

> 12.1…Subject to the limitations in section 13 of this Agreement, the following shall not count toward the cap: any penalties imposed by the Commission; any penalties imposed directly by this Agreement for failure to report, failure to report timely, or failure to report accurately; and any interest payments for underpayment.

Thus, in its compliance filing here in Washington, Qwest omitted the language in bold from the CPAP language. The language from the Commission's Order requires Qwest to incorporate the PAP language on this issue. The Joint CLECs request that the Commission find that Qwest has not complied with its 30th Supplemental Order until it changes this provision to be entirely consistent with the CPAP on service quality payment issues.

[27] 30th Supplemental Order at ¶. 109.

VI. ADDING UNES AND PERFORMANCE MEASURES TO THE PAP.

A. Qwest has failed to incorporate the agreed upon standard for line sharing in its compliance filing.

In the 30th Supplemental Order at ¶124, the Commission states, "Qwest must also add the sub-loop and line sharing standards to the QPAP as the ROC collaborative establishes them."

A standard of 3.3 days has been agreed upon for Line Sharing. However, nothing in Qwest's compliance filing addresses this. Attachment 1 does not set forth the standards at the sub-measurement level, where line sharing would be listed. Thus, the parties are left only to assume that Qwest will honor the Commission's order on this issue. The Joint CLECs ask the Commission to require Qwest to assure the CLECs in writing that it has complied with the Commission's order on this issue and has incorporated the agreed upon standard for line sharing in its Washington PAP.

B. Attaching PID Definitions

The Colorado Commission has required Qwest to attach the PID definitions and business roles for the performance measurements as Appendix B to the CPAP. The Joint CLECs ask that this Commission also require Qwest to attach the PID definitions and business roles as Appendix B. The PIDs and the business rules are the bases for the standards and payments contained in the PAP. Appending them to the PAP will enable all parties and interested persons to have all reference materials relating to the PAP in one place.

VII. PAYMENT METHOD

Qwest has added language on the payment method that has not been authorized by this Commission. In its 33rd Supplemental Order at paragraph 83, the Commission

states, "As Qwest has now agreed to language concerning the form of payment in Colorado, we see no reason to modify our decision on the issue in the *30th Supplemental Order*."

The 30th Supplemental Order at paragraph 220 states:

> We are persuaded that the Colorado Hearing Examiner's approach to the form of payment provides the appropriate balance between the competing positions of the parties. That is, Qwest will make cash equivalent QPAP payments to CLECs except when a non-disputed CLEC payment to Qwest is more than 90 days past due. Qwest must amend section 11.2 of the QPAP to adopt the language from section 12.2 of the CPAP which states: "All payments shall be in cash. Qwest shall be able to offset cash payments to CLEC with a bill credit applied against any non-disputed charges that are more than 90 days past due."

In its compliance filing, Qwest includes the following:

> 11.2 All payments shall be in cash. **Qwest shall be allowed through the use of electronic fund transfers to CLECs and the State.** Qwest shall be able to offset cash payments to CLECs with bill credits applied against any non-disputed charges that are more than 90 days past due.24

Not only is the above bolded language unclear and fragmented, the Commission has not authorized Qwest to utilize electronic fund transfers for payments. The Joint CLECs ask the Commission to require Qwest to strike the bolded language from the PAP.

If, however, the Commission agrees to allow Qwest to use electronic fund transfers, it should limit its use to CLECs that agree to receive payments in electronic form. The language from the CPAP at section 12.2 reads as follows: "Qwest shall be allowed, after obtaining the individual agreement of CLEC, to make such cash payments through the use of electronic fund transfers to CLEC and the State." The Joint CLECs

request that if the Commission approves of the use of the electronic transfer of funds, it adopt the language from the CPAP on this issue.

VIII. COLLOCATION

A. Qwest has not complied with the Commission's orders to incorporate WAC 480-12-560 into the SGAT.

The Commission's 33rd Supplemental Order at paragraph 28 provides:

> **Discussion and Decision:** Upon review of SGAT section 8.2.1 and WAC 480-120-560, we reject Qwest's assertion that no further changes are necessary to the SGAT. The CLECs are correct in noting certain omissions. In addition to those noted by the CLECs, Qwest must modify SGAT section 8.2.1.1 to include the following sentence: "The terms and conditions of this section (8.2.1) shall be in compliance with all requirements specified in the Washington State Collocation Rule, WAC 480-120-560. Further, Qwest must add the following sentences to SGAT section 8.4.1.10: "Recurring charges will not begin to accrue for any element until Qwest delivers that element to the CLEC. To the extent that the CLEC self-provisions any collocation element, Qwest may not impose any charges for provisioning that element."

Qwest has added the first required sentence in its May 28, 2002 - Sixth Revision of the SGAT. However, its revised SGAT does not address the specific requirements of the collocation rule, including those referred to by the Joint CLECs in the Joint Answer to Qwest's Petition for Reconsideration. The SGAT is not compliant with Commission orders on this issue until Qwest includes language that reflects all requirements of the collocation rule, WAC 480-120-560.

Further, Qwest has not added the language required by the Commission to Section 8.4.1.10 of the SGAT. Qwest states in footnote 18 under section 8.4.1.10 of the May 28, 2002 - Sixth Revision of the SGAT, "*33rd Supplemental Order*, at page 8, para. 28. Because the April 19 SGAT contained compliant language, no revision is required." In their review of the April 19, 2002 and the May 28, 2002 SGATs, the Joint CLECs

found nothing that includes the above Commission-required language. Qwest is not compliant with the Commission's orders on collocation until it includes this language in its SGAT.

In addition, the specific key language from the 33rd Supplemental Order that the Commission required Qwest to include in the SGAT sections 8.2.1.1 and 8.4.1.10 should also be included in section 6.3 of Qwest's compliance filing Exhibit A which is "Exhibit K Performance Assurance Plan."

IX. QWEST'S PROPOSED ADDITION OF TABLE 2A OF SECTION 6.2.2 IS NON-COMPLIANT WITH THE COMMISSION'S ORDER.

The Commission's order stated:

> In this particular case, we find that higher payment levels for high-value services create a more appropriate incentive for Qwest to provide nondiscriminatory service, because they more closely correlate with one another. Qwest must amend the QPAP to include the payment table for high-value services proposed in Exhibit 1205 at page 12.[28]

The Commission directed Qwest to increase the payment levels for high-value services. High-value services are services used at DS1 and DS3 rates. Qwest did, in Table 2A, increase the payment levels for high-value services. However, Qwest deviated from the Commission's order in that it also decreased the payment levels for the residence resale, UBL-2 wire/analog loop, business resale and UNE-P low-value services. Exhibit 1205 did include a Qwest proposal to increase the payment levels for high-value services and to decrease the payment levels for low-value services. However, the Commission's order only directed Qwest to amend the QPAP for high-value services. The Commission did not direct Qwest to reduce the payment levels for the low-value services.

[28] Commission 30th Supplemental Order at ¶ 135 and 346.

X. TIER 2 PAYMENT STANDARDS

It is clear from the Commission's order that Tier 2 payments should be due in any month in which Qwest has failed to meet the Tier 2 performance standards.[29] The Commission directed Qwest to modify section 7.3 to reflect Tier 2 payments being due in any month in which Qwest failed to meet the Tier 2 performance standard. However, language on the trigger for Tier 2 payments also can be found in Section 9.0. Recognizing that the Commission's omission of an order to change Section 9.0 was likely an inadvertent oversight, Qwest modified some portions of Section 9.0 to eliminate any reference to the three month period.[30] However, Qwest failed to modify all of the relevant 9.0 sections. Section 9.2.2.3 Step 3 includes the sentence, "[t]he average for three months (rounded to the nearest integer) shall be calculated and multiplied by the result of the per occurrence dollar amount taken from the Tier 2 Payment Table to determine the payment to the State for each non-conforming performance measurement. To be fully compliant with the Commission's order AT&T suggests that Section 9.2.2.3 Step 3 be modified as follows:

> For each performance measurement, the total number of data point each month shall be multiplied by the percentage calculated in the previous step. The ~~average for three months (rounded to the nearest integer)~~ result shall be calculated and multiplied by the result of the per occurrence dollar amount taken from the Tier 2 Payment Table to determine the payment to the State for each non-conforming performance measurement.

Qwest also failed to properly modify Section 9.4.1.1 Step 2. To be fully compliant with the Commission's order, AT&T suggests that Qwest's latest proposal for Section 9.4.1.1 Step 2 be modified as follows:

[29] 30th Supplemental Order at ¶ 86 and 339.
[30] *See* Sections 9.1.2, and 9.3.1.3 Step 3.

> The difference between the actual rate for the CLEC and the parity value rate for each non-conforming month ~~of the non-conforming three-month period~~ shall be calculated. The calculation is: diff = (CLEC rate – parity value rate). This formula shall apply where a high value is indicative of poor performance. The formula shall be reversed where high performance is indicated of good performance.

For the same reasons, AT&T suggests that Section 9.4.1.2 Step 3 be modified as follows:

> For each performance measurement, the total number of data points shall be multiplied by the difference calculated in the previous step for each month. The ~~average for three months~~ result shall be calculated (rounded to the nearest integer) and multiplied by the result of the per occurrence dollar amounts taken from the Tier 2 Payment Table to determine the payment to the state.

XI. CONCLUSION

The Commission was clear in both its 30th and 33rd Supplemental Orders on what was required for compliance. Qwest has failed to comply on numerous issues. Accordingly, Qwest has thwarted this Commission's efforts to create an effective performance assurance plan, against the public interest of the citizens of the State of Washington.

Respectfully submitted on June 3, 2002.

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

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