

**EXHIBIT K TO QWEST'S  
STATEMENT OF GENERALLY AVAILABLE TERMS AND CONDITIONS  
AND SUPPORTING COMMENTS**

**INTRODUCTION**

Qwest is incorporating its Performance Assurance Plan (“QPAP”) into its Statement of Generally Available Terms and Conditions (“SGAT”) as Exhibit K. The QPAP is voluntarily submitted for the purpose of demonstrating to the Federal Communications Commission (“FCC”) that Qwest will have compelling economic incentives to continue meeting the requirements of section 271 after it obtains approval to offer long distance services in any given state. By its voluntary terms, Qwest’s liability under the PAP will commence once it has obtained effective section 271 authorization from the Federal Communications Commission (“FCC”) for the state. The QPAP is provided as Attachment 1 to this filing.

Unlike other checklist items that are included in the SGAT, the QPAP represents an undertaking that is not required under sections 251, 252 or 271 of the Telecommunications Act. The FCC has never required Bell Operating Company (“BOC”) applicants to demonstrate that they are subject to performance monitoring and enforcement mechanisms as a condition of section 271 approval. However, where a BOC has voluntarily provided a performance assurance plan, the FCC has stated that these mechanisms would constitute “probative evidence” that the BOC will continue to meet its section 271 obligations and that its entry would be consistent with the public interest.<sup>1</sup>

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<sup>1</sup> See, e.g., Memorandum Opinion and Order, *Application by Bell Atlantic New York for Authorization Under Section 271 of the Communications Act to Provide In-Region, InterLATA Service in the State of New York*, 15 FCC Rcd 3953, 4161 ¶422 (1999), *aff’d*, 220 F.3d 607 (D.C. Cir. 2000) (“BA-

Qwest's QPAP meets or exceeds the performance measurements and penalties already scrutinized and approved by the FCC in its 271 orders. As a sign of Qwest's commitment to adopt a rigorous performance assurance plan, Qwest initially adopted the key structural aspects of the FCC-approved Southwestern Bell Telephone Company ("SWBT") performance assurance plan for the State of Texas.<sup>2</sup> Qwest then engaged in months of workshop sessions with state staff members and CLECs under the auspices of the Regional Oversight Committee ("ROC"). Through this collaborative process, Qwest demonstrated a willingness to compromise its proposed PAP to take into consideration reasonable proposals from CLECs. The sessions resulted in substantial consensus with many participating CLECs over the three major structural aspects of the QPAP: the performance measurements to be included in the QPAP, the statistical methodology which determines whether the performance meets the standard, and the basis for the payment amounts to be applied to non-conforming performance results. With its genesis in the FCC-approved SWBT provisions and the revisions resulting from the ROC workshops, the QPAP is a robust performance assurance plan that provides confidence for the Commission to recommend that Qwest's section 271 filing is in the public interest and will provide protection against performance backsliding after Qwest obtains long distance entry.

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NY") and Memorandum Opinion and Order, *Application by SBC Communications Inc., Southwestern Bell Telephone Company, and Southwestern Bell Communications Services, Inc. d/b/a Southwestern Bell Long Distance Pursuant to Section 271 of the Telecommunications Act of 1996 to Provide In-Region, InterLATA Services in Texas*, 15 FCC Rcd 18354, 18559-60 ¶ 420 (2000), *appeal voluntarily dismissed*, AT&T v. FCC, No. 00-1295 (D.C. Cir. Mar. 1, 2001) ("SWBT-Texas").

<sup>2</sup> Nearly identical plans were approved by the FCC for SWBT's Kansas and Oklahoma applications. See Memorandum Opinion and Order, *Application by SBC Communications Inc., Southwestern Bell Telephone Company, and Southwestern Bell Communications Services, Inc. d/b/a Southwestern Bell Long Distance for Provision of In-Region, InterLATA Services in Kansas and Oklahoma*, CC Docket No. 00-217, FCC 01-29 (rel. Jan. 22, 2001), *pet. for review filed sub nom.*, Sprint v. FCC, No. 01-10761 (D.C. Cir. filed Feb. 16, 2001) ("SWBT-Kansas/Oklahoma").

## BACKGROUND

In August 2000, state regulatory commissions in 11 of Qwest's 14 in-region states invited interested parties to participate with them and Qwest in collaborative workshops to develop a post-271 entry performance assurance plan.<sup>3</sup> A series of conference calls and five multi-day workshops were held between October 2000 and May 2001. Staff members from the 11 states as well as AT&T, WorldCom, Ztel, Covad, McLeod, Eschelon, Southwestern Bell and other CLECs participated in the workshop process.

In the beginning, the collaborative reviewed Qwest's proposed performance assurance plan, in addition to a number of performance plans with vastly different performance measures, statistical procedures, and payment and administrative provisions submitted by the CLECs. Position papers were generally filed before each workshop, and through the oversight and direction of the project manager, Maxim Telecom Group ("MTG"), the collaborative engaged in exhaustive presentations and debate over elements of the proposed plans. In the end, the participants agreed to focus on the Qwest proposed Performance Assurance Plan and ultimately achieved substantial closure on the essential parameters of performance assurance: measurements, statistics, and payments. As Attachment 2, to this filing, Qwest is providing MTG's final report on the workshops listing the agreements reached and the areas in which the parties were unable to reach agreement.<sup>4</sup>

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<sup>3</sup> Participating states included Idaho, Iowa, Nebraska, New Mexico, North Dakota, Montana, Oregon, South Dakota, Utah, Washington, and Wyoming. Arizona and Minnesota declined the invitation to participate. Colorado opened Docket 01I-041T on January 24, 2001 to separately consider a Performance Assurance Plan.

<sup>4</sup> Appendix C of the MTG report, which contained an earlier version of the Qwest PAP, is omitted, as Qwest has provided its plan in the form of SGAT language. For that reason, the format of the two documents will be different, and in some instances the sentence structure changed to conform to clear

Qwest has incorporated the Agreements reached in the collaborative into its QPAP, provided as Attachment 1. The unresolved issues raised in the collaborative are either appropriately left out of the PAP or addressed in a way that is consistent with the FCC's expectations. Accordingly, the state commissions should accept Qwest's proposed plan, in its entirety, and recommend that Qwest's section 271 filing is in the public interest.

## DISCUSSION

### I. THE QPAP MEETS THE FCC'S EXPECTATIONS

As part of the FCC's consideration of a BOC's section 271 application, the FCC will "assess whether the requested authorization would be consistent with the public interest, convenience and necessity."<sup>5</sup> As a part of its analysis, the FCC will consider two factors: (1) whether the BOC has opened its markets to competition, and (2) whether the BOC has provided sufficient assurance that the markets will remain open after the application is granted.<sup>6</sup> The first question is being addressed in an unprecedented series of checklist workshops in the region. The second question is answered by the presence of a performance assurance plan.

Where, as here, a BOC elects to adopt a performance monitoring and enforcement mechanism to demonstrate its commitments to maintain market-opening performance after 271 entry, the FCC will examine whether the mechanism "fall[s] within a zone of reasonableness" and is "likely to provide incentives that are sufficient to foster post-entry

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contract language. Additionally, Qwest made changes, as necessary, to clarify terms or accommodate individual state filings.

<sup>5</sup> *BA-NY* 4161 ¶ 422; *SWBT-Texas* 18557 ¶ 416.

<sup>6</sup> *See BA-NY* 4161-62 ¶ 422-23; *SWBT-Texas* 18557-58 ¶¶ 416-17.

checklist compliance.”<sup>7</sup> To guide this analysis, the FCC has identified five key characteristics of an acceptable performance assurance plan: (1) potential liability that provides a meaningful and significant incentive to comply with the designated performance standards; (2) clearly articulated, pre-determined measures and standards, which 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 leave the door open unreasonably to litigation and appeal; and (5) reasonable assurances that the reported data are accurate.<sup>8</sup> As demonstrated below, the QPAP contains all the hallmarks of reasonableness that the FCC has identified in its section 271 orders. And while the parties could not resolve every issue during the ROC PEPP negotiation, the provisions of the QPAP adequately address each of the FCC’s concerns listed above.

**(1) Qwest’s potential liability under the QPAP provides a meaningful and significant incentive to comply with the designated performance standards.**

The QPAP exposes Qwest to substantial potential financial liability. The FCC approved Bell Atlantic’s application for New York and Southwestern Bell Telephone Company’s applications for Texas, Oklahoma, and Kansas with those companies placing at risk 36% of net revenues based on ARMIS data.<sup>9</sup> ARMIS data “represents total operating revenue less operating expenses and operating taxes” and is provided to the

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<sup>7</sup> BA-NY 4166-67 ¶ 433.

<sup>8</sup> See BA-NY 4166-67 ¶ 433.

<sup>9</sup> See BA-NY 4167-68 ¶ 435 n.1332; SWBT-Texas 18561-62 ¶ 424 n.1235; SWBT-Kansas/Oklahoma ¶ 274 n.837. In New York, this amount was subsequently increased due to concerns arising after section 271 approval. See *Order Adopting the Amended Performance Assurance Plan and Amended Change Control Plan*, Case Nos. 97-C-0271, 99-C-0949 NY PSC (Nov. 3, 1999), available at <http://www.dps.state.ny.us/fileroom/doc6721.pdf> (“NY PSC Order”).

FCC on an annual basis.<sup>10</sup> The FCC found that a calculation of “net return” based upon this data was a “reasonable approximation of total profits derived from local exchange service.”<sup>11</sup> The FCC considered 36% of net revenues sufficient incentive for the BOC to “maintain a high level of performance.”<sup>12</sup> Qwest’s PAP places at risk an amount representing 36% of Qwest’s net operating revenue for each state based on ARMIS data. Attachment 3 of the QPAP shows the amount at risk for Qwest’s states.<sup>13</sup>

CLECs have variously proposed that the cap on payments in the QPAP be raised above 36% of annual net revenues and that any “cap” be merely a “trigger” for investigation by the state commission. Those proposals are contrary to the FCC’s acceptance of a 36% cap for other BOCs. There is no basis for asking Qwest to offer more.

**(2) The QPAP contains clearly articulated and pre-determined measures and standards that encompass a range of carrier-to-carrier performance.**

Payments under the QPAP are tied to effective enforcement measures, which are well defined and comprehensive. The Performance Indicator Definitions (“PIDs”) form the foundation of the QPAP. The PIDs were developed through months of collaboration with CLECs and state staff members in the ROC Operational Support System (“OSS”) collaborative and cover Qwest’s wholesale performance from preorder through provisioning and billing. Early in the ROC collaborative process, the parties agreed to

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<sup>10</sup> *BA-NY* 4168 ¶ 436; *SWBT-Texas* 18561-62 ¶ 424.

<sup>11</sup> *Id.*

<sup>12</sup> *BA-NY* 4167-68 ¶ 435; *SWBT-Texas* 18561-62 ¶ 424.

<sup>13</sup> Because neither Colorado, Arizona or Minnesota participated in the ROC PEPP process, they are not identified on Attachment 3.

take advantage of the PIDs developed in the ROC OSS collaborative. The advantage of using the PIDs is twofold: First, the PIDs themselves are the result of months of discussion and collaboration under the auspices of the same states and with active participation of many CLECs. Second, the PIDs represent the very standard against which Qwest will be judged in determining whether it should receive section 271 approval, the precursor to any “backsliding” plan.

There was substantial disagreement over which PIDs should be included in the QPAP at the beginning of the ROC Post Entry Performance Plan (“PEPP”) workshop: while the CLECs proposed that almost every PID be included; Qwest objected because many of the PIDs resulted in duplicative payments. In the end, the parties agreed to an approach that resolved disputed performance measurements through “give and take” and by using a “family” approach. Nearly all of the disputed PIDs are placed in the operation of the PAP, but some of the payments are made based only on the “family member” that generates the highest penalty. Under this approach, the incentive for maintaining conforming performance for all family members is created while reasonably keeping Qwest from paying multiple times for the same performance deficiency. The ROC PIDs developed through the ROC OSS collaborative will be finalized shortly after completion of the ongoing third-party performance measure audit in the 13 ROC States and will be provided as Attachment B to the SGAT.

The QPAP also contains a built-in review mechanism to ensure that the PIDs continue to be an effective measure of Qwest’s wholesale performance in the future. Every six months, the QPAP requires a thorough review of the performance measurements, at which time the Commission and Qwest and participating CLECs can

consider changes, additions and deletions to the measurements. This six-month review provision is identified in section 16 of the QPAP.<sup>14</sup>

Notwithstanding the parties' agreement to work from the already developed ROC PIDs, Qwest agreed to consider whether it would be appropriate to add to the PAP yet-undeveloped measurements that addressed Qwest's software change management. Qwest has proposed change management PIDs and the parties are currently negotiating those PIDs in the ROC OSS collaborative. Qwest maintains that it is premature to include them in the QPAP and that the issue of whether to include these measures should be raised at the six month review.

**(3) The QPAP provides a reasonable structure that is designed to detect and sanction poor performance when and if it occurs.**

**(a) Payment structure**

Qwest initially adopted the payment structure of the SWBT performance assurance plan, which had been determined both by the Texas Commission and the FCC to be a reasonable structure that will be effective in sanctioning poor performance. In the ROC PEPP workshops, Qwest made substantial improvements to the payment structure that should leave little doubt that the QPAP is an acceptable performance assurance plan.

Like the SWBT plan, the QPAP is a two-tiered plan. Certain PIDs are categorized as "Tier 1," and for those measurements, Qwest will make payments directly to individual CLECs if Qwest does not satisfy the performance measurements in the plan -- either parity between the service Qwest provides to the CLEC and that which it provides to its own retail customers, or where there is no retail analog, a designated

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<sup>14</sup> In implementing the SGAT language, Qwest has modified the QPAP language from the ROC PEPP version to indicate that PAP revisions can be made only with Qwest's consent.



benchmark standard. Certain PIDs are categorized as “Tier 2,” and for those measurements, Qwest will make payments to the State.<sup>15</sup> This two-tiered structure assures that Qwest has incentive to maintain satisfactory wholesale performance to individual CLECs, as well as to CLECs in the aggregate.

Payments under the QPAP are on a per occurrence basis, except where the measurements do not lend themselves to a per occurrence payment. In such cases, the payment is on a per measurement basis. The payment is calculated by multiplying the per occurrence payment amounts specified in the QPAP by the number of consecutive months of non-conforming performance. The performance measures are ranked from low to high and the dollar amounts associated with a miss of each measure increase, accordingly. The level of payment under the QPAP depends on the number of consecutive months of non-conforming performance: the payment escalates the longer the non-conforming performance continues and, like the SWBT plan, the escalation continues for six consecutive months. In order to emphasize performance with regard to new services, the QPAP contains a minimum payment that is to be shared by CLECs based upon Qwest’s performance in connection with nascent services. The methods for calculating payments to CLECs and the State are set forth in sections 6.0 and 7.0 of the QPAP. The per occurrence dollar amounts are set forth in the QPAP at Tables 2 and 3 and is the same as the amounts contained in the SWBT plan.

CLECs initially proposed, but later abandoned, alternative payment structures. In fact, four CLECs volunteered to make available to the collaborative their individual

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<sup>15</sup> In light of state specific limitations for receiving and administering Tier 2 payments, Qwest has modified the QPAP terms from the ROC PEPP version to allow for funds to be paid either to a fund established by the State Commission or, where required by state law, to a state general fund. Because of

performance results in order to test the reasonableness of the Qwest and CLEC proposals. Qwest provided actual “price outs” of the QPAP based on those results.<sup>16</sup> Upon a quantification of (i) the overall Tier 1 and Tier 2 payment levels for selected states, (ii) Tier 1 payment levels to individual CLECs, and (iii) the payment levels at the sub-measurement results, the CLECs agreed that the Qwest payment structure was robust and should be adopted by the collaborative.

Notwithstanding the robust payments produced by Qwest’s proposed plan, Qwest agreed to magnify the escalation of payments where Qwest misses the performance standard consecutively. The concept, coined “sticky duration” in the workshops, requires payments to stay at escalated levels rather than to return immediately to their beginning levels. The result is that escalation of payments for consecutive months of non-conforming service will be matched month-for-month with de-escalation of payments, instead of reverting to base levels after one month of conforming service. Thus, payments that had been escalated due to consecutive months of non-conforming service would step down, one month at a time, for every consecutive month of conforming service. Qwest also agreed to reconstruct the payment scheme for certain Tier 2 measures, creating a minimum payment per measure and increasing the payment based upon the severity of the miss. The “sticky duration” provision is contained in section 6.0 of the QPAP. The Tier 2 minimum payment provision is contained in section 7.0 of the QPAP.

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unique circumstances in Wyoming, Qwest has revised the language to direct Tier 2 payments to the state universal service fund.

<sup>16</sup> The information was provided under a confidentiality agreement and pursuant to authorization from the CLECs.

The unresolved issues related to the QPAP payment structure relate to proposals that are only designed to increase payments to CLECs and are not justified. For example, in the May ROC PEPP Workshop, in an effort to reach complete agreement on payment structure, Qwest proposed to redistribute payments by increasing the Tier 1 level of payments to CLECs and decreasing the level of Tier 2 payments to state funds. The CLECs responded by accepting the Tier 1 increases, but did not accept the offsetting decrease in Tier 2 payments. The CLECs also proposed that all performance measures designated “low” in the QPAP be classified as “medium” and that the “low” category be eliminated. The CLECs failed to provide either rationale or a demonstration that their proposals were reasonable.

In addition, CLECs proposed higher levels of per occurrence payments for longer duration and unlimited escalation. Qwest opposed extending duration beyond the six months specified in the QPAP, but considered offsetting higher payments for longer duration with smaller payments for lesser periods of duration. The participating state staff members recognized that appropriate incentive is created by one approach or the other, but not both. The CLECs remained resolute in their demands.

The CLEC demands are unreasonable. The QPAP categorizes performance measurements as High, Medium, or Low, with payment levels matched to those severity levels. The QPAP per occurrence payments of \$800, \$600, and \$400 (for High, Medium, and Low designations at the six-month level, respectively) fully compensate CLECs for any alleged harm resulting from Qwest missing a performance measurement standard. In addition, the QPAP provides escalating payments for consecutive months of non-conforming performance. Tier 2 payments to the State serve as an additional escalation

mechanism in light of the overlap with Tier 1 measurements. The same per occurrence amounts were approved as part of the Texas plan.<sup>17</sup> Any further escalation of these dollar amounts would amount to unjustified windfalls to the CLECs. The Qwest plan contains the same payment amounts for the High, Medium and Low categories and the same duration function as the Southwestern Bell Texas plan. Accordingly, the approach adopted in the QPAP is acceptable.

Two other payment issues raised by CLECs are related to the CLECs' desire to have higher payments for certain services. One proposal would require Qwest to disregard the ROC collocation measurements and adhere to a completely different method of measuring collocation. The other would require Qwest and the CLECs to agree to classify certain products/services as "high value," and more important to CLECs, than others. Neither proposal is necessary in order for Qwest's plan to be considered a sufficient anti-backsliding mechanism. The last payment issue raised at the last workshop appears to be a request for increasing payments for percentage type measures. The collaborative was not given any description of the nature of this request. The fact that it was raised at the eleventh hour, without an explanation of the proposal, demonstrates that the request was merely an effort to increase payments to CLECs.

The CLEC proposals for increased severity and unlimited duration are attempts to create steep and unrelenting payments to CLECs. The payment provisions of the Texas plan on which the QPAP is based were sufficient to support FCC approval. Moreover, Qwest has provided "price outs" of the QPAP, using actual performance data. That information demonstrates that the QPAP structure produced robust payments for non-

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<sup>17</sup> See *SWBT-Texas* 18562 ¶426.

conforming performance. No other changes to the QPAP payment structure are necessary or appropriate.

**(b) Statistical methodology**

Qwest's proposed Plan incorporated the same statistical methodology as the SWBT plan. The plan relies on statistical scoring to determine whether any differences in performance results are significant or merely the result of random variation. Like the SWBT plan, the proposed QPAP contained a K table to account for random variation in the performance results.

While the statistical methodology—or even whether statistics should be used—to determine whether Qwest meets parity performance standards was vigorously contested in the ROC collaborative, the parties were ultimately able to reach agreement. Participants were concerned with whether the methodology could adequately detect non-conforming performance when sample sizes (the number of CLEC orders) were small and whether it could be calibrated to differentiate between false failures (Type I errors) and false passes (Type II errors). The workshop participants agreed to a statistical methodology for parity measurements that balances the participants' concerns about sample sizes, Type I and Type II errors, and statistical significance.<sup>18</sup> Qwest eliminated the “K table” employed by the Texas plan to account for random variation and agreed to use, instead, specified critical values for different volumes of orders.

This consensus represents perhaps the first time in any region that a BOC and AT&T have reached agreement on the statistical methodology to be used in a performance assurance plan. The statistical methodology is straightforward. It uses a

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<sup>18</sup> WorldCom and Z-Tel proposed a subsequent modification to this agreement which has been rejected by Qwest.

standard z-test, but adopts a different critical value for certain products. For these, the critical value is smaller, thereby making the test most stringent when CLEC volumes are under 11. The result is a criterion for each PID, by submeasurement and by month, that is acceptable to Qwest and to large and small CLECs operating in its region, a full description of the statistical methodology is provided in sections 4.0 and 5.0 of the QPAP.

**(4) The QPAP contains a self-executing mechanism that does not leave the door open unreasonably to litigation and appeal.**

The QPAP provides self-executing payments for nonconforming service.<sup>19</sup> The plan generates automatic payments to CLECs and to the State based upon the performance results generated under the PID business rules, the statistical methodology, and the payment structure. CLECs receive Tier 1 payments without any need to prove that they were harmed by the non-conforming performance. Step-by-step descriptions for calculating the payments are described in sections 8.0 and 9.0 of the QPAP. Section 14 specifies the deadlines for which Qwest must produce the results of its performance to the CLEC, and Section 11 specifies the monthly due date for payment to the CLECs and the State.

In order for Qwest to obtain relief from making any payments, it must affirmatively seek an exception based upon force majeure events and events outside of its control. Qwest has the burden of demonstrating its right to those exceptions. The

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<sup>19</sup> *BA-NY 4171-72* ¶ 441; *SWBT-Texas 18563-64* ¶427.

relevant provisions are provided in sections 13 and 14 of the QPAP and are based upon the similar provisions of the SWBT plan.<sup>20</sup>

The CLECs' request that Qwest be required to make direct payments to CLECs instead of issuing bill credits is inconsistent with the plans that were adopted as part of the section 271 approval processes in Kansas, Massachusetts, New York, Oklahoma, and Texas.<sup>21</sup> None of the PAPs in those states requires direct payments instead of bill credits. While the CLECs claim that checks are easier to administer than bill credits, they have neither explained nor demonstrated why that is allegedly the case. The financial management at a modern corporation is performed through its accounting system, not through its cash box. Whether paid by check or by bill credit, CLECs must still enter the payment into its accounting system. Such systems disregard whether the payment originated as a bill credit or a check. CLECs claim that checks would have a greater impact on Qwest than bill credits. This assertion is simply wrong and is based upon the mistaken view that the modern corporation still relies upon senior management hand-signing all checks. Whether by bill credits or check, the visibility to Qwest senior management of payments to CLECs under this PAP will be through the monthly profit and loss statement that summarizes Qwest results.

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<sup>20</sup> In light of the different mechanisms for resolving disputes specified in the SGAT and interconnection agreements, as well as limitations in some states, Qwest has changed the language in section 13.0 to allow resolution of these issues to be handled in the same manner as other interconnection agreement/SGAT disputes.

<sup>21</sup> See, e. g., Memorandum Opinion and Order, *Application of Verizon New England Inc., Bell Atlantic Communications, Inc. (d/b/a Verizon Long Distance), NYNEX Long Distance Company (d/b/a Verizon Enterprise Solutions), and Verizon Global Networks, Inc., for Authorization to Provide In-Region, InterLATA Services in Massachusetts*, CC Docket No. 01-9, FCC 01-130 ¶ 238 (rel. April 16, 2001) (“*Verizon-Massachusetts*”); *BA-NY* ¶ 432.

The CLECs have also expressed concern about their ability to account for and track penalty payments coming to them in the form of bill credits. At least a portion of the opposition to bill credits as the vehicle for QPAP payment stems from the CLECs' concern that QPAP payments will simply be lumped in with operational bill credits. In order to allay that concern, Qwest agreed in the ROC workshop to supply detailed statements showing exact QPAP payment calculations. Qwest agreed to provide the CLECs with sample statements showing the level of detail for penalty calculations that will accompany bill credits sent to the CLECs and to accept input from the CLECs relating to the design and lay-out of these statements. At the last ROC workshop, CLECs indicated that this information might eliminate their opposition to bill credits.

**(5) The QPAP provides reasonable assurances that the reported data are accurate.**

The Qwest plan provides for extensive data validation and auditing.<sup>22</sup> By the time that the QPAP becomes effective in the State, the performance measurements that form the basis of the QPAP will have undergone not one, but two comprehensive audits of its data collection, calculation, and reporting functions by two different independent auditors.<sup>23</sup> The CLEC audit provisions are patterned after the FCC-approved SWBT plan and are provided in section 15 of the QPAP. Moreover, Qwest has included in its plan an adaptation of the root cause provisions that Texas agreed to incorporate after FCC approval. In Section 15.5 of the QPAP, Qwest has agreed to investigate any second consecutive Tier 2 miss and consecutive aggregate Tier 1 misses to determine the cause

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<sup>22</sup> See *BA-NY* 4172 ¶ 442; *SWBT-Texas* 18564 ¶ 428; see also *SWBT-Kansas/Oklahoma* ¶ 278; *Verizon-Massachusetts* ¶ 247.



of the miss and to identify the action needed to meet the standard. The Qwest provision contemplates an investigation based upon aggregate, rather than individual, CLEC misses, as in the SWBT provision. In Qwest's region, the CLEC volumes for any submeasurement are small and subject to wider variation. When volumes of orders are that low, a small number of missed orders could lead to a miss of the performance measurement. Requiring root cause analysis for consecutive months of small volume misses would be wasteful. To correct for this small volume, the QPAP root cause analysis provision relies on aggregate data.

The QPAP also provides for audits of the financial system that produces the payments, to be paid for by Qwest. The first audit begins 12 months after the effective date of the QPAP and a second audit 18 months after the first audit. The necessity of any further audits may be considered during the six month review. Furthermore, the Commission has the option of conducting these audits itself instead. Given these rigorous audit and root cause analysis provisions there is no basis for demanding that Qwest conduct comprehensive annual audits or submit to any additional audit process. On a related point, while Qwest does not believe that late reporting causes harm to CLECs, it has nevertheless agreed to pay a total of \$500 to the State for each business day Qwest misses the reporting deadline.<sup>24</sup> This amount is sufficient in light of the fact that Qwest produces reports for the hundreds of individual CLECs and aggregate reports for each State at the same time. If the need to restate the data or a computer glitch causes

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<sup>23</sup> The performance measures included in the QPAP were audited both by Liberty Consulting Group in the ROC OSS collaborative and by Cap Gemini Ernst & Young in the Arizona collaborative.

<sup>24</sup> The \$500 represents the total payment for missing any deadline, rather than a payment per report.

late reports, it is likely that reports for all the States will be late. Accordingly, Qwest would be subject to this payment in each of its fourteen states.

## **II. NONE OF THE OTHER ISSUES RAISED BY THE CLECS CHALLENGE THE SUFFICIENCY OF THE QPAP.**

### **A. Qwest's Liability Under the QPAP Will Begin When Qwest Receives Effective 271 Authority.**

The QPAP will become available to CLECs in each state upon Qwest's receipt of effective Section 271 authority from the FCC for the particular state. CLECs' claim that Qwest should incur liability under the PAP *before* it receives approval to offer long distance services in the state is without merit and contradicts the basic premise of the performance assurance plan. As the name of the ROC workshop (Post Entry Performance Plan collaborative) indicates, the performance assurance plan should be operational post-entry. The FCC has clearly stated that the purpose of a performance assurance plan is to prevent backsliding once the RBOC obtains approval to offer interLATA long distance.<sup>25</sup> The rationale behind such a Plan is that a BOC's incentive to engage in market-opening behavior exists before, but may be reduced, upon section 271 approval.

The FCC acknowledged the voluntary nature of a plan and recognized the BOC's undertaking as "probative evidence that the BOC will continue to meet its 271 obligations and that its entry would be consistent with the public interest."<sup>26</sup> In other words, to bolster its assertion that granting section 271 approval is in the public interest,

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<sup>25</sup> See, e.g., *Verizon-Massachusetts* ¶¶ 236-37, 240, (noting that purpose of Massachusetts Plan is to ensure "post-entry checklist compliance").

<sup>26</sup> *BA-NY 4164* ¶ 429 (emphasis added).

BOCs such as Qwest may agree to do *more* than otherwise required to meet their section 251 obligations, such as offer liquidated damages and penalties that are self-executing. In adopting Bell Atlantic's amended performance assurance plan in New York, the New York Commission considered and rejected a CLEC proposal essentially identical to that proposed by the CLECs here under which the plan would be "fully-operational and effective immediately after the order approving the plan is issued to assure that the market is irreversibly open prior to obtaining section 271 authority."<sup>27</sup>

Finally, Qwest has a powerful incentive to provide the CLECs with an appropriate level of service before its section 271 application is granted. That incentive, of course, stems from the reality that Qwest will not obtain section 271 approval unless it is providing service at an appropriate level of quality.

#### **B. The Legal Operation of the QPAP Is Appropriate**

CLECs apparently object to the fact that Qwest has defined the Tier 1 payments to CLECs as "liquidated damages." However, this provision is the same as that contained within the SWBT plan and applicable to Tier 1 payments therein. Under this provision, the QPAP payments are treated as the settled contractual remedy for the claimed harm resulting from non-conforming performance. CLECs receive these self-executing payments without any need to prove actual injury. Indeed, CLECs may receive substantial payments under the QPAP when they have suffered no actual harm whatsoever. Accordingly, in order to receive these advantages, CLECs cannot fairly, and under the PAP do not, retain a right to obtain additional contract remedies if they believe that a particular event may create harm that exceeds what the PAP would pay for that

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<sup>27</sup> See *NY PSC Order* at 10.

particular loss. Qwest has included the same language as the Texas plan, which states that CLECs are not foreclosed from bringing non-contractual legal and non-contractual regulatory claims and remedies that may be available to them. Thus, the QPAP payment mechanism is fair and self-executing, yet minimizes unnecessary litigation.

### **CONCLUSION**

The State commission's review of the QPAP is different from its review of the checklist items mandated by section 251 of the Act. The Commission's role in reviewing the QPAP is to evaluate the sufficiency of the offering as evidence that Qwest will continue to meet its 271 obligations in the state. Viewed in its entirety, the QPAP meets this test because it ensures that Qwest will continue to meet high wholesale performance standards. The QPAP is sufficient to support a recommendation that Qwest's section 271 filing is in the public interest.