BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF SOUTH DAKOTA

IN THE MATTER OF THE ANALYSIS OF QWEST CORPORATION'S COMPLIANCE WITH SECTION 271(c) OF THE TELECOMMUNICATIONS ACT OF 1996	))))	**ORDER REGARDING THE PUBLIC INTEREST** **TC01-165**

The procedural history for this docket is set forth in the Commission's order regarding checklist items 3, 7, 8, 9, 10, and 12. At its November 20, 2002, meeting, the Commission found that in order for the Commission to find that Qwest's section 271 application is in the public interest, Qwest shall make the revisions as required below. Qwest shall make a compliance filing with these revisions, including a redlined version of the changes.

PUBLIC INTEREST ANALYSIS

Section 271(d)(3)(C) provides, in part, that the FCC shall not approve a BOC's section 271 application unless it finds that "the requested authorization is consistent with the public interest, convenience, and necessity." The FCC analyzes the public interest requirement as follows:

> [W]e view the public interest requirement as an opportunity to review the circumstances presented by the application to ensure that no other relevant factors exist that would frustrate the congressional intent that markets be open, as required by the competitive checklist, and that entry will therefore serve the public interest as Congress expected. Among other things, we may review the local and long distance markets to ensure that there are not unusual circumstances that would make entry contrary to the public interest under the particular circumstances of [an] application. While no one factor is dispositive in this analysis, our overriding goal is to ensure that nothing undermines our conclusions, based on our analysis of checklist compliance, that markets are open to competition.

Bell Atlantic New York Order at ¶ 423.

The FCC has found that compliance with the checklist items "is a strong indicator that long distance entry is consistent with the public interest." *Id.* at ¶ 422. However, the FCC recognized that "the public interest analysis is an independent element of the statutory checklist and, under normal canons of statutory construction, requires an independent determination." *Id.* at ¶ 423. The FCC has further stated that, as part of its public interest analysis, it considers "whether a BOC will continue to satisfy the requirements of section 271 after entering the long distance market." *Id.* at ¶ 429. The FCC reasoned that this factor is supported by the Department of Justice's standard of review in which it looks at whether the local market is fully and irreversibly open. *Id.*

Qwest asserted that South Dakota specific data demonstrated that the local market is open to competition. Qwest Exhibit 1 at 34. Qwest claimed that many CLECs have successfully entered the South Dakota market. *Id.* at 38. Qwest pointed to interconnection agreements it had entered into with CLECs, and noted that a number of CLECs had interconnected with Qwest and/or purchased resold services. *Id.* at 34. Qwest also pointed to its SGAT on file with the Commission. *Id.* at 35.

With respect to further compliance, Qwest stated that its QPAP was designed as an anti-backsliding mechanism and to provide incentive for Qwest to ensure service quality. *Id.* at 36. Further, Qwest stated that the FCC has enforcement remedies, including imposition of penalties, suspension or revocation of 271 approval, and an expedited complaint process, which all provide additional anti-backsliding protections. *Id.* at 37.

Qwest also maintained that other public interest considerations supported Qwest's entry into the interLATA market. Qwest asserted that "opening the long distance market in South Dakota will provide significant advantages to South Dakota's consumers." *Id.* at 40. Qwest asserted that the market experience in New York showed that consumers in that state "will save hundreds of millions of dollars annually on long distance and local telephone service as a result of Verizon's entry into the interLATA market in New York." *Id.* at 40-41. Based on the New York experience, Qwest claimed that it was "reasonable to predict that Qwest's reentry into the interLATA market will bring increased competitive intensity to the local and long distance markets in South Dakota, resulting in savings for South Dakota consumers." *Id.* at 41-42. Qwest cited to a study performed by Dr. Jerry Hausman from MIT in which he suggested that "South Dakota consumers can save as much as $16.6 million a year when Qwest enters the interLATA market." *Id.* at 42.

Qwest further contended that an additional consumer benefit will be one-stop shopping for all residential and business customers. *Id.* at 43. Qwest maintained that its entry into the interLATA market will also encourage competition in the intraLATA and local exchange markets. *Id.* at 44.

Disputed Issues[1]

1. Unfiled Agreements and CLEC Agreements Not to Participate in Section 271 Proceedings.

AT&T's Position[2]

AT&T asserted that Qwest entered into interconnection agreements which Qwest had failed to file with the Commission and that the existence of unfiled agreements raised public interest implications. AT&T's Brief Regarding Public Interest at 5. AT&T contended that the unfiled agreements demonstrate that interconnection is not being provided in a nondiscriminatory manner. *Id.* at 6. Specifically, AT&T pointed to agreements entered into between Qwest and Eschelon, Qwest and Covad, and Qwest and Z-Tel.

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[1] Disputed issues regarding the QPAP are discussed separately in these findings regarding public interest, *infra*.

[2] In its brief, AT&T also brought up issues related to its UNE-P testing complaint filed against Qwest with the Minnesota Public Utilities Commission, the TouchAmerica complaints filed against Qwest with the FCC, and, what AT&T terms, Qwest's anti-competitive behavior. See AT&T's Brief Regarding Public Interest at 16-22. However, these were issues raised in AT&T's verified comments that were not introduced into the record at the hearing. AT&T's brief stated that it "hereby incorporates by reference the previously filed Comments of AT&T Corp. Regarding Public Interest, as if the same were stated verbatim herein. See Exhibit A, attached here." *Id.* at 1. As stated in the Commission's decision regarding checklist items 2, 4, 5 and 6, the Commission declines to allow prefiled comments to come into the record by attachment to a brief.

FiberCom's Position

Black Hills FiberCom stated that the agreements provided performance standards that were offered to a few favored CLECs, but were not made generally available to all CLECs. Intervenor Black Hills FiberCom, L.L.C.'s Response to Qwest Corporation's Post-Hearing Brief at 6. FiberCom stated that "McLeod had performance standards with Qwest that it could rely upon in provisioning customer services. FiberCom on the other hand has none and remains entirely at Qwest's mercy in this regard." *Id.*

Staff's Position

Staff recommended that the Commission consider a separate docket to consider the agreements. Staff's Brief at 41.

Qwest's Position

Qwest asserted that the proper standard under which to evaluate whether the agreements are relevant to the public interest question is whether the evidence "would tend to undermine our confidence that the BOC's local market is, or will remain, open to competition once the BOC has received interLATA authority." Qwest Corporation's Post-Hearing Reply Brief on the Public Issue at 9 (*citing* Memorandum Opinion and Order, *Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as amended, To Provide In-Region, InterLATA Services in Michigan*, 12 FCC Rcd 20543, ¶ 397 (1977). Qwest noted that an FCC proceeding was currently under way concerning these agreements and there was "little point to duplicating these efforts in this proceeding." Qwest Corporations' Post-Hearing Reply Brief on the Public Issue at 12. Qwest further claimed that it had "committed to applying a very broad standard with respect to future agreements with CLECs, in order to remove any doubt as to whether Qwest will be complying with any reasonable standard that a state or the FCC might possibly apply." *Id.* at 13.

Commission's Finding

The Commission agrees with Staff that the issue regarding whether agreements should have been filed are best handled in a separate proceeding. The Commission makes no determination within this 271 proceeding as to whether certain agreements were required to be filed pursuant to section 252(e). The Commission finds it is not compelled to address this issue now because, assuming, arguendo, that Qwest failed to file agreements, it is the Commission's position that these unfiled agreements would not cause the Commission to find that it was not in the public interest to grant section 271 approval to Qwest.

The Commission views this issue in light of the FCC's analysis of the public interest factor. The FCC has determined that it will look to whether there are any "unusual circumstances that would make entry contrary to the public interest under the particular circumstances of [an] application. While no one factor is dispositive in this analysis, our overriding goal is to ensure that nothing undermines our conclusions, based on our analysis of checklist compliance, that markets are open to competition." *Bell Atlantic New York Order* at ¶ 423. Further, the FCC considers "whether a BOC will continue to satisfy the requirements of section 271 after entering the long distance market." *Id.* at ¶ 429. The Commission finds that Qwest's past conduct regarding the agreements has not resulted in closed markets in South Dakota. The Commission further finds that the question of whether Qwest will continue to satisfy the section 271 requirements after entry is best handled by the development of a strong performance assurance plan that contains appropriate incentives as well as disincentives.

2. *"Price Squeeze" Issues*

Midcontinent and Staff raised pricing issues as public interest concerns.[3] Specifically, the concern is that Qwest's UNE-P prices and intraLATA access charges are too high and, thus, would prevent would-be competitors from entering the market and attaining profitability.

a. *UNE "Price Squeeze"*

Midcontinent's Position

Midcontinent suggests that high UNE prices would not permit a CLEC to enter the local exchange market in a profitable way. Midcontinent stated:

> In the QSI consulting report, it was noted that AT&T provided evidence to support the conclusion that Qwest 1FR rates were lower than UNE prices. Midcontinent's experience confirms AT&T's conclusions. As a part of early facilities based testing, we provided residential local exchange services over UNE local loops. The combination of a high UNE local loop price and the non-recurring set up charge proved this network option too costly for residential services. Midcontinent has chosen to provide local exchange services through its own hybrid fiber coax network, where available, or via Qwest's resold services. At current prices a UNE local loop is simply not competitive for residential services.

Midcontinent Exhibit 38 at 19-20. Midcontinent submitted an exhibit designed to show that UNE and UNE-P pricing was too high for a CLEC to use to provide residential service. Midcontinent Exhibit 39; Hearing Transcript for April 30, 2002, at 21-25. In its post-hearing brief, Midcontinent contended that "it is clear that UNE-P is overpriced and it is in the public interest that Qwest's price to CLECs be adjusted to a reasonable and realistic level." Midcontinent's Post Hearing Brief at 8.

Staff's Position

Staff stated that the Multi-state Facilitator found that Qwest's retail rates were lower than UNE prices but "that the difference could be made up by CLECs by offering vertical features and in other ways, and that CLECs could turn to resale as an option if UNE prices are set at such a level that retail service cannot be offered by CLECs profitably." Staff Exhibit 3 at 30. Staff recommended that the Commission completely discount these comments because "Congress and the FCC intend for CLECs to have the ability to access the incumbent carrier's unbundled network and to provide competitive alternatives to retail consumers through the use of unbundled network elements." *Id.* Staff then recommended the following:

> I am aware that the Commission is planning to take up the issue of UNE prices in an upcoming Docket. Because UNE prices that are in excess of Qwest's retail prices constitutes [sic] a significant barrier to entry, I recommend that the Commission withhold a recommendation on this point pending the conclusion of that proceeding, and a finding that there is no imbalance between retail service prices and wholesale UNE prices that would prohibit competitive entry into the local market.

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[3] AT&T's prefiled comments were not entered into the record.

Id. at 31.[4]

Qwest's Position

Qwest contended that by paying $22.16 for a UNE platform, a CLEC has the potential to earn $38.34 of revenue, on average, from each customer. Qwest Exhibit 5 at 7. Qwest asserted that Midcontinent's arguments were incomplete and misleading since Midcontinent's witness conceded that he failed to include subscriber line charge revenue and vertical feature revenue. Qwest Corporation's Opening Post-Hearing Brief on the Public Interest at 22-23 *(citing* Hearing Transcript for April 30, 2002, at 37, 39). Qwest maintained that it was also not clear whether all long distance toll revenue was included. *Id.* at 24 *(citing* Hearing Transcript for April 30, 2002, at 33). Qwest stated that the FCC made it clear that such additional revenues and savings must be included in the comparison, and quoted from the FCC's *Verizon Vermont Order*:

> AT&T and WorldCom also fail to present other evidence that would be relevant in a residential-only price squeeze analysis, such as the incremental toll revenues that would be generated by winning the local, intrastate, and interstate toll business of customers that currently use other carriers for these services.

Qwest Corporation's Opening Post-Hearing Brief on the Public Interest at 20 (citing *Verizon Vermont Order* at ¶ 71).

Qwest further asserted that any alleged UNE-P "price squeeze" is not preventing significant residential market competition, nor has it been shown to have an adverse affect on the openness of the local markets to competition, as required by the FCC. Qwest Corporation's Post-Hearing Brief on the Public Interest at 6. Qwest also noted that Congress provided three ways to enter the local market under the rationale that competitors would enter the market through different entry mechanisms based on different circumstances. Qwest Corporation's Opening Post-Hearing Brief on the Public Interest at 17-18. Qwest then stated that because one mode of entry may be less profitable than another in a given situation is irrelevant for section 271 purposes. *Id.* at 18. Qwest contended that "resale under section 251(c)(4), with its separate statutory pricing scheme and its Commission-guaranteed 15% potential margin, is the answer to any CLEC that does not believe that residential rates in South Dakota are high enough to permit it to earn a profit using a UNE platform. . . ." *Id.* at 19.

Further, in its reply brief, Qwest pledged to reduce certain UNE rates in South Dakota. Qwest stated:

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[4] The Commission notes that in the conclusion of its brief, Staff requested "that the Commission order Qwest to file the number of retail access lines in the state of South Dakota on a monthly basis." Staff's Brief at 41. Staff stated that Qwest's witness had stated that as of August 31, 2001, Qwest had 231,707 retail lines in South Dakota but that in the data submitted by Qwest to Staff for the same date, Qwest had reported 273,180 of South Dakota Total Company Network Access Lines. *Id.* Staff also stated that "[b]y April 2002 that Total Access Lines had decreased by approximately 11,000. Qwest appears to be fast approaching the 200,000 retail access lines which is what triggers the Commission's jurisdiction of local recurring and nonrecurring rates pursuant to SDCL 49-31-86." *Id.* The Commission finds that this does not appear to be a section 271 issue. Staff can certainly make this same request outside of this proceeding.

In two states for which 271 applications have now been filed with the FCC, Idaho and North Dakota, Qwest faced circumstances similar to those that pertain here with regard to the existing UNE rates. As in South Dakota, in those states the commission had not addressed UNE rates outside arbitration cases completed several years prior to the FCC filing. To remove any doubt that the rates contained in the SGAT price lists for those states were TELRIC-complaint [sic], Qwest voluntarily reduced certain of its key UNE rates to a level consistent with the rates established by the Colorado commission, which has recently concluded a comprehensive cost docket. The UNE elements affected by these price reductions were those that make up the UNE Platform, including local loop rates. In the case of the loop rate, for example, the Colorado price was adjusted by state-specific cost differences established by the FCC's Synthesis Model.

Qwest is prepared to make similar voluntary rate reductions for South Dakota and will file a revised version of its South Dakota SGAT, Exhibit A, setting out these rate changes. This filing will take place shortly before Qwest files its FCC application for South Dakota and will contain any other SGAT changes that are required to bring the South Dakota SGAT into compliance with the Commission's final decision in this case. Qwest will seek the Commission's acknowledgement that these unilaterally reduced rates are effective on the date indicated in that filing. These reduced rates will be available to CLECs prior to the filing of Qwest's South Dakota application at the FCC. Other than the unilaterally reduced rates, Qwest's revised Exhibit A will not change the other rates currently available in South Dakota. No rates will be increased. Qwest strongly believes that the UNE rates submitted on the revised Exhibit A will be deemed by the FCC to fall within the range of reasonable results produced by TELRIC-based price setting.

Qwest Corporation's Overview Reply Brief at 20-21.

Commission's Finding

The Commission finds that both Midcontinent and Staff based UNE-P price squeeze-related public interest recommendations on faulty and incomplete UNE-P cost comparisons to Qwest's residential rate. The Commission finds that the functionalities of the local loop include much more than basic residential service. This is not a novel concept. For years this Commission has been allocating costs of the local loop among various uses which have attendant revenue streams. The Commission finds that because UNE-P includes the entirety of the loop functionalities, not just basic residential service, the average customer will provide a CLEC with reasonably expected revenue streams in addition to basic residential service revenues. The Commission also finds that because of various circumstances, there may be little connection between Qwest's residential rate and the UNE-P cost. The Commission finds that Qwest's South Dakota residential rate is not cost-based, but is capped by statute. The Commission finds that residential service pricing in a competitive market may bear little connection to TELRIC-determined loop costs or any other loop costing methodology. The Commission also finds that because CLECs can design marketing programs to appeal to customers more likely to use an above-average amount of vertical and toll services, a CLEC has an opportunity to gain margins larger than the average. In addition, the Commission notes that Qwest will be filing reductions to its UNE rates prior to Qwest filing its FCC application for South Dakota. The Commission further finds that CLECs not wishing to purchase a UNE-P because of Qwest's pricing of basic residential service can purchase, at a 15% discount, Qwest's basic residential service for resale.

b. Switched Access Pricing

The switched access price squeeze issue posed is that Qwest's switched access rates may be higher than "economic cost" and this excess margin could be used to offset the actual switched access cost of Qwest affiliates. It is unchallenged that Qwest's 272 interLATA affiliate would pay the same access rates as Qwest charges to competitors. Even so, Qwest and its affiliate ultimately share the same bottom line. If switched access rates contain "subsidies" and those subsidies are allocated in a manner that offsets the combined Qwest costs, competition could be harmed.

Midcontinent's Position

Midcontinent briefly commented on its concern about intrastate switched access charges. Midcontinent Exhibit 38 at 20. Midcontinent stated that "[c]are must be taken to prevent any additional profit margin from Qwest carrier access revenues to off-set [sic] Qwest's cost of providing intrastate access to Qwest customers, thereby giving Qwest an unfair advantage over other competitors." *Id.*

Qwest's Position

Qwest claimed that Qwest's intrastate access rates have no connection to section 271 authority as Qwest is primarily a one-LATA state, and Qwest can now provide intrastate long distance throughout the state without section 271 authority. Qwest Exhibit 2 at 40. Qwest noted that the only new authority given with section 271 approval is interstate services, and the FCC has jurisdiction over interstate access charges. *Id.* Qwest contended that it would be illogical to require intrastate access reform as a pre-condition to section 271 approval as there is no relationship between the two. *Id.* Qwest further said that no state that has gained 271 approval has been required by the FCC to undergo intrastate access reform, nor has the FCC even suggested such reform might be necessary. *Id.*

In addition, Qwest pointed to imputation as a non-discrimination safeguard, as well as the section 272 safeguards applicable to improper cost allocation and cross-subsidization. *Id.* at 41-42. Qwest concluded that the FCC has found no substantiated complaints of a long distance market price squeeze. *Id.* at 46.

Commission's Finding

The Commission finds that South Dakota is primarily a one-LATA state, and, therefore, Qwest already competes for statewide service. While a price squeeze concern may exist, it would not be created by granting section 271 authority, and it is not appropriately connected to the granting of section 271 authority. South Dakota has long been operating under tightly defined switched access costing rules. The Commission finds that any proceeding to review and potentially revise those rules is a matter separate from any recommendation regarding section 271 authority. The Commission further finds that the record contains no evidence that improper switched access-related subsidies currently exist, or that Qwest has been using switched access subsidies to unfairly compete.

3. Misuse of Competitive Information

Midcontinent's Position

Midcontinent asserted that a Midcontinent customer received a mailing addressed to "Midcontinent Resold Customer." Midcontinent Exhibit 38 at 13. Midcontinent expressed concerned that its customers were specifically targeted and that its customers' records were reviewed by Qwest sales personnel. *Id.* Midcontinent further stated that some Midcontinent employees who were also Midcontinent customers had received a mailing that contained Midcontinent's reseller code on the mailing label. Hearing Transcript of April 29, 2002, at 41-44; Midcontinent Exhibit 15.

Qwest's Position

Qwest produced a letter entitled "Dear Telecommunications Manager" which concerned a Qwest DSL offer. Qwest Exhibit 58. Qwest asserted that it would not be unusual for Midcontinent employees to receive a mailing about a Qwest DSL offer. Qwest Corporation's Post-Hearing Reply Brief on General Terms and Conditions, Section 272, and Track A at 2.

Commission's Finding

Midcontinent did not produce the mailing that it stated was addressed to a Midcontinent customer with the words "Midcontinent Resold Customer." Thus, the Commission is unable to determine whether there was any misuse of customer information by Qwest. With respect to the mailings addressed to "Dear Telecommunications Manager," the Commission similarly finds there is insufficient evidence to find a misuse of information. Midcontinent did not produce any information that would show that a non-Midcontinent employee received the mailing with Midcontinent's reseller code.

QWEST'S PERFORMANCE ASSURANCE PLAN

FCC STANDARDS

Section 271(d)(3)(C) requires that a BOC's requested authorization for section 271 approval must be consistent with the public interest, convenience, and necessity. One of the factors that the FCC looks at to determine whether a section 271 authorization is in the public interest is "whether a BOC would continue to satisfy the requirements of section 271 after entering the long distance market." *Bell Atlantic New York Order* at ¶ 429. The FCC looks at performance monitoring and enhancement mechanisms to see if key aspects "fall within a zone of reasonableness, and are likely to provide incentives that are sufficient to foster post-entry checklist compliance." *Id.* at ¶ 433. The FCC examines a performance assurance plan to see if it has the following characteristics:

> Potential liability that provides a meaningful and significant incentive to comply with the designated performance standards; clearly-articulated, pre-determined measures and standards, which encompass a comprehensive range of carrier-to-carrier performance; a reasonable structure that is designed to detect and sanction poor performance when it occurs; a self-executing mechanism that does not leave the door open unreasonably to litigation and appeal; and reasonable assurances that the reported data is accurate.

Id.

PROCEDURAL HISTORY OF THE QPAP

Qwest filed its first version of the QPAP with its petition on October 27, 2001. After the other parties had filed testimony, Qwest filed its rebuttal testimony on the QPAP. In its rebuttal testimony, in response to concerns raised by the other parties, Qwest agreed to make a number of changes, including adopting the Multi-state QPAP. *See generally* Qwest Exhibit 78. Then, at the hearing, Qwest stated that it would be willing to make a number of additional modifications and further stated that it would offer the Utah stipulation modifications to the Multi-state QPAP. Hearing Transcript for April 25, 2002, at 125-131. On May 22, 2002, with its post-hearing brief, Qwest submitted a revised QPAP which was, apparently, based on the Utah stipulation. Qwest Exhibit 82. On July 17, 2002, along with its post-hearing reply brief, Qwest submitted the North Dakota QPAP, marked as Qwest Exhibit 93. Qwest stated that it would not object to the Commission endorsing the North Dakota QPAP. Qwest Corporation's Reply Brief in Support of the QPAP at 2.

While in many instances Qwest was attempting to address some of the parties' concerns, Qwest's revisions and submissions of new QPAPs makes it quite difficult to ascertain all of the parties' positions or even if a particular concern of a party has been resolved. For example, as stated above, Qwest submitted a QPAP that reflected an agreement with the Utah staff after the hearing. However, this meant that parts of the intervenors' prefiled written testimony, as well as their oral testimony at the hearing, addressed the QPAP as originally proposed by Qwest. The intervenors' post-hearing briefs then attempted to address the revised QPAP. But then, after the intervenors had submitted their briefs, Qwest submitted a post-hearing reply brief which proposed additional revisions. In addition, Qwest submitted the North Dakota QPAP and asserted that it would not object to this Commission adopting that QPAP. The Commission points out that the QPAP the Commission is considering is the QPAP filed with Qwest's initial brief, marked as Exhibit 82.

QWEST'S COMMENTS

Qwest asserted that its QPAP satisfies the five characteristics as set by the FCC. With respect to the first characteristic, Qwest stated that its QPAP exposes Qwest to substantial financial liability which is a meaningful and significant incentive to comply with the designated performance standards. Qwest Exhibit 77 at 9.

Next, Qwest claimed that its QPAP contains clearly articulated and pre-determined measures and standards that encompass a range of carrier-to-carrier performance. *Id.* at 11-15. Qwest asserted that the Performance Indicator Definitions ("PIDs") form the foundation of the QPAP and measure Qwest's wholesale performance in accordance with two types of standards. *Id.* at 11. The "parity of service" standard compares the quality of Qwest's retail service to the service it provides to CLECs where there is a retail analogue to the wholesale product or service. *Id.* The benchmark standard is used when comparable retail products, services, or functions do not exist. *Id.*

Qwest also asserted that its QPAP provides a reasonable structure that is designed to detect and sanction poor performance. *Id.* at 15. Qwest stated that the QPAP has two levels with respect to sanctions: "Tier 1 operates at the individual CLEC level and provides for self-executing compensatory payments to CLECs and Tier 2 operates at the aggregate CLEC level and provides additional financial incentive payments to the state." *Id.* Qwest stated that "[f]or performance measurements that have parity standards, the QPAP uses statistical tools to determine whether the service levels Qwest provides to CLECs is statistically different from the service levels Qwest provides to its retail operations." *Id.* at 20. For PIDs with benchmark standards, Qwest stated it meets the standard when the monthly performance results equal or exceed the benchmark. *Id.* at 21.

Regarding the fourth characteristic, Qwest stated that its Tier 1 and Tier 2 payments are self-executing: CLECs will receive bill credits without proving economic harm and Tier 2 payments will be made automatically to either a state fund administered by the Commission or to the South Dakota Treasury. *Id.* at 26.

Qwest stated that its QPAP also meets the fifth criteria as outlined by the FCC because its QPAP provides for extensive data validation and auditing. *Id.* at 29. Qwest asserted that an independent party would perform a risk-based audit of the performance measurements. *Id.* Qwest stated that its QPAP also provides for audits of the financial system that produces the payments. *Id.* at 30.

INTERVENORS' GENERAL CONCERNS REGARDING THE QPAP

A common theme running through the testimony and briefs of the intervening parties, most notably Midcontinent's and FiberCom's, was that although Qwest now appeared to be listening to, and attempting to address CLEC problems, this increased attention would prove to be a temporary phenomenon related to Qwest's attempt to get into the in-region, interLATA market. In an attempt to convey this concern, the parties listed a number of specific problems that they have encountered in the past when dealing with Qwest and then noted the difficulties they had in resolving those concerns prior to Qwest initiating section 271 proceedings in South Dakota. Some of the specific problems encountered by the CLECs are as follows:

> Black Hills FiberCom stated that although the customized branding service was listed in Qwest's catalog, it was not available in South Dakota until after a switch was upgraded. Hearing Transcript for April 30, 2002, at 78.
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> Midcontinent stated that it had numerous problems with directory listings for resold customers. Midcontinent Exhibit 38 at 4. Midcontinent asserted that it had experienced 80 separate problems in January and February, 2002. *Id.* Some of the types of problems were the listing of residential customers in the business sections, misspellings, the listing of numbers that were not supposed to be listed, and the listing of addresses that were not supposed to be included. *Id.* at 5.
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> Black Hills FiberCom stated that when it first tried to use local number portability, it could only process five or six LNP orders a day per employee but it was acquiring 25 to 60 customers a day. Hearing Transcript for April 30, 2002, at 67. In order to alleviate this problem, FiberCom had to offer one month of free service to attempt to convince customers to change their telephone numbers. *Id.* at 68. FiberCom said this cost its company about $170,000.00. *Id.* If a customer chose to keep his or her telephone number, the customer was charged a monthly fee of $2.00. *Id.* Black Hills FiberCom stated that this showed that even though a service may be listed in Qwest's catalog, it does not mean that Qwest is able to adequately serve a competitor's needs. *Id.* However, FiberCom also stated that Qwest had improved its processes. *Id.* at 67.
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> Midcontinent raised issues regarding billing problems with resold services, ordering telephone number prefixes for SmartPak service, and notice issues regarding the offering of new retail products. Midcontinent Exhibit 38 at 10-12, 13-15. One of the billing problems concerned Qwest adjusting Midcontinent's resale rate to the amount stated in the Interconnection Agreement, but that rate had been adjusted in the first

amendment to the Interconnection Agreement. *Id.* at 15. Midcontinent stated that Qwest's response to this problem was slow and was reportedly due to Qwest personnel changes and lack of available personnel. *Id.* Midcontinent stated the amount in dispute had grown to over $200,000.00. *Id.* Midcontinent noted that its personnel spent numerous overtime hours reconciling the bills and that the "additional accounting burden has continued for six months to date, unfairly costing us time and money." *Id.* at 16.

Black Hills FiberCom asserted that "what we chose to do because we were on a fast track and the telecommunications business was on a hot track we couldn't afford to wait [nine to twelve months to negotiate] so we opted into the Interconnection Agreement, which Qwest describes as an arms-length negotiated agreement that allowed us to change our business name, our business address, and even though the effective date of the agreement was June 15, 1998 and we signed it October 31, 1998, we were unable to change even the effective date of that agreement. It is an agreement that we have worked to try and understand and implement. Note that we signed that agreement in October of '98. Already by the legislative session in 1999, Black Hills FiberCom was so frustrated with its activities in trying to work the collocation agreements and the Interconnection Agreements that we were before the legislature attempting to get protections for our business because it was young and trying to develop so that we would get an opportunity to get to the marketplace before Qwest countered." Hearing Transcript for April 30, 2002, at 57-58.

Midcontinent stated that Qwest had ported business customers ahead of the scheduled time, before Midcontinent was ready to accept the traffic. Midcontinent Exhibit 38 at 7. Midcontinent asserted that this early porting left its new customers without service. *Id.*

As acknowledged by some of the parties, their point in reciting these concerns was not always that the problems still existed, but to contrast Qwest's reaction to problems prior to Qwest seeking section 271 approval with Qwest's reaction after it had filed its section 271 filing with the Commission. The difference is perhaps best characterized by this testimony provided by Midcontinent at the hearing:

> In our early relationship with Qwest, then U S WEST, we spent a considerable amount of time arguing the specific details of our agreements and whether U S WEST was obligated and ultimately able to provide a certain element, certain feature, or a certain piece of information.
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> On several occasions, we requested information that U S WEST personnel deemed beyond the scope of their requirements. In fact, on several occasions, I was told quite directly that U S WEST was not required to teach me the phone business.
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> U S WEST personnel were very guarded with their information so we decided to work the relationship more from a personal angle, which worked, of course, until a staff change took place, which was often. Since we first began offering services, we've had four sales representatives and two service representatives, and we understand we're about to get a new service representative. We remain concerned about personnel churn and if Qwest Corporation truly values the importance of the relationship between service and sales representatives and a customer like us, a CLEC.

> We clearly understand why the early relationship may have been difficult. This entire process was new for us, and it was new for U S WEST. We encountered a number of delays, and frankly some of which were imposed by us. We were and are still reluctant to risk the quality of a customer's service unless we are certain we can provide the service as promised. We raised the issue of Qwest's ability and willingness to port numbers, the issue of possible misuse of competitive information, and the issue of internal controls relating to both service and billing problems as a result of our direct experience. They're described on page 3 of the handout.
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> I would, however, be remiss if I did not add that Qwest has responded to most of these problems that we've experienced in the past, the majority of which have been resolved or hopefully are well on their way to resolution. The larger issue, however, may not be Qwest's solution of the problem but a greater question of whether there are adequate systems and structures in place to prevent problems of this type from recurring.
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> Most recently, we believe our relationship with Qwest has progressed. We have found Qwest personnel to [be] more helpful. They are more likely to tell us what they can do rather than what they won't do. But there are continuing issues, which is why we offered testimony on the items listed on the next page in the handout, including testimony on directory listings, testimony on inside wiring ownership questions, and carrier access billing issues.
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> These issues we are jointly work[ing] on today. *While I'm not necessarily satisfied with the progress, I am frankly, satisfied with the attention. We have had more contact with our sales representatives perhaps in the past six months than we have in the previous couple of years. We've scheduled regularly monthly meetings with our service representative to work out specific problems and issues.* We continue to maintain a strong relationship with local Qwest personnel, who we believe have gone to extraordinary lengths to assist us when our paths seemed blocked by personnel or system elsewhere. I can cite several examples and would be willing to do so upon request of that level of cooperation.
>
> I believe the Qwest South Dakota team clearly understands the importance of the vendor/customer relationship. Our concerns however, have again more to do with the systems and structure Qwest is or will provide to support their people and frankly support us in our development as intended by the Act.

Hearing Transcript for April 30, 2002, at 15-18 (emphasis added).

Midcontinent further expressed its concern "that once the checklist has been deemed complete, the level of cooperation may diminish." *Id.* at 18. In its brief, Midcontinent asserted that "[t]wo significant points should be kept in mind here, the level of Qwest's attention to and resolution of issues increased markedly as the time of the hearing approached, and Midcontinent's motive for mentioning many of these items was to show the evolution of Qwest cooperation and performance from first contact with Midcontinent to more recent interaction between the two." Midcontinent's Post Hearing Brief at 5. Midcontinent noted that "the issue here is not whether [problems] occurred and were eventually corrected, but whether Qwest's zeal for eliminating problems in the future will continue past its receipt of 271 interLATA long distance authority." *Id.* at 8-9.

The same concern was expressed by Black Hills FiberCom. FiberCom stated at the hearing that Qwest is unlikely "to do anything that you're not willing to force them to do. And we hope that you will take the initiative to look this over very carefully. I want to remind you that *as a result of participating in this proceeding* we do, in fact, have better service from Qwest. But what about the future? Qwest's focus on payment caps and limited escalation provisions certainly give us concern that they may not be as serious about performing in the future. They know better than any of us how bad they have been in the past and what business decision they might be willing to make in the future." Hearing Transcript for April 30, 2002, at 77 (emphasis added). FiberCom also stated that "[w]e have longed for performance measures with some teeth in them for a long time. *And we're a company that has done business with Qwest and has found that at times it can be difficult to do business with Qwest.* So we think this is a very important tool to move forward with." *Id.* at 52 (emphasis added).

COMMISSION'S VIEW OF THE QPAP

As the Commission noted in its procedural history recited in its first order regarding Qwest's 271 filing, the Commission chose not to participate in the Multi-state Proceeding in order to ensure that smaller CLECs that operate in South Dakota would have the opportunity to bring any concerns to the Commission without having to participate in lengthy, out-of-state proceedings. The Commission notes that this goal was accomplished when two of South Dakota's most active CLECs participated in the hearing and shared their views of their past experiences with working with Qwest. The Commission also was pleased to have the participation of AT&T, a company that was able to bring to the Commission the views of a large company operating nation-wide. The Commission finds all of these views to be instructive when deciding disputed issues relating to the QPAP, as well as all of the other section 271 issues.

In making its findings regarding the South Dakota QPAP, the Commission is cognizant of all of these CLECs' experiences in working with Qwest. The ultimate goal of a QPAP is to help ensure that CLECs in South Dakota will be able to continue to operate in competition with Qwest. Qwest's repeated references to what the FCC has found reasonable in the past does not bind this Commission to any particular performance plan. The FCC has not set up an exact blueprint for a BOC's performance assurance plan. To the contrary, the FCC has specifically acknowledged the importance of a state commission's ability to formulate a QPAP based on the state's local marketplace. For example, in reviewing Verizon's section 271 application for Pennsylvania, the FCC noted that the Pennsylvania performance assurance plan differed significantly from the New York and Texas Plans. Memorandum Opinion and Order, *In the Matter of 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 Service in Pennsylvania*, 16 FCC Rcd 17419, ¶ 128 (2001) ("*Verizon Pennsylvania Order*"). The FCC stated that it recognized "that states may create plans that ultimately vary in their strengths and weaknesses as tools for post-section 271 authority monitoring and enforcement." *Id.* The FCC further understood that "the development of performance measures and appropriate remedies is an evolutionary process that requires changes to both measures and remedies over time." *Id.* The FCC anticipated that "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." *Id.* With these observations in mind, the Commission makes the following findings regarding the remaining disputed items in the QPAP.

Disputed Issues

1. Annual Cap

Qwest's Position

Qwest's original proposal regarding a cap on its potential liability placed 36% of its annual net return in South Dakota at risk, as calculated from 1999 ARMIS data. Qwest Exhibit 77 at 10. Qwest stated that this would place $15 million at risk. *Id.* Qwest subsequently changed its position. Qwest Corporation's Post-Hearing Brief in Support of the QPAP at 11. Qwest described its new cap as follows:

> Qwest has now agreed to a "procedural" cap pursuant to which, if it pays out as much as 24% of its net profits in any one year, it may seek relief from further payments by filing a petition with this Commission. However, the Commission may thereafter increase the cap to as much as 44% of Qwest's net profits, if it finds that the public interest so warrants. Under Qwest's revised plan, Qwest will have the burden of establishing in any such proceeding that it could not have remained under the existing cap through reasonable and prudent effort.

Id. Qwest also agreed to update the plan annually with the most recently available ARMIS data, instead of continuing its use of 1999 ARMIS data to calculate the cap. *Id.* at 11-12. As support for a cap, Qwest stated that the FCC has repeatedly found that placing 36% of the BOC's net local revenues at risk constitutes a meaningful incentive to maintain a high level of performance and further asserted that the FCC has rejected the claim that a 36% cap provides an inadequate incentive. *Id.* at 12.

With respect to the issue of whether Qwest should have submitted evidence of its projected marginal cost of compliance, Qwest stated that the Facilitator in the Multi-state Proceeding found that no party had submitted evidence as to Qwest's marginal cost of compliance and that it might be impossible for Qwest to make the calculation. Qwest Exhibit 78 at 12. Qwest noted that the Facilitator also stated that there were other costs Qwest might face for nonconforming service, such as enforcement proceedings and the revocation of section 271 approval. *Id.*

Qwest also disputed Commission Staff's claim that what Qwest pays is entirely under its control. *Id.* at 13. Qwest stated that given the "lack of real world experience with the PIDs, and the fact that new submeasurements or standards may well be introduced after the QPAP becomes effective, it is entirely possible that poorly designed PIDs will prevent Qwest from consistently meeting all of its obligations, *regardless of Qwest's desire to do so.*" *Id.* at 13 (emphasis in original).

Staff's Position

Commission Staff's position was that there should be no limitation on Qwest's potential liability to others under the QPAP. Staff Exhibit 3 at 12. Staff reasoned that a limitation on Qwest's liability "opens the door for Qwest to treat QPAP assessments, not as penalties that provide incentive for Qwest to comply with its agreements, but as business expenses to be absorbed during the period in which CLECs continue to have an interest in competing in South Dakota." *Id.* Staff stated that "[i]f Qwest's performance was at such a substandard level that CLECs elected to exit the market, Qwest's liability would be reduced to $0, since CLECs that have exited the market would no longer be receiving payments from Qwest." *Id.*

Commission Staff further asserted that Qwest had provided no economic justification for the original 36% cap. *Id.* at 17. Staff stated that in order to support a cap, Qwest should have done a cost/benefit analysis which would show whether a 36% cap would provide sufficient incentive for Qwest to comply with performance standards. *Id.* Staff also maintained that increasing the cap or eliminating it is not the same as subjecting Qwest to higher payments because Qwest maintains control over its total payments regardless of the cap level. *Id.* at 21.

AT&T's Position

AT&T recommended that this Commission adopt a procedural cap or remove the cap altogether. AT&T Exhibit 8 at 30-33. AT&T asserted that under the QPAP, a CLEC has limited alternative remedies, thus if the cap is reached the CLECs "are robbed of relevant remedies." *Id.* at 33. AT&T also maintained that the monthly cap should be eliminated. *Id.*

FiberCom's Position

FiberCom objected to the cap structure under the QPAP as originally proposed by Qwest. Black Hills FiberCom Exhibit 1 at 7-11.

Midcontinent's Position

Midcontinent asserted that it was concerned about repeated problems that continue without being corrected. Midcontinent Exhibit 38 at 16. Midcontinent stated that any penalty should be "of sufficient size to catch Qwest's attention and make it worth their while to correct the problem as quickly as possible." *Id.*

Commission's Finding

The Commission finds that Qwest shall remove the cap in its entirety. The Commission rejects Qwest's claim that what Qwest pays is not within its control. Qwest's argument that there is a "lack of real world experience with the PIDs" is at odds with its testimony concerning its commercial performance data. When requesting that this Commission find that Qwest had satisfied the 14 point checklist, Qwest did not allude to a lack of real world experience with the PIDs. Quite to the contrary. Qwest repeatedly assured the Commission that Qwest's "audited performance results demonstrate that it is providing service to competing carriers in substantially the same time and manner as Qwest provides to itself, and in a manner that allows an efficient CLEC a meaningful opportunity to compete. . . ." Qwest Exhibit 72 at 4. Qwest asserted that its "performance results demonstrate that Qwest is providing every element of the checklist at an acceptable level of quality." *Id.*

Qwest's argument that new "poorly designed PIDs" will prevent Qwest from consistently meeting all of its obligations is similarly weak. As discussed *infra* in the six-month review discussion, no new performance measurement will be added to the QPAP that has not been subject to observation as a diagnostic measurement for a period of six months, unless ordered otherwise by the Commission.

From either an optimistic or pessimistic viewpoint, the Commission concludes that no cap is the best approach. Optimistically, one can argue that it is highly unlikely that Qwest would reach a 24% cap, much less a 44% cap. If Qwest's performance deteriorates, the Commission fully

expects Qwest to respond to that deterioration and fix the problem.[5] Adopting a more pessimistic viewpoint, the lack of a cap may just prevent Qwest from making such drastic cuts in its personnel that Qwest would be putting at risk all of its revenues. The Commission will not repeat the comments made by the CLECs concerning their apprehensions about Qwest's willingness to continue to respond to any problems after receiving section 271 approval. Suffice it to say, the lack of a cap may alleviate, to some degree, those concerns.

2. Payment Triggers

Qwest's Position

Tier 1 payments are made to individual CLECs and are paid each month based on Qwest's performance to each CLEC. Qwest Exhibit 77 at 15. Tier 2 payments, based on aggregated CLEC performance results, are made to the state. *Id.* Qwest originally proposed that Tier 2 payments were required only if Qwest missed the performance standards for three consecutive months. Qwest Exhibit 78 at 15-16. In its post-hearing brief, Qwest stated that it agreed to modifications regarding the Tier 2 trigger. Qwest Corporation's Post-Hearing Brief in Support of the QPAP at 18. Qwest agreed to accept the Multi-state Facilitator's recommendations which provide that Qwest will make Tier 2 payments under the following conditions:

> For Tier 2 measures with Tier 1 counterparts, if Qwest misses the performance measures in any two out of three consecutive months in a 12-month period, with respect to the second consecutive month in which Qwest subsequently misses the performance measures. For Tier 2 measures without Tier 1 counterparts, if Qwest misses the performance measures in any two out of three consecutive months in a 12-month period, with respect to the very next month in which Qwest subsequently misses the performance measures.

Id.

The second modification proposed by Qwest was that the two-out-of-three-consecutive-month trigger for Tier 2 payments would be "removed if Qwest's overall conforming performance level falls below 85% for any five months out of a 12-month period. In that event, Tier 2 payments will be triggered the very next month of noncompliance with measures that do not have Tier 1 counterparts and upon two months of subsequent noncompliance for measures that do have Tier 1 counterparts." *Id.* Qwest's rationale for the payment trigger for Tier 2 payments is that it will be difficult for Qwest to react to nonconforming performance when performance results are not known until almost 30 days after the end of the month to which the data relates. Qwest Exhibit 78 at 15-16. Qwest asserted that a two-consecutive-month miss is a strong possibility before Qwest has the ability to fix the problem. *Id.* at 16.

Staff's Position

Commission Staff asserted that there should be a one month trigger for Tier 2 payments. Staff's Brief at 33. Staff stated that Tier 2 payments serve as an incentive to motivate Qwest to

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[5] Moreover, it was a Qwest witness who stated that the FCC would be in the middle of an investigation if Qwest "got even a quarter of the way to a 36 percent cap. . . ." Hearing Transcript for April 25, 2002, at 173-74.

provide compliant performance. *Id.* at 31. Staff asserted that Tier 2 payments have two purposes: one is to recognize the limits of record-keeping systems and the second is to avoid overcompensating CLECs, yet still provide Qwest with a sufficient incentive to comply. *Id.* at 32.

AT&T's Position

AT&T stated that Tier 2 payments should apply in any individual month in which Qwest provides deficient performance to all CLECs. AT&T Exhibit 8 at 17.

FiberCom's Position

FiberCom objected to Qwest's Tier 2 trigger for payments. Black Hills FiberCom Exhibit 1 at 15.

Commission's Finding

The Commission finds that, consistent with the FCC requirement that a performance assurance plan should be "designed to detect and sanction poor performance when it occurs," Tier 2 payments shall be made for any month in which Qwest fails to meet the applicable standard. The Commission agrees with Staff that Tier 2 payments serve as an incentive to motivate Qwest to provide compliant performance. Thus, there is no reason to weaken this incentive by not having it apply for each month's performance.

3. Limit on Escalation

Qwest's Position

Qwest originally proposed that Tier 1 payments to CLECs would escalate if Qwest misses performance measures in consecutive months, with a six-month cap on the escalation. Subsequently, Qwest revised the QPAP to allow the Commission to lift the cap on escalation, if it concludes that doing so is in the public interest and that Qwest could have avoided the cap through reasonable and prudent efforts. *See* Qwest Exhibit 82 (section 16.2). If escalation goes beyond 12 months, Qwest would pay the escalation amounts to the state rather than to CLECs to avoid the potential for overcompensating the CLECs. *Id.* In addition, any additional escalation would be subject to a 10% collar. *Id.* (section 16.4).

Qwest asserted that its revised sections are within the FCC's zone of reasonableness. Qwest Corporation's Post-Hearing Brief in Support of the QPAP at 21. Qwest provided an example of payments in which it stated that "unlimited escalation would lead to payments far beyond any reasonable approximation of the value of the service to a CLEC" and allowing unlimited escalation would mean that "the combined effect of Tier 1 payments at various levels of escalation and Tier 2 payments [would be] equivalent to the proceeds Qwest would receive from providing *multiple years* of service." Qwest Exhibit 78 at 17 (emphasis in original). Qwest also claimed that unlimited escalation could convert the QPAP into a CLEC subsidy scheme and give CLECs an incentive to cause noncompliance. Qwest Corporation's Post-Hearing Brief in Support of the QPAP at 24. Qwest then stated that if the six-month cap is eliminated it should not be eliminated with respect to billing measures. Qwest Corporation's Reply Brief in Support of the QPAP at 12. Qwest stated that caps on billing measures are needed because payments to CLECs could reach extraordinary amounts. *Id.*

Staff's Position

Staff asserted that escalation should not be limited by a cap. Staff Exhibit 3 at 23-24. Staff stated that the lack of a cap "would ensure that Qwest could not treat the costs of noncompliance as a business expense, but instead would consider payments for noncompliance a significant incentive to comply with its agreed to performance standards." *Id.* at 26. Commission Staff dismissed Qwest's concern about CLEC causing noncompliance, stating that any such behavior would be easily detected. Staff Brief at 34-35.

AT&T's Position

AT&T also opposed any limitation of escalation of payments. AT&T reasoned that:

> If after six months of escalating performance payments Qwest's performance is still deficient, it is likely that the level of performance payments have not been significant enough to provide Qwest with enough incentive to correct that performance. Allowing the performance payments to escalate continually with consecutive months of deficient performance should bring the payment amounts to a level that Qwest decides is significant enough to correct the deficient performance.

AT&T Exhibit 8 at 11.

Commission's Finding

The Commission finds that there shall be no cap on payment escalation, including billing measurements. The Commission agrees with AT&T and Staff that the lack of a cap will serve as an additional incentive to Qwest to correct any deficient performances. With respect to Qwest's argument that continuing escalation could overcompensate the CLECs and turn the QPAP into a CLEC subsidy scheme, the Commission finds that it agrees with Qwest that if escalation goes beyond 12 months, Qwest would pay the escalation amounts to the state rather than to CLECs to avoid the potential for overcompensating the CLECs.[6] However, the Commission rejects Qwest's 10% collar on any additional escalation.

4. Sticky Duration

Qwest's Position

Under the QPAP, once a QPAP payment is escalated, payments are subsequently allowed to de-escalate by allowing payments to step down one notch at a time for each conforming month of performance. Qwest Exhibit 82 (section 6.2.1). Qwest noted that the Multi-state Facilitator rejected the notion of "sticky duration" which requires QPAP payments to remain at escalated levels even after subsequent months of compliance. The Facilitator stated that it was inappropriate

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[6] On a related note, the Commission points out that section 11 is designed to allow Tier 2 payments be placed into a South Dakota Special Fund and a South Dakota Discretionary Fund. These are two separate interest bearing escrow accounts established by Qwest but administered by the Commission. The Commission notes that section 2.1.1 refers to a Tier 2 Fund "established by the state regulatory commission. . . ." The Commission requires Qwest to change the word "established" to "administered" in order to be consistent with section 11.

because it ignores entirely the successful performance of Qwest and "is draconian because its new baseline payments levels, when multiplied by the still applicable escalated levels, could produce payments by Qwest that are an order of magnitude higher than those contemplated by the QPAP. . . ." Qwest Exhibit 28 at 63.

Staff's Position

Commission Staff objected to allowing escalated penalty payments to de-escalate upon subsequent compliant performance. Staff Exhibit 3 at 28-29. Staff asserted that the QPAP should not be designed to reward Qwest for compliant behavior but to keep Qwest from acting in a discriminatory, anti-competitive manner. *Id.* at 29.

Commission's Finding

The Commission agrees with the Multi-state Facilitator that requiring the QPAP payment to remain at escalated levels even after subsequent months of compliance ignores Qwest's successful performance. Although non-compliant behavior should have sufficient deterrents, the Commission also believes that compliant behavior should have sufficient rewards. Thus, the Commission finds Qwest may de-escalate payments upon subsequent compliant performance.

5. Use of Tier 2 Payments

AT&T's Position

AT&T stated that section 7.5 of the QPAP should not limit the use of Tier 2 payments for any purpose that relates to the Qwest service territory. AT&T Exhibit 8 at 24.

Qwest's Position

Qwest revised the QPAP to address this concern. *See* Qwest Exhibit 82 (section 7.5).

Commission's Finding

Section 7.5 now provides that "[p]ayments to a state fund shall be used for any purpose determined by the Commission that is allowed to it by state law." The Commission finds this language resolves this issue. On a related note, in order to be consistent with this section, Qwest shall delete line four of section 11.3.2 which states that "[o]ther than the transfer of funds allowed in section 11.3.2.1, disbursements from the South Dakota Discretionary Fund shall be limited to South Dakota telecommunications initiatives."

6. 100% Cap for Interval Measures

AT&T's Position

AT&T requested that sections 8.2.1.2 and 9.2.2.2 be revised to eliminate the cap on payments that result from Qwest's poor performance. AT&T Exhibit 8 at 25. The sections provide that the percent difference is capped at 100% which AT&T states allows Qwest's payment liability to be capped once Qwest's performance has degraded to a certain point. *Id.* AT&T asserted that the only purpose of the cap is to protect Qwest from its own bad performance. *Id.* at 26.

Qwest's Position

Qwest stated that section 8.2.1.1 sets forth the way to calculate payments for misses of performance measures that involve average intervals for multiple orders by a CLEC. Qwest Exhibit 78 at 24. Qwest described the cap as "designed to permit some sensitivity for severity of misses, while avoiding paying for orders that do not involve misses, or potentially do not even exist." *Id.* Qwest provided examples under the formula and concluded that there was sufficient severity built into a payment structure that is capped at 100%. *Id.* at 26. Qwest also stated that no party had provided any evidence that the payments, with the 100% cap, would be insufficient to compensate a CLEC for any harm caused by missed performance measures.

Commission's Finding

The Commission finds that a percent difference calculation between two intervals is an effective way to quantify the severity of Qwest's performance and that the cap only serves to protect Qwest when it performs badly. The Commission notes that the Multi-state Facilitator found that although Qwest's solution to the problem posed by multiple orders involving average intervals to not be perfect, the solution proposed by the CLECs was also less than perfect, and, thus, the Facilitator supported the cap. However, the Commission agrees with the Iowa Utilities Board which found that the Facilitator "missed the basic premise of the CLEC argument, which was that a 100% cap on interval measurements removes a payment increase factor that would incorporate the severity of the misses." *Conditional Statement Regarding Qwest Performance Assurance Plan*, Docket Nos. INU-002, SPU-00-11, at 122 (issued May 7, 2002). The Commission directs Qwest to remove the 100% cap language.

7. Form of QPAP Payments

AT&T's Position

AT&T requested that all payments to CLECs be cash payments. AT&T Exhibit 8 at 29-30. If the Commission allows bill credits, AT&T requested that language be added to the QPAP which states that Qwest will provide credit information in a manner that would allow CLECs to identify the sources of the credits given. *Id.* at 30.

Qwest's Position

Qwest stated that under section 11.2 of the QPAP, payments to CLECs will be made by bill credits unless the monthly payment exceeds the amount the CLEC owes Qwest. Qwest Exhibit 78 at 27. In that event, Qwest will pay the excess in cash. *Id.* Qwest stated that "[o]n average, CLEC charges that are more than 30 days past due represent 96% of current billings, only about one-third of which involve billing disputes." *Id.* at 28.

Commission's Finding

The Commission finds that bill credits are a reasonable form of paying Tier 1 payments. The Commission agrees with AT&T that bill credit payment information must be clearly identified on the CLECs' bills. In its QPAP language for section 11.2, Qwest has provided that "[b]ill credits shall be identified on a summary format substantially similar to that distributed as a prototype to the CLECs and the Commissions." The Commission directs Qwest to submit its most recent summary format it intends to use with its compliance filing.

8. Interest Rate on Late Payments and Underpayment

AT&T's Position

AT&T asserted that Qwest should pay an interest rate that is higher than the treasury rate. AT&T Exhibit 8 at 28-29. AT&T pointed out that the Multi-state Facilitator had recommended that the interest rate be changed to the prime rate, not the treasury rate. *Id.* at 28.

Qwest's Position

Qwest agreed to use the prime rate and substituted that rate for the treasury rate in the revised QPAP. Qwest Exhibit 78 at 28; Qwest Exhibit 82 (section 11.1).

Commission's Finding

The Commission finds that the prime rate is a reasonable interest rate and finds no changes are needed to section 11.1.

9. Audit Provisions

AT&T's Position

AT&T raised a number of concerns with respect to the audit provisions of the QPAP. First, AT&T opposed allowing Qwest to select the independent auditor, and proposed that the Commission select the auditor. AT&T Exhibit 8 at 50. Second, AT&T objected to language in section 15.1 that appeared to contemplate audits for performance measurements that are separate from audits for financial systems. *Id.* at 51. Also, with respect to section 15.1, AT&T stated that the language appears confusing as to what measurements will actually be subject to an audit. *Id.* at 52. In addition, AT&T contended that the provisions limit audits to be commenced not more than 12 months after which alleged inaccurate results are first reported and does not allow CLEC-initiated audits if the audit would be redundant of other audits, such as planned audits or audits initiated in another state. *Id.* at 53. AT&T further stated that Qwest inappropriately limits a CLEC's ability to request audits to two audits per calendar year for the entire in-region states and each audit request is limited to two performance measurements per audit. *Id.* Finally, AT&T objected to language which would appear to permit Qwest to request an audit of the CLEC's performance measurement data collection and data reporting processes. *Id.*

FiberCom's Position

FiberCom asserted that Qwest should be required to fund an outside audit of its QPAP implementation. Black Hills FiberCom Exhibit 1 at 11.

Qwest's Position

In its rebuttal testimony, Qwest agreed to include the recommendations regarding audits as recommended by the Multi-state Facilitator. Qwest Exhibit 78 at 30. Qwest stated that these changes include allowing the auditor to be chosen by the state commissions. *Id.* at 31. In addition, the revisions would allow the CLECs to submit any number of audit requests to the independent auditor, and the independent auditor would determine whether an audit is necessary. *Id.* A CLEC could dispute the auditor's decision through the dispute resolution process. *Id.* Further, the

revisions would allow audits of both high and low risk performance measurements. Qwest stated that AT&T's concern about potential CLEC audits is unwarranted since it is logical that in a dispute over performance results or payments, both parties would have to present their evidence regarding the correct results or payments. *Id.* Qwest stated that a coordinated multi-state audit would be the most efficient way to audit the QPAP since Qwest uses the same processes to implement its performance measurements in each of the 14 states. *Id.* at 31-32.

Commission's Findings

Although Qwest's revised audit procedures provide for a regional audit or an individual state audit, the Commission notes that the procedures favor a regional approach. Qwest Exhibit 82 (part 15.0). As a result, the audit provisions attempt to unduly restrict the Commission's ability to conduct an audit outside of a regional audit. For example, part A of section 15.5 which concerns an audit by an individual state provides as follows:

> The audit shall be limited to (1) problem areas requiring further oversight as specifically identified in a previous audit; (2) any submeasurements changed or being changed from a manual to an electronic system; (3) any submeasurement responsible for at least 20% of the payments paid by Qwest over the prior year, and (4) whether Qwest is exercising due diligence in evaluating which, if any, performance data can be properly excluded from its performance measurements.

The Commission certainly appreciates the benefits of conducting a regional audit, however, if the Commission is unable to participate in a regional audit, the Commission's power to audit Qwest should not be limited as currently provided for in the revised QPAP.

The Commission prefers the approach taken by the New Mexico Public Regulation Commission which does not unduly limit a state commission's ability to audit Qwest. These provisions provide as follows:

> 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.
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> 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 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 the 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 or 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 incurred by the Commission, 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.

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.

In addition, part 11 of the QPAP must be changed to be consistent with these sections. Also, in section 11.3, Qwest shall eliminate the requirement that the Commission appoint a person to administer the disbursement of any funds; instead the provision shall provide that the Commission shall disburse the funds. The Commission finds that these revisions address many of the concerns brought forth by AT&T and FiberCom.

10. Dispute Resolution

AT&T's Position

AT&T asserted that the dispute resolution section should be changed so that dispute resolution is available for every section of the QPAP and dispute resolution authority should be vested exclusively in the Commission. AT&T Exhibit 8 at 62.

FiberCom's Position

Black Hills FiberCom stated that the Commission should decide any disputes under the QPAP. Black Hills FiberCom Exhibit 1 at 11-12.

Qwest's Position

Qwest revised the QPAP to provide that the dispute resolution provision of section 5.18 of the SGAT applies when a CLEC uses the SGAT or elects to make the QPAP part of its interconnection agreements. Qwest Exhibit 82 (section 18.0).

Commission's Finding

The Commission finds that any disputes regarding the QPAP should be resolved by the Commission, unless otherwise specifically provided by the QPAP. The Commission directs Qwest to insert the following language:

Except as otherwise provided in the PAP, the Commission shall resolve any disputes.

11. Six-Month Review

Qwest's Position

Qwest revised the provisions related to the six-month review which would allow the Commission to resolve any disputes, but limited those disputes to the addition, deletion,

modification, or reclassification of the performance measurements. Qwest Exhibit 82 (section 16). Qwest also included what it terms a "collar" to limit Qwest's liability resulting from any changes made pursuant to the review. *Id.* The "collar" provides that Qwest is not liable for making any payments that result from such changes that exceed 10% of the total monthly payments that Qwest would have made absent the effect of such changes as a whole. *Id.*

Staff's Position

Commission Staff opposed the revised language, stating that the six-month review language lacks procedural details and leaves too much power in Qwest's hands. Staff's Brief at 36. Staff stated that the Commission should retain its capacity to change any element of the plan as needed. *Id.* Staff recommended that the Commission review language from the Nebraska QPAP. *Id.*

AT&T's Position

AT&T agreed with Staff that the Commission should have ultimate authority over any changes to the QPAP. AT&T Exhibit 8 at 58. In addition, AT&T stated that the scope of the review should not be limited to a review of the performance measurements but to the entire PAP. *Id.* AT&T also objected to Qwest's language in section 16.1 which provides that "[t]he criterion for reclassification of a measurement shall be whether the actual volume of data points was less or greater than anticipated." *Id.* at 59.

FiberCom's Position

FiberCom objected to any review of the QPAP being conducted in a multi-state proceeding. Intervenor Black Hills FiberCom, L.L.C.'s Response to Qwest Corporation's Post-Hearing Brief at 14-15. FiberCom further objected to language which provided that changes would not be made without Qwest's agreement. *Id.* at 15. FiberCom also contended that the QPAP be amended to go beyond the statutory three year sunset period as found in section 272(f). *Id.*

Midcontinent's Position

Midcontinent asserted that final approval should be with the Commission after giving parties an opportunity to offer suggestions for change and improvements. Midcontinent Exhibit 38 at 19.

Commission's Finding

The Commission finds that Qwest's revisions are too restrictive. The Commission finds that Qwest shall change section 16.0 to read as follows:

> 16.1 Every six (6) months, beginning six months after the effective date of 271 approval by the FCC for the state of South Dakota, Qwest, CLECs, and the Commission shall participate in a review of the performance measurements 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. Criteria for review of performance measurement, 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. After the Commission considers changes proposed in the six-month

review process, it shall determine what, if any, changes shall be made by Qwest. The Commission retains its independent authority under state law to initiate a proceeding to review the PAP at any time and to order changes to any provision of the PAP, after notice and hearing, and consistent with due process and other rights of all parties. No new performance measurements shall be added to the PAP that have not been subject to observation as a diagnostic measurement for a period of six (6) months, unless ordered otherwise by the Commission. Any changes made pursuant to this section shall apply to and modify this agreement.

16.1.2 Notwithstanding section 16.1, if any agreements on adding, modifying, or deleting performance measurements as permitted by section 16.1 are reached between Qwest and CLECs participating in an industry Regional Oversight Committee PID administration forum, those agreements shall be incorporated into the PAP and modify the agreement between CLEC and Qwest at any time those agreements are submitted to and approved by the Commission, whether before or after a six-month review.

16.2 Two years after the effective date of the first FCC 271 approval of the PAP, the Commission, by itself or in conjunction with other state commissions, may conduct a review by an independent third party to examine the continuing effectiveness of the PAP as a means of inducing compliant performance. Except for expenses which may be assigned under section 15.3, the expenses of any review by the state of South Dakota, or if the Commission participates in a multi-state review, the expenses attributable to South Dakota, 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.

12. Nature of Damages

AT&T's Position

AT&T contended that the term "liquidated damages" should be stricken from any QPAP provision. AT&T Exhibit 8 at 37. AT&T asserted that the payments to CLECs under the QPAP are not liquidated damages because "until the damage at issue actually occurs, it is impossible to ascertain the extent of such damages." *Id.* In addition. AT&T asserted that a performance assurance plan is an incentive plan to ensure that the market remains open after a section 271 application is granted. *Id.*

Midcontinent's Position

Midcontinent agreed that contractual damages should be considered to be liquidated damages because such damages would be difficult to measure precisely. Midcontinent Exhibit 38 at 17. However, Midcontinent questioned if there were "appropriate consequences for poor performance on Qwest's part that causes Midcontinent's loss of a customer." *Id.*

Qwest's Position

Qwest asserted that the payments are not incentives but were designed to function as compensatory damages to CLECs. Qwest Exhibit 78 at 38. Qwest noted that the provision only

seeks to limit contractual remedies, not noncontractual remedies. *Id.* at 36. Qwest pointed out that the Multi-state Facilitator found that it was not reasonable to allow a CLEC to keep Tier 1 payments when it suits the CLEC but to seek more money when it did not. *See* Qwest Exhibit 28 at 33.

Commission's Finding

The Commission agrees that the payments to CLECs should be considered to be compensatory damages. It is a CLEC's choice as to whether it decides to incorporate the QPAP into its interconnection agreement and then become eligible for the self-executing payments as delineated under the terms of the QPAP.

13. Offset

AT&T's Position

AT&T objected to the language found in section 13.7 regarding offset of Qwest payments made to CLECs which stated as follows:

> 13.7 If for any reason Qwest is obligated by any Court or regulatory authority of competent jurisdiction to pay to any CLEC that agrees to this QPAP compensatory damages based on the same or analogous wholesale performance covered by this QPAP, Qwest may reduce such award by the amount of any payment made or due to such CLEC under this QPAP, or may reduce the amount of any payments made or due to such CLEC under this QPAP by the amount of any such award, such that Qwest's total liability shall be limited to the greater of the amount of such award or the amount of any payments made or due to such CLEC under this QPAP. By adopting this QPAP, CLEC consents to such offset.

AT&T stated that this language would allow Qwest "to unilaterally attempt to withhold funds from a judicial judgment claiming that the damages were already paid under the QPAP," as well as allowing Qwest to "withhold payments to the CLEC if Qwest feels that the CLEC has already been paid." AT&T Exhibit 8 at 44. AT&T stated that it had recommended the following language in Colorado:

> 13.7 If for any reason CLEC agreeing to this PAP is awarded compensation for the same or analogous wholesale performance covered by this PAP, Qwest shall not be foreclosed from arguing that such award should be offset with amounts paid under this PAP.
>
> 13.4.2 By accepting this performance remedy plan, CLEC agrees that Qwest's performance with respect to this remedy plan may not be used as an admission of liability or culpability for a violation of any state or federal law or regulation. ~~(Nothing herein is intended to preclude Qwest from introducing evidence of any Tier 1 "liquidated damages" under these provisions for the purpose of offsetting the payment against any other damages or payments a CLEC might recover.)~~ The terms of this paragraph do not apply to any proceeding before the Commission or the FCC to determine whether Qwest has met or continues to meet the requirements of section 271 of the Act.

Staff's Position

Staff recommended that the Commission accept the language that was adopted by the Nebraska Public Service Commission and the North Dakota Public Service Commission regarding offset. Staff's Brief at 37.

Qwest's Position

In its revised QPAP filed after the hearing, Qwest changed section 13.7 to read as follows:

> Qwest shall be entitled to seek an offset against any recovery by CLEC under any noncontractual theory of liability (including but not limited to tort and antitrust claims). 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.

Qwest Exhibit 82 (section 13.7).

In its post-hearing reply brief, Qwest agreed to adopt the language from North Dakota which it stated AT&T had endorsed. Qwest Corporation's Reply Brief in Support of the QPAP at 15.

Commission's Finding

The North Dakota language provides as follows:

> Any liquidated damages payment by Qwest under these provisions is not hereby made inadmissible in any proceeding related to the same conduct where Qwest seeks to offset the payments against any other damages a CLEC may recover, whether or not the nature of the damages sought by the CLEC is such that an offset is appropriate will be determined in the relevant proceeding.

Interim Consultative Report on Qwest's Performance Assurance Plan, U S WEST Communications, Inc. Section 271 Compliance Investigation, Case No. PU-314-97-193, North Dakota Public Service Commission (dated May 22, 2002). The Commission finds this language is reasonable.

14. Force Majeure and Bad Faith

AT&T's Position

AT&T objected to Qwest's language in section 13.3 relating to bad faith and force majeure provisions. AT&T Exhibit 8 at 33-36. AT&T stated that the force majeure exceptions "are so open-ended and vague, that it is substantially unlikely that the CLECs will receive any payments for Qwest's deficient performance." *Id.* at 34. Specifically, AT&T objected to the bad faith exception and stated that any limitation on payments would be only for benchmark measures, not parity measures since if Qwest is able to perform the function for itself, it should be able to perform the same function for a CLEC. *Id.* at 35. AT&T requested the following revisions:

> 13.3 Qwest shall not be obligated to make Tier 1 and Tier 2 payments for any measurement but only to the extent that non-conformance for that measurement was the result of a Force Majeure event, when the performance measurement standard is a benchmark, as defined in § 13.3 of the SGAT. Any penalty shall be paid if such

> Force Majeure did not make it impossible for Qwest to perform. If a Force Majeure event or other excusing event recognized in this section only suspends Qwest's ability to timely perform an activity subject to Performance Measurement, the applicable time frame in which Qwest's compliance with the parity or benchmark criterion is measured will be extended on an hour-for-hour or day-for-day basis, as applicable, equal to the duration of the excusing event.

Id. at 35-36.

Qwest's Position

Following the hearing, Qwest submitted a revised QPAP which Qwest stated added refinements suggested by the Multi-state Facilitator. Qwest Corporation's Post-Hearing Brief in Support of the QPAP at 44. Qwest asserted, however, that the exceptions for bad faith acts or omissions by CLECs were an essential part of the QPAP and were approved by the Facilitator. *Id.* at 44-45. Qwest's revised section 13.3 reads:

> Qwest shall not be obligated to make Tier 1 or Tier 2 payments for any measurement if and to the extent that non-conformance for that measurement was the result of the following: 1) with respect to performance measurements with a benchmark standard, a Force Majeure event as defined in section 5.7 of the SGAT, Qwest will provide notice of the occurrence of a Force Majeure event within 72 hours of the time Qwest learns of the event or within a reasonable time frame that Qwest should have learned of it; 2) an act or omission by a CLEC that is contrary to any of its obligations under its interconnection agreement with Qwest or under federal or state law; an act or omission by CLEC that is in bad faith. Examples of bad faith conduct include, but are not limited to: unreasonably holding service orders and/or applications, "dumping" orders or applications in unreasonably large batches, "dumping" orders or applications at or near the close of a business day, on a Friday evening or prior to a holiday, and failing to provide timely forecasts to Qwest for services or facilities when such forecasts are explicitly required by the SGAT; 3) problems associated with third-party systems or equipment, which could not have been avoided by Qwest in the exercise of reasonable diligence, provided, however, that this third party exclusion will not be raised in the State more than three times within a calendar year. If a Force Majeure event or other excusing event recognized in this section merely suspends Qwest's ability to timely perform an activity subject to a performance measurement that is an interval measure, the applicable time frame in which Qwest's compliance with the parity or benchmark criterion is measured will be extended on an hour-for-hour or day-for-day basis, as applicable, equal to the duration of the excusing event.

Qwest Exhibit 82 (section 13.3).

Commission's Finding

The Commission first notes that Qwest has added language which provides that the Force Majeure event applies to performance measurements with benchmark standards which was one of AT&T's concerns. The Commission agrees with the Multi-state Facilitator that it is appropriate to have a payment exception for bad faith acts of CLECs. *See* Qwest Exhibit 28 at 38. The Commission further points out that the Facilitator required the language of section 13.3.2 to be added which provides as follows:

> Notwithstanding any other provision of this PAP, it shall not excuse performance that Qwest could reasonably have been expected to deliver assuming that it had designed, implemented, staffed, provisioned, and otherwise provided for resources reasonably required to meet foreseeable volumes and patterns of demands upon its resources by CLECs.

The Commission finds that this language limits, to some extent, the ability of Qwest to excuse its performance based on a CLEC's conduct. Thus, the Commission accepts Qwest's language for section 13.3.

15. Section 13.3.1 and 13.3.2

AT&T's Position

AT&T contended that in other states, Qwest has included the following additional language to section 13.3.1:

> A party may petition the Commission to require Qwest to deposit disputed payments into an escrow account when the requesting party can show cause, such as commercial uncertainty.

AT&T Exhibit 8 at 36.

AT&T also asserted that in other states Qwest had included section 13.3.2. *Id.* AT&T requested the inclusion of this language in the South Dakota QPAP with one revision -- changing the "and" after the word "provisioned" to "and/or." *Id.*

Qwest's Position

In the revised QPAP submitted following the hearing, Qwest included essentially the same language for section 13.3.1 as requested by AT&T:

> A party may petition the Commission to require Qwest to deposit disputed payments into an escrow account when the requesting party can show cause, such as grounds provided in the Uniform Commercial Code for cases of commercial uncertainty.

Qwest Exhibit 82 (section 13.3.1).

In addition, as the Commission noted in its preceding finding concerning force majeure and bad faith, Qwest included section 13.3.2 as requested by AT&T, except that it did not change the "and" to "and/or." *Id.* (section 13.3.2).

Commission's Finding

The Commission finds Qwest's language in sections 13.3.1 and 13.3.2 is reasonable and no changes are required.

16. Exclusive Remedy

AT&T's Position

AT&T objected to the language in section 13.6 which requires a CLEC to opt into the QPAP in lieu of other alternative standards of relief. AT&T Exhibit 8 at 38-43. AT&T proposed the following language:

> 13.6 This PAP contains a comprehensive set of performance measurements, statistical methodologies, and payment mechanisms that are designed to function together, and only together as an integrated whole.

Id. at 42.

AT&T also recommended the deletion of section 13.8 which provided:

> Qwest shall not be liable for both Tier 2 payments under the PAP and assessments, sanctions, or other payments for the same or analogous performance pursuant to any Commission order or service quality rules.

Qwest's Position

In Qwest's revised QPAP submitted after the hearing, Qwest proposed the following revisions to section 13.8:

> To the extent Qwest believes that some Tier 2 payments required to be made under this PAP would duplicate payments that have been assessed by or on behalf of the Commission pursuant to any service quality rules or Commission orders, Qwest may make such Tier 2 payments to a special interest bearing escrow account and then dispute the payments before the South Dakota Commission. If Qwest can show that the payments relate to the same underlying activity or omission, it may retain the Tier 2 payments and any interest accrued on such payments.

Qwest Exhibit 82 (section 13.8).

Commission's Finding

The Commission agrees that the PAP is designed to work "as an integrated whole" and finds that section 13.6 is reasonable. With respect to section 13.8, the Commission finds that the language as revised by Qwest is reasonable because the Commission will determine whether the payments relate to the same underlying activity or omission, as opposed to the language originally proposed by Qwest which merely provided that Qwest was not liable for both types of payments.

17. Voluntary Nature of the QPAP

AT&T's Position

AT&T asserted that section 17.0 of the QPAP, entitled Voluntary Performance Assurance Plan, may be used by Qwest "to declare sections void, refuse to implement certain sections, and even refuse to continue with the performance assurance plan. For these reasons, no other

performance assurance plan contains such language." AT&T Exhibit 8 at 60. AT&T recommended that the section be stricken.

Qwest's Position

Qwest's revised section 17.0 (with the revision being the addition of the last sentence) now provides as follows:

> This PAP represents Qwest's voluntary offer to provide performance assurance. Nothing in the PAP or in any conclusion of non-conformance of Qwest's service performance with the standards defined in the PAP shall be construed to be, of itself, non-conformance with the Act. Except for those changes expressly provided in sections 12.2, 0.1.3 and 16.1, no changes shall be made to this QPAP.

Qwest Exhibit 82 (section 17.0). Qwest stated that the standards contained in the QPAP should not be construed as standards to comply with section 271. Qwest Corporation's Post-Hearing Brief in Support of the QPAP at 45.

Commission's Finding

The Commission finds that this entire section must be deleted. The Commission is concerned that any reference to the QPAP as voluntary may allow Qwest to argue that it is not bound by the terms of the QPAP. In addition, the Commission finds the remainder of the language in the section to be unnecessary.

18. Termination of the QPAP

AT&T's Position

AT&T asserted that it was inappropriate for Qwest to propose that it can avoid its section 251 obligations by exiting the interLATA market. AT&T Exhibit 8 at 59. AT&T recommended deleting the sentence which provides that "in the event Qwest exits the interLATA market, that State PAP shall be rescinded immediately." *Id.* at 60.

Qwest's Position

Qwest asserted that a performance assurance plan is only offered in exchange for interLATA relief to prevent backsliding, and that the QPAP is not intended to fulfill Qwest's obligations under section 251. Qwest Exhibit 78 at 42. Qwest argued that "a regime of self-executing payments where CLECs need prove no harm to receive compensation is wholly inappropriate without the interLATA quid pro quo." Qwest Corporation's Post-Hearing Brief in Support of QPAP at 44.

Commission's Finding

The entire section reads as follows:

> Qwest will make the PAP available for CLEC interconnection agreements until such time as Qwest eliminates its Section 272 affiliate. At that time, the Commission and Qwest shall review the appropriateness of the PAP and whether its continuation is necessary. However, in the event Qwest exits the interLATA market, that State PAP shall be rescinded immediately.

Qwest Exhibit 81 (section 16.6).

The Commission finds that if Qwest exits the interLATA market, a phase-out of the PAP would be appropriate. The Commission points out that immediate rescission of the PAP upon Qwest exiting the interLATA market is unreasonable since Qwest could still owe Tier 1 and Tier 2 payments. With respect to whether Qwest may no longer make the PAP available after it eliminates its section 272 affiliate, the Commission finds that issue should be reviewed by the Commission. Thus, the Commission finds that Qwest shall change the language as follows:

> Qwest will make the PAP available for CLEC interconnection agreements. Upon Qwest's elimination of its Section 272 affiliate or upon it exiting the interLATA market, Qwest may petition the Commission to phase out the PAP. At that time, a review of the PAP shall be conducted to determine whether a phase-out of the PAP is appropriate.

19. CLEC Requests for Raw Data

AT&T's Position

AT&T requested that section 14.1 be revised to add a provision that would require Qwest to provide a CLEC's raw data within two weeks upon a request by the CLEC. AT&T Exhibit 8 at 47-48. AT&T stated that Qwest should respond in a timely manner since the reason a CLEC generally requests raw data is if the CLEC believes that there is a problem with Qwest's reported data. *Id.* at 47. AT&T further requested that a sentence be added that would treat a violation of the two week standard as a late report under section 14.3. *Id.*

Qwest's Position

Qwest stated that a two-week deadline along with the late report treatment are unreasonable provisions. Qwest Exhibit 78 at 46-47. Qwest contended that the time needed to produce the raw data depends on a number of factors, not all of which are in Qwest's control. *Id.* at 47.

Commission's Finding

The Multi-state Facilitator found that "[n]othing in the QPAP limits [CLEC raw data requests] sufficiently to justify firm response deadlines." *See* Qwest Exhibit 28 at 83. The Commission agrees and finds that Qwest is not required to add a provision which would require Qwest to provide a CLEC's raw data within two weeks.

20. CLEC Data Protection

AT&T's Position

AT&T proposed amending section 14.2 to delete the sentences which would allow Qwest to provide the Commission with individual CLEC raw data. AT&T Exhibit 8 at 48. AT&T stated that such a request should be made by the Commission directly to the CLEC. *Id.*

Qwest's Position

Following the hearing, Qwest revised this section and added provisions that stated that Qwest would initiate procedures to protect the confidentiality of the information and would provide

notice to the CLEC as directed by the Commission. Qwest Exhibit 82 (section 14.2). Qwest stated that it should be allowed to provide the information directly, without any concern about possible tampering. Qwest Exhibit 78 at 47.

Commission's Finding

The Commission first notes that Qwest's revised section specifically provides that Qwest will initiate procedures to protect the confidentially of individual CLEC raw data and will also notify the CLEC that it is providing the information. The Commission finds this process is sufficient to guard the confidentiality of the information. The Commission sees no need to have to ask a CLEC for information that it would, apparently, then request Qwest to provide to the CLEC, with the result being that the CLEC would then give the information to the Commission. The Commission assumes that the CLEC would also request that the information filed be treated as confidential. Thus, the process as proposed by AT&T would only serve to needlessly lengthen the Commission's request for information.

21. Late Reporting Fee

AT&T's Position

AT&T contended that section 14.3 should not limit the total of Qwest's payments for late reports to $500.00 per day for all missed reports. AT&T Exhibit 8 at 48-49. AT&T argued that this was not a significant incentive and recommended that section 14.3 be modified to reflect that a $500.00 payment will be due for each business day that each CLEC-specific report is late, with an additional $500.00 for each business day that aggregate CLEC reports due to the Commission are late. *Id.* at 49.

Qwest's Position

Qwest revised this provision following the hearing to provide payments of $500.00 for each business day for which reports are 6-10 days late, $1000.00 per day for reports that are 11-15 days late, and $2,000.00 per day for reports more than 15 days late. Qwest Exhibit 82 (section 14.3). Qwest stated that this is appropriate because, as recognized by the Multi-state Facilitator, Qwest will be filing reports on a 14-state basis, and, thus, if a report is late, it will probably be late for all fourteen states. Qwest Corporation's Post-Hearing Brief in Support of the QPAP at 47.

Commission's Finding

The Commission finds that the revised provision, as recommended by the Multi-state Facilitator, provides sufficient sanctions for late reports.

22. QPAP Recovery in Rates

AT&T's Position

AT&T requested that a new section be added which would ensure that Qwest is prohibited from charging back its QPAP payments to retail or wholesale customers. AT&T Exhibit 8 at 63. AT&T noted that the FCC has found that ratepayers should not pay for a failure by a BOC to provide adequate service to a CLEC and any attempt to recover fines through increased rates would undermine the incentive created by a performance assurance plan. *Id. (citing Bell Atlantic New York Order* at ¶ 443). AT&T proposed the following language:

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.

Id.

Qwest's Position

Qwest responded that such a prohibition goes beyond the purpose of the QPAP and is in the province of federal and state rate regulation. Qwest Corporation's Post-Hearing Brief in Support of the QPAP at 48.

Commission's Finding

The Commission notes that the FCC, in the *Bell Atlantic New York Order*, stated that:

> Bell Atlantic should not be permitted to reflect any portion of market adjustments as expenses under the revenue requirement for interstate services of the Bell Atlantic incumbent LEC. Such accounting treatment ensures that ratepayers do not bear, in the form of increased rates, the cost of market adjustments under the APAP and ACCAP in the event Bell Atlantic fails to provide adequate service quality to competitive LECs. We agree with CPI that any other approach would seriously undermine the incentives meant to be created by the Plan. We note that the New York Commission has adopted a similar approach at the state level.

Bell Atlantic New York Order at ¶ 443. The New York Commission had prohibited Bell Atlantic from recovering revenue losses attributable to the remedial performance credits given in connection with the performance plan. *Id.* at footnote 1364.

The Commission agrees with AT&T and instructs Qwest to incorporate the language proposed by AT&T in the QPAP. Although it should go without saying that Qwest may not recover QPAP payments in rates, the Commission finds that an explicit prohibition in the QPAP provides additional assurance that Qwest's payments will not end up in rates.

23. Successor Liability

FiberCom's Position

FiberCom asserted that the QPAP should provide that any successor to Qwest is bound by the terms of the QPAP. Intervenor Black Hills FiberCom, L.L.C.'s Response to Qwest Corporation's Post-Hearing Brief at 15.

Qwest's Position

Qwest stated it was not aware of any other plan that contained such language and asserted that successor liability is addressed in section 5.12 of the SGAT. Qwest Corporation's Reply Brief in Support of the QPAP at 16.

Commission's Finding

The Commission finds that although, generally, successor language will be contained in the SGAT or in the interconnection agreement, that language applies to the SGAT or interconnection agreement. The Commission agrees with FiberCom that some form of successor language should be in the QPAP and directs Qwest to provide language.

24. Applicability of QPAP

FiberCom's Position

FiberCom stated that a CLEC should be able to take advantage of the Tier 1 payments without first being required to adopt the QPAP as part of an interconnection agreement. Intervenor Black Hills FiberCom, L.L.C.'s Response to Qwest Corporation's Post-Hearing Brief at 15. FiberCom noted that when FiberCom initiated negotiations with Qwest regarding an interconnection agreement, the only amendment allowed by Qwest was the signature line for FiberCom.[7]

Qwest's Position

Qwest responded that it would not "object to preparing a model amendment for CLECs that simply incorporates the QPAP and any other provisions from the SGAT that are necessary for implementation of the QPAP, such as § 20, which contains the Performance Indicator Definitions." Qwest Corporation's Reply Brief in Support of the QPAP at 16.

Commission's Finding

The Commission finds that Qwest shall submit its proposed model amendment, along with the revisions to the QPAP as required by this Commission, in its compliance filing.

25. Rounding of Averages

Midcontinent's Position

Midcontinent expressed concern that Qwest may be permitted to round out averages which would allow Qwest too much leeway in meeting performance standards. Midcontinent Exhibit 38 at 18.

Qwest's Position

Qwest replied that it assumed that Midcontinent was referring to section 2.4 of the QPAP "which allows Qwest to round up to the next whole integer to determine the allowable number of misses for small sample sizes for benchmark measures." Qwest explained that "[t]his provision is

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[7] Intervenor Black Hills FiberCom, L.L.C.'s Response to Qwest Corporation's Post-Hearing Brief at 15 (citing Black Hills FiberCom's Exhibit 1 at 5 in which FiberCom stated that "we have an 'arms-length negotiated' interconnection agreement with Qwest in which the only items we were allowed to modify were our business name and the name and title of the officer signing the agreement. Not even the effective date of the agreement could be changed, even though it was over four months prior to our actually entering into the agreement.")

designed to ensure that Qwest will not otherwise be held to a standard of perfection in cases of very small order volumes." *Id.* Qwest stated it would modify section 2.4 to reflect the Multi-state Facilitator's recommendation which was to use "data from previous months to determine whether the current month's data should be reflected as a 'miss' or a 'make.'" *Id.*

Commission's Finding

In the revised QPAP, section 2.4 now provides that:

> Percentage benchmarks will be adjusted to round the allowable number of misses up or down to the closest integer, except when a benchmark standard and low CLEC volume are such that a 100% performance result would be required to meet the standard and has not been attained. In such a situation, the determination of whether Qwest meets or fails the benchmark standard will be made using performance results for the month in question, plus a sufficient number of consecutive months so that a 100% performance result would not be required to meet the standard. For purposes of section 6.2, a meet or fail determined by this procedure shall count as a single month.

Qwest Exhibit 82 (section 2.4). The Commission finds that this revision should alleviate Midcontinent's concern.

26. LIS Trunks Weighting

Midcontinent's Position

Midcontinent asserted that Qwest may be able to control the timing and availability of LIS trunks which could allow Qwest the competitive advantage of being able to respond more quickly to a customer request. Midcontinent Exhibit 38 at 18.

Qwest's Position

Qwest replied that it has addressed this claim by agreeing "to apply a lower critical value (1.04) to LIS trunks for CLEC volumes of 10 or fewer for the provisioning and maintenance metrics." Qwest Exhibit 78 at 23. Qwest further noted that the provisioning measurements carry the highest payment level. *Id.*

Commission's Finding

As pointed out by Qwest, it has applied a lower critical z-value for low volume LIS trunks. The Commission finds this alleviates, to some degree, Midcontinent's concern and finds no further changes are required.

27. Initial Effective Date

Midcontinent's Position

Midcontinent asserted that the effective date for QPAP performance measurements should be upon the issuance of the Commission's orders, with payments assessed after the FCC approves Qwest's 271 application. Midcontinent Exhibit 38 at 19.

Qwest's Position

Qwest stated that it was willing "to provide QPAP reports with payment estimates based on monthly performance measurements prior to section 271 approval. Qwest is already providing such mock bill credit reports in 10 of its other in-region states." Qwest Exhibit 78 at 41.

Commission's Finding

The Commission finds that Qwest shall begin to provide the payment estimates for South Dakota prior to any section 271 approval. However, Qwest is not required to make any payments pursuant to the QPAP until section 271 approval is granted to Qwest for South Dakota.

28. Indemnity for CLEC Payments Under State Service Quality Standards

Midcontinent's Position

Midcontinent reiterated its position that CLECs should not bear responsibility for violating state service quality standards when the responsibility for the failure is Qwest's. Midcontinent Exhibit 38 at 17-18.

Qwest's Position

Qwest responded that CLECs are already entitled under the QPAP to receive liquidated damages payments for Qwest's performance without proof of actual damages and that adoption of Midcontinent's position would give CLECs an extra payment opportunity. Qwest Exhibit 78 at 43.

Commission's Finding

The Commission finds that, consistent with its position on this issue in the order concerning general terms and conditions, that a provision transferring any Commission sanctions levied against a retail provider to the wholesale provider, if the wholesale provider is at fault, is an unnecessary provision. The Commission will determine any sanctions for any violation of service standards within a proceeding conducted by the Commission. Liability, if any, will be determined based on the facts peculiar to each case.

Commission's Finding Regarding the Public Interest

The Commission finds that in order for this Commission to find that Qwest's entry into the interLATA market is in the public interest, Qwest shall make the following changes to its QPAP: (1) Qwest shall remove the cap on payments to others under the QPAP; (2) Qwest shall remove the Tier 2 payment triggers and Tier 2 payments will apply in any individual month; (3) Qwest shall remove the cap on payment escalation; (4) Qwest shall delete line four of section 11.3.2 relating to disbursements from the South Dakota Discretionary Fund in order to be consistent with section 7.5; (5) Qwest shall eliminate the requirement in section 11.3 regarding the appointment of a person to administer the Fund; (6) In section 2.1.1, Qwest shall change the phrase "established by the state regulatory commission" to "administered by the state regulatory commission"; (7) Qwest shall remove the 100% cap for interval measures; (8) Qwest shall submit its summary format for bill credits; (9) Qwest shall change its audit provisions to the language provided in the Commission's written order and make any corresponding revisions to section 11; (10) Qwest shall change its dispute resolution language to provide that the Commission shall resolve disputes; (11) Qwest shall

change its six-month review provisions to the language provided in the Commission's written order; (12) Qwest shall change its offset provision to the language as adopted in North Dakota; (13) Qwest shall delete section 17.0 which states that the QPAP is a voluntary offer; (14) Qwest shall revise section 16.6 to provide that Qwest may petition the Commission to phase out the QPAP if it exits the interLATA market or its section 272 affiliate is eliminated; (15) Qwest shall add a provision prohibiting Qwest from recovering QPAP payments from increased rates; (16) Qwest shall add a provision regarding successor language; (17) Qwest shall submit its proposed model amendment for CLECs that incorporates the QPAP into a CLEC interconnection agreement; (18) Qwest shall provide payment estimates prior to any section 271 approval.

Verification of Compliance With This Order

As stated above, in order for the Commission to find that Qwest's entry into the interLATA market is in the public interest, Qwest shall make the following changes as required by this order. Qwest shall make a compliance filing with these revisions, including a redlined version of the changes.

It is therefore

ORDERED, that Qwest shall make a compliance filing as described above; and it is

FURTHER ORDERED, that the parties shall have ten days following Qwest's filing of its compliance filing to file written comments concerning the revisions; and it is

FURTHER ORDERED, that the Commission finds Qwest's entry into the interLATA market is in the public interest subject to Qwest making the revisions as ordered above and all the other revisions as required in the Commission's other section 271 orders.

Dated at Pierre, South Dakota, this 22nd day of November, 2002.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that this document has been served today upon all parties of record in this docket, as listed on the docket service list, by facsimile or by first class mail, in properly addressed envelopes, with charges prepaid thereon.

By: Delaine Kolbo

Date: 11/22/02

(OFFICIAL SEAL)

BY ORDER OF THE COMMISSION:

James A. Burg
JAMES A. BURG, Chairman

Pam Nelson
PAM NELSON, Commissioner

Robert K. Sahr
ROBERT K. SAHR, Commissioner