

11/22/02

Order Re: Section 272

thru

12/9/02 Qwest

Notice of Errata

and Conditions;

11/22/02 - Order Regarding Section 272;

11/22/02 - Order Regarding Operational Support Systems, ROC OSS Test, and Commercial Performance Data;

11/22/02 - Order Regarding the Public Interest;

12/05/02 - Qwest's Notice of Errata to Updated Statement of Generally Available Terms and Conditions;

12/13/02 - Qwest's Notice of Updated Statement of Generally Available Terms and Conditions;

12/16/02 - Qwest's Notice of Errata to December 12, 2002 Statement of Generally Available Terms and Conditions;

12/23/02 - AT&T's Response to Qwest's Notice of Updated Statement of Generally Available Terms and Conditions;

1/21/03 - Commission Staff's Response to Qwest's Notice of Updated Statement of Generally Available Terms and Conditions;

01/29/03 - Reply to the Commission Staff's Response to Qwest's Notice of Generally Available Terms and Conditions;

02/04/03 - Notice of Mock Payment Report;

02/04/03 - Request for Confidential Treatment of Information;

02/04/03 - Order Regarding Compliance Filings and Recommendation to the FCC;

02/04/03 - Comments to the FCC;

02/17/03 - Qwest's Notice of Compliance Filing for Qwest Performance Assurance Plan;

02/26/03 - Order Regarding Public Interest Compliance Filing and Final Recommendation to the FCC;

02/26/03 - Reply Comments to the FCC;

02/26/03 - Docket Closed.

03/03/03 - Mock Payment Report;

03/04/03 - Qwest's Notice of Filing of Revised Exhibit K to its Statement of Generally Available Terms and Conditions;

04/01/03 - Mock Payment Report;

05/01/03 - Mock Payment Report;

06/02/03 - Mock Payment Report;

06/18/03 - Memorandum of Understanding.

10/31/03 - Submission of OP-5(A) for Inclusion in the QPAP;

12/17/03 - Order Approving Revisions to QPAP;

12/17/03 - Docket Closed.

**BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF SOUTH DAKOTA**

IN THE MATTER OF THE ANALYSIS OF)	ORDER REGARDING
QWEST CORPORATION'S COMPLIANCE)	SECTION 272
WITH SECTION 271(c) OF THE)	
TELECOMMUNICATIONS ACT OF 1996)	TC01-165

SECTION 272

Qwest is required to show that, upon commencing in-region interLATA service, Qwest will provide such service in accordance with the requirements of section 272. 47 U.S.C. § 271(d)(3)(B). Section 272 sets forth the structure and business relationship that Qwest must establish with the affiliate that will be providing interLATA services.

The first requirement of section 272 relates to whether the affiliate is separate from Qwest. The section requires that a BOC may not provide interLATA long distance services unless it provides that service through one or more affiliates that are separate from the entity that is subject to section 251(c) requirements. 47 U.S.C. § 272(a)(1).

Qwest stated that it has created a separate affiliate as required by section 272. Qwest's 272 affiliate is Qwest Communications Corporation ("QCC" or "272 Affiliate"). Qwest Exhibit 51 at 1. QCC is an indirect, wholly owned subsidiary of Qwest Communications International Inc. *Id.* at 6. Qwest Corporation, the BOC, and QCC are both subsidiaries of Qwest Service Corporation which is a wholly owned subsidiary of Qwest Communications International Inc. ("QCI"). *Id.* Qwest asserted that the "272 Affiliate is one of the top five interLATA providers nationwide despite the fact that, because of the merger with U S WEST, Inc., Qwest Communications International Inc. and its subsidiaries were required to divest themselves of all in-region, interLATA business." Qwest Exhibit 59 at 10.

Qwest also maintained that it will comply with the structural separations requirements for the separate affiliate which are contained in section 272(b). They are as follows:

The separate affiliate required by this section -

- (1) shall operate independently from the Bell operating company;
- (2) shall maintain books, records, and accounts in the manner prescribed by the Commission which shall be separate from the books, records, and accounts maintained by the Bell operating company of which it is an affiliate;
- (3) shall have separate officers, directors, and employees from the Bell operating company of which it is an affiliate;
- (4) may not obtain credit under any arrangement that would permit a creditor, upon default, to have recourse to the assets of the Bell operating company; and
- (5) shall conduct all transactions with the Bell operating company of which it is an affiliate on an arm's length basis with any such transactions reduced to writing and available for public inspection.

The FCC has interpreted the first requirement, that the 272 affiliate operate independently from the BOC, as imposing certain requirements beyond the structural separation requirements contained in section 272(b)(2)-(5). *In the Matter of Implementation of the Non-Accounting Safeguards of Section 272 and 272 of the Communications Act of 1934, as amended*, CC Docket No. 95-149, Third Order

on Reconsideration, at ¶ 9, (rel. October 1, 1999) ("*Third Order on Reconsideration*"). In that order, the FCC reaffirmed that "the 'operate independently' requirement precludes the joint ownership of transmission and switching facilities by a BOC and its section 272 affiliate, as well as the joint ownership of the land and buildings where those facilities are located." *Id.* The requirement also "precludes a section 272 affiliate from performing operating, installation, and maintenance functions associated with the BOC's facilities" and "it bars a BOC or any BOC affiliate, other than the section 272 affiliate itself, from performing operating, installation, or maintenance functions associated with the facilities that its section 272 affiliate owns or leases from a provider other than the BOC with which it is affiliated." *Id.*

Qwest stated that its 272 Affiliate satisfies the "operate independently" requirement. Qwest Exhibit 61 at 8. Qwest asserted that the 272 Affiliate does not and will not jointly own, with the BOC, telecommunications switching or transmission facilities, or the land or buildings where the facilities are located. Qwest Exhibit 59 at 11. Qwest further asserted that neither the BOC or any other Qwest affiliate performs operation, installation, and maintenance functions associated with the 272 Affiliate's switching and transmission facilities. *Id.* at 12. Conversely, Qwest stated that the 272 Affiliate does not perform such functions associated with the BOC facilities. *Id.*

Qwest further asserted that it complies with section 272(b)(2) and the 272 Affiliate maintains separate books, records, and accounts. Qwest Exhibit 61 at 9. Qwest further stated that the 272 Affiliate follows Generally Accepted Accounting Principles as mandated by the FCC. *Id.*

Qwest claimed that it meets section 272(b)(3) which requires the 272 Affiliate to have separate officers, directors, and employees from the BOC. *Id.* at 12. Qwest stated that the 272 Affiliate and the BOC maintain separate payrolls and staff. *Id.* at 14. Qwest further asserted that "[w]hen 272 Affiliate employees provide services to Qwest affiliates, including the BOC, the employees are required to time report and the BOC is charged for their time using rates set according to applicable FCC requirements." *Id.* Qwest stated that if an employee accepts employment with a different Qwest corporation, the new employee is required to sign a non-disclosure statement to prevent the sharing of non-public information between the companies. *Id.* at 15.

With respect to section 272(b)(4), Qwest maintained that its Section 272 Affiliate cannot obtain credit under any arrangement which would permit a creditor to have recourse to the assets of the BOC. *Id.* at 17. Qwest stated that the 272 Affiliate is capitalized separately from the BOC and funding is provided by financial obligations issued by Qwest Capital Funding, Inc. and which is guaranteed by Qwest Communications International Inc. *Id.* at 17. Qwest claimed that neither the debt obligations issued by Qwest Capital Funding, Inc. nor the guarantee by Qwest Communications International Inc. provide creditors recourse to the assets of the BOC. *Id.* at 18.

Qwest claimed that its 272 Affiliate satisfies section 272(b)(5) which requires all transactions between the BOC and the 272 Affiliate to be on an arm's length basis, with any such transactions reduced to writing and available for public inspection. *Id.* Qwest asserted that "[t]he 272 Affiliate has accounted for all transactions between itself and the BOC in accordance with the FCC's affiliate transaction rules back to the date of the Qwest - U S WEST merger, which closed on June 30, 2000." *Id.* Qwest stated that all of the transactions are posted on Qwest Communications International Inc.'s website. *Id.* at 19.

Section 272(c) sets forth nondiscrimination safeguards and provides as follows:

In its dealings with its affiliate described in subsection (a) of this section, a Bell operating company - (1) may not discriminate between that company or affiliate and any other entity in the provision or procurement of goods, services, facilities, and information, or in the establishment of standards; and (2) shall account for all transactions with an affiliate described in subsection (a) of this section in accordance with accounting principles designated or approved by the Commission.

Qwest stated that the 272 Affiliate is required to contact the BOC's IXC Sales Executive Team representative to obtain services in the same manner as other IXCs. Qwest Exhibit 59 at 26. Qwest claimed that the 272 Affiliate does not currently have access to the BOC's OSS and would obtain access only if the 272 Affiliate obtained CLEC status at some time in the future. *Id.* at 26-27. Non-tariffed services which are available to the 272 Affiliate are reduced to writing in a contract or a work order. *Id.* at 27. Qwest asserted that these services will be made available to other entities under the same terms, conditions, and rates except for joint-marketing related services which are not subject to the nondiscrimination requirement. *Id.*

Section 272(d) requires a BOC that has received section 271 authority to obtain and pay for a biennial audit. The section provides that:

(1) General Requirement. A company required to operate a separate affiliate under this section shall obtain and pay for a joint Federal/State audit every 2 years conducted by an independent auditor to determine whether such company has complied with this section and the regulations promulgated under this section, and particularly whether such company has complied with the separate accounting requirements under subsection (b) of this section.

(2) Results submitted to Commission; State commissions. The auditor described in paragraph (1) shall submit the results of the audit to the Commission and to the State commission of each State in which the company audited provides service, which shall make such results available for public inspection. Any party may submit comments on the final audit report.

(3) Access to documents. For purposes of conducting audits and reviews under this subsection - (A) the independent auditor, the Commission, and the State commission shall have access to the financial accounts and records of each company and of its affiliates necessary to verify transactions conducted with that company that are relevant to the specific activities permitted under this section and that are necessary for the regulation of rates; (B) the Commission and the State commission shall have access to the working papers and supporting materials of any auditor who performs an audit under this section; and (C) the State commission shall implement appropriate procedures to ensure the protection of any proprietary information submitted to it under this section.

Qwest stated that, in accordance with FCC directives, the first biennial audit will be conducted 23 months after the BOC receives its first section 271 approval. Qwest Exhibit 59 at 30. Qwest stated that it will cooperate to the fullest extent possible in providing data necessary to assist the auditor in accomplishing its objective and that the results of the audits will be provided to the FCC and state commissions as required. *Id.*

Section 272(e) outlines four other requirements for a BOC and its 272 affiliate. The section provides:

A Bell operating company and an affiliate that is subject to the requirements of section 251(c) of this title - (1) shall fulfill any requests from an unaffiliated entity for telephone exchange service and exchange access within a period no longer than the period in which it provides such telephone exchange service and exchange access to itself or to its affiliates; (2) shall not provide any facilities, services, or information concerning its provision of exchange access to the affiliate described in subsection (a) of this section unless such facilities, services, or information are made available to other providers of interLATA services in that market on the same terms and conditions; (3) shall charge the affiliate described in subsection (a) of this section, or impute to itself (if using the access for its provision of its own services), an amount for access to its telephone exchange service and exchange access that is no less than the amount charged to any unaffiliated interexchange carriers for such service; and (4) may provide any interLATA or intraLATA facilities or services to its interLATA affiliate if such services or facilities are made available to all carriers at the same rates and on the same terms and conditions, and so long as the costs are appropriately allocated.

Qwest stated that, upon obtaining section 271 approval, the 272 Affiliate will obtain telephone exchange service or exchange access under the same tariffed terms and conditions as are available to unaffiliated IXCs. Qwest Exhibit 59 at 31. Qwest further asserted the orders will be processed in a nondiscriminatory manner. *Id.*

Section 272(g) contains the requirements and restrictions regarding joint marketing efforts between the BOC and the 272 affiliate. Section 272(g)(1) provides that "[a] Bell operating company affiliate required by this section may not market or sell telephone exchange services provided by the Bell operating company unless that company permits other entities offering the same or similar service to market and sell its telephone exchange services." Qwest stated that it will comply with this section and "[t]he 272 Affiliate will not market or sell BOC services except through agreement on an arm's length basis, reduced to writing, and made publicly available as required by Section 272(b)(5)." *Id.* at 22.

Section 272(g)(2) states that "[a] Bell operating company may not market or sell interLATA service provided by an affiliate required by this section within any of its in-region States until such company is authorized to provide interLATA services in such State under section 271(d) of this title." Qwest asserted that "[t]he 272 Affiliate will not market or sell interLATA services with the BOC until the BOC is authorized by the FCC to provide interLATA service in South Dakota." *Id.* at 23.

MOTION TO REOPEN RECORD

On September 27, 2002, AT&T submitted a Motion to Reopen and Supplement the Record ("AT&T Motion"). AT&T requested that the Commission reopen the record and require Qwest "to supplement the record with sufficient evidence to demonstrate that Qwest and its new section 272 affiliate are in compliance with section 272. . . ." AT&T asserted that "Qwest has announced its

¹ AT&T Motion at 1. The Commission notes that although AT&T submitted unverified comments prior to the hearing concerning section 272, AT&T never offered the comments during the hearing and, therefore, they are not part of the record.

On October 10, 2002, Qwest submitted Opposition of Qwest Corporation to AT&T's Motion to Reopen and Supplement the Record ("Qwest Response"). Qwest maintained that "the prudent course of action would be for the Commission to issue no findings or recommendations at all on Qwest's section 272 compliance, and to simply leave that subject for the FCC's imminent decision. There is no reason to delay the Commission's work to otherwise complete this docket or waste its resources by opening a parallel investigation into the very same matters the FCC is actively considering, especially when nothing about those matters is specific to South Dakota." Qwest Response at 2. Qwest further contended that "the FCC staff specifically advised the state commissions at the September 23, 2002 Regional Oversight Committee open session that (1) the section 272 questions are interLATA issues that fall within the FCC's purview, (2) it was not necessary for the states to conduct an evaluation of section 272 or the new affiliate, and (3) the states could provide comments to the FCC on section 272 in their comments on Qwest's federal applications." *Id.* at 6-7.

At its October 17, 2002, meeting, the Commission listened to arguments from AT&T and Qwest concerning AT&T's motion. At its November 20, 2002, meeting, the Commission denied AT&T's motion. The Commission finds that reopening the record at this point would accomplish very little. Moreover, scheduling another hearing and briefing schedule would most likely significantly delay this proceeding. No one disputed Qwest's statement that FCC staff had stated in a public meeting that it was not necessary for the states to conduct an evaluation of section 272 or the new affiliate. The Commission agrees with Qwest that the Commission will have the opportunity to comment on the new section 272 affiliate in Qwest's filing before the FCC. Moreover, AT&T will have an opportunity to comment before the FCC also. The Commission further finds that since Qwest has just recently formed a new section 272 affiliate, the details of which are not in the record before the Commission, the Commission will make no recommendation to the FCC on this issue.

It is therefore

ORDERED, that the Commission makes no recommendation to the FCC regarding Qwest's compliance with section 272.

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:	<u>Melaine Keebo</u>
Date:	<u>11/22/02</u>
(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

**BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF SOUTH DAKOTA**

IN THE MATTER OF THE ANALYSIS OF)	ORDER REGARDING
QWEST CORPORATION'S COMPLIANCE)	OPERATIONAL SUPPORT
WITH SECTION 271(c) OF THE)	SYSTEMS, ROC OSS TEST,
TELECOMMUNICATIONS ACT OF 1996)	AND COMMERCIAL
)	PERFORMANCE DATA
)	TC01-165

Procedural History

The South Dakota Public Utilities Commission (Commission) participated in the Regional Oversight Committee ("ROC") collaborative section 271 performance measurements proceeding. The ROC Operational Support Systems ("OSS") test final report was issued on May 28, 2002. At its May 30, 2002, meeting, the Commission listened to comments from the parties on how to proceed with consideration of the ROC OSS test. By order dated June 19, 2002, the Commission set the following procedural schedule to consider the ROC OSS test:

July 3, 2002 - Parties may file comments on the ROC OSS test. These comments are optional. A party may present testimony at the hearing without filing comments;

July 11, 2002 - A hearing will be held beginning at 8:30 a.m. on July 11, 2002, in Room 412, State Capitol Building, Pierre, South Dakota. The ROC OSS vendors will present testimony on the ROC OSS test. The following vendors will be giving presentations: MTG - Denise Anderson and Marie Bakunas; KPMG - Mike Weeks and Joe Dellatorre; and HP - Geoff May, Liz Gragert, and Don Petry. All parties will be allowed an opportunity for cross-examination. Following that testimony, all parties will be allowed the opportunity to present additional testimony, which will also be subject to cross-examination. The Commission is scheduling only one day for this hearing. If necessary, the hearing may extend into the evening hours;

July 22, 2002 - Qwest may file a post-hearing brief concerning issues related to the ROC OSS test;

August 5, 2002 - Staff and Intervenors may file a post-hearing brief concerning issues related to the ROC OSS test; and

August 12, 2002 - Qwest may file a rebuttal brief.

On June 25, 2002, the Commission received Qwest's Motion to Amend the Scheduling Order for Review of the ROC OSS Test. Qwest stated that it did not anticipate a need to file a post-hearing brief and requested that Staff and Intervenors file a post-hearing brief on or before July 22, 2002, and Qwest file a rebuttal brief on or before July 29, 2002. No parties objected to the motion to amend and the Commission amended the procedural schedule accordingly.

Prior to the hearing, comments were submitted by Commission Staff, Qwest, and AT&T. The hearing on the ROC OSS test was held as scheduled on July 11, 2002. Testimony on the ROC OSS test was given by the consultants involved in the ROC OSS test. Denise Anderson and Marie Bakunas testified on behalf of Maxim Telecommunications Group Consulting ("MTG"), which acted

as the Project Manager. Michael Weeks and Joe Dellatorre testified on behalf of KPMG Consulting ("KPMG"). KPMG prepared the test plan and the final report evaluating the results of the test. Don Petry and Geoff May testified on behalf of Hewlett-Packard Consulting ("HPC") which generated test transactions through the creation of a pseudo-CLEC. None of the parties submitted briefs following the hearing.

On September 30, 2002, the Commission received Qwest's Request for Acceptance of PO-20 for inclusion in the QPAP. Qwest requested that the Commission approve Qwest's proposed PO-20 performance measurement and payment scheme for inclusion in its QPAP. Qwest stated that its proposed PID "measures Qwest's performance in accurately processing manual service orders and is designed as a 95% benchmark measure with payments for non-compliance made to the states." On October 10, 2002, the Commission received AT&T and WorldCom, Inc.'s Comments on Qwest's Proposed PO-20 Measurement. AT&T and WorldCom opposed Qwest's request, stating that the PO-20 PID should be developed through a collaborative process and asserting that the proposed PID contained significant flaws. On October 16, 2002, the Commission received AT&T's Notice of Supplemental Authority Regarding PO-20. At its October 17, 2002, meeting, the Commission considered Qwest's request for acceptance of the PID. After listening to the arguments of the parties, the Commission deferred action on the request. At its November 20, 2002, meeting, the Commission again considered the request. The Commission voted to accept PO-20 on an interim basis. The Commission finds that acceptance of PO-20 on an interim basis does not eliminate the opportunity to make changes to this PID during the six-month review or through the collaborative process.

OPERATIONAL SUPPORT SYSTEMS

FCC Standards

Section 271(c)(2)(B)(ii) requires Qwest to provide to other telecommunications carriers "[n]ondiscriminatory access to network elements in accordance with the requirements of sections 251(c)(3) and 252(d)(1)." The FCC set forth a minimum list of unbundled network elements that incumbent LECs must provide to competing carriers on an unbundled basis. The list includes operations support systems. See 47 C.F.R. § 51.319.

The FCC has determined that:

For OSS functions that are analogous to those that a BOC provides to itself, its customers or its affiliates, the nondiscrimination standard requires the BOC to offer requesting carriers access that is equivalent in terms of quality, accuracy, and timeliness. The BOC must provide access that permits competing carriers to perform these functions in "substantially the same time and manner as the BOC. . . ."

For OSS functions that have no retail analogue, the BOC must offer access "sufficient to allow an efficient competitor a meaningful opportunity to compete." In assessing whether the quality of access affords an efficient competitor a meaningful opportunity to compete, we will examine, in the first instance, whether specific performance standards exist for those functions. In particular we will consider whether appropriate standards for measuring OSS performance have been adopted by the relevant state commission or agreed upon by the BOC in an interconnection agreement or during the implementation of such an agreement. If such performance standards exist, we will evaluate whether the BOC's performance is sufficient to allow an efficient competitor a meaningful opportunity to compete.

Bell Atlantic New York Order, at ¶¶ 85, 86 (citations omitted).

In evaluating each OSS function, the FCC uses a two-step approach. *Id.* at 87. The FCC first looks to "whether the BOC has deployed the necessary systems and personnel to provide sufficient access to each of the necessary OSS functions and whether the BOC is adequately assisting competing carriers to understand how to implement and use all of the OSS functions available to them." *Id.* (citations omitted). Under this inquiry, the "BOC must demonstrate that it has developed sufficient electronic (for functions that the BOC accesses electronically) and manual interfaces to allow competing carriers equivalent access to all of the necessary OSS functions." *Id.* at 88 (citations omitted). Under the second step, the FCC assesses "whether the OSS functions that the BOC has deployed are operationally ready, as a practical matter." *Id.* at 87 (citations omitted). The FCC reviews:

performance measurements and other evidence of commercial readiness to ascertain whether the BOC's OSS is handling current demand and will be able to handle reasonably foreseeable demand volumes. The most probative evidence that OSS functions are operationally ready is actual commercial usage. Absent data on commercial usage, the Commission will consider the results of carrier-to-carrier testing, independent third-party testing, and internal testing in assessing the commercial readiness of a BOC's OSS.

Id. at 89 (citations omitted). The FCC requires a BOC to provide CLECs with access to five OSS functions: pre-ordering, ordering, provisioning, maintenance and repair, and billing. *Georgia/Louisiana 271 Order*, Appendix D, at ¶¶ 33-39. In addition, the FCC requires a BOC to provide an adequate change management process ("CMP").

The FCC has established the following criteria that it uses to evaluate a BOC's CMP:

(1) that information relating to the change management process is clearly organized and readily accessible to competing carriers; (2) that competing carriers had substantial input in the design and continued operation of the change management process; (3) that the change management plan defines a procedure for the timely resolution of change management disputes; (4) the availability of a stable testing environment that mirrors production; and (5) the efficacy of the documentation the BOC makes available for the purpose of building an electronic gateway.

Id. at ¶ 40. In addition, the FCC looks to whether the BOC is adequately assisting competing carriers to use available OSS functions and whether the BOC has adhered to the change management process over time. *Id.* at ¶ 40.

ROC OSS Process

The South Dakota Commission, as a member of the Regional Oversight Committee joined 12 other states in a collaborative process to design a plan that would test whether CLECs are being provided with nondiscriminatory access to Qwest's OSS. The ROC hired MTG to act as project manager. Hearing Transcript for July 11, 2002, at 5. The ROC technical advisory group ("TAG") served as the primary forum for developing the test and was comprised of CLECs, industry associations, the ROC Steering Committee, Qwest, and the vendors. *Id.* at 10-11. ROC retained KPMG to serve as test administrator. Qwest Exhibit 88 at 8. KPMG defined test criteria and expected test results and evaluated Qwest's performance against the expected results. *Id.* KPMG

developed a Master Test Plan ("MTP"). *Id.* The first version was finalized on November 17, 2000. *Id.* at 9. The MTP was subject to numerous changes and the final MTP version, version 5.2, was issued on April 9, 2002. *Id.* at 9. The MTP used transaction-based testing and operational analysis testing. Staff Exhibit 7 at 5. HPC, acting as the pseudo-CLEC, was involved in the transaction-based testing which "involved the submission of orders that replicated the content of orders CLECs would submit as they gained customers." *Id.* Operational analysis testing involved observation of Qwest's business processes, review of the documents used in those processes, and review of the actions of the Qwest personnel charged with implementing the processes. *Id.*

The TAG agreed to a set of measurement definitions, named Performance Indicator Definitions ("PIDs"), which describe the manner in which Qwest's performance is measured. Qwest Exhibit 88 at 9. The PIDs currently contain 53 measures and more than 700 submeasures. *Id.* at 10, *fn.* 17. The PIDs measure whether there is parity between retail and wholesale, or whether benchmarks are met. Hearing Transcript for July 11, 2002, at 21. There were also a number of diagnostic measures which report Qwest's performance data, but do not establish a standard. *Id.* at 24. The Liberty Consulting Group was hired to conduct an audit of the PIDS developed by the TAG to ensure that Qwest was accurately measuring and recording its commercial data and to ensure that the PIDS measured were accurate. Qwest Exhibit 88 at 8.

Before a test was started, criteria were established to determine whether the results satisfied a measurement. Hearing Transcript for July 11, 2002, at 8. KPMG assigned one of four outcomes to a performance measurement: satisfied, not satisfied, unable to determine, and diagnostic. Staff Exhibit 7 at 7. If there was a problem or question, a vendor was able to write an Observation or an Exception. *Id.* Most of the Observations or Exceptions were resolved by Qwest improving its performance or revising its procedures. *Id.* However, Qwest could elect to close an Observation or Exception as unresolved. *Id.*

The following evaluations were included in the ROC test: (1) Pre-ordering, Ordering, and Provisioning Functional Evaluation; (2) Order Flow-Through Evaluation; (3) Pre-ordering, Ordering, and Provisioning Volume Performance Test; (4) Maintenance and Repair Functionality and End-to-End Trouble Report Processing Tests, including a Maintenance and Repair Volume Test; (5) Billing Usage and Carrier Bill Functionality Test; (6) CLEC Support Processes and Procedures Review; (7) Change Management Test; and (8) Performance Measure Audit. Qwest Exhibit 88 at 15.

Qwest's Position

Qwest explained that the ROC/OSS Test contained 711 evaluation criteria. Qwest Exhibit 88 at 20. Of the 711 criteria, 684 had defined success criteria and 27 were labeled as diagnostic. *Id.* Of the 684 non-diagnostic criteria, Qwest satisfied 645. *Id.* Qwest was assigned a "not satisfied" result for 11 criteria, an "unable to determine" result for 25 criteria, and the remaining three were found to be "not applicable." Of almost 500 Observations and Exceptions, only nine Exceptions and one Observation were closed as unresolved, and five Exceptions were closed as inconclusive. *Id.* Qwest asserted that "many of the evaluation criteria designated 'not satisfied,' 'unable to determine' or 'not complete' in the Final Report, and the majority of the closed/unresolved Observations and Exceptions are mitigated by Qwest's commercial performance and other evidence." *Id.* at 21. Qwest further maintained that "none of the handful of unsatisfied evaluation criteria or closed/unresolved Observations and Exceptions have any significant impact on a CLEC's ability to provide service. These few items in no way diminish the conclusion that follows from the totality of the evidence, including Qwest's overall test performance and strong commercial performance results, that Qwest has satisfied its OSS-related Section 271 obligations." *Id.* at 21-22.

With respect to pre-ordering, Qwest stated that pre-ordering allows a CLEC to obtain and verify information in advance of submitting an order, on a real time basis. *Id.* at 22. Test 12 (in part) and Test 12.7 assessed Qwest's pre-ordering performance. *Id.* Qwest stated it satisfied 37 of 37 non-diagnostic pre-ordering related test criteria. *Id.* at 22-23. Qwest further stated that for the past four months, commercial data demonstrates that Qwest has met or exceeded the PID response time benchmark for each pre-ordering activity. *Id.* at 23.

For ordering, Qwest stated that a CLEC can begin the ordering process by submitted an LSR via IMA-EDI or IMA-GUI, or by faxing the order to a Service Delivery Center. *Id.* at 25. Qwest asserted a CLEC also has two additional electronic interface for ordering via the Access Service Request Process. *Id.* Qwest stated that KPMG evaluated Qwest's ability to process orders in four separate tests: (1) a Functionality Test (part of Test 12); (2) a Manual Order Processing Evaluation (Test 12.8); (3) an Order Flow-Through Evaluation (Test 13); and (4) a Volume Performance Test (Test 15). *Id.* at 26. Test 12 evaluated the accuracy, accessibility, completeness, and timeliness of Qwest's EDI, GUI, and manual ordering interfaces; the clarity of Qwest's ordering documentation; and the timeliness, accuracy, and completeness of Qwest's order responses. *Id.* at 26. Test 12.8 evaluated order handling procedures for manually submitted orders and for orders submitted via EDI or GUI that drop out and require manual handling. *Id.* at 35. Test 13 analyzed the ability of Qwest to flow orders through IMA interfaces without manual intervention. *Id.* at 37. Test 15 evaluated Qwest's systems and processes associated with pre-order and order processes, and validated the performance of the interfaces and systems at future projected transaction volumes. *Id.* Qwest satisfied 88 of 94 non-diagnostic ordering related test criteria, with two criteria labeled "not satisfied" and four labeled "unable to determine." *Id.* at 25. Qwest asserted that the test results provide "compelling evidence that Qwest accommodates and processes CLEC orders accurately and expeditiously." *Id.* at 26.

For provisioning, Qwest stated that the ROC/OSS Test "confirms that Qwest provisions CLEC orders accurately and expeditiously." *Id.* at 39. Qwest explained that KPMG evaluated Qwest's ability to provision orders in three separate tests: (1) a Provisioning Evaluation (Test 14.0); (2) a Provisioning Process Parity Evaluation (Test 14.7); and (3) a Provisioning Coordination Process Evaluation (Test 14.8). *Id.* Test 14 "involved verifying that orders submitted were properly provisioned as requested on the LSR, provisioned as documented in Qwest's internal Methods and Procedures, and that the provisioning was completed on time." *Id.* Test 14.7 was designed to determine the extent to which Qwest's provisioning processes and systems for CLECs operate at parity with Qwest's retail operations. *Id.* at 46. In Test 14.8, KPMG reviewed Qwest's procedures, process, and operation environment used to support coordinated provisioning with CLECs. *Id.* at 47. Qwest noted that it had satisfied 96 of 104 non-diagnostic evaluation criteria. *Id.* at 39.

With respect to maintenance and repair, Qwest stated that a CLEC has three ways to access Qwest's maintenance and repair functionalities: (1) Customer Electronic Maintenance Repair/Repair Call Expert; (2) Electronic Bonding-Trouble Administration; and (3) calling or faxing a Qwest Service Center. *Id.* at 49. The KPMG evaluation of maintenance and repair involved six tests: (1) a CEMR Functional Evaluation (Test 16); (2) a MEDIACC-EB-TA Functional Evaluation (Test 17); (3) an M&R End-to-End Trouble Report Processing (Test 18); (4) an M&R Work Center Support Evaluation (Test 18.7); (5) an End-to-End M&R Process Evaluation (Test 18.8); and (6) a Network Surveillance and Outage Support Evaluation (Test 24.9). *Id.* at 49-50. Test 16 reviewed "the trouble administration functional elements of CEMR, their conformance to documented specifications, and an analysis of its functionality in comparison to Qwest's retail front-end systems." *Id.* at 50. The object of Test 17 was to validate the existence and expected behavior of Qwest's EB-TA gateway functionality. *Id.*

at 52. Test 18 concerned the execution of maintenance and repair test scenarios to evaluate Qwest's performance in making repairs under the conditions of certain wholesale maintenance scenarios. *Id.* at 53. Test 18.7 was described by Qwest as "a comprehensive operational analysis of the work center processes developed by Qwest to respond to CLEC questions, problems and issues pertaining to wholesale trouble reporting and repair operations." *Id.* at 59. The purpose of Test 18.8 was to measure the functional equivalence of the maintenance and repair processing for wholesale and retail trouble reports. *Id.* With Test 24.9, Qwest's process, procedures, and other operational elements associated with Qwest's network surveillance responsibilities were reviewed. *Id.* Qwest stated that the KPMG evaluation demonstrated that Qwest provides CLECs with maintenance and repair functionality in substantially the same time and manner as it provides such functionality to itself. *Id.* at 49.

For billing, Qwest contended that the ROC/OSS test found that "Qwest bills CLECs accurately and expeditiously, and in turn enables CLECs to bill their end-users accurately and expeditiously." *Id.* at 60. Billing was evaluated in five tests: (1) a Billing Usage Functional Evaluation (Test 19); (2) a Carrier Bill Functional Evaluation (Test 20); (3) a Daily Usage Feed Returns, Productions and Distribution Process Evaluation (Test 19.6); (4) a Bill Production and Distribution Process Evaluation (Test 20.7); and (5) an ISC/Billing and Collection Center Evaluation (Test 24.10). *Id.* Test 19 analyzed Qwest's daily message processing, and was designed to ensure that usage record types appear accurately on the Daily Usage Feed ("DUF"). *Id.* at 61. Test 20 evaluated the ability of Qwest to accurately bill usage and monthly recurring charges. *Id.* at 63. Test 19.6 "examined the operational processes and related documentation Qwest uses to create and transmit DUF files, accept DUF returns, and investigate potential errors." *Id.* 61. Test 20.7 evaluated Qwest's operational processes concerning its production and distribution of timely and accurate wholesale bills. *Id.* at 62. With Test 24.10, KPMG examined the process and documentation developed by Qwest to support resellers and CLECs with usage and/or billing related claims, inquiries, problems, and issues. *Id.* at 67. Qwest noted that of 85 evaluation criteria, Qwest satisfied 78 criteria, with seven labeled as "unable to determine." *Id.* at 60.

With respect to CMP, Qwest asserted that its CMP meets the FCC standards. Qwest Exhibit 88 at 71. Qwest stated that it has spent the last eleven months working with CLECs in order to address their concerns with CMP. *Id.* at 71. Qwest contended that the redesign team has reached agreement on all the substantive aspects of the CMP. *Id.* Qwest further stated that it had agreed to an extensive CMP for product and process changes. *Id.* at 73-74. Qwest stated that its overall results for ROC OSS Test 23, the Change Management Evaluation, showed that Qwest had satisfied eleven of the eighteen criteria with seven criteria rated as "unable to determine." *Id.* at 74. Qwest maintained that it provides easily accessible and well-organized information concerning the CMP on its wholesale website. *Id.* at 76. Qwest stated that CLECs have had and will continue to have substantial opportunities for input into the design and operation of the CMP. *Id.* at 78. Further, Qwest claimed that it had developed escalation and dispute resolution jointly with the CLECs. *Id.* at 79. Qwest stated that the escalation procedures apply to all items within the CMP, in addition to issues surrounding the CMP and the administration of the CMP. *Id.* at 79. Qwest asserted that the dispute resolution process contains specific requirements for describing and documenting the dispute. *Id.* at 80.

Qwest declared that it had compiled a strong record of compliance with the redesigned CMP and had instituted training for its personnel to keep them updated on current CMP requirements. *Id.* at 80. Qwest further asserted that it "offers CLECs an extensive array of training and assistance with respect to its OSS" and that the ROC OSS Test results "support the conclusion that Qwest

adequately assists CLECs in their use of available OSS functions and the conclusion that Qwest's EDI documentation provides CLECs with sufficiently detailed interface design specifications." *Id.* at 90, 91.

Qwest stated that it provides CLECs with assistance in developing an EDI interface as follows:

- (1) providing CLECs with a well-documented EDI implementation process and individually working with CLECs via a CLEC-specific IMA-EDI development team;
- (2) making available detailed interface design specifications and other documentation;
- and (3) working collectively with CLECs on EDI development through the change management process.

Id. at 96. As of June 1, 2002, Qwest stated that 31 CLECs have been certified to use Qwest's EDI and one CLEC is in the process of certification. *Id.* at 97.

Qwest also contended that it makes available a stable testing environment that mirrors production. *Id.* at 99. Qwest said that it provides two alternative testing environments to CLECs -- its stand-alone test environment ("SATE") and its Interoperability environment. *Id.* Qwest explained that "SATE provides a CLEC with the ability to learn how Qwest's IMA-EDI functions work and the ability to test its interface in a test environment that returns pre-defined test scenarios that mimic production responses." *Id.* at 102-103. Qwest's Interoperability environment "validates transactions against actual production data using real production legacy systems to validate the data for pre-order and order transactions, including validation of account data." *Id.* at 101. Qwest stated that seven individual CLECs, as well as five CLECs represented by service bureaus, have successfully completed testing using SATE. *Id.* at 108. Qwest asserted that 26 CLECs have tested through the interoperability environment and have achieved production status. *Id.* at 109.

Disputed Issues Regarding Pre-Ordering, Ordering and Provisioning¹

1. Manual Processing of Orders

AT&T's Position

AT&T contended that Qwest was manually handling an excessive number of orders. AT&T Exhibit 15 at 2. AT&T stated that this manual handling of orders led KPMG to find "that there were excessive amounts of human errors being made by Qwest personnel as they processed CLEC orders." *Id.* at 3. AT&T described how KPMG handled this finding and concluded that KPMG mistakenly decided not to retest, but to instead review Qwest documentation and interview and

¹ The Commission notes that FiberCom submitted prefiled testimony that raised some issues regarding OSS but FiberCom chose not to put the testimony into the record. In addition, the Commission points out that Staff discussed other issues that were not brought up by AT&T, which had received an "unable to determine" finding. See generally Staff Exhibit 7. The majority of these issues received an "unable to determine" conclusion because of low volumes or because the activities were embedded in automated, as opposed to manual, processes. *Id.* Staff did not find that any of these remaining issues required denial of section 271 approval. *Id.* The Commission does not discuss these issues separately, but, instead, notes that for all of these issues, the Commission may seek to review them in the six-month review process.

observe Qwest employees. *Id.* at 5. AT&T asserted that this approach resulted in the erroneous decision to close Observation 3086. *Id.* In addition, AT&T noted that KPMG did retesting associated with Exception 3120 and found that for 76 manually handled orders, there were 12 instances of human errors resulting in an error rate of 15.8%. *Id.* at 7. KPMG determined that this was a limited review and assigned an "unable to determine" finding to this Exception. *Id.* at 8. AT&T contended that this should have resulted in a "not satisfied" result. *Id.*

AT&T stated that the human error in Qwest's manual processing of CLEC orders affects the PIDs for OP-3 Commitments Met, OP-4 Installation Interval, and OP-6 Delayed Days. *Id.* at 9, 12. AT&T contended that KPMG's "retest data for Exception 3120 as well as other historical retest data caused such concern to KPMG Consulting that it could not find that Qwest had satisfied the test evaluation criteria 12-11-4 and 14-1-44." AT&T concluded that "[u]ntil Qwest has demonstrated to the satisfaction of KPMG Consulting that its performance measurement results for manually processed orders are accurate and reliable, this Commission should not rely upon Qwest's reported performance results for performance measurements OP-3, OP-4, and OP-6." *Id.* at 11-12.

Staff's Position

Regarding Evaluation Criterion 12-11-4 (measurement of preorder/order test results for HPC transactions consistent with KPMG/HPC's measurement), Commission Staff noted that "[d]ue to human error issues identified in Exception 3120 and Observation 3110 regarding manual processing of data intended for use in PID reporting, KPMG identified a need for additional retesting. Qwest elected not to perform additional testing, so KPMG [was] unable to reach a conclusion." Staff Exhibit 7 at 20. Staff concluded that KPMG's finding does not require the Commission to withhold section 271 approval. *Id.* Similarly, for Evaluation Criterion 12.8-2 (which determined whether procedures for electronically submitted non-flow-through orders are defined, documented, and followed), Staff did not believe that the "unable to determine" finding required the Commission to withhold section 271 approval. *Id.*

For Evaluation Criterion 14-1-44 (Qwest's measurement of ordering and provisioning test results for HPC transactions consistent with KPMG/HPC measurement), Staff noted that the problems KPMG initially identified with flow-through orders and measurement were resolved with the aid of retesting. *Id.* at 22-23. However, Staff noted that Qwest had declined to conduct any additional retesting. *Id.* at 23. Staff concluded that "Qwest should continue to inform the Commission concerning its handling of non-flow through orders in South Dakota" but Staff did not believe that KPMG's "unable to determine" finding should cause the Commission to withhold approval. *Id.*

Qwest's Position

With respect to Evaluation Criterion 12-11-4, Qwest asserted that it believes the number of human errors are within a reasonable tolerance level. Qwest Exhibit 88 at 32. Qwest also stated that it has "instituted an extensive quality assurance program, including reviews of manually typed orders that validate the date fields on the orders." *Id.* at 32-33. Qwest contended that it is providing additional employee training and has implemented system enhancements to improve order processing. *Id.* at 33. In addition Qwest stated that it is developing a new PID, PO-20, to measure manual service order accuracy. *Id.* Qwest hoped to begin voluntary manual reporting of this measure with June results reported in July. *Id.* at 34.

Regarding Evaluation Criterion 12.8-2, Qwest asserted that it had satisfactorily addressed all of KPMG issues relating to its test and that KPMG had "determined through additional evaluation and monitoring that Qwest's training, continuous improvement measures, and new quality initiative adequately address the identified issues." *Id.* at 36. Qwest asserted that "limited manual order processing errors" had led to label this Evaluation Criterion as "unable to determine." *Id.* at 36. Qwest stated that for the same reasons listed for Evaluation Criterion 12-11-4 and Observation 3110, the "unable to determine" finding should not impact the Commission finding that Qwest satisfies the section 271 requirements. *Id.* at 36-37.

With respect to Evaluation Criterion 14-1-44 and Exception 3120, Qwest stated that "KPMG was unable to determine whether Qwest satisfied this criterion because, while KPMG acknowledged that all system issues had been resolved, it had not had the opportunity to definitively determine the impact of manual processing errors, as discussed above, regarding Evaluation Criterion 12-11-4." *Id.* at 46. Qwest stated that this finding, in addition to other findings for Test 14, do not diminish Qwest's overall strong performance in Test 14. *Id.*

Commission's Finding

The Commission first notes that the Department of Justice, in its evaluation of Qwest's application for section 271 authorization for the states of Colorado, Idaho, Iowa, Nebraska, and North Dakota, also expressed concerns regarding Qwest's manual handling of orders. *In the Matter of Application by Qwest Communications International, Inc. for Authorization to Provide In-Region, InterLATA Services in the States of Colorado, Idaho, Iowa, Nebraska, and North Dakota*, WC Docket No. 01-148, Evaluation of the United States Department of Justice, dated July 23, 2002, at 16-22. The DOJ found that "a large quantity of electronically submitted orders are being manually handled by Qwest; however, in determining the adequacy of Qwest's OSS, the quality of the manual handling is more important than the quantity of orders manually handled." *Id.* at 17. The DOJ noted that KPMG had noticed errors on manually handled orders after reviewing and verifying information regarding Qwest's training and monitoring. *Id.* at 21. KPMG then reviewed its data on manually handled orders and found that some 15% had been erroneously handled. *Id.* Due to the small sample size, KPMG requested additional retesting, which Qwest elected not to do. *Id.* The DOJ concluded:

The lack of regularly reported commercial data on manual accuracy renders the record incomplete. The Department believes that this is a serious issue, particularly given the expert tester's carefully expressed concerns. But for the concerns expressed by KPMG at the close of the test, the positive results on the underlying test criteria would appear to support a finding that Qwest proved the overall adequacy of its processes. Since filing its application, Qwest has submitted substantial evidence regarding its own internal tracking of manual order accuracy, and, if reliable, this data could support a finding that Qwest's processes are sufficient to permit CLECs a meaningful opportunity to compete. The Department agrees with KPMG's assessment that further measures are necessary to permit continued monitoring, recognizes Qwest's willingness to implement a new performance measure and make available information on internal manual accuracy tracking, and believes this monitoring should be implemented promptly to ensure that Qwest continues to maintain the requisite accuracy of manual handling.

Id. at 22 (footnotes omitted).

The Commission notes that Qwest is attempting to respond to these issues by instituting additional employee training and implementing system enhancements. Further, as stated by Qwest, a new PID, PO-20, has been implemented by Qwest in an attempt to address concerns raised by DOJ, as well as others. At its November 20, 2002, meeting, the Commission accepted Qwest's proposed PID on an interim basis. The Commission further notes that Qwest began reporting the results of its new PID, PO-20, in its June of 2002, performance results. For Manual Service Order Accuracy (Benchmark), Qwest's percentage was 90.25%. This is below the benchmark of 95% as proposed in PO-20. For Manual Service Order Accuracy (Diagnostic), Qwest's percentage was 95.45%. The Commission points out that there is only one month of performance data, which is not enough to draw a definitive conclusion on Qwest's performance. The Commission finds that Qwest's performance regarding manual handling of orders must continue to be reviewed. The Commission further finds that the six-month review presents a good opportunity for the Commission, and other interested parties, to revisit these issues surrounding the manual handling of orders. The Commission will then be able to review the results over a longer period of time and CLECs will have another opportunity to present any problems they continue to have in this area.

2. Jeopardy Notices

AT&T's Position

AT&T noted that Qwest had received a "not satisfied" for two jeopardy notice Evaluation Criteria: 1) Evaluation Criterion 12-9-4 which measures whether Qwest systems or representatives provide timely jeopardy notices for resale products and services; and (2) Evaluation Criterion 12-9-5 which measures whether Qwest systems or representatives provide timely jeopardy notices for UNE-P. AT&T Exhibit 15 at 13. These measurements track the percent of time that Qwest provides a jeopardy notice when Qwest misses a committed due date. *Id.* AT&T stated that these failures demonstrate that Qwest has failed to meet its checklist item 2 obligations. *Id.*

Staff's Position

Staff pointed out that for both of these measures, the order volumes were quite low. Staff Exhibit 7 at 9-11. For example, for Evaluation Criterion 12-9-4, there were only eight missed resale orders for all of Qwest's regions. *Id.* at 9. No jeopardy notices were issued so the success rate was 0%. *Id.* Similarly, for Evaluation Criterion 12-9-5, there were 11 missed UNE-P orders for which no jeopardy notice was received. *Id.* at 10. Staff concluded that given these low volumes, the "not satisfied" ratings were not enough to withhold section 271 approval. *Id.* at 10-11. Staff stated that if the Commission had concerns, it could use the six-month review to review Qwest's performance for these two measurements. *Id.*

Qwest's Position

Qwest asserted that the Commission should look at Qwest's commercial performance results concerning these criteria. Qwest Exhibit 88 at 28. For Evaluation Criterion 12-9-4, jeopardy notices for resale, Qwest stated that for each of the past twelve months where data exists, Qwest is "providing jeopardy notifications at parity with retail, in terms of the percentage of late orders for which jeopardy notifications were provided." *Id.* at 29. With respect to Evaluation Criterion 12-9-5 (provision of timely jeopardy notices for UNE-P products and services), Qwest stated that its commercial performance data showed that Qwest met the parity standard for the last twelve months where data exists. *Id.* at 30. Qwest also noted that "[t]he low number of jeopardies overall is a positive result and demonstrates that Qwest has focused its efforts on meeting its installation commitments. . . ." *Id.*

Commission's Finding

The Commission notes, that as pointed out by KPMG at the hearing, "[t]he good news is [KPMG] didn't get a lot of jeopardies during the course of this test. But the bad news is, therefore, [KPMG does not] have a lot of record to go on here." Hearing Transcript for July 11, 2002, at 29. KPMG further stated that jeopardy notices present a "Catch -22" for a company. *Id.* at 30. KPMG explained:

If they send out the jeopardy notice and they find out they could actually get the work [done], then they've gotten everybody all upset for nothing. If they don't send a jeopardy notice out on a timely basis, then customers get frustrated because there's missed appointments and they don't have their schedules met and so on.

Id. KPMG further noted that "there are certain products and services that have same day or next day types of provisioning. So there's really not time to get a jeopardy notice out in a meaningful way." *Id.* at 29.

The Commission finds that based on Qwest's commercial performance data and the low volumes of the OSS tests, Qwest's "not satisfied" ratings for these measurements do not raise sufficient concerns to withhold section 271 approval. However, the Commission further finds that it may review these measurements during the six-month review.

3. Provisioning of Unbundled Dark Fiber

AT&T's Position

AT&T noted that Qwest was given a "not satisfied" for Evaluation Criterion 14-1-10, which evaluates whether Qwest technicians follow Qwest methods and procedures when installing dark fiber. AT&T Exhibit 15 at 14. AT&T stated that KPMG had issued Exception 3010 due to Qwest's failure to follow its documented methods and procedures. *Id.* at 15. Upon retest, KPMG found that Qwest followed the documented methods and procedures in 64% of the 50 tasks when observing 10 unbundled fiber circuits. *Id.* AT&T asserted that based on the low level of commercial activity for unbundled dark fiber and KPMG's "not satisfied" finding, "the Commission can comfortably conclude that Qwest is not capable of providing either dark fiber for unbundled loops (Checklist Item 4) or interoffice transport (Checklist Item 5) to CLECs." *Id.* at 16.

Staff's Position

Staff pointed out that due to low commercial volumes, testing was suspended. Staff Exhibit 7 at 11. Staff asserted that "the low demand for Dark Fiber that led to the decision to stop testing for the product means the Not Satisfied conclusion for this performance measurement is not a basis for the Commission withholding Section 271 approval. If the Commission continues to have concerns about this performance measurement, Staff notes that the 6-month review of the QPAP could serve as a reminder to revisit Qwest's performance. The Commission would want to consider whether order volumes were still low for Dark Fiber, as well as Qwest's performance level." *Id.* at 11-12.

Qwest's Position

Qwest stated that given the lack of dark fiber orders, "it is difficult for Qwest to prove through commercial data that it provisions UDF [unbundled dark fiber] in accordance with documented methods and procedures." Qwest Exhibit 88 at 40. Qwest asserted that it has made recent updates to its unbundled dark fiber documentation, and, in May of 2002, it modified its process to accept dark fiber orders via an Access Service Request, and it now provisions and bills unbundled dark fiber through its Integrated Access Billings System. *Id.* at 41.

Commission's Finding

The Commission agrees with Staff and finds that due to the low volumes, Qwest's "not satisfied" rating for this measurement does not raise sufficient concerns to not recommend approval. The Commission further finds that the Commission may review this measurement during the six-month review. At that time, the Commission will better be able to evaluate whether Qwest's recent updates and modifications to its processes have produced acceptable results.

4. Provisioning of Enhanced Extended Links

AT&T's Position

AT&T pointed out that Qwest was given a "not satisfied" rating for Evaluation Criterion 14-1-14 which measures whether Qwest provisions EEL circuits by adhering to documented methods and procedures. AT&T Exhibit 15 at 16. KPMG had issued Exception 3104 and, during the retest, KPMG found Qwest technicians followed the documented methods and procedures in 50% of the 15 tasks. *Id.* at 17. AT&T stated that this performance was worse than KPMG's initial findings where Qwest's compliance was 87%. *Id.* at 16-17. AT&T asserted that the Commission should find that Qwest is not capable of providing EELs to CLECs. *Id.* at 18.

Staff's Position

Commission Staff noted that the TAG suspended testing because of low commercial volume. Staff Exhibit 7 at 12. As with dark fiber, Staff concluded that since low demand led to the decision to stop testing, the conclusion of "not satisfied" is not a basis for the Commission withholding section 271 approval. *Id.* Again, Staff noted that the Commission could review Qwest's performance in the 6-month review. *Id.*

Qwest's Position

Qwest stated that it had updated documentation on EELs which KPMG evaluated and found satisfactory. Qwest Exhibit 88 at 41. Qwest asserted that "[b]ecause Qwest has repeatedly shown that it is capable of following documented methods and procedures in other contexts, this Commission can reasonably infer that Qwest is equipped to provision EELs on a timely, non-discriminatory basis." *Id.* at 41-42.

Commission's Finding

The Commission agrees with Staff and finds that due to the low volumes, Qwest's "not satisfied" rating for this measurement does not raise sufficient concerns to not recommend approval. The Commission further finds that the Commission may review this measurement during the six-month review.

6. Provision of UNE-P and Business Resale Services

AT&T's Position

AT&T stated that KPMG found "that Qwest was provisioning UNE-P services and business resale services, where the installation did not require a dispatch, in a discriminatory manner." AT&T Exhibit 15 at 18. AT&T stated that KPMG found Qwest was installing UNE-P services in about three days and Qwest was installing the equivalent retail service in about two days." *Id.* AT&T asserted that Qwest's failure of these ROC tests allow the Commission to conclude that Qwest has failed to demonstrate compliance with checklist item 2 for provisioning UNE-P services and checklist item 14 for business resale services. *Id.*

Staff's Position

Commission Staff noted that the installation interval for resold business POTS is parity with retail service. Staff Exhibit 7 at 13. Staff stated that Qwest failed to meet the standard in the Eastern and Western regions resulting in the issuance of Exception 3086. *Id.* Upon retesting, Qwest continued to fail in the Eastern region, and Exception 3086 was subsequently closed as resolved as requested by Qwest. *Id.* Staff pointed out that, for this measurement, there was no problem with the size of the sample used for the test and no reason to question the validity of the test. *Id.* Since Qwest stated that it has revised its processes, Staff recommended that the Commission look at recent commercial performance data for this measurement. *Id.* at 13-14. Staff concluded that "[i]f the commercial performance data clearly indicates Qwest does not satisfy the evaluation criterion, the Commission should consider additional tracking and reporting requirements for Qwest, particularly if there are other test items where it does not find Qwest's performance is satisfactory. If the Commission continues to have concerns about this performance measurement, Staff notes that the 6-month review of the QPAP could serve as a reminder to revisit Qwest's performance." *Id.* at 14.

For Evaluation Criterion 14-1-36 (which measures whether the installation interval for UNE-P is at parity with retail), Qwest failed to meet the standard for all three regions in the initial test as well as the retest. *Id.* at 14. Staff gave the same recommendation as above.

Qwest's Position

Qwest stated that the commercial performance results for business POTS shows that Qwest has satisfied the parity standard in each of the last three months. Qwest Exhibit 88 at 42. For UNE-P POTS, Qwest stated it satisfied the parity standard in each of the past four months. *Id.*

Commission's Finding

The Commission notes that, based on Qwest's most recent commercial performance data, Qwest has appeared to have improved its provisioning of UNE-P and business resale. However, the Commission finds that these are important criteria that should continue to be evaluated. The Commission will review Qwest's performance data at the six-month review to ensure that it continues to satisfy the parity standards.

Disputed Issues Regarding Maintenance and Repair

1. Provision of Timely Responses to CLEC Requests to Modify a Trouble Report

AT&T's Position

AT&T pointed out that Qwest received a "not satisfied" for Evaluation Criterion 16-3-5, which measures whether "modify trouble report transactions" are processed within the guidelines established by the benchmark. AT&T Exhibit 15 at 19. In response to the exception issued by KPMG, Exception 3107, Qwest requested that the Exception be closed as unresolved. *Id.* at 20. Subsequently, Qwest performed three internal retests on its own. *Id.* AT&T noted that KPMG did not accept Qwest's three internally administered tests because that approach was inconsistent with methodology set forth by the ROC TAG and there were no provisions in the MTP for consideration of a Qwest-administered test. *Id.* at 19-20. AT&T stated that "[t]he Commission should be suspicious of Qwest's internally produced data given that Qwest had the opportunity for KPMG Consulting to conduct an independent retest and declined to pursue the option that would have produced more trustworthy results." *Id.* at 20.

Staff's Position

Staff said this finding does not, on its own, constitute grounds for withholding section 271 approval. Staff Exhibit 7 at 16.

Qwest's Position

Qwest noted that the transactions averaged 27 seconds, rather than the 24 second benchmark. Qwest Exhibit 88 at 50. Further, Qwest asserted that its internal tests showed that it met the 24 second benchmark. *Id.* at 51. In addition Qwest stated that all non-designed edit transactions accounted for only 0.3%, on average, of actual CLEC transaction volumes for the most recent six-month period. *Id.* Qwest asserted that the very low volume of non-design edit transactions combined with a mere three second delay for one test transaction at peak load makes it extremely unlikely that this would have a material impact on a CLEC in a commercial setting. *Id.* at 52.

Commission's Finding

At the hearing, KPMG stated that it did not have an opinion on Qwest's independent testing because KPMG did not examine it. Hearing Transcript for July 11, 2002, at 76. KPMG stated that "There were 13 different performance evaluation criteria that had to do with CEMR interface during the volume test. Qwest passed all of the 13 evaluation criteria during the normal volume test and 12 out of 13 of the evaluation criteria during the peak test." *Id.* at 75. KPMG further asserted that this failure should not receive much weight because it occurred during peak volumes, it was for a particular type of transaction that is not frequently used, and the amount by which it missed the benchmark was not very large. *Id.* at 128-29. It was KPMG's overall opinion that the record for maintenance and repair demonstrated that Qwest has the necessary mechanisms in place to manage and monitor its maintenance and repair transactions and that they all fundamentally work. *Id.* at 85.

The Commission agrees with KPMG's analysis that the "not satisfied" rating for this Evaluation Criterion should not be afforded much weight. The Commission finds that failing one of

13 criteria, with that failure occurring during a peak test, does not translate into a finding that Qwest's maintenance and repair systems are deficient.

Quality of Qwest's Repair Records

AT&T's Position

AT&T noted that Qwest received a "not satisfied" rating for Evaluation Criterion 18-6-1, which determines whether close out codes for out-of-service and service affecting wholesale UNE-P, resale, and Centrox 21 troubles indicated in Qwest's systems, that may or may not require the dispatch of a technician, are consistent with the troubles placed on the line. AT&T Exhibit 15 at 20. Or, in other words, whether Qwest was accurately assigning disposition and cause codes to CLEC trouble reports. *Id.* AT&T stated that Qwest did not meet the benchmark in the initial test, and, in the retest, Qwest incorrectly applied codes on over 11% of the trouble reports. *Id.* at 21. AT&T concluded that "[w]hile Qwest recognized the problem and asserted that it had implemented a solution, Qwest chose to have Exception 3055 closed as unresolved rather than subject itself to the rigor of a KPMG Consulting retest." *Id.* at 22.

Staff's Position

Staff said this finding does not, on its own, constitute grounds for withholding section 271 approval. Staff Exhibit 7 at 16. Again, Staff noted that the Commission could review Qwest's performance in the 6-month review. *Id.*

Qwest's Position

Qwest stated that "as a practical matter, Qwest's performance during the retest would not in any way have negatively impacted an actual CLEC's ability to do business, based on the close-out codes used by Qwest." Qwest Exhibit 88 at 54. Qwest explained that a close out code consists of four digits, with the first two digits identifying whether the trouble was a Qwest issue or a CLEC issue and the second two digits identifying the group or equipment component. *Id.* Qwest asserted that the last two digits have no significance for CLECs since trouble tickets contain a narrative field that often describes the trouble with greater specificity as compared to the close out codes. *Id.* Qwest contended that if KPMG had relied on the narrative field, instead of the code numbers, Qwest would have achieved a 95.08% result. *Id.* at 55. In addition, Qwest stated that it has implemented additional training and a weekly internal audit indicating that the additional training has improved Qwest's close out codes accuracy. *Id.*

Commission's Finding

At the hearing, KPMG stated that it was not aware of looking at Qwest's additional training and weekly internal audit. Hearing Transcript for July 11, 2002, at 79. From its perspective, KPMG stated that it is either coded correctly or it is not coded correctly. *Id.* KPMG stated that the four digit codes exist for a reason and the codes are useful. *Id.* at 78-79.

Although the Commission does not disagree with KPMG that all four digits are important, the Commission finds that the failure is mitigated somewhat by the fact that the narrative field may also provide the CLEC with the same or possibly superior information. The Commission agrees with Staff and finds that Qwest's "not satisfied" rating for this measurement does not raise sufficient concerns to not recommend approval. However, the Commission may review this measurement during the six-month review.

2 Quality of Maintenance and Repair Activities

AT&T's Position

AT&T pointed out that Qwest had received a "not satisfied" finding for the Evaluation Criterion 18-7-1, which measures whether out-of service and service affecting wholesale UNE-P, resale, and Centrex 21 troubles, that may or may not require the dispatch of a technician, are successfully repaired. AT&T Exhibit 15 at 22. AT&T asserted that "[s]uccessful repair of troubles by Qwest that are found in CLEC services is a critical element in the satisfaction of a CLEC's customers. A failure by Qwest to repair the service on the first attempt will necessitate a second visit to the customer and will likely reduce the level of customer satisfaction with the CLEC." *Id.*

Staff's Position

Staff noted that of 259 troubles submitted, 92% were successfully repaired. Staff Exhibit 7 at 17. The benchmark is 95%. *Id.* Qwest did not want any additional testing. *Id.* Staff did not believe that the "not satisfied" finding for this Evaluation Criterion was, by itself, grounds for withholding section 271 approval. *Id.*

Qwest's Position

Qwest disagreed with KPMG's assignment of a 95% benchmark. Qwest Exhibit 88 at 57. KPMG should have looked at PID MR-7 which, Qwest asserted, "measures precisely the performance that KPMG purported to evaluate under criterion 18-7-1. . . ." *Id.* Qwest stated that its "overall performance under MR-7's parity standard has generally been very good. Qwest has satisfied the parity standard with very few failures in the past twelve months." *Id.* at 58.

Commission's Position

At the hearing, KPMG stated that this criterion did not give KPMG a great deal of concern because the primary objective is to get the customer back into service. Hearing Transcript for July 11, 2002, at 130. KPMG explained that the description of the repair that was recorded in the system by Qwest did not match what the description should have been, but that the customer was back in service. *Id.* at 129. KPMG stated that this could be characterized as "all's well that ends well. . . ." *Id.*

The Commission takes no position on whether KPMG correctly assigned a benchmark to this criterion. Instead, the Commission finds that, based on KPMG's description of this criterion, Qwest's failure to satisfy this criterion does not appear to have much of an affect on a CLEC's ability to provide service. Obviously, the most important aspect is whether the customer is back in service.

Disputed Issues Regarding Billing

1. Daily Usage Feed Returns, Production, and Distribution Process Evaluation

AT&T's Position

AT&T noted that during the testing of Qwest's ability to transmit complete and accurate DUFs to CLECs, Qwest failed the test five consecutive times. AT&T Exhibit 15 at 23. Qwest passed on the sixth test. *Id.* AT&T asserted that "[t]he fact that Qwest failed, on five separate occasions,

to provide complete and accurate DUF records to the pseudo-CLEC speaks very poorly of the processes that Qwest uses to produce and distribute those records." *Id.* AT&T further contended that the only apparent way Qwest was able to identify that it even had problems was through the OSS retesting. *Id.* AT&T noted that KPMG had found only two "unable to determine" results for the DUF return process. *Id.* at 24. AT&T contended that KPMG should have factored in the retest test failures. *Id.* at 25. AT&T concluded that Qwest should have been given "not satisfied" ratings for evaluation criteria 19.6-1-1, 19.6-1-4, 19.6-1-5, and 19.6-1-6. *Id.* at 25-26.

Staff's Position

Staff did not address the retesting but did address the "unable to determine" results for criteria 19.6-1-17 and 19.6-1-19. Staff Exhibit 7 at 24-25. For Evaluation Criterion 19.6-1-17 (which involves where a DUF is corrected and returned on a defined schedule), Staff asserted that CLECs typically do not ask for DUFs to be corrected and returned, but instead ask for a new DUF. *Id.* at 24. Given that CLECs do not follow the "correct and return" procedure, Staff concluded that the Commission did not need to give the "unable to determine" finding any weight. *Id.* at 24. Staff came to the same conclusion for Evaluation Criterion 19.6-1-19, which measures whether CLECs can readily obtain the status of a DUF return request.

Qwest's Position

Qwest also noted that for criteria 19.6-1-17 and 19.6-1-19, KPMG found that no CLECs subscribe to this automated process so KPMG could not evaluate these criteria. Qwest Exhibit 88 at 62.

Commission's Finding

At the hearing, KPMG confirmed that the reason for the "unable to determine" findings is "that there is a defined process for returning DUF files that is not used by any of the commercial CLECs." Hearing Transcript for July 11, 2002, at 82. Thus, with respect to criteria 19.6-1-17 and 19.6-1-19, the Commission finds that the "unable to determine" findings are not significant given that CLECs do not use this process.

With respect to AT&T's contention that the retests should have been factored in and "not satisfied" ratings given to Qwest for evaluation criteria 19.6-1-1, 19.6-1-4, 19.6-1-5, and 19.6-1-6, the Commission first notes that Qwest did pass this test eventually. However, the Commission also recognizes that Qwest's initial failures requires the Commission to treat this area of testing with heightened scrutiny. Thus, the Commission may review Qwest's performance in this area during its six-month review.

Disputed Issues Regarding Change Management Process

1. Adherence to the CMP Over Time

AT&T's Position

AT&T pointed out that Qwest received "unable to determine" findings for criteria 23-1-7, 23-1-8, 23-1-9, 23-2-7, 23-2-8, 23-2-9, and 23-2-2. AT&T Exhibit 15 at 26-27. In its post-hearing brief, AT&T noted that for Exception 3094, which relates to criteria 23-2-8 and 23-2-9, and Exception 3110, which relates to criteria 23-1-7 and 23-1-9, KPMG conducted retesting but was unable to

conclusively verify Qwest's consistent adherence. AT&T's Brief Regarding Qwest's Change Management Process at 5-9. For Exception 3111, which relates to criteria 23-1-8, AT&T noted that KPMG was unable to confirm adherence to a new process for prioritization and packaging of new MA releases. *Id.* at 8. AT&T asserted that these findings show that Qwest is unable to prove it has met the FCC's criteria and adhered to it over time. *Id.* at 27.

Staff's Position

For these measures, Staff stated that since the CMP process was not done, KPMG was not able to reach a conclusion about the adequacy of the CMP. Staff Exhibit 7 at 28. Staff recommended that the Commission ask Qwest for a progress report and an estimate of when the process will be complete. If the Commission determines from that additional evidence presented by Qwest that Qwest has completed or is continuing to progress toward completing the CMP redesign, then the Commission should find that the "unable to determine" findings are not an obstacle to granting section 271 approval. *Id.* at 28-32.

Qwest's Position

Qwest asserted that KPMG issued exceptions regarding these criteria because KPMG was unable to observe Qwest's adherence to the procedures. Qwest Exhibit 88 at 77, 87, 88. Qwest claimed that the new processes are clearly documented. *Id.* Qwest stated that the parties to the redesign process have resolved all of the significant CLEC concerns. *Id.* at 72. Qwest further maintained that it has submitted detailed evidence establishing a six-month record of nearly 99% compliance with the redesigned process. *Id.* at 73. Qwest contended that KPMG's inability to follow Qwest's compliance over a long period of time should not impact a finding that Qwest is in compliance with section 271. *Id.* at 77.

Qwest stated that, with regards to Exception 3094, KPMG conducted limited retesting and the retests showed that Qwest did adhere to the redesigned process during the period KPMG observed. Qwest Corporation's Post-Hearing Reply Brief Regarding Change Management at 4. With respect to Exception 3110, Qwest asserted that in the retest, Qwest complied with the process in each instance. *Id.* at 5. Qwest claimed that it "has complied with 100% of the OSS interface release documentation interval notification deadlines that have occurred thus far." *Id.* at 6. Regarding Exception 3111, Qwest asserted that "KPMG had already observed Qwest's adherence to each phase of the prioritization and packaging processes for major system releases that were in place and agreed to via CMP at the time of executing the process. These observations demonstrated Qwest's compliance with the process." *Id.* at 8.

Commission's Finding

At the hearing, KPMG noted that, for Test 23, many of the "unable to determine" findings were due to the fact that at the time of the final report, the CMP process was still a work in progress." Hearing Transcript for July 11, 2001, at 89. KPMG stated it "had to conclude the test without being able to come to a final conclusion on these particular evaluation criteria." *Id.* at 91. KPMG further asserted that there were "a lot of people working very hard to try to make this change management process a robust one and one that's responsive to the needs of the community as a whole." *Id.*

The Commission finds that KPMG's inability to reach a conclusion on this issue does not require the Commission to find Qwest not in compliance. The Commission instead relies on Qwest's

compliance record with the redesigned CMP and may review these issues in its six-month review.

2. Availability of Stand-Alone Test Environment

AT&T's Position

AT&T noted that Qwest received a "not satisfied" for Evaluation Criterion 24.6-1-8 which measures whether SATE is made available to customers for all supported interfaces. AT&T Exhibit 18 at 27. AT&T asserted that this finding showed that Qwest has not satisfied, in its entirety, the FCC requirements. *Id.* In its post-hearing brief, AT&T asserted that VICKI, Qwest's newer stand-alone test environment, is an important addition to SATE, but it falls short of meeting the mirroring objective. AT&T's Brief Regarding Qwest's Change Management Process at 12. AT&T pointed out that KPMG found that VICKI had some shortcomings. *Id.* at 13-14.

Staff's Position

Staff noted that the specific problems KPMG found were that the SATE transaction responses are manually generated and the environment does not support flow-through transactions. Staff Exhibit 7 at 17. Staff stated that KPMG also identified problems related to adding functionality to SATE. *Id.* Staff concluded that these problems, alone, are not grounds for withholding section 271 approval.

Qwest's Position

Qwest asserted that it addressed the issues raised by KPMG "through the implementation of automated responses (VICKI) in January 2002 and through the implementation of flow-through capability." Qwest Exhibit 88 at 111. Qwest also asserted that the FCC does not require flow-through capability. *Id.* With respect to the issue of adding new IMA products or existing products not currently supported by SATE, Qwest maintained that these concerns have been resolved in the Redesign Process and that CLECs and Qwest have agreed on a process to add products and make other changes to SATE. *Id.* at 112.

Commission's Finding

At the hearing, KPMG explained that Test 24.6 reviews interface development and tests new software releases prior to a public release. Hearing Transcript for July 11, 2002, at 93-94. KPMG stated that this was an important issue but that it had not investigated the changes that had been made since the release of the final report. *Id.* at 130-131.

The Commission notes that there are two PIDs that measure Qwest's stand-alone test environment. One of the PIDs, PO-19B, will "run transactions both in these test environments and turn around and run them into production to make sure that they mirror each other. . . ." Hearing Transcript for July 11, 2002, at 193. The Commission finds that if there continue to be problems after the changes made by Qwest, a party may bring that to the Commission's attention in the six-month review. The Commission finds that the "not satisfied" finding for this criterion is not sufficient for the Commission to find that Qwest has not satisfied section 271 requirements.

3. Availability and Segregation of Carrier-to-Carrier Test Environments

AT&T's Position

AT&T noted that Qwest had received a "not satisfied" finding for Evaluation Criterion 24.6-2-9 which determines whether carrier-to-carrier test environments are available and segregated from Qwest's production and development environments. AT&T Exhibit 15 at 27. AT&T asserted that this finding showed that Qwest has not satisfied, in its entirety, the FCC requirements. *Id.*

Staff's Position

Staff stated that Qwest has a Tester to monitor test transactions and "KPMG found that, due to necessary manual intervention of the Qwest Tester, two non-designed services test trouble reports submitted by a CLEC passed through to the Qwest Production Screeners." *Id.* at 18. Again, Staff concluded that these problems, alone, are not grounds for withholding section 271 approval.

Qwest's Position

Qwest first asserted that "the FCC has not required that BOCs provide CLECs with an electronic interface for maintenance and repair activities in order to obtain Section 271 approval." Qwest Exhibit 99 at 113. In addition, Qwest stated that KPMG issued the Exception "because test scenarios for non-designed services are processed by the Loop Maintenance Operations System (LMOS) production mainframe." *Id.* at 114. Qwest maintained that the use of the LMOS is advantageous to the CLEC because it allows the full functionality of EB-TA to be tested. *Id.* at 115. Qwest further noted that CLECs have successfully tested using EB-TA and the testing of the interface was not impeded when combined with the LMOS production environment. *Id.*

Commission's Finding

At the hearing, KPMG explained that Evaluation Criterion 24.6-2-9 concerns the fact that there is no MEDIACC for the electronic bonding of trouble administration. Hearing Transcript for July 11, 2002 at 95. KPMG noted that very few CLECs use this interface and opined that this is "probably not a significant industry issue unless the industry changes and decides to begin to start implementing this interface on a wide scale basis, which they have not done in the last few years." *Id.* at 95, 115.

The Commission agrees and finds that KPMG's "unable to determine" finding for this measurement does not raise sufficient concerns to withhold section 271 approval.

d. Voting Process

AT&T's Position

In its post-hearing brief, AT&T noted that the CMP document now contains several references to voting. AT&T's Brief Regarding Qwest's Change Management Process at 10. AT&T stated that there are seven items on which CMP participants will vote. *Id.* AT&T stated, however, that there is no agreed upon language for the voting process, and until the parties reach agreement, critical aspects of the CMP cannot be implemented. *Id.*

Qwest's Position

Qwest responded that new voting provisions were finalized on July 10, 2002, and prior to that time, the CMP operated under the existing voting process. Qwest Corporation's Post-Hearing Reply Brief Regarding Change Management at 11. Qwest stated that it "will now implement the new provisions as soon as practicable and the CMP will continue to operate under those provisions." *Id.*

Commission's Position

The Commission finds that since the parties have reached agreement, this issue appears to be resolved.

Diagnostic Measures

The Commission first notes that no party asserted that a particular result for a diagnostic measure showed that Qwest is not meeting its OSS requirements. At the hearing, KPMG stated that "there are a number of these PIDs for which the ongoing process of PID administration is going to make them non-diagnostic to some kind of benchmark or parity standard." Hearing Transcript for July 11, 2002, at 51. KPMG declined to give an opinion on the diagnostic PIDs, reasoning that a benchmark or parity standard should be determined through a collaborative process that affords the parties due process. *Id.* at 51-52. The Commission agrees and finds that diagnostic PIDs may evolve into non-diagnostic PIDs but this should occur within a collaborative process. However, the fact that a measurement may be diagnostic does not prevent a party from contending that Qwest's performance for that measurement should be improved. The Commission will continue to look at the diagnostic PID results in its six-month review.

COMMERCIAL PERFORMANCE DATA

With respect to performance data, the FCC has held that if there are no statistically significant differences between a BOC's provision of service to competing carriers and its own retail customers or if a BOC's provision of service to competing carriers satisfies the performance benchmark, the FCC will generally not look any further. *Verizon/New York 271 Order* at ¶ 58. Even if significant differences in performance exists, the FCC may conclude "that such differences have little or no competitive significance in the marketplace." *Id.* at ¶ 59. The FCC may also look at "how many months a variation in performance has existed and what the trend has been in recent months. A steady improvement in performance over time may provide us with an indication that problems are being resolved." *Id.* The FCC has stated:

The determination of whether a BOC's performance meets the statutory requirements necessarily is a contextual decision based on the totality of the circumstances and information before us. There may be multiple performance measures associated with a particular checklist item, and an apparent disparity in performance for one measure, by itself, may not provide a basis for finding noncompliance with the checklist. Other measures may tell a different story, and provide us with a more complete picture of the quality of service being provided.

Id. at ¶ 60

Qwest asserted that "[v]iewed under the proper legal standard, 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 stated that its performance data is accurate and reliable. The ROC hired Liberty Consulting Group (Liberty) to conduct an audit of Qwest's wholesale performance measures. Hearing Transcript for April 25, 2002, at 8. Liberty issued its final audit report on September 25, 2001. With respect to the audit of Qwest's performance measures, Liberty concluded that "Qwest's wholesale performance measures accurately and reliably reported on their actual performance." *Id.* at 9-10.

In addition to the audit, ROC requested that Liberty conduct a data reconciliation effort. *Id.* at 9. Three CLECs, AT&T, WorldCom, and Covad, participated in the project. *Id.* at 10. During the project, Liberty evaluated approximately 10,000 orders or trouble tickets. *Id.* at 13. Liberty issued 13 Observations and One Exception, all of which were eventually closed. *Id.* at 14. At the conclusion of the data reconciliation project, Liberty found that "Qwest's performance measures accurately and reliably report on their actual performance." *Id.* at 20.

Qwest explained that it tracks and reports its wholesale and retail performance in accordance with the ROC PIDs. Qwest Exhibit 71 at 2. The PIDs use two performance standards: (1) where a retail analogue exists, wholesale performance must be at parity with retail; and (2) where no retail analogue exists, wholesale performance must meet a set benchmark. *Id.* at 2-3. Qwest asserted that its "performance results demonstrate that Qwest is providing every element of the checklist at an acceptable level of quality." *Id.* at 4. Qwest asserted that a review of its commercial performance data "shows that Qwest is making each checklist item available in either substantially the same time and manner or such that an efficient CLEC has a meaningful opportunity to compete." *Id.* at 82-83. Qwest further contended that it is making each checklist item available at an acceptable level of quality. *Id.* at 83.

At the hearing Qwest provided "blue charts" designed to show its level of performance. Qwest provided blue charts for South Dakota and Regional results. See Qwest Exhibits 73, 74. A dark blue box for a measurement indicated that Qwest had zero misses or met the standard in three of the last four months, if the one miss was not in the most recent month. Hearing Transcript for April 25, 2002, at 47. A medium blue box indicated that Qwest had one miss in the last four months, with that miss being the most recent month of data or Qwest had two misses in the last four months. *Id.* A light blue box showed that Qwest missed three of four months. *Id.* at 47-48.

Checklist Item 1

For checklist item 1, interconnection, Qwest's South Dakota Blue Chart contained 11 metrics, with 10 showing Qwest achieved parity in at least three of the last four months. Qwest Exhibit 73 at 2. For collocation, Qwest's Regional Blue Chart showed eight metrics and each metric that had data met the ROC benchmark. *Id.* at 3.

Checklist Item 2

With respect to checklist item 2, unbundled network elements, Qwest showed the results for pre-order information, flow-through, billing, and UNE combinations. *Id.* at 4-9. For pre-order, Qwest's South Dakota Blue Chart contained 57 metrics, showing 52 were at parity in at least three of the last four months, with no data for the remaining five. *Id.* at 5. For flow-through for eligible LERs, Qwest's Regional Blue Chart showed 8 metrics that were all above the ROC benchmark. Qwest Exhibit 74 at 7. For billing, Qwest's South Dakota Blue Chart shows that Qwest achieved the standard for at least three of the last four months for only 4 of 8 metrics. Qwest Exhibit 73 at 8.

Similarly, for the Regional Blue Chart, the chart shows that Qwest achieved the standard for at least three of the last four months for only 3 of 8 metrics. Qwest Exhibit 74 at 9. Qwest asserted that it had corrected the problems and that billing accuracy and completeness had increased in the most recent months for BI-3A, BI-4A, PO-7A, and PO-7B. Hearing Transcript for April 25, 2002, at 57. For UNE combinations, the South Dakota Blue Chart showed Qwest attained parity for 50 of the 60 metrics, with 2 measures having no activity. Qwest Exhibit 73 at 9.

In its comments, AT&T pointed out the billing problems experienced by Qwest. AT&T Exhibit 8 at 6-7. AT&T also stated that Qwest was having problems with OP-4, installation interval for UNE-P, and MR-8, trouble rate for UNE-P Centrex. *Id.* at 8.

With respect to billing, the Commission finds that Qwest has continued to experience uneven performance for BI-3A in South Dakota through June of 2002. However, Qwest has improved its performance in the other billing areas. The Commission further finds that Qwest has subsequently improved its performance for the installation interval for UNE-P (OP-4C) in South Dakota as demonstrated by its most recent measurements filed with the Commission which are through June 2002. However, Qwest continues to be unable to reach parity for UNE-P Centrex repair (MR-8, Trouble Rate). In addition, Qwest's performance for trouble rate for UNE-P Centrex 21 repair has declined in the last few months (MR-8, Trouble Rate).

Checklist Item 3

For checklist item 3, access to poles, ducts, conduits, and rights-of-way, there are no performance measures established by ROC. Qwest Exhibit 71 at 40.

Checklist Item 4

With respect to checklist item 4, unbundled loops, Qwest's South Dakota Blue Chart showed that for 40 measurements with activity, Qwest met the performance objective for 38 measurements in at least three of the last four months. Qwest Exhibit 73 at 10-12.

Checklist Item 5

Regarding checklist item 5, unbundled dedicated interoffice transport, the Regional Blue chart shows Qwest met 31 of the 32 measurements in at least three of the last four months. Qwest Exhibit 73 at 14.²

Checklist Item 6

For checklist item 6, unbundled switching, there are no performance measurements for stand-alone unbundled switching. Qwest Exhibit 71 at 66.

Checklist Item 7

With respect to checklist item 7, regarding 911, directory assistance and operator services, Qwest pointed out that most of the measures associated with this checklist item are database

² The South Dakota volumes were too low to adequately demonstrate Qwest's performance. See Qwest Exhibit 73 at 13.

updates and, thus, are parity by design. Qwest Corporation's Opening Post-Hearing Brief on Performance at 23. This means that CLECs obtain non-discriminatory access by definition. *Id.* For the measurements that are not parity by design, Qwest's Regional Blue Chart showed 16 metrics for 911. Qwest Exhibit 74 at 15. For 15 of the 16 metrics, Qwest achieved parity in at least three of the last four months. *Id.*³

Checklist Item 8

For checklist item 8, white pages directory listings, the PIDs are parity by design. Qwest Corporation's Opening Post-Hearing Brief on Performance at 25. Qwest stated it completed updates to the directory listings database in an average of 0.09 seconds or less, with an accuracy rate of over 93.5%. *Id.*

Checklist Item 9

With regard to checklist item 9, number administration, Qwest stated it loaded and tested 100% of CLEC NXX codes prior to the Local Exchange Routing Guide effective date for South Dakota, as well as regionally. Qwest Exhibit 71 at 72.

Checklist Item 10

For checklist item 10, call-related databases and associated signaling, Qwest stated that pursuant to the "parity by design" measurement, Qwest uses a queuing and routing system that treats all carriers alike. *Id.* at 73. The one performance measure for this checklist item measures the time to update the line information database. *Id.* This measurement is reported on a regional basis and the update process does not distinguish between updates for Qwest versus updates for CLECs. *Id.*

The Commission notes that although Qwest's performance had deteriorated in the November 2001 through February 2002 time frame, its most recent performance updates, which show results through June 2002, demonstrate that Qwest has decreased the amount of time it takes to update its database.

Checklist Item 11

With respect to checklist item 11, number portability, Qwest's South Dakota Blue Chart shows Qwest met four of the five metrics in the last four months. Qwest Exhibit 73 at 16. The other measure had no data.⁴

Checklist Item 12

Regarding checklist item 12, local dialing parity, this item does not have any performance measures. Qwest Exhibit 71 at 75.

³ AT&T stated that the E911 database administrator was not allowing CLECs to update the E911 database. AT&T Exhibit 9 at 14. The Commission believes this issue has been resolved as noted in its order regarding checklist item 7.

⁴ *Id.* AT&T brought up an issue regarding the new disconnect process, however the Commission believes this issue has been taken care of in its order regarding local number portability.

Checklist Item 13

For checklist item 13, reciprocal compensation, Qwest stated that for South Dakota, Qwest's bills were 100% complete of each of the last four months. Qwest Corporation's Opening Post-Hearing Brief on Performance at 25; Qwest Exhibit 73 at 17.

Checklist Item 14

Regarding checklist item 14, Qwest stated that the standard for resale is parity. Qwest Corporation's Opening Post-Hearing Brief on Performance at 27. Qwest focused on the large volume services, residential POTS, business POTS, and Centrex 21 service. *Id.* Qwest's South Dakota Blue Chart showed 87 metrics, of which Qwest met 75 for at least three of the last four months, with four measurements having no activity. Qwest Exhibit 73 at 18.

AT&T stated that for installation commitments met for residential resale, no dispatches, Qwest is providing discriminatory treatment. AT&T Exhibit 9 at 11. AT&T further stated that the repeat report rate for residential resale, MR-7, no dispatches, showed CLECs experience more repeat troubles. *Id.* AT&T next brought up MR-8, the trouble rate for residential resale and MR-8, the trouble rate for business resale. *Id.* at 12, 13-14. AT&T noted that for OP-4 installation interval for business resale, no dispatches, Qwest was providing discriminatory service. *Id.* at 12.

The Commission finds that for installation commitments met for residential resale, no dispatches, in South Dakota, Qwest has improved its performance in this area (OP-3C). For repeat report rate for residential resale, MR-7C, no dispatches, the Commission notes that Qwest continues to experience uneven performance in this area. With regard to MR-8, the trouble rate for residential resale and MR-8, the trouble rate for business resale, the most recent South Dakota results show Qwest has improved its performance for residential resale but its most recent performance for business resale trouble rates is uneven. For OP-4C, installation interval for business resale, no dispatches, Qwest has improved its performance in its most recent results.

Commission's Finding Regarding OSS

The Commission finds that when the results of the ROC OSS test and Qwest's commercial performance data are viewed in their entirety, Qwest has demonstrated that it has substantially met the statutory and FCC standards concerning OSS. Although the Commission has noted specific areas where Qwest is not meeting the benchmarks and/or parity, the Commission does not find those deficiencies to be sufficient to recommend that the FCC deny Qwest's section 271 petition. The Commission further notes that if Qwest is granted section 271 approval, the Commission will continue to review Qwest's performance, most notably through the six-month review process. If Qwest's overall performance begins to show signs of deterioration to the extent that the Commission determines Qwest is no longer meeting the statutory or FCC standards, the Commission will promptly inform the FCC. Moreover, the Commission will also be able to review any declines in performance outside of the six-month review process.

It is therefore

ORDERED, that the Commission finds Qwest has shown substantial compliance with the requirements relating to the provisioning of operational support systems.

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 matter, as listed on the docket service list, by personal or by first class mail, in properly addressed envelopes, with charges prepaid thereon.

Neilson Kalbs

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

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF SOUTH DAKOTA

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

[T]he 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.

See 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 ¶ 420. 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 Issues¹

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

AT&T's Position²

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.

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.

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:

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 concern 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.

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.

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.

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.

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.

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.

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.

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.

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 "We 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 82 (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 comments 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 35% 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

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

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 is not 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.

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 subsection, 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 15). 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 P&AP. *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 10.

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 32.

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 36. 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 discussion 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 5 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 63. 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 6 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 confidentiality 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 6 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 9 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 fees 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 QPAP 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 35 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

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 α -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: *Deldine Keeso*

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



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DEC 05 2002

SOUTH DAKOTA PUBLIC
UTILITIES COMMISSION

Mary S. Hobson
Director
mhobson@stoel.com

December 4, 2002

VIA OVERNIGHT DELIVERY

Debra Elofson, Executive Director
SD Public Utilities Commission
500 East Capitol
Pierre, SD 57501

**Re: NOTICE OF ERRATA TO UPDATED STATEMENT OF GENERALLY
AVAILABLE TERMS AND CONDITIONS
Docket No. TC01-165**

Dear Ms. Elofson:

Enclosed please find an original and ten copies of the **NOTICE OF ERRATA TO UPDATED
STATEMENT OF GENERALLY AVAILABLE TERMS AND CONDITIONS.**

Thank you for your consideration of this matter.

Very truly yours,

A handwritten signature in cursive script that reads "Mary S. Hobson".

Mary S. Hobson

blg
Enclosure



RECEIVED

DEC 05 2002

SOUTH DAKOTA PUBLIC
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December 4, 2002

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**Re: NOTICE OF ERRATA TO UPDATED STATEMENT OF GENERALLY
AVAILABLE TERMS AND CONDITIONS
Docket No. TC01-165**

Dear Counsel:

This is to advise you that Qwest has filed with the South Dakota Public Utilities Commission an original and ten copies of its Notice of Errata to Updated Statement of Generally Available Terms and Conditions. A copy is enclosed for your file.

Very truly yours,

A handwritten signature in cursive script that reads "Mary S. Hobson".

Mary S. Hobson

:blg

Enclosure

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BEFORE THE PUBLIC UTILITIES COMMISSION
STATE OF SOUTH DAKOTA

RECEIVED

DEC 05 2002

SOUTH DAKOTA PUBLIC
UTILITIES COMMISSION

IN THE MATTER OF THE ANALYSIS
INTO QWEST CORPORATION'S
COMPLIANCE WITH SECTION 271(C)
OF THE TELECOMMUNICATIONS ACT
OF 1996

DOCKET TC 01-165

QWEST CORPORATION'S NOTICE OF
ERRATA TO UPDATED STATEMENT
OF GENERALLY AVAILABLE TERMS
AND CONDITIONS

Qwest Corporation ("Qwest") submits this Notice of Errata to its updated Statement of Generally Available Terms and Conditions ("SGAT") filed November 18, 2002, along with the three omitted pages from the SGAT, which are attached. Qwest respectfully requests that the South Dakota Public Utilities Commission ("Commission") allow these pages to be inserted into the SGAT previously filed with the Commission.

This filing is necessary because it recently came to Qwest's attention that three pages (pages 56, 57, and 58) were inadvertently omitted from the SGAT that was filed with the Commission on November 18, 2002. These pages were not included in the original copy due to a mechanical malfunction in the copying procedure.

Since all parties in this case were served electronically, the omission of these pages did not affect the parties.

Qwest apologizes for any confusion its error may have caused, and respectfully asks that the Commission allow the newly corrected November 18, 2002, SGAT to go into effect.

RESPECTFULLY SUBMITTED this 4th day of December, 2002.



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Attorneys for Qwest Corporation

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 4th day of December, 2002, the foregoing QWEST CORPORATION'S NOTICE OF ERRATA TO UPDATED STATEMENT OF GENERALLY AVAILABLE TERMS AND CONDITIONS was served upon the following parties as follows:

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QWEST CORPORATION'S NOTICE OF ERRATA TO UPDATED STATEMENT
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Brandi L. Gearhart, PLS
Legal Secretary to Mary S. Hobson
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QWEST CORPORATION'S NOTICE OF ERRATA TO UPDATED STATEMENT
OF GENERALLY AVAILABLE TERMS AND CONDITIONS -

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users. Such nonrecurring charges will be subject to the wholesale discount, if any, that applies to the underlying service being added or changed.

6.4 Ordering Process

6.4.1 CLEC, or CLEC's agent, shall act as the single point of contact for its End Users' service needs, including without limitation, sales, service design, order taking, Provisioning, change orders, training, maintenance, trouble reports, repair, post-sale servicing, Billing, collection and inquiry. CLEC's End Users contacting Qwest in error will be instructed to contact CLEC; and Qwest's End Users contacting CLEC in error will be instructed to contact Qwest. In responding to calls, neither Party shall make disparaging remarks about each other. To the extent the correct provider can be determined, misdirected calls received by either Party will be referred to the proper provider of Local Exchange Service; however, nothing in this Agreement shall be deemed to prohibit Qwest or CLEC from discussing its products and services with CLEC's or Qwest's End Users who call the other Party seeking such information.

6.4.2 CLEC shall transmit to Qwest all information necessary for the ordering (Billing, listing and other information), installation, repair, maintenance and post-installation servicing according to Qwest's standard procedures, as described in the Qwest Product Catalog PCAT available on Qwest's public web site located at <http://www.qwest.com/wholesale/pcat>. Information shall be provided using Qwest's designated Local Service Request (LSR) format which may include the LSR, end user and resale forms.

6.4.3 Qwest will use the same performance standards and criteria for installation, Provisioning, maintenance, and repair of services provided to CLEC for resale under this Agreement as Qwest provides to itself, its Affiliates, its subsidiaries, other Resellers, and Qwest retail end users. The installation, Provisioning, maintenance, and repair processes for CLEC's resale service requests are detailed in the Support Functions Section of this Agreement, and are applicable whether CLEC's resale service requests are submitted via Operational Support System or by facsimile.

6.4.4 CLEC is responsible for providing to Qwest complete and accurate end user listing information including initial and updated information for Directory Assistance Service, white pages directories, and E911/911 Emergency Services. The Ancillary Services Section of this Agreement contains complete terms and conditions for listings for Directory Assistance Service, white pages directories, and E911/911 Emergency Services.

6.4.5 If Qwest's retail end user, or the end user's new local service provider orders the discontinuance of the end user's existing Qwest service in anticipation of end user moving to a new local service provider, Qwest will render its closing bill to the end user, discontinuing Billing as of the date of the discontinuance of Qwest's service to the end user. If a CLEC that currently provides resold service to an end user, or if end user's new local service provider orders the discontinuance of existing resold service from CLEC, Qwest will bill the existing CLEC for service through the date end user receives resold service from the existing CLEC. Qwest will notify CLEC by Operational Support System interface, facsimile, or by other agreed-upon processes when an end user moves from one CLEC to a different local service provider. Qwest will not provide CLEC with the name of the other local service provider selected by the end user.

6.4.6 CLEC shall provide Qwest and Qwest shall provide CLEC with points of contact for order entry, problem resolution and repair of the resold services. These points of contact will be identified for both CLEC and Qwest in the event special attention is required on a service

request.

6.4.7 Prior to placing orders on behalf of the end user, CLEC shall be responsible for obtaining and having in its possession Proof of Authorization (POA), as set forth in the Proof of Authorization Section of this Agreement.

6.4.8 Due date intervals for CLEC's resale service requests are established when service requests are received by Qwest through Operational Support Systems or by facsimile. Intervals provided to CLEC shall be equivalent to intervals provided by Qwest to itself, its Affiliates, its subsidiaries, other Resellers, and to Qwest's retail end users.

6.5 Billing

6.5.1 Qwest shall bill CLEC and CLEC shall be responsible for all applicable charges for the resold services as provided herein. CLEC shall also be responsible for all Tariffed, cataloged, price listed, and other retail Telecommunications Services offerings charges and charges separately identified in this Agreement associated with services that CLEC resells to an end user under this Agreement.

6.5.2 Qwest shall provide CLEC, on a monthly basis, within seven (7) to ten (10) calendar days of the last day of the most recent Billing period, in an agreed upon standard electronic Billing format as detailed in the Section 12.2.5, Billing information including (1) a summary bill, and (2) individual end user sub-account information consistent with the samples available for CLEC review.

6.6 Maintenance and Repair

6.6.1 Qwest will maintain its facilities and equipment used to provide CLEC resold services. A CLEC or its end users may not rearrange, move, disconnect or attempt to repair Qwest's facilities or equipment, including facilities or equipment that may terminate or be located at the CLEC's end user's premises, other than by connection or disconnection to any interface between Qwest and the end user's facilities, without the written consent of Qwest.

6.6.2 Maintenance and repair procedures are detailed in Section 12. Access to telephone numbers and Dialing Parity are discussed in Sections 13 and 14 respectively.

6.6.3 CLEC and Qwest will employ the procedures for handling misdirected repair calls as specified in Section 12.3.8 of this Agreement.

Section 7.0 - INTERCONNECTION

7.1 Interconnection Facility Options

7.1.1 This Section describes the Interconnection of Qwest's network and CLEC's network for the purpose of exchanging Exchange Service (EAS/Local traffic), Exchange Access (IntraLATA Toll) and Jointly Provided Switched Access (InterLATA and IntraLATA) traffic. Qwest will provide Interconnection at any Technically Feasible point within its network, including but not limited to, (i) the Line Side of a local Switch (i.e., local switching); (ii) the Trunk Side of a local Switch, (iii) the trunk connection points for a tandem Switch, (iv) Central Office Cross Connection points, (v) out-of-band signaling transfer points necessary to exchange traffic at these points and access call-related databases, and (vi) points of access to Unbundled Network Elements. Section 9 of this Agreement describes Interconnection at points (i), (iv), (v), and (vi), although some aspects of these Interconnection points are described in Section 7. "Interconnection" is as described in the Act and refers, in this Section of the Agreement, to the connection between networks for the purpose of transmission and routing of Telephone Exchange Service traffic and Exchange Access traffic at points (ii) and (iii) described above. Interconnection, which Qwest currently names "Local Interconnection Service" (LIS) is provided for the purpose of connecting End Office Switches to End Office Switches or End Office Switches to local or Access Tandem Switches for the exchange of Exchange Service (EAS/Local traffic); or End Office Switches to Access Tandem Switches for the exchange of Exchange Access (IntraLATA Toll) or Jointly Provided Switched Access Traffic. Qwest tandem to CLEC tandem Switch connections will be provided where Technically Feasible. New or continued Qwest local tandem to Qwest access tandem and Qwest access tandem to Qwest Access Tandem Switch connections are not required where Qwest can demonstrate that such connections present a risk of Switch exhaust and that Qwest does not make similar use of its network to transport the local calls of its own or any Affiliate's end users.

7.1.1.1 Qwest will provide to CLEC Interconnection at least equal in quality to that provided to itself, to any subsidiary, Affiliate, or any other Party to which it provides Interconnection. Notwithstanding specific language in other sections of this Agreement, all provisions of this Agreement regarding Interconnection are subject to this requirement. Qwest will provide Interconnection under rates, terms and conditions that are just, reasonable and non-discriminatory. In addition, Qwest shall comply with all state wholesale and retail service quality requirements.

7.1.2 Methods of Interconnection

The Parties will negotiate the facilities arrangement used to interconnect their respective networks. CLEC shall establish at least one Physical Point of Interconnection in Qwest territory in each LATA the CLEC has local Customers. The Parties shall establish, through negotiations, at least one of the following Interconnection arrangements: (1) a DS1 or DS3 Qwest provided facility; (2) Collocation; (3) negotiated Mid-Span Meet POI facilities; (4) other Technically Feasible methods of Interconnection.

7.1.2.1 Qwest-provided Facility. Interconnection may be accomplished through the provision of a DS1 or DS3 entrance facility of CLEC's determination. An entrance facility extends from the Qwest Serving Wire Center to CLEC's Switch location or any Technically Feasible POI chosen by CLEC. Qwest provided entrance facilities may not extend beyond the area served by the Qwest Serving Wire Center. The rates for Qwest