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BEFORE THE ARIZONA CORPORATION COMMISSION

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Chairman
JAMES M. IRVIN
Commissioner
MARC SPITZER
Commissioner

IN THE MATTER OF U S WEST COMMUNICATIONS, INC.'S COMPLIANCE WITH § 271 OF THE TELECOMMUNICATIONS ACT OF 1996

Docket No. T-00000A-97-0238

OPENING BRIEF OF WORLDCOM AND Z-TELCOMMUNICATIONS REGARDING QWEST CORPORATION'S PERFORMANCE ASSURANCE PLAN

WorldCom, Inc., on behalf of its regulated subsidiaries, ("WorldCom") and Z-Tel Communications (collectively "the Joint Intervenors") submit their opening brief addressing Qwest's proposed performance assurance plan ("PAP"). Both Joint Intervenors have submitted pleadings, comments and spreadsheets (WorldCom Exhibits 1 through 14 and Z-Tel Exhibits 1 through 4) in this proceeding that address in detail the Joint Intervenors' specific concerns and recommendations on the various "impasse" issues. This brief summarizes the Joint Intervenors' position on Qwest's PAP identified as Qwest Exhibit 16 that was filed on or about April 19, 2001.

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INTRODUCTION

The Federal Communications Commission ("FCC") stated its general principles for a successful performance incentive plan.[1] A PAP must include:

1. Potential liability that provides a meaningful and significant incentive to comply with the designated performance standards;

2. Clearly articulated, pre-determined measures and standards, which encompass a comprehensive range of carrier-to-carrier performance;

3. A reasonable structure that is designed to detect and sanction poor performance when it occurs;

4. A self-executing mechanism that does not leave the door open unreasonably to litigation and appeal;

5. Reasonable assurances that the reported data is accurate.

The FCC reviews PAPs as an element demonstrating whether entry by a Regional Bell Operating Company ("RBOC") into the long distance market is in the public interest. Based upon the principles supplied by the FCC, any PAP adopted by this Commission should 1) build on Arizona/ROC performance measures and standards; 2) be easy to understand and administer (efficient); 3) be comprehensive and achieve the objectives described in the Joint Intervenors' previously filed comments (meaningful), and 4) set

[1] In re Application of Bell Atlantic New York for Authorization under Section 271, CC Docket No. 99-295, at para. 433, December 22, 1999.

sufficient penalties to assure compliance with the PAP and local market competition (effective).

The consequences for failure to comply with the PAP must be severe enough to encourage compliance with performance standards, deter misconduct, and cause Qwest Corporation ("Qwest") to correct a problem rather than allowing payments to become part of Qwest's cost of doing business. The payments must be substantial enough in order to ensure local market competition as contemplated under Section 251 of the federal Telecommunications Act of 1996 ("federal Act") can develop and to minimize Qwest's incentive to engage anti-competitive "backsliding."

The consequences must increase based upon the severity or magnitude and duration of poor performance. Penalties must be imposed without delay and expense. Payments to individual competitive local exchange carriers ("CLECs") harmed must be based on performance failures in accordance with relevant metrics. Finally, additional consequences must be imposed for industry-wide poor performance.

The base remedy amounts proposed by Qwest are too low to provide an adequate incentive for Qwest to cooperate with its competitors in opening the local market. The remedy provisions of the plan, in Tier I, call for remedy amounts of only $25, $75, and $150 per occurrence for its low measures. For per measure remedy amounts, Qwest proposes payments of only $5,000, $10,000, and $25,000. These amounts would have little impact on a company the size of Qwest and do not provide significant incentive to comply with the designated performance standards. FCC Chairman Michael Powell recently

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recommended that Congress increase the forfeiture level imposed on common carriers violating the local competition provisions of the federal Act from the current statutory limit of $1.2 million per violation to at least $10 million per violation.[2] The chairman also stated that too many telecommunications providers simply consider $75,000 fines "the cost of doing business" and that CLECs need assurance that they will be protected from unfair competition.[3]

On the other hand, the impact of Qwest's provision of poor service to CLECs trying to compete for customers can have multiple effects. The impact to a CLEC would likely be that some of its customers would discontinue their relationship with the CLEC for local service, and other customers may discontinue using the CLEC for long distance services and other services as well. The harm to a CLECs reputation and the scaling back of market rollout due to poor service received by the CLECs from Qwest has a large and lasting effect. Discrimination against a few CLEC orders can results in CLEC harm, and Qwest financial gain, that is in no way measured by the number of CLEC orders placed in a given month. For example, poor service provided by BellSouth in Georgia forced Z-Tel to refrain from offering service in that state for a number of months.[4] Clearly, basing

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[2] See FCC Press Release dated May 7, 2001, wherein Powell also stated: ". . .the FCC must "vigorously enforce the local competition provisions of the 1996 Act, " and said, "I believe there is more that we can do with the help of Congress."

[3] Billing World magazine, May 2001, page 60. Excerpt from Michael Powell's testimony before the House Energy and Commerce Subcommittee on Telecommunications and Internet.

[4] See Letter from Peggy Rubino, VP Z-Tel, to James M. Schenk, BellSouth, dated October 3, 2000.

remedy amounts on the poor service provided for the Z-Tel's orders does not capture the full harm to Z-Tel (or gain to BellSouth) from the discriminatory acts.

Poor performance by Qwest impacts CLECs' reputations in the market, that is immediate, long lasting and foretelling to all market participants. In addition, the CLECs' ability to enter the market is constrained by the reliability and quality of Qwest's operational processes and operational support systems ("OSS"). Qwest's poor performance may also result in civil liability and violations of laws and rules of state and federal commissions. For example, CLECs are subject to this Commission's quality of service rules. Qwest has a powerful incentive to protect its near local market monopoly, its advanced digital services, and future long distance revenues.

The CLECs and Qwest have a fundamental disagreement whether the payments made to CLECs should be tied to compensatory or liquidated damages. The penalties must be adequate enough to create sufficient incentives for Qwest to address and correct any performance failures, and the underlying systems that may have caused performance failures. Additionally, if CLEC harm was always below the financial gain to Qwest of discrimination, then competition will be effectively impeded. Qwest always will prefer to pay the remedy rather than provide parity service. The penalties cannot become a cost of doing business, and if the penalties are too low, that prospect becomes a real possibility, as recognized by Chairman Powell.

Because CLEC harm is so varied, it is not possible to quantify the compensatory harm without a thorough investigation of each CLEC's cost of doing business, and other market factors, for virtually each and every sub-measure. Moreover, the amount to which a CLEC is entitled may vary from case to case. For example, there certainly could be times when Qwest's behavior is so bad as to drive a customer completely away from a CLEC, in which case the annual profit loss becomes a "customer lifetime" of profit losses. As previously mentioned, poor service to a few customer in one month can bring to a halt the customer growth of the CLEC in the future. Thus, the service provided to a few CLEC customers can extend to well beyond those customers, reducing the growth and prospects for competition into the future.

If the incentive payments are less than the financial gain Qwest can realize from providing poor service, Qwest is motivated to maximize profit and not improve its quality of service for wholesale products and services. The economics of the matter are clear and indisputable; remedy amounts must be sufficiently large to render discrimination an unprofitable strategy to Qwest. A single act of discrimination by Qwest also may reduce the perceived service quality of a CLEC, thus reducing the number of customers switching to other CLECs. It is therefore, critical that any plan adequately take into account the duration and severity of poor performance allowing payment levels to escalate as the level of non-compliance increases. By using severity factors, the payments will continue to increase, incenting Qwest to provide the required conforming performance.

CONSUMER HARM

All of the performance measures at issue as well as the remaining impasse issues have a direct impact on how consumers are affected by Qwest's performance as a

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wholesale provider, although the consumer may be a CLEC customer. Obviously, for example, consumers expect proposed activity such as installations, maintenance and repair to be completed when a due date is assigned. Consumers do not expect, nor desire, to be double-billed for the same or similar services by several providers. Such failures would not be tolerated by a consumer for any other industry such as auto repair, mortgage commitments, or the provision of energy needs. If there is a failure in work completion, missing a commitment, or double billing, the customer will contact the CLEC to determine what happened and hold the CLEC accountable.

In a mature competitive environment, the customer could switch to another CLEC or Qwest and hopefully not encounter the same problem. Presumably the consumer would believe that the first CLEC did not know what it was doing. Of course, since the problem arises from Qwest's provision of service to CLECs, other CLECs may face the same problem. In short, the perception of consumers may well begin to echo the well-worn phase of the middle to late 1980s, "Why did we ever break up the Bell System?" This phrase did not demonstrate that competition could not bring benefits, rather it demonstrated that it could take a long time for competition to overcome the incumbent's entrenched market power. Therefore, what appear to be free markets, if left to their own devices, can be "unfree" in fact.

Certainly, where an incumbent's market power persists, as with local telecommunications services, industry structure tends toward monopolization, particularly if the monopoly provider has little or no incentive to open the market, or industry structure tends to ongoing unhealthy levels of concentration. Sometimes, government needs to intervene to insulate market forces from the conditions that produce high levels of concentration in order to ensure consumers realize the full benefits of competition.[5] After the break-up of the Bell System, the customer saw few benefits to competition for an extended period because the problems encountered with an entrenched monopoly provider, which suggested that competition had brought customers no benefits and created more confusion and complexity.

The perception that competition in local exchange markets is a failure unfairly benefits the incumbent and must be minimized or avoided at all costs since this Commission is directed to encourage and foster competition. The recommendations proposed to the PAP impasse addressed below are intended to ensure that consumers can obtain all of the benefits that competition can provide, as contemplated by the federal Act, the FCC and the Arizona Corporation Commission.

The very reason for allowing competition in the local market was to bring consumers the well-recognized benefits of competition. Whether Qwest meets its performance commitments ultimately affects consumers, not just CLEC business plans. However, if CLECs cannot effectively compete because Qwest fails to meet its legal obligations, CLECs have less opportunity to provide consumers with choices, innovation, and lower prices promised by opening the local market. As is already evident, unhealthy

[5] See, Chernow, *Titan, The Life of John D. Rockefeller, Sr.*, Random House, 1998, at page 297.

concentration among the original RBOCs may be occurring through mergers and acquisitions and is becoming more evident as the resulting conglomerates refuse or are unable to compete against one another out-of-region because of the very problems encountered by new entrant CLECs. Moreover, many CLECs are going out of business or restricting their business plans.

Therefore, as the Commission reviews this brief, the Commission must ask itself, will the following proposals to the PAP enhance the consumer experience and ultimately improve the likelihood of bring the real benefits of competition to all consumers. Using that criteria should demonstrate the best reasons to modify Qwest's proposed PAP.

CLEC HARM

Qwest has stated in section 13.5 of its proposed PAP in Arizona:

> 13.5 By incorporating these liquidated damages terms into the PAP, Qwest and CLECs accepting this PAP agree that proof of damages from any non-conforming performance measurement <u>would be difficult to ascertain and, therefore, liquidated damages are a reasonable approximation of any contractual damages</u> that may result from a non-conforming performance measurement.

Qwest has argued in these workshops that this language is standard "legalese". The reality is that a CLEC's harm is difficult to quantify for an individual consumer, let alone the harm for all existing or potential CLECs. The purpose for establishing a liquidated damages clause in a contract is to approximate harm. However, with a bilateral contract where there is "arm's length negotiation", the parties agree to what liquidated damages should be. Here, that is not the case. Remedy amounts should be large enough to adjust Qwest's behavior, not simply to compensate CLECs.

Qwest has proposed payment amounts and justified its proposed payments by describing the pre-tax total annual customer profits as a measure of CLEC harm. It has calculated those lost profits in Arizona to be $146 per customer. It has also asserted that Z-Tel's financial reports demonstrate that the incremental pre-tax profit Z-Tel achieves from a customer is $60. It, therefore, asserts that neither Z-Tel nor any other CLEC cannot reasonably argue before this Commission that its financial harm exceeds that amount, nor that payments greater than $60 would not be an economic windfall which could be used to fund further market penetration into Qwest's customer base (see Qwest Exhibit 5, p. 15, presented at the December 18, 2000 Arizona PAP workshop). Qwest significantly understates CLEC harm. First, Qwest ignores Z-Tel's public documents that show its annual profit margin to be about $300 per year.[6] But the underestimate does not stop there.

Even if the penalties are tied to CLEC harm or compensatory damages, Qwest's measure of damages ignores the extent of harm. Qwest only focuses on lost profits for a local customer. For example, Qwest does not address customer acquisition costs that a CLEC incurs to acquire a customer. In a Colorado 271 workshop held April 17, 2001,

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[6] Z-Tel's 10-K form reveals a gross margin of about 40%, which is consistent with the margin alleged in a White Paper by Z-Tel's CEO Gregg Smith (available at www.z-tel.com). Z-Tel's service offering is priced at $49.99 in most states, not including the subscriber line charge, long distance usage over the minutes

George Coons, Vice President of Regulatory Affairs for Sunwest Communications, stated under oath that its customer acquisition costs were $350 per line (Docket No. 97i-198t, Colorado 271 Transcript, dated April 17, 2001, at page 140, line 18).

At the ROC meeting held April 23, 2001, Citizens Communications advised that its average investment per line for its Qwest states ranges from $218 to $284. It also stated that the industry average is $153. The average investment per line and the acquisition costs discussed are approximately $600 per line, over 4 times higher than the lost profit amount Qwest has provided to justify its penalties and approximately 10 times higher than the alleged Z-Tel loss of profit (even as it is severely underestimated by Qwest). To the extent Qwest's "baseline" harm is as much as 10 times lower than some measure of CLEC harm, the proposed penalties should be increased correspondingly. In other words, if Qwest understates CLEC harm, the penalty amounts it proposes should be increased correspondingly. A $25 penalty should be $250 since CLEC harm is 10 times greater than what Qwest estimates by simply looking at the acquisition costs and average investment per line cost that a CLEC incurs to obtain and provide service to a new customer versus Z-Tel's lost profits.

Moreover, Qwest's measure ignores the costs CLECs incur to provision an order that ultimately fails to go through Qwest systems or is not provisioned properly. For example, the CLEC must generally prepare and submit a local service request ("LSR") to

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included in the package, international call charges, and so forth. Assuming an average revenue of $60 per month, the annual profit margin is $288.

Qwest to provide service to a CLEC customer. There is a cost to simply enter the LSR that Qwest does not take into account, which at a minimum is a labor rate paid to prepare the LSR. Qwest's proposed labor rate in the Arizona Costing and Pricing Proceeding pending before this Commission is approximately $30.00 per hour.[7] (The labor rate ranges from about $29.00 to $33.00 per hour depending on the nature of the labor performed.). CLECs also incur labor costs to "work" a rejected order.

In addition, CLECs must make the investment to build appropriate systems to interact with the Qwest OSS. That investment comes with a price – the cost of capital. Qwest's measure of damages ignores the CLEC investment in its systems.

Qwest also ignores lost profits, investments and expenses that WorldCom, for example, incurs to provide long distance service to its customers or any other services it may offer. If Qwest enters the long distance market, it will surely win customers from other interexchange carriers. If it obtains those customers when it has not met performance requirements for the provision of wholesale services to enable CLECs to provide local service, CLECs lose that profit, and still incur the associated costs of acquiring those customers and the embedded investment to serve those customers.

Further, Qwest (and Qwest's Plan) ignores that the harm inflicted upon a CLEC (and the gain to Qwest from discrimination) is not limited to those customers directly impacted by the poor service. Discriminatory service changes CLEC business plans, as the above example of Z-Tel's actions in Georgia demonstrates. Discrimination against 100

[7] See, Docket No. T-00000A-00-0194, Testimony of Maureen Arnold, "Arizona Rates" Exhibit MA-1.

customers can impact thousands, as CLECs scale back entry efforts in response to poor performance. As a consequence, Qwest protects the profits of the many by discriminating, and paying remedy payments, for the few.

Finally, WorldCom's statistical consultants, John Jackson of Auburn University and former Senior Economist George Ford (now with Z-Tel), have calculated that if Qwest delayed the growth of CLEC market share gain to 20% rather than 30% (similar to gain of market share by competitors in the long distance market against AT&T), over 10 years, Qwest would retain more than $228 million in profits from local services, new DSL-type services and long distance revenue after Qwest gains entry into the long distance market. This is based on per line monthly profit assumptions of $5 per local, $10 for DSL and $2.50 for long distance and access line growth of 5% annually over 1998 levels also is assumed.[8]

The remedies also must be sufficient to provide Qwest with an incentive to expend the capital and human resources needed to correct flawed systems and processes that prevent CLECs from ramping up in the market. With a per-occurrence plan with remedies set at low levels, remedies would have to build up for six months or a year or more before remedies become an incentive to spend the money to fix the problem. CLECs may have left the market by that time and certainly would not be providing service at the volumes of customers they had anticipated to reach. For example, Verizon had to pay $13 million in fines for missing notifier problems ($10,000,000 to individual CLECs and $3 million to the U.S. Treasury) before it began to change out its servers and software that were causing the problem.

EFFECTIVE DATE OF PLAN

The Commission must adopt "self-executing" remedies that take effect before Qwest receives § 271 approval.[9] This plan is intended to enforce Qwest's § 251 obligations under the federal Act requiring Qwest to open its local market and to ensure that Qwest provides additional assurance that the local market will remain open after Qwest receives § 271 authorization. The FCC has stated that one factor it may consider as part of its public interest analysis is whether a Bell Operating Company ("BOC") would continue to satisfy the requirements of section 271 after entering the long distance market.[10] All the applications that have been granted by the FCC to date contain an enforcement plan to protect against backsliding after entry into the long-distance market.[11]

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[8] See, Exhibit WorldCom 3, at page 4, lines 10-18.

[9] See, Georgia PSC's Order in Docket No. 7892-U; In re: Performance Measurements For Telecommunications Interconnection, Unbundling And Resale Released January 16, 2001, which in pertinent part states "BellSouth maintains that remedies should only be adopted to prevent backsliding once BellSouth has entered the long distance market. Yet avoiding backsliding is only one of the purposes served by a remedies plan. By delaying adoption of a penalty plan until BellSouth enters the long distance market, the Commission would forego the opportunity to enable more rapid development of competition. At the hearing, many CLECs testified that they are currently experiencing problems with the quality of service they are receiving from BellSouth. These problems could make it more difficult for CLECs to attract and retain customers. An appropriate penalty plan will further encourage BellSouth to provide nondiscriminatory service during the critical early stages of competition, while providing some compensation to CLECs for the additional costs they incur when BellSouth's performance falls short. The Commission finds that the remedy plan shall go into effect 45 days from issuance of order. This time will allow BST to put statistical methods and the remedy plan into operation." (emphasis supplied, at p. 22).

[10] *See, e.g., Second BellSouth Louisiana Order*, 13 FCC Rcd at 20806, paras. 363-64; *see Ameritech Michigan Order*, 12 FCC Rcd at 20747, para. 390.

[11] See, e.g. Verizon 271 Application, at para. 236 and Southwestern Bell Telephone Company Texas 271 Application, at para. 420, wherein the FCC stated that it has strongly encouraged state performance monitoring and post-entry enforcement, although WorldCom recognizes that it has never required BOC applicants to demonstrate that they are subject to such mechanisms as a condition of section 271 approval.

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Although Qwest claims its plan is voluntary,[12] the Joint Intervenors disagree because of the statements found in the FCC's orders. Moreover, as noted in the Colorado Draft PAP Report ("Colorado Draft Report" or "Draft Report"), the obligation to continue to open its local market is mandatory.[13]

By allowing the plan to take effect prior to Qwest's entry into the long distance market, evidence on the effectiveness of the plan may be used to adjust payments and terms of the plan to ensure Qwest meets both its § 251 obligations and its § 271 obligations prior to its entry into the long distance market.

Massachusetts[14], Pennsylvania, Louisiana and Michigan are among states that have adopted self-executing remedies to enforce § 251 requirements before § 271 approval. CLECs also could, and many did, include the SBC-Texas remedy plan in their contracts before § 271 authorization. The metrics and remedies are needed to ensure local markets are open, and Qwest's willingness to effectively implement its PAP before § 271 approval should be considered. WorldCom's experience in trying for months to negotiate a Commission-ordered service level agreement with Qwest in Minnesota shows that Qwest

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The Commission has stated that the fact that a BOC will be subject to performance monitoring and enforcement mechanisms would constitute probative evidence that the BOC will continue to meet its section 271 obligations and that its entry would be consistent with the public interest. See, also Southwestern Bell Telephone Company Kansas/Oklahoma 271 Application para. 269-280.

12 See, Section 17 of Qwest's PAP.

13 See, Docket No. 01I-041T, Section I, footnote 11.

14 While Massachusetts adopted a PAP similar to New York's that took effect after 271 approval, it earlier in the first round of interconnecction contract arbitrations had adopted the first self-executing performance remedy plan contained in ILEC-CLEC interconnection agreements. Currently CLECs receive the higher of the PAP or the consolidated arbitration remedies in Massachusetts, since Verizon's recent gain of section 271 authority.

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will not willingly back up its service commitment to CLECs without regulatory intervention and even then it will drag its feet.

The Commission also should issue an order making the plan and remedies available to CLECs without having to incorporate the PAP into their interconnection agreements. WorldCom has experienced delays in receiving benefits of remedy plans because of onerous conditions that ILECs have posed as part of the contract agreement, requiring an arbitration to settle these disputes and receive the benefits of the remedy plan. Qwest's amendment process, discussed at length in the checklist item workshops that are a part of this record, to date has caused substantial delays for CLECs. Implementing the plan through an order also will enable the Commission to retain control over the remedy plan. This will help ensure that the remedies and metrics address new problem areas as market entry develops.

There has been ample evidence in the portion of this proceeding addressing Qwest's conduct in complying with its legal obligations under the various § 271 checklist items that demonstrate that Qwest may purportedly "talk the talk" but not "walk the walk." In five rounds of checklist item workshops held in this docket, Eschelon, DLECs and other CLECs have presented substantial evidence of Qwest's failure to properly provide wholesale services even though interconnection agreements ("ICAs") require Qwest to provide those wholesale services. Implementation of Qwest's agreed upon legal obligations is troublesome to be polite.

Qwest has a history of contradicting language in ICAs in product notifications and internal documentation that has been described, documented and briefed in the various checklist item workshops. While Qwest asserts it wants fair competition, its internal business processes do not support fair competition. Therefore, implementation of the plan by the Commission in advance of § 271 approval will allow Qwest to demonstrate it is truly and fairly implementing its legal obligations, has implemented appropriate and efficient business processes and provides further incentive for Qwest to comply with its wholesale service quality requirements. Finally, this Commission has not established detailed wholesale service quality requirements for Qwest, and this plan should be used to address the lack of such standards.

At a minimum, the pre-271 period should be used to adjust the remedy amounts through the severity and duration factors. By doing so, the remedy amounts are adjusted to more effective levels prior to 271 approval.

SUMMARY OF JOINT INTERVENOR'S POSITION

The Commission must consider the following competitive realities in the Arizona local exchange marketplace: (1) CLECs' ability to enter the market is constrained by the reliability and quality of Qwest's operational processes and OSS; (2) Qwest possesses powerful incentives and the ability to protect its near local market monopoly, its advanced digital services, and future long distance revenues; (3) Poor performance by Qwest will harm existing competitors' reputations in the market and greatly slow the entry of all new competitors and (4) The impact of poor performance on competitors' reputations in the market is immediate and long-lasting.

Given these competitive realities, any remedy plan ultimately adopted by the Commission must provide a strong disincentive for Qwest to impede real and sustained competition for local services in Arizona. The consequences for failure to comply with the PAP must be severe enough to encourage compliance and cause Qwest to correct problems rather than viewing assessments as a cost of doing business. To that end, the consequences must increase based on magnitude and duration of poor performance. Additional consequences must also be imposed for industry-wide poor performance. Furthermore, any absolute caps on liability must be eliminated. Penalties must be paid directly to CLECs rather than accounted for as billing credits. Lastly, the PAP must be implemented prior to any grant of §271 authority. Accordingly, the Commission must order Qwest to revise its proposed PAP consistent with the comments previously provided by the Joint Intervenors and the arguments contained in this brief.

COMMENTS ON SPECIFIC PAP IMPASSE ISSUES

A. PAP-1: PO-6, PO-7, PO-8, and PO-9 performance measures should be included in the PAP.

1. PO-6 and PO-7

The PAP should include both performance measures PO-6 and PO-7 as individual measures. Qwest has proposed to include either PO-6 or PO-7. While the Performance Indicator Definitions ("PIDs") speak for themselves, the work completion notice (PO-6) and billing completion notice (PO-7) serve different purposes. PO-6 evaluates the timeliness of Qwest issuing electronic notifications to CLECs that provisioning work on an order has been completed and the service is available to the customer. The work completion notice is needed to ensure that a CLEC knows as soon as possible that Qwest has completed an installation for the CLEC. The work completion notice also informs CLECs about an order's status when its customers call on or shortly after the due date of the order.

PO-7 evaluates the timeliness with which electronic billing completion notifications are transmitted to CLECs, focusing on the percentage of orders for which notifications are transmitted (for CLECs) or posted in the billing system (for Qwest retail) within four business days. The billing completion notice informs the CLEC when Qwest will cease billing the customer. That date also lets the CLEC know the date it can begin billing the customer. A missing or untimely billing completion notice can result in a customer being double billed. In addition, PO-6 should no longer be considered a diagnostic measure. PO-6 should, therefore, be sent back to the TAG to develop an appropriate, defined standard.

Absent these notices to the CLEC, the CLEC customer service representative cannot provide reliable information to the CLEC customer to explain what has occurred. Clearly, the customer has been harmed, and the CLEC's reputation is adversely affected when it cannot provide accurate information to its customer and must speculate on the cause of a problem.

The Texas plan does include a per occurrence payment for "Percent Mechanized Completions Returned Within one Day Of Work Completion".

2. PO-8 and PO-9

Qwest has proposed to include PO-8 and PO-9 if taken as family (e.g., PO-8a and PO-9a). These measures also should both be included as individual measures since these do measure different forms of performance by Qwest. PO-8 is a quantitative measure that determines the timeliness of the process. PO-9, on the other hand, measures the quality of the process.

PO-8, the Jeopardy Notice Interval, addressed when original due dates are missed and measures the extent to which Qwest notifies customers in advance of jeopardized due dates. It evaluates the timeliness of jeopardy notifications, focusing on how far in advance of an original due date a jeopardy notification is provided to CLECs (regardless of whether the due date was actually missed). For those instances when Qwest does send a jeopardy notice, it tracks how far in advance of the due date the jeopardy notice is sent. The sooner in advance of the due date the notice is sent, the more timely the notice is considered to be.

PO-9, Timely Jeopardy Notices, measures how successful Qwest is in providing CLECs with advance notice that Qwest will miss a commitment date by evaluating. The desired performance is that a high percentage of orders where Qwest has missed the commitment date will have received a jeopardy notice prior to the miss. The higher the percentage of missed commitments that receive a jeopardy notice prior to the due date, the higher the perceived quality of Qwest's notification process.

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Once again, absent these notices to the CLEC, the CLEC customer service representative cannot provide reliable information to CLEC customers.

B. PAP-2: Performance measures for the change management process must be included in PAP.

To maintain the integrity of a PAP, it is critical that Qwest adhere to strict processes in designing, prioritizing and implementing its business process or information system changes that affect its CLEC customers (e.g. applicable business rules[15]) or changes that would impact data collection, calculation, or reporting. Qwest's PAP does not contain adequate metrics or remedies relating to its change management process ("CICMP"). Intervals need to be established for the distribution of Qwest's change management notification and documentation, along with metrics to report Qwest's compliance with those intervals.

In response to this omission, Qwest recently offered a draft of PO-16 entitled "Timely Change Management Notifications". WorldCom provided specific comments on Qwest's draft; however, PO-16 has not been discussed in detail in this proceeding. Subsequent to this, Qwest also proposed new measure GA-7 entitled "Timely Outage Resolution following Software Releases" (drafted April 19, 2001) after workshops for this phase of the proceeding had been completed that also has not been discussed. This measure addresses the time Qwest takes to resolve software failures related to its new software releases. However, Qwest did not provide a performance measure addressing

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software validation asserting that it did not do so because the test bed issues are still being discussed in the CICMP forum.

Such a measure addresses the time Qwest takes to resolve software failures related to its new software releases. Software errors obviously can have a significant impact on CLECs by disabling a CLEC's ability to conduct business and consequently harming CLECs' customers. If Qwest fails to adhere to change management notice requirements, it prevents CLECs from developing corresponding and complementary system changes. This will delay entry and likely preclude the effective operation of existing CLEC OSS interfaces.

The Verizon (Bell Atlantic) performance plan includes several change management standards, including those relating to notification of system changes, software validation, resolution of problems discovered in Verizon's systems, and change management timeliness. Verizon "divides all changes into five categories and provides specific time lines and intervals for each category." The five categories are: 1) emergency, 2) regulatory, 3) industry standards, 4) requests by Verizon, and 5) requests by CLECs. By recognizing these different categories, Verizon's process is flexible and more responsive to different needs.

Because adequate change management measures are missing from Qwest's PAP, its PAP must be modified to incorporate the omitted measures. While this issue has been

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[15] "Business rules refer to the protocols that an incumbent uses to ensure uniformity in the format of orders and include information concerning codes such as universal service ordering codes (USOCs) and field identifiers (FIDs)." Ameritech Michigan Order, 12 FCC Rcd at 20617 n.335.

raised from the outset, Qwest only recently attempted to address this issue and then only to a limited degree. Qwest should not be rewarded for its delay in addressing this issue.

Since, the change management measures have not been addressed in these workshops to any significant extent, the change management process will be discussed here in detail to demonstrate why appropriate measures are needed. The change management process must embody several key principles. Among the critical ingredients are: (1) a minimum lead time for freezing a change prior to implementation that is sufficient to allow CLECs to implement and test the changes that are necessary to accommodate Qwest's system or business process change; (2) the time frame and nature of the explanation of additional functionalities provided by new changes; (3) backwards compatibility for some time period (e.g., 6 months) after an update is installed; (4) a feedback opportunity for carriers (e.g., a website and a monthly forum); (5) standards on what type of stable testing environment will be provided to competing carriers; and (6) a plan for backing out a change where there are significant, unexpected problems.[16]

Qwest has implemented its CICMP that does provide a vehicle for CLECs to propose requested changes, which are evaluated by Qwest and either accepted or rejected. All the other changes made by Qwest are evaluated internally and implemented solely at the discretion of Qwest. CLECs are not provided insight to these changes until release notifications are distributed. CLECs must be provided visibility to Qwest's proposed

[16] See Bell Atlantic New York, at para. 111.

enhancements and Qwest's proposed enhancement must be included in the prioritization process. If Qwest and CLECs disagree, CLECs must have the ability to address such disagreements in the dispute resolution process or at the Commission. Of particular concern is that CLECs have no voice on Qwest's own internal changes and how they are prioritized for implementation vis-à-vis CLEC proposed changes.

CLECs are not involved in Qwest's design process. CLECs are provided an initial evaluation of what Qwest believes it will take ("level of effort") to implement the requested change from CLECs only. Qwest will not finally determine the level of effort that will be required until the change request is considered a baseline candidate for the next related release. CLEC change requests are made part of the approval process as follows: Qwest comes to the table and describes the "capacity" (man hours to support CLEC change requests) is available above and beyond what Qwest has committed to implement internally. Qwest will also provide any known dependencies that would work easily in the next related release. CLECs' change requests are then categorized by "level of effort" required and discussed and voted upon. The release schedules are established by Qwest with no CLEC further input and CLECs have no information on when changes will occur or what changes are in a queue until releases are issued. Qwest establishes and prioritizes when any proposed changes are scheduled.

Qwest has a CICMP web site but it lacks a tracking mechanism that includes all proposed changes (Qwest's internal and CLECs' change requests) and status of all changes. A database would be extremely useful for the tracking of system changes.

CLECs are not involved in the detailed design document development process, implementation process, scheduling process, classification of severity of modification (e.g., to correct a problem or to upgrade a system) or proposed testing strategies discussions. CLECs should be involved in the processes.

Qwest implements IMA GUI functionality on a "flash cut" basis requiring all users to accept the latest functionality. For IMA EDI, Qwest supports the last release for six months after implementation of the new release. There is no process for backing out a change where significant, unexpected problems arise. This is a critical process that needs to be implemented by Qwest. Qwest has committed to provide a test environment, but it has offered no implementation time frame. Only after implementation of this test environment will change stability be properly assessed.

Because the implementation of new software upgrades also constitutes a competitively significant issue, CLECs should be permitted to request an "Information Technology Audit." This audit would evaluate whether such upgrades were put in place in a manner that comports with industry standards and whether Qwest used sound business practices in implementing CLEC requested corrections and improvements and enhancements and other changes. If such an audit revealed that Qwest failed to comply with relevant industry standards, Qwest would not only be required to pay for the audit, but additional penalties. Qwest would also be required to correct the upgrade.

Finally, in the Colorado Draft Report, it was recommended that compliance with the Change Management Process would be an absolute requirement and that no PID need

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be developed, but rather, that any failures to follow the requirements set forth in the procedure would trigger penalties. The Colorado Draft Report proposed that Qwest be required to designate a "Wholesale Assurance Group," whose director would be responsible for: (1) maintaining a website that assists competitors on relevant issues; (2) hosting monthly collaborative forums, to which Staff would be invited, for interested parties to discuss performance measurement, results, and its wholesale processes; (3) participating in the PAP Revision Process; and (4) serving as a contact person for complaints that could escalate into disputes.[17]

Qwest's PAP also lacks metrics that capture when status notices are missing. This was a problem that arose after the New York Carrier-to-Carrier metrics were completed. The metric only captured intervals for what actually was delivered. For example, if an ILEC received 100 orders and sent 50 firm order confirmations ("FOCs") or completion notices on time and did not send the other 50 notices at all, the metric would show perfect performance. Since Qwest is only measuring FOC intervals, the order has to be received to have an end time. The denominator is not FOCs due during the period, it is the FOCs received.

CLECs encountered serious problems with missing Bell Atlantic notices that led to a $10 million separate fine and another $24 million added to the New York Performance Assurance Plan to address a missing status notifier metric, that effectively resulted in

[17] See, Draft Colorado PAP Report entitled DRAFT REPORT AND RECOMMENDATION AND FURTHER REQUEST FOR COMMENTS, para. II.B, issued April 13, 2001. A copy will be

increasing the overall cap on the New York plan to $293 million, nearly 44% of its net local return. The same problem prompted an FCC consent decree requiring Verizon to pay $3 million to the U.S. Treasury. Metrics capturing the percent of missing confirmations and rejections, billing and provisioning completion notices should be added. Most importantly, Qwest should adopt the metric "Missing Notifier Trouble Tickets Cleared in Three Days" that is contained in the New York PAP except that it should be modified to define that the end time is when trouble tickets are closed not just cleared. The metric also includes a companion measurement that limits the ILEC's closing instructions to resubmit the order to only those orders truly not showing up in the ILEC's systems. This metric prescribes that no more than 5% of resubmissions can be rejected as duplications. This related metric on resubmissions closed a loophole whereby Verizon could quickly close a trouble ticket by telling the CLEC to resubmit it, putting the CLEC back to where it had started as the resubmission would reject before the CLEC could get any notifier, let alone the missing ones.

C. <u>PAP-3: Qwest's PAP must include a provision for root cause analysis after failing to meet a performance measure for two consecutive months</u>.

A two-consecutive month failure standard was adopted in the Texas six-month review process to trigger a root cause analysis. While Qwest accepted other modifications to the Texas Plan implemented as a result of the six-month review, Qwest failed to incorporate the two-consecutive month standard into its plan. Repeated failures are a reasonable trigger for further investigation. A root cause analysis should be performed for

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provided upon request.

any measure that misses three consecutive months (at any level) or two consecutive months at a mean difference of 25% or above. In addition the Commission should formally establish its right to initiate a root cause analysis under whatever circumstances it deems warrant further investigation.

The following language now found in the Texas PAP should be included in Qwest's PAP to address the need to conduct a root cause analysis:

> In the event Qwest misses any measurement for two consecutive months, and for each succeeding violation of that measurement, Qwest shall conduct an investigation to identify the problem and take corrective action. In addition, Qwest shall report and post such findings and a description of corrective action on its web site.

Qwest's resistance to this provision is puzzling, as it would seem a necessary step for it to fix a problem and stop paying remedies to CLECs. Qwest's reluctance to commit to root cause analysis for a repeated problem may foretell that it would be more willing to pay its low per occurrence remedies than find and fix the problem impeding CLEC growth in Arizona.

D. <u>PAP-4: A "K-table" should not be used in the PAP.</u>

Qwest's proposed use of the K Table allows for excessive forgiveness. Random variation and its associated forgiveness recognize the potential for Type I errors, but ignore the possibility of Type II error. At the critical value of 1.65 proposed by Qwest, the expected number of Type I errors are only 5 out of every 100 tests. Yet, Qwest demands that 8 failures be excluded from remedy payments for every 100 tests performed. On average, Qwest seeks about 40% too much exclusion for Type I error. Type II error,

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however, is ignored entirely by the K-Table. If Qwest is correct that sample sizes are and will remain small in its region, then Type II error (the failure to detect discrimination) is likely to exceed Type I error. Statistical issues aside, a large means difference between Qwest and the CLEC will generate harm to the CLEC and gain to Qwest, regardless of whether or not the means difference was the result of Type I error or not.

The expert hired by Qwest for the performance plan workshops in the ROC PEPP workshops recognizes this fact: "Whether [the ILEC's] non-compliance with service quality or performance standards is inadvertent (e.g., due to system malfunctions, breakdowns within the sequence of tasks and operations associated with wholesale services, or pure random variation) or a deliberate act of discrimination (intended to diminish [a CLEC's] ability to compete in retail service markets) should not be the central issue. Regardless of whether disparity is a planned or unplanned outcome, the net financial consequences are likely to be the same."[18]

If the benefits and harm from performance differences arise from the performance differences themselves, regardless of the source of the differences, then making adjustments for the source (i.e., the potential for a Type I error) is inappropriate.

Qwest's plan conceivably could forgive the same metrics month over month, much more than three times in a five-year period, even when sub-metric modified z-scores represent confidence levels of disparity higher than 95%. The Pennsylvania Public Utility Commission chose to use the 1.645 critical value as a clear line for when per measure remedies for parity measures should be paid with no forgiveness.[19] The New Jersey staff has proposed a per occurrence plan with no forgiveness, specifically rejecting a K-Table proposed by Verizon.[20] The New York plan provides no forgiveness for its Critical Measures, Special Measures, Collocation Mode of Entry and Change Control Assurance Plan components. In the Resale, UNE and Interconnection Mode of Entry components some forgiveness is given through a minimum scoring threshold, but Method of Entry scoring begins at a critical value of 0.8225 (repeated - equating to about a 90% confidence level).

If use of the K Table is accepted, then there should be a monthly adjustment for Type II errors through a similar table or an adjusted K-Table. In that case, WorldCom endorses the Balanced K Table described in Z-Tel's January 29, 2001, proposal. But a Balanced K Table injects unnecessary complexity that can be avoided by rejecting the use of the K Table outright. Therefore, the use of a Balanced K Table is the lesser of two evils, not the proper solution.

If the Commission decides to use the K Table, then it should consider limits on sample sizes, Z-score levels, or means differences that should not be forgiven. Finally, no

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[18] (Rebuttal Testimony of Dr. William E. Taylor, FPSC Docket No. 000121-TP, March 21, 2001, p. 36).

[19] Joint Petition of NEXTLINK Pennsylvania, Inc., RCN Telecommunications Services of Pennsylvania, Inc., Hyperion Telecommunications, Inc., ATX Telecommunications, Focal Communications Corporation of Pennsylvania, Inc., CTSI, Inc., MCI Worldcom, e.Spire Communications, and AT&T Communications of Pennsylvania, Inc., f.or an Order Establishing a Formal Investigation of Performance Standards, Remedies, and Operations Support Systems Testing for Bell Atlantic-Pennsylvania, Inc. Order released December 31, 1999 in Case P-00991643.

[20] New Jersey Board of Public Utilities Division of Telecommunications staff remedies proposal released October 3, 2000 in Technical Solutions Facilitations Team Performance Measures and Standards Incentive Proposals Docket No. TX98010010.

repeated failure for a measure should be forgiven as the repetition makes it unlikely that the failure was random. A more detailed analysis of forgiveness is presented in Dr. John Jackson's paper on "Random Variation, Forgiveness, and K-Tables".[21]

E. PAP-5: There should be no cap on the amount of penalties that can be imposed for performance failures.

There should be no absolute cap on Qwest's liability for its failure to meet performance measures. There is absolutely no economic justification for a cap. If performance continues to be poor, remedy payments should continue. Qwest's position that continued poor performance requires no remedy payments is untenable. Rather than an absolute cap, a threshold should be established to trigger regulatory review, a "procedural cap". The procedural cap should be set high enough to avoid constant litigation, but low enough to be meaningful. A monetary cap allows Qwest to easily calculate the "worst" case amount it would pay for repeated poor performance and compare that amount to the amount it would have to expend to correct a problem or enhance a system. The Commission must ensure that the Qwest plan offers Qwest no certainty as to the amount at risk so that it cannot ascertain its cost for failure.

An absolute monetary cap will reduce the effectiveness of the plan with no offsetting benefits to CLECs or, more importantly, consumers. A procedural cap, on the other hand, makes it more difficult for Qwest to quantify its risks, but provides parties with a known "trigger" that alerts the Commission to a problem and allows the

[21] See, WorldCom Exhibits 9 and 12.

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Commission to intercede. The Michigan Public Service Commission's April 17, 2001, decision in Case U-11830 establishes a review cap at 36% of net local return. The Pennsylvania PUC established no caps, review or otherwise, in its December 31,1999 order in Docket No. P-00991643. The Arizona Corporation Commission must retain control over the plan to modify it as necessary.

The initial procedural cap should be set at 44% of Qwest's net local return for the previous year reported. This is consistent with the post-271 remedial actions of the FCC and New York Public Service Commission that raised the total remedies for Verizon's poor performance in New York to nearly 44% of net local revenue. In the event the review threshold is reached, the Commission would then have the opportunity to consider whether to apply additional remedies.

While the FCC concluded that 36% of net local return was sufficient in its first two 271 application approvals, it also noted that other remedies were available to CLECs in their contracts beyond these remedies to counter ILEC incentives[22] to gain long distance entry as well as local profits.[23] The PAP is the only monetary remedy offered in the

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[22] See, Verison 271 Application, a para. 238, where it states: "*Total Liability At Risk.* The Massachusetts PAP places a total of $155 million in potential bill credits placed at risk, on an annual basis, under all components of the PAP.[22] The PAP adopted by the Massachusetts Department does not represent the only means of ensuring that Verizon continues to provide nondiscriminatory service to competing carriers. In addition to the $155 million at stake under this plan, Verizon faces other consequences if it fails to sustain a high level of service to competing carriers, including: federal enforcement action pursuant to section 271(d)(6) and remedies associated with antitrust and other legal actions."

[23] No matter what percentage is selected, returns for local, DSL and long distance services should be included in the calculation. See, In the Matter of the Application of Bell Atlantic New York for Authorization Under Section 271 of the Communications Act to Provide In-Region, InterLATA Service in the State of New York. CC Docket No. 99-295, Issued December 21, 1999, page 216, footnote 1133:

Arizona for CLECs for Qwest's provision of wholesale services. No interconnection agreement contains monetary penalties payable to CLECs for poor service to the Joint Intervenors' knowledge. Moreover, the Commission has no specific and detailed wholesale quality of service rules that provide monetary payments to CLECs. The Commission has contempt authority to assess penalties for noncompliance with its orders and rules, but penalties paid under that statute are not paid to CLECs or the consumers harmed, but to the State of Arizona.[24]

The Qwest plan is further weakened by the imposition of caps on the per-occurrence payments (in addition to the overall plan cap). To the extent that per-occurrence payments amount to an appreciable amount (possibly by an extended cessation of all services for all CLECs), they are reduced by the per-measurement caps reducing the impact to Qwest. The per-occurrence cap reduces the effectiveness of the remedy plan with no offsetting benefits.

Even worse than the overall cap are the proposed per measure caps in the plan. Such caps would limit remedies when the harm to the CLEC is at its greatest and make the overall cap illusory. Further, the justification for the measure caps is the very large sample sizes endemic to particular measures. If sample size is the problem, then sample size, not the payment, should be capped. Payment caps are equally likely to apply to large means

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While we are using net local revenue as a reference point or yardstick for comparison purposes, we do not suggest that local revenues constitute the only relevant figure. We recognize that Bell Atlantic may also derive benefits in other markets (such as long distance) from retaining local market share.

differences and persistent non-conformance as they are to large sample sizes. Finally, caps on remedies paid to one CLEC also should not be set.

F. PAP-6: Penalties and direct payments to CLECs.

1. There should be a minimum per-occurrence penalty.

Small order counts will not produce significant payments under Qwest's PAP. However, such discrimination may not have small consequences and could be a significant impediment to competition. A simple solution is to incorporate a minimum remedy of at least $2,500 per occurrence with no restrictions on sample size or products as set out in Z-Tel's February proposal. Duration and severity factors would also be applied to allow for payments to adjust to the appropriate effective level.

Hypothetically, a CLEC having problems with Qwest's provisioning of its first 100 loops is going to delay a plan to launch 10,000 loops in two months and create even more customer dissatisfaction. The per occurrence remedies would be a small cost compared to what Qwest gains from slowing the competitor's ramp-up plans. In fact, Qwest may even make a profit from the CLEC even if it paid penalties for missing all of the 100 initial loop orders because of the monthly collocation charges that the CLEC pays whether the loops ever connect paying customers to those collocations sites.

New York and Pennsylvania have adopted remedies paid on a per-measure basis. The New York plan even creates Special Measures, a super measurement-based remedy, focused on past performance weaknesses of Verizon. The special measures divide large

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[24] See A.R.S. § 40-424.

remedy amounts ($2.5 million quarterly for flow through, $2 million monthly for hot cuts, $2 million monthly for missing notices, for example) among the CLEC community when benchmarks are missed for metric groups. The PSC believed that these were persistent problems that needed a very large incentive to outweigh the costs and competitive advantages of not fixing underlying operational problems. A combined per occurrence and per measure approach is best for opening new markets to competition and ensuring that CLECs' new service offerings are not crushed at introduction with no substantial financial risk to Qwest.

2. <u>Penalties should continue to increase after 6 months of failure</u>.

Under Qwest's Tier I payments, the remedy amounts do increase, but are insignificant for repeated violations. The percentage increase in remedy amounts from month to month drops dramatically in the fourth month and beyond. Also, Qwest reduces its exposure by holding the payment steady at the sixth month and beyond. Moreover, under Qwest's Tier II, it pays the same amount of remedies each month even if it fails to correct a severe problem for months on end. Certainly this provides no benefits to the CLECs that are adversely affected by Qwest's poor performance.

Continuous duration penalty escalation discourages repeated non-conformance. Payment levels must correspond to the number of consecutive months of non-conforming performance. Repeated non-conformance indicates that payment levels are too low and are being treated as a cost of doing business. Duration penalty escalation causes the payments to increase to an effective level that causes Qwest to correct the problem causing the repeated failure. It is less effective if Qwest is not required to pay higher penalties after the sixth month. A cap of this nature reduces the effectiveness of the remedy plan with no offsetting benefits for CLECs.

The Pennsylvania remedy plan adopted on December 31, 1999, requires a pro rata remedy the first month and then remedies of $2000 for the second and $4000 for the third on top of the pro rata amounts. At the fourth month, the PUC may levy up to an additional $25,000 fine, but it's not self-executing like the second and third month fines. Under this plan, Bell Atlantic-Pennsylvania must have two compliant months in a row before the duration penalties go down to the first month pro rata level again. This ensures that any fixes of disparate performance have staying power and are not a periodic spike in staffing or overtime to contain remedies.

3. <u>There should be direct payments to CLEC rather than bill credits</u>.

Payments to CLECs should be made by check by the end of the month following the data report (*e.g.* June data, reported in July, remedies paid by August 31). An invoice must accompany the payment explaining the calculation of each sub-metric missed. If Qwest fails to remit a consequence payment by the due date, then it should be liable for accrued interest for every day that the payment is late. Payment by check is necessary in order to ensure certain payment and is easier for the CLECs to administer and track.

Price reductions and bill credits are also an inadequate means to serve as a deterrent for poor performance. Credits are hard to administer, can be delayed due to bill cycles, or delayed by the CLEC withholding payment to get Qwest's attention on adjustments needed for a continuing billing error. Direct payments, on the other hand, can be administered immediately and are easier to audit. Direct payments from Qwest also would more readily bring to top executive's attention that remedy payouts are increasing where credits would make this trend harder to discern in a timely manner. Furthermore, if bill credits are used, two entire payment systems must be designed, implemented, and administered because direct payment is required for Tier 2 payments and for any payments that exceed the CLEC's bill. Since direct payment must be made for Tier II payments, there is no reason to require Qwest to implement and administer two separate payment mechanisms, particularly when direct payment is required for Tier II remedies and preferred by the CLECs.

The Pennsylvania and Michigan orders cited favorably required direct payments to CLECs, with Pennsylvania requiring that an invoice explaining the payment be attached. The Georgia commission did not rule on the issue as BellSouth's plan has always included only direct payments.

G. <u>PAP-9: Identifying and ranking measures.</u>

1. <u>There should be both Tier 1 and Tier 2 payments associated with failures.</u>

If both Tier 1 and Tier 2 penalties are contained in the PAP, there generally is no reason that both types of penalties should not be imposed on Qwest for any violation. Tier 1 penalties are paid directly to the CLEC, whereas Tier 2 penalties are paid to a state fund as further incentive to Qwest to correct problems causing failures. Since the purposes for the two types of penalties differ, there generally is no reason to not impose both types of penalties when both the CLEC is harmed and Qwest requires further incentive to correct a problem.

2. <u>Ranking of measures is too subjective and arbitrary.</u>

The process, or lack thereof, for ranking or weighting the PIDS is very subjective and arbitrary. No objective criteria or standards have been proposed to rationally rank measures. Weighting only creates areas where ILECs can target poor performance at bargain prices. Any attempt at ranking or weighting measurements will result in CLECs entry strategies competing against each other to ensure that a particular CLECs "important measures" are categorized and weighted properly for its needs. Ranking measures forces parties to minimize the importance of some measures when all measures established in Qwest PIDs are important and impact consumers. It also allows Qwest to allocate its resources to those measures carrying the greatest penalty, ensuring failures of measures with lower penalties are corrected last. It is also difficult to rank measures since the priority may actually lie at the sub-measure level. Moreover, the importance of particular measures will likely change over time. The Michigan PSC agreed, giving all metrics the medium ranking from the Texas plan, and then doubling the Tier I and Tier II amounts. This resulted in per occurrence amounts for all the per occurrence remedies being equal to (first month) or higher (subsequent duration months) than the Texas and Qwest proposed plan and the per measure remedies being less for most measures.

However, if the Commission believes measures should be ranked, those failures that would create the most harm for CLECs trying to provide service to consumers should certainly have an impact. In addition, as stated in the Colorado draft PAP report, areas of wholesale performance that go to the heart of Qwest's market power and where abuse of its obligation to deliver reliable wholesale performance may be most pronounced. The Colorado draft PAP report identifies four critical competitively significant areas of wholesale performance, all of which can "gate" CLEC entry and would, at least for the foreseeable future, constitute essential wholesale inputs: (1) interconnection; (2) switching of customers; (3) collocation; and (4) the provisioning of local loops. These critical areas may provide this Commission guidance in ranking measures.

H. Pap-10: Qwest's PAP must address the magnitude of failures.

Qwest's plan does not adequately account for the magnitude of poor performance. Qwest plan only picks up the number of customers harmed not the degree to which they received poorer service than retail customers. It does not distinguish whether the standard was exceeded by 1 day for 100 people or 30 days for 100 people. In both instances the same remedy amount would apply. The penalty levels are set too low and do not provide significant incentive to cause Qwest to comply with the designated performance standards. For example, there is a significant difference in missing the "Commitments Met" metric 88% of the time versus less than 50%. Also, additional consequences should be imposed when poor performance is industry-wide, blocking competition on a wide-scale. Severe or repeated non-conformance indicates that payment levels are too low to ensure parity or benchmark performance. By using severity and duration factors, the payments will continue to increase, incenting Qwest to provide the required conforming performance.

I. **PAP-11: Qwest's plan must be properly and regularly audited.**

As has been stated in the Colorado Draft PAP Report, Qwest does not necessarily have the incentive to report on its wholesale performance in a reliable manner, particularly where it will be required to pay penalties for deficient performance. To address this concern, the ROC process enlisted Liberty Consulting to perform a full performance management audit ("PMA"). This audit, while providing assurance that the measures in effect at its completion are correct, does not provide continued assurance to this effect. The Colorado Draft Report recommends a five-step process that is an appropriate means to audit Qwest's future compliance with its PAP.

Under the Colorado Plan, for the first three years of the auditing program, Qwest should pay for the first three aspects of this audit process described below. After the three years, the commission can decide whether Qwest should bear full financial costs for future annual audits based on the results of past audits and the current competitive state of the Arizona market. The fourth and fifth aspect of the audit process addresses mini-audits and Commission audits. The sixth element is a requirement that Qwest adopt a change management plan for metrics so that auditors and CLECs can follow changes in metrics from month to month for accurate replication. As mentioned before, only authorized changes in the PIDs should be implemented. At the PAP's inception and every year thereafter, the Arizona Corporation Commission, with input from the Commission and its staff, Qwest and CLECs should select an appropriate outside firm to perform the auditing function.

(1) Basic Requirements Imposed on Qwest

Qwest must not be authorized to make any change in its performance measurement and reporting system unless the Commission, through the PAP Revision Process or otherwise, approves of such a procedure in advance. In addition, to facilitate the use of effective auditing of Qwest's performance measurement system, Qwest should be required to store all such records in easy-to-access electronic form for 3 years after they have been produced (and an additional three years in an archived format). Any failure to follow either of these requirements shall be treated as a violation of the Change Management Procedure resulting in penalties. The auditor should be empowered to go beyond checking Qwest's calculations and adherence to business rules but to ensuring that the underlying data was properly coded so that exclusions are proper (See issues raised by CWA report to the New York PSC contained in attachment II of WorldCom's filing dated 1/29/01).

(2) Oversight of Initial Problem Areas

During the first two years following the institution of the PAP (starting with the first generation of the performance reports called for by it), Qwest shall be subject to periodic specialized audits focused on areas of performance that were identified in the initial performance management audit. Any issues identified by the auditor must be corrected by Qwest to the satisfaction of the auditor and the Commission before the audit is closed. In addition any future audits may include "areas of performance" not "identified" in the initial performance measure audit.

(3) Regular Performance Management Audits on Selected Measures

At annual intervals for the first three years of the PAP's operation and at intervals to be determined by the Commission thereafter, the outside auditor shall perform an audit that will entail three basic steps. First, this audit should evaluate the accuracy of the measures. Second, the audit should examine the measures responsible for producing 80% of the penalties paid by Qwest over the prior interval. Finally, the audit should take particular care in evaluating whether Qwest is exercising a proper duty of care in evaluating which, if any, requests for performance can be properly excluded and thus not counted towards its wholesale performance requirements. To facilitate this exercise, Qwest shall be required to keep a record of all exclusions -- whether authorized by the PIDs or otherwise excluded -- and to catalogue the effect of such exclusions on otherwise applicable penalty calculations. Such records should be kept in easy-to-access electronic format for three years and an additional three years in an archived format.

(4) Mini-audits upon CLEC request

At the election of an individual CLEC, the CLEC can request a "mini-audit" of Qwest's wholesale measurement systems. Mini-audits must also be conducted by a third party auditor. Qwest should pay for fifty percent (50%) of the costs of the mini-audits. The other fifty percent (50%) of the costs will be divided among the CLEC(s) requesting the mini-audit unless Qwest is found to be "materially" misreporting or misrepresenting data or to have non-compliant procedures, in which case, Qwest should pay for the entire cost of the third party auditor. Whether Qwest is "materially" at fault should be based on the parameters of failure to perform: "materially" at fault means that a reported successful measure changes as a consequence of the audit to a missed measure, or there is a change from an ordinary missed measure to intermediate or severe. Each party to the Mini-Audit should bear its own internal costs, regardless of which party ultimately bears the costs of the third party auditor. In addition to fixing the identified problems, Qwest should also be responsible for paying a penalty under the change management process.

CLECs should have the right to request mini-audits of individual performance measures/sub-measures during the year. When a CLEC has reason to believe that the data collected for a measure is flawed or the reporting criteria for the measure is not being followed, it must have the right to have a mini-audit performed on the specific measure/sub-measure upon written request (including e-mail), which will include the designation of a CLEC representative to engage in discussions with Qwest about the requested mini-audit. If, 30 days after the CLECs written request, the CLEC believes that the issue has not been resolved to its satisfaction, the CLEC may commence the mini-audit upon providing Qwest with 5-business days advance written notice.

Each CLEC should be limited to auditing three single measures/sub-measures or one domain area (preorder, ordering, provisioning, maintenance or billing) during an audit year. The audit year should commence with the completion of the OSS test (or an Annual Audit). Mini-Audits may be requested for months including and subsequent to the month in which the OSS or an Annual Audit was completed. Mini-audits cannot be requested by a CLEC while the OSS third party test or an Annual Audit is being conducted (i.e. before completion).

Mini-audits must include a review of all systems, processes and procedures associated with the production and reporting of performance measurement results for the audited measure/sub-measure. Mini-audits should include two (2) months of raw data. Raw data supporting the performance measurement results must be available monthly to CLECs.

No more than three (3) mini-audits should be conducted simultaneously unless more than one CLEC wants the same measure/sub-measure audited at the same time, in which case, mini-audits of the same measure/sub-measure shall count as one mini-audit.

If, during a mini-audit, it is found that for more than 30% of the measures in a major service category Qwest is "materially" at fault (i.e., a reported successful measure changes as a consequence of the audit to a missed measure, or there is a change from an ordinary missed measure to a higher duration or severity penalty), the entire service category should be re-audited at Qwest's expense.

The results of each mini-audit should be submitted to the CLEC involved and to the Commission as a confidential document. Qwest should provide notification to all CLECs of any mini-audit requested when the request for the audit is made on its website or by other means.

(5) Commission audits

The Commission should retain the right to perform an audit, with the assistance of the outside auditor if it so chooses to examine any aspect of Qwest's wholesale performance at any time that it deems warranted. Such an audit should be paid for through Tier II penalties maintained in a state fund. If the audit discovers errors in performance reporting that are adverse to the CLECs, Qwest should reimburse any costs of the audit and be liable for penalties under the change management process.

Qwest's proposal that an ongoing monitoring program of performance measurements and the reporting of performance results be adopted in lieu of a comprehensive annual audit is not appropriate. Independent, third-party OSS audits generally only check the mathematics of calculations, exclusions, and adherence to business rules for historical data. Auditors generally make no representation about or have any obligation to address transactions occurring subsequent to the OSS audit.[25] Any plan must include requirements for periodic comprehensive audits to ensure that Qwest continues to produce reliable data and reporting. An annual comprehensive audit of Qwest's reporting procedures and reportable data should be conducted.

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[25] See, KPMG Final Report as of December 22, 2000 issued in its Pennsylvania OSS test wherein it states at p. 5:

> We have not conducted an audit or review of the historical data provided to us in accordance with generally accepted auditing procedures and/or standards promulgated by the American Institute of Certified Public Accountants (AICPA). We express no opinion or offer any assurance with respect to the accuracy of the aforementioned historical data. KPMG Consulting makes no representation nor has any obligation with reference to

(6) Qwest should adopt a change management process with input from CLECs to ensure that metrics can be replicated by the auditor. The change record would cover all elements of a metric and should be enforced by commission directive that the auditors inability to replicate a metric due to poor change control or missing data should elicit the same remedy as if the metric had been missed, including duration remedies if multiple months cannot be replicated.

I. **PAP-12: Qwest's Tier II payment scheme is inadequate and ineffective.**

Under Qwest's plan, there are two types of penalties to be paid by Qwest: one that would be paid to CLECs for poor performance ("Tier I") and one payable to the state treasury ("Tier II"). Payments to the state treasury account should in no way benefit Qwest. The remedies paid to CLECs would be based on individual CLEC results. The remedies paid to the state would be based on aggregated results for all CLECs with remedies computed monthly using monthly data. Qwest has limited the number of Tier II penalties to only to certain measures. The Joint Intervenors generally recommend that the Tier II penalties mirror those of Tier I.

Qwest's Tier II remedy payments are not triggered unless they have discriminated against the entire CLEC community for three consecutive months. Even one month of poor performance, such as during a CLEC's ramp-up before it has established a reputation in the local market, can seriously erode prospects for local competition. Two consecutive months of poor performance would gravely impact any CLEC at any stage of market

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any events or transactions occurring subsequent to the date of this report.

entry. Under its PAP, it is possible for Qwest to provide discriminative service 8 out of 12 months on an aggregate basis and still pay no penalty. In short, the Tier II remedies may rarely, if ever, be triggered, leaving Qwest with only the prospect of a small fine from the inadequate remedy amounts in Tier I. Further, there is no reason to evaluate Tier I measures monthly, but Tier II measures only every three months. Performance should be evaluated monthly for both Tier I and II measures so that problems are addressed, with remedy payments, sooner rather than later.

Tier II penalties paid to the State should be paid for all performance measures in the plan except the agreed upon GA measures using aggregated CLEC data. The "aggregated" CLEC should be treated as any other CLEC, but all remedy dollars are paid directly to the State Treasury or Corporation Commission for administrative costs of the performance plan, including audits. In no case should Qwest benefit by receiving any funding from the state allocation.

Qwest has only agreed to a limited number of measures for Tier II penalties.

J. <u>PAP-13: Penalties should return to their original amount only after 2 months of compliance</u>.

Plans submitted by CLECs address both severity and duration in an effort to discourage severe or repeated non-conformance. Payment levels depend on the severity of the non-conformance with payments escalating as the level of non-conformance increases. In addition, payment levels depend upon the number of consecutive months of non-conforming performance. Severe or repeated non-conformance indicates that payment levels are too low to ensure parity or benchmark performance. By using severity and duration factors, the payments will continue to increase, incenting Qwest to provide conforming performance.

Severity and duration factors allow for payments to adjust to the appropriate effective level. It would no longer be effective, if we allowed payments to return to their original base amount. It is important to show that Qwest has actually fixed the problem rather then a achieving a single one-month fix or a fluke. Therefore, more than just one month of compliant performance before falling back to their original levels. Three months of compliance is appropriate, but two may be adequate.

In addition, if either the severity or duration factors are invoked again for the same measure, the highest payment made during the episode of non-conformance needs to become the base penalty. If repeated disparity continues, the evidence is clear that the remedy amount is inadequate. Returning the payment to its initial level only ensures that discrimination will occur once more. Once a payment is found that produces non-discriminatory service, there is no reason to reduce that payment. The goal here is an effective performance plan, not a plan that jumps back and forth between effectiveness and ineffectiveness.

K. <u>PAP-14: Qwest's Plan Limitations found in Section 13 are inappropriate</u>.

Some of the reasons for opposing the limitations found in Section 13 have been discussed under other impasse issues or in other parts of this opening brief. Those arguments will not be repeated here, but will be identified. However, in general, the Joint

Intervenors are concerned with limitations of any kind that Qwest may attempt to use as "loopholes" in an attempt to avoid penalty payments for discriminatory service.

Sections 13.1 and 13.2: The PAP should become effective prior to Qwest's obtaining or seeking 271 approval. This will enable the Commission to comprehensively evaluate the application and effectiveness of the PAP. This will also allow the Commission to compare compliance before and after Qwest's entry into the long distance market. Therefore, a CLEC should be able to "opt" into the PAP under Section 1.8 of the SGAT immediately upon approval of the PAP by this Commission for all of the reasons earlier stated on the effective date of the plan.

Section 13.3: Qwest has not defined any the laundry list of events and also identified force majeure events. The list is vague, ambiguous and too broad. Moreover, a force majeure event should only apply to benchmark measures, rather than parity measures, force majeure event should affect Qwest and CLEC results in the same manner. The list also contains events that are frequently addressed in negotiations over the contents of force majeure clauses. In its SGAT, Qwest has proposed force majeure language in Section 5.7 that will soon be discussed in the General Terms and Conditions workshops. WorldCom has proposed the following force majeure language:

> Neither Party is liable for any delay or failure in performance of any part of this Agreement from any cause beyond its control and without its fault or negligence. These causes may include acts of God, acts of civil or military authority, embargoes, epidemics, war, terrorist acts, riots, insurrections, fires, explosions, earthquakes, nuclear accidents, floods, power blackouts, or unusually severe weather. If there is an excused delay in the performance of a Party's obligation(s) under this Agreement, the due date for the performance of the original obligation(s) will be extended by a term equal to the time lost by reason of the delay. If there is a delay, the delaying Party

> shall perform its obligations at a performance level no less than that which it uses for its own operations. If there is a performance delay or failure by Qwest, Qwest agrees to resume performance in a nondiscriminatory manner and will not favor its own provision of Telecommunications Services above that of CLEC.

Since the PAP will be incorporated into the SGAT, this section of the PAP should cross reference the definition of force majeure approved in Section 5.7 of the SGAT rather than using a vague, ambiguous and broad list of acts that excuse Qwest's performance. Qwest should be responsible for all Qwest retained vendors issues. Finally, Qwest must have the burden of proving a force majeure event.

Section 13.4: This section may suggest that any underlying evidence of Qwest's failure to perform cannot be used by a CLEC to demonstrate that Qwest has violated performance measures. Moreover, it appears that Qwest believes that underlying evidence cannot be used to prove a violation of state or federal law or regulations. If that is the intent of this section, then it is unacceptable. Qwest's conduct underlying its performance, including its performance results, is discoverable and may be admissible as evidence. Qwest is certainly free to contest the evidence, but to say it can't be introduced is incorrect. Finally, to the extent Qwest is attempting to make its performance under the PAP "settlement negotiations" under Rule 408 of the Rules of Evidence that is wrong. It is not apparent what Qwest is doing here, and the section is vague and needs to be rewritten consistent with these comments.

As argued earlier, the Tier I and Tier II payments are not liquidated damages and the reference to liquidated damages should be deleted, referring only to the "assessments".

Section 13.5: Once again the reference to liquidate damages is wrong. These are penalties for bad performance and Qwest is trying to make these payments something akin to "gratuities" since Qwest's considers its PAP a voluntary plan under Section 17. As stated in footnote 17 to the Draft Colorado PAP Report:

> This report rejects any suggestion that Qwest's implementation of a PAP is an option insofar as Section 271 compliance is concerned. As Ameritech recognized in 1997, without "`concrete, detailed performance standards and benchmarks for measuring Ameritech's compliance with its contractual obligations and impos[ing] penalties for noncompliance,' Ameritech's statutory nondiscrimination obligations are only 'abstractions.'[26]

Sections 13.6 and 7: The Joint Intervenors do not seek "double recovery". The Joint Intervenors agree that any incentive payments they receive would be netted out if the Joint Intervenors were ever to bring other actions that resulted in damages, remedies or incentives payments for the same conduct that resulted in Qwest's payment of penalties under the PAP. No court or state commission would allow for double recovery, so the language here is unnecessary, but potentially overly restrictive. However, this language is too board, as written ensuring that whether a CLEC was seeking double recovery would be subject to significant litigation. This section should be narrowed to payment of double recovery only for the same acts, not "analogous" wholesale performance that is too vague, and then only to the extent the lesser amount paid by Qwest is offset against any greater amount Qwest is obligated to pay. Finally, it is not clear whether this section addresses

[26] In the Matter of Application of Ameritech Michigan Pursuant to Section 271 of the Telecommunications Act of 1996 to Provide In-Region, InterLATA Services in the State of Michigan, CC Docket No. 97-137, Evaluation of The United States Department of Justice, at 40 (June 25, 1997)

Tier II penalties. If a CLEC has been damaged, and is entitled to recovery under any theory of law of any kind, Qwest must not be permitted to subtract from payment due to a CLEC payments it made to the state treasury.

Section 13.8: This section should be deleted because Qwest should be liable for be liable for both Tier I and Tier II penalties for performance measure failures as discussed earlier in this brief.

Section 13.9: This section should be stricken if the Commission uses a procedural Cap s proposed earlier. Moreover, this section is not necessary unless the Commission adopts some form of absolute cap on the PAP, such as an overall cap, a per occurrence cap, a per measure cap, or a monthly cap.

L. PAP-15: The PAP should impose penalties for not providing accurate data on a timely basis.

If performance data and associated reports are not available to the CLECs by the due dates, Qwest should be liable for payments of $5,000 to a state fund for every day past the due date for delivery of the reports and data. If performance data and reports are incomplete, or if previously reported data are revised, then Qwest should be liable for payments of $1,000 to a state fund for every day past the due date for delivery of the original reports. If a CLEC cannot access its detailed data underlying Qwest's performance reports due to failures under the control of Qwest, then Qwest should pay the affected CLEC $1,000 per day (or portion thereof) until such data are made available. If

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(available at http://www.usdoj.gov/atr/public/comments/sec271/ameritech/1147.htm) (quoting Ameritech Brief at 85).

Qwest fails to remit a consequence payment by the due date, then it should be liable for accrued interest for every day that the payment is late. Paying remedies for late or missing notices does not relieve Qwest of eventually reporting the missing data and paying any associated remedies with interest to affected carriers and/or the state fund.

In the Colorado Draft PAP Report it was recommended that Qwest be required to pay twice its authorized return on equity ("ROE") for each late day into the special fund and that for inaccurate reporting, as revealed by any management performance audit, Qwest shall be required to pay the applicable penalty and a penalty of 50% of that amount in cash to the CLEC. In the event that Qwest voluntarily corrects some erroneous reports (i.e., before the audit begins), it shall receive the more lenient treatment of paying the applicable payment along with a 15% penalty.

M. <u>PAP-16: A.R.S. § 40-424 has limited applicability to this PAP</u>.

A.R.S. § 40-424 entitled "Contempt of Corporation Commission – Penalty" addresses the failure to comply with any order, rule, or requirement of the Commission has limited, if any, application to the Qwest PAP. The Commission's authority to implement this PAP is found in the federal Act as interpreted by the FCC. As noted earlier, the FCC has included a PAP in every 271 application granted to date.[27] Further, the FCC has stated in its orders giving Southwestern Bell long distance approval in Texas, Kansas and Oklahoma and giving Verizon long distance approval for Massachusetts that performance monitoring and enforcement mechanisms administered by state commissions can be

[27] See, footnote 11, *supra*, and relevant text.

critical complements to this Commission's section 271(d)(6) authority given the state commissions' historical role in regulating local exchange services.

The Commission is not relying on its authority under state law, and is not bound by any restrictions imposed by state law, to implement the PAP. Here this section has only limited applicability. If the Commission adopts this plan by order or decision, then if Qwest fails to comply with the requirements of the plan, § 40-424 would be applicable and Qwest could be fined for failure to comply with a Commission order. However, any penalty imposed on Qwest would be payable to the State of Arizona, not a CLEC, and would not be the result of the penalties proposed under the PAP.

Finally, the PAP is a self-executing plan. Once approved by this Commission and the FCC, the Commission will oversee the plan and may modify as contemplated in the PAP, but should not have to order any penalties to be paid unless a dispute arises. Even in that latter circumstance, its role will be to interpret the PAP and whether a self-executing penalty as defined is required, not establish a new penalty amount or new criteria.

For these reasons, § 40-424 should have limited application that will not affect the PAP in any manner.

CONCLUSION

For the reasons stated, the Joint Intervenors request that the Commission modify Qwest's PAP as proposed in this Opening Brief.

The undersigned is authorized to file this Opening Brief on behalf of Z-Tel Communications.

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Respectfully submitted this 10th day of May, 2001.

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