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BEFORE THE ARIZONA CORPORATION COMMISSION

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Chairman

JAMES M. IRVIN
Commissioner

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Commissioner

Arizona Corporation Commission
DOCKETED

MAY 22 2002

DOCKETED BY

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**

THIRD SUPPLEMENT TO WORLDCOM, INC.'S RESPONSE TO QWEST CORPORATION'S COMMENTS ON RECOMMENDED OPINION AND ORDER OF THE ADMINISTRATIVE LAW JUDGE ON QWEST'S PERFORMANCE ASSURANCE PLAN

WorldCom, Inc., on behalf of its regulated subsidiaries, ("WorldCom") filed its Response to Qwest's Comments on the Recommended Opinion and Order ("ROO") on April 22, 2002. WorldCom hereby supplements that filing with the Washington Utilities

and Transportation Commission's 33rd Supplemental Order; Order Denying in Part, and Granting in Part, Qwest's Petition for Reconsideration of the 30th Supplemental Order, Commission Order Addressing Qwest's Performance Assurance Plan issued on May 20, 2002 and updates the 30th Supplemental Order which was Exhibit C to WorldCom's Response.

Due to the expense of copying and mailing this 33rd Supplemental Order, WorldCom also requests that it only be required to file the 33rd Supplemental Order with the official Commission copies. All other parties will be provided electronic copies of the 33rd Supplemental Order. If, for any reason, a party wants a copy of the 33rd Supplemental Order, please contact the undersigned.

RESPECTFULLY submitted this 22nd day of May, 2002.

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ORIGINAL and ten (10) copies of the foregoing filed this 22nd day of May, 2002, with:

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COPY of the foregoing hand-delivered this 22nd day of May, 2002, to:

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Attachment A

BEFORE THE WASHINGTON UTILITIES AND
TRANSPORTATION COMMISSION

In the Matter of the Investigation Into U S WEST COMMUNICATIONS, INC.'s [1] Compliance With Section 271 of the Telecommunications Act of 1996	)	DOCKET NO. UT-003022 DOCKET NO. UT-003040 33RD SUPPLEMENTAL ORDER; ORDER DENYING IN PART, AND GRANTING IN PART, QWEST'S PETITION FOR RECONSIDERATION OF THE 30TH SUPPLEMENTAL ORDER, COMMISSION ORDER ADDRESSING QWEST's PERFORMANCE ASSURANCE PLAN
In the Matter of U S WEST COMMUNICATIONS, INC.'s Statement of Generally Available Terms Pursuant to Section 252(f) of the Telecommunications Act of 1996	)	

I. SYNOPSIS

In this Order, the Commission denies Qwest's petition for reconsideration of the Commission's 30th Supplemental Order, except for Qwest's request for reconsideration of modifications to language in the QPAP concerning force majeure events and monthly reports, which the Commission grants in part and denies in part. The Order also directs Qwest to modify language in the QPAP relating to election of remedies.

II. BACKGROUND AND PROCEDURAL HISTORY

1 This is a consolidated proceeding to consider the compliance of Qwest Corporation (Qwest), formerly known as U S WEST Communications, Inc., with the requirements of section 271 of the Telecommunications Act of 1996 (the Act)[2] and to review and consider approval of Qwest's Statement of Generally Available Terms and Conditions (SGAT) under section 252(f)(2) of the Act. The Commission is conducting its review in this proceeding through a series of workshops, comments by the parties, and the opportunity for oral argument to the Commission on contested issues.

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[1] Since the inception of this proceeding, U S WEST has merged and become known as Qwest Corporation. For consistency and ease of reference we will use the new name Qwest in this Order.
[2] Pub. L. No. 104-104, 110 Stat. 56, *codified at* 47 U.S.C. § 151 *et seq.*

2 The Commission participated with a number of other states in the initial review of Qwest's Performance Assurance Plan (QPAP). Washington and Nebraska joined other states already participating in the Multi-state Proceeding[3] for the purpose of holding hearings, developing an evidentiary record, and issuing an initial order on the QPAP. Hearings in the Multi-state Proceeding were held on August 14-17, and August 27-29, 2001, in Denver, Colorado.

3 Mr. John Antonuk, the facilitator for the Multi-state Proceeding, issued his Report on Qwest's Performance Assurance Plan (QPAP Report or Report) on October 22, 2001. *Ex. 1285.* The Commission had previously explained in the *12th Supplemental Order* that it considered Mr. Antonuk's report to be analogous to an initial order entered by an administrative law judge or hearing examiner, and that all findings and conclusions reached in Mr. Antonuk's report would be subject to review by the Commission.

4 Following written comments on the Report, as well as responses to Bench Requests and other questions by the Commission, and oral argument by the parties, the Commission entered on April 5, 2001, its *30th Supplemental Order, Commission Order Addressing Qwest's Performance Assurance Plan.*

5 On April 15, 2002, Qwest filed a Petition for Reconsideration of the *30th Supplemental Order*, requesting reconsideration of a number of issues decided in the order. On May 1, 2002, AT&T Communications of the Pacific Northwest, Inc., AT&T Local Services on behalf of TCG Seattle and TCG Oregon (collectively AT&T), Time Warner Telecom of Washington, Electric Lightwave, Inc., WorldCom Inc. and Covad Communications Company (collectively "CLECs") filed a Joint Answer to Qwest's Petition for Reconsideration. Public Counsel also filed a response to Qwest's petition on the same day.

III. DISCUSSION

1. Standard of Review/FCC Standard

6 The *30th Supplemental Order* identifies the performance assurance plan as an element of the public interest requirement under section 271(d)(3)(C), specifically, whether there is sufficient assurance that markets will remain open after grant of the application" and "whether a BOC would continue to satisfy the requirements of section 271 after entering the long distance market." *Order at ¶5 (citing Bell Atlantic*

[3] Seven states--Iowa, Utah, North Dakota, Wyoming, Montana, Idaho, and New Mexico—have held a joint proceeding similar to the proceeding in Dockets No. UT-003022 and UT-003040 to evaluate Qwest's SGAT and Qwest's compliance with section 271 of the Act. This proceeding has become known as the "Multi-state Proceeding."

New York Order).[4] The Order outlines the standard used by the FCC to determine the sufficiency of a performance assurance plan, i.e., the five-prong zone of reasonableness test. *Id. at ¶7.*

7 The Order also rejected certain "considerations" upon which the Facilitator based his decisions that went beyond the FCC's zone of reasonableness test. *Id. at ¶36.* The Order further stated that the Commission would apply the FCC's test, but asserted that the "Commission has authority under state law and the Telecommunications Act to require Qwest to act if its performance results in service that is unfair, unreasonable, or would stifle competition in the state." *Id. at ¶37.*

8 **Qwest:** Qwest states that the Commission correctly recognizes that its recommendations to the FCC must be governed by the FCC's zone of reasonableness test. *Qwest's Petition for Reconsideration at 2 (Petition).* However, Qwest objects to paragraphs 36 and 37 of the Order, asserting that the Commission's decision "begins with an incorrect premise." *Id. at 1-2.* Qwest argues that the Commission "ignore[s] Qwest's two-year effort to model the QPAP upon a framework already repeatedly found by the FCC to satisfy that federal standard." *Id. at 2 (emphasis omitted).* In addition, Qwest asserts that the Commission "appears to dismiss Qwest's further efforts in the ROC PEPP collaborative and multi-state workshop to make substantial improvements on what the FCC has previously required." *Id.*

9 Qwest objects to references to decisions on performance assurance plans from other states, arguing that the references "ignore the different overall structure, record, and negotiating history of those other state proposals." *Id. at 3.* Specifically, Qwest questions why the FCC's prior determinations on performance assurance plans should not control the Commission's decision in Washington. *Id.* Qwest argues that the QPAP filed in Washington following the issuance of the QPAP Report is sufficient to meet the FCC's "zone of reasonableness" without the changes ordered in the *30th Supplemental Order. Id. at 5.*

10 **CLECs:** The CLECs assert that Qwest has demonstrated no "substantial error of fact and law" as the Commission has required for petitions for clarification or reconsideration. *Joint Answer to Qwest Corporation's Petition for Reconsideration at 2 (Joint Answer).* The CLECs argue that the Commission correctly based its decision on the FCC's zone of reasonableness test and the statements of the FCC requiring state authority over performance assurance plans. *Id. (citing to the Bell Atlantic New York Order and the Verizon Pennsylvania Order).*[5] Specifically, the CLECs argue that the

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[4] *In the Matter of 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,* Memorandum Opinion and Order, CC Docket No. 99-295, FCC 99-404, (rel. Dec. 22, 1999) (*Bell Atlantic New York Order*).

[5] *In the Matter of the Application of Verizon Pennsylvania Inc., Verizon Long Distance, Verizon Enterprise Solutions, Verizon Global Networks Inc., and Verizon Select Services Inc. for Authorization*

FCC has stated that states have authority under the Telecommunications Act as well as state law to adopt performance assurance plans that meet the needs of the particular state, and to determine whether the plan meets the public interest requirement of the Act. *Id. at 2-5.*

11 The CLECs object to Qwest's characterization of compromise and negotiation at the ROC PEPP collaborative, arguing that Qwest failed to negotiate key sections of the QPAP that are now at issue in this proceeding. *Id. at 5.* Further, the CLECs argue that the Commission should reject Qwest's argument that its QPAP should be sufficient because the framework of the QPAP is like that in the plan adopted in Texas and other SBC states approved by the FCC. *Id.* The CLECs assert that the QPAP offered by Qwest for the state of Washington is different from the Texas plan. *Id.*

12 **Discussion and Decision:** We reject Qwest's assertion that the FCC's zone of reasonableness test limits states to approving plans that are identical to those included in applications the FCC has previously approved. The FCC's standard is a zone, which by definition is not an exact point, but parameters within which states may approve varying plans. As we stated in the *30th Supplemental Order*, the FCC has recognized and allowed states to develop plans that vary:

> We recognize that states may create plans that ultimately vary in their strengths and weaknesses as tools for post-section 271 authority monitoring and enforcement. We also recognize that the development of performance measures and appropriate remedies is an evolutionary process that requires changes to both measures and remedies over time. We anticipate that state commissions will continue to build on their own work and the work of other states in order for such measures and remedies to most accurately reflect commercial performance in the local marketplace.[6]

13 We also reject Qwest's assertion that the Commission's authority to approve a performance assurance plan is limited to the requirements of section 271, section 272 and the FCC's rules. In its first order approving an application under section 271, the FCC noted that performance monitoring and enforcement mechanisms "are generally administered by state commissions and derive from authority the states have under state law or under the federal act."[7]

14 Finally, we reject Qwest's objection to references in the Order to other state decisions and plans, asserting that these plans' provisions were developed through a different history and process. First, throughout its petition, Qwest appears to contradict itself by requesting that the Commission adopt provisions from a stipulation offered but not

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to Provide In-Region, InterLATA Services in Pennsylvania, Memorandum Opinion and Order, CC Docket No. 01-138, FCC 01-269, (rel. Sept. 19, 2001) (*Verizon Pennsylvania Order*).

[6] *Verizon Pennsylvania Order*, ¶128.

[7] *Bell Atlantic New York Order*, ¶429, n.1316.

adopted in Utah, which was negotiated by the Utah Advocacy Staff and Qwest without involvement of the CLECs (Utah stipulation). Second, given the FCC's expectation that states will "build on the work of other states" in developing plans, it is entirely appropriate for this Commission to consider what other states have ordered. The process of developing a plan for Washington has not occurred in a vacuum, but at a time when each of the 14 states in Qwest's region are determining an appropriate plan for that state. The Commission has looked to the decisions of other states in keeping with the FCC's direction to develop the best plan for Washington state.

2. Duration/Severity Caps

15 The *30th Supplemental Order* directs Qwest to remove the 100 percent cap on the deviation between actual performance and the performance standard in order to encourage Qwest to minimize any disparity in providing services between itself and competitors. *Order at ¶78.*

16 **Qwest:** Qwest asks the Commission to reconsider the decision to remove the 100 percent cap on the interval measures contained in the QPAP. Qwest argues that the *30th Supplemental Order* "addresses neither the reasons for departing from these FCC views nor the basis for rejecting the Facilitator's approach." *Petition at 7.* Qwest provides two mathematical examples that purport to demonstrate that sufficient incentive is provided under the proposed 100 percent cap. *Id. at 7-8.* Qwest argues that "there is no basis for departing from the clear recognition by the FCC and all other state Commissions in Qwest's region that have addressed the matter that the 100% cap satisfies the governing FCC incentive criterion of its zone of reasonableness standard." *Id. at 8-9.*

17 **CLECs:** The CLECs take issue with Qwest's assertion that removing the 100 percent cap is a departure from the FCC's approval of a 100 percent cap. *Joint Answer at 6.* The CLECs assert that the FCC initially endorsed a plan containing no cap on the number of payment occurrences in approving SBC's application for Texas, and then allowed SBC to modify the plan to accommodate a change made during the first six-month review. *Id. at 7-8.* The CLECs also assert that Qwest misrepresents how the Colorado plan treats the severity of misses, noting that the Colorado plan does limit the number of occurrences to 100 percent, but includes a payment multiplier to account for the severity of misses. *Id. at 8-9.* The CLECs assert that the FCC, Colorado and Washington all share the concern that the payment liability should increase with the severity of the performance failures. *Id. at 9.*

18 With respect to Qwest's demonstration that the existing formula provides sufficient incentive, the CLECs note that Qwest used the worst-case scenario, i.e., an $800 per-occurrence payment that only applies to measures in the "High" category, and only after six consecutive months of missing the measure. *Id. at 10.*

19 **Discussion and Decision**: The CLECs' answer demonstrates that the FCC has accepted performance assurance plans that contain a 100 percent cap and has accepted a state plan that contained no limitation. The most reasonable conclusion is that both options are within the FCC's zone of reasonableness. What is relevant here is that there are different ways to address severity of performance failure, not just one correct way. As we stated in the *30th Supplemental Order*, the key to local service competition is Qwest providing services to CLECs at parity with the services it provides to its own retail customers. Removing the 100 percent cap best achieves the proper balance of incentives for Qwest following a grant of section 271 authority. We are not persuaded by Qwest's arguments to retain the 100 percent cap for severity of performance failures and deny Qwest's request for reconsideration of this issue.

3. Tier 2 Payment Trigger

20 Qwest's original QPAP, Exhibit 1200, required Tier 2 payments—payments made to the state—only after 3 consecutive months of non-performance. The Report modified Qwest's proposal to require Tier 2 payments when Qwest failed to meet any Tier 2 performance measure for any two months of any consecutive three months in a rolling 12-month period. *Report at 43.* The *30th Supplemental Order* directs Qwest to modify section 7.3 of the QPAP to require Tier 2 payments in any month that Qwest fails to meet Tier 2 performance standards. *Order at ¶86.*

21 **Qwest**: Qwest asks the Commission to reconsider its decision regarding Tier 2 payments, asserting that "this modification has not been required by the FCC." *Petition at 9.* Qwest argues that Tier 2 payments are designed purely to provide additional incentive to Qwest and have payment levels at least three times higher than Tier 1 base payment levels. *Id.* Qwest suggests that it is only fair for Qwest to have some opportunity to review and address its performance results before being subject to Tier 2 payments. Qwest reiterates the concern it expressed in prior arguments to the Commission that it may not be aware of a problem until the month after the performance results were generated. *Id. at 10.* Noting that the objective of Tier 2 payments is to provide incentive, not punishment, Qwest offers to include Tier 2 payment provisions agreed to in the Utah stipulation. *Id. at 10-11.*

22 **CLECs:** The CLECs disagree with Qwest's assertion that it may not be aware of performance misses until the end of the month following the performance failure. *Joint Answer at 12.* The CLECs assert that Qwest's operational employees rely on performance measurement information that is available on a daily and weekly basis. *Id.* The CLECs also express concerns with the Utah stipulation, arguing that it is quite unlikely that Tier 2 payments would ever be made under the language in the stipulation. *Id. at 14.*

23 **Public Counsel:** Public Counsel objects to Qwest's proposed use of the Tier 2 trigger language in the Utah stipulation arguing that language in the stipulation would allow a significant lag before any payment would occur. *Response of Public Counsel to Qwest's Petition for Reconsideration of the 30th Supplemental Order at 7 (Public Counsel's Response).* Public Counsel argues that this lag in making Tier 2 payments could act as a disincentive for Qwest to take immediate action to address performance issues related to Tier 2 performance measures. *Id.*

24 **Discussion and Decision**: It is not possible from the evidence in this proceeding or the parties' arguments to determine how frequently Qwest monitors its performance results. However, it cannot be denied that Qwest has access to the data and control over how and when to analyze it. The FCC looks to see whether a plan includes "potential liability that provides a meaningful and significant incentive to comply with the designated performance standards."[8] A plan that allows Qwest to miss significant performance measurements one-third of the time without consequence does not create a meaningful and significant incentive to comply. Nor does it provide "a reasonable structure that is designed to "detect and sanction poor performance when it occurs."[9] Qwest's request for reconsideration of this matter is denied.

4. Collocation Payments

25 Washington state rules establish standards and payments for collocation provisioning in Washington state. *WAC 480-120-560.* Qwest's QPAP also includes payments and standards for collocation. *Ex. 1217, §§6.3, 6.4; Table 3.* Paragraph 93 of the *30th Supplemental Order* requires Qwest to modify the QPAP to reflect that certain business rules are applicable only to matters not addressed in WAC 480-120-560. The Order also requires that section 6.3 of the QPAP and section 8.4.1.10 of the SGAT be consistent in applying the Washington rule.

26 **Qwest:** Qwest asserts that no additional changes are necessary to address the Commission's concerns about business rules CP-2 and CP-4. *Petition at 11-12.* Qwest asserts that provisioning intervals of interconnection agreements are incorporated into CP-2 and CP-4. *Id. at 11.* Further, Qwest asserts that the SGAT incorporates the intervals from WAC 480-120-560 to allow CLECs to include the intervals in their interconnection agreements. *Id.*

27 **CLECs:** The CLECs assert that it is not clear whether all of the requirements of the Washington rule are incorporated into the SGAT. *Joint Answer at 15.* Specifically, the CLECs identify certain omissions from SGAT section 8.2.1.9 through 13. *Id.* The CLECs request that the Commission require Qwest to demonstrate how each requirement of the rule is incorporated into the SGAT. *Id.*

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[8] *Bell Atlantic new York Order*, ¶433.
[9] *Id.*

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

5. Special Access Circuits

29 The payments in the QPAP are based upon performance measures defined by performance indicator definitions, or PIDs. During the Multi-state Proceeding, WorldCom and the Joint CLECs requested that special access circuits be included in the performance measurements in the QPAP. The Report rejected that request, finding that the FCC has jurisdiction over circuits purchased under federal tariff. *Report at 57.* Paragraph 119 of the *30th Supplemental Order* required Qwest to report its monthly provisioning and repair intervals for special access circuits at the same time it begins special access reporting to the Colorado commission.

30 **Qwest:** Qwest reasserts its argument that state commissions lack jurisdiction to address performance issues relating to special access circuits purchased from the interstate tariff. *Petition at 12.* Qwest notes that the FCC has issued a Notice of Proposed Rulemaking to determine whether to establish federal performance standards for provisioning special access circuits and argues that the Commission should allow the FCC to determine the issue. *Id., n.26.*

31 Qwest also asserts that its systems are not capable of distinguishing between orders purchased for local service and orders for other uses of special access services, or those carriers and its own retail customers who purchase special access. *Id.* Qwest offers to provide monthly special access reports to the Commission on a reasonable schedule, as long as the measurements are not included in the PIDs or the QPAP, as in Colorado. *Id. at 13.*

32 **CLECs:** The CLECs assert that Qwest has agreed to begin reporting special access performance results in Colorado by mid-June, not "upon a reasonable implementation schedule" as Qwest offers to this Commission. *Joint Answer at 17.* The CLECs argue that the Commission should not reconsider or "weaken" the special access reporting requirements adopted in the *30th Supplemental Order. Id. at 18.* The CLECs also assert that Qwest does include measures of special access performance in the PIDs and that Qwest already measures its special access performance in Washington. *Id. at 17.*

The CLECs state that the only issue is whether Qwest can disaggregate its retail and wholesale service measurements. *Id. at 17-18.*

33 **Discussion and Decision**: Qwest's request for reconsideration of this issue is denied. As we discussed in the *30th Supplemental Order*, we assert our jurisdiction over the provision of intrastate services under federal tariff, as the matter does not involve enforcement of rate terms in the federal tariff. *Order at ¶117 (citing to Special Access Order).*[10] Should the FCC determine whether to establish performance measures for provisioning and repair of special access circuits, we will address whether the reporting requirements we order here are consistent with the FCC's standards.

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

35 Although Qwest has agreed to begin reporting its performance in Colorado in mid-June, Qwest requests a "reasonable implementation schedule" in Washington. Given that Qwest acknowledges that certain measures already exist to measure special access performance, and that it has agreed to provide the reports to Colorado in June, we expect Qwest to provide reports in Washington at the same time it does so for Colorado.

6. Adding New Performance Measures

36 During this proceeding, the CLECs asked that Qwest establish several new performance measures in the QPAP, including PIDs for electronic order flow-through. Paragraph 129 of the *30th Supplemental Order* directed Qwest to add the PID for electronic order flow-through (PO-2b) into the QPAP in the Low Tier 1 and High Tier 2 payment categories, stating that the measure is important to a CLEC's ability to compete with Qwest.

37 **Qwest:** Qwest argues that it is premature to include the PO-2b measurement in the QPAP and asserts that the measure should not be considered for inclusion into the QPAP until the first six-month review. *Petition at 14.* Qwest asserts that the matter was not raised until after the hearing on the QPAP in the Multi-state Proceeding.

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[10] *In re the Complaint of AT&T Communications of the Northwest, Inc. v. U S WEST Communications, Inc., Regarding the Provision of Access Services*, Tenth Supplemental Order, WUTC Docket No. UT-991292 (May 18, 2000) (*Special Access Order*).

Qwest also argues that it is not appropriate to include the measure in the QPAP as the measure is affected by CLEC behavior, i.e., accurate order submission. *Id.* Further, Qwest argues that the industry is still evaluating how to make PO-2b a better measurement. *Id.*

38 **CLECs**: The CLECs request that the Commission reject Qwest's request to defer the matter to the six-month review. *Joint Answer at 20.* The CLECs argue that the PO-2b measurement is not a last minute request, but has been subject to discussion before the ROC Steering Committee since September 2001. *Id. at 18.* Further, the CLECs assert that Qwest has agreed to include the PO-2b measurement in the Colorado performance assurance plan (CPAP), and that it has been included in the CPAP since April 2001. *Id. at 19.* The CLECs also dispute Qwest's claim that the measure is not appropriate for inclusion, asserting that the PO-2b measurement allows Qwest to exclude "rejected LSRs and LSRs with CLEC-caused non-fatal errors." *Id.*

39 **Discussion and Decision**: Given the information and arguments provided by the parties, we are not persuaded to change our decision to require that the PO-2b measurement be included in the QPAP for payment purposes. In particular, Qwest has agreed to include the measure in its plan in Colorado, and should do no less in Washington. The measure is an appropriate measure of Qwest's performance, regardless of the weight that the FCC has assigned to the measurement in looking at overall BOC performance. If, at the time of the six-month review, it appears that it is necessary to make refinements to the PO-2b measurement, the parties can revisit the matter.

7. Six-Month Review Process

40 The *30th Supplemental Order* states that the Commission has authority under state and federal law to amend the QPAP during the six-month review process. *Order at ¶143.* The Order requires Qwest to modify section 16.1 of the QPAP to provide that the Commission, not Qwest, retains control over whether changes will be made to the QPAP, and the scope of those changes. *Id. at ¶146.*

41 **Qwest:** Qwest objects to the Commission's decision to require Commission approval for changes to the QPAP, and to determine the scope of changes that may be made during the six-month review. *Petition at 15.* Qwest also objects to the Commission conducting its own six-month review and not agreeing to participate in a multi-state review process. *Id.*

42 Qwest argues that it based its QPAP upon the Texas plan, which requires mutual agreement for any changes to the plan, and argues that under the Commission's decision, Qwest will face uncertain and substantial financial risk under the QPAP. *Id. at 16.* Qwest argues that state commissions have no authority to order changes to the QPAP and cannot assert such authority in the QPAP. *Id. at 16-17.* While Qwest

acknowledges that the FCC recognizes the role of state commissions in administering plans, Qwest disputes the idea that states have "change control" over the plan. *Id. at 18.* Qwest proposes that the Commission adopt the change control provisions it recently negotiated with the Utah Advocacy Staff. *Id.* The Utah stipulation provides that Commission approved changes would be subject to judicial review, and imposes a "payment collar" on Qwest's total liability by limiting to 10 percent any increase in payment liability for changes occurring in the six-month review. *Id.* Qwest would continue to retain approval authority over changes to the QPAP. *Id.*

43 **CLECs**: The CLECs assert that there is significant statutory and FCC authority that would allow state commissions, and not Qwest, the authority to modify any aspect of the QPAP. *Joint Answer at 20.* In particular, the CLECs point to provisions in plans included in applications for Pennsylvania and Massachusetts, both of which the FCC has approved. *Id.* The CLECs also argue that no Commission in the Qwest region that has issued a final order on the QPAP has allowed Qwest to retain ultimate change control authority. *Id. at 20-23.* The CLECs object to the provisions in the Utah stipulation as worse than the original Qwest language. *Id. at 23.*

44 **Public Counsel**: Public Counsel urges the Commission to deny Qwest's petition for reconsideration on this issue and to reject the language in the Utah stipulation. *Public Counsel's Response at 2, 5.* Public Counsel argues that veto power by Qwest over changes to the QPAP "is inconsistent with the primary goals of the QPAP: to deter anti-competitive conduct and compensate CLECs for inferior service." *Id. at 2.* Public Counsel cites to the final decision of the Montana Public Service Commission in arguing that it is logical for the Commission to oversee the operations of the QPAP, and when necessary, order changes consistent with the public interest. *Id. at 3.*

45 Public Counsel also argues that the Commission's decision in the *30th Supplemental Order* "strikes an appropriate balance regarding the scope of the six-month reviews." *Id. at 4.* Public Counsel notes that no party can foresee what might be appropriate to address during a six-month review, and that the Commission has appropriately limited issues to those that can be demonstrated as "highly exigent." *Id.*

46 **Discussion and Decision**: We are not persuaded to modify our decision on this issue, and deny Qwest's request for reconsideration. As we noted in the *30th Supplemental Order*, the FCC expects states to play a prominent role in modifying and improving the performance metrics in performance assurance plans. *Order at ¶145 (citing to Verizon Pennsylvania Order, ¶¶127-32).* The FCC has approved plans in New York and Massachusetts that allow states control over changes to the plan. *See Joint Answer, Attachments 9 and 10.* As such, state commission control over changes to the plan appears to be within the FCC's zone of reasonableness.

47 Further, Qwest has agreed to a plan in Colorado that allows the state control over changes to the plan. *Joint Answer, Attachment 4.* Every state commission in Qwest's region that has entered a final order on the QPAP has asserted control over changes to the QPAP, denying Qwest the sole right over changes to the QPAP.

48 While we reject Qwest's offer to adopt the language in the Utah stipulation, we find that the issue of including a mechanism such as the payment collar is more appropriately considered during the six-month review.

8. Special Fund & Multi-state Audits/Investigations

49 Following the Multi-state Proceeding, the Facilitator recommended an extensive multi-state process for six-month reviews, as well as audits and investigations, and a special fund for funding the multi-state processes. *Report at 42, 78-79.* In the *30th Supplemental Order*, the Commission declined to adopt the Facilitator's recommendations on these matters. *Order at ¶¶ 160-61, 239-42.* The Commission explained that it was not prepared to adopt the Facilitator's proposed multi-state process, as the ROC Technical Advisory Group was currently developing a post-section 271 long-term PID administration and review process. *Id. at ¶¶149, 241.* In the meantime, the Commission directed Qwest to include alternative language concerning audits and funding mechanisms into the QPAP. *Id. at ¶¶161-162, 241-42.*

50 **Qwest:** Qwest argues that the Commission, Qwest, and CLECs would all benefit from a regional audit and urges the Commission to include language agreed to in the Utah stipulation. *Petition at 21-25.*

51 Qwest also requests that the Commission reconsider its decision to modify section 15.5 of the QPAP to require root cause analyses for any consecutive Tier 1 miss. *Id. at 25.* Qwest argues that root cause analyses are conducted due to "systemic problems exemplified by deficient industry-wide performance." *Id.* Qwest believes such problems would be captured in the original language of section 15.5 concerning consecutive month misses for Tier 2 and aggregate Tier 1 measures. *Id.* Qwest does not oppose the other changes the Commission ordered for section 15.5.

52 **CLECs:** The CLECs object to Qwest's request that the Commission participate in a multi-state audit proceeding, and limit the Commission's ability to conduct an independent audit. *Joint Answer at 25.* The CLECs argue that Qwest provides no compelling reason to modify its decision, or to adopt language from a stipulation that has not been approved or reviewed in any other state, including Utah. *Id. at 26.* The CLECs also argue that Qwest's proposed language is "too much, too late" in the process. *Id. at 26-30.* The CLECs identify problems with the specific language in the Utah stipulation. *Id. at 31-34.*

53 The CLECs request that the Commission deny Qwest's request for reconsideration of the requirement to conduct root cause analyses in the event of consecutive Tier 1 misses. *Id. at 34.* The CLECs argue that without the requirement for a root cause analysis of consecutive Tier 1 misses, Qwest may be able to discriminate against a particular CLEC without triggering a Tier 2 payment. *Id.*

54 **Public Counsel:** Public Counsel objects to Qwest's proposal to retain language in the QPAP for a multi-state audit and review process. *Public Counsel's Response at 5.* Public Counsel believes the decision to participate in a multi-state audit and investigation process is best made by the state commission. *Id. at 6.* Further, Public Counsel argues that a multi-state effort would severely limit the ability of Washington-state specific parties to participate and would make the process less open to the public. *Id.*

55 **Discussion and Decision**: We deny Qwest's request for reconsideration of this issue as well as Qwest's proposal to adopt language concerning a multi-state process from the Utah Stipulation. The Commission is currently participating in a ROC-led effort to develop a multi-state process that is intended to be acceptable to all parties. As we stated in the *30th Supplemental Order*, the Commission will await the outcome of that process before deciding whether to participate in a multi-state process, as well as the extent of our participation and funding for the process.

56 We also deny Qwest's request for reconsideration of modifications to QPAP section 15.5 concerning root cause analyses for consecutive Tier 1 misses. Qwest is not required to conduct a root cause analysis every time there is a consecutive Tier 1 miss, but only upon a petition by a party. Qwest will have an opportunity to respond to the petition before the Commission determines if it is appropriate to conduct a root cause analysis. Providing an opportunity for investigation is a means to discourage discrimination against an individual CLEC.

9. Termination of QPAP

57 The *30th Supplemental Order* requires Qwest to modify QPAP section 16.2 to mirror language in section 18.11 of the CPAP approved by the Colorado Hearing Examiner, to allow the QPAP to expire in six years, but to continue payments to individual CLECs subject to a review of their necessity. *Order at ¶180.* Qwest's original QPAP provides that the plan will terminate upon Qwest exiting the long distance market.

58 **Qwest**: Qwest argues that the Commission misconstrues the purpose of a performance assurance plan. *Petition at 26.* Qwest argues that the plan is offered to satisfy the requirement that a BOC's performance not "backslide" after obtaining section 271 approval. *Id.* Qwest insists that it would be unfair to enforce the QPAP if Qwest is no longer in the long distance market. *Id.* Qwest asserts that, upon termination of the QPAP, CLECs would have all non-QPAP remedies that are available to them today.

Id. at 26-27. Finally, Qwest argues that inserting section 18.11 of the CPAP into the QPAP does not work and shows the problems of adopting other state provisions. *Id. at 27.*

59 **CLECs:** The CLECs assert that Qwest has agreed to implement the language in CPAP section 18.11. *Joint Answer at 35.* The CLECs further note that this Commission ordered Qwest to incorporate the concept of CPAP section 18.11 into the QPAP, not to include the exact language. *Id. at 36.* The CLECs assert that "for all practical purposes" there are no other remedies for Qwest's failure to perform other than the QPAP. *Id.* The CLECs argue that the Commission should require Qwest to adopt the same language it has agreed to in Colorado. *Id.*

60 **Discussion and Decision**: The Commission directed Qwest to *mirror* the language in CPAP section 18.11 in the QPAP, not insert the exact language. The CPAP does not allow the plan to terminate upon Qwest exiting the long distance market, but provides that the CPAP will expire after six years, with certain payments, equivalent to Tier 1 payments, continuing subject to Commission review. *Joint Answer, Attachment 4, §18.11.* Such a requirement does not result in the problems Qwest alleges. Qwest has acquiesced in this language in its plan filed in Colorado. Qwest provides no justification for why such a provision is not appropriate in the plan for the state of Washington. Allowing time after the plan terminates for a review of payments to individual CLECs will allow the Commission time to investigate the need for wholesale service quality rules, if the Commission has not already adopted such rules. While Qwest may leave the long distance market, it will likely continue to compete with CLECs in the local market. For the reasons stated above, we deny Qwest's request for reconsideration of this issue.

10. Election of Remedies

61 Section 13.6 of the original QPAP requires CLECs to elect a remedy for poor performance, but includes an exception allowing CLECs to seek remedies for non-contractual causes of action. *Ex. 1200.* The Report recommended modifying section 13.6 to limit any recovery in non-contractual causes of action to harm not compensable under a contractual theory of liability. *Report at 32.* The *30th Supplemental Order* found that the Report's recommendation would severely and inequitably limit the alternative remedies available to CLECs. *Order at ¶193.* The Order required Qwest to include language in part proposed by AT&T and in part from section 16.6 of the CPAP. *Id. at ¶195.*

62 **Qwest**: Qwest argues that the election of remedies language of the QPAP contains language that is consistent with language included in the Texas plan and plans adopted in four other states in SBC's region. *Petition at 28.* Qwest argues that it is "intended to require an election of remedies compensable in contract that are available to the

CLECs for activity covered by the PAP." *Id.* Qwest argues that the Commission disregards the FCC's prior guidance on the issue. *Id. at 29.*

63 Qwest also asserts that borrowing portions of CPAP section 16.6 is problematic as the context of the language is lost when only a portion of the language is adopted. *Id. at 29-30.* Qwest also objects that the CLECs' language does not reflect the language in the CPAP that a CLEC must disgorge any payments made under the QPAP if they are proceeding under an alternative remedy. *Id. at 30.* Finally, Qwest offers to modify the QPAP to include language from the Utah stipulation. *Id. at 31-32.*

64 **CLECs**: The CLECs assert that section 13.6 of the QPAP as offered by Qwest does not contain exactly the same language as contained in the FCC-approved SBC Texas plan. *Joint Answer at 36.* The CLECs assert that the FCC has not required that liability under the QPAP be the only remedy for CLECs. *Id. at 37.* The CLECs note that the states of Montana, Nebraska, and Wyoming have also rejected Qwest's proposal and have adopted the Colorado proposal for election of remedies. *Id. at 37-40.* The CLECs are concerned that Qwest would accept the language in Colorado and not in another state. *Id. at 40.* Finally, the CLECs reject the language in the Utah stipulation arguing that it would foreclose any alternative remedy. *Id. at 40-41.*

65 **Discussion and Decision**: We remain convinced that the QPAP should not be the sole remedy available to CLECs for poor performance. Nor has the FCC required the QPAP to be the sole remedy. We reject Qwest's offer to substitute language from the Utah stipulation, as it appears to limit the alternative remedies for CLECs more so than the language recommended in the Report. Upon review of our decision in the *30th Supplemental Order*, however, we agree that the language ordered in paragraph 195 was not a full and accurate excerpt from the CPAP, especially with regard to disgorging payments made under the PAP.

66 In order to accurately reflect the concepts and limitations set forth in section 16 of the CPAP, Qwest must replace section 13.6 of the QPAP with the following:

> 13.6 This PAP contains a comprehensive set of performance submeasures, statistical methodologies, and payment mechanisms that are designed to function together, and only together, as an integrated whole. To elect the PAP, CLEC must adopt the PAP in its entirety, into its interconnection agreement with Qwest in lieu of other alternative standards or relief, except as stated in Sections 13.6.1, 13.6.2, and 13.7.
>
> 13.6.1 In electing the PAP, CLEC shall surrender any rights to remedies under state wholesale service quality rules or under any interconnection agreement designed to provide such monetary relief for the same performance issues addressed by

the PAP. The PAP shall not limit either non-contractual legal or non-contractual regulatory remedies that may be available to CLEC.

13.6.2 Tier 1 payments to CLECs are in the nature of liquidated damages. Before CLEC shall be able to file an action seeking contract damages that flow from an alleged failure to perform in an area specifically measured and regulated by the PAP, CLEC must first seek permission through the Dispute Resolution Process set forth in Section 5.18 of the SGAT. This permission shall be granted only if CLEC can present a reasonable theory of damages for the non-conforming performance at issue and evidence of real world economic harm that, as applied over the preceding six months, establishes that the actual payments collected for non-conforming performance in the relevant area do not redress the extent of the competitive harm. If CLEC can make this showing, it shall be permitted to proceed with this action. Any damages awarded through this action shall be offset with payments made under this PAP. If the CLEC cannot make this showing, the action shall be barred. To the extent that CLEC's contract action relates to an area of performance not addressed by the PAP, no such procedural requirement shall apply.

67 These paragraphs are taken directly from CPAP sections 16.3, 16.4, and 16.6. We find this language correctly balances the concerns of Qwest and the CLECs concerning limiting financial exposure and remedying poor performance. Qwest has agreed to this same language concerning election of remedies in Colorado and must adopt the same language in its Washington QPAP.

11. Offsetting Remedies

68 The QPAP originally filed in the Multi-state Proceeding included a provision allowing Qwest itself to offset any award "for the same or analogous wholesale performance covered by this PAP." *Ex. 1200.* While the Report recommended changes to section 13.7 of the QPAP, the Report did not change the language allowing Qwest the right to make an offset. Paragraph 202 of the *30th Supplemental Order* requires Qwest to modify the SGAT to reflect that only a court or finder of fact has the right to require an offset. The Order determined that allowing Qwest the right to offset would only add another level of litigation concerning Qwest's action if it were not ordered by a court or regulatory commission. *Order at ¶202.*

69 **Qwest:** Qwest asserts that nothing in QPAP section 13.7 gives Qwest the sole decision to determine an offset. *Petition at 31.* Qwest argues that the provision gives Qwest the option to choose the forum in which it enforces its right to offset. *Id.* Specifically, Qwest states that its decision to offset is "not unreviewable." *Id.*

70 **CLECs:** The CLECs assert that "offset is a judicial concept for the finder of fact to consider to ensure that a party does not receive double recovery." *Joint Answer at 42.* The CLECs assert that Qwest has the right to argue for an offset, but not the right to make the offset on its own decision. *Id.* The CLECs note that the Texas plan requires that "whether an offset is appropriate will be determined in the relevant proceeding." *Id. at 43.* Further, the CLECs argue that Qwest has agreed in Colorado to include in the plan offset language like that ordered in the *30th Supplemental Order. Id.* The CLECs also note that the states of Idaho, Montana, Nebraska, and Wyoming have limited the right to offset to the court or finder of fact. *Id. at 43-45.*

71 **Discussion and Decision**: Qwest has provided no reason to persuade us to modify our decision in the *30th Supplemental Order* on this issue, and we deny Qwest's request for reconsideration. Qwest has agreed to similar language in Colorado, and as we stated above, has not sufficiently explained why the language is inappropriate for Washington. Allowing Qwest the right to offset an award on its own decision would only invite additional litigation, contrary to the FCC's desire for a plan with a "self-executing mechanism that does not leave the door open to unreasonable litigation and appeal."[11]

12. Force Majeure Language

72 The *30th Supplemental Order* addressed two impasse issues concerning force majeure events: First, whether a reference to parity is appropriately included at the end of QPAP section 13.3 because force majeure events should not apply to parity standards; and Second, whether Qwest must file a waiver of payment obligations with the Commission following a force majeure event. *Order at ¶¶208-9.* The Report recommended adopting language proposed by AT&T to the effect that force majeure events did not excuse poor performance with respect to parity measures. *Report at 38.*

73 **Qwest:** Qwest states that, at AT&T's request, it included certain language in QPAP section 13.3 to address the time frame in which force majeure and other excusing events would apply to benchmark and parity measures. *Petition at 32-33.* Qwest argues that the reference to parity measures is necessary because the phrase also includes "other excusing events." *Id. at 33.*

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[11] *Bell Atlantic New York Order*, ¶433.

74 Qwest also objects to the requirement that it seek a waiver from the Commission before its performance is excused for a force majeure event. *Id.* Qwest asserts that the QPAP already provides a process for parties to petition the Commission to determine whether a force majeure event should excuse Qwest's performance, and that the Commission's decision would only add an administrative hurdle. *Id. at 34.*

75 **CLECs**: The CLECs assert that force majeure events should not apply to parity measures. *Joint Answer at 46.* The CLECs suggest, however, adding the words "(excluding Force Majeure events)" after the word "parity" in section 13.3 in order to resolve any ambiguities or inconsistencies. *Id. at 46-47.*

76 The CLECs assert that the Commission should deny Qwest's request to reconsider the decision to modify section 13.3 to add a waiver process. *Id. at 47.* The CLECs argue that the existing processes place the burden on the CLECs and the Commission to petition the Commission to determine if a force majeure event should excuse performance. *Id.* The CLECs argue that the burden should be placed on Qwest, not CLECs, to request that Qwest's performance be excused. *Id.* The CLECs note that the CPAP, which Qwest has now agreed to, includes such a provision. *Id. at 47-48.*

77 **Public Counsel:** Public Counsel argues that the waiver process required in the *30th Supplemental Order* will provide a clearly defined and transparent process to protect against the potential abuse of force majeure claims. *Public Counsel's Response at 7.*

78 **Discussion and Decision**: After reviewing Qwest's petition and the CLEC's response, we grant, in part, Qwest's request for reconsideration and require Qwest to modify the language in section 13.3 to add the words "(excluding Force Majeure events)" after the word "parity" to avoid any confusion or inconsistencies.

79 Qwest's request to reconsider the requirement for a waiver procedure is denied. A review of the provisions in sections 13.3 and 13.3.1 shows that there would not be a duplicative process. As the CLECs point out, the current process does not require Qwest to seek approval before it considers a force majeure event to be an excusing event. The waiver procedures requested by Public Counsel and required by the *30th Supplemental Order* are necessary to avoid any potential abuses, and places the burden more appropriately on Qwest to request that its performance be excused.

13. Payment Method

80 Section 11.2 of Qwest's QPAP provides that payments to CLECs be made in the form of bill credits, rather than by cash or check. Paragraph 220 of the *30th Supplemental Order* requires Qwest to modify the QPAP section to adopt the language in section 12.2 of the CPAP, providing that payments be made in cash, except where a CLEC has non-disputed charges 90 days past due.

81 **Qwest:** Qwest argues that there is nothing in the record to support a requirement that payments be made in cash. *Petition at 35.* Qwest then notes that it provided rebuttal testimony in the Multi-state Proceeding to demonstrate that FCC-approved plans for New York, Connecticut, and Massachusetts all include payment exclusively by bill credits. *Id.* Qwest also argues that payment by cash would be more difficult to administer. *Id.*

82 **CLECs:** The CLECs argue that Qwest has now agreed to the language in the Colorado plan requiring the company to pay CLECs in cash, rather than bill credits, and that Qwest should agree to the same provision in Washington. *Joint Answer at 48-49.* The CLECs argue that Qwest has made no new arguments, nor provided any new evidence that should cause the Commission to change its decision. *Id. at 49.*

83 **Discussion and Decision**: The record in the Multi-state proceeding included testimony, exhibits and argument concerning the issue of the form of payment. The parties provided additional argument on the issue before this Commission. As Qwest has now agreed to language concerning the form of payment in Colorado, we see no reason to modify our decision on the issue in the *30th Supplemental Order.*

14. Monthly Reports to Public Counsel

84 Sections 14.1 and 14.2 of the QPAP require Qwest to provide monthly reports to CLECs and the Commission of its performance under the measures set forth in the QPAP. Paragraph 244 of the *30th Supplemental Order* requires Qwest to also provide copies of the monthly aggregate reports to Public Counsel.

85 **Qwest:** Qwest states that it does not object to providing monthly reports to the Commission, but requests that the Commission allow Qwest to provide the state aggregate information on its public website. *Petition at 36.*

86 **Public Counsel**: Public Counsel requests that the Commission affirm its decision requiring Qwest to provide copies of its monthly reports to relevant parties such as Public Counsel. *Public Counsel's Response at 8.*

87 **Discussion and Decision**: Qwest's request is vague, and implies that Qwest would not provide paper copies to *either* the Commission or Public Counsel. That is not sufficient. Qwest must revise QPAP section 14.1 to provide that it will make the state aggregate performance data available to the public on its website, and will provide a paper copy and electronic copy of the information to the Commission and Public Counsel.

IV. FINDINGS OF FACT

88 Having discussed above in detail the oral and documentary evidence received in this proceeding concerning all material matters, and having stated findings and conclusions upon issues at impasse between the parties and the reasons and bases for those findings and conclusions, the Commission now makes and enters the following summary of those facts. Those portions of the preceding detailed discussion that state findings pertaining to the ultimate findings stated below are incorporated into the ultimate findings by reference.

89 (1) The FCC has accepted state performance assurance plans that contain a 100 percent cap for severity of performance failures, and has also accepted a plan that did not contain such a cap.

90 (2) The evidence in this proceeding does not demonstrate how frequently Qwest monitors its performance results. Qwest has access to its own performance data and has control over how and when to analyze the data.

91 (3) SGAT section 8.2.1, as filed with the Commission on April 5, 2002, omits certain aspects of the Washington collocation rule, WAC 480-120-560.

92 (4) The FCC has approved performance assurance plans in New York and Massachusetts that allow the states control over changes to the plan. In addition, Qwest has agreed to a plan in Colorado that allows the state control over changes to the plan.

93 (5) Under the provisions of QPAP section 15.5, as required by paragraph 242 of the 30th *Supplemental Order*, Qwest is not required to conduct a root cause analysis every time there is a consecutive miss.

94 (6) Qwest has agreed to implement the terms of section 18.11 of the Colorado plan, which allows the plan to expire after six years, but requires payments to individual CLECs to continue after expiration of the QPAP subject to a review of their necessity.

95 (7) Qwest has agreed to include in its Colorado plan a provision that gives the finder of fact, i.e., a court or state commission, the right to determine whether an offset should be made.

96 (8) Qwest has agreed to include in its Colorado plan a provision requiring the company to pay CLECs in cash, rather than bill credits, except where a CLEC has non-disputed charges 90 days past due, similar to the requirement ordered in paragraph 220 of the *30th Supplemental Order.*

V. CONCLUSIONS OF LAW

97 Having discussed above in detail all matters material to this decision, and having stated general findings and conclusions, the Commission now makes the following summary conclusions of law. Those portions of the preceding detailed discussion that state conclusions pertaining to the ultimate decisions of the Commission are incorporated by this reference.

98 (1) The FCC's zone of reasonableness test does not limit states to approving plans identical to those included in applications the FCC has previously approved.

99 (2) State commission authority to approve and administer a performance assurance plan derives from state law and the Telecommunications Act, and is not limited to authority under sections 271 and 272 of the Act and FCC rules.

100 (3) The FCC expects that states will look to and build upon the work done in other states on performance measurements and performance assurance plans, and does not prohibit states from doing so.

101 (4) There is room within the FCC's zone of reasonableness for plans to include, or remove, a 100 percent cap on severity of performance failures. We believe that removing the cap best achieves the proper balance of incentives for Qwest following a grant of section 271 authority.

102 (5) A plan that allows Qwest to miss significant performance measurements one-third of the time without consequence does not fall within the FCC's zone of reasonableness, as the plan does not create a "meaningful and significant incentive to comply." Nor would the plan adequately "detect and sanction poor performance when it occurs."[12]

103 (6) Consistent with our decision in the *Special Access Order*, the Commission may assert jurisdiction over the provision of intrastate services under federal tariff where the matter does not involve enforcement of rate terms in the federal tariff.

104 (7) State commission control over changes to performance assurance plans is within the FCC's zone of reasonableness, as the FCC expects states to play a prominent role in modifying and improving the performance metrics in performance assurance plans and has approved plans in New York and Massachusetts that allow states control over changes to the plan.

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[12] *Bell Atlantic New York Order*, ¶433.

105 (8) The QPAP should not be the sole remedy available to CLECs for poor performance, nor has the FCC required the QPAP to be the sole remedy.

106 (9) The waiver process following force majeure events ordered in paragraph 208 of the *30th Supplemental Order* is necessary to avoid any potential abuse concerning force majeure events, and places the burden more appropriately on Qwest to request that its performance be excused.

107 (10) Qwest's offer to provide the Commission and Public Counsel access over its website to monthly aggregate performance reports is not sufficient.

VI. ORDER

THE COMMISSION ORDERS That:

108 (1) The Commission retains jurisdiction to implement the terms of this order.

109 (2) Qwest's Petition for Reconsideration of the *30th Supplemental Order* is denied in part, and granted in part.

110 (3) Qwest must modify SGAT sections 8.2.1.1 and 8.2.1.10 as set forth in paragraph 28 of this order.

111 (4) The Commission defers until the six-month review the question of whether special access performance measures should be included in PIDs or added to the QPAP.

112 (5) Qwest must provide reports on special access performance in Washington at the same time, and upon the same measures, as it does so for Colorado.

113 (6) To ensure that the language in section 13.6 of the QPAP retains the intent of section 16.6 of the Colorado plan, Qwest must modify the QPAP as set forth in paragraph 66 of this order.

114 (7) Qwest must modify the language in QPAP section 13.3 to add the words "(excluding Force Majeure events)" after the word "parity".

115 (8) Qwest must revise QPAP section 14.1 to provide that it will make the aggregate performance data available to the public on its website, and will provide a paper copy and electronic copy of the information to the Commission and Public Counsel.

DATED at Olympia, Washington and effective this 20th day of May, 2002.

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

MARILYN SHOWALTER, Chairwoman

RICHARD HEMSTAD, Commissioner

PATRICK J. OSHIE, Commissioner