Decision No. R01-1142-I

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

DOCKET NO. 01I-041T

IN THE MATTER OF THE INVESTIGATION INTO ALTERNATIVE APPROACHES FOR A QWEST CORPORATION PERFORMANCE ASSURANCE PLAN IN COLORADO.

DECISION ON MOTIONS FOR MODIFICATION AND CLARIFICATION OF THE COLORADO PERFORMANCE ASSURANCE PLAN

Mailed Date: November 5, 2001

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I. BACKGROUND

A. The Colorado Performance Assurance Plan (CPAP), Decision No. R01-997-I (CPAP Order) in Docket No. 01I-041T, is among the prerequisites for this Commission to endorse Qwest Corporation's (Qwest) § 271 application to the Federal Communications Commission (FCC). The CPAP Order, mailed on September 26, 2001, allowed parties to file Motions to Modify the CPAP and responses to the same.

B. Qwest, AT&T Communications of the Mountain States (AT&T), WorldCom, Inc., on behalf of its regulated subsidiaries (WorldCom), Time Warner Telecom of Colorado LLC (Time Warner) and XO Colorado, Inc. (XO), jointly, and the Colorado Office of Consumer Counsel (OCC) filed motions to modify the CPAP and responses to the same.

C. Qwest filed its Response to the motions to modify one day late and moved for leave to late-file. No party responded to this motion.

D. Qwest Corporation moved for leave to supplement record on October 25, 2001, and attached its supplement. WorldCom, Time Warner and XO objected to the supplement. Qwest's Motion for Leave to Supplement Record is denied.

E. This Decision addresses the Requests for Modification raised by the respective parties. The Decision follows a similar format as the CPAP Order: a brief synopsis of the requested modification is given, and a synopsis of the decision. Next, there is a recitation of the arguments in support of and against the modification, and my reasoning for the accepting or denying the requested modification.

II. INTRODUCTION

A. The CPAP in its substance and execution largely tracks with the Final Report and Recommendation of the Special Master. The participants in this docket display general agreement on the structure and principles of the CPAP.

B. By this stage, the issues participants seek to modify are not "big picture," fundamental elements of the CPAP. Rather, the Motions to Modify seek interstitial changes to the CPAP, or clarification of how it will function. This Order

modifies and clarifies the CPAP where warranted. Fundamentally, however, this Order reaffirms the integrity of the initial recommended CPAP from the Special Master, as modified by Decision No. R01-997I. This final recommended CPAP, embodied in the SGAT language of Attachment A, represents this Commission's best effort – with ample input from all parties – to ensure that Qwest performs its interconnection and unbundling obligations under the Act after receiving in-region, interLATA authority under § 271.

C. Based on the outcome of requested modifications, new recommended SGAT language accompanies this Decision as Attachment A. This now becomes the operative SGAT language Qwest must adopt before I will recommend to this Commission that it certify § 271 compliance.

III. ~~I~~ISSUE-BY-ISSUE DISCUSSION

A. Request 1:

Qwest seeks modification of the effective date of the CPAP. *Qwest Motion* at 2-4; *Decision* at 16. WorldCom and AT&T contend that implementing the CPAP pre-§ 271 approval would provide the necessary experience to address the effectiveness of and to refine the CPAP, if required. *WorldCom Response* at 2-3. *AT&T Response* at 3-4.

1. Decision

a. The CPAP will not take effect until § 271 approval is granted by the FCC. I grant the requested

modification. Mock reports will still be required pre-§ 271 approval.

b. The effective date will be specified in the Recommended SGAT language as follows:

18.0 Effective Date, Reviews and Termination

18.1 The effective date of the CPAP will be the date on which Qwest obtains § 271 approval from the FCC for Colorado.

18.2~~1~~ Reviews of the CPAP occur every six months, commencing with the effective date of the CPAP. Under the six-month CPAP review process, a Commission staff person shall submit a report to the Commission at the five month mark to recommend a series of changes, if any, to the CPAP, noting which of those were agreed to by all parties and which were contested.

2. Discussion

a. Qwest argues that the CPAP should require mock reports only and that it would be untimely and unproductive for other provisions of the CPAP to go into effect before § 271 approval from the FCC. Qwest acknowledges that monetary penalties will not be assessed until Qwest's § 271 application is granted and does not object to providing mock reports pre-§ 271 approval. Qwest objects to any other provisions of the CPAP becoming effective before § 271 approval. Qwest contends that it cannot know what the CPAP requirements are until the Commission acts on the parties' motions for modification. Qwest further contends that a number of ongoing activities that result in changes and improvements to Qwest's processes would be impeded if provisions of the CPAP, other than the mock reporting, are allowed to go into effect pre-§ 271 approval.

Qwest requests the effective date be changed to the date of the § 271 approval by the FCC so that Qwest is not subject to the provisions of the CPAP, except the requirement to provide mock reports.

b. WorldCom suggests that Qwest follow the requirements of Decision No. R01-997-I, unless and until that decision is modified. AT&T indicates that the requirements of the CPAP will be known when there is a Final Order on the CPAP. WorldCom contends that a six-month review occurring before § 271 approval could address the effectiveness of data collection and reporting and would demonstrate the penalties Qwest would have paid if the CPAP was fully operational. AT&T asserts that implementation of the CPAP pre-§ 271 approval will allow for the CPAP to be corrected if it is not running smoothly. Both WorldCom and AT&T recommend the effective date should remain unchanged.

c. There is no principled reason to prefer one CPAP start date over another. Starting the CPAP now, as the CPAP Order decided, allows the six-month review process to start earlier and gets the parties' attention directed to the CPAP's practical functioning. These are salutary things. It likewise moves up the annual audit of the Performance Measurement and Reporting System. Whether accelerating these dates is a good thing or not for a given constituency – Qwest or CLECs – really

depends on what one thinks the anticipated results from the six month review and annual audit will be.

d. For instance, if CLECs anticipate the audit and review will lead to more exacting standards being applied to Qwest, then they will prefer starting the clock on these audit functions earlier; vice-versa for Qwest. However, if one anticipates the opposite will happen, the CLECs will move to postpone and Qwest will want to hasten the CPAP's review periods. Right now, of course, neither assumption can be made. Therefore, parties should be indifferent to when the CPAP starts, except insofar they believe the current CPAP "misses the mark" and needs to be modified.

e. On the Goldilocks scale, I believe that the CPAP is neither too hard nor too soft, but just right. Therefore, I have no inherent preference for starting the CPAP clock sooner or later.[1] But there are some reasons that support a delay in the CPAP's effective date.

f. Postponing the CPAP's effect until § 271 approval allows a longer lead time for parties to become familiar with the workings of the CPAP and allows the mock reporting, arguably the most important aspect to be worked out

[1] Indeed, it makes no apparent sense to me why Qwest would necessarily want to postpone the CPAP's start date. If the CPAP's flaws that are Qwest-harming become apparent before monetary penalties kick-in, then I would think that Qwest would prefer to get the review clock underway sooner.

in this “trial run,” to receive exclusive focus. A final reason for postponing the CPAP is that there is simply too much going on right now in this proceeding for the CPAP to get the attention it needs.

g. Qwest’s legal objection to the CPAP also warrants some comment. Qwest asserts that there can be no CPAP until it is formally made a part of the Qwest SGAT by Qwest putting it there. This is a not an insignificant objection to the possible start date of the CPAP. In light of this Commission’s view that the source of its authority to require the CPAP and its extra-state-jurisdictional remedies derives from the CPAP’s “voluntary” nature, then there is no authority for the CPAP to begin working until Qwest has incorporated it in the SGAT.

h. But the legal objection is not ultimately correct. For one, the CPAP language could be fashioned to acknowledge work done prior to its actual adoption in the SGAT. Qwest is also required to file a complete SGAT, including the CPAP, on or before November 30, 2001. Therefore, the CPAP could be made effective by the terms of the SGAT by November 30, 2001.

i. The practical difficulties, however, drive me to postpone the CPAP’s effective date. I do not think that Colorado Commission Staff -- among others -- can devote the time and attention to the CPAP to be ready for the six month

review by February 26, 2002.[2] I also believe that the CPAP is too important to take a back seat to the probable frenzy of work that will accompany the filing of a § 271 application with the FCC. Therefore, I think that all parties will be better off if the CPAP's full-effectiveness is postponed until Qwest is actually granted § 271 authority.

j. Mock reporting will still begin before full CPAP implementation. The first mock report is due on the last business day of the month after Qwest files the complete SGAT. The remainder of the CPAP's aspects, and the associated dates for reviews and audits, will not begin until § 271 approval. New CPAP language reflecting this change is contained in Attachment A.

B. Request 2

Qwest requests modification of § 14.1 to identify changes that can be made by Qwest to the Performance Measurement and Reporting System without obtaining approval. *Qwest Motion* at 4-7 and Attachment B. *Decision* at 25-28. *Recommended SGAT* at §§ 14.1, 14.2, and 14.3. *AT&T Response* at 4-5. *WorldCom Response* at 3-4.

1. Decision

a. SGAT §§ 14.3 and 18.9 shall be refashioned to provide more clarity on what and how CLEC-affecting changes may be made by Qwest.

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[2] Indeed, recent schedules for the ROC OSS test indicate that the KPMG Final Report may not be "final" before this date!

b. Specifically, language will be added to the Recommended SGAT as follows:

14.3 Qwest shall obtain approval ~~for~~ from the Commission, or from the Change Management Process forum, or other industry forum prior to implementing any CLEC-affecting changes to the performance measurement and reporting system. ~~If a redesigned Change Management Process (CMP) process is formally in place and approved by the industry, Qwest shall follow the change management processes thus set forth. If a redesigned CMP process is not in place, Qwest will be allowed to obtain approval for the change from the CLECs via the Independent Monitor. The Independent Monitor shall then be responsible for guiding the change management process.~~ Any CLEC-affecting change to the CPAP, including the PIDs, the underlying data collection, reporting, and payment calculations must go through one of two processes. Either:

> Qwest can bring these changes to an industry forum, such as the Change Management Process (CMP), for discussion. If agreement is reached, then Qwest will file the change with the Commission, in a compliance-type filing. The Commission will not issue a decision on these items, but they will simply be incorporated into the CPAP; or
>
> Qwest will make an application-like filing with the Independent Monitor for changes that have not been agreed to at an industry forum either because agreement could not be reached, or because Qwest did not present the change to the forum. Parties will be allowed to comment and a record will be established. The Independent Monitor will then issue a formal decision on whether the change will be allowed as part of the CPAP.

If Qwest fails to obtain approval for any CLEC-affecting change, it shall pay a $1000 fine for each affected CLEC. This fine shall be paid directly to the affected CLECs. This payment shall not count against the cap described in Section 11.1.

18.9 If Qwest or CLEC wishes to modify a PID outside of the six-month review process set forth in this plan, the change must be approved by the Independent Monitor and then also approved by the Commission. The Independent Monitor and the Commission shall be more likely to allow ~~approve~~ the change if it has been approved by another forum such as the ROC or CMP ~~(if PIDs are ultimately included within the scope of CMP)~~ (See section 14.3). PID changes that have not been approved by one of these two forums or their future equivalent shall be unlikely to be approved outside of the six-month review process or the three-year review.

2. Discussion

c. Qwest argues that the recommended SGAT language would restrict Qwest from changing the Performance Measurement and Reporting System to correct for inaccuracies in reporting without either obtaining approval or incurring

penalties. Qwest further argues that any changes made to its data gathering, calculation and reporting systems could be interpreted to be CLEC-affecting requiring Commission approval. Qwest contends that it has no way of avoiding fines if it discovers a change is required in the underlying data to self-correct an inaccurate report. A fine of $1,000 per affected CLEC would be imposed for making any non-approved change in underlying data. A fine might be imposed for not making a change to underlying data if an audit revealed an inaccurate report. Qwest asserts that having to obtain approval before making this type of CLEC-affecting change would restrict its ability to conduct business and meet regulatory requirements. Qwest requests § 14.1 of the recommended SGAT be modified to state that Qwest may make changes to the underlying data collection and gathering process implementing its measurement or reporting systems so long as the performance measurements are implemented as required. Alternatively, if § 14.1 is not modified to remove the restriction, Qwest requests a list to be added to the SGAT language that would specify changes that would not be considered CLEC-affecting.

d. AT&T asserts that a payment-affecting change should require Commission approval. WorldCom and AT&T contend that Qwest should not be allowed to make changes without approval, which would allow CLECs an opportunity for input.

They request changes not be made to the recommended SGAT language for the CPAP.

e. I have some sympathy for the concerns Qwest brings up here. This is a difficult balance between retaining Qwest’s ability reasonably to make changes to its processes and CLECs need for certainty and advance notice of the same. Where the equipoise lies between these concerns is unclear and probably varies from situation to situation.

f. The best solution I can come up with is simply to set a process in place to handle these changes. The process I adopt for the CPAP is as follows:

(1) Any CLEC-affecting change to the CPAP, including the PIDs, the underlying data collection, reporting, and payment calculations must go through one of two processes. Either:

- Qwest can bring these changes to an industry forum, such as the Change Management Process (CMP), for discussion. If agreement is reached, then Qwest will file the change with the Commission, in a compliance-type filing. The Commission will not issue a decision on these items, but they will simply be incorporated into the CPAP; or

- Qwest will make an application-like filing with the Independent Monitor for changes that have not been agreed to at an industry forum either because agreement could not be reached or because Qwest did not present the change to the forum. Parties will be allowed to comment and a record will be established. The Independent Monitor will then issue a formal decision on whether the change will be allowed as part of the CPAP.

This should give Qwest more latitude to make necessary, even CLEC-affecting, changes without having to seek pre-clearance for every change.

g. The next issue is the murky definition of "CLEC-affecting." I am not opposed to a list of "safe harbor" changes that Qwest can make without being CLEC-affecting. However, I hesitate to endorse the Qwest list of "safe harbor" changes without CLEC input. For now, the general principle will have to do: Qwest cannot make CLEC-affecting changes without pre-vetting it through the CMP (or a related body), or the Independent Monitor.

h. Over time, with actual experience of the CPAP, I would anticipate the contours of "CLEC-affecting" changes can and will be better defined, to both Qwest's and the CLECs benefit. Until then, it will be left to the Independent Monitor to referee when impermissible CLEC-affecting changes take place. I do not foresee this becoming the black hole of liability that Qwest fears. For one, the prudent judgment of the Independent Monitor should avoid needlessly onerous interpretations of "CLEC-affecting." Second, a liability-averse Qwest will err toward pre-vetting any contemplated changes through the CMP (or a related body) or Independent Monitor. After experience with the type and variety of changes that might be made, some reasonable commercial understanding should

eventually take root between the parties about what changes can and cannot be unilaterally made by Qwest.[3]

C. Request 3

Qwest urges the Commission to impose a one year moratorium on a CLEC requesting a mini-audit if the auditor does not identify any non-conformance in the previous mini-audit.. *Qwest Motion* at 7-11. *Decision* at 30-32. *Recommended SGAT* at §§ 14.11, 14.12, and 14.13. *AT&T Response* at 5-7. *WorldCom Response* at 4-5.

1. Decision

The duty of good faith and fair dealing always exists between parties' dealing with one another. *See* 47 U.S.C. § 251(c)(1), 47 C.F.R. §§ 51.301(a), (b). The remainder of the mini-audit procedures will remain in place. Qwest's suggested change to CPAP § 14.11 is accepted and is as follows:

14.11 The scope of the CLEC mini-audit allowed under this CPAP is limited to the relevant measures and submeasures that were the subject of ~~or~~ and determined to be suspect, through the Qwest-CLEC data reconciliation process.

2. Discussion

a. Qwest argues that the six month moratorium on a CLEC's requesting a mini-audit if the auditor does not identify any non-conformance in the previous mini-audit is too lenient. Qwest also argues that CLECs should be required to work in good faith with respect to data reconciliation. Qwest contends that the mini-audit requirements of the CPAP are more

[3] I would expect that a similar accommodation might take place over time with the level of detail and the extent of the change log that Qwest must keep. *See* Decision No. R01-997-I, ¶¶ III.B.2.d. at pp. 26-27. The Commission begins with the presumption that a maximum degree of information should be kept and shared. If commercial experience demonstrates otherwise—for instance, that the minutely detailed change logs are of no value—then by all means the CPAP requirement should be revised.

stringent than those envisioned by the Special Master and the mini-audit requirements of performance assurance plans approved by the FCC and other state regulators. Qwest requests that the recommended SGAT language be changed to the language in the Special Master's Final Report and Recommendation. Qwest also requests changing the "or" in § 14.11 to "and." Qwest argues that a CLEC should not be able to request a mini-audit on an issue that, while not raised, was determined to be suspect during data reconciliation.

b. AT&T and WorldCom contend the CPAP limitations on mini-audits are adequate and would prevent frivolous requests for audit. AT&T asserts that the CPAP is not more stringent than other approved plans. Both parties state that the language on this matter should not be changed.

c. The current CPAP mini-audit provisions, §§ 14.0 *et seq.*, represent a reasonable balance between CLECs deserving accurate performance data and unduly burdening Qwest with costly and unnecessary audits. Actual experience with the mini-audit process will have to bear out the truth or falsity of Qwest's concerns of its over-use to no good end. The mini-audit process and moratorium represents a first cut at striking a balance. I do nonetheless agree with Qwest's proposed change to § 14.11 to require that CLECs raise the mini-audit topic issue during data reconciliation.

d. This specific concern leads to some general comments on the parties' requested modifications. In many cases, the party requesting modification recites a parade of horribles that might occur unless the CPAP is altered. Fears of abuses by parties, exploitation of open-ended provisions, or structural flaws that will result in drastic over- or under-enforcement are a few of the reasons alleged for modifying the current CPAP. To be sure, some of the concerns seem plausible, but at this point they remain hypothetical. Because of the lack of record evidence concerning actual commercial harm, the CPAP remains a best, informed guess at getting the incentives right for competitive entry in Colorado. At many levels, however, it remains a guess. The CPAP will have to be fine-tuned based on actual experience with its functioning. If some of the alleged horribles cited by parties here do come true, the Commission will not hesitate to make appropriate changes at the six-month review.

e. Qwest's mini-audit concerns are a case-in-point of hypothetical, but plausible, concerns that may require CPAP revision if those concerns bear out. If, indeed, CLECs, collectively or singly, use the mini-audit process to inflict countless, marginally effective mini-audits on Qwest, then I would expect two things to happen: first, the Independent Monitor would shut down this manifest abuse of process; second,

the Commission would revise the CPAP at the six-month review to prohibit abuse of the mini-audit procedures. But this is the realm of speculation.

D. Request 4

Qwest requests that it be allowed, at a minimum, to apply bill credits to CLECs who are more than 30 days past due on any non-disputed charges. Qwest *Motion* at 11-13. *Decision* at 42-43. *Recommended SGAT* at § 12.2. *AT&T Response* at 7-8. *WorldCom Response* at 5-6.

1. Decision

a. Qwest shall continue to be obligated to make payments in cash, but shall be able to apply bill credits against CLECs who are more than 90 days past due for non-disputed charges.

b. The language for the recommended SGAT shall be as follows:

12.2 All payments shall be in cash. <u>Qwest shall be able to offset cash payments to CLEC with a bill credit applied against any non-disputed charges that are more than 90 days past due.</u>

2. Discussion

a. Qwest contends that it should not be required to pay cash for penalties. Qwest argues that bill credits instead of cash payment for penalties provide incentive to CLECs to pay their bills on time. Qwest requests modification of the requirement to make cash payments. Qwest requests that it be allowed, at a minimum, to apply bill credits

to CLECs who are more than 30 days past due on any non-disputed charges.

b. AT&T and WorldCom assert that penalty amounts awarded under CPAP should not be a solution to any bill collection problems Qwest is experiencing. Both parties suggest that Qwest should take appropriate collections or dispute resolution action to collect on unpaid CLEC bills. WorldCom also notes that Commission rules do not specify when a wholesale bill is considered to be past due. WorldCom and AT&T oppose any modification of the cash payment requirement for penalties.

c. I adopted the cash payment system to make CPAP payments straightforward and to keep them from getting tangled up in billing disputes. I still believe that cash payments are superior. Nevertheless, the CPAP and CLECs' payment of wholesale bills are not wholly unrelated. For instance, unpaid CLEC bills should presumably be reflected in wholesale rates, as Qwest is entitled to recover a premium in those rates for its risk of loss. Likewise, Qwest is not obligated to debt-finance CLECs through unpaid bills on the one hand, while paying them CPAP penalties on the other. I therefore will allow Qwest to credit CPAP penalties for bills that are more than 90 days past due.

d. WorldCom's objection that there is no Commission rule prescribing when a payment is past due is

unavailing. I refuse to believe that conventions on when payments are due for wholesale services do not already exist. I would particularly expect an entity like WorldCom that has relations to ILECs in its IXC capacity to have evolved bill payment due date conventions. These conventions will supply the relevant metric for when payments are more than 90 days past due.

E. Request 5

Qwest asserts that payment escalation for non-conformance must be limited. (Qwest does not request any specific change.) *Qwest Motion* at 13-17. *Decision* at 60-61. *Recommended SGAT* at § 8.2. *AT&T Response* at 8-11. *WorldCom Response* at 6-7.

1. Decision

I decline to modify the current payment escalation process.

2. Discussion

a. Qwest asserts that the CPAP provision allowing the Independent Monitor to perform a root-cause analysis of repeated nonconformance better accomplishes the same objective as unlimited escalating payments. Qwest speculates that unlimited escalating payments allow CLECs unlimited financial opportunities because poorly-defined PIDs could be gamed by CLECs.

b. AT&T contends that Qwest has made an argument for the CPAP to become effective pre-§ 271 approval

because there would be an opportunity to refine the PIDs before penalties go into effect. AT&T also contends that, as experience has been gained through the ROC OSS testing process, Qwest has had opportunities to refine the PIDs. AT&T argues that, if the PIDs are considered to be adequate for measuring performance to receive § 271 approval, then the PIDs should be considered adequate for performance assurance purposes. AT&T and WorldCom assert that the CPAP contains adequate deterrents to prevent CLECs from gaming the plan. AT&T and WorldCom conclude the unlimited payment escalation provision should not be changed.

c. Qwest cites two perils from the CPAP's current escalation process: one, poorly-defined PIDs can result in transfer payments from Qwest to CLECs that serves no deterrent function and misallocates resources; two, the ability of CLECs to game flawed PIDS.

d. Qwest's concerns do not necessarily lack merit, but they are wholly hypothetical. If actual experience with the CPAP reveals "bad PIDs" resulting in escalation payments wholly disproportionate to the commercial harm to CLECs, this Commission will not hesitate to make appropriate changes to the CPAP.

F. Request 6

Qwest requests modification to eliminate any rollover of

payment amounts that exceed the $100 million annual cap to future years. Qwest also requests modification to limit assessment of penalties not specified in the CPAP. *Qwest Motion* at 17-19. *Decision* at 61-64. *Recommended SGAT* at §§ 11.2 and 11.3. *AT&T Response* at 11-12. *WorldCom Response* at 7.

1. Decision

I decline to modify the "rolling forward" feature of the plan.

2. Discussion

a. Qwest contends that its future liability should be limited. Qwest argues that the CPAP requirement to carry forward deferred penalty payments into the next year is at odds with the $100 million annual cap provision. Qwest contends that other performance assurance plans approved by the FCC adopt caps on liability. Qwest requests the recommended SGAT language for the CPAP be modified to make clear that rollover of deferred amounts expires at the end of each calendar year. Qwest also seeks modification of § 11.2 to remove language which Qwest asserts implies that the Independent Monitor has authority to assess penalties not specified in the CPAP.

b. AT&T contends that the cap and deferred penalty payment provisions in the CPAP balance Qwest's desire to cap its monetary requirement against AT&T's desire to receive full penalty payment. AT&T opposes Qwest's request for modification of the recommended SGAT language on this matter.

WorldCom and AT&T disagree with Qwest's interpretation of § 11.2 and oppose Qwest's proposed change.

c. The CPAP's primary thrust is to limit Qwest's not insubstantial incentive to breach its interconnection and unbundling obligations. Likewise, the CPAP aims to compensate CLECs for harm suffered when Qwest does breach its obligations under the Act. The $100 million cap on CPAP payments represents a retreat from these two principles.

d. The cap is a concession to Qwest's need for some upward limit on its potential post-§ 271 liability and predictability as to its potential liability. Nevertheless, the cap also represents an opportunity for Qwest efficiently to breach its obligations to CLECs, as well as for CLECs to be systematically undercompensated for Qwest's breaches of the SGAT.

e. Because the deterrence and remunerative goals of the CPAP take precedence over the predictability goals of Qwest, it makes sense to "roll-over" Qwest's liability under the CPAP into future years. That way, the incentives to breach ICAs with impunity – which would become manifold when the cap is approached – are limited.

f. Finally, the language in § 11.2 that Qwest objects to cannot reasonably be construed to authorize the Independent Monitor to assess non-CPAP specified penalties.

G. Request 7

Qwest requests limitation of CLECs' pursuit of additional contract damages. *Qwest Motion* at 19-21. *Decision* at 65-67. *Recommended SGAT* at § 16.6. *AT&T Response* at 12. *WorldCom Response* at 8-9.

1. Decision

An offset clause will be added to the CPAP as follows:

16.6 Tier 1X payments . . . . action. Any damages awarded through this action shall be offset with payments made under this CPAP. 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 CPAP, no such procedural requirement shall apply.

2. Discussion

a. Qwest argues that the possibility of an offset to liquidated damages does not mitigate harm to Qwest or the possibility of windfall opportunities to CLECs. Qwest contends that Tier 1 payments are liquidated damages in other FCC-approved performance assurance plans. Qwest asserts that CLECs should be prohibited from arguing to a court that payments received under the CPAP were not for the same harm. Qwest requests modification of the offset provision in the CPAP to mandate that any damages awarded be offset by CPAP payments. Specifically, Qwest requests the CPAP read: "any damages awarded in a future action shall be offset with payments under the CPAP for, at a minimum, the previous six months."

b. AT&T asserts that no other FCC-approved performance assurance plan requires the offset that Qwest is

seeking in its request to modify. WorldCom contends that the determination of offset properly belongs in the courts to be determined on a case-by-case basis. AT&T argues that the CPAP contains the proper definition of offset.

c. I agree with Qwest that an offset clause should be added to the CPAP. I cannot imagine that a court would not offset any liability payments from the CPAP from a court-ordered remedy, but it might as well be made explicit.

d. Offset is also consistent with the theory of the CPAP. The CPAP is meant to be self-executing way for CLECs to be compensated for harm suffered when Qwest breaches its contractual obligations to CLECs to interconnect and to unbundle Qwest's network under the Act. Damages awarded by a court for the same damage would duplicate the work of the CPAP. Therefore, § 16.6 will be modified to reflect Qwest's right to offset.

H. Request 8

Qwest seeks to limit Commission modification of CPAP. *Qwest Motion* at 21-25. *Decision* at 69-70. *Recommended SGAT* at § 19.1. *AT&T Response* at 12-13. *WorldCom Response* at 9-11.

1. Decision

The Commission shall retain the ability unilaterally to modify the CPAP. The second sentence in § 19.1 will be deleted. Section 19.1 shall read as follows:

~~19.1~~ This CPAP represents Qwest's voluntary offer to provide performance assurance. ~~No changes shall be made without Qwest's consent.~~

2. Discussion

a. Qwest argues that the Commission should not be allowed unilaterally to modify the CPAP because the Commission has no legal authority to do so. Qwest argues that § 19.1 of the CPAP requires that the Commission obtain Qwest's consent before a change can be made to the CPAP. Because the CPAP also includes provisions that would allow the Commission discretion to modify the CPAP, Qwest is concerned that the CPAP does not provide the legal certainty it seeks to be assured that the terms it agrees to are known and cannot be changed unilaterally.

b. AT&T believes the Commission does have authority to determine the public interest of the CPAP. AT&T asserts that it would be inappropriate for Qwest to control changes to the CPAP because there would be no incentive post-§ 271 approval for Qwest to maintain the integrity of the CPAP. WorldCom notes that the FCC has stated that performance assurance plans are not to be static, and that state Commissions must be committed to periodic review and modification of the plans based on input from both the RBOC and the CLECs. WorldCom further notes that the Commission has been granted the authority under the Act unilaterally to order changes to the CPAP.

WorldCom contends that Qwest's concerns are mitigated by the Decision No. R01-997-I statement that "the Commission will be disinclined to make any fundamental changes to the CPAP unless there is a clear need and benefit."

c. This is a tricky issue because it ultimately turns on an issue that this Commission has sedulously avoided: namely, where does this Commission derive its authority to mandate the CPAP on Qwest. In the CPAP Order, I equated the CPAP to a detailed arbitration clause in a commercial contract and a consent decree. Thus, the CPAP derives its enforceability from the contract terms itself, not from some enforcement authority under state or federal law.

d. Therefore, the Commission's authority to modify the CPAP comes from the CPAP itself. Indeed, by "voluntarily" adopting the CPAP, Qwest confers to the Commission the ability to make changes to the same. This grant of CPAP-changing authority is not so strange either. Open contract terms – subject to later negotiation or decision by a neutral third-party – are quite common. The Uniform Commercial Code has a provision dealing with open price terms. U.C.C. § 2-305; § 4-2-305, C.R.S.; *see generally,* Mark P. Gergen, *The Use of Open Terms in Contract,* 92 Colum. L. Rev. 997 (1992). Open contract terms are used when uncertainty confronts contracting

parties on a going-forward basis.[4] *Id.* Given the CPAP is only a first cut at getting the parties respective incentives right, there is certainly the need for open terms and self-revising mechanisms within the plan to tailor the plan to the commercial realities experienced in the Colorado local exchange market.

e. *Otter Tail Power Co. v. United States,* 410 U.S. 366, 93 S.Ct. 1022 (1973), gives further support to the Commission's unilateral right to revise the CPAP, even when the CPAP's terms go beyond the Commission's traditional jurisdiction. In *Otter Tail*, an antitrust court's remedy enabled the Federal Power Commission to evaluate and enforce a filed tariff that called for the wholesale wheeling of power, even though the FPC lacked authority to mandate such a step under its traditional jurisdiction. *See* Id. at 375-76 (1973). Similarly here, the Commission is being empowered by Qwest's CPAP tariff to revise the enforcement regime in ways that go beyond traditional state jurisdiction.

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[4] Open contract terms have been criticized for shifting costs to the judicial system that should otherwise have been privately borne and negotiated. *See,* Richard A. Posner, *Economic Analysis of Law,* § 4.2 at p. 109 (Aspen: 1998). Here, the open contract term – the self-revising aspects of the CPAP – are costs properly socialized to the Commission for two reasons: first, there is uncertainty as to the going-forward incentives of the CPAP with a concomitant need for a neutral third-party fairly to adjust the CPAP to the uncertainty; second, an Interconnection Agreement or the SGAT is not merely a contract, but is also an expression of public policy as embodied in 47 U.S.C. §§ 251, 252, 271, and subject to state Commission approval under 47 U.S.C. § 252(e)(1). Therefore, this Commission's ongoing superintending over the CPAP is both unremarkable as a matter of contract law and required as a matter of competition policy under the Act.

f. Granting the Commission unilateral authority to revise the CPAP is the only sensible course. If Qwest retained veto rights over CPAP changes through, say, an aggressive reading of CPAP § 19.1, then the CPAP revision process would become a ratchet toward Qwest-favorable terms. This would not solve the problem of Qwest's incentive to breach.

g. The option of leaving the "firm" parts of the CPAP intact is also not right. The CPAP is informed by a great deal of input from all parties, but it is far from perfect at capturing the forward-looking incentives and plans of Qwest and the CLECs. The CPAP will possibly under- and over-enforce the Act. The Commission – as well as the parties – need a self-revising mechanism within the CPAP.

h. I can understand the desire of Qwest for some certainty as to its potential liability under the CPAP. But Qwest's assumptions strangely seem to cut only toward the CPAP becoming more exacting, with more penalties being added through the revision process. This is not an accurate assumption. The CPAP revisions will attempt to correct both over- and under-enforcement problems.

I. Request 9

Qwest requests elimination of the requirement to monitor and report special access information. *Qwest Motion* at 25-32. *Decision* at 79-83. *AT&T Response* at 13. *WorldCom Response* at 11-14. *XO and Time Warner Joint Response*.

1. Decision

I decline to modify the special access requirements.

2. Discussion

a. Qwest objects to the CPAP requirement to monitor and report special access information. Qwest argues that, because special access does not have to be addressed to determine checklist compliance for § 271 approval, there should be no requirement for special access in the CPAP. Qwest further argues that special access services are primarily ordered under the federal tariff and, therefore, Colorado is preempted applying provisioning standards to Qwest's special access service. Qwest asserts that special access facilities used by CLECs in the provisioning of local exchange service can be converted to UNEs which are covered by the CPAP. Qwest indicates that it is investigating, but is not sure it could implement, CPAP submeasures for special access within the specified 120 days. Qwest requests the requirement to monitor and report special access submeasures be eliminated.

b. XO and Time Warner argue that CLECs rely heavily on special access in order to provide local exchange service. XO and Time Warner assert that reality dictates use of special access instead of UNEs. This unavailability of alternatives to special access supports the monitoring and

reporting. WorldCom points out that special access is ordered from the federal tariff because only 10 percent of all traffic traversing such a circuit needs to be interstate. Any intrastate traffic that traverses a circuit is jurisdictional to this Commission. AT&T, WorldCom, XO, and Time Warner cite several decisions made by other jurisdictions establishing requirements to measure special access. These CLECs support requirements to monitor and report special access submeasures.

c. I decline to make the modification requested by Qwest. Special access shall remain part of the CPAP reporting requirement.

d. Time Warner and XO have made out a convincing factual case that the special access metrics should be included in CPAP reporting. The high capacity loops ordered through the special access tariff are an important component for CLECs seeking to enter the Colorado local exchange market with their own facilities.

e. Bringing Special Access performance metrics into the sunshine, without any attendant penalties, may by itself ensure that Qwest's performance for special access is adequate. At this time, the Commission has no particular inclination to take the next step and include special access in the CPAP penalty scheme. So long as Qwest's special access provisioning is brought to light through CPAP reporting and

remains adequate, I would anticipate that reporting alone will be adequate.

f. Finally, I am not convinced by Qwest's jurisdictional argument. That special access is from the federal tariff does not mean it cannot be part of the CPAP. Qwest is surely right that § 271 is aimed at opening the local exchange market. Indeed, § 271 only looks to opening the local exchange market. That said, XO and Time Warner have made a plausible factual case that special access is being used to enter the local exchange market.

g. The crux of Qwest's jurisdictional argument is beside the point. Monitoring and reporting of special access will be required. This is Qwest's tariffed offering to CLECs. It makes no difference whether that tariff offering includes jurisdictionally uniform performance guarantees.

J. Request 10

Qwest requests modification of the responsibilities of the Independent Monitor. *Qwest Motion* at 32-35. *Recommended SGAT* at § 17.2. *AT&T Response* at 13-15. *WorldCom Response* at 15.

1. Decision

The Independent Monitor will remain unchanged.

2. Discussion

a. Qwest objects to the role of the Independent Monitor. Qwest argues that the need for a fair and independent

hearing requires either a wholly independent arbitrator or an independent avenue of judicial review for decisions made by the Independent Monitor. Qwest raises concern about potential conflict of interest because the Independent Monitor, appointed only by the Commission, will be compensated from penalties assessed by the Independent Monitor, which will be paid to the Special Fund. Qwest requests modification of the process of appointing the Independent Monitor to ensure his independence from the Commission. Qwest further seeks modification of the Independent Monitor's responsibilities to include evaluating whether Qwest has established that a payment should be waived and to exclude the provision to assess any additional penalties under the CPAP.

b. AT&T asserts the CPAP is similar to a contract and as such should limit or exclude judicial review. AT&T and WorldCom question Qwest's concern about conflict of interest because Qwest paid for the Special Master and also paid for consultants and facilitators throughout the § 271 process. AT&T recommends that Qwest's arguments regarding the Independent Monitor should not be well taken.

c. Qwest's arguments about the Independent Monitor are not well-taken, and the Independent Monitor aspects of the CPAP shall not be changed. AT&T and WorldCom no doubt took delight in pointing out Qwest's own petard-hoisting

rhetoric about supposed conflicts of interest, although AT&T knows all too well about carelessly tossing conflict of interest charges. *See* Decision No. R01-222-I, Docket No 01-041T (March 9, 2001).

d. In fact, I believe that the Independent Monitor represents a signal leap forward in ILEC-CLEC dispute resolution. Unlike state commissions or the FCC, where I believe the public choice hazards are much greater, the Independent Monitor represents a clear step toward a normalized commercial arbitration relationship between Qwest and CLECs. As in a "normal" commercial context, the use of an independent arbitrator allows the parties to hire expert decision-makers that timely resolve disputes. The private law model that the Indpendent Monitor points toward should be embraced by all parties as delivering greater certainty, expedition, and impartiality.

e. The Independent Monitor's independence will likewise be honored by this Commission. While the Commission retains appellate-like authority over the Independent Monitor, I would anticipate that this Commission and its successors will be inclined to defer to the Independent Monitor's determinations. A prudential deference toward the Independent Monitor's determinations is necessary for the office of Independent Monitor to succeed. Though not explicit in the CPAP, I would

expect this Commission to defer to the Independent Monitor's determinations consistent with deferential standards applied to arbitration decisions. *See* §§ 13-22-201 *et seq.,* C.R.S.; 9 U.S.C. §§ 1 *et seq.*

f. To the extent that the Independent Monitor represents a shift from the realm of pure policymaking, as often happens when the Commission is involved, to contract law-applying, as the Independent Monitor will be doing, this can only increase certainty for all parties.

K. Request 11

Qwest seeks deletion of several portions of the Recommended SGAT language for the CPAP. *Qwest Motion* at 36-37. *Recommended SGAT* at §§ 4.3, 11.4, 13.2, 13.5, 13.7, 13.8, 13.9, 14.3, 14.4, 14.6, 14.9, 14.13, 16.9, 17.5, and 18.8. *AT&T Response* at 15-17. *WorldCom Response* at 15-16.

1. Decision

The unsolicited changes incorporated in the recommended SGAT language shall remain.

2. Discussion

a. Qwest argues that changes should not have been made to its proposed SGAT language for the CPAP unless the changes were sought by a CLEC. Qwest argues that unsolicited changes incorporated in the recommended SGAT language for the CPAP upset the balance represented in the CPAP. Qwest notes such changes were made without any discussion in Decision No. R01-997-I as to the reason for the change. Qwest seeks deletion

of changes in §§ 4.3, 11.4, 13.2, 13.5, 13.7, 13.8, 13.9, 14.3, 14.4, 14.6, 14.9, 14.13, 16.9, 17.5, and 18.8.

b. AT&T counters that the Hearing Commissioner acted on matters of public interest and, therefore, had the authority to make the changes incorporated in the recommended SGAT language for the CPAP. AT&T points out that the sections that were changed dealt with subjects which were and are in dispute between Qwest and the CLECs. WorldCom contends that the Hearing Commissioner is permitted to use his independent thinking and judgment to take action in a proceeding, even if the action was not advocated by any party. AT&T asserts that Qwest's requested deletions should not be adopted.

c. This gets back to the "voluntary" nature of the CPAP. Qwest can file whatever SGAT language it wants and call it a performance assurance plan. The only language I will endorse for § 271 purposes is attached to this Order.

L. Request 12

Qwest seeks clarification of the payment amounts required by the recommended SGAT in§§ 13.4, 13.5, and 13.6. *Qwest Motion* at 37-38. *Recommended SGAT* at §§ 13.4, 13.5, and 13.6. *AT&T Response* at 17-18.

1. Decision

These payments are cumulative.

Recommended SGAT language:

13.3 In the case of late reporting, Qwest shall make a payment of $500 per calendar day to the Special Fund. This amount represents the total payment for missing a

reporting deadline, rather than a payment per report. This payment shall begin on the report due date and continue until the report is actually distributed.

13.5 In addition to the payment in 13.4, if as a result of an inaccurate report, any bill over $25,000 is adjusted upwards by 25% or more, Qwest shall also incur a late reporting payment as set forth in section 13.3. This payment shall begin ~~from the day~~ on the report ~~filing~~ due date and shall continue until the day the discrepancy is resolved.

2. Discussion

a. Qwest requests clarification that the provisions of §§ 13.4, 13.5, and 13.6 are not cumulative. If more than one provision is applicable, the more specific provision shall govern.

b. AT&T argues that Qwest is attempting to lessen its liability when it does not file timely or accurate reports. AT&T suggests Qwest's request for clarification should not be entertained.

c. The payments are cumulative because they are for different violations. The clarification will be made so there is no ambiguity as to the cumulative and separate nature of §§ 13.4, 13.5 and 13.6.

M. Request 13

Qwest requests clarification of the six-month average calculations used for Tier 1A measurements. *Qwest Motion* at 37. *Recommended SGAT* at §§ 6.1 and 7.4.

1. Decision

The six-month average will be done on a rolling basis.

2. Discussion

a. The Special Master recommended a six-month fixed average. This average would require Qwest to calculate twice a year the six-month fixed average. The Special Master adopted this method for ease of administration.

b. In contrast, I adopted and reaffirm here the use of a rolling average. This means that Qwest will derive the averages on a rolling, monthly basis. The rolling average will require monthly calculations, but will be more accurate. I believe that this requirement will not be administratively burdensome. A properly programmed spreadsheet should make this calculation easy to perform on a monthly basis.

N. Request 14

Qwest requests clarification that the results for PO-2A-1 and PO-2A-2 will be aggregated for purposes of calculating any penalty payment. *Qwest Motion* at 38-39. *Recommended SGAT* at Appendix A. *AT&T Response* at 18.

1. Decision

Clarification language shall be added to the recommended SGAT language as follows:

Electronic Flow Through Rates

For Resale:

~~PO-2A~~	~~Flow-through LSRs~~	~~*Electronic Flow-through (Percent)*~~
~~PO-2B~~	~~Flow-through Eligible LSRs~~	~~*Electronic Flow-through (Percent)*~~
PO-2A-1	IMA Flow-through LSRs	*Electronic Flow-through (Percent)*
PO-2A-2	GUI Flow-through LSRs	*Electronic Flow-through (Percent)*
PO-2B-1	IMA Flow-through Eligible LSRs	*Electronic Flow-through (Percent)*
PO-2B-2	GUI Flow-through Eligible LSRs	*Electronic Flow-through (Percent)*

For Unbundled Loops:

~~PO-2A~~	~~Flow-through LSRs~~	~~*Electronic Flow-through (Percent)*~~

~~PO-2B Flow-through Eligible LSRs *Electronic Flow-through (Percent)*~~

PO-2A-1	IMA Flow-through LSRs	*Electronic Flow-through (Percent)*
PO-2A-2	GUI Flow-through LSRs	*Electronic Flow-through (Percent)*
PO-2B-1	IMA Flow-through Eligible LSRs	*Electronic Flow-through (Percent)*
PO-2B-2	GUI Flow-through Eligible LSRs	*Electronic Flow-through (Percent)*

For LNP:

~~PO-2A~~	~~Flow-through LSRs~~	~~*Electronic Flow-through (Percent)*~~
~~PO-2B~~	~~Flow-through Eligible LSRs~~	~~*Electronic Flow-through (Percent)*~~
PO-2A-1	IMA Flow-through LSRs	*Electronic Flow-through (Percent)*
PO-2A-2	GUI Flow-through LSRs	*Electronic Flow-through (Percent)*
PO-2B-1	IMA Flow-through Eligible LSRs	*Electronic Flow-through (Percent)*
PO-2B-2	GUI Flow-through Eligible LSRs	*Electronic Flow-through (Percent)*

For UNE-P (POTS):

~~PO-2A~~	~~Flow-through LSRs~~	~~*Electronic Flow-through (Percent)*~~
~~PO-2B~~	~~Flow-through Eligible LSRs~~	~~*Electronic Flow-through (Percent)*~~
PO-2A-1	IMA Flow-through LSRs	*Electronic Flow-through (Percent)*
PO-2A-2	GUI Flow-through LSRs	*Electronic Flow-through (Percent)*
PO-2B-1	IMA Flow-through Eligible LSRs	*Electronic Flow-through (Percent)*
PO-2B-2	GUI Flow-through Eligible LSRs	*Electronic Flow-through (Percent)*

Qwest shall be required to meet a standard for either eligible flow-through (PO-2B-1 & PO-2B-2 aggregated) or actual flow-through (PO-2A-1 & PO-2A-2 aggregated). If Qwest misses the standard for both ~~submeasures~~ PO-2B and PO-2A, it shall pay payments on the measure in which it performed closer to the relevant standard.

2. Discussion

a. Qwest requests addition of a clarification sentence to the Electronic Flow Through Rates section of Appendix A of the recommended SGAT language for the CPAP. The additional language Qwest proposes is: "For the purpose of calculating the payment, PO-2A and PO-2B shall each include all applicable LSRs received through both EDI and GUI."

b. AT&T disagrees with Qwest's proposed language. AT&T contends that flow through results for EDI are currently much worse than for IMA-GUI. AT&T argues that combining the flow through results for IMA-GUI and EDI would

permit Qwest to mask poor performance of the EDI. AT&T proposes that the CPAP language should be clarified to state that each submeasure, PO-2A-1, PO-2A-2, PO-2B-1 and PO-2B-2, should be reported separately.

c. The Final Report and Recommendation states that for electronic flow through rates both EDI and GUI performance will be aggregated. In its compliance filing of SGAT language, Qwest did not capture this provision. Because there is already a disagreement between Qwest and AT&T on this matter, the language will be clarified as noted in the decision above.

O. Request 15

Qwest requests clarification that escalation of per occurrence payments applies to Tier 1X. *Qwest Motion* at 39-40. *Recommended SGAT* at § 8.2.

1. Decision

Escalation of per occurrence payments does apply to Tier 1X. The requested modification is granted as follows:

8.2 The second continuous month of non-conforming performance for a particular submeasure will require the total per occurrence payment before severity to be multiplied by two. On the third continuous month, the total per occurrence payment before severity will be multiplied by three. The escalation . . . .

2. Discussion

a. Qwest asserts that the recommended SGAT language is not clear on the amounts to be paid to Tier 1X and Tier 1Y if per occurrence payments are escalated. To clarify the application of the escalation provision, Qwest requests

addition of language to § 8.2 of the Recommended SGAT language for the CPAP.

b. I agree that the language of CPAP § 8.2 needs to be clarified. The new language in § 8.2 makes the modification requested by Qwest.

P. Request 16

Qwest seeks clarification that OP-6A and OP-6B will be treated as a single measure for purposes of calculating any penalty payment. *Qwest Motion* at 40. *Recommended SGAT* at Appendix A. *AT&T Response* at 18.

1. Decision

Clarification language shall be added to the recommended SGAT language as follows:

[1] Submeasures for OP-4 are included with OP-6 as "families": ~~OP-4A/OP-6A-1/OP-6B-1; OP-4B/OP-6A-2/OP-6B-2; OP-4C/OP-6A-3/OP-6B-3; OP-4D/OP-6A-4/OP-6B-4; and OP-4E/OP-6A-5/OP-6B-5~~ OP-4A with (OP-6A-1 & OP-6B-1 combined); OP-4B with (OP-6A-2 & OP-6B-2 combined); OP-4C with (OP-6A-3 & OP-6B-3 combined); OP-4D with (OP-6A-4 & OP-6B-4 combined); and OP-4E with (OP-6A-5 & OP-6B-5 combined). Submeasures within each family share a single payment opportunity with only the submeasure (OP-4 or OP-6A & OP-6B combined) with the highest payment being paid.

2. Discussion

a. Qwest points out that the recommended SGAT language for the CPAP does not capture the Final Report and Recommendation proposal to treat OP-6 as a single measure.

b. The recommended SGAT language does not adequately state that OP-6 will be treated as a single measure. The language will be changed as noted in the decision above.

Q. Request 17

Qwest requests correction of a typo in Appendix A of the Recommended SGAT. *Qwest Motion* at 40. *Recommended SGAT* at Appendix A.

1. Decision

The typo shall be corrected as follows:

For Unbundled Loops:

PO-5A-1(b)	IMA Electronic LSRs	*FOCs On Time (Percent)*
PO-5A-2(b)	EDI Electronic LSRs	*FOCs On Time (Percent)*
PO-5B-1(b)	IMA Electronic/Manual LSRs	*FOCs On Time (Percent)*
PO-5B-2(b)	EDI Electronic/Manual LSRs	*FOCs On Time (Percent)*
PO-5C-(~~c~~b)	Fax Manual LSRs	*FOCs On Time (Percent)*
PO-9B		*Timely Jeopardy Notices (Percent)*

R. Request 18

The Office of Consumer Counsel (OCC) requests that it be deemed a "relevant party" for purposes of receiving reports, suggesting modifications to and enforcement of the CPAP. *OCC Motion* at 1. *Decision* at 18. Qwest contends that the OCC is not entitled to receive CPAP information but may request it from the Commission under the confidentiality rules, 4 CCR 723-16.4.4. *Qwest Response* at 16.

1. Decision

OCC will be a relevant party for receiving monthly reports and providing input into the modification and enforcement of the plan. SGAT § 13.2 will be changed as follows:

13.2 Qwest shall deliver the individual monthly report to CLEC and the aggregate State report to the Commission and the Office of Consumer Counsel via email on or before the last business day of each month following the relevant performance period.

2. Discussion

a. The OCC cites to the CPAP Decision at page 18 which states, "Reports generated prior to § 271 approval will

be distributed to all relevant parties and to the Commission via the same distribution mechanism that will be in effect post-§ 271." The OCC would like it to be clear that it is a "relevant party" for purposes of receiving pre- and post-§ 271 reports, suggesting modifications to and enforcement of the CPAP. The OCC states that it has been actively participating in this docket as well as Docket Nos. 97I-198T and 99A-577T. The OCC further states that it has a statutory duty to represent residential, small business and agricultural customers who may be affected by the CPAP reports and parameters of the CPAP.

b. In its response, Qwest states that nothing in the statutory obligations or duties of the OCC entitle it to the payment information that Qwest would be obligated to provide under the CPAP. In addition, Qwest states that any information provided to the individual CLECs will contain confidential information about individual CLEC's orders, which is protected from disclosure. It is Qwest's position that the OCC may request information from the Commission to the extent allowed under the confidentiality rules, 4 C.C.R. 723-16.4.4.

c. The OCC should be considered a relevant party to receive aggregate reports. The OCC shall need to work through the Commission's confidentiality rules to obtain CLEC-specific confidentiality information.

S. Request 19

The OCC requests modification to the language in § 10.7 to prevent the use of remaining Tier 2 Special Fund monies to benefit Qwest directly *or indirectly*. *OCC Motion* at 2. *Recommended SGAT* at § 10.7.

1. Decision

This requested modification is not necessary.

2. Discussion

a. Section 10.7 of the recommended SGAT currently reads: "Upon implementation of the CPAP, the Commission shall decide how to use the remainder of this fund. The uses shall be competitively-neutral efforts in the telecommunications field that do not benefit Qwest directly." The OCC would like language added to this section to read "do not benefit Qwest directly or indirectly." The OCC states that Qwest should in no way, directly or indirectly, benefit from the payments made into the Tier 2 fund. These are monies that would not be present but for Qwest's non-compliance with the CPAP and § 271. The law does not permit a breaching party to benefit from its transgressions, and it should not be allowed in this instance either.

b. The general principle embodied in CPAP § 10.7 is adequate.

T. Request 20

The OCC requests clarification on the process the Commission will use to determine how to use any remaining

Tier 2 Special Fund monies and for allowing input from other interested parties. *OCC Motion* at 2. *Recommended SGAT* at § 10.7.

1. Decision

I decline to adopt a process for how to use left-over Special Fund monies at this time.

2. Discussion

a. The OCC requests the Commission clarify the process the Commission will use to determine how to use any remaining dollars from the Special Fund and consider allowing input from other interested parties. The OCC's position is that since this money is designed to capture the competitive harms in the market-place as a whole, the Commission should include a process whereby interested parties may participate and submit recommendations for competitively neutral efforts in the telecommunications filed that do not benefit Qwest directly or indirectly.

b. The general principle of CPAP § 10.7 is enough at this time and encompasses the OCC's concerns in any event.

U. Request 21

The OCC urges the Commission to add a section to the SGAT that explicitly prohibits Qwest from recovering any Tier 1 and Tier 2 penalties from its ratepayers. *OCC Motion* at 3. *Recommended SGAT* at § 11.0. Qwest states this provision is unnecessary as the FCC has already stated that 271 payments may not be charged to ratepayers. *Qwest Response* at 19.

1. Decision

No modification is necessary. The FCC has already spoken on this.

2. Discussion

a. The OCC believes that it is the Commission's intent that Qwest shareholders, and not ratepayers, be liable for any CPAP penalties; but the OCC would prefer explicit language in the CPAP SGAT. The OCC suggests that § 11.0 may be the most appropriate place to include language to this affect.

b. Qwest asserts that this language is unnecessary and would simply restate the FCC's already clearly articulated position. In the *Bell Atlantic New Yo*rk Order, the FCC stated that § 271 payments may not be charged to ratepayers.It would be inappropriate and unnecessary to add a provision to the CPAP reiterating the FCC's settled policy on this issue. In addition, Qwest states that the SGAT is a contract between two companies for interconnection and wholesale services, not a statement of retail ratemaking policy.

c. I agree with Qwest that the FCC's statements on this matter are dispositive. There is no need to include this language in the SGAT, particularly since it has no effect on the rights and obligations between Qwest and a CLEC.

V. Request 22

The OCC requests clarification regarding who will pay to

hire an expert for the Three Year Review if no funds are available in the Special Fund. *OCC Motion* at 3. *Recommended SGAT* at § 18.9.

1. Decision

Similar to the Independent Monitor and Auditor, Qwest will advance the funds for the expert if necessary. CPAP § 18.9 shall be modified for clarification as follows:

18.9 Thirty (30) months after § 271 approval, the Commission shall initiate a comprehensive review of the CPAP (the "Three Year Review") with the assistance of an outside, independent expert. Such expert shall be paid from the Special Fund. When there are insufficient funds in the Special Fund for this purpose, Qwest shall advance the funds. The Three Year Review shall:

2. Discussion

a. Section 18.9 of the recommended SGAT states that the Special Fund will pay for the Commission to hire an expert to assist with the Three Year Review. The OCC requests clarification regarding who will pay to hire an expert for the Three Year Review if no or insufficient funds are available in the Special Fund.

b. CPAP § 18.9 will be changed to account for this circumstance. Qwest will advance the funds, if necessary.

W. Request 23

The OCC requests clarification on why § 19.1 still states that the CPAP is Qwest's voluntary offer to provide performance assurance. Such a statement is either redundant or incorrect. Therefore, the OCC requests that the second sentence in § 19.1 be stricken. *OCC Motion* at 4. *Recommended SGAT* at § 19.1. AT&T and WorldCom agree that this second sentence of 19.1 should be stricken because it is in conflict with §§ 17.5, 17.7 and 18.0. *AT&T Motion* at

8-10. *WorldCom Motion* at 8.

1. Decision

See Decision Request 8.

2. Discussion

a. The OCC believes that § 19.0 should be stricken from the SGAT language. Specifically, the second sentence in this section should be deleted. It reads: "No changes shall be made without Qwest's consent." Further, the OCC contends that the Hearing Commissioner has equated the CPAP to a consent decree, stating, "A consent decree might contain terms outside the bounds of traditional legal remedies, yet in exchange for settlement of a lawsuit, the parties agree to abide by those 'extra-legal' terms. Here Qwest agrees to include the CPAP in the SGAT – in essence a detailed arbitration and remedies clause – in exchange for long distance authority." The OCC believes that § 19.1 is contradictory to this position and to other statements in the SGAT language.

b. AT&T agrees with the OCC's interpretation of this § 19.1. AT&T states that § 16.9 of the CPAP SGAT language reads: "The Commission shall have the right to modify this plan at any time as appropriate." There is no statement in this section that such changes are subject to Qwest's approval. AT&T goes on to cite other examples from the CPAP SGAT language that state when the Commission will potentially make changes to the

CPAP. Like the OCC, AT&T recommends striking the second sentence in § 19.1.

c. WorldCom also commented on this issue in its Motion to Modify and agrees with the OCC and AT&T that the second sentence in § 19.1 should be deleted.

X. Request 24

AT&T requests that "Tier 1X" be included in § 11.1 of the SGAT to clarify that there is not a cap on Tier 1X payments. *AT&T Motion* at 3. *Recommended SGAT* at § 11.1.

1. Decision

This modification is not necessary because § 11.3 already addresses the issue.

2. Discussion

a. AT&T contends that the CPAP Decision and recommended SGAT language repeatedly statethat there is no cap on Tier 1X payments. Specifically, the CPAP Decision states at pages 61-62 that Tier 1X payments would continue to be paid even if Qwest reached the cap on Tier 1Y and Tier 2 payments. Further, in § 11.3 of the recommended SGAT, it indicates: "If the total payments (Tier 1X, 1Y, 2) do exceed the cap, Qwest shall pay all Tier 1X payments (even if they alone exceed the cap)." AT&T would like clarification, therefore, on the language in § 11.1 that states, "there shall be an annual cap of $100 million on payments for performance under this CPAP. The cap shall apply to Tier 1X, Tier 1Y and Tier 2 payments as

explained in § 11.3." AT&T requests that "Tier 1X" should be stricken from § 11.1.

b. Section 11.3 already answers AT&T's concern.

Y. Request 25

AT&T requests clarification on whether interest payments are included in the annual cap. *AT&T Motion* at 3. *Recommended SGAT* at § 11.2.

1. Decision

Interest payments are not included in the cap. CPAP § 11.2 will be modified to make this clear.

11.2 The following shall not count toward the cap: any penalties imposed by the Independent Monitor to maintain the integrity of the CPAP; any penalties imposed by the Commission; any penalties imposed directly by the CPAP for failure to report, failure to report timely, or failure to report accurately; any liquidated damages under another Interconnection Agreement; any interest payments; and any damages in an associated action.

2. Discussion

a. AT&T seeks clarification on several sections of the Recommended SGAT, namely §§ 12.4, 13.6 and 13.7, that deal with interest payments on penalties. AT&T questions whether the interest payments called for in the CPAP would count toward the CPAP cap. Section 11.2 does not expressly identify interest payments as falling outside the cap. It is AT&T's assumption that since these payments are typically made due to Qwest's failure accurately to report or to pay timely amounts due under the CPAP, the interest payments will not count toward the cap.

b. AT&T is correct that interest payments do not count against the cap. CPAP § 11.2 shall be modified as set forth above.

Z. Request 26

AT&T requests clarifying language in § 11.3 regarding the carry-over of Tier 1Y and Tier 2 payments when they exceed the monthly cap. *AT&T Motion* at 3-4. *Recommended SGAT* at § 11.3.

1. Decision

CPAP § 11.3 will be modified as follows to adopt AT&T's language:

11.3 Tier 1Y and Tier 2 penalties shall be subject to a monthly cap of 1/12 of the annual cap of $100 million. Following is a description of how the cap shall work:

If the total payments (Tier 1X, 1Y, 2) do not exceed the cap, Qwest shall make all payments.

If the total payments (Tier 1X, 1Y, 2) do exceed the cap, Qwest shall pay all Tier 1X payments (even if they alone exceed the cap). Other than Tier 1X and payments specified in section 11.2, Qwest shall not make payments in excess of the monthly cap. The balance in excess of the cap shall roll forward and be paid when Qwest's total monthly penalties are below the cap, whenever that time should occur (even if that should take longer than a year).

In a month when Qwest's total payment is below the monthly cap, any deferred payments plus interest will be due, but only to the extent that the deferred payments do not cause the total monthly payment to exceed the monthly cap. In the event all Tier 1Y and Tier 2 payments cannot be made in any month due to the cap, Qwest will pay Tier 1Y payments first (up to the cap) and then, from the remaining money, pay Tier 2 payments (up to the cap).

The deferred payments shall be paid with interest on the relevant amount equal to twice the Commission prescribed deposit rate.

If Qwest wishes to pay any Tier 1Y and Tier 2 payments over and above the monthly cap in order to avoid paying interest on the deferred amount, it may do so.

2. Discussion

a. AT&T asserts that it would be helpful if CPAP § 11.3 could be amended to include the CPAP Decision language that clarifies the carry-over of Tier 1Y and Tier 2 payments that exceed the monthly cap. AT&T recommends the following language be added to the end of that section:

> In a month when Qwest's total payment is below the monthly cap, any deferred payments plus interest will be due, but only to the extent that the deferred payments do not cause the total monthly payment to exceed the monthly cap. In the event all Tier 1Y and Tier 2 payments cannot be made in any month due to the cap, Qwest will pay Tier 1Y payments first (up to the cap) and then, from the remaining money, pay Tier 2 payments (up to the cap).

b. AT&T's suggested language helps clarify § 11.3 and is adopted.

AA. Request 27

AT&T requests clarification on whether Qwest will include carry-over amounts in the monthly reports it prepares for the CPAP. *AT&T Motion* at 4.

1. Decision

a. Qwest should keep a running-record of carry-over amounts on monthly reports.

b. SGAT § 13.1 is modified to reflect this requirement, as follows:

13.1 Beginning 60 days after the Commission's adoption of this CPAP, Qwest will provide the Commission and CLECs opting into the CPAP with a monthly report of Qwest's performance for the PIDs. <u>These reports shall contain any carry-over payment amounts and calculations as well as the current month's information.</u> Qwest will collect, analyze,

and report performance data for these measurements. Qwest will store such data in easy-to-access electronic form for three years after they have been produced and for an additional three years in an archived format. Any failure to follow these requirements shall be treated as a violation of the CPAP integrity requirements discussed in sections 17.5 and 17.8.

2. Discussion

a. AT&T's expects that any payment amounts carried-over to subsequent months due to reaching the monthly cap will be contained in the monthly reports Qwest prepares under CPAP § 13. AT&T would like the Commission to clarify this point.

b. The carry-over amounts will be included in the CPAP § 13 reports.

BB. Request 28

AT&T requests that CLEC may request the raw data used for payment calculations and seek Qwest's assistance in reconciling the information. Qwest shall comply with all such reasonable requests. *AT&T Motion* at 5. *Recommended SGAT* at § 12.3. Qwest states this requested provision is unnecessary and would exacerbate the already onerous penalty provisions of the CPAP. *Qwest response* at 4.

1. Decision

I decline to make the requested modification.

2. Discussion

a. AT&T asserts that the CPAP Decision makes it clear that CLECs may request raw data Qwest used in its calculations and that Qwest must cooperate with the CLEC in reconciling such data. AT&T proposes additional language for

the end of § 12.3 of the CPAP SGAT to clearly state this obligation.

~~a.~~b. Qwest contends that AT&T's additional proposed language is unnecessary and would exacerbate the already onerous penalty provisions of the CPAP. Qwest states that it is developing a bill format that will provide a breakdown of the various payment amounts and that CLECs can use in combination with the performance reports to verify that Qwest's calculations are correct. Qwest contends that a similar prototype was developed for the multistate QPAP and was provided to the same CLECs participating in this proceeding. No CLEC objected to the format. Further, Qwest states that the format summarizes the total payment amount for each PID and contains a detailed breakdown of the inputs used to calculate the payment amount. The CLEC will have all the pertinent information to replicate the calculations. Also, the CLEC will be able to initiate data reconciliation and, if appropriate, an audit.

~~b.~~c. I agree with Qwest that the language is unnecessary. AT&T's concerns fall into the hypothetical yet plausible concern category. If actual experience with the CPAP indicated a change is necessary, it can be explored during the six-month review.

CC. Request 29

AT&T requests clarification on the definition of "an additional penalty to Tier 1Y as if the discrepancy was revealed by an audit." AT&T believes that this refers to the $100,000 penalty contained in § 17.12. *AT&T Motion* at 5. *Recommended SGAT* at §§ 13.8, 13.9 and 17.12. Qwest believes that these penalty provisions should be deleted entirely. *Qwest Motion* at 37 and *Qwest Response* at 8-13.

1. Decision

a. AT&T misunderstands the interrelation between §§ 13.8, 13.9 and 17.12.

b. The reference in § 13.8 will be made more accurate to clarify this misunderstanding.

13.8 If a given Qwest-CLEC data reconciliation process forces Qwest to adjust its payment upwards three months in a row, Qwest must pay the additional amount and an additional penalty to Tier 1Y as if the discrepancy was revealed by an audit (see section 14.~~0~~12) for that third month and for each consecutive month that the CLEC reveals additional payments via data reconciliation.

2. Discussion

a. AT&T notes that the CPAP § 13.8 and 13.9 make reference to "an additional penalty to Tier 1Y as if the discrepancy was revealed by an audit (see § 14.0)..." This penalty is undefined, according to AT&T. AT&T believes this reference is meant to direct the reader to CPAP § 17.12 regarding the $100,000 penalty for willful misconduct. AT&T contends that an explicit cross-reference to § 17.12 would be helpful.

b. Qwest asserts that AT&T is mistaken in it interpretation of §§ 13.8 and 13.9. Qwest maintains, as stated in its Motion, that these sections are entirely new and should be deleted in their entirety. However, Qwest states, that while the reference to § 14.0 could have been more precise, namely to § 14.12, the intent is clear: § 14.0 relates to audits and § 14.12 in particular, states that where a mini-audit reveals a discrepancy, Qwest must "pay any applicable payments under the late payment rules." The late payment rules are contained in § 12.4 and provide for double interest on any late payment.

c. AT&T reaches on this one -- too far. The CPAP will be modified to change the reference from § 14.0 to § 14.12 to avoid misunderstanding such as the one under which AT&T labors.

DD. Request 30

AT&T requests clarification on whether the Commission intends to require that any changes to the performance measurement or reporting system, the underlying data, data extraction processes or code tables affecting CLECs be approved by the Commission prior to implementation. *AT&T Motion* at 5.

1. Decision

See Decision Request 2.

2. Discussion

a. AT&T asserts that the CPAP Decision states that: "Qwest must obtain Commission approval prior to implementing any change to the performance measurement or reporting system, the underlying data, data extraction processes and code tables if that change will affect the CLECs." This kind of change is addressed in the CPAP SGAT language at § 14.3. However, AT&T asserts that this language makes no reference to Commission approval for such changes. If the Commission intends to approve all such changes after it has gone through the Change Management Process or a procedure established by the Independent Monitor, AT&T contends it would be helpful to add a clarifying statement to that effect in CPAP § 14.3. AT&T suggests that this additional statement read as follows: "Upon completion of either the foregoing processes, Qwest shall submit such change to the Commission for approval."

b. The decision on Request 2 resolves this issue.

EE. Request 31

If Qwest implements a CLEC-affecting change without proper approval, AT&T wants to know what happens to that unapproved change. AT&T suggests the change should be voided. *AT&T Motion* at 5-6. *Recommended SGAT* at § 14.3. Qwest states this suggestion should be rejected because it would result in over-deterrence and lead to wasted efforts and resources. *Qwest Response* at 15.

1. Decision

The unapproved change shall not automatically be voided.

2. Discussion

a. CPAP § 14.3 states that, if Qwest makes a CLEC-affecting change without approval, then it shall pay a $1000 fine to each affected CLEC. AT&T inquires as to what happens to the unapproved change. AT&T believes it would be appropriate for such a change to be voided and for Qwest to be required to follow the appropriate processes to implement the change. AT&T suggests language for § 14.3 to clarify this intent.

b. Qwest asserts that this proposal from AT&T should be rejected because it would result in over-deterrence and lead to wasted efforts and resources. As Qwest discussed in its Motion, the CLEC-affecting standard is vague and puts Qwest in the untenable position of either having: 1) to guess whether a particular change is CLEC-affecting at the risk of incurring hefty penalties ($1,000 per affected CLEC), if the Commission reaches a different judgment; or, 2) having to request approval for virtually any change, which will be time-consuming and could result in Qwest being out of compliance if approval for necessary changes is not quickly received. Qwest asserts that AT&T's suggestion to "void" the unapproved changes exacerbates

the problem. Even if the change is appropriate, Qwest could be required to recalculate its results and payment amounts after the eventual Commission approval, and that would subject Qwest to inaccuracy and late reporting penalties. Qwest states that there is no need to reach such a punitive and inefficient result.

c. I am persuaded by Qwest's response that the CPAP should not adopt a blanket-rule of negating the change. The payment remedy should be an adequate remedy and deterrent to Qwest's making unapproved CLEC-affecting changes. Moreover, the Independent Monitor should deal with these changes on a case-by-case basis rather than prophylactically with a negation rule.

FF. Request 32

AT&T requests the inclusion of language in the SGAT that allows the Independent Monitor or the auditor to broaden the scope of the audit. *AT&T Motion* at 6. *CPAP Order* at 22 and 40. *Recommended SGAT* at § 14.6. Qwest states that to allow the Independent Monitor or the auditor to expand the audit would expose Qwest to potentially onerous and unproductive audits. *Qwest Response* at 14.

1. Decision

Independent Monitor or auditor will not be able to broaden the scope. No modification will be made.

2. Discussion

a. AT&T asserts that two places in the CPAP Order contain language regarding the fact that the scope of the audit may be broadened at the discretion of the Independent

Monitor or the Auditor. CPAP SGAT § 14.6 identifies a minimum set of items that are encompassed by the audit, but does not state that the Independent Monitor and auditor each have the discretion to broaden the scope of the audit. AT&T suggests language be added to § 14.6 to clarify this intent.

b. Qwest counters that AT&T's attempt to eviscerate the standard for audits in § 14.6 should be rejected. Qwest asserts that the recommended CPAP appropriately spells out a concrete standard for the scope of the audit and that this balancing of the scope had its genesis in important policy considerations. In particular, Qwest looks to page 29 of the CPAP Order where it states: "the audit must not be any more intrusive or cumbersome than necessary to achieve" the goal of "accurate reports and pay[ment] [of] appropriate penalties."

c. I agree with Qwest and will hold the CLECs to a "pleading rule" in defining the scope of their audits.

GG. Request 33

AT&T requests additional language be included in the SGAT to clarify that the Independent Monitor may require Qwest to perform a root-cause analysis for repeatedly failing to meet the performance requirements under any given PID. *AT&T Motion* at 7. *Recommended SGAT* at § 17.5.

1. Decision

Independent Monitor will be able to make Qwest perform a root-cause analysis for repeated poor performance. Section 17.5 will be modified as follows:

17.5 The Independent Monitor shall be responsible, at least initially, for the following functions, which may be modified by the Commission as it deems appropriate, with input from the parties. The Independent Monitor shall resolve all challenges to the accuracy of any performance measurements or reports, as evaluated through the auditing process in section 14.0, as well as any disputes over the CPAP integrity requirements (that is, the rules that enable the CPAP to function, such as data collection and retention requirements, maintaining the PIDs as approved, and so forth). If Qwest is repeatedly penalized for failing to meet the performance requirements under any given PID, the Independent Monitor shall have the authority to require Qwest to perform a root-cause analysis. The Independent Monitor shall evaluate all allegations that Qwest has misinterpreted, wrongly applied, or violated the relevant business rules that govern the applicable payments to be made pursuant to the CPAP. For example, for disputes about whether particular CLEC actions qualify as exclusions from a measure, where such disputes were not settled by the Qwest-CLEC data reconciliation process or an audit, the Independent Monitor shall be authorized to decide what payments should have been made. The Independent Monitor shall also entertain challenges to disqualify the auditor based upon gross neglect of duties, incompetence, or a significant conflict of interest. The Independent Monitor shall approve or deny permission for a CLEC to bring an overlapping lawsuit for contractual remedies. Finally, the Independent Monitor shall assess any additional penalties under this plan, such as penalties for bringing frivolous disputes.

2. Discussion

a. CPAP § 17.5 identifies the initial functions to be performed by the Independent Monitor. AT&T states that, while this list includes several areas of responsibility, it appears to omit an area identified in the CPAP Order on page 60. AT&T wants the Independent Monitor to be able to require Qwest to perform a root-cause analysis when Qwest is penalized on an ongoing basis from any given PID. AT&T proposes language for § 17.5 to clarify this responsibility: "When Qwest is repeatedly penalized for failing to meet the performance requirements under any given PID, the Independent Monitor shall have the authority to require Qwest to perform a root-cause analysis."

b. I agree with AT&T that the Independent Monitor should be empowered to order Qwest to undertake root

cause analysis for repeatedly poor performance. This seems an appropriate and necessary superintending function for the Independent Monitor to have.

HH. Request 34

AT&T proposes additional language to clarify that the six-month review is not limited to the PIDs but rather can have a broader definition. *AT&T Motion* at 8. *Recommended SGAT* at § 18.5. Qwest states that this requested language should be rejected because it disagrees with the Hearing Commissioner's decision to permit the analysis of the "firm" aspects of the plan. *Qwest response* at 17.

1. Decision

a. The six-month review may go beyond PID definitions and may modify "firm" aspects of the plan.

b. The phrase recommended by AT&T will be included in § 18.5 as follows:

18.5 The six-month CPAP review process shall focus on refining, shifting the relative weighing of, deleting, and adding new PIDs; however, such review is not limited to these areas. After the Commission considers such changes through the six-month process, , it shall determine what set of changes should be embodied in an amended SGAT that Qwest will file in order to effectuate these changes.

2. Discussion

a. AT&T states that the CPAP Order, page 68, states that a party may petition for review of the "firm" aspects of the CPAP. This indicates, to AT&T, that a broad review, if appropriate, is available. The recommended SGAT language at § 18.5 states that the focus of the six-month review is the PIDs. AT&T asserts that a phrase should be added to this section to avoid having this language read to imply that other

aspects of the CPAP are off-limits for this review. AT&T proposes: "however, such review is not limited to these areas."

b. Qwest counters that this suggestion by AT&T should be rejected. Qwest disagrees with my decision to permit the possibility of opening "firm aspects of the plan -- and AT&T's proposed language only expands that inappropriate approach and ensures that the six month review as envisioned by the Recommended CPAP will be a wholesale revision of the CPAP."

c. Firm aspects of the CPAP may be reviewed during the six-month review. Such review follows from the nature of the CPAP, and is necessary for the CPAP to remain vital.

d. That said, the six-month reviews will not be an opportunity to reopen and reargue each and every firm element of the CPAP. To the contrary, there is a strong presumption that the "firm" aspects of the CPAP will continue without change. Before the Commission revises a "firm" aspect of the plan, there will have to be clear and convincing evidence of the need to do so.

e. For instance, the Special Master noted that: "[u]nfortunately, no parties have carefully documented the payments necessary to address different types of harms…and thus the Tier IX payments reflect merely a very rough and unrefined approximation of what compensation is owed." *Final Report and*

Recommendation at p. 12. Thus, I could anticipate parties trying to better quantify the commercial harm caused by Qwest's falling short on its performance obligations. By the same token, I would anticipate Qwest will be vigilant to instances of over-enforcement, where the CPAP might unwittingly create arbitrage opportunities for CLECs.

f. It should also be emphasized that general grievances about the CPAP will not constitute clear and convincing evidence warranting its change. Parties arguing to change the CPAP during the six-month review will need to come forward with specific, credible information of the CPAP's in- or over-sufficiency.

~~II.~~g. I recognize the reliance interests that are and will be built up in regard to the CPAP. These reliance interests will not be trifled with by the Commission during the six month reviews. However, as I have noted before, the CPAP is, at best, an informed guess about setting the proper incentives for keeping the Colorado local exchange market open. Actual experience with the CPAP will inform the Commission where it may be over- or under-enforcing the obligations of the Act. Where this experience demonstrates the clear and convincing need for changes to the CPAP, they will be enacted.

II. Request 35

WorldCom requests clarification regarding the penalties

that are excluded from the $100 million cap. More specifically, WorldCom requests the addition of exclusion language for the late reporting penalty, the penalty omitting or inaccurately reporting changes to software and data structure of the CPAP, and the penalty for not obtaining approval for CLEC-affecting changes. *WorldCom Motion* at 1-2. *Recommended SGAT* at § 13.3, 14.2 and 14.3.

1. Decision

I agree that WorldCom's suggested language helps clarify what penalties are excluded. The following language will be added to the CPAP SGAT:.

13.2 In the case of late reporting, Qwest shall make a payment of $500 per calendar day to the Special Fund. This amount represents the total payment for missing a reporting deadline, rather than a payment per report <u>and does not count against the cap described in Section 11.1.</u> This payment shall begin on the report due date and continue until the report is actually distributed.

14.2 Qwest shall be allowed to change the software and data structure that underlies the performance measurement and reporting system in ways that are transparent to the CLECS, but shall promptly record these changes on the change log so that they may factor into the process by which the scope of the audit is determined. Omitted or inaccurate changes shall result in Qwest being required to pay a $2500 fine, plus interest at the commission prescribed deposit rate accrued from the time the change took effect. The payment shall go to the Tier 2 Special Fund <u>and does not count against the cap described in Section 11.1.</u>

14.3 Qwest shall obtain approval for any CLEC-affecting changes to the performance measurement and reporting system. If a redesigned Change Management Process (CMP) process is formally in place and approved by the industry, Qwest shall follow the change management processes thus set forth. If a redesigned CMP process is not in place, Qwest will be allowed to obtain approval for the change from the CLECS via the independent monitor. The independent monitor shall then be responsible for guiding the change management process. If Qwest fails to obtain approval for any CLEC-affecting change, it shall pay a $1000 fine for each affected CLEC. This fine shall be paid directly to the affected CLECS <u>which payment does not count against the cap described in Section 11.1.</u>

2. Discussion

a. WorldCom asserts that, in many sections of the recommended SGAT, the language provides for penalties that are excluded from the $100 million cap. For example, any

penalties imposed directly by the CPAP for failure to report, failure to report timely, or failure to report accurately are excluded from the cap. The plan further states that, if the Independent Monitor determines that Qwest did not obtain necessary approval or did not notify all affected CLECs, Qwest will be fined $1000 per affected CLEC, payable to each affected CLEC. However, in §§ 13.3, 14.2 and 14.3 there is no specific language that states whether payments under these sections count or do not count against the cap. WorldCom suggests language in each of these sections that makes that intent explicit.

b. The suggested language helps clarify what penalties count against the cap and what penalties do not. §§ 13.3, 14.2 and 14.3, in Attachment A, now make clear that those penalties do not count against the cap.

JJ. Request 36

WorldCom requests that the Hearing Commissioner wait the results of the technical conference to determine if any further changes to the PIDs are necessary for the CPAP. *WorldCom Motion* at 3-4. Qwest states in its response that there is no reason to reopen the issues on which PIDs are included in the plan. *Qwest Response* at 18.

1. Decision

This request to modify is denied.

2. Discussion

a. WorldCom states that the CPAP is built on detailed Performance Indicator Definitions both from the ROC OSS

process and ordered by this Commission. On October 17, 2001 a technical conference was held to address, *inter alia*, the PIDs, including background information on the development and publishing of the PIDs; relevant Colorado-specific measures; and the potential need for additional Colorado-specific PIDs. WorldCom suggests that the Hearing Commissioner should wait until after the technical conference to determine the final list of PIDs that should be incorporated into the CPAP.

b. Qwest responds that this suggestion by WorldCom is simply one more attempt to have one more run at persuading the Hearing Commissioner to include additional PIDs in the plan and that it should be rejected. Qwest states that the parties have fully briefed the issues related to which PIDs should be included in the plan, and there is no reason to reopen those issues.

c. The CPAP needs finality. Excepting the modifications in this Order, that finality came from Decision No. R01-997-I. The next opportunity to take up the PIDs will come at the six-month review.

KK. Request 37

WorldCom requests clarification on the Hearing Commissioner's phrase "all other conditional have been met" in reference to his recommendation to the Commission that it recommend to the FCC that Qwest's entry into the long distance market is consistent with the public interest requirement of U.S.C. § 271 (d)(2)(B). *WorldCom Motion* at 4. *CPAP Order* at page 14.

1. Decision

This Commission will perform all FCC-required analysis in making its recommendation under 42 U.S.C. § 271(d)(2)(B).

2. Discussion

a. The CPAP Order, page 14, states that if Qwest implements the CPAP by adopting the attached recommended SGAT language -- and assuming all other conditions have been met -- I will recommend to this Commission that it recommend to the FCC that Qwest's entry into the long distance market is consistent with the public interest requirement of 42 U.S.C. § 271 (d)(2)(B). WorldCom assumes that the Hearing Commissioner's reference to "all other conditions have been met" is not limited to the § 271 14 point checklist items, but also includes issues related to the general terms and conditions of the SGAT as well as evidence presented in the public interest workshops. WorldCom seeks clarification of this ruling, specifically that Qwest could incorporate the CPAP into its SGAT and still fail the public interest requirements because of evidence presented in the public interest workshops.

b. This Commission's recommendation to the FCC will include all relevant analysis for compliance with § 271.

LL. Request 38

WorldCom requests language be added to the SGAT itself in §

20.0 that includes some of the salient provision of the CPAP. *WorldCom Motion* at 5-6. Qwest responds that it will provide a cross-reference in § 20, but that no other language is necessary or advisable. *Qwest Response* at 18-19.

1. Decision

I agree that just adding a cross-reference is advisable.

2. Discussion

a. WorldCom states that Qwest should be directed to reference the CPAP in § 20 of its SGAT and attach the CPAP as an exhibit to the SGAT. WorldCom proposes specific language for § 20 that includes some of the salient provisions from the CPAP.

b. Qwest counters that, at the appropriate time, it will file an amended SGAT with a provision in § 20 cross-referencing the CPAP contained in Exhibit K. Qwest states that no additional language is necessary or advisable. To put any substantive language in § 20 would be redundant with the CPAP and thus create confusion.

c. The addition of a cross-reference to § 20 makes sense. Any additional language, however, would be superfluous and create the possibility of confusion. The SGAT § 20.0 shall be amended to cross-reference the CPAP Exhibit.

MM. Request 39

WorldCom requests that the Commission allow an offending

CLEC to request mini-audits during the six-month moratorium by demonstrating to the Independent Monitor "good cause" for allowing such a mini-audit. *WorldCom Motion* at 6-7. Qwest responds that this request should be rejected because the provision is already generous to the CLECs. *Qwest Response* at 14.

1. Decision

The mini-audit rights will remain as-is.

2. Discussion

a. The CPAP Order states that, if a mini-audit fails to reveal any changes to Qwest's payment calculations, the CLEC is prohibited from initiating any mini-audits in the following six months. WorldCom asserts that the Commission should allow an offending CLEC to request mini-audits during the six-month moratorium by demonstrating to the Independent Monitor "good cause" for allowing such a mini-audit.

b. Qwest asserts that this recommendation should be rejected. Qwest states in its response that the moratorium recommended by the Hearing Commissioner is already substantially more generous to the CLECs than the provision recommended by the Special Master. The Hearing Commissioner has permitted CLECs to continue to seek data reconciliation and to use the dispute resolution process to seek a mini-audit if Qwest fails to act in good faith in a data reconciliation. Qwest argues that the point of the moratorium is to deter CLECs from requesting frivolous mini-audits. If WorldCom's proposal is

adopted the moratorium will not be a moratorium at all and thus will have no deterrent effect on CLECs.

c. The existence of the mini-audit process acknowledges the need for CLECs to make sure they have accurate information from Qwest. The moratorium provision for frivolous mini-audits recognizes the inherent moral hazard to granting CLECs this unilateral right. I am satisfied with the current balance these respective provisions strike.

NN. Request 40

WorldCom request that the exception of *force majeure* be defined as already contained in the SGAT at § 5.7. *WorldCom Motion* at 7. Qwest believes the most straightforward approach is a stand-alone provision for *force majeure* without any cross-reference back to the SGAT. *Qwest Response* at 16-17.

1. Decision

The language from SGAT § 5.7 will be cross-referenced in CPAP § 15.1 as follows:

15.1 Qwest may seek a waiver of the obligation to make payments pursuant to this CPAP by seeking an exception from the Independent Monitor on any of the following grounds:

Force majeure, as defined ~~Qwest's retail tariffs~~ <u>in SGAT § 5.7 </u>(as to benchmark standards, but not as to parity submeasures;

2. Discussion

a. WorldCom states that under § 15.1 of the recommended SGAT, Qwest may seek a waiver of the obligation to make payments pursuant to this CPAP by seeking an exception from

the Independent Auditor on certain grounds, including *force majeure*. WorldCom asserts that, rather than referring to a *force majeure* provision defined in Qwest's tariffs, the Commission should rely upon the *force majeure* provision already contained in the SGAT at § 5.7. This language was developed in the § 271 workshop process, and the parties reached consensus. WorldCom states it would be logical to cross-reference the *force majeure* language in the SGAT and that it is readily available to CLECs.

b. Qwest believes that the most straightforward approach to the CPAP is a stand-alone provision. Such a stand-alone provision would eliminate the need for any cross-referencing and would allow the CPAP to function as a self-contained document. Qwest states that given the large, self-executing payments in the CPAP, it would be inappropriate to subject Qwest to an overly-narrow *force majeure* clause. The proposed *force majeure* language identifies issues that legitimately affect Qwest's ability to meet service obligations and affect the fairness of making the significant self-executing payments.

c. The language from SGAT § 5.7 will be cross-referenced in the CPAP. SGAT § 5.7 *force majeure* language has already been agreed-to by the parties.It would seem only to sow

confusion to have different *force majeure* definitions in the main SGAT and the CPAP.

OO. Request 41

Opt-in does not require approval, just requires need to report to Commission per other Commission rules. *CPAP Order* at 23.

1. Decision

I raise this issue *sua sponte* as an advisory matter. CLECs that want to opt-in to the CPAP need not apply for approval. A CLEC can simply notice opt-in through 4 CCR 723-44-6.

PP. Request 42

Qwest shall include two appendices to the SGAT CPAP exhibit. The first appendix, A, shall be the list of submeasures included in the CPAP. The second appendix, B, shall be the Performance Indicator Definitions (PIDs) for all submeasures in the Plan.

1. Decision

For CPAP PIDs already contained in the Qwest SGAT Exhibit B reserved for the Service Performer Indicators, Qwest does not need to duplicate PIDs contained in SGAT Exhibit B, but shall provide a list with the appropriate cross-reference in CPAP Appendix B. For PIDs that are specific to the CPAP, Qwest must include the actual PID in Appendix B.

IV. ORDER

A. It is Ordered That:

1. Before receiving a favorable recommendation of § 271 compliance, Qwest will implement the CPAP consistent with this Order and Attachment A, including Appendices A and B, hereto. Attachment A contains the actual SGAT language to be implemented for this Commission favorably to recommend § 271 compliance. The recommended SGAT language in Attachment A reflects decisions from the original CPAP Order, as well as any modifications ordered here.

2. Qwest Corporation's Motion for Leave to File Response to Motions to Modify CPAP Decision One Day Late on October 17, 2001 is granted. Qwest's Response to Motions to Modify was considered in this Order.

3. Qwest's Motion for Leave to Supplement Record is denied.

4. Qwest shall file the first CPAP mock report on or before the last business day of the month following the November 30, 2001, SGAT filing.

B. This Order is effective immediately on its Mailed Date.

(S E A L)

ATTEST: A TRUE COPY

Bruce N. Smith
Director

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

RAYMOND L. GIFFORD

Hearing Commissioner