

Decision No. R01-997-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.

COLORADO PERFORMANCE ASSURANCE PLAN

Mailed Date: September 26, 2001

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I. BACKGROUND

1. The Telecommunications Act of 1996 (Act) seeks to foster competition in local telephone markets. Because the existing monopoly holders--incumbent local exchange carriers (ILECs)--are not naturally inclined to abdicate their monopoly positions by helping their competitors,¹ the Act contains a

¹ See Richard A. Epstein, *A Clear View of The Cathedral: The Dominance of Property Rules*, 106 YALE L.J. 2091, 2119 (1997) ("the blockade position of the local monopolists is such that they would have every incentive to guard access to their networks against would-be competitors").

variety of incentives and enforcement mechanisms to achieve this end. One of the foremost incentives is the promise that an ILEC will be allowed to offer in-region, interLATA service (long distance) upon proving either: a) it has entered into an interconnection agreement with a competing facilities-based CLEC or b) it offers a standing Statement of Generally Available Terms and Conditions (SGAT) that fulfills the fourteen checklist items set forth in § 271(c)(2)(B) of the Act.²

2. Even after the ILEC demonstrates to the Federal Communications Commission (FCC) that it meets these requirements, the FCC must also agree that provision of long distance service is in the public interest.³ The FCC requires a plan for identifying and penalizing any anti-competitive behavior that may take place after the ILEC has entered the long distance market. The Act directs the FCC to correct any ILEC behavior that subsequently falls short of the Act's § 271 requirements, either by issuing an order, imposing a penalty or revoking the right to provide long distance service.⁴ This corrective action implies ongoing monitoring of ILEC behavior, either by a federal or state commission or by the ILEC's competition. However, in other states' § 271 proceedings,

² 47 USC §§ 271(c)(1), (c)(2)(B) (1996).

³ 47 USC § 271(d)(3)(C).

⁴ 47 USC § 271(d)(6).

parties have expressed concern with the effectiveness of this monitoring.⁵ In response, the Department of Justice advises ILECs to provide detailed performance measurements to ensure that the market is "irreversibly" open to competition and to assure that wholesale performance does not deteriorate.⁶ The FCC considers the presence of a Performance Assurance Plan (PAP) that contains self-executing penalties in response to any discriminatory wholesale service as "probative evidence" that an ILEC's market is irreversibly open and that § 271 approval is consistent with the public interest requirement.⁷

3. The FCC has given only very general guidance about the mechanics of aPAP. The FCC has said that the PAP must not be the single mechanism to guard against anti-competitive behavior by the ILECs.⁸ Other bodies of law, state and federal mechanisms and private interconnection agreements serve to

⁵ *In the Matter of Application by Bell Atlantic New York for Authorization Under Section 271 of the Communications Act to Provide In-Region InterLATA Service in the State of New York*, Memorandum Opinion and Order, CC Docket 99-295, at ¶ 446 (December 22, 1999) (Bell Atlantic New York Order).

⁶ *In the Matter of Application by BellSouth, et al., Pursuant to section 271 of the Communications Act of 1934, as amended, to Provide In-Region InterLATA Services in South Carolina*, Memorandum Opinion and Order, CC Docket 97-208, at ¶ 36 (December 24, 1997) (BellSouth South Carolina Order) ("Moreover, the Department of Justice found that BellSouth had failed to demonstrate that the local market would remain open to competition because it had not instituted performance measurements needed to ensure consistent performance in the delivery of service to new entrants").

⁷ Bell Atlantic New York Order at ¶ 429.

⁸ *Id.* at ¶ 430.

bolster the ILECs' incentive to comply with the Act.⁹ With this in mind, the FCC has defined some general characteristics to which a PAP should adhere:

- Potential liability that provides a meaningful and significant incentive to comply with the designated performance standards;
- Clearly-articulated, pre-determined measures and standards, which encompass a comprehensive range of carrier-to-carrier performance;
- A reasonable structure that is designed to detect and sanction poor performance when it occurs;
- A self-executing mechanism that does not leave the door open unreasonably to litigation and appeal; and,
- Reasonable assurances that the reported data are accurate.¹⁰

4. The Colorado Performance Assurance Plan (CPAP or Plan) meets these five requirements. The full terms and conditions of the CPAP are set forth as recommended SGAT language in attachment A to this Order.

5. First, Qwest's annual liability for capped payments is \$100 million. This figure is approximately 36% of Qwest's annual local services revenues.¹¹ This is approximately

⁹ *Id.*

¹⁰ *Id.* at ¶ 433.

¹¹ This figure is based on the FCC's Automated Management Reporting Information System (ARMIS) data.

the same proportion as New York's, Texas' and other states' approved plans.¹² Furthermore, many penalties, such as the high priority compensatory payments (Tier 1A and 1B) and penalties for compromising the integrity of the Plan¹³, are not capped at all.

6. Second, the CPAP is built on detailed Performance Indicator Definitions (PIDs) that include detailed disaggregation requirements, business rules, and standard performance levels. The FCC strongly recommends a collaborative process for establishing appropriate performance indicators.¹⁴ The Regional Oversight Committee's (ROC)¹⁵ process by which these PIDs were designed fulfills this objective.

7. Third, the Plan entails monthly monitoring of these PIDs. The PIDs will be compared to either Qwest's retail performance or a benchmark performance level, whichever is appropriate. The mode of comparison balances the strength of

¹²*In the Matter of Application by SBC Communications Inc., Southwestern Bell Telephone Company, And Southwestern Bell Communications Services, Inc. d/b/a Southwestern Bell Long Distance*, Memorandum Opinion and Order, CC Docket 00-65, at n. 1235 (June 30, 2000) (SBC Texas Order).

¹³ The exception is the penalty for billing measure, Tier IC, which is capped at \$5,000 per measure and has a total per-measure cap of \$30,000 for escalated penalties.

¹⁴ Bell Atlantic New York Order at ¶ 54.

¹⁵ The Regional Oversight Committee (ROC) is comprised of the fourteen state Public Utilities Commissions in Qwest's region.

the statistical analysis used in other states (the modified z-test) with the simplicity of "stare-and-compare" analysis for some higher priority PIDs. Both mechanisms will accurately detect non-compliant performance and bring this behavior to light.

8. Fourth, when the mode of analysis shows that Qwest's performance has fallen below either retail parity or a standard benchmark, payments will accrue automatically. These payments will escalate with the number of occurrences, the severity and the duration of the non-compliance. Furthermore, the Plan provides for an Independent Monitor and contains a dispute resolution process, which includes collaboration requirements and arbitration in the case of any disagreements. Finally, the Plan outlines a screening process to ensure that the parties do not bring frivolous or frequent lawsuits against one another.

9. Fifth, the Plan calls for annual audits, CLEC-initiated mini-audits and the possibility for additional Commission-initiated audits. There are also provisions for the CLECs to request access to raw data and a requirement for Qwest actively to participate in assisting the CLECs with data reconciliation. Furthermore, the Plan includes both limitations on Qwest's ability unilaterally to modify the performance monitoring and reporting system and mechanisms to include any

changed aspects of the system and processes in the annual audits.

10. Beyond these five requirements, the FCC conferred significant discretion to the states. A key emphasis is that a state's plan be flexible enough to adapt to changes in the telecommunications industry, as well as the local market.¹⁶ In fact, the FCC has said that "plans may vary in their strengths and weaknesses, and there is no one way to demonstrate assurance."¹⁷ The FCC has stated that plans should fall into a "zone of reasonableness."¹⁸

11. The CPAP falls well into that "zone of reasonableness." The Plan builds upon the New York and Texas plans and adds to this foundation six intense months of state-specific customization. This effort included the Staff of this Commission, counsel for the Commission, a Special Master, a research assistant, and all interested parties. The process included approximately 20 meetings with the parties and approximately 35 substantive filings. Additionally, the Commission considered input from the multi-state collaborative performance plan effort. This Order is the culmination of this

¹⁶ *Id.* at ¶ 438.

¹⁷ SBC Texas Order at ¶ 423.

¹⁸ *Id.*

work. Attachment A contains the Commission's recommended SGAT language.

12. Pursuant to Decision No. R01-624-I Qwest submitted a compliance filing (*Qwest Proposed CPAP SGAT*) that contains proposed SGAT language for the CPAP. On July 10, 2001 comments on the *Final Report and Order* and *Qwest Proposed CPAP SGAT* were filed by AT&T, see *AT&T's Comments Regarding the Special Master's Report and Qwest Proposed Statement of Generally Accepted Terms and Conditions Language (AT&T Comments)*; Colorado Office of Consumer Counsel, see *Comments of the Colorado Office of Consumer Counsel on the Draft SGAT Language Consistent With the Final Report and Recommendation of the Special Master (OCC Comments)*; Covad see *Comments Covad Communications Company on Final Report and Recommendation (Covad Comments)*; Qwest, see *Qwest Corporation's Comments on the Recommendation of the Special Master and Recommended Performance Assurance Plan (Qwest Comments)*; WorldCom, see *WorldCom's Comments on the Final Report Issued By the Special Master Addressing Qwest's Performance Assurance Plan*; and XO Colorado and Time Warner Telecom of Colorado, see *Comments of XO Colorado, LLC. and Time Warner Telecom of Colorado, LLC on Final Report and Recommendation (XO Colorado and Time Warner Telecom Comments)*. On July 20, 2001 Qwest filed performance measure definitions for new PIDs required by the *Final Report and Order*,

see Qwest's Filing of CPAP Performance Measures (*Qwest Proposed New PIDs*). AT&T also filed comments on the new PIDs, see AT&T's Comments On Disputed Performance Measurement Issues (*AT&T Proposed New PIDs*). Decision No. R01-769-I requested supplemental comments on select CPAP topics. Supplemental comments were filed by AT&T, see AT&T's Additional Comments Regarding Colorado's Performance Assurance Plan Final Report; Covad, see Covad Communications Company's Supplemental Comments on the *Final Report and Recommendation*; Qwest, see Qwest Corporation's Supplemental Comments Regarding Performance Assurance Plan (*Qwest Supplemental Comments*); and WorldCom, see WorldCom's Supplemental Comments on the Final Report Issued By the Special Master Addressing Qwest's Performance Assurance Plan (*WorldCom Supplemental Comments*). This order contains resolutions of the issues raised by the parties in the final two rounds of comments.

13. This Order is not compulsory, but rather hortatory. 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). On the other hand, if Qwest declines to adopt this version of the CPAP, I will advise

this Commission to withhold a recommendation of § 271 compliance.

II. PROCEDURAL POSTURE AND BACKGROUND

A. Issue 1:

Covad, WorldCom and AT&T argue that the self-executing remedies must take effect before Qwest receives § 271 approval. These parties claim that, because similar requirements are imposed on Qwest via § 251 of the Act, the penalties are justified regardless of the § 271 application status. They maintain that, absent the incentives of the CPAP, Qwest will not provide the non-discriminatory service to which the CLECs are entitled. *Covad Comments* at 1-3; *WorldCom Comments Attachment A* at 4-6; *AT&T Comments* at 11-12; *Qwest Proposed CPAP SGAT* § 16.1; *Final Report and Recommendation* at 2.

1. Decision

The CPAP will go into effect on the mailed date of this decision, but monetary penalties will not be assessed until and unless Qwest's § 271 application is approved.

2. Discussion

a. The Act offers ILECs the prospect of entering the interLATA long distance market as an incentive to comply with § 271 of the Act. Because this incentive abates upon § 271 approval,¹⁹ the FCC has applauded other ILECs' PAPs, which help ensure ongoing performance.²⁰ Although some states

¹⁹ Although under 47 USC § 271(d)(6), the FCC is entitled to take measures against Qwest after § 271 approval, the proactive analysis of the ILEC's behavior that occurs as part of the 271 approval process will be over.

²⁰ Bell Atlantic New York Order at ¶¶ 429, 446.

have implemented the payment mechanisms before § 271 approval, this Commission believes that implementing the "stick" of the CPAP penalties prior to § 271 approval is unnecessarily redundant with the "carrot" of interLATA market entry. Consequently, penalties will not take effect until the FCC grants Qwest this approval. The first set of payments that Qwest must make will be the payments based on the first full month's performance after § 271 approval is granted by the FCC.

b. On the other hand, implementing the CPAP "sans penalties" prior to § 271 approval will serve as an effective "dress rehearsal," during which time Qwest and the CLECs can work through latent ambiguities, misinterpretations, system glitches and procedural details. Another benefit of pre-271 approval implementation is insight into the anticipated penalty levels. The reports will reveal whether a particular pattern of ILEC behavior generates a reasonable level of penalties. This Commission reserves the right to alter the penalty levels and other aspects of the plan as warranted by the pre-271 reports and to require Qwest to implement these changes.

c. To achieve the objective of the "pre-271 reporting" period, Qwest must fully implement the CPAP, as set forth in Attachment A, 30 days from the issuance of this Order. The first report will be due on the last business day of the month after that. Qwest asserts that this amount of time

should be adequate fully to implement and test the Performance Monitoring and Reporting System. This initial implementation need not include the new Performance Indicator Definitions (PIDs) that the Commission adds in this Order, but must include all of the ROC PIDs included in the Operations Support Systems (OSS) test. Qwest will have 120 days from the issuance of this Order fully to implement the new PIDs contained in this Order.

B. Issue 2

Covad maintains that, regardless of whether the penalties are implemented prior to § 271 approval, when the plan goes into effect post-271, the penalty levels should be ratcheted up to reflect historical poor performance. Covad Comments at 3.

1. Decision

After § 271 approval, the payment levels will be calculated based on a "clean-slate." Prior poor performance will not be used to step up penalties.

2. Discussion

As stated above, prior to § 271 approval, Qwest's behavior will theoretically be governed by its motivation to enter the interLATA market, and post-271, Qwest's behavior will largely be governed by the incentives of the CPAP. Creating an overlap in these incentives, even to the extent that prior performance will affect the penalties assessed after market entry, is theoretically unnecessary. Primarily for this reason, but also for simplicity, and because the parameters of the CPAP

may be in flux during the pre-271 reporting period anyway, the CPAP will begin with a "clean-slate" after § 271 approval.

C. Issue 3

WorldCom requests that reports produced before § 271 approval be distributed to all relevant parties rather than being available only to the Commission. *WorldCom Comments Attachment A at 6; Final Report and Recommendation at 2.*

1. Decision

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.

2. Discussion

a. The pre-271 reporting period serves several objectives. First, it will provide an opportunity for Qwest to perfect its systems and processes and to anticipate its level of future liability. Second, the exercise will allow CLECs, the Independent Monitor, and Staff to better understand the information and to implement their own report evaluation processes. Third, it will begin to reveal to the Commission whether the parameters of the plan are sufficient; for instance, the variance factors, the critical values, the minimum and per occurrence penalty levels. Since all parties have a relevant interest in the pre-271 reporting period, all relevant parties will be able to participate in the dress rehearsal, even to the extent that CLECs may request the underlying data from Qwest.

b. The scope of the pre-271 reporting period stops short of the mini-audit process, however. In lieu of the mini-audit, a CLEC is entitled to present Qwest with a prepared list of questions regarding the data, and Qwest must either respond in writing to the questions or schedule a meeting with the CLEC, at Qwest's option. To the extent that issues are not resolved, the issues may be raised at a Commission CPAP meeting. The purpose of these meetings is to review the CPAP issues before the penalties kick in. The schedule, format and scope of the meetings will be announced when the CPAP goes into effect prior to § 271 approval.

D. Issue 4

WorldCom and AT&T emphasize that Qwest's participation in the plan is not "voluntary," but that it is a mandatory enforcement mechanism for § 251 compliance both before and after § 271 approval. *WorldCom Comments Attachment A* at 5; *AT&T Comments* at 22. Qwest, on the other hand, asserts that its voluntary adoption of the CPAP is a factor that will be considered during the § 271 approval process, and thus implies that it may choose not to implement the CPAP if it ceases to pursue § 271 approval. *Qwest Comments* at 2; *Qwest Proposed CPAP SGAT* § § 1.1, 19.0; *Final Report and Recommendation* at 3-4.

1. Decision

Qwest's choice to provide this CPAP in its SGAT is only voluntary to the extent that pursuing § 271 approval is voluntary. After Qwest receives § 271 approval, the CPAP will become mandatory.

2. Discussion

a. Qwest alludes to the voluntary nature of the CPAP in sections 1.1 and 19.0 of the proposed SGAT language. Ultimately, Qwest's submission of the CPAP is voluntary; however, this Commission will require Qwest to deploy the CPAP as set forth in Attachment A prior to lending the Commission's recommendation for § 271 approval to the FCC.²¹ The origin of this Commission's strong encouragement of the CPAP is the FCC's claim that proper measures to prevent backsliding are a critical component of the public interest requirement of § 271 approval;²² and in all successful § 271 applications so far, a PAP has served as this preventive measure. As stated in the *Final Report and Recommendation*, Qwest's future choice of whether to offer interLATA service after § 271 approval will not affect its obligation to participate in the CPAP since the primary incentive to adhere to § 271 requirements will have disappeared.

b. Apparently, some of the parties equate

²¹ *Bell Atlantic New York Order* at ¶ 429 ("Although the [FCC] strongly encourages state performance monitoring and post-entry enforcement, we have never required BOC applicants to demonstrate that they are subject to such mechanisms as a condition of section 271 approval. The [FCC] has, however, stated that the fact that a BOC will be subject to performance monitoring and enforcement mechanisms would constitute probative evidence that the BOC will continue to meet its section 271 obligations..."); *id.* at ¶ 51 ("[W]e view the state's...role to be one similar to that of an 'expert witness'...[W]e may conclude that the evidence submitted by a state commission is more persuasive than that submitted by the Department of Justice, particularly if the state has conducted a rigorous analysis of the evidence.").

²² *Id.* at ¶ 429.

participation in the CPAP with adherence to § 251 requirements, but the two are simply not the same. Clearly, Qwest is obligated to conform to § 251 whether it is attempting to gain § 271 approval or not and whether it is participating in the CPAP or not. The difference is in the monitoring and enforcement mechanism. With the § 271/CPAP approach, Qwest is motivated by rewards and penalties. Outside of this structure, Qwest is still obligated to adhere to the statute. If another party believes that Qwest is not complying with § 251, it is free to complain to this Commission via Commission Rule 723-1-61, to complain to the FCC, or to bring a lawsuit under antitrust²³ or another cause of action. In sum, if Qwest chooses not to pursue § 271 approval, it is not obligated to institute the CPAP.

c. Qwest argues, in its supplemental comments, that this Commission does not have authority to implement a self-executing set of remedies such as the CPAP. Strictly speaking, this may be true. Nevertheless, based on experience in Texas and New York, the CPAP can be analogized to the terms of a consent decree. 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

²³ *Pace, Goldwasser v. Ameritech*, 222 F.3d 390 (7th Cir. 2000).

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 authorization. Nonetheless, while Qwest's arguments are compelling, I will not further engage this debate. I reserve that analysis in the unlikely event that Qwest chooses to stop pursuing § 271 approval and the Commission decides to implement the CPAP anyway.

E. Issue 5

WorldCom and AT&T object to Qwest's proposal not to make Tier 1 penalty payments to CLEC until the Commission has approved an Interconnection Agreement between the CLEC and Qwest which adopts the CPAP. They say that CLECs should not be required to "opt-in" to the CPAP. *WorldCom Comments Attachment A* at 5; *AT&T Comments* at 17-18; *Qwest Proposed CPAP SGAT* § 16.1; *Final Report and Recommendation* at 19.

1. Decision

CLECs are not required to incorporate the CPAP into their new or existing ICAs prior to its effectiveness, but if a CLEC wishes to receive the benefits of the CPAP, it must obtain Commission approval of an ICA which incorporates the CPAP section of the SGAT or amend its existing ICA for inclusion of the CPAP.

Discussion

a. In order to obtain this Commission's recommendation for § 271 approval, Qwest must adopt the attached SGAT language incorporating the CPAP terms. The *Final Report*

and Recommendation envisioned that the CPAP would be embodied in a stand-alone section of Qwest's SGAT. The CPAP would then be available to CLECs to opt-in, similar to any other stand-alone SGAT provision, for incorporation into an existing ICA between Qwest and a CLEC. The *Final Report and Recommendation* does not require Qwest to offer the terms of the CPAP outside of an ICA as suggested by AT&T's proposed language. Because Commission rule 4 CCR 723-44 requires that an ICA be approved by this Commission before the ICA is effective, Qwest will not be required, as proposed by WorldCom to make the CPAP and its penalties available to CLECs before an ICA incorporating the CPAP is approved. A CLEC may adopt the CPAP even if it has not adopted the SGAT in its entirety.

III. PROCEDURAL ARCHITECTURE OF CPAP

Auditing of Performance Measures

A. Issue 6

Qwest contends that it should be able to choose the annual auditor, with certain constraints. *Qwest Comments* at 15; *Qwest Proposed CPAP SGAT* § 14.7; *Final Report and Recommendation* at 4-5.

1. Decision

Qwest may not unilaterally choose the auditor; however, the Commission will consider external factors, such as regional auditing activity, in selecting the auditor.

2. Discussion

The Commission will consider input from Qwest as well as the other parties when selecting the auditor. No party will have unilateral control, but the Commission will strive to select an auditor that is most fair to all parties.

B. Issue 7

Qwest argues that it must have the flexibility to improve upon its data collection and storage techniques without being hindered by a lengthy approval process. Qwest agrees to provide notice to all interested parties any time it changes a PID or a report. *Qwest Comments* at 14. Covad contends that *all* changes to the CPAP measurement and reporting systems must be reported to the interested parties, rather than only the CLEC-affecting changes. *Covad Comments* at 5; *Qwest Proposed CPAP SGAT* §§ 14.1, 14.2, 14.3; *Final Report and Recommendation* at 5.

1. Decision

Qwest must obtain approval for any CLEC-affecting changes to a PID or reporting process. Qwest may make non-CLEC-affecting changes without approval, but must implement a reliable method of recording and describing *all* changes to notify CLECs and the Commission and so that the changes may be included in the annual audit.

2. Discussion

a. When determining the extent to which Qwest may change the performance measurement or reporting system, the Commission balances two competing priorities. First, Qwest must have flexibility to improve upon its internal systems and

processes. Second, Qwest must not unilaterally make any change that compromises the integrity of the CPAP or affects CLECs.

b. Regarding the first priority, any company that manages complex databases and generates external information based on these data understands the need for caution in maintaining the data, data structures and related code. At the same time, these components often need to be modified to accommodate system improvements. These changes may be as innocuous as changing the indices on a table, or may be as substantive as modifying the data themselves.

c. For any sort of change to the data or to the systems that use the data to generate reports, the change falls into one of two categories: either it does not affect the performance measurement reporting or it does affect the performance measurement reporting. Further, the changes that affect the performance measurement reporting comprise a spectrum. At one end of the spectrum, the changes might be purely cosmetic, and at the other end of the spectrum, the changes might affect the penalties that are due.

d. As a starting point, Qwest must thoroughly document *any* change, no matter how small, that it makes to the performance measurement or reporting system as well as the underlying data, data extraction processes and codes tables. This change log must be available to the CLECs and the

Commission via Qwest's CPAP web site. The log must contain a detailed description of the change (in plain English), the effects of the change, the reasons for the change, the dates of notification and of implementation, and whether the change received Commission approval. The purpose for this extensive change-reporting and documentation requirement is twofold. First, CLECs, the Commission and the Independent Monitor will have visibility into changes to investigate suspicious results; and, second, the auditor will use the change log to help determine the scope of the audit. In fact, the requirement for an accurate change-reporting mechanism is so crucial that any lapse of performance by Qwest will be penalized by a \$2500 fine per omitted or inaccurate change. This penalty will go to the Special Fund and does not count against the cap.

e. Next, Qwest must obtain Commission approval prior to implementing any change to the performance measurement or reporting system, the underlying data, data extraction processes and codes tables *if* that change will affect the CLECs. Then Qwest must actively notify the affected CLECs in addition to listing the change on the web site. Qwest is responsible for determining whether the change will affect the CLECs and for seeking approval. If a CLEC believes that a change materially affected it but was not properly approved, the CLEC may raise the issue via the dispute resolution process. 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. This penalty does not count against the cap.

f. The Independent Monitor is responsible for designing the process surrounding raising the issue and for making a recommendation to the Commission. If the Change Management Process (CMP) has been redesigned and adopted by the parties, then Qwest is required to follow the CMP procedures for notification, prioritization and implementation of the CLEC-affecting changes to the CPAP monitoring and reporting systems.²⁴ If not, the Independent Monitor may establish procedures for coordination and notification of CLEC-affecting changes.

C. Issue 8

The OCC emphasizes that Qwest must report each data exclusion, rather than aggregating the exclusions. OCC Comments at 5; Qwest Proposed CPAP SGAT § 14.4; Final Report and Recommendation at 5.

1. Decision

Qwest may aggregate data exclusions for the purposes of reporting the exclusions on the website. The detail behind the exclusions must be available upon auditor, Independent Monitor, Commission, or CLEC request.

²⁴ The CMP was formerly known as the CICMP, or Co-provider Industry Change Management Process.

2. Discussion

a. Although the number of exclusions will certainly vary, it is conceivable that the amount of data excluded may make the information too cumbersome to be distributed easily via website. Also, posting this information on a website would require security measures that protected individual CLEC's confidential information. The Commission will only require Qwest to make the relevant exclusion data available to Independent Monitor, Commission or individual CLEC upon request.

D. Issue 9

WorldCom maintains that the annual audit should be thorough and comprehensive rather than selective. Furthermore, WorldCom contends that auditing the PIDs that generate the most penalties is backwards - the PIDs that are not generating penalties should be the ones audited. *WorldCom Comments Attachment A* at 8; *Qwest Proposed CPAP SGAT § 14.6; Final Report and Recommendation* at 5.

1. Decision

The annual audit may be selective. The scope of the audit defined by this report is a *minimum* scope, and the scope may be increased at the discretion of the independent monitor and/or the auditor. The scope of the audit may be decreased by the six-month revision process or an order of the Commission.

2. Discussion

a. The scope of the audit must balance two competing goals. First, the audit must ensure that Qwest is creating accurate reports and paying appropriate penalties; and, second, the audit must not be any more intrusive or cumbersome than necessary to achieve the first goal. The Commission believes that Special Master Weiser's recommendation appropriately balances these two goals.

b. The recommendation regarding auditing PIDs that generate higher penalties, rather than PIDs that generate lower penalties, will also be adopted. Although it is understandable that CLECs would wish for the audit to raise penalties rather than lower penalties, and that there is a greater chance of penalties being raised if the lowest paying PIDs are the ones being audited, this is not a sound basis for argument. Some of the PIDs may currently, or at least soon, reflect obsolete or little-used services. It makes no sense to audit these. Lower payments are not necessarily a reflection of good performance. As a result, the audit will initially include the PIDs with the higher payments. If the auditor deems it appropriate, perhaps various high-volume PIDs can be included whether or not they are generating high payments.

E. Issue 10

WorldCom argues that the mini-audit process should be

changed in one of two ways: either the CLEC and Qwest should split the cost of the mini-audit or the CLEC should be able to request an audit as often as it pleases. *WorldCom Comments Attachment A* at 10. Covad argues that a CLEC should not be penalized if an innocent mistake causes it to request an unnecessary mini-audit. *Covad Comments* at 8; *Qwest Proposed CPAP SGAT* § 14.11; *Final Report and Recommendation* at 6.

1. Decision

If the mini-audit uncovers any discrepancy in Qwest's reporting and payment calculations for a CLEC, that CLEC is not barred from requesting future mini-audits. If the mini-audit uncovers no discrepancy, the CLEC is barred from requesting future mini-audits for six months.

2. Discussion

a. The Special Master recommended the fee shift and the 12-month moratorium based on the 10% threshold as mechanisms for discouraging useless audits. The overriding objective of both is to ensure that the CLEC and Qwest work together to reconcile the data questions prior to deploying additional resources for an audit. Some parties argue, however, that the fee shift already motivates CLECs to refrain from initiating gratuitous audits and that the 12-month moratorium is excessive. Another concern is that the 12-month restraint might have the unintended consequence of motivating Qwest to encourage these audits rather than working in cooperation with the CLEC to discern the causes of misunderstanding. The useless audit,

then, would be a sort of inoculation against future audits. Moreover, the CLEC is already paying for the audit. The audit does not generate much additional income and even brings the risk that, since Qwest *undercalculated* the penalty, the CLEC already has incentive to avoid useless audits. Finally, *any* error correction in the CCPAP reports is beneficial to some degree, especially in the long run, so legitimate audits should not be overly-discouraged.

b. Because these arguments are persuasive, I include lighter consequences for unproductive mini-audits in the CPAP than the Special Master recommended. If an 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*. However, the CLEC may use the dispute resolution process to avoid this moratorium if it can prove that Qwest did not work in good faith to resolve data questions prior to the initiation of the mini-audit.

F. Issue 11

Covad argues that the 10% variance threshold that legitimizes a mini-audit should be 5% at the most. Covad Comments at 6-7. AT&T asserts that the 10% threshold should be eliminated and that, if Qwest was found to have underpaid at all, Qwest must also pay \$2500 to the Special Fund. Qwest Proposed CPAP SGAT § 14.11; Final Report and Recommendation at 5.

1. Decision

The variance threshold will remain at 10%. Qwest will not be required to make an additional penalty payment to the Special Fund.

2. Clarification

The 10% threshold applies to the overall results of the CLEC-initiated audit. If the CLEC initiates a mini-audit for a single month on three PIDs, then the 10% threshold will apply to the aggregate penalty that is at stake for those PIDs for that month.

3. Discussion

a. Ideally, parties would share costs of the audits in proportion to the severity of the incorrect penalty calculations. In this ideal world, Qwest would pay 100% of all audit *costs and expenses* if it miscalculated the penalty by 100% or more, and Qwest would pay none of the audit costs if its penalty calculations were previously correct. Because this sliding scale is difficult to implement, and since the internal expenses of conducting an audit are nebulous, the 10% threshold is an acceptable substitute. The threshold avoids the hazard of marginally productive audits, in return for the fact that Qwest is never reimbursed for *internal expenses* incurred in the course of unsuccessful audits. This approach also shifts the fee in a

simpler way than a sliding scale would. This threshold may be changed at a later date if it is found to be inappropriate.

b. Qwest will not be subject to any additional penalties for underestimating payments other than the additional penalties set forth in section III-C of the Special Master's *Final Report and Recommendation*.

G. Issue 12

Qwest wishes to add a timeline to the mini-audit process during which the parties must work together to resolve any discrepancies prior to the mini-audit. *Qwest Comments* at 16; *Qwest Proposed CPAP SGAT* § 14.11; *Final Report and Recommendation* at 5.

1. Decision

A timeline for data reconciliation is not necessary, but a reminder that the parties must work together in good faith is in order.

2. Discussion

Setting a fixed timeline for data reconciliation is unnecessary in light of the requirement that the parties work together in good faith. The goal of the data reconciliation process is to ensure that a CLEC only initiates audits based on miscalculated payments, and not based on data misinterpretations. Setting a timeline for this process may motivate Qwest to stall or may lead the CLEC to initiate audits prematurely. Instead of a fixed timeline or predefined process, Qwest must respond to the CLEC requests in a timely fashion and

provide the proper expertise to the CLEC during the reconciliation period. If Qwest does not do this, and the CLEC initiates a superfluous audit, the CLEC may thereafter shift the cost of the audit to Qwest via the dispute resolution process.

H. Issue 13

Qwest maintains that it should not be subject to multiple mini-audits at the same time. *Qwest Comments* at 17; *Qwest Proposed CPAP SGAT § 14.11; Final Report and Recommendation* at 5.

1. Decision

Qwest may be subject to multiple mini-audits at the same time, but it may request the Independent Monitor to consolidate efforts when appropriate.

2. Discussion

Limiting the number of concurrent CLEC mini-audits would artificially limit Qwest's liability in the case of inaccurate reporting. If Qwest wishes to reduce the number of mini-audits, it should strive to reconcile data and payment issues prior to the point at which the CLEC initiates the audit. Since this approach is not feasible in all circumstances, the Independent Monitor may facilitate the consolidation of overlapping audits and/or work with other state commissions to identify opportunities for results-sharing.

I. Issue 14

WorldCom and Covad request that Qwest provide explanations of the underlying calculations for the penalties rather

than simply providing the final penalty amount. *WorldCom Comments Attachment A* at 12, 13; *Covad Comments* at 12; *Qwest Proposed CPAP SGAT* § 12.3, 13.2; *Final Report and Recommendation* at 7.

1. Decision

Qwest must provide the information that forms the basis for calculation along with the final payment amount.

2. Discussion

a. It is foreseeable that the payment calculation will be quite complex. For example, a CLEC's payment may include some combination of interest charges, minimum payment levels, waivers, and additional penalties assessed on audited reports. Given the potential complexity, Qwest must provide enough information for the CLEC fully to understand how the final number was derived. This information will enable the CLEC to double check the calculations and will reduce the number of follow-up inquiries.

b. One other factor bears mention: a CLEC may question a payment calculation just as a CLEC would question reporting data. The CLEC may request raw data used for calculations and ask for Qwest's assistance in reconciling the information. Furthermore, the payment calculation will be subject to audit just as the reports are.

J. Issue 15

WorldCom and Covad do not believe that Qwest should be relieved of additional penalties in the case that Qwest

corrects the penalty calculation before initiation of an audit. *WorldCom Comments Attachment A* at 12; *Covad Comments* at 11-12; *Qwest Proposed CPAP SGAT* § 13.6; *Final Report and Recommendation* at 8.

1. Decision

If a discrepancy is revealed solely by Qwest, and Qwest self-corrects the discrepancy prior to the monthly payment being due, no additional liability shall be assessed. If Qwest voluntarily corrects erroneous reports before an audit begins, but after the relevant payment is made, it shall be responsible for paying the additional amount owed due to the non-conforming performance, as well as interest on this amount at the rate of two times the deposit rate.

2. Discussion

a. When Qwest self-corrects the penalty levels prior to an audit, any late payments are subject to interest at twice Commission-prescribed deposit rate on the late portion of the payment. This is already an additional penalty since Qwest is only entitled to recover the deposit rate when it overpays. Furthermore, as stated above, an overarching goal is to avoid unnecessary audits. Therefore, the disincentive for commencing an audit should be stronger than correcting inaccurate penalties prior to an audit.

b. On the other hand, if Qwest continually forces the CLECs to "henpeck" Qwest to obtain proper results so that a pattern develops, there will be additional penalties. Furthermore, if Qwest alters a penalty amount after a report is generated, this change must be reported to the Independent Monitor so that the activity can be considered when the auditor decides the scope of the next annual audit.

K. Issue 16

WorldCom wishes to clarify that the late penalty charges apply to Tier 2 payments as well as Tier 1 payments. *WorldCom Comments Attachment A* at 12; *Qwest Proposed CPAP SGAT* § 12.4; *Final Report and Recommendation* at 8.

1. Decision

Late fee payments apply to Tier 1 and Tier 2 payments.

2. Discussion

Late penalties as described in section II.C of the Special Master's *Final Report and Recommendation* apply to Tier 2 as well as Tier 1 penalties. The only difference is that all Tier 2 payments and penalties will be paid into the Special Fund rather than to the CLEC.

L. Issue 17

Covad argues that the late fees should be calculated against the entire monthly amount owed rather than just the additional amount owed. *Covad Comments* at 11; *Qwest Proposed CPAP SGAT* § 12.4; *Final Report and Recommendation* at 8.

1. Decision

Late fees are calculated based on the late portion of the payment rather than the entire payment.

2. Discussion

Interest charges generally only apply to outstanding balances. It would be illogical to assess interest on money already paid (on-time) to a CLEC. Additional penalties are addressed elsewhere in section 12.0.

M. Issue 18

Covad claims the imposition of the per day penalty where a \$25,000 bill is adjusted upwards 25% or more discriminates between CLECs with larger volumes of orders and CLECs with smaller order volumes. Covad Comments at 12; Qwest Proposed CPAP SGAT § 13.5; Final Report and Recommendation at 8.

1. Decision

Since the \$500/day penalty is paid to the Special Fund, this penalty does not discriminate against smaller CLECs.

2. Discussion

Late reporting does not materially harm the CLECs other than delaying their ability to plan on incoming funds. As a result, all penalties for late reports will go directly to the Special Fund. The condition that imposes late report penalties in the situation in which Qwest adjusts a \$25,000 payment upwards 25% or more is a special disincentive to counteract Qwest's potential incentive for delaying the reporting of these

large payments. Since this penalty is intended to motivate Qwest to pay large payments on time, and since it doesn't discriminate against any CLECs, this payment to the Special Fund stands. The late-reporting penalty does not count against the cap.

N. Issue 19

AT&T argues that the \$500/day penalty for late reporting is per report, and not absolute. It further maintains that the penalty should be raised to \$2500 per report. AT&T Comments at 13; Qwest Proposed CPAP SGAT § 13.3; Final Report and Recommendation at 8.

1. Decision

The \$500/day penalty is a flat per-day penalty with no multiplier per report or per CLEC.

2. Discussion

The purpose of the daily late reporting fee is to motivate Qwest to turn in its reports on time. As stated above, however, the material impact on an individual CLEC is much lower if the report is late as compared to the situation in which a payment is late. As a result, the \$500/day charge is a flat charge to Qwest. If Qwest is late with all CLEC reports, or if Qwest is only late with one CLEC's report, the penalty will be the same. The late-reporting penalty does not count against the cap.

O. Issue 20

AT&T believes that self-adjustments by Qwest should trigger

audits. *AT&T Comments* at 13-14; *Qwest Proposed CPAP SGAT § 13.6; Final Report and Recommendation* at 8.

1. Decision

Refer to Issue 9 above: Auditor has discretion to add or remove components of audit.

2. Discussion

Refer to Issue 9 above: Auditor has discretion to add or remove components of audit.

P. Issue 21

Qwest argues that it is unfair to require additional penalties after an audit forces a payment adjustment. *Qwest Comments* at 15; *Qwest Proposed CPAP SGAT § 13.4; Final Report and Recommendation* at 8.

1. Decision

It is appropriate for Qwest to pay a penalty when an audit forces a payment adjustment.

2. Discussion

As stated above, an audit should be a mechanism of last resort for the parties. Qwest must be properly motivated to resolve issues with the CLECs prior to an audit. If the parties do indeed commence an audit, and as a result, Qwest must modify the results, it is appropriate for Qwest to pay a penalty on the adjusted amount. This threat of a penalty will hopefully motivate Qwest to re-examine thoroughly the reports and address the CLECs' issues prior to resorting to the audit process. The penalty does not count against the cap.

Form of Payment

Q. Issue 22

AT&T points out that the Form of Payment section in the *Final Report and Recommendation* should refer to all of Tier 1 rather than simply Tier 1X. *AT&T Comments* at 11; *Final Report and Recommendation* at 8.

1. Decision

AT&T is correct in pointing out that *the Final Report and Recommendation* should refer to all Tier 1 payments to CLECs rather than only Tier 1X.

2. Discussion

Tier 1X and 1Y payments are equivalent except that half of Tier 1Y goes to the Special Fund. Consequently, Tier 1X and 1Y payments should be treated similarly under the payment mechanism.

R. Issue 23

Covad and WorldCom would like the payments in cash rather than bill credits. *Covad Comments* at 12; *WorldCom Comments Attachment A* at 13; *Qwest Proposed CPAP SGAT § 12.2*; *Final Report and Recommendation* at 8.

1. Decision

Payments will be made in cash rather than in the form of bill credits.

2. Discussion

The parties' arguments regarding the merits of cash payments are persuasive. First of all, bill credits are complex to administer. If, for example, the payment amount

exceeds the CLEC's wholesale bill for that month, then Qwest will need to make a supplemental cash payment: two forms of payment to a single CLEC in a single month. Also, if Qwest and the CLEC were in the midst of a billing dispute, the CPAP payment would need to be made in cash anyway. Furthermore, bill credits require billing system modifications that may lead to errors or confusion, and that will be difficult to test during the CPAP pre-271 reporting period. Overall, cash payments are simpler and more straightforward for all the parties involved, and thus are superior to bill credits.

S. Issue 24

Covad asserts that Qwest must be obligated to make the CPAP payments independent of any billing dispute between parties. Covad Comments at 13; Final Report and Recommendation at 8.

1. Decision

This issue refers to the CLEC concern that, if payments are in the form of bill credits, a billing dispute may affect the credits to that bill (*i.e.*, CLECs did not want the credit to apply toward the disputed amount). Since payments will be in the form of cash, this issue is moot.

The Report's Philosophy on Use of Statistical Methodologies

T. Issue 25

WorldCom argues that all PIDs with a sample size of 1-10 should be evaluated with a critical value of 1.04. WorldCom Comments Attachment A at 15-16; Qwest Proposed CPAP SGAT § 5.1; Final Report and Recommendation at 9.

1. Decision

The modified z-test will be used for Tier 1B and 1C submeasures when the CLEC sample size is ≥ 30 . The critical value of all PIDs with a sample size of 30 - 150 will remain at 1.645, as demonstrated in the critical value table. A permutation test will be applied for CLEC sample size < 30 . The value of α will be set at .05, except for individual month testing involving LIS Trunks and Unbundled Dedicated Interoffice Transport, Resale, and Unbundled Loops at DS-1 and DS-3 rates. For these submeasures, when the CLEC sample size is 1-10. Then the value of α will be 0.15 .

2. Discussion

a. During the ROC collaborative process, AT&T, Qwest and New Edge agreed on this critical value table. This agreement attests to the fairness of this table as a starting point for the CPAP. Furthermore, a critical value of 1.645 is derived from a confidence level of 95%: the risk of Type I errors (mistakenly finding Qwest's nondiscriminatory behavior discriminatory) equal 5%. If, however, these critical values yield an excess of Type II errors (where Qwest's discriminatory

behavior is found nondiscriminatory), then these critical values are subject to adjustment.²⁵

U. Issue 26

AT&T argues that a comparison of Qwest's treatment of a CLEC in a particular month against Qwest's performance over the prior six months does not represent a parity evaluation. *AT&T Comments* at 5. WorldCom, however, argues that parity measures are a bad idea entirely because they compare wholesale performance to Qwest's poor retail performance. *WorldCom Comments Attachment A* at 17-18; *Qwest Proposed CPAP SGAT* § 6.1; *Final Report and Recommendation* at 10.

1. Decision

A six-month average is an effective method of evaluating parity performance measures.

2. Discussion

a. The FCC has not given much guidance to the states regarding statistical evaluation of identifying discriminatory service. This lack of guidance seems to be intentional, with the objective of encouraging state experimentation. Accordingly, this Commission has significant latitude in designing a PAP that identifies discriminatory service. The method outlined in the *Final Report and Recommendation* achieves a balance between providing

²⁵ As one raises the confidence level (and lower the Type I errors), the Type II errors go up. Qwest obviously wishes to raise the confidence level as high as possible, while the CLECs wish to lower the confidence level to minimize the risk of Type II errors.

predictability of service to the CLECs while identifying service levels that are below Qwest's retail service levels. The parameters of the Tier 1A approach provide the flexibility to ensure that the standard performance levels are fair. The "variance factors" may be adjusted during a six month review if the CPAP is clearly generating unfair results.

b. As the parties are undoubtedly aware, the Act calls for "nondiscriminatory" service. The parity evaluation ensures that this Commission is not requiring Qwest to provide service that is superior to the service which it provides itself. The parity approach has been adopted by all other states' PAPs and is not open to debate.

V. Issue 27

AT&T and WorldCom believe that the proposed variance factors permit Qwest's performance to degrade much too far before it is deemed that Qwest's performance is at a level where Tier 1A penalties are incurred. *AT&T Comments* at 5; *WorldCom Comments Attachment A* at 18; *Qwest Proposed CPAP SGAT* § 6.1; *Final Report and Recommendation* at 10-11.

1. Decision

The variance factors set forth in the *Final Report and Recommendation* are a valid starting point and are subject to adjustment during a six-month review if necessary.

2. Discussion

a. The Special Master derived the variance factors from what the similar "slack" would be if the modified

z-test and a critical value of 1.645 were implemented. The variance factors are larger for lower sample sizes because lower sample sizes are inherently less indicative of a pattern of behavior and are subject to larger anomalies than larger sample sizes.

b. AT&T and WorldCom argue that the variance factors are too high. Both parties cite examples in their original comments that purportedly show an extremely high variance without the imposition of penalties. These examples, however, are based on assumptions and are limited to a few in number. When the parties were given an opportunity to expand their evidence in the supplemental comments, they neither offered an alternative proposal, nor expanded their evidence against the proposed variance factors. As a result, the Special Master's variance table will be the starting point for the CPAP. During the pre-271 reporting period, and at the six month reviews after approval, the parties will be given the opportunity to show that both the variance factors and the critical z values are ineffective, and the Commission (with the help of the Independent Monitor) will consider whether to alter the values.

c. These tables are the key to the CPAP's flexibility. The variance table, for example, could either force Qwest to maintain a constantly upward trend of service (if

the slack factors were 0) or allow Qwest to provide a constantly downward trend (if the variance factors are too high). The Commission's goal is to achieve parity, and of course, ultimately competition where competition is appropriate. To achieve this end, the Commission will strive to ensure that the Plan is fair and that all parameters of the Plan are set accordingly.

W. Issue 28

AT&T and WorldCom argue that the variance factors should be smaller for smaller sample sizes rather than larger with smaller sample sizes. *AT&T Comments* at 7; *WorldCom Comments Attachment A* at 18; *Qwest Proposed CPAP SGAT § 6.1; Final Report and Recommendation* at 10-11.

1. Decision

The variance factors should be larger for smaller sample sizes.

2. Discussion

The results derived from small sample sizes are more often affected by a single anomalous result. To allow for occasional results that are out of the ordinary range, are truly anomalous, and are not indicative of a trend, the variances for smaller sample sizes are larger than for larger sample sizes that have a tendency to stabilize due to the normalizing effect. The variances will ideally allow for anomalies, yet identify trends of discriminatory performance. If the variances do not

achieve this objective, they may be changed as described in Issue 27.

X. Issue 29

AT&T maintains that allowing Qwest to "miss one" any time there is a sample size of 10 or less is overly generous to Qwest. AT&T Comments at 7-8; Qwest Proposed CPAP SGAT § 6.2; Final Report and Recommendation at 11.

1. Decision

Allowing Qwest to "miss one" occurrence is an acceptable safeguard for unexpected performance variances.

2. Discussion

The "miss one" principle is an attempt to allow for anomalous results, and an avoidance of requiring "perfect" performance. If this clause were omitted from the CPAP, then anytime a CLEC had very low sample sizes, Qwest's performance would have to be perfect to be deemed non-discriminatory. This aspect of the plan will be evaluated at the first six-month review. If Qwest is consistently taking advantage of this allowance and, as a result, missing a high percentage of samples, then the requirement can be modified.

Y. Issue 30

AT&T points out that α needs to be established. AT&T Comments at 4; Qwest Proposed CPAP SGAT § 4.4.

1. Decision

Alpha (α) is 0.05 unless otherwise stated. See discussion on Issue 25.

2. Discussion

Alpha (α) is the probability of falsely finding that Qwest is providing service out of parity when, in fact, it is in parity (Type I error). The difference between 1 and α is commonly referred to as the confidence level, and the z critical value is derived from tables based on the confidence level. Since the z value of 1.645 (which is used for small sample sizes) is derived from a confidence level of 95%, it follows that $\alpha = 5\%$ (or 0.05).²⁶

IV. PAYMENT STRUCTURE AND PHILOSOPHY BEHIND CPAP

Tier 1: Compensatory (Tier 1X) Payments

A. Issue 31

WorldCom believes that minimum payments should apply to any CLEC with small measurement pools because, although the harm might be higher for a fledgling CLEC, the harm is also elevated for the new services of a larger CLEC. *WorldCom Comments Attachment A* at 21. Qwest maintains that the number of lines in service in Colorado is not the proper evaluation of whether a CLEC should benefit from minimum payments. Instead, Qwest argues the proper measure is the amount of time the CLEC has been in business. *Qwest Comments* at 9; *Qwest Proposed CPAP SGAT §§ 9.1, 9.2; Final Report and Recommendation* at 13.

1. Decision

Minimum payments will apply only to small CLECs. Number of lines is an appropriate indicator of a small CLEC.

²⁶ Bell Atlantic New York Order at Appendix B, Statistical Methodology, nn.22, 25.

Small CLECs will be defined as those having $\leq 100,000$ lines.

2. Discussion

a. Small CLECs are favored under the minimum penalty method because these CLECs lose a higher percentage of their business when they lose a customer or must compensate a customer for poor service. In theory, these small CLECs may not have the market presence, name recognition or leverage that the larger CLECs have so that poor service may be more likely seriously to damage a small company or to drive it out of business. Larger companies may leverage more marketing and support resources to help rectify problems caused by the ILEC. Although it is true that both companies suffer, the risk of sending a small CLEC out of business altogether is larger than the risk of putting a large CLEC out of business.

b. Qwest proposes minimum payments in the case of *newer* CLECs as opposed to *smaller* CLECs, implying that some CLECs may be small by choice, but still be well-entrenched in their market. This alternative is attractive on the surface, but brings many more complications than the number of lines criterion. For instance, the date from which a company's existence is measured could be a contentious topic if it was spun off from another company or merged from multiple companies. On the other hand, the number of lines is reported to the Commission on the company's annual report.

c. On another note, the parties should keep in mind that the minimum payment only applies when Qwest only misses a Tier 1A measure by *one* or *two* occurrences (occurrences are calculated according to the formulas set forth in IIIA of the *Final Report and Recommendation*). In these cases, the payment increases from \$225 or \$450 to \$600. Misses beyond that will be irrelevant since the minimum payment will have been met. The minimum payment for Tier 1B measures is only relevant when Qwest misses by *one*, *two* or *three* occurrences. Otherwise, the payment will already have made the minimum of \$300. Also, only interval measures should ever yield a single occurrence since one miss is always allowed.²⁷ If, despite these considerations, it appears that the minimum payment provision is consistently increasing a given CLEC's penalty amount by a sizeable percentage, the minimum penalty amount and/or the criterion by which it is assessed may be evaluated.

B. Issue 32

WorldCom contends that per-occurrence plans do not open the market as quickly as plans with large, fixed penalties. *WorldCom Comments Attachment A* at 21; *Qwest Proposed CPAP SGAT* § 7.1; *Final Report and Recommendation* at 13.

²⁷ The calculation for the number of occurrences missed for an interval measure is ((CLEC Result - Standard)/Standard) * CLEC Volume). Since this formula implicitly considers severity, it is possible that a slight difference between CLEC result and standard will result in one "occurrence" even though more samples actually fell short of parity performance.

1. Decision

Per occurrence plans are an appropriate balance of compensating for damages and opening the market.

2. Discussion

a. The Plan contains a combination of compensatory and punitive payments. This approach attempts to be fair to the CLECs by reimbursing them for injuries caused by Qwest, and to provide sufficient financial motivation for Qwest to comply with § 271 requirements. Unfortunately, the penalty level that will reimburse damage to a CLEC is sometimes less than the penalty level that Qwest is willing to sustain before improving performance. In this case where Qwest's cost of improving performance is greater than CLEC damage, it would be more economically efficient for Qwest to continue providing poor performance and to pay the CLEC for the damage caused. Economic efficiency, however, is not the sole objective of the Act. Instead, the Act flatly requires nondiscriminatory wholesale service. As a result, when compensatory payments are not high enough to motivate Qwest to improve service, the payments are ratcheted up each month until Qwest does comply. This escalating payment structure is the best way to elicit the lowest payments from Qwest and still achieve compliance.

b. WorldCom's assertion that higher penalties will provoke faster compliance is undoubtedly true. However,

the next question has to be just how fast the compliance must occur and just how high the payments must be to satisfy this goal. The payment levels could be set considerably higher than the Plan sets forth, but the risk of over-penalizing rises with the payment levels. Since the minimum payments necessary to elicit compliance vary for each PID, and since these payment levels are currently unknown, the best approach is to implement the escalating payment system currently set forth and to monitor Qwest's responsiveness to ongoing penalties. If time shows Qwest consistently delays its compliance for many months, this Commission will initiate a root-cause analysis investigation and may increase the penalties and escalation factors, if appropriate.

C. Issue 33

Qwest argues that a single order should not generate minimum payment under more than one PID. Instead, Qwest advocates grouping the penalties that stem from a single order into a family. Qwest Comments at 8.

1. Decision

A single order may generate minimum payment under multiple PIDs.

2. Discussion

a. Qwest argues that, since it is able to discriminate against a CLEC in a variety of ways with only a

single order as ammunition, it should only be subject to a single minimum payment per order. I disagree.

b. The purpose of the CPAP is to assure Qwest's ongoing provision of service to the CLECs at parity to the service it provides itself. Qwest is obliged to make its systems, procedures and personnel work toward the goal of continuous service at or above the required level. To encourage this behavior, the CPAP must, should, and will encompass payments for each PID not met, regardless of whether one or many orders are involved. A failure to comply is a failure to comply.

c. Qwest's sample scenario in which it violates seven PIDs for a single order would seem to justify seven minimum payments. The bottom line is that the PIDs were designed knowing that they measured various functional areas and that a given order might involve more than one PID. Changing such a fundamental quality of the PIDs after so much work, effort and compromise is not justified at this point.

d. Furthermore, since the monetary penalties are meant to reimburse a CLEC for actual damage, it is conceivable that each breach of performance would generate a new set of costs for the CLEC - that is, if the customer hangs around long enough to continue receiving such bad service.

D. Issue 34

Covad argues that the proper basis for setting penalty levels is the value of a customer or the cost of acquiring a customer rather than the estimate of harm from a particular incident. *Covad Comments* at 14-15; *Qwest Proposed CPAP SGAT § 7.3; Final Report and Recommendation* at 13.

1. Decision

Estimate of harm is the appropriate penalty measure.

2. Discussion

Covad's argument that penalties should be based on the value of a customer is not persuasive. Although it is true that the value of a customer might be more stable than an incident-based penalty amount, a model based on customer value would have at least as many unknown variables as an incident-based scheme. First, a customer-value based model would need to incorporate some type of multiplier to account for the percentage of times that a particular violation of a particular severity leads to a lost customer. Second, the model would need to consider the amount of resources expended by the CLEC in trying to retain the customer. Third, the value of a customer varies according to differing services, volumes and duration. None of this information was included in Covad's comments. Accordingly, the CPAP will implement an incident-based payment structure.

E. Issue 35

Alternatively, Covad argues that, if the penalty levels are set according to actual cost to a CLEC, they are woefully low. *Covad Comments* at 15-16; *Qwest Proposed CPAP SGAT § 7.3; Final Report and Recommendation* at 13.

1. Decision

The Special Master's recommended payment levels will serve as the starting point for the CPAP.

2. Discussion

a. The Special Master worked to extract from the parties concrete information regarding the appropriate penalty levels. In response, AT&T and WorldCom have done an effective job of proving the difficulty of designing a "bottom-up" penalty scheme that attempts to compensate parties for damages (as opposed to a "top-down" approach that serves to apply a predetermined amount of penalties to the ILEC for misbehavior). Unfortunately, however, AT&T and WorldCom have not proposed an alternative scheme of any detail, beyond referring to other states' plans. On the other hand, Qwest has shown that the proposed payment levels have the potential of generating very large payments to the CLECs.

b. As an initial matter, I find that the Special Master's proposed payment levels are an adequate compromise between the positions of the parties and a sufficient starting point for the CPAP. If this payment structure does not

generate payments that are sufficiently meaningful to Qwest, the Commission, with input from the Independent Monitor, will modify the payment levels as deemed appropriate.

Incentive-Based (Tier 1Y) Payments

F. Issue 36

WorldCom does not believe that the duration function should automatically exclude the severity factor calculation in Tier 1X. *WorldCom Comments Attachment A* at 24; *Qwest Proposed CPAP SGAT* § 7.4, 8.2; *Final Report and Recommendation* at 15.

1. Decision

Each month, Qwest will pay the CLEC the proper additional penalty based on that current month's severity. This severity will not be multiplied by the step-wise escalation, however.

2. Discussion

a. There are two separate and distinct multipliers that can increase Qwest's monthly payment to a CLEC. One is based on severity, and one is based on duration. The proper approach is to keep the factors separate. Each month, an additional penalty may be assessed if the performance was beyond a given severity. That additional penalty will be calculated based on the current month's base penalty amount. Each month, an additional penalty will also be assessed for ongoing poor performance. That additional penalty will be a factor of the number of consecutive months missed.

b. WorldCom's proposal to incorporate severity into the duration multiplier inappropriately commingles these two factors. Furthermore, the argument that Qwest would be getting relief from its severe poor performance is not valid since Qwest is being penalized for that severe performance on a monthly basis, regardless of duration multipliers.

G. Issue 37

WorldCom also argues that the entire penalty escalation should go to the CLEC rather than just half. *WorldCom Comments Attachment A* at 24. Qwest, on the other hand, argues that paying the CLECs half of the Tier 1Y payments is a windfall to the CLECs and their portion should be limited to 35%. *Qwest Comments* at 5; *Qwest Proposed CPAP SGAT § 8.3; Final Report and Recommendation* at 15.

1. Decision

Fifty percent of the payment escalation amounts will go to the CLEC and 50% will go to the Special Fund.

2. Discussion

Depending on their interests, the parties either argue that CLECs should get more or less of the escalated penalties. Either way, the proportion would be an educated guess at best. A valid starting point for the plan is to send 50% of escalated payments to the Special Fund and 50% to the CLEC. The CLEC will then be getting increased penalties to cover the increased risk to its reputation and customer service quality, while Qwest will also be penalized an additional amount to deter the ongoing behavior.

H. Issue 38

Qwest asserts that the payment escalation should freeze after six months. At this point, it says, the payments are more than sufficiently high to motivate Qwest to perform. *Qwest Comments* at 4-5; *Qwest Proposed CPAP SGAT* § 8.2; *Final Report and Recommendation* at 15.

1. Decision

Payment escalation will not freeze after six months.

2. Discussion

Qwest's argument to freeze escalated penalties makes no logical sense. It bases its argument on the simple fact that the escalated payment would potentially "dwarf" the cost of the service in question. This argument misses the point that the payment escalations are meant to be a balance between compensating the CLECs for their losses and ensuring that the penalty is higher than the amount that Qwest is willing to absorb as a cost of doing business. Since the value to Qwest of suppressing competition in a particular market may "dwarf" the cost of the relevant services that Qwest should be selling, sometimes the escalation may have to be significant to motivate Qwest to perform. Although the idea that Qwest would rationally evaluate whether it is more valuable to absorb penalties and retard competition or to adhere to the law and avoid penalties is still purely speculative, one of the underpinnings of this performance plan is to ensure that this type of strategic action

is deterred. Continuous escalation of payments for continuous poor performance should help prevent this strategic activity.

I. Issue 39

Covad believes that if Qwest is penalized on an ongoing basis for any given PID, Qwest should be required to initiate a root-cause analysis. Covad Comments at 15; Final Report and Recommendation at 15.

1. Decision

The Independent Monitor, at his/her own discretion, may require Qwest to initiate root-cause analysis.

2. Discussion

The Independent Monitor will have latitude in initiating a root-cause analysis. If Qwest continues to miss penalties, the Independent Monitor may suspect that Qwest is behaving strategically. In this case, the Independent Monitor may request information from Qwest regarding the cause of the discriminatory performance as well as the anticipated rectification approach and timeline. This process is not mandatory.

Caps on Payments

J. Issue 40

WorldCom strongly disapproves of any firm monetary cap on penalties - either overall or per measurement. WorldCom Comments Attachment A at 25-26. Qwest, on the other hand, maintains that Tier 1X payments as well as penalties assessed according to other interconnection agreements should be subject to the cap. Qwest Comments at 10; Qwest Proposed CPAP SGAT § 11.0; Final Report and Recommendation at 16-17.

1. Decision

The caps proposed in the *Final Report and Recommendation* are reasonable and will be included in the CPAP.

2. Discussion

a. The caps proposed in the *Final Report and Recommendation* are quite reasonable. Even though the *Report* proposes capping the monthly payment amount, there are two, quite sizeable, exceptions to this rule. First, Tier 1X payments are not capped. Second, Tier 1Y and Tier 2 payments that exceed the monthly cap are deferred until a subsequent month when payments would have been below the cap. There is a third exception, the size of which cannot be predicted: payments made as a result of Qwest's failure to comply with the requirements for the structural integrity of the CPAP (e.g., failure to make payments on time, to report on time, and to document changes) are not capped and are excluded from the cap. These factors soften the cap and represent a reasonable compromise.

b. The only Tier 1X caps are per measure caps on Tier 1C payments. Since these measures have the least business impact, they have been designated a lower priority than other Tier 1X measures; however, since they are typically very high volume, they have the potential for generating high payments. This conflict is resolved by setting appropriate per

measure caps as described in the *Final Report and Recommendation*.

c. Qwest's request to include other payment mechanisms in the cap is denied. The CPAP has been designed with the other enforcement mechanisms in mind. If Qwest wishes to limit its liability, it is free to negotiate other performance remedy plans with the CLECs. Further, Qwest always has the alternative of improving performance to avoid payments.

3. Clarification

Different parties seem to have interpreted the last three sentences in the first paragraph of section IIID of the *Final Report and Recommendation* in different ways. These sentences describe the way that the cap will limit Qwest's Tier 1Y and Tier 2 payments. Let me attempt to clarify this language:

Qwest's cap on annual payments is \$100 million. The monthly cap is equal to 1/12 of this annual cap. If the Tier 1X payments *alone* do not exceed the monthly cap, *but* the Tier 1X, Tier 1Y and Tier 2 payments *combined* exceed the monthly cap, Qwest will pay the entire 1X payments and will pay Tier 1Y and Tier 2 payments until the cap is reached. The amount of the Tier 1Y and Tier 2 payments that is over the cap is deferred. If the Tier 1X payments *alone* exceed the monthly cap, Qwest will still pay the entire Tier 1X payments, but *all* Tier 1Y and Tier

2 payments will be deferred. 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).

K. Issue 41

WorldCom believes that a procedural cap would be useful. WorldCom Comments Attachment A at 25-26; Qwest Proposed CPAP SGAT § 11.3; Final Report and Recommendation at 17.

1. Decision

There is already a procedural cap in the *Final Report and Recommendation*.

2. Discussion

The *Final Report and Recommendation* describes a procedural cap in the second paragraph of section IIID. This procedural cap is superior to a strict annual procedural cap because it allows a faster response to high payments - two months as opposed to a year - and fosters analysis of annual trends.

V. LEGAL OPERATION OF CPAP

A. Issue 42

Qwest argues that the payments defined in the CPAP are liquidated damages and thus foreclose any supplemental damages from overlapping contract actions. *Qwest Comments* at 11-12. Covad is concerned about the procedural obstacles that must be overcome prior to filing suit regarding an issue that overlaps with the CPAP. *Covad Comments* at 17. AT&T maintains that a CLEC should not be limited in bringing related contractual actions in any way. *AT&T Comments* at 19-20; *Qwest Proposed CPAP SGAT* § 16.6; *Final Report and Recommendation* at 19, 27.

1. Decision

CLECs will be able to sue for additional contract damages, as discussed in the *Final Report and Recommendation*.

2. Discussion

a. CLECs' ability to sue for additional contract damages is a safeguard against extraordinary losses that CLECs might suffer as a result of Qwest's poor performance. While the CPAP payment structure will be periodically evaluated and adjusted to reflect fair compensation and average losses incurred by CLECs, there may still be occasions in which poor performance results in an unusually high CLEC loss. The SGAT language should allow for the CLECs to recover these losses via court action if there is a valid cause of action.

b. Qwest argues that it is not fair for the CLECs to receive liquidated damages, but still retain the right to fight for more damages in court. It argues that the two

should be mutually exclusive. The validity of this concern is tempered by two factors.

c. First, it is true that, in an ordinary commercial contract, parties would not have the ability to supplement liquidated damages. The SGAT, though, is not an ordinary commercial contract. Rather, it is a regulatory hybrid of a contract and a tool for furthering public policy. This Commission has the authority to ensure that Qwest's interconnection agreements with CLECs promote competition and adhere to the Act. This Commission also has the authority to levy fines on Qwest for providing poor retail and wholesale service. These principles, combined with the broad concern about post-271 backsliding, justify the risk that occasionally Qwest may overcompensate the CLECs for their damages, while preserving the right of the CLECs to sue when they are under compensated. This risk to Qwest is mitigated substantially by the probability that a court would not allow double recovery and would require an offset of any amount the CLEC received under the CPAP.

d. Second, the CLECs' ability to bring suit is procedurally limited.. CLECs are deterred from bringing frivolous suits until they can navigate the dispute resolution process. Some parties are concerned that this hurdle will chill lawsuits. Chilling frivolous lawsuits is exactly the purpose of

this procedure. Since the CPAP will already be in place, Qwest should not be pestered with groundless lawsuits. Non-frivolous lawsuits will not be deterred if the parties expend the proper resources to show the validity of the cause of action.

e. As for the concern that the parties will have to waste valuable resources on the dispute resolution process, it seems that the majority of this work will significantly overlap with the work that would be incurred in trial preparation, so there will be significant opportunity for reuse.

B. Issue 43

Qwest maintains that Tier 2 payments should not overlap with payments to the State for the same service. Qwest Comments at 13.

1. Decision

Tier 2 payments shall not overlap with payments under the Commission's service quality rules, 4 CCR 723- 43, for the same service.

2. Discussion

If Qwest believes that some Tier 2 payments duplicate payments that are made under service quality rules, Qwest may make the payments to a special interest-bearing escrow account and then dispute the payments via the Independent Monitor. If Qwest can show that the payments are indeed duplicative, it may retain the money (and its interest) that

indeed duplicated service quality rule's payments. Otherwise the money and interest will go to the Tier 2 Special Fund.

C. Issue 44

Covad questions the Commission's legal authority to obligate the parties to waive remedies that overlap with the CPAP. Covad Comments at 17; Qwest Proposed CPAP SGAT § 16.4; Final Report and Recommendation at 19.

1. Decision

The CLECs waive the remedies that overlap with the CPAP by adopting the CPAP as a contract.

2. Discussion

The process by which the parties will undertake the CPAP is as follows. First, the Commission will recommend SGAT language to Qwest. Next, if Qwest wants this Commission's § 271 recommendation, Qwest will adopt the recommended CPAP SGAT language. Finally, if the CLECs wish, they may opt-in to the CPAP by adopting the CPAP SGAT language wholesale. Obviously, the Commission is not forcing the parties to forego any legal rights. The CLECs have their choice of remedies. They are not entitled to multiple remedies for the same discriminatory behavior. The Commission's role is simply not to force Qwest to implement SGAT provisions that create redundant obligations under multiple frameworks.

VI. CPAP REVISION PROCESS

A. Issue 45

WorldCom believes that no topic regarding the CPAP should be completely "off-limits," but rather that a party should be able to petition for review of these "firm" aspects of the plan. *WorldCom Comments Attachment A* at 35; *Qwest Proposed CPAP SGAT § 18.1; Final Report and Recommendation* at 23.

1. Decision

A party should be able to petition for review of "firm" aspects of the CPAP.

2. Discussion

a. When Qwest implements the CPAP, some aspects will undoubtedly be more flexible than other aspects. For example, it will probably be easier to adjust a per measure base payment amount than it will be to vary the calculation by which overall payments are calculated. The increased difficulty is a result of systems programming and user training factors. Furthermore, if the Plan does not have a chance adequately to stabilize, there is a risk of "thrashing" in which the Plan is constantly being "improved," yet the improvements and their consequences are not well coordinated, are isolated, or are not thought out.

b. The Commission wishes to balance the difficulty of changing "firm" aspects of the CPAP with the need for flexibility. Also, the Commission wishes to avoid hearing

arguments that the parties will undoubtedly raise repeatedly just for the sake of argument rather than for the purpose of concretely improving the Plan. On the other hand, since the CPAP does not closely follow any other state's working PAP, it is possible that some aspects of the CPAP will be less effective than others. The parties should be entitled to raise *valid* concerns regarding these areas. However, the Commission will be disinclined to make any fundamental changes to the Plan unless there is a clear need and benefit, and the Commission will not appreciate hearing the same arguments rehashed time and again with no new supporting evidence.

B. Issue 46

Qwest is concerned that there is no firm sunset of the plan. Qwest would like for the three-year review to include an evaluation of whether private business agreements are sufficiently pervasive to supplant the CPAP. *Qwest Comments* at 20; *Qwest Supplemental Comments* at 12-13. AT&T and WorldCom argue that there should not be a sunset provision in the plan. *AT&T Supplemental Comments* at 2; *WorldCom Supplemental Comments* at 2; *Final Report and Recommendation* at 23.

1. Decision

The three-year review will evaluate the plan to determine which aspects may be phased-out. The entire plan will automatically sunset six years after § 271 approval, with the exception of Tier 1A payments, which shall persist indefinitely until suspended by the Commission or superceded by a new CPAP.

2. Discussion

a. The CPAP is a temporary mechanism to ensure that Qwest's performance does not backslide after it is allowed to enter long distance markets. After the plan has been in full-effect with payments made for six years, the market should have stabilized; there should be available alternatives to Qwest's resale and unbundled access products; and Qwest and CLECs will likely have adopted customized performance agreements. The Commission is optimistic that all of these factors will obviate the need for the CPAP. The six-year review (conducted at 5 ½ years after § 271 approval) will evaluate the appropriateness of complete phase out and set concrete dates and processes by which any remaining facets of the plan will then be eliminated.

b. Despite this six-year review, this entire plan, with the exception of Tier 1A payments, will sunset by its terms six years after the plan goes into effect. At that time, the Commission may revive this CPAP wholesale, may sunset the entire plan, including Tier 1A payments, or may allow more traditional contract and arbitration remedies to take the CPAP's place.²⁸

²⁸ This inquiry will bring the issue of the CPAP's voluntary or mandatory nature to the fore. It will likewise require that the Commission answer the question of its authority to require a CPAP. I nonetheless prefer setting the presumption that the CPAP will end and then have to be revived or

C. Issue 47

Qwest argues that payments made under private performance plans should contribute toward the cap. Otherwise, it says, private performance plans will never proliferate. *Qwest Comments* at 20; *Final Report and Recommendation* at 16-17.

1. Decision

Payments made under private performance plans will not contribute toward the cap.

2. Discussion

Payments made under private agreements will not count toward the cap because private agreements will then have the power to affect the amount of money paid to the Special Fund from Tier 1Y and Tier 2 payments. Also, the private agreements will most likely replace Tier 1X payments, and these are not capped anyway. Finally, if Qwest is concerned about its larger potential liability with the advent of private agreements, it should undertake to provide non-discriminatory service and hence avoid the payments altogether.

VII. DISPUTE RESOLUTION PROCESS

A. Issue 48

Qwest advocates using a contract ALJ and existing Colorado statutory procedures for dispute resolution. *Qwest Comments* at 17; *Qwest Proposed CPAP SGAT* §§ 17.0 et seq.; *Final*

revised, over the contrary presumption that would have it persist indefinitely. If, after six years, competition in the local exchange market is no more advanced than it is now, then there are problems in the market that surely go beyond the performance assurance plan's capability to address or to remedy.

Report and Recommendation at 24.

1. Decision

The Commission will hire an Independent Monitor to resolve disputes, ambiguities, and questions regarding the CPAP.

2. Discussion

a. The responsibilities of the Independent Monitor will range from informal question answering and interpretation of the Plan to formal dispute resolution and arbitration.²⁹ Because of the range of responsibilities, the position is unique: a sort of hybrid of Staff, arbitrator and ALJ. For this reason, the Commission declines to peg the Independent Monitor into an ALJ title.

b. Furthermore, none of the existing Commission rules meet the CPAP needs. The formal dispute resolution rules require too much overhead for the simple clarifications and explanations needed for the CPAP; the informal dispute resolution rules lead to resolution by the Commission; the expedited dispute resolution rules also require a formal procedure. The expedited complaint process most closely conforms to the CPAP needs, but it is overly-formal for a first-round of decision making. Also, those rules are intended to be a last

²⁹ Note, however, that even simple question-answering or interpretation will be filed publicly.

resort, to be used *after* the parties use the processes set forth in any interconnection agreements. On the whole, the process set forth in the *Final Report and Recommendation* is appropriate and can be later followed up with the process set forth in the Commission Rules (*see, e.g., 4 CCR 723-1-61*).

B. Issue 49

Qwest also asks to change the VP-VP negotiating process so that the two companies have longer to come to a resolution after the executives meet. Qwest Comments at 17; Qwest Proposed CPAP SGAT § 17.8; Final Report and Recommendation at 25.

1. Decision

The VP-VP negotiation requires the following:
The CPAP's dispute resolution process shall not be resorted to, unless and until, the problem is raised at the VP-VP level two weeks *before* a complaint is filed *and* the complainant submits a statement, including specific facts, that the complainant engaged (or attempted to engage) in good faith negotiations to resolve the disagreement and that, despite these negotiations, the parties failed to resolve the issue.

2. Discussion

The CPAP will implement the language set forth above. This serves as a clarification and embellishment. It is a combination of the specifics offered in the *Final Report and Recommendation* and the process set forth in the expedited dispute resolution rule at 4 CCR 723-1-61(k)(1)(c).

C. Issue 50

AT&T worries that the dispute resolution procedures and risk of associated penalties will have a chilling effect on disputes. *AT&T Comments* at 21; *Qwest Proposed CPAP SGAT* §§ 17.11, 17.12; *Final Report and Recommendation* at 26.

1. Decision

The dispute resolution procedures and risk of associated penalties are meant to have a chilling effect on *frivolous* disputes.

2. Discussion

As discussed above, one of the goals of the CPAP is to encourage the parties to work through their disagreements voluntarily. Parties who bring frivolous complaints and suits will be penalized. Parties who have non-frivolous claims need not worry about the penalties.

VIII. MISCELLANEOUS ISSUES

A. Issue 51

Qwest wishes to include a paragraph in the CPAP SGAT that says Qwest's performance under the CPAP shall not be used as an admission against Qwest or as evidence that Qwest is liable or culpable for violation of any state or federal law. *Qwest Comments* at 19; *Qwest Proposed CPAP SGAT* § 16.2.

1. Decision

2. Qwest is entitled to include language in the CPAP that will limit its liability and culpability for the enforcement terms and payments in the CPAP. These terms and payments will not be considered as an admission against interest or an admission of liability in any legal, regulatory, or other

proceeding relating in whole or in part to the same performance. Discussion

Although the *information* contained on the performance reports *may* be entered into evidence in a subsequent proceeding involving Qwest's performance, *payment* information is *not* appropriate for that forum. While the statistical methodologies and payment calculations represent the Commission's best effort to implement an automatic detection system for discrimination, any automated system will not necessarily take into account all factors that a court of law might consider. The payment information should not be used automatically to incriminate Qwest under other state and federal obligations.

B. Issue 52

Covad suggests new change management PIDs to address timely and accurate notice to all CLECs. Qwest and AT&T jointly propose new PIDs for change management (PO-16, GA-7, and PO-18) and the provisioning of LNP (OP-17, MR-11, and MR-12). AT&T individually proposes a new change management PID (RQ-3). WorldCom individually proposes a new change management PID . Covad Comments at 9-10; Qwest Proposed New PIDs at 1-5 and Attachment A; AT&T Proposed New PIDs at 2-12 and Attachments 1-2; WorldCom Supplemental Comments at 4-5 and Attachment; Qwest Supplemental Comments at 14-15; Final Report and Recommendation at 30.

1. Decision

The new PIDs agreed upon by the parties are accepted. The CPAP shall incorporate the proposed PO-16; GA-7; and PO-18 change management PIDs. The CPAP shall incorporate

the proposed OP-17, MR-11, and MR-12 PIDs measuring the provisioning of LNP. Qwest is allowed 60 days after it begins pre-271 reporting to report on these new PIDs.

2. Discussion

a. The *Final Report and Recommendation* specifies standards for, and requires development of, three change management PIDs. Qwest and AT&T jointly propose the three required change management PIDs (PO-16, GA-7, and PO-18). At the time that the new PIDs were proposed, Qwest and AT&T did not agree on whether unrecoverable data loss should be accounted for in GA-7. The parties have since agreed on language dealing with the data loss issue. WorldCom supports these proposed change management PIDs. Covad makes several suggestions on what change management PIDs ought to address. Covad did not develop or propose any specific PIDs. Covad also does not comment on any of the change management PIDs that are proposed. It appears that the change management PIDs proposed by Qwest and AT&T address some of Covad's suggestions. If additional change management PIDs are developed, those new PIDs shall be considered at the first six-month review.

b. The *Final Report and Recommendation* specifies that the parties develop submeasures for MR-5 and MR-6 to measure effectiveness in situations in which the number porting/disconnect process left a customer without service.

Instead of submeasures for MR-5 and MR-6, Qwest and AT&T jointly proposed two new PIDs, MR-11 and MR-12. WorldCom supports these proposed LNP PIDs. These proposed PIDs satisfy the requirement.

c. The *Final Report and Recommendation* also suggests development of a PID to address premature disconnection of a customer that is switching providers. Qwest and AT&T jointly proposed OP-17, and the parties have since agreed upon the standard for this measure. WorldCom supports this proposed LNP PID. The proposed OP-17 PID satisfies the requirement.

d. The Release Quality Implementation of Changes per Qwest Documentation and Specifications (RQ-3) measure proposed by AT&T and supported by WorldCom will not be incorporated at this time in the CPAP. Also, the Software Validation measure individually proposed by WorldCom will not be incorporated. Both measures are proposed by the parties to address the quality of Qwest's software releases. Qwest specifically opposes incorporation of RQ-3 and argues that GA-7 addresses problems associated with new software releases. PIDs measuring software quality need to be carefully weighed against the possibility that software releases may be unnecessarily delayed in an attempt to achieve perfection. To allow more time to weigh these proposed measures, they shall be considered at the first sixth-month review.

C. Issue 53

Qwest suggests that the change in definition of existing PID PO-6 should be incorporated in the CPAP and that a new standard should be established. Qwest Supplemental Comments at 15-16.

1. Decision

The change in definition shall be incorporated in the CPAP. A new standard shall also be incorporated since the existing standard was based on the previous definition of PO-6. Qwest shall immediately inform the Commission in writing of the new standard when agreement on the new standard is reached by the ROC OSS collaborative.

2. Discussion

Changing the definition for an existing ROC-developed PID is in accordance with the direction provided by the Special Master as long as the ROC collaborative has reached agreement on the changes to the PID. In this case it also makes sense to change the standard.

D. Issue 54

XO Colorado, Time Warner Telecom and WorldCom argue that special access services should be included and disaggregated in the ordering, provisioning, maintenance and repair PIDs. XO Colorado and Time Warner Telecom Comments at 1-20; WorldCom Comments Attachment B at 3-15.

1. Decision

Qwest shall include disaggregated special access information in PIDs PO-5, PO-9, OP-3, OP-4, OP-6, OP-8, MR-3,

MR-5, MR-6, MR-7, and MR-9 in its monthly performance reports. Penalties shall not be assessed for these orders, however. Instead, Qwest will provide the information necessary to compare its own retail service to the service provided to CLECs.

2. Discussion

a. There are two competing views regarding the inclusion of special access services in the CPAP. On one hand, one might broadly argue that the purpose of the CPAP is to ensure that the ILEC provides adequate service to allow the CLECs to compete effectively. On the other hand, one might narrowly argue that the CPAP's purpose is to ensure that the ILEC provides non-discriminatory service in unbundled network elements, resale and collocation.

b. The FCC has provided little guidance. The Act states that the ILEC must continue to "meet the conditions required for ... approval."³⁰ The DOJ evaluates whether a local market is "fully and irreversibly open."³¹ Neither source is particularly helpful in resolving this issue.

c. I prefer the narrower argument. Fundamentally, this CPAP is a temporary mechanism designed to ensure that the local telephone market is conducive to

³⁰ 47 USC § 271 (d) (6) (A).

³¹ BellSouth South Carolina Order at 36.

competitive entry.³² The purpose of the CPAP is not to ensure that Qwest provides satisfactory service to all CLECs at all times, rather the purpose is to ensure that Qwest's wholesale service does not backslide after § 271 approval. Consistent with this view, PIDs should be targeted to the same § 271 requirements that Qwest had to fulfill to obtain approval in the first place. Then, as Qwest demonstrates regular acceptable service, as private agreements for performance monitoring are reached, and as competition grows, the CPAP will be phased out of existence. The inclination of the hearing commissioner is to keep the scope of the CPAP narrow rather than broad - the goal is to shrink the Plan rather than to expand it.

d. Furthermore, although the XO/Time Warner Telecom brief argues that the CLECs are forced to order special access circuits instead of functionally equivalent and cheaper unbundled network elements, the CLECs are really only locked into their existing special access lines until their contracts expire, at which time the circuits may be converted to UNEs. At that point in time, the CLECs will be able to decide whether it is more economically efficient to order UNEs or special access circuits. Performance will obviously be one of the factors in the decision whether or not to convert. Also, XO and Time

³² See *supra*, Issue 46.

Warner Telecom correctly point out that Qwest will not build facilities to accommodate UNE orders. If there are no available facilities, then Qwest will only provide these facilities for a special access order, which is more expensive. Based on the viable alternatives to special access, and Qwest's valid declination to build facilities for UNE orders, the special access orders are not an essential wholesale requirement under § 251 or § 271 and do not belong in the CPAP.

e. On the other hand, the Commission cannot deny that special access services are currently an important part of some CLECs' offerings. Also, after the Texas Public Utilities Commission conducted an investigation into special access services, it ordered Southwestern Bell Texas (SWBT) to include special access services as another level of disaggregation for UNE measurements. In light of these two factors, Qwest shall include special access as a level of disaggregation in the PIDs listed above. For these purposes, "special access" shall be defined as any circuits (DS0, DS1, DS3, OCN) ordered under the special access tariff by a CLEC in lieu of a UNE.³³

f. Although these data shall be included in the reports, and the reports shall compare the special access

³³ This is a narrower definition than WorldCom proposes.

service to retail special access, no payments will be assessed. At the first six-month review, this Commission shall decide whether to include these orders in the number of "occurrences." Qwest shall begin reporting on these data 120 days after the issuance of this Order. (Qwest is allowed 60 extra days after the commencement of pre-271 reporting since this is a change to a PID.

IX. 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 hereto. Attachment A contains the actual SGAT language to be implemented for this Commission favorably to recommend § 271 compliance.

2. Any necessary Motions to Modify this Order shall be filed within 10 days of the mailed date of this Order. Responses to the same shall be filed five days thereafter. Service of motions and responses shall be in accordance with previous procedural orders.

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

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

Hearing Commissioner