

STATE OF IOWA
DEPARTMENT OF COMMERCE
UTILITIES BOARD

IN RE: U S WEST COMMUNICATIONS, INC., n/k/a QWEST CORPORATION	DOCKET NOS. INU-00-2 SPU-00-11
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**RECONSIDERATION OF CONDITIONAL STATEMENT REGARDING
QWEST PERFORMANCE ASSURANCE PLAN**

(Issued June 7, 2002)

On February 10, 2000, the Utilities Board (Board) issued an order initiating an investigation relating to the possible future entry of U S WEST Communications, Inc., n/k/a Qwest Corporation (Qwest), into the interLATA market. The investigation was identified as Docket No. INU-00-2.

In a filing dated May 4, 2000, Qwest encouraged the Board to consider a multi-state process for purposes of its review of Track A (competition issues),¹ various aspects of each item on the 14-point competitive checklist, section 272 (separate subsidiary) issues, and public interest considerations. The Board considered the concept of a multi-state process for purposes of its review of a Qwest application to provide in-region, interLATA services sought comment and subsequently issued an order dated August 10, 2000, indicating that its initial review of Qwest's compliance with the requirements of 47 U.S.C. § 271 would be through participation in a multi-state workshop process with the Idaho Public Utilities

¹ See, 47 U.S.C. § 271(c)(1)(A).

Commission, North Dakota Public Service Commission, Montana Public Service Commission, Wyoming Public Service Commission, and the Utah Public Service Commission. Since the time of that order, the New Mexico Public Regulation Commission has also joined in the workshop process.

In August of 2000, a collaborative process was initiated with 11 of the 14 Qwest state public service commissions participating. The process was known as the Post-Entry Performance Plan (PEPP) collaborative. Between October of 2000 and May of 2001, five separate multi-day workshops were convened, numerous conference calls were placed, and a large quantity of information, proposals, and supporting data were exchanged and reviewed in an attempt to create a "consensus plan."

The PEPP collaborative ended in May of 2001 when Qwest representatives indicated a reluctance to continue with further meetings in the current format, expressing a belief that no further consensus could be reached. A final collaborative summary was prepared by MTG Consulting (MTG) and the National Regulatory Research Institute (NRRI) and distributed on June 5, 2001. This summary document contained a list of agreements that had been reached through the collaborative process as well as a list of unresolved issues.² Ultimately, the seven multi-state workshop participants for considering the checklist items became a nine-state workshop collaborative for purposes of considering the performance assurance plan

² This "Final Collaborative Summary" can be viewed at http://www.nrri.ohio-state.edu/oss/Post271/Post271/final_report.pdf.

and public interest issues raised by the plan, with the Washington and Nebraska commissions joining the effort.

A set of procedures was established and an appropriate schedule for producing a report that would provide the nine commissions with a series of proposed conclusions and recommendations addressing the public interest and performance plan issues. The procedures allowed all participants to file comments and testimony in response to the proposed Qwest performance assurance plan (QPAP), which Qwest filed on or about July 16, 2001, in substantially the same form with all nine commissions. Qwest was then permitted to file pre-hearing responses to those comments.

Hearings were scheduled and held during the weeks of August 13 and August 27, 2001. In addition to the scheduled filings, AT&T has filed numerous "supplemental authority" pleadings. These appear to be intended to bring to the Board's attention other state commission actions on these issues.

The Federal Communications Commission (FCC) has delineated five general characteristics that must be part of a section 271-performance assurance plan as part of a "zone of reasonableness" analysis. These include:

- Meaningful and significant incentive to comply with designated performance standards.
- Clearly articulated and pre-determined measures and standards encompassing a range of carrier-to-carrier performance.
- Reasonable structure designed to detect and sanction poor performance when and if it occurs.

- Self-executing mechanism that does not open the door unreasonably to litigation and appeal.
- Reasonable assurance that the reported data are accurate.³

Liberty's report outlined a total of 68 issues relating to Qwest's proposed QPAP that remained at impasse following the multi-state workshops. From those impasse issue discussions, Liberty made recommendations for 29 separate changes to the QPAP. In a conditional statement dated May 7, 2002, the Board addressed each of the impasse issues, and concluded that it was prepared to indicate that the QPAP would provide assurance that the local market would remain open after approval from the FCC for Qwest to provide in-region interLATA service in Iowa, assuming Qwest implemented each of the conclusions as directed in its conditional statement.

On May 14, 2002, Qwest filed comments to the Board's May 7, 2002, conditional statement requesting Board reconsideration on four issues:

- The 36 Percent of Net Revenues Standard – Cap on amount of net income from IntraLATA toll at risk for QPAP payments.
- Limiting Escalation to six months – Capping increases on payments to CLECs for non-compliance at the six month escalated level.
- Six Month Plan Review – Proposed automatic stay during judicial review, proposed standard language and 10 percent payment increase limit.
- 100 Percent Cap on Interval Measures Formula – Limitation of the effect of the number of missed days (Severity) in calculation of installation time frames.

³ See Memorandum Opinion and Order, *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*, 15 FCC Rcd 3953 ¶ 433 (1999) (*New York Order*), *aff'd sub nom. AT&T Corp. v. FCC*, 220 F.3d 607 (D.C. Cir. 2000).

On May 16, 2002, AT&T filed its request for reconsideration of the Board's conditional statement, requesting the Board re-examine its determination on two issues:

- Exclusivity – The ability to seek remedy for both contractual and non-contractual Issues outside the QPAP.
- Offset – Whether Qwest or the finder of fact determines if an offset for payments already paid is appropriate.

On May 21, 2002, through a "supplemental authority" filing, AT&T provided the Board with an order issued by the Washington Utilities and Transportation Commission. The six issues listed above were each addressed in that Washington order. Qwest responded to AT&T's filing on May 24, 2002.

Joint CLEC's filed a response Qwest's comments on May 28, 2002. On May 29, 2002 Qwest filed a reply to the Joint CLEC's response.

The Board will discuss each of the six issues listed above individually in this statement.

1. 36 Percent of Net Revenues Standard (Qwest comments, pp. 1-3; Joint CLECs reply comments, pp. 2-15; Qwest response, pp. 1-2)

In the Board's May 7, 2002, conditional statement the Board determined "the 36 percent figure arrived at by Qwest, is in line with other approved PAP's and appears to represent a reasonable starting point." The Board indicated that,

[R]ather than set a percentage cap, the Board will direct Qwest to include a fixed dollar amount cap at the projected \$31 million mark, which is equivalent to Iowa's portion of the

36 percent cap recommend by Liberty, based on ARMIS revenue data from 1999.⁴

In Qwest's comments it proposed updating the cap to reflect current financial data, by continuous annual recalculation of the cap based upon the most recently available ARMIS data, by the inclusion of the following language in the QPAP:

The cap shall be recalculated each year based upon the prior year's Iowa ARMIS results. Qwest shall submit to the Board the calculation of each year's cap no later than 30 days after submission of ARMIS results to the FCC.

Qwest also proposed a change in the determining the cap level during the plan year based on a negotiated stipulation with Utah Advocacy Staff. The Utah Public Service Commission has not yet made a determination on the proposal. Qwest suggests the proposed changes provide the Board with more discretion over determining the cap level during any plan year. The following is the proposed language:

12.1 There shall be an initial procedural annual cap ('initial cap') on the total payments made by Qwest for the 12-month period beginning with the effective date of the PAP for the State of Iowa, and any subsequent 12-month period thereafter ("plan year"). The amount of this initial annual cap for the State of Iowa shall be \$21,000,000 (24% of the Iowa 1999 ARMIS Net Return). During any given plan year, Qwest may be required to make payments in excess of the initial annual cap, as described in section 12.2, but in no event shall the annual payments exceed a maximum cap of 44% of the 1999 ARMIS Net Return, or \$38,000,000. CLEC agrees that these provisions will result in a maximum annual cap that shall apply to the aggregate total of Tier 1 liquidated damages, including any such damages paid pursuant to this

⁴ Conditional Statement Regarding Qwest Performance Assurance Plan issued May 7, 2002, pp 11-12.

Agreement, any other interconnection agreement, or any other payments made for the same underlying activity or omission under any other contract, and Tier 2 assessments or payments made by Qwest for the same underlying activity or omission under any other contract.

12.2 If the initial procedural cap described in 12.1, or any subsequent cap established by the Board pursuant to this section which is under the 44% maximum cap ('existing cap'), is reached, prior to the end of any plan year, Qwest may file a petition with the Board seeking relief from making payments in excess of the existing cap. Upon Qwest's filing, the Board shall initiate an expedited proceeding to determine whether and to what extent Qwest should be required to make payments in excess of the existing cap (but not to exceed the 44% annual cap.) Qwest will not be required to make payments in excess of the existing cap pending the outcome of the proceeding before the Board. Qwest will be required to make payments in excess of the existing cap only if the Board finds, after the expedited proceeding, that the public interest requires the existing cap to be raised.

One of the primary considerations in raising or maintaining an existing cap shall be whether Qwest could have remained below the cap through reasonable and prudent efforts. In such a proceeding, Qwest shall have the burden of establishing that it could not have remained below the existing cap through the use of reasonable and prudent effort. (Emphasis added) If the Board determines that Qwest should make payments in excess of the existing cap, Qwest shall be required to make any and all payments that were suspended with interest and continue to make payments pursuant to the new cap established by the Board. If no petition is filed, Qwest shall be required to continue to make Tier 1 and Tier 2 payments under the plan for the remainder of the plan year up to an annual cap of 44% of 1999 ARMIS Iowa Net Return.

The Joint CLEC's expressed concern with the proposed standard (reasonable and prudent) to be applied by the Board when determining whether the cap should

appropriately be raised. The Joint CLECs cited the Board's conditional statement, at page 101:

The Board directs Qwest to submit for approval the addition of similar language along with deletion of the Qwest veto over changes and limitations of what may be considered in a review of its QPAP, which are currently contained in Section 16.1 and 16.2.

The Joint CLEC's state that the Board already has broad authority, pursuant to Iowa Code § 476 *et. seq.*, to administer a performance assurance plan supported by the Telecommunications Act of 1996 (Act). Joint CLECs cited the FCC's Georgia and Louisiana Order that states in part:

It is not unreasonable for us to expect that these commissions could modify the penalty structure if BellSouth's performance is deficient post approval.⁵

Joint CLECs also cited orders in Colorado, Montana, Idaho, Washington, and North Dakota where the same or similar Qwest language has been rejected. The Joint CLECs indicate they do not oppose a procedural cap, suggesting the Board should review Qwest's performance when it is "abysmal." But, Joint CLECs contend that Qwest would avoid payment after reaching the 24 percent cap, until the Board completed a hearing in which it determined that the public interest required a raise in the cap. It would be difficult if not impossible for the Board and the CLECs, as opposed to Qwest, to determine whether Qwest could have remained below the cap

⁵ BellSouth Georgia/Louisiana Order, released May 15, 2002, at ¶ 300.

or not as Qwest controls the systems, personnel and data. At a minimum, Joint CLECs request that the two bolded sentences above be stricken.

Qwest responded that the Board is capable of determining whether Qwest has met the reasonable and prudent effort burden. Additionally, Qwest pointed out, that is only one of the primary considerations the Board may consider. Qwest maintains that the revised cap procedure provides the Board with additional flexibility while maintaining sufficient financial exposure for Qwest to constitute a "meaningful incentive" to maintain a "high level" of performance.

The Board believes a procedural cap is acceptable to the CLECs in theory and has a number of advantages over the fixed dollar amount previously directed by the Board. The Qwest proposal raises the maximum payout to 44 percent and establishes a process for possible review once the 24 percent initial cap is reached. The sentence delineating the reasonable and prudent effort standard should be stricken, to avoid the possibility of any delays in QPAP payments to CLECs and corrective actions taken by Qwest, created by unnecessary squabbling among the parties related to the standard.

Reasonable and prudent efforts by Qwest would only be one of the factors the Board would likely consider, but by listing that factor exclusively in the QPAP might be construed as a limitation on the Board's decision-making authority. The language is ambiguous and overly general. The Board will approve the proposed sentence concerning the automatic recalculation of the cap and sections 12.1 and 12.2 as

offered by Qwest with the deletion of the two bolded sentences in section 12.2 that was shown in bold.

2. Limiting Escalation to six months (Qwest Comments, pp. 4-7; Joint CLECs reply comments, pp. 15-23; Qwest response, pp. 3-5)

The Board stated:

The Board agrees with the CLECs that a cap at six months on the escalation of the payment amounts is contrary to the hoped for incentive benefit of a QPAP. The Board disagrees with the Liberty's apparent fears that the PIDs may be, in some way, unreachable by Qwest. Qwest has never argued that it cannot meet these PIDs. Qwest should know through its military style OSS testing and its involvement in establishing the PIDs if it can reach the required compliance. This only leaves it to Qwest to decide if it is more beneficial to pay a penalty or fix a problem. An artificial six-month cap on Tier 1 allows Qwest to make a business decision on meeting a PID they helped design and test or miss it and with its decision to miss, hinder competition. Only Qwest can decide when the level of payment penalties becomes an incentive. The Board would hope that Qwest would not let any PID be missed, and thus pay no penalties at any level. The Board is not convinced from the record that CLEC harm from lost business can be accurately measured, so the policy goal should be a QPAP that precludes any Qwest business decision that relies on an escalation cap. Moreover, the QPAP gives Qwest an ability to reduce the escalation step they are making current payments based on by simply meeting the standards in any one month.

The Board has determined that the rate of increase and decrease in the Per Occurrence and the Per Measurement for high, low, and medium payouts should change by the same amount following month six as it did from month five to month six, shown in Table 2 of the QPAP. For example, following month six in the per occurrence portion, high would increase or decrease each month by \$100, medium by \$100, and low by \$100 for all months following the sixth month. The Per Measurement Cap of payments to any CLEC should increase/decrease in a like manner. That would mean an

increase or decrease in high of \$25,000, medium of \$10,000, and low of \$5,000 following month six.

Qwest requested the Board reconsider its determination concerning escalation of Tier 1 penalties after six months. Qwest noted that the FCC has previously approved limitations on the escalation of Tier 1 payments as being within its defined "zone of reasonableness" standard. Qwest's contends that its performance under the negotiated ROC PIDs should not be a basis for recommending unlimited escalating payments, pointing out that even the ROC PIDs have had design flaws which Qwest discovered over time, such as the CLECs' ability to affect MR-8 results. Additionally, Qwest notes that under the six-month review process envisioned by this Board, all the measurements and their standards are subject to change in the future. Qwest suggests the accuracy of the design and Qwest's ability to meet the proposed standards is certainly unknown at this time.

Qwest proposes a provision based on the compromise of this issue reached by Qwest and the Utah Advocacy Staff. This provision would allow the Board to review and determine whether sub-measures should continue to escalate. To accomplish this, Qwest submits that the following language be included in the QPAP:

16.2. If at the time the Board conducts any six-month review, Qwest is making Tier 1 sub-measurement payments that have reached the 6 month payment escalation level, as described in section 6.2 and Table 2 of this plan, the Board may consider whether the Tier 1 payment for any such measurements should continue to escalate beyond the six month payment level identified in Table 2. Continued escalation shall occur only if the Board finds that Qwest could have provided conforming performance through reasonable and prudent efforts and that continued escalation

would be in the public interest. For those measures that the Board decides payments should escalate beyond six months, any escalated payments beyond 12 months shall be deemed Tier 2 payments, payable to the state in accordance with section 7.5.

16.3 If the Board determines that the payment levels for the specified performance measurements should continue to escalate, based on the criterion in section 16.2, Qwest shall add \$100 per month to the 6 month Tier 1 payment levels in Table 2 for each consecutive month of non-conforming performance. For payment levels that have escalated beyond 6 months there shall be an accelerated payment de-escalation process based on consecutive months of conforming performance, as follows. For payment levels that have escalated 9 months or more, 3 consecutive months of conforming performance will reduce the payments to the 6-month level. After 3 more consecutive months of conforming performance, the payment level will reduce to the base amount. Except as specifically provided by the accelerated payment de-escalation process in this section, payment de-escalation shall occur in accordance the 'step down' provision described in section 6.2.1. Performance measurements that have been subject to escalation beyond 6 months, in accordance with this section, but which subsequently de-escalate below the 6-month payment level, would only be subject to further escalation beyond 6 months if decided by the Board in a subsequent 6-month review in accordance with this section 16.3 and section 16.2.

16.4 Any changes made pursuant to sections 16.2 and 16.3 shall be subject to and included in the calculation and application of the 10% payment collar identified in section 16.1.

Qwest continues to argue, as they did during the workshops, that unlimited escalation would lead to payments far beyond any reasonable approximation of the value of the service to a CLEC. Qwest contends the combined effect of Tier 1

payments at various levels of escalation and Tier 2 payments is equivalent to providing multiple years of service.

The Joint CLECs suggest that the Qwest is merely attempting to protect itself financially from its own chronically poor performance over at least a six-month period. The Joint CLECs contend that if after six months of escalating performance payments Qwest's performance is still deficient, it is likely that the level of performance payments were not significant to provide Qwest with adequate incentive to correct its performance. Allowing the performance payments to escalate continuously with consecutive months of deficient performance should bring the payment amounts to a level significant enough to give Qwest the proper incentive to correct the deficient performance.

The CLEC's point out that similar to the Board's determination, the Colorado, Montana, Wyoming, and Nebraska commissions have each rejected a cap on Tier 1 escalation after six months.

The Colorado Public Utilities Commission found:

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.⁶

The Montana Public Service Commission indicated:

The Commission rejects Antonuk's recommendation for a six-month limitation on Tier 1 payment escalation for the reasons identified by AT&T and Covad: (1) to deter Qwest from providing poor service to CLECs for extended periods of time; and (2) to help to ensure Qwest's payment for noncompliance is higher than the amount Qwest is willing to absorb as a cost of doing business. Participants are invited to propose changes to QPAP Section 6.2.2 (and Table 2 therein) to reflect the escalation increments for noncompliant months after the sixth month.

The Wyoming Public Utilities Commission found:

We do not believe it is the role of the QPAP to set a price on noncompliance but to encourage it not to happen or to correct such noncompliant behavior if it occurs. Therefore, we do not believe that an arbitrary limit on escalation of payments is warranted or demonstrated to be necessary. Qwest has argued, testified, and shown us documentary evidence that it is either meeting its performance indicators or working hard to do so in the future. If this is true, the likelihood of payments under the QPAP is relatively low and should be considered by Qwest as a manageable financial risk largely under its own control. Additionally, we have not been provided with cogent reasons why there should be a limit on the escalation of payments or that a limit of six months is somehow compelled by the facts of the case. We therefore will allow the escalation of QPAP payments without a time limit.

The Nebraska Public Service Commission stated:

⁶ Colorado Reconsideration Order, at pp. 59-60.

If Qwest is meeting the standards currently to obtain § 271 relief then there is no reason it should not be able to meet them in the future. 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 this type of strategic action is deterred. Continuous escalation of payments for continuous poor performance should help prevent this strategic activity.

Thus, one solution, as suggested by Utah and New Mexico staff and done by Colorado is to remove the limitation on escalation. Nebraska agrees with that approach and directs Qwest to remove the caps on escalation found in Table 2 of its proposed QPAP. As such, Tier One Per Occurrence-High, Medium and Low would increase one hundred dollars per month until compliance. Tier One Per Measurement High would increase \$25,000 per month, Medium would increase \$10,000 per month, and Low would increase \$5,000 per month until compliance.

The Nebraska Commission proposes a modified "sticky" duration.

Once Qwest has completely stepped down the Tier 1 payment schedule through several consecutive months of compliant performance, should Qwest then fail to comply with a benchmark or parity performance measure for two consecutive months, the amount of payment to a CLEC shall be the amount in the Tier 1 payment schedule for two months or the highest monthly payment for the same measure incurred in the preceding 12 months, whichever is greater.

Besides unlimited escalation and sticky duration, the Nebraska Commission also found that Tier 2 should also escalate. Qwest was directed to create an escalation schedule for Tier 2 payments that mirrors that of Tier 1

payments. Additionally, the sticky duration methodology outlined above was to apply Tier 2 payments.

Joint CLECs addressing the specifics of the proposed Qwest language for payment escalation beyond six consecutive months, argue that the Board would be limited to two standards:

- Qwest could have made reasonable and prudent efforts to limit such payment; and
- Continued escalation was in the public interest.

The Joint CLECs suggest that under the Utah Stipulation between Qwest and the Utah Advocacy staff, the Board would be faced with the nearly impossible task of proving that Qwest could have taken reasonable and prudent steps to limit its payments. The CLECs contend the Board may not be in a position to easily conclude that Qwest could have taken steps to limit the payments, noting the difficulty in understanding enough about Qwest's processes to have a reasonable basis to determine what Qwest could, or could not have done, in conforming to its performance obligations.

The Joint CLECs also argue that the proposed language would not be self-executing, requiring Board involvement on a submeasure-by-submeasure basis, effectively requiring litigation before the Board. This Board involvement on a submeasure-by-submeasure basis fails to meet the FCC's indication that any adequate performance assurance plan should include a self-executing mechanism that does not open the door unreasonably to litigation and appeal.

Another concern raised by the Joint CLECs relates to the timing of reaching the sixth consecutive month of non-conforming behavior between six-month reviews.

Qwest responded by acknowledging the Board's concern from its conditional statement that a cap on escalation might limit Qwest's incentives to correct problems. Qwest suggested the new language would allow the Board the flexibility to lift the cap on escalation, if it concludes that Qwest could have avoided the cap through reasonable and prudent efforts and that doing so is in the public interest. Qwest proposed to pay any incremental escalation portion to the state, rather than to CLECs for escalation beyond 12 months.

Qwest argued that Joint CLECs provided no coherent explanation that indicated why the Board would not be capable of making a determination as to whether Qwest could have provided conforming performance through reasonable and prudent efforts and whether continued escalation would be in the public interest. Finally, Qwest maintains the 10 percent collar is an appropriate means of providing a "balance" that would ensure Qwest would not be subject to dramatic increases in payment liability without unduly limiting the Board's ability to ensure that Qwest has sufficient incentives to satisfy the performance standards.

The Board finds Qwest did not offer any new substantive information or evidence that would provide insight to the Board to explain why, after taking part in the formulation, test, and design of the PIDs, Qwest could not meet those standards. As the Joint CLECs and other state commissions have noted, Qwest should be meeting them at the time of any 271 application. Similar to the "36 percent cap

language" previously discussed, Qwest inserted language establishing a "reasonable and prudent" standard as "the primary consideration."

Qwest did not respond to the Joint CLECs' concern on the timing of the six-month review on a PID that is five months out of conformity and would not be considered by the Board for continued escalation until the next six-month review.

Though the Board is not ready to recommend the "Sticky Duration" provisions that the Nebraska Commission approved, neither is it persuaded that Qwest should be rewarded with accelerated de-escalation of penalties for meeting the PIDs or a 10 percent cap on escalating payments.

Escalated payments may indeed surpass the cost of any specific service, but it is the value to Qwest in slowing competition that the unlimited cap on Tier 1 escalation addresses. Though, there is no evidence that Qwest would make a strategic business decision on the trade-off of penalties and maintaining monopoly market share, the Board believes it is better to discourage such decisions where possible with provisions in the QPAP. The Board rejects Qwest's request for reconsideration on the issue of placing a cap on escalation beyond the sixth month of Tier 2 payments.

3. Six-Month Plan Review (Qwest comments, pp. 7-9; Joint CLECs reply comments, pp. 2-13; Qwest response, pp. 5-9; AT&T's supplemental authority, May 31, 2002, p. 1, Appendix 1)

As the Board noted in its May 7, 2002, conditional statement,

The Board is concerned with the language of Section 16.0, which requires Qwest's agreement to any addition, deletion, or change of a PID. In both the Texas Plan and the

Colorado Plan, the state commission is the final authority, not the BOC. In the November 6, 2001, QPAP Qwest has added language to include making the review a common review involving all the states and further limits the changes to be considered to add/deletions, classification of only PIDs.⁷

The Board directed Qwest to submit language similar to that approved in Colorado, and directed that it delete language providing Qwest with veto power over changes and limitations related to what could be considered in a review of its QPAP.

Qwest requested the Board reconsider its determination and offered new language for the Board's consideration. Qwest argues that it is not asking the Board to give up any authority it may have to modify the QPAP, independently, under state law. However, Qwest suggests it is inappropriate to ask Qwest to give up rights or concede authority that the Board would not otherwise have under such law. Without waiving any of its rights, Qwest agrees to offer a six-month review process that is significantly more expansive than that provided in the Texas Plan, as approved by the FCC. Qwest states that the proposed new language for Section 16.1 allows the Board to address disputes as to both the addition of new measurements and the modification of existing measurements through a state proceeding. It provides a financial "collar" that would protect Qwest from a significant change to the financial liability under the plan that may result from the expanded scope of the six-month provisions.

⁷ Conditional Statement Regarding Qwest Performance Assurance Plan, issued May 7, 2002, p. 100.

Qwest proposed additional language in Section 16.1.2 that would accommodate changes resulting from a ROC PID industry forum. Qwest indicated that new Section 16.5 would make it clear that the QPAP language is not intended to foreclose any independent state law authority. Section 16.5, as proposed, would provide an automatic stay pending any challenge to changes in the plan beyond those addressed in Section 16.0. Qwest submitted the following language for the Board's consideration:

16. 1 Every six (6) months, beginning six months after the effective date of Section 271 approval by the FCC for the state of Iowa, Qwest, CLECs, and the Iowa Utilities Board shall participate in a review of the performance measurements to determine whether measurements should be added, deleted, or modified; whether the applicable benchmark standards should be modified or replaced by parity standards; and whether to move a classification of a measurement to High, Medium, or Low, Tier 1 or Tier 2. The criterion for reclassification of a measurement shall be whether the actual volume of data points was less or greater than anticipated. Criteria for review of performance measurements, other than for possible reclassification, shall be whether there exists an omission or failure to capture intended performance, and whether there is duplication of another measurement. Any disputes regarding adding, deleting, or modifying performance measurements shall be resolved pursuant to a proceeding before the Board and subject to judicial review. No new performance measurements shall be added to this PAP that have not been subject to observation as diagnostic measurements for a period of 6 months. Any changes made at the six-month review pursuant to this section 16.1 shall apply to and modify this agreement between Qwest and CLEC, subject to a stay, modification or reversal upon appeal or judicial review.

If a CLEC or Qwest repeatedly requests modifications to the plan, without a reasonable level of evidentiary support for the modification, that are not for the effectiveness of the plan itself,

that Participant may be subject to sanctions at the discretion of the Board.

16.1.1 Qwest shall calculate separately, payments owed under the QPAP that do not include changes made at the six-month review ("baseline QPAP") and payments owed under a QPAP revised to reflect changes made at the six-month review ("revised QPAP"). If payments calculated under the revised QPAP are more than 110% of payments calculated under the baseline QPAP, Qwest shall limit payments to the affected CLECs and to the State to a 10% increase ("10% collar") above the total baseline QPAP payment liability. At any six-month review, if the total payment liability for the revised QPAP is below 110% of the total payment liability for the baseline QPAP for the preceding six month period, the revised QPAP shall become the baseline QPAP for the next six month period, otherwise, the same baseline QPAP shall remain in effect for the next six month period.

16.1.2 Notwithstanding section 16.1, if any agreements on adding, modifying or deleting performance measurements as pursuant to section 16.1 are reached between Qwest and CLECs participating in an industry Regional Oversight Committee (ROC) PID administration forum, those agreements shall be incorporated into the QPAP and modify the agreement between CLEC and Qwest at any time those agreements are submitted to the Board, whether before or after a six-month review. Any changes made pursuant to this section shall be subject to and included in the calculation and application of the 10% payment collar identified in section 16.1.1.

16.2 – 16.4 (omitted from this discussion)

16.5 Nothing in this QPAP precludes the Board from modifying the QPAP based upon its independent state law authority, subject to judicial challenge. If the Board orders a change to the QPAP that is outside the scope of issues identified in sections 16.1, 16.1.2, 16.2, 16.3 and 16.4 without Qwest's agreement, the Board decision shall be stayed automatically during the course of any judicial challenge up to issuance of a final non-appealable order on the merits.

The Joint CLECs argue that the Board has authority to consider all elements of the QPAP and as a part of that authority should be able to determine for itself a set of standards. The Joint CLECs suggest Qwest's proposed language would make every decision made by the Board, other than adding, deleting; or modifying a PID, either subject to judicial review or subject to a stay, modification, or reversal upon appeal or judicial review.

The Joint CLECs quote the Act, pronouncements of the FCC, and various state commission orders to support the assertion of the broad extent of the Board's authority as it relates to change control over the QPAP in Iowa. Directing the Board's attention to the FCC, the Joint CLECs note that the FCC has indicated that performance assurance plans are generally administered by state commissions and derive from authority the states have under state law or under the Act.

We recognize that states may create plans that ultimately vary in their strengths and weaknesses as tools for post-section 271 authority monitoring and enforcement. We also recognize that the development of performance measures and appropriate remedies is an evolutionary process that requires changes to both measures and remedies over time. We anticipate that state commissions will continue to build on their own work and the work of other states in order for such measures and remedies to most accurately reflect commercial performance in the local marketplace.⁸

In its Georgia and Louisiana Order, the FCC indicated:

We also recognize that the development of performance measures and appropriate remedies is an evolutionary process that requires changes to both measures and

⁸ Verizon Pennsylvania 271 Order, released September 19, 2001, at ¶ 128.

remedies over time . . . Both the Georgia and Louisiana Commissions will continue to subject BellSouth's performance metrics to rigorous scrutiny in their on-going proceedings and audits; thus, it is not unreasonable for us to expect that these commissions could modify the penalty structure if BellSouth's performance is deficient post approval.⁹

The QPAP will be incorporated into Qwest's statement of generally available terms and conditions (SGAT) as Exhibit K. As part of an interconnection agreement, adopted by a CLEC, it then must be reviewed by the Board pursuant to 47 U.S.C. § 252. Section 252 expressly provides the Board the authority to create and enforce a performance assurance plan, as part of an interconnection agreement.

The Wyoming Public Service Commission maintained change control indicating:

The Commission has only the public interest to look after and is not a partisan force in the process. We have also developed considerable familiarity and experience with the issues so ably presented by the parties to the Wyoming and multi-state Section 271 process. The better model for modification of the QPAP is a proceeding before the Commission which preserves the due process and other rights of the parties and retains the Commission's ability to act in the public interest regarding this document.

The Idaho Public Utilities Commission rejected the idea of Qwest maintaining change control as follows:

The QPAP should leave open the possibility that the Commission may broaden the review if necessary to respond to circumstances arising from actual experience with the QPAP. In addition, Section 16.1 of the QPAP describing the six-month review does not permit changes

⁹ BellSouth Georgia/Louisiana Order, released May 15, 2002, at ¶ 294.

without Qwest agreement. That language must be modified to state that Qwest will make changes if the Commission so directs, whether Qwest agrees or not with the changes.

The Washington Utilities and Transportation Commission indicated:

We disagree with Qwest that the Commission has no authority under state or federal law to order Qwest to amend the QPAP during the six-month review process. The Commission has broad authority to regulate the rates, services, facilities and practices of telecommunications companies in the public interest, and to promote competition in the provision of telecommunications services. In addition, section 261(c) of the Act provides:

Nothing in this part precludes a State from imposing requirements on a telecommunications carrier for intrastate services that are necessary to further competition in the provision of telephone exchange service or exchange access, as long as the state's requirements are not inconsistent with this part or the [FCC's] regulations to implement this part.

Section 252(f) of the Act provides that a Bell Operating Company "may prepare and file with the state commission a statement of generally acceptable terms and conditions." The SGAT is also a "voluntary" filing, yet Qwest has not disputed the Commission's authority to order changes to the SGAT. Qwest intends to incorporate the QPAP into the SGAT as Exhibit K.

Qwest, in its reply comments on this issue, maintained its proposal is a reasonable effort to "balance opposing concerns," as encouraged by the FCC. Qwest suggested the Joint CLECs essentially oppose the idea of any permanent structure for the QPAP. Qwest suggests the opposition is premised on three erroneous arguments.

First, the 1996 Act says nothing about authority to establish such plans -- much less to rewrite them. Section 271(d)(3)(C) of the Act does not provide for any statutory role by state commissions in determining whether the public interest standard is met. Qwest points out that the state commissions' statutory consultative role is confined to the requirements of Section 271(c) -- the satisfaction of the 14-point competitive checklist and the Track A/Track B determination about local competition in the state.

Second, Qwest notes that the Joint CLECs appear to disagree that the approach proposed by Qwest here is similar to the balance ultimately struck by the Colorado Commission, after its remand to address this issue. According to Qwest's response, the Colorado Commission has provided that absent "highly exigent" circumstances, the basic architecture of the plan will not be addressed during the six-month review process.¹⁰ This includes changes to statistical methodology, payment caps, or the payment regime structure, or indeed any other change that does not relate directly to measuring and/or providing payments. Where such exigent circumstances do exist, Section 18.7.1 of the Colorado plan would provide for an automatic stay pending judicial review of any such changes.

Third, the Joint CLECs have argued that the FCC has acknowledged the power of state commissions to modify performance assurance plans, under state or federal law. However, Qwest points out that the FCC has approved the Texas plan

¹⁰ See Colorado Performance Assurance Plan, § 18.7.

and its progeny, substantially *limiting* such authority, as a model that is "effective in practice." As the Joint CLECs note, the FCC has also acknowledged the role of the state commissions in *administering* such plans, and it has recognized that such commissions may participate in a process of modifying them. Qwest notes that the FCC has never had occasion to address the question whether a state commission can impose a unilateral right to rewrite the plan over the objection of the company that actually designed the plan for submission to the FCC in the first instance. As the Colorado Commission noted, this is "a tricky issue" that it "has sedulously avoided."

On May 31, 2002, AT&T provided for the Iowa record the language submitted by Qwest to the North Dakota Public Service Commission. AT&T argues that the North Dakota language offered by Qwest, "gives the North Dakota Public Service Commission unfettered discretion on administering the performance assurance plan."

The main differences between what was submitted to the Board and that submitted in North Dakota is the broad statement of the North Dakota Public Service Commission's authority and deletion of the following language; "automatic stay during the course of any judicial challenge up to issuance of a final non-appealable order on the merits," which appears in the proposed language for Iowa's QPAP Section 16.5.

The Board is not convinced that an automatic stay until judicial review on any QPAP issue that is not delineated in Section 16.0 is the right course of action. This proposed language is the opposite of what the Board instructed Qwest to file, putting more limits on the Board than the original language. The automatic stay provisions

proposed are unnecessary and appear to have been rejected in many of the other Qwest states.

The Board is concerned that an automatic stay would reduce the efficiency of the plan review. If Iowa joins with other states to review the plan and Qwest disagreed with an agreed upon course of action, Iowa alone should not be saddled with the automatic stay. Additionally, there is little clarity provided as to what the next step would be following the stay.

Qwest also proposes in Section 16.1.1 that payments made after implementation of a "Revised Plan" be capped at 110 percent above the plan payments prior to the revisions. It appears to the Board that this is an artificial cap that limits the effectiveness of Board ordered changes and might provide Qwest with an incentive to continue with the actions that precipitated the changes in the plan.

The Board will deny Qwest's request for reconsideration on the six-month plan review and the proposed automatic stays, limitations on scope of the six-month plan review, and the 110 percent caps. Each of these proposals are rejected by the Board.

4. 100 Percent Cap on Interval Measurements

In its May 7, 2002, conditional statement the Board rejected Qwest's proposed language and the facilitator's finding that a cap of 100 percent should be used to limit the interval measurement formula. Qwest and the facilitator suggested an "arithmetic compromise," of the 100 percent formula limit, to capture some of the severity related to the number of days that the miss exceeds the set interval measurement and to

protect Qwest from paying penalties on orders that were not actually placed. CLECs argued capping the formulas outcome at the 100 percent level would not capture the true "severity" of the interval miss. CLECs argued that these severe misses were the most damaging to the CLEC's business and capping their effect in payments reduced the incentive for corrective action by Qwest.

The Board noted:

It appeared that Liberty missed the basic premise of the CLEC argument, which was that a 100 cap on interval measurements removes a payment increase factor that would incorporate the severity of the misses. The Board directs Qwest to submit proposed language to remove the 100 percent cap on interval measurements from Section 8.2.1.2.¹¹

Qwest disagreed with the Board's conclusion and requested the Board reconsider its determination regarding the 100 percent cap. Qwest offered the following example:

First, assume that Qwest's average retail installation interval parity result is 3 days, and that a CLEC has 10 orders, for which its average interval is 4.5 days. Then further assume that these 10 orders include two "misses," one severe (20 days) and one not (4 days), with the remaining orders meeting the retail standard (3 in 2 days and 5 in 3 days). Here, under the formula in Section 8.2.1.2, the payment calculation is as follows:"

$$\frac{4.5 \text{ day CLEC average} - 3 \text{ day Qwest average parity result}}{3 \text{ day Qwest average}} = 50\%$$

$$50\% * 10 \text{ orders} * 800 = \$4,000$$

¹¹ Conditional Statement Regarding Qwest Performance Assurance Plan, issued May 7, 2002, p. 122.

A payment of \$2,000 per order is certainly a premium over the standard \$800 per occurrence payment. That higher payment number is directly attributable to the severity of the 20-day miss and the fact that the formula requires multiplication by the total number of orders, not simply the two missed ones.

If Qwest missed the interval by an even greater amount on any of these orders, the payments would continue to escalate, up to the 100% cap. For example, assume that the 20-day interval orders used above were increased to a 26-day interval, and that the 4-day interval orders were increased to a 13-day interval. The total days interval would increase by 15 days, for a new total of 60 days. This, in turn, would result in a CLEC average interval of 6 days (60 days / 10 orders). The new payment calculation would be as follows:

$$\frac{6 \text{ day CLEC average} - 3 \text{ day Qwest average parity result}}{3 \text{ day Qwest average}} = 100\%$$

$$100\% * 10 \text{ orders} * 800 = \$8,000$$

Qwest argues that its proposed "arithmetical compromise" deals with the severity of misses in a way that lies well within the FCC's zone of reasonableness.

Joint CLECs argue that, the FCC, the Colorado, Washington, and Iowa state commissions all shared the same view on the severity of misses, that the more severe the performance misses, the higher the payment liability should be.

Joint CLECs also argued that an arithmetical average looks at the CLEC retail volumes in their entirety. An average can be worse than the standard performance level if many transactions miss the standard by a little, or if a few transactions miss the performance standard by a large margin. An average looks at the entire volume

of transactions. The Joint CLECs suggest Qwest's position distorts the purpose of an average by suggesting that the results be examined in terms of "misses."

Qwest responded by noting that Liberty agreed with Qwest that capping payments on interval measures based on averages of multiple orders by CLECs was a reasonable "arithmetical compromise" -- between the need to conform to the plan's given structure based on actual order volumes, and the goal of increasing payments for more severe misses. Qwest also pointed out that five of the other six commissions or staffs in Qwest's region that have addressed the 100 percent cap have rejected AT&T's challenge to it.

The FCC has found that a no cap limit on interval measurements is within the zone of reasonableness. The Board agrees with Joint CLECs that measurements that use averages may at times require no payment, thus ignoring individual misses in an average calculation. Additionally, using averages may increase payments where the severities of "misses" used in the average calculation are great. The Board rejects Qwest's request for reconsideration of the 100 percent cap on interval measurements.

5. Exclusivity and Offset (AT&T request, pp.1-12; Qwest response, pp. 1-4)

AT&T requested the Board reconsider its findings concerning exclusivity and offset. The Board approved Qwest's language in Sections 13.6 and 13.7 concerning these two issues. AT&T expressed concern with the last sentence of Section 13.6, which states:

By electing remedies under the PA, CLEC waives any causes of action based on a contractual theory of liability, and any rights of recovery under any other theory of liability (including but not limited to a regulatory rule or order) to the extent recovery is related to harm compensable under a contractual theory of liability (even though it is sought through a non-contractual claim, theory or cause of action.)

AT&T argued that CLECs would give up both contractual and non-contractual remedies as well as remedies for conduct not even measured by the QPAP such as EEL and DSL provisioning. AT&T requested that Section 13.6 be modified by removing the sentence quoted above to bring it more in line with Liberty's stated intention and closer to the Texas plan by allowing CLECs to seek remedies elsewhere regarding non-contractual matters.

Concerning the issue of offset, AT&T requested the Board reconsider the language in Section 13.7 that would allow Qwest to determine offset of damage awards against any payments already made under the QPAP. AT&T contends that the finder of fact is the appropriate party to determine offset. Additionally, AT&T argued that leaving it to Qwest to decide when offset is appropriate, would leave the door open to unreasonable litigation and appeal.

Qwest responded by indicating that Qwest and AT&T have recently reached agreement on language to embody these principles, and noting that the agreed to language was recently approved by the North Dakota Public Service Commission in its Interim Consultative Report on the QPAP, filed May 22, 2002. Qwest suggested the agreed-to language would replace the present provisions of Sections 13.6 and 13.7 with the following language:

13.6. This PAP contains a comprehensive set of performance measurements, statistical methodologies, and payment mechanisms that are designed to function together, and only together, as an integrated whole. To elect the PAP, CLEC must adopt the PAP in its entirety in its interconnection agreement with Qwest in lieu of other alternative standards or relief for the same wholesale services governed by the QPAP. Where alternative standards or remedies for Qwest wholesale services governed by the QPAP are available under rules, orders, or contracts, including interconnection agreements, CLEC will be limited to either PAP standards and remedies or the standards and remedies available under rules, orders, or contracts and CLEC's choice of remedies shall be specified in its interconnection agreement.

13.7. Any liquidated damages payment by Qwest under these provisions is not hereby made inadmissible in any proceeding related to the same conduct where Qwest seeks to offset the payments against any other damages a CLEC may recover; whether or not the nature of the damages sought by the CLEC is such that an offset is appropriate will be determined in the relevant proceeding.

The new language clarifies the remedy procedures for CLECs regarding non-contractual issues and is consistent with the intent of the Texas plan, which was the initial model for the Iowa QPAP. Additionally, the compromise reached in Section 13.7 related to the offset issue will avoid future litigation on the appropriateness of any determination by removing that authority from Qwest and placing it with the finder of facts. The Board will approve the new language for Sections 13.6 and 13.7 as shown above.

SUMMARY

Assuming Qwest implements each of the conclusions as directed by the Board throughout this conditional statement, the Board is prepared to indicate at this time that the QPAP will provide assurance that the local market will remain open after Qwest receives approval from the FCC to provide in-region interLATA service in Iowa. Additionally, the QPAP is likely to provide incentives that are sufficient to foster post-entry checklist compliance.

IT IS THEREFORE ORDERED:

Any responses to this statement and all future filings and Board orders or statements in this docket must be filed no later than close of business on the third business day following the filing or issuance.

UTILITIES BOARD

/s/ Diane Munns

/s/ Mark O. Lambert

ATTEST:

/s/ Judi K. Cooper
Executive Secretary

Dated at Des Moines, Iowa, this 7th day of June, 2002.