

BEFORE THE NEBRASKA PUBLIC SERVICE COMMISSION

In the Matter of Qwest ) Application No. C-1830  
Corporation, filing its notice )  
of intention to file its Section )  
271(c) application with the FCC ) QPAP APPROVED AS AMENDED  
and request for the Commission )  
to verify compliance with )  
Section 271(c). )  
 ) Entered: April 23, 2002

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BY THE COMMISSION:

This order addresses the adequacy of the proposed performance assurance plan (QPAP) submitted by Qwest Corporation (Qwest) to provide assurance that Qwest will fulfill its requirements under the public interest standard of § 271, in connection with its application for in-region interLATA authority. Under the Telecommunications Act of 1996 (the Act), a Bell Operating Company (BOC) may not provide in-region interLATA service until it has received approval to do so from the Federal Communications Commission (FCC). See 47 U.S.C. § 271.

Section 271(d)(3)(C) of the Act requires a BOC applicant, such as Qwest, to demonstrate that its entry into the in-region interLATA service market satisfies the public interest. Qwest has indicated that it proffered its proposed QPAP to meet the

parameters of this public interest test in Qwest's pursuit of § 271 relief.

Accordingly, the Nebraska Public Service Commission (Commission) notes that a performance assurance plan is designed to ensure that, after the BOC enters the interLATA market, there is a mechanism in place to ensure that it does not "backslide" from the level of performance found to be satisfactory by the FCC in approving the checklist demonstration provided in the § 271 application. According to the FCC, "The public interest analysis is an independent element of the statutory checklist and, under normal canons of statutory construction, requires an independent determination."<sup>1</sup> As part of the public interest determination, this Commission must consider whether Qwest "would continue to satisfy the requirements of § 271 after entering the long distance market."<sup>2</sup>

The FCC has determined that effective performance monitoring and enforcement mechanisms (i.e., a performance assurance plan) constitute probative evidence as to public interest being met in the particular state.<sup>3</sup> Thus, as Qwest has stated, Qwest is proffering its proposed QPAP to assure this Commission and the FCC that it would continue adhering to the requirements of § 271 post-entry.

According to the FCC, there are five relevant factors for this Commission to consider in determining if Qwest's plan meets the public interest test. Those factors are as follows:

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

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<sup>1</sup> See *Application of Bell Atlantic New York for Authorization Under Section 271 of the Communications Act to Provide In-Region, InterLATA Service in the State of New York*, Memorandum Opinion and Order, CC Docket 99-295, ¶ 423 (December 22, 1999) (*Bell Atlantic New York Order*).

<sup>2</sup> *Id.* at ¶ 429.

<sup>3</sup> *Id.*

- 5) Reasonable assurances that the reported data is accurate.<sup>4</sup>

### Procedural History

In August 2000, 11 of Qwest's 14 states participating in Qwest's Regional Oversight Committee (ROC), including Nebraska, invited interested parties to participate in a collaborative process (the ROC PEPP collaborative) designed to seek creation of a consensus performance assurance plan (PAP). Staffs of the state commissions, competitive local exchange carriers (CLECs) and Qwest participated in the collaborative. Five multi-day workshops, a number of conference calls and numerous exchanges of proposals, supporting data and other information occurred from October 2000 through May of 2001.

The statistical methods and payment structure of the performance assurance plan approved by the FCC in SBC Communications, Inc.'s application under 47 U.S.C. § 271 for the state of Texas, was used by Qwest as the starting point in the ROC PEPP collaborative. Through the collaborative process, consensus was reached on a number of issues, including several modifications to the Texas plan.

After Qwest unexpectedly determined that no further progress would be made within the PEPP collaborative, the PEPP collaborative activities came to a halt. However, after CLECs and state commission staffs raised concerns about what appeared to be a premature conclusion of the PEPP review process, this Commission, along with other state commissions, engaged Liberty Consulting to hear the remaining issues under the auspices of the multi-state § 271 collaborative (Multi-State Proceeding). The Nebraska Commission joined the Multi-State Proceeding by an order dated July 11, 2001, for the review of what is now called Qwest's Performance Assurance Plan (QPAP). Commission staff participated in the Multi-State Proceeding with staff from eight other states to evaluate and develop a recommendation on the proposed performance assurance plan.

The Multi-State Proceeding began its QPAP review with Qwest submitting its version of the revised QPAP, as well as supporting comments to John Antonuk, Liberty's facilitator (Facilitator). After various procedural issues were resolved by conferences and briefing, the CLECs and state commission staffs then had an opportunity to comment on the plan, followed by hearings held during the weeks of August 13 and 27, 2001. On

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<sup>4</sup> *Id.* at ¶ 433

October 22, 2001, the Antonuk Report (Antonuk Report) was released. The Commission subsequently solicited further comments from the parties and held oral arguments on the proposed Nebraska QPAP on November 27, 2001. Subsequently, parties have made various supplemental filings that have become part of the record in Nebraska.

## O P I N I O N   A N D   F I N D I N G S

### A. General

1. Qwest argues that this Commission should not disturb the compromise developed by the facilitator and indicated that the Commission should rely exclusively on the findings of the Antonuk Report. However, to do so, would disregard the insightful and persuasive findings of various other commissions and commission staffs.

2. Therefore, the Commission has reviewed the findings and comments made by the chairperson of the Colorado Public Utilities Commission, Raymond Gifford; Utah Division of Public Utilities advocacy staff; and Dr. Buster Griffing PhD., from the New Mexico Public Regulation Commission Staff; as well as reviewed plans endorsed by the FCC including the Texas plan that Qwest indicated it modeled its version of the QPAP after.

3. While the Commission has found the multi-state workshop process to be a valuable and efficient way of developing issues and better understanding the parties' points of view, we cannot abdicate our regulatory responsibility to a third party. The Nebraska Commission is the body that must decide what is in the "public interest" for the citizens of Nebraska.

4. Finally, the Commission notes that the proposed QPAP is only "voluntary" to a certain extent. The Commission agrees with Chairperson Gifford, of the Colorado Public Utilities Commission, that Qwest's choice to provide a PAP is only voluntary to the extent that pursuing § 271 approval is voluntary. Once Qwest receives § 271 approval, a performance assurance plan is mandatory.

5. The proposed QPAP must ultimately provide the necessary assurances that Qwest will live up to its obligations under § 271 if it is allowed to enter the in-region long distance market. Overall, the FCC looks to see whether a plan is likely to be effective "in practice" in deterring and enforcing against backsliding behavior by the BOC. The Nebraska Commission does not believe that the FCC requires, nor does it expect, all post-

entry performance plans like the proposed QPAP to be identical. In fact, the FCC has stated,

"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."<sup>5</sup>

6. We also agree with the recent findings of the Wyoming Commission<sup>6</sup> in that, because of the size, character, composition and physical distribution of a particular state's telecommunications markets, as well as the level of cost of providing service in such a state, a state like Nebraska can clearly be different from other states. As such, the Nebraska Commission has a legitimate basis for the additional requirements contained herein, as it is acting in a manner consistent the pro-competitive intent of the federal Act, the FCC and Nebraska law.

7. Therefore, in order to gain this Commission's approval that the public interest prong has been satisfied, Qwest shall be required to implement the changes mandated in this order. Once Qwest has done so, the required changes will be reviewed by this Commission for compliance with this order. If compliance is achieved, this Commission will recommend that the revised QPAP satisfies the public interest for the citizens of Nebraska.

#### B. Cap

8. Regarding the cap, the Commission is concerned with the Antonuk Report finding that establishes a 36 percent cap that utilizes "movement principles" not found in any other plan and not proposed by any of the parties. The Commission notes that Antonuk's solution allowing a four percent upward movement from 36 percent after the Commission finds that the cap would have been exceeded for the prior 24 months is unlikely to ever occur and is certainly inequitable. Qwest would have to exceed the cap for 24 consecutive months before this Commission could

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<sup>5</sup> See Verizon Pennsylvania Order, FCC 01-029, released Sept. 19, 2001, paragraph 128.

<sup>6</sup> See Wyoming Public Service Commission, Order Denying Petition for Reconsideration and Setting Public Hearing and Procedure, Docket No. 70000-TA-00-599 (Record No. 5924), Issued March 27, 2002

raise it. Certainly, this Commission wishes to take a more proactive approach before Qwest performance is so poor that it exceeds the cap for 24 consecutive months.

9. The Commission also notes that the Antonuk movement principles also allow the cap to be decreased (below the FCC threshold of 36 percent) a maximum of four percent at any one time when a consecutive 24-month period demonstrates that payments made were eight or more percentage points less than the cap amount for that period. This Commission notes that the FCC has never allowed a plan to dip below a 36 percent cap, and believes that the public interest principles combined with lack of precedent make Antonuk's position untenable.

10. The Commission has also reviewed the findings of other commissions' staff. Dr. Buster Griffing of the New Mexico Commission staff, a consultant that this Commission has engaged in other matters, indicates that any sort of cap goes against relevant economic principles. Accordingly, Dr. Griffing advocates for a removal of the 36 percent cap.

11. In Utah, the Division of Public Utilities advisory staff raised the cap to 44 percent. The Utah Division of Public Utilities advisory staff allowed a maximum increase of up to four percentage points when the current cap had been exceeded for any consecutive period of 12 months. There is no provision for lowering the cap.

12. Regarding the Colorado approach, the Colorado Commission (through Chairperson Gilford) notes that it agrees with Antonuk's acknowledgement that Tier IX payments under the Colorado Performance Assurance Plan (CPAP) are the same as Tier 1 payments under the QPAP. As Tier IX payments provide compensatory payments to the CLECs, the CPAP does not cap those payments. Other types of payments such as Tier II are capped. However, depending on the Qwest's performance, the Colorado Commission retained the authority to open a proceeding and raise any prescribed cap.

13. The Nebraska Commission also notes that the Louisiana Public Utilities Commission required Bell South, a sister BOC, to utilize a procedural cap such as the one utilized in Colorado. Bell South was required to implement a 44 percent cap in Georgia. Accordingly, the concept of either a procedural cap or a 44 percent cap is hardly unprecedented.

14. Therefore, in light of these findings and the record before us in Nebraska, the Commission is of the opinion that there should be an overall cap of 44 percent. In addition to

the overall cap, there shall be a 24 percent "soft" cap that will require Commission intervention. While the Commission reserves the right to intervene at any time, the Commission will be required to proactively intervene should the "soft" cap be reached in order to investigate the reasons for Qwest's performance deterioration. Such caps are justified in Nebraska, as they will serve the public interest by creating a meaningful and significant incentive for Qwest to comply with designated performance standards, while providing a degree of certainty for Qwest regarding the total liability at risk.

15. However, the Commission is of the opinion that the overall cap should be based upon a more current revenue figure. Therefore, the Commission requires Qwest to utilize the prior year's ARMIS Net Revenue when calculating the current year's overall cap. As telecommunications markets can change dramatically from year to year, the Nebraska Commission is of the opinion that this levels the playing field for both CLECs and Qwest for years to come.

16. The Commission ultimately agrees with the facilitator that providing for such a cap under the plan furthers both the public interest and congressional policy goals, because if the BOCs face too high an entry cost for the 271 market, interLATA competition will be unduly discouraged.<sup>7</sup> However, when CLECs are limited in alternative remedies that they can pursue, such as in this proposed QPAP, a balanced approach must be taken. The FCC has never suggested that unlimited risk of payments was necessary to provide a meaningful financial incentive to a BOC<sup>8</sup>; therefore, this commission believes that a 44 percent cap is within the zone of reasonableness as required by the FCC.

17. Finally, if the annual cap appears to be in jeopardy of being exceeded, the Commission reserves the right to initiate proceedings to minimize adverse impacts that poor Qwest performance may have on CLECs.

#### C. Exclusivity/Offset

18. This Commission has also reviewed Qwest's language regarding exclusivity of remedies and offset. In doing so, the Commission looked at FCC dicta indicating that liability under a PAP is not the only mechanism to offset the BOC's incentive to discriminate. Other incentives of continued compliance include possible federal enforcement actions under 271(d)(6); liquidated damages under interconnection agreements; and remedies asso-

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<sup>7</sup> See Facilitator's Report at 16.

<sup>8</sup> See SBC Texas Order ¶ 424.

ciated with antitrust and other legal actions. FCC TX Order ¶ 424; FCC NY Order ¶ 435.

19. The Qwest language at issue is as follows:

§ 13.5 By incorporating these liquidated damages terms into the PAP, Qwest and CLEC accepting this PAP agree that proof of damages from any non-conforming performance measurement would be difficult to ascertain and, therefore, liquidated damages are a reasonable approximation of any contractual damages that may result from a non-conforming performance measurement. Qwest and CLEC further agree that Tier 1 payments made pursuant to this PAP are not intended to be a penalty. The application of the assessments and damages provided for herein is not intended to foreclose other noncontractual legal and non-contractual regulatory claims and remedies that may be available to a CLEC.

§ 13.6 By electing remedies under the PAP, 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 such recovery is related to harm compensable under a contractual theory of liability (even though it is sought through a noncontractual claim, theory or cause of action.)

§ 13.7 If for any reason CLEC agreeing to this PAP is awarded compensation for the same underlying activity or omission for which Tier 1 assessments are made under this PAP, Qwest may offset the award with amounts paid under this PAP or offset any future payments due under the PAP by the amount of any such award. This section is not intended to permit offset of those portions of any damages allowed by noncontractual theories of liability that are not also recoverable under contractual theories of liability. Nothing in this PAP shall be read as permitting an offset related to Qwest payments related to CLEC or third-party physical damage to property or personal injury. (Emphasis added).

20. The Commission notes that the Qwest proffered QPAP language differs from the FCC mandate, as well as the Texas Plan that Qwest indicates it models its own plan after. Under the Qwest language, there can be no liquidated damages under



interconnection agreements as a CLEC would have to pick the QPAP as its exclusive remedy. Furthermore, Qwest would seemingly be allowed to unilaterally limit remedies associated with antitrust and other legal actions pursuant to §13.6 combined with § 13.7.

21. Also, under the Qwest proposed QPAP, contrary to FCC precedent, CLECs cannot sue for contractual remedies including for measures not even measured by the proposed QPAP. For non-contractual remedies, CLECs can sue, but cannot recover. If the CLECs were able to obtain a judgment in a court of law, Qwest would be able to withhold that payment claiming that it was already paid under the QPAP.

22. Also troubling to this Commission is that the Antonuk analysis on this issue appears to contradict the most current law on the subject. According to the Antonuk Report, Qwest could withhold base damages if a CLEC prevails on an anti-trust claim utilizing his language that "any rights of recovery under any other theory of liability (including but not limited to a regulatory rule or order) to the extent such recovery is related to harm compensable under a contractual theory of liability (even though it is sought through a noncontractual claim, theory or cause of action.)" However, pursuant to *Goldwasser v. Ameritech Corporation*, 222 F.3d 390, 401-02 (7th Cir. 2000), a party is precluded from bringing an anti-trust claim based on Telecommunications Act of 1996 obligations. As such, even though under the relevant case law, a party can not even sue Qwest under an Anti-Trust theory for obligations related to Qwest § 251 duties, Antonuk would allow Qwest to unilaterally withhold those base remedies. The Commission finds that this analysis is fundamentally flawed, as well inconsistent with the FCC's findings in relevant orders.

23. This Commission also agrees with the findings of the Colorado Public Utilities Commission (through its chairperson, Raymond Gifford) that the SGAT is not a normal bilateral contract involving traditional liquidated damage analysis. Chairperson Gifford indicated,

"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. The 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."

24. For these policy and legal reasons, this Commission is enticed by the language of the Colorado Performance Assurance Plan § 16.6. Under that provision, before:

"CLECs shall be able to file an action seeking contract damages that flow from the alleged failure to perform in an area specifically measured and regulated by the CPAP, CLEC must first seek permission through the Dispute Resolution Process...to proceed with the action. The permission shall be granted only if a CLEC can present a reasonable theory of damages for the non-conforming performance at issue and evidence of real world economic harm that, as applied over the preceding six months, establishes that the actual payments collected for non-conforming performance in the relevant area do not redress the extent of the competitive harm."

This language takes into consideration the FCC's mandate of allowing additional mechanisms to offset the BOC's incentive to discriminate.

25. As to Qwest's provisions regarding offset, it is clear that double recovery for the same damages is legally barred.<sup>9</sup> However, offset is a judicial concept for the finder of fact to consider to assure that an aggrieved party does not receive double recovery.<sup>10</sup> The Commission questions why Qwest did not adopt the Texas PAP language (also found in the Colorado CPAP and Utah Advisory Staff Report) which does not preclude Qwest from arguing for offset in the relevant court of law. However, as stated in the Texas Plan § 6.2 "whether or not the nature of damages sought by CLEC is such that an offset is appropriate will be determined in the relevant proceeding," not unilaterally by Qwest in this proceeding.

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<sup>9</sup> See e.g. CJI 4<sup>th</sup> 6:14 (1988).

<sup>10</sup> *Id.*

26. The Commission is thus interested in seeing the Texas and Colorado language regarding offset: "(i)f for any reason CLEC agreeing to the QPAP is awarded compensation for the same or analogous wholesale performance covered by the QPAP, Qwest shall not be foreclosed from arguing that such award should be offset with amounts paid under the QPAP."

27. Accordingly, the proposed QPAP should be edited by Qwest as follows:

§ 13.5 By incorporating these liquidated damages terms into the PAP, Qwest and CLEC accepting this PAP agree that proof of damages from any non-conforming performance measurement would be difficult to ascertain and, therefore, liquidated damages are a reasonable approximation of any contractual damages that may result from a non-conforming performance measurement. Qwest and CLEC further agree that Tier 1 payments made pursuant to this PAP are not intended to be a penalty. The application of the assessments and damages provided for herein is not intended to foreclose other noncontractual legal and non-contractual regulatory claims and remedies that may be available to a CLEC.

(DELETE)

~~§ 13.6 By electing remedies under the PAP, 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 such recovery is related to harm compensable under a contractual theory of liability (even though it is sought through a noncontractual claim, theory or cause of action.)~~

(INSERT)

§ 13.6 CLECs shall be able to file an action seeking contract damages that flow from the alleged failure to perform in an area specifically measured and regulated by the QPAP, however; CLEC must first seek permission through the Nebraska Public Service Commission to proceed with the action. The permission shall be granted only if a CLEC can present a reasonable theory of damages for the non-conforming performance at issue and evidence of real world economic harm that, as applied over the preceding six months, establishes that the actual payments collected for non-conforming

performance in the relevant area do not redress the extent of the competitive harm.

(DELETE)

~~§ 13.7 If for any reason CLEC agreeing to this PAP is awarded compensation for the same underlying activity or omission for which Tier 1 assessments are made under this PAP, Qwest may offset the award with amounts paid under this PAP or offset any future payments due under the PAP by the amount of any such award. This section is not intended to permit offset of those portions of any damages allowed by noncontractual theories of liability that are not also recoverable under contractual theories of liability. Nothing in this PAP shall be read as permitting an offset related to Qwest payments related to CLEC or third party physical damage to property or personal injury.~~

(INSERT)

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

#### D. Trigger of Payments

28. The proposed QPAP incorporates a two-tier system of payments based on Qwest's monthly performance results, with Tier 1 payments made to the CLECs to provide compensation, and Tier 2 payments made to the states to provide additional performance incentives to Qwest. As presented by Qwest, the trigger dates of said payments would vary between Tier 1 and Tier 2.

29. The Commission does not concur with the reasoning behind differentiating between the trigger dates for Tier 1 and Tier 2 payments. As Qwest agrees that it must be in compliance with § 271 before entering the in-region long distance market, the Commission sees no reason to wait a number of months before Qwest would become liable for anti-competitive behavior and thus Tier 2 payments. To do otherwise, would provide Qwest an opportunity to act in an anti-competitive fashion for a number of months only to correct it before a penalty would apply.

30. Therefore, the Commission believes that both Tier 1 and Tier 2 payments shall begin simultaneously after the first month of non-compliance. Qwest is directed to modify its proposed QPAP accordingly.

E. Escalation Cap

31. In its proposed QPAP, Qwest has included a cap as to escalation of payments.<sup>11</sup> Facilitator Antonuk agreed with such a concept. This Commission notes that Dr. Griffing of the New Mexico Advisory Staff, the Colorado Public Utilities Commission (through its Chairperson Raymond Gifford) and the Utah Division of Public Utilities staff have summarily dismissed such a concept. In fact, the Colorado Public Utilities Commission indicated that Qwest's argument to freeze escalated penalties made no logical sense.

32. Antonuk argues that the PID standards may be flawed and thus Qwest will not be able to achieve such standards. However, this Commission agrees more with the views of the Utah Commission Staff. 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.

33. Qwest further argues that Qwest's compliance payments may dwarf CLEC costs to provide service. The Commission, however, agrees with the Colorado Public Utilities Commission, through its Chairperson, who indicated that the argument missed the point because,

"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 this type of strategic action is deterred. Continuous escala-

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<sup>11</sup> See Exhibit K at §6.2.2.

tion of payments for continuous poor performance should help prevent this strategic activity."

34. This Commission also agrees with the comments of Buster Griffing of the New Mexico Advocacy Staff that if Qwest's performance for a performance measurement remains non-compliant for over six consecutive months, then evidence exists that the payment levels have not escalated to the point that would induce Qwest to come into compliance with those performance measurements.

35. 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.

36. Furthermore, Nebraska, like the state of Wyoming, is also concerned about Qwest being "rewarded" through de-escalation after a certain period of corrected performance. If a certain level of payment was required to obtain Qwest compliance, then future failures by Qwest should also be penalized accordingly. Therefore, the Nebraska Commission proposes a modified "sticky" duration.

37. 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.

38. Furthermore, the Nebraska Commission believes that it must take the issue of escalation one step further. Based upon the record before us in Nebraska, the Commission sees no basis for distinguishing between escalating Tier 1 and Tier 2 payments. If Qwest continues to perform at an unsatisfactory level for both Tier 1 measures and Tier 2 measures, there is no logical basis under which Tier 2 payments should not similarly escalate. Therefore, Qwest is directed to create an escalation schedule for Tier 2 payments that mirrors that of Tier 1 payments. Finally, the sticky duration methodology outlined above shall also apply to Tier 2 payments.

## F. Six Month Review

39. This Commission is further concerned that Qwest maintains too much control in the six-month review. It is particularly troubled by proposed QPAP § 16.1, which states, "any changes cannot be made without Qwest approval." As it currently reads, there is no provision in the proposed QPAP for the Commission to be the ultimate determiner of contested issues. Therefore, the Commission is concerned about the ability to change other aspects of the plan as found in the Texas PAP.

40. The Commission has reviewed Colorado's CPAP § 18.6 which indicates,

"...(t)he six-month CPAP review process shall focus on refining, shifting the relative weighting of, deleting, and adding new PIDs. After the Commission considers such changes through the six-month process, it shall determine what set of changes should be embodied in an amended SGAT that Qwest will file in order to effectuate these changes." (emphasis added).

CPAP § 18.7 allows parties to "suggest more fundamental changes to the plan; but unless the suggestion is highly exigent, the suggestion shall either be declined or deferred until the three-year review."

41. The Commission has also reviewed the findings of the Utah Advisory Staff in which they indicated that the Utah Public Service Commission will be the ultimate decision maker in the decision making process to proposed QPAP changes." In addition, the Commission has reviewed Dr. Griffing's (of the New Mexico Public Utilities Commission Staff) determination that the Commission should retain its ability to make changes if the QPAP is not in the public interest. Finally, the Commission has reviewed § 6.4 of the Texas PAP which permits changes to the "remedy plan" whereas the Qwest proposed QPAP does not.

42. The Commission finds that it is in the public interest to assure that the Commission has the ultimate authority to determine if and when changes should be made to the QPAP. Therefore, this Commission reserves the right to initiate a proceeding regarding the QPAP at any time. While the normal review should be periodic and the six-month interval will generally suffice, parties should be able to raise serious

issues before the Commission at any time. The Commission will decide if such issue needs to be immediately addressed or if it should be considered at the next six-month review.

43. Finally, the Commission wants to make clear that it should also have the ultimate authority to change any provisions of the QPAP after notice and hearing.

44. Such proceedings will preserve the due process and other rights of all parties, while retaining the Commission's ability to act in the public interest regarding this document. Qwest shall amend proposed QPAP § 16.1 to incorporate these modifications.

#### G. Audits

45. The audit program in the QPAP is intended to provide assurance that a high level of confidence can be placed in the performance results that Qwest measures. Antonuk's report recommended a multi-state process for audits, as there would be substantial commonality among issues, and that Qwest would face significant costs if all 14 states in its region were to conduct individual audits. Nonetheless, Antonuk also recognized that states needed to retain the ability to potentially conduct their own audits to meet the particular needs and circumstances of the state.

46. Antonuk's report proposes an audit approach that allows for both pre-planned and as-needed testing of Qwest's measurement program. Under such an approach, the states would jointly retain an independent auditor for a two-year period to conduct the audit, and assess the need for individual audits requested by individual CLECs, with the costs of said audits being paid from a portion of Tier 1 and Tier 2 payments.

47. According to its latest proposed QPAP, Qwest has modified the QPAP consistent with the Facilitator's recommendations. The redlined QPAP provides for a two-year audit cycle and a detailed audit plan developed by an independent auditor retained for a two-year period. The proposed QPAP identifies the scope of the audit plan as "identifying specific performance measurements to be audited, the specific tests to be conducted, and entity to conduct them," with specific attention to "higher risk areas identified in the OSS report."

48. The proposed QPAP proposes that a committee of Commissioners from different states would have oversight over the auditor's activities, and would resolve disputes arising



from the audit. Any disagreements between Qwest and CLECs about accuracy or integrity of data would be referred to the auditor.

49. The Nebraska Commission concurs with the facilitator's findings that Qwest's original proposed audit program in § 15 of the proposed QPAP is not sufficient to ensure a high level of confidence in the performance results that Qwest measures. However, while we do want to investigate the possibility of multi-state ROC collaborative in this area, we are not prepared to commit ourselves at this time, to the specific multi-state review process set forth in Qwest's redlined QPAP.

50. The Nebraska Commission believes that it is the state's responsibility to evaluate any issues that may arise over performance results or performance measures, including changes in the way Qwest produces performance results. As such, we prefer to wait and see how the ROC collaborative process develops before agreeing to a specific multi-state review process for an audit process. Therefore, we defer our decision on participation in any multi-state audit process until a later date. To that end, Qwest must replace the language in §§ 15.1 through 15.4 of the redlined QPAP, with the following:

15.1 Any party may request that the Commission conduct an audit of performance results or performance measures. The Commission will determine, based upon requests and upon its own investigation, which results and/or measures should be audited. The Commission may, at its discretion, conduct audits through participation in a collaborative process with other states.

15.2 The costs of auditing will be paid for by Qwest.

15.3 Qwest shall report to the Commission monthly, any changes it makes to the automated or manual processes used to produce performance results including data collection, generation and reporting. The reports must include sufficient detail to enable the parties to understand the scope and nature of the changes.

15.4 In the event of a dispute between Qwest and any CLEC regarding the accuracy or integrity of data collected, generated and reported pursuant to the QPAP, Qwest and the CLEC shall first consult with one another and attempt to resolve the dispute. If the

issue is not resolved within 45 days, either party may request that the Commission consider the matter.

#### H. Audits/Review Expenses

51. The Commission disagrees with Antonuk regarding the placement of Tier 1 and Tier 2 payments into a special fund to cover audit expenses. The QPAP was designed for Qwest and thus all expenses related to its administration should be borne by Qwest. Accordingly, 100 percent of Tier 1 and Tier 2 funds should be paid to the respective CLEC and/or state fund, with the costs of the audit and other administrative activities paid by Qwest. Any costs of review by the State of Nebraska will be paid for out of the state fund to the extent funds are available. Qwest will be responsible for any costs that exceed the funds available from the state fund.

#### I. Payments

52. All Tier 1 payments made by Qwest under the QPAP shall be in the form of cash payments instead of bill credits, unless a CLEC owes Qwest for undisputed accounts receivables that are past due over 90 days.

53. Tier 2 payments that are to go to the state fund shall be deposited into the Nebraska Competitive Telephone Marketplace Fund.

54. Tier 1 and Tier 2 payments shall be made within one month following the due date of the performance measurement report for the month for which payment is being made. Qwest shall pay interest on any late payment and underpayment at the Prime Rate as reported by the Wall Street Journal on the day the payment was originally due. On any overpayment, Qwest is allowed to offset future payments by the amount of the overpayment plus interest at the Prime Rate.

#### J. Plan Implementation

55. The QPAP shall become effective on the date the FCC grants Qwest § 271 relief for the state of Nebraska.

#### K. Compliance Language

56. As the record indicates that Qwest has agreed to incorporate the below-stated language if a commission so orders, this Commission mandates that Qwest incorporate the following language into the proposed QPAP:

§ 13.10 Any payments made by Qwest as a result of the PAP should not: 1) be included as expenses in any Qwest revenue requirement, or 2) be reflected in increased rates to CLECs for services and facilities provided pursuant to § 251(c) of the Telecommunications Act of 1996 and priced pursuant to § 252(d) of the Telecommunications Act of 1996.

C O N C L U S I O N

57. Therefore, in consideration of the findings contained herein, the Commission is of the opinion and finds that Qwest's proposed QPAP should be approved as amended, with direction for Qwest to make the modifications outlined within this order. When such modifications have been incorporated into the Qwest's proposed QPAP, the Commission will review said changes and, if satisfactory, recommend to the FCC that the revised QPAP satisfies the public interest for the citizens of Nebraska.

O R D E R

IT IS THEREFORE ORDERED by the Nebraska Public Service Commission that Qwest shall incorporate the changes outlined in this order.

IT IS FURTHER ORDERED that once Qwest has done so, the required changes will be reviewed by this Commission for compliance with this order.

IT IS FINALLY ORDERED that if compliance is achieved, the Commission will recommend to the FCC that the revised QPAP satisfies the public interest for the citizens of Nebraska.

MADE AND ENTERED at Lincoln, Nebraska, this 23rd day of April, 2002.

NEBRASKA PUBLIC SERVICE COMMISSION

COMMISSIONERS CONCURRING:

Chair

ATTEST:

Executive Director