

IN THE MATTER OF THE APPLICATION OF)
QWEST CORPORATION REGARDING)
RELIEF UNDER SECTION 271 OF THE)
FEDERAL TELECOMMUNICATIONS ACT OF)
1996, WYOMING'S PARTICIPATION IN A)
MULTI-STATE SECTION 271 PROCESS, AND)
APPROVAL OF ITS STATEMENT OF)
GENERALLY AVAILABLE TERMS)
)

Docket No. 70000-TA-00-599
(Record No. 5924)

Final Report to the
Wyoming Public Service Commission

“QPAP Report and Public Interest”
(Group 5A Report)

Prepared on Behalf of the Wyoming Public Service Commission

January 2, 2002



Table of contents

Introduction	1
Qwest Performance Assurance Plan (QPAP)	1
Development of the QPAP	3
Evaluating the QPAP	5
QPAP Basics	6
QPAP Issues:	7
Meaningful and Significant Incentive – Total Payment Liability:	7
1. <i>The 36 Percent of Net Revenues Standard</i>	7
<i>Background:</i>	7
<i>Analysis:</i>	8
<i>Further Analysis</i>	11
<i>Recommendation</i>	12
2. <i>Procedural Caps</i>	13
<i>Background</i>	13
<i>Analysis</i>	13
<i>Further Analysis</i>	15
<i>Recommendation</i>	16
3. <i>Qwest’s Marginal Cost of Compliance</i>	16
<i>Background</i>	16
<i>Analysis</i>	18
<i>Further Analysis</i>	20
<i>Recommendation</i>	20
4. <i>Continuing Propriety of a Cap Based on 1999 Net Revenues</i>	20
<i>Background</i>	20
<i>Analysis</i>	21
<i>Recommendation</i>	21
5. <i>Likely Payments in Low Volume States</i>	21
<i>Background</i>	21
<i>Analysis</i>	21
<i>Recommendation</i>	22
<i>Background</i>	22
<i>Analysis</i>	22

<i>Recommendation</i>	22
6. <i>Relevance of Compensation as a QPAP Goal</i>	22
<i>Background</i>	22
<i>Analysis</i>	23
<i>Recommendation</i>	24
7. <i>Evidence of Harm to CLECs</i>	24
<i>Background</i>	24
<i>Analysis</i>	25
<i>Further Analysis</i>	26
<i>Recommendation</i>	26
8. <i>Preclusion of Other CLEC Remedies</i>	26
<i>Background</i>	26
<i>Analysis</i>	26
<i>Further Analysis</i>	27
<i>Recommendation</i>	27
9. <i>Indemnity for CLEC Payments Under State Service Quality Standards</i>	27
<i>Background</i>	27
<i>Analysis</i>	27
<i>Recommendation</i>	27
10. <i>Offset Provision (Section 13.7)</i>	28
<i>Background</i>	28
<i>Analysis</i>	29
<i>Further Analysis</i>	30
<i>Recommendation</i>	31
11. <i>10. Exclusions (Section 13.3)</i>	31
<i>Background</i>	31
<i>Analysis</i>	31
<i>Recommendation</i>	31
12. <i>SGAT Limitation of Liability to Total Amounts Charged to CLECs</i>	32
<i>Background</i>	32
<i>Analysis</i>	32
<i>Recommendation</i>	32
13. <i>Tier 2 Payment Use</i>	32
<i>Background</i>	32
<i>Analysis</i>	33
<i>Further Analysis</i>	33
<i>Recommendation</i>	33

14.	<i>Three-Month Trigger for Tier 2 Payments</i>	34
	<i>Background</i>	34
	<i>Analysis</i>	34
	<i>Further Analysis</i>	35
	<i>Recommendation</i>	36
15.	<i>Limiting Escalation to 6 Months</i>	36
	<i>Background</i>	36
	<i>Analysis</i>	36
	<i>Further Analysis</i>	38
	<i>Recommendation</i>	39
16.	<i>Splitting Tier 2 Payments between CLECs and the States</i>	39
	<i>Background</i>	39
	<i>Analysis</i>	39
	<i>Recommendation</i>	39
17.	<i>Requiring Payments for Canceled Orders</i>	39
	<i>Background</i>	39
	<i>Analysis</i>	39
	<i>Recommendation</i>	39
18.	<i>Requiring Payments for “Diagnostic” UNEs</i>	40
	<i>Background</i>	40
	<i>Analysis</i>	40
	<i>Recommendation</i>	40
19.	<i>Cooperative Testing</i>	40
	<i>Background</i>	40
	<i>Analysis</i>	40
	<i>Recommendation</i>	40
20.	<i>Adding PO-15 D to Address Due Date Changes</i>	41
	<i>Background</i>	41
	<i>Analysis</i>	41
	<i>Recommendation</i>	41
21.	<i>Including PO-1C Preorder Inquiry Timeouts in Tier 2</i>	41
	<i>Background</i>	41
	<i>Analysis</i>	41
	<i>Recommendation</i>	41
22.	<i>Adding Change Management Measures, Adding a Software Release Quality Measure, Adding a Test Bed Measurement, Adding a Missing-Status-Notice Measure</i>	42
	<i>Background</i>	42

<i>Analysis</i>	42
<i>Recommendation</i>	42
23. <i>Aggregating the PO-1 A and PO-1B Performance Measures</i>	42
<i>Background</i>	43
<i>Analysis</i>	43
<i>Recommendation</i>	43
24. <i>Changing Measure Weights</i>	43
<i>Background</i>	43
<i>Analysis</i>	43
<i>Recommendation</i>	43
25. <i>Eliminating the Low Weighting</i>	43
<i>Background</i>	44
<i>Analysis</i>	44
<i>Recommendation</i>	44
26. <i>LIS Trunks Weighting</i>	44
<i>Background</i>	44
<i>Analysis</i>	44
<i>Recommendation</i>	44
27. <i>Collocation</i>	44
<i>Background</i>	44
<i>Analysis</i>	45
<i>Recommendation</i>	45
28. <i>Including Special Access Circuits</i>	45
<i>Background</i>	45
<i>Analysis</i>	45
<i>Further Analysis</i>	46
<i>Recommendation</i>	46
29. <i>Proper Measure of UNE Intervals</i>	46
<i>Background</i>	46
<i>Analysis</i>	46
<i>Recommendation</i>	46
30. <i>Low Volume CLECs</i>	46
<i>Background</i>	47
<i>Analysis</i>	47
<i>Recommendation</i>	47
31. <i>6-Month Plan Review Limitations</i>	47
<i>Background</i>	47

<i>Analysis</i>	48
<i>Further Analysis</i>	49
<i>Recommendation</i>	49
32. <i>Monthly Caps</i>	49
<i>Background</i>	49
<i>Analysis</i>	49
<i>Recommendation</i>	49
33. <i>Sticky Duration</i>	49
<i>Background</i>	50
<i>Analysis</i>	50
<i>Further Analysis</i>	50
<i>Recommendation</i>	50
34. <i>Low Volume Critical Values and Applying the 1.04 Critical Value to 4-Wire Loops</i>	50
<i>Background</i>	51
<i>Analysis</i>	51
<i>Recommendation</i>	52
35. <i>Measures Related to Low Volume, Developing Markets and Minimum Payments</i>	52
<i>Background</i>	52
<i>Analysis</i>	52
<i>Recommendation</i>	52
36. <i>100% Caps for Interval Measures</i>	52
<i>Background</i>	52
<i>Analysis</i>	53
<i>Recommendation</i>	53
37. <i>Assigning Severity Levels to Percent Measures</i>	54
<i>Background</i>	54
<i>Analysis</i>	54
<i>Recommendation</i>	54
38. <i>Self-Executing Mechanism, Assurances of the Reported Data’s Accuracy, and Other Issues</i> ..	54
<i>Background</i>	54
<i>Analysis</i>	55
<i>Further Analysis</i>	57
<i>Recommendation</i>	57
Public Interest	58
Introduction	58
Public Interest Issues	60

1. <i>UNE Prices</i>	60
<i>Background</i>	60
<i>Analysis</i>	61
<i>Further Analysis</i>	61
<i>Recommendation</i>	62
2. <i>Intrastate Access Charges</i>	62
<i>Background</i>	62
<i>Analysis</i>	62
<i>Recommendation</i>	63
3. <i>Post-Entry Assurance Plan</i>	63
<i>Background</i>	63
<i>Analysis</i>	64
<i>Recommendation</i>	64
4. <i>Lack of Competition</i>	64
<i>Background</i>	64
<i>Analysis</i>	64
<i>Further Analysis</i>	65
<i>Recommendation</i>	65
5. <i>Prior Qwest Conduct</i>	65
<i>Background</i>	65
<i>Analysis</i>	66
<i>Further Analysis</i>	67
<i>Recommendation</i>	67
6. <i>Structural Separation</i>	67
<i>Background</i>	67
<i>Analysis</i>	68
<i>Further Analysis</i>	68
<i>Recommendation</i>	68
7. <i>Sustained Checklist Compliance</i>	68
<i>Background</i>	68
<i>Analysis</i>	69
<i>Recommendation</i>	69
8. <i>Inducing Competition</i>	69
<i>Background</i>	69
<i>Analysis</i>	69
<i>Recommendation</i>	70
9. <i>Other Issues</i>	70

<i>Background</i>	70
<i>Analysis</i>	71
<i>Recommendation</i>	71

Final Report to the Wyoming Public Service Commission

“QPAP Report and Public Interest” (Group 5A Report)

Prepared on Behalf of the Wyoming Public Service Commission

Introduction

QSI Consulting submits this report on the Qwest Performance Assurance Plan (QPAP) and Public Interest to the Wyoming Public Service Commission (WPSC). This report deals with the QPAP issues to which the Facilitator has proposed resolutions which have direct bearing on the form of the SGAT as well as the Public Interest provisions.

Qwest Performance Assurance Plan (QPAP)

Performance assurance plans have become the vehicle by which Bell Operating Companies (“BOCs”) such as Qwest partially fulfill the Section 271 requirement¹ that their applications to provide in-region interLATA service are consistent with the public interest. The FCC has said that a BOC must open its local market to competition prior to Section 271 approval and that it must provide assurances the local market will remain open after a BOC receives Section 271 approval².

The FCC has spoken most recently about the role of post-entry enforcement mechanisms such as the PAP in the Pennsylvania 271 Order

¹ 271(d)(3)(C) 1996 Telecommunications Act.

² Memorandum Opinion and Order, CC Docket No. 97-137 (rel. August 19, 1997), paragraph 390 (Michigan Order).

... In prior orders, the Commission has explained that one factor it may consider as part of its public interest analysis is whether a BOC would have adequate incentives to continue to satisfy the requirements of section 271 after entering the long distance market. Although it is not a requirement for section 271 authority that a BOC be subject to such performance assurance mechanisms, the Commission previously has stated that the existence of a satisfactory performance monitoring and enforcement mechanism would be probative evidence that the BOC will continue to meet its section 271 obligations after a grant of such authority.³

In prior section 271 orders, the Commission has reviewed performance assurance plans modeled after either the New York Plan or the Texas Plan.⁴ Although similar in some respects, the current Pennsylvania plan, however, differs significantly from each of these two plans. As stated above, we do not require any monitoring and enforcement plan and therefore, we do not impose requirements for its structure if the state has chosen to adopt such a plan.⁵ *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.*⁶ *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 actual commercial performance in the local marketplace.* (emphasis added)⁷

³ *Ameritech Michigan Order*, 12 FCC Rcd at 20748-50, paras. 393-398. We note that in all of the previous applications that we have granted to date, the applicant was subject to an enforcement plan administered by the relevant state commission to protect against backsliding after BOC entry into the long-distance market.

⁴ In our other section 271 applications, the relevant state commission had adopted either the New York or Texas plans for use in their respective state. *See SWBT Texas Order*, 15 FCC Rcd at 18560, para. 421; *Bell Atlantic New York Order*, 15 FCC Rcd at 4166-67, para. 433.

⁵ *SWBT Texas Order*, 15 FCC Rcd at 18558-59, para. 423; *Bell Atlantic New York Order*, 15 FCC Rcd at 4166-67, para. 433.

⁶ *See Ameritech Michigan Order*, 12 FCC Rcd at 20748, para. 393. The Commission has previously predicted that the enforcement mechanisms developed in different plans developed by New York and Texas would be effective in practice. *See, e.g., Bell Atlantic New York Order*, 15 FCC Rcd at 4166-67, para. 433. This prediction was based on five characteristics: potential liability that provides a meaningful and significant incentive to comply with the designated performance standards; clearly-articulated, pre-determined measures and standards, which encompass a comprehensive range of carrier-to-carrier performance; a reasonable structure that is designed to detect and sanction poor performance when it occurs; a self-executing mechanism that does not leave the door open unreasonably to litigation and appeal; and reasonable assurances that the reported data are accurate. *Id.*; *see also SWBT Texas Order*, 15 FCC Rcd at 18558-59, para. 423.

⁷ *Verizon Pennsylvania Order*, FCC 01-029, Released September 19, 2001, para. 127-128.

Development of the QPAP

The FCC makes it clear that states have the ability to create PAPs of their own design. Wyoming began its consideration of a PAP in August 2000 when it decided to take part in a collaborative process with ten other states that are members of the Qwest Regional Oversight Committee (“ROC”). The process acquired the title of Post-Entry Performance Plan (“PEPP”) Collaborative. During its course there were six multi-day workshops October of 2000 to May of 2001. The PEPP was different from the OSS Test Collaborative in that much less occurred between workshops. There were no regular weekly conference calls and the exchanges between parties were less frequent. The PEPP Collaborative participants included staff members, CLECs, and Qwest.

The PEPP process ended in May 2001 when Qwest’s representatives said Qwest would not participate in additional meetings. With this turn of events the seven commissions then participating in these multi-state workshops, all of which were PEPP participants, decided that the section 271-affecting aspects of the performance assurance plan expected to be filed by Qwest (QPAP) would best be considered in these workshops. Later, the commissions of Nebraska and Washington also decided to participate in the multi-state workshops, insofar as they would address the public-interest aspects of the QPAP.

A telephonic procedural conference ensued on August 3, 2001. There was broad participation in that procedural conference, which included state commission staffs, CLECs, and public counsel not already involved in the workshops. Most of the new participants were either involved in the PEPP Collaborative efforts, or in 271 proceedings before the Washington or Nebraska commissions; however, some either had been

inactive participants in the multi-state workshops or sought intervention in them after the decision to include QPAP consideration.

The results of that conference were used to establish a set of procedures and schedule for producing a report that would provide the nine commissions with a series of proposed conclusions and recommendations addressing the public interest issues raised by the QPAP. The procedures allowed all participants to file comments and testimony in response to the QPAP, which Qwest filed on or about July 16, 2001 and in substantially the same form with all nine commissions. Qwest was then permitted to file pre-hearing responses to those comments.

Hearings were scheduled for and held during the weeks of August 13, and August 27, 2001. Those hearings included direct, rebuttal, and surrebuttal testimony. In all, 11 witnesses testified during seven days of hearings. The Report states the purpose of the workshops was not to revisit agreements already made in the PEPP Collaborative. The PEPP participants, despite their widely diverging views and mutual impatience with each other's positions, succeeded in reaching a number of agreements. Where a participant could show that substantial or complete agreement was reached during the efforts of the collaborative, the agreement was accorded significant but not determinative weight, when examining previously unraised proposals or positions in opposition to those taken earlier. The decision not to re-open most of the agreements was intended to not disturb the delicate balance of those agreements.

Complicating the matter was that some PEPP participants, including Staff, felt the abrupt end to the process meant that some of the supposed agreements were still tentative. Some of these parties were withholding judgment on the agreements until the

full range of issues had been considered. Significant evidence of the fluid nature of the PEPP was that it came to a halt just two days after Qwest submitted a new PAP proposal. Change continued through consideration of the QPAP as the QPAP filed by Qwest in these proceedings contained material changes from that last one provided to the PEPP collaborative.

Evaluating the QPAP

The FCC has set forth criteria by which PAPs are to be evaluated. These criteria are:

- 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

The Facilitator added a sixth criterion.

Clearly, where agreement was reached through compromise, we needed to be careful not to support an improvement in what party got (what) without considering what had been given in return. This report largely addresses issues on their individual merits, but there are a significant number of cases where maintaining the general balance that resulted from the PEPP collaborative contributed to conclusions and recommendations.⁸

⁸ Page 2, QPAP Report, October 22, 2001.

The QPAP recommended by the Facilitator in the QPAP Report complies with the five criteria in many areas. Many parties, however, find that it is flawed in ways that call into question whether the first and third of these criteria will be met. Many parties also believe the Facilitator, who did not participate in the PEPP process, has given too much weight to the work of the PEPP with his sixth criterion. The strength of the agreements reached in that process varied greatly. Moreover, several issues (e.g., overall cap, treatment of Tier 2 payments) did not receive serious consideration until the workshops because other issues consumed the attention of the PEPP participants. Therefore, taking the QPAP presented by Qwest in the workshops as representative of a consensus position on such issues is unwarranted. There appears to be a feeling among parties that the Facilitator rejected suggestions that would have improved the QPAP because he gave too much weight to retaining what he perceived to be the balance of the QPAP presented to him by Qwest.

QPAP Basics

The QPAP contains performance measures that Qwest must comply with as it serves CLECs. If Qwest's performance falls short of the standards (some are benchmarks, some are parity with Qwest's performance to itself), it must make payments to either CLECs or to states, according to payment schedules included in the QPAP. Payments to CLECs are called Tier 1 payments and are intended to mitigate if not fully compensate the loss to CLECs of the noncompliant performance. Payments to states are called Tier 2 payments. The rationale for these payments is twofold. The data for some performance measures cannot be separated by CLEC, yet the service is important to CLECs. Thus, Qwest

should make payments for noncompliant performance, but there is no way to allocate the payments among CLECs. Thus, states receive the money. For performance measurements that can be identified by CLEC, the Tier 2 payment represents compensation to consumers for the loss to them of reduced competition that likely will be the result of noncompliant service by Qwest to CLECs.

QPAP Issues:

Meaningful and Significant Incentive – Total Payment Liability:

1. The 36 Percent of Net Revenues Standard

Report page 12, Qwest comments page 2, AT&T comments page 6, New Mexico Staff comments page 7, WPC comments page 3, CAS comments page 3.

Background:

The QPAP filed by Qwest in the multi-state 271 proceeding included a yearly cap on payments of 36% of ARMIS net intrastate revenues. This cap has been described as a “hard” cap. Various parties to the multi-state proceeding have criticized this hard cap, as potentially not providing appropriate incentives for Qwest to comply with the terms and conditions of the SGAT.

The Facilitator recommends a 36 percent overall annual cap as a starting place and provides for increasing or decreasing the cap as Qwest performance varies. The Facilitator’s recommendation has also come under attack, in that it was never discussed in any of the workshop proceedings, and that it may have the same weakness associated with the cap proposed by Qwest with respect to providing sufficient incentives for Qwest to meet its 271 obligations.

Analysis:

- To begin, it must be understood that these caps play an incredibly important role in ensuring that Qwest will comply with its 271 obligations in Wyoming. The terms and conditions of the SGAT, no matter how carefully crafted to ensure that competition can thrive, would be meaningless if it is in Qwest's best interest to not comply, and to pay the QPAP penalties as a "cost of doing business". In other words, the SGAT is meaningless if Qwest does not have a strong financial incentive to play by the rules of the SGAT.
- The Facilitator's recommendation of an annual overall cap on Qwest's payments of 36 percent, with a provision for increasing or decreasing the cap in accordance with Qwest performance, may not ensure the incentives will be sufficient. The existence of the cap, any cap, allows for the possibility that the incentive for Qwest may not be sufficient.
- A cap also creates administrative problems that would be avoided in its absence.
- The guiding principle in this analysis is the economic principle that if the benefit to a firm of a behavior exceeds its cost, the firm will rationally choose to continue the behavior.
- This principle has application to the QPAP in that an overall annual cap can act to limit the cost to Qwest of failing to provide wholesale service to CLECs that complies with the standards developed for the performance measurements in the QPAP. This limit on the cost to Qwest could leave it in the position where the rational choice for it will be to continue to discriminate against

CLECs, thus damaging the ability of those firms to compete and denying consumers the benefits of competition.

- In such a case, the capped payments would be a “cost of doing business” for Qwest.
- The Facilitator criticizes the various parties who questioned the effectiveness of a 36% cap, saying that those parties did not provide guidance with respect to what level of payment would be sufficient. However, such criticism may not be warranted. Because only Qwest knows what level would provide the incentive for compliance, other parties should not be expected to have that information. The Facilitator provided no economic basis for the 36% level that is the basis for his recommendation. This is not surprising, since the Facilitator is not in any better position to know the critical level than any of the other parties other than Qwest.
- By removing the annual cap the issue of what the proper level would be is entirely avoided and the determination to comply with the plan would fall entirely to Qwest. This is because, with continued non-compliance, the “cost of doing business” would eventually reach a point where it would cost more to discriminate against CLECs than to comply with the SGAT. In other words, in the absence of a cap, the Commission is certain that Qwest will have the economic incentive to comply with its obligations. This also eliminates the question as to whether the cap is too high or too low.
- Without a cap, the only guideline for deciding whether there will be discriminatory or compliant behavior is which behavior will most benefit

Qwest, and Qwest will be the only body that has to actively answer that question. Qwest is also best suited to make that decision, having the best grasp of any party to the QPAP of the benefits and costs of its actions.

- The Facilitator also seems to believe that removing the cap guarantees that Qwest will have total remedies in excess of 36 percent. It writes of plan incentives imposing “a price on in-region, InterLATA entry that it would be irrational for a BOC to pay for the privilege of such entry.” That outcome does not logically follow from a QPAP with no annual cap. It is likely that the breakeven point for marginal cost and marginal revenue for Qwest is less than 36 percent. In that event, the cap is irrelevant. However, should the benefits of discrimination by Qwest be larger than 36 percent, having a cap of that size in place creates the conditions for abuse by Qwest. In either case, a set hard cap makes no sense, and only illustrates the arbitrary nature of a set hard cap, no matter where it is set.
- The Washington Public Counsel (WPC) advocates against a hard cap, and strongly recommends that if there should be a cap on payments, that the QPAP should include a “carry-forward” mechanism. The WPC supports the Facilitator’s recommendation to include a mechanism to address harm to CLECs that occurs late in the year, after the cap has been reached, but notes that in order to provide an appropriate incentive for Qwest not to provide inferior service after the cap has been reached, a carry forward mechanism is necessary. The WPC offers language at page 8 of its comments that incorporate these provisions.

- Administratively, the absence of a cap would eliminate the WPC's concerns. First, there is no chance that CLECs due to receive payments at the end of a year will find there is no money to pay them. Hence, there is no need to develop an elaborate scheme by which CLECs that received payments earlier in the year have to return them to create an equal level of remedy shortfall among the companies discriminated against.
- In its comments, AT&T prefers any of the alternatives put forth by other parties to the hard cap.
- The CAS recommends that the Commission eliminate the annual cap.

Further Analysis

- Other than repeatedly citing FCC precedent, Qwest could not provide an answer to the question: "how can the Commission be sure that this 36% cap will provide Qwest incentive to comply with the SGAT". (transcript pages 142, 144, 150, 152, 153, 154, 156, etc.)
- Qwest sought to assure the Commission with respect to the cap by saying that there are other mechanisms in place that will prevent backsliding (transcript page 149). (As if to indicate that the level of (or even existence) of a cap doesn't matter). However, the other mechanism (revocation of 271 authority) lies entirely with the FCC.
- Further, Mr. Reynolds admits that no one knows what the FCC will do (transcript pages 148-149).
- It should be expected that Qwest will be willing to spend a lot of money in order to gain access to the LD market (see transcripts page 148, lines 18, 19).

Qwest also has extremely strong financial incentives to protect its existing local market. Costs associated with advertising, marketing, etc. are no less a cost of doing business than paying penalties.

- Qwest could not provide justification for the 36% cap. There is really no way to justify any set cap level, that the Commission could be certain was sufficient to prevent Qwest from backsliding. The only way to prevent that behavior is to eliminate the cap entirely.
- In response to a question asking if Qwest thought it would pay more under a higher cap (transcript page 170), Qwest only responded by saying that it would be difficult to go back to “management” with no cap, that there may be negative investor perception (171) and that Qwest would be exposed to “blank check” risks. The QPAP is not designed to satisfy Qwest management, or investors. Further, no matter what the cap is set at, if at all, the size of the check Qwest rights is entirely under its control.
- Mr. Korber established that the amount Qwest would be paying is currently significantly under the cap (transcript, page 199)
- Qwest noted that the cap is “an equity market thing”. (transcript page 171). However, Ms. Stang admitted that the QPAP is not designed to stabilize Qwest’s equity market. (transcript page 172).

Recommendation

The WPSC should reject the Facilitator’s findings on this issue. Consistent with the recommendation of the CAS, and several other parties, the cap should be eliminated.

2. Procedural Caps

Report page 12, Qwest comments page 3, AT&T comments page 6, New Mexico Staff comments page 11, Washington Staff comments page 7.

Background

AT&T and Z-Tel supported the adoption of a procedural rather than an absolute or “hard” cap. WorldCom supported this approach, citing that a procedural cap makes it more difficult, as compared with a hard cap, for Qwest to make a calculating decision whether it is more economical to continue bearing the costs of non-compliance, rather than to bring its performance up to standard. WorldCom also observed that a procedural cap would give state regulators the power to modify the plan where circumstances would warrant a change. AT&T also argued that a hard cap would operate to deny a CLEC full compensation in cases where the cap was reached before an individual CLEC suffered substandard performance. For example, under the QPAP, if Qwest reached the cap in October, but in that same month first failed to meet standards in the case of CLEC “X”, CLEC X would be entitled to no payments at all.

The Facilitator rejects procedural caps. He also took up the issues of allowing for the movement of the cap up and down and what to do with payments to CLECs when the annual cap is reached. A lengthy process for CLECs that received payments early in the year compensating CLECs that should receive payments late in the year after the cap is reached is laid out in the report.

Analysis

- As noted in the “Analysis” section of the previous issue, there are various seemingly economically sound arguments against the hard cap.

- The Facilitator's proposed cap that incorporates "movement principles" limits the upward and downward movement of the cap. Such principles could potentially restrict Commission authority.
- The Facilitator proposes that if Qwest is found to be in compliance, that the cap should be lowered. It would appear that such a downward movement of the cap would serve no purpose. If Qwest is in compliance, and no payments are triggered, then the cap, no matter what its level, is completely irrelevant.
- The Facilitator also discusses his preference that Qwest should have some certainty as it enters markets, and that a hard cap provides such certainty. In his view, procedural caps that would allow for an undetermined escalation of Qwest payments for non-compliance would cause Qwest to view entering markets as more risky, and may also have an impact on investors' decisions regarding Qwest. (Washington comments)
- However, such considerations may be misplaced in the context of the development of a QPAP that is established to deter anti-competitive conduct, not to assuage Qwest and its investors.
- There is also a possibility that Qwest could adjust its performance in such a way that it could perform under the cap less than it performs above the cap and still not have the cap increase. (AT&T comments)
- With respect to the downward movement in the cap, AT&T has noted in its comments that the FCC has never authorized a plan that would allow for less than a 36% cap.

- Additionally, since CLECs would potentially be waiving all of their remedies by participating in the QPAP, the Facilitator's proposal opens the possibility of CLECs being denied the possibility of receiving remedies in one year because of Qwest's failure to meet the cap in other years. (AT&T comments)
- AT&T further points out that the Facilitator's plan actually contains a perverse incentive, which would actually reward Qwest for the lack of competition in the marketplace. This is because fewer CLEC participants reduce Qwest's payout, regardless of Qwest's performance. Therefore, Qwest would have the incentive to run CLECs off in order to reduce its payments (and thereby stay under the cap).
- AT&T states that the alternative proposals set forth by the Utah Division of Public Utilities and the Colorado PUC are far more balanced, more well thought out and far less Qwest biased than the Facilitator's proposal.
- As for the Facilitator's proposal with respect to the reallocation of a year's payments among CLECs, it is an example of what is needed administratively to administer a QPAP with a cap. Eliminating the cap (as discussed above) would eliminate the need for the process. It also would mean Qwest could not avoid paying for noncompliant performance. (New Mexico comments)
- Qwest proposes clarifying language at page 4 of its comments.

Further Analysis

- The argument of Qwest and the finding of the Facilitator, that the QPAP should somehow provide some certainty with respect to Qwest's entry into the

long distance market (by limiting penalties associated with backsliding) is not consistent with the actual purpose of the QPAP. (transcript page 157).

- The QPAP was never intended to act as a mechanism to limit Qwest's risk (Ms. Stang admitted as much at page 172 if the transcript) – it was intended as a mechanism to limit Qwest's anti-competitive behavior. Qwest can limit its risk by limiting such behavior. If the QPAP does not incent such behavior, it is not working.

Recommendation

As noted above, QSI recommends that the Commission reject a cap. However, if the Commission does approve some kind of cap, it appears that there are strong and economically sound arguments regarding the Commission adopting a procedural rather than a hard cap, and rejecting the Facilitator's recommendation which appears to contain some perverse incentives which would not result in the furthering of competition in Wyoming.

3. Qwest's Marginal Cost of Compliance

Report page 20, New Mexico comments page 7.

Background

A number of participants supported the argument of the New Mexico Advocacy Staff that one sound way to examine the propriety of a firm payment cap would be to compare: (a) Qwest's marginal cost of complying with the performance standards against (b) the payments to which it would be exposed for not complying. The New Mexico Staff

argument pointed out that the hard cap would allow Qwest to calculate the net cost of discriminatory service to CLECs and weigh that cost against potential gains to Qwest of poor service to competitors. Z-Tel agreed, saying that there is a “substantial risk” that Qwest will decide that paying 36 percent of its 1999 measured revenues is preferable to keeping its local market open.

Qwest argued that there is no evidence to show that its marginal cost of compliance is greater than 36 percent of its net revenues. Moreover, Qwest said that the FCC has rejected the notion that such a balancing is appropriate in the first place. Qwest added that, even were it appropriate to use as a benchmark, the calculation of marginal cost is not straightforward, because Qwest would face enforcement risks beyond the monetary payments imposed under the PAP, were it to reach maximum payment levels. Qwest also argued that any such analysis would have to consider not just a single year’s payments. The reasoning was that Qwest would have an incentive to make very high cost investments that would produce benefits for numerous years, because those investments would reduce recurring QPAP payments in every year that the investment (e.g., additional trucks or network facilities) yielded benefits. In other words, in terms of examining Qwest’s incentives, it would be necessary to look not only at one year’s payback (e.g., reduced QPAP payments), but rather to value the stream of annual reductions that would result from an investment.

The Facilitator acknowledged that the concepts put forward by the New Mexico Staff were appealing. However, the Facilitator found the concept to be unworkable in the real world.

Analysis

- According to the New Mexico Staff comments, the Facilitator misunderstood the thrust of this Staff testimony. From remarks in the Report, it appears the Facilitator believed that Staff was advocating an intensive study using marginal cost-marginal benefit analysis to determine whether the annual cap's 36 percent level was appropriate.
- Qwest has objected to the removal of a cap on the grounds that the marginal cost-marginal benefit analysis cannot be performed reliably. The Facilitator seems to have agreed with this position. The Report states that two conditions stood in the way of performing the analysis: (1) the need to incorporate remedies such as antitrust or regulatory enforcement other than the QPAP into the process; and (2) expenditures by Qwest to improve its performance that have benefits over several years.
- However Staff points out that it was arguing just the opposite point, that such study is not necessary. By not having a cap at all, the QPAP would ensure that Qwest could not long find itself with costs that were lower than benefits. As noted previously in this report, escalation built into Tier 1 payments would at some point cause the total cost to Qwest of the QPAP remedies to exceed the benefit of the discriminatory behavior that led to the payments. Thus, without a cap, there is no doubt that Qwest will (sooner or later) find it financially attractive to bring its performance into compliance with the QPAP standards.
- It should be noted that this result occurs naturally, and completely in the absence of knowing what Qwest's marginal costs are. Qwest would simply

respond to the incentive in an incremental cost manner, thereby avoiding the need for studies etc.

- Additionally, the New Mexico Staff points out that, Qwest has faced such analytical problems before and met the challenge. Moreover, the existence of a cap is irrelevant to the need to perform such calculations. Consider the oft-cited threat of 271 authority revocation allowed for in Section 271 (d) (6). Imagine a Qwest that is performing poorly, missing performance measurements across the board and persistently, exactly the sort of performance that might attract the attention of the FCC, which retains the revocation authority. Would it make one iota of difference to Qwest as it mulled over what its response to this subjective threat should be if there were or were not an annual overall cap in place? No. Hence, the idea that taking away the cap would impose decision-making hardships on Qwest is ludicrous.
- The same can be said for the idea that Qwest somehow cannot handle thinking about expenditures and benefits that do not have a one-to-one correspondence in time. The Report seems to accept the notion that no one within Qwest is familiar with the idea of amortization. Experience tells us a different story. Federal and state regulatory bodies prescribe depreciation schedules for equipment that Qwest uses. Basic management skills call for the ability to handle this concept whether there are rules governing its application or not. Qwest knows how to compute the costs and benefits of such expenditures because it is in its best interest to have that capability.

Further Analysis

- QSI agrees that the Facilitator misinterpreted the arguments put forth by the New Mexico Staff, and further notes that in the absence of a cap, there is no need to scrutinize Qwest's marginal costs.
- In fact, QSI notes that the only time that it becomes necessary to scrutinize these costs is if a cap *is* established. Then, in order for state commissions to be certain that the cap in fact does provide meaningful and significant incentive to prevent Qwest from backsliding, such an analysis would have to be done on a state-by-state basis.

Recommendation

The thought process involved in this issue further brings to light the complexities associated with setting a hard cap. QSI recommends elimination of the cap, but if the Commission does set a cap, a Wyoming specific marginal cost analysis should be performed in order to determine whether it would in fact, provide meaningful and significant incentive for Qwest to comply with the SGAT.

4. Continuing Propriety of a Cap Based on 1999 Net Revenues

Report page 21, WPC comments page 9, New Mexico comments page 12.

Background

Qwest argued for basing the cap on 1999 net revenues, while other parties suggested the cap should fluctuate based on actual net revenues going forward. In other words, to the extent that a cap is used at all, the cap for any given year should be based on actual net revenues from the previous year. The Report recommends retaining 1999 as the base

year, noting that doing so may actually keep the cap amount higher as Qwest loses voice customers in a competitive market.

Analysis

- QSI notes that the Facilitator's concerns regarding the speculative nature of Qwest's future net intrastate operating revenue can be entirely alleviated if a hard cap is not in existence.
- Once again, the Facilitator's concerns could be eliminated entirely by removing the cap (if there is no cap, there is no need to haggle over what the basis for the cap should be).
- The WPC advocates for the use of the most recent data.

Recommendation

If the Commission allows a hard cap, the cap should be based on the most recent ARMIS data.

5. Likely Payments in Low Volume States

Report page 22.

Background

The New Mexico Staff questioned the importance to be placed on the total cap amount in New Mexico, saying that the small amount of CLEC business would make it unlikely that Qwest could reach the cap limit. The Facilitator notes that this argument has no bearing on the level of the cap.

Analysis

- QSI notes that the only way to really deal with this is to lower the cap – such a move would not be consistent with furthering competition in Wyoming.

Recommendation

QSI agrees with the Facilitator.

5. Deductibility of Payments

Report page 22.

Background

CLECs wanted the QPAP to specify Qwest payments could not be deducted for income tax purposes. The Report notes that existing FCC and tax rules and regulations will deal with the issue.

Analysis

- This issue was not challenged.

Recommendation

QSI agrees with the Facilitator.

6. Relevance of Compensation as a QPAP Goal

Report page 26, AT&T comments page 10.

Background

Z-Tel discounted substantially the relevance of the goal of compensating CLECs for damages incurred as a result of non-compliant Qwest wholesale performance. In fact, Z-Tel said that the point of a performance assurance plan is to create incentives to detect and sanction poor wholesale performance, not to compensate CLECs for harm. Apart from the question of whether the QPAP should address CLEC compensation at all, Z-Tel also argued that it is not appropriate to subject such compensation to a liquidated damages test, because Qwest has not shown that the legal standard applicable in deciding

the propriety of allowing liquidated damages has not been met here. In support of its position with respect to the insignificance of the question of damages in connection with the QPAP, Z-Tel asserted that the FCC has not yet faced an application that specifically requires CLECs to waive their other contractual claims and other rights of action.

The Facilitator found that it is appropriate for the QPAP to address the question of compensating CLECs for contractual damages, and it is appropriate that the QPAP liquidate such damages, given the difficulty in measuring them precisely, and given that the QPAP payments approximate such damages.

Analysis

- AT&T, in its comments, agrees with the Facilitator in his view that the remedies should discourage a party from either breaching a contract or future tortious actions.
- AT&T cites the CPAP report that noted that although it is true that ordinary commercial contracts would prohibit parties from supplementing liquidated damages, that the SGAT can not be considered an ordinary contract. Further, the CPAP report notes that the risk to Qwest associated with a CLEC's right to sue for damages is mitigated by the probability that a court would not allow double recovery, and would require an offset of any amount the CLEC received under the QPAP. Based on that rationale, it is unlikely that Qwest would ever overcompensate a CLEC.
- AT&T also points out that the QPAP should not serve the purpose of compensation for the CLEC, but is intended to keep Qwest from backsliding.

Recommendation

QSI agrees with the Facilitator and his conclusion that the QPAP is designed to replace costly and protracted litigation. Other CLEC compensation issues are addressed further, later in this report.

7. Evidence of Harm to CLECs

Report page 28.

Background

Covad said that a cap would necessarily leave CLECs less than whole for the harm that they suffer from Qwest conduct. Covad did not present any quantitative evidence that would correlate the harm it suffers either with the amounts it would receive under the QPAP, or with the 36 percent revenue cap.

WorldCom objected to the CLEC lost-profits analysis presented by Qwest because it was based on a one-line business analog service rate. WorldCom said that Qwest's analysis failed to include the loss of profits that would come to CLECs when other services were bundled or when customers had more than one line. WorldCom also argued that Qwest failed to consider customer acquisition, local-service-request, maintenance and repair, or coordinated-cut costs in its analysis. WorldCom also said that the commissions could consider Qwest's labor rates as surrogates for CLEC costs in assessing damage resulting from poor Qwest performance.

AT&T noted that intangible CLEC losses were "impossible to quantify;" therefore, they should not be limited. Qwest said that Covad failed to support its argument that Tier 1 payments did not compensate it sufficiently; as Qwest noted, there was no Covad accounting of the tangible or intangible costs or damages it suffered through substandard

performance from Qwest. Qwest argued further that no CLEC presented any evidence that would verify any customer loss due to Qwest's performance or that would address the frequency with which they would lose customers for such reasons. Qwest also said that there was no CLEC evidence about the expenses or investments that they incurred due to poor Qwest performance.

The Facilitator's discussion of this issue focused on the lack of CLEC evidence that could show what CLEC damages had been or could be. He noted that after reviewing CLEC evidence submitted, the question remained, whether the QPAP payments represent a reasonable approximation of the harm that CLECs suffer. Even though the evidence provided by Qwest was judged by the Facilitator to be of only marginal value, the Facilitator found that the QPAP payment levels were a sufficient approximation of CLEC damages.

Analysis

- AT&T notes in its brief (sarcastically) that it was not aware that it carried the burden of prosecution in this proceeding.
- AT&T then reiterates its assertion that it is impossible to quantify certain intangible losses, providing examples at page 12.
- QSI notes that indeed, it would be extremely difficult if at all possible to quantify losses associated with loss of goodwill etc. that AT&T could experience due to substandard Qwest performance or discriminatory Qwest conduct.
- AT&T then provides specific examples of costs that it could suffer. AT&T says it was prohibited from bringing this evidence into the record previously.

- AT&T questions the Facilitator's lack of faith in the judicial system, and asserts that CLECs should be allowed to seek additional remedies.
- Qwest offered added language specifying that rules and orders are treated as contractual. (Page 6)

Further Analysis

- Mr. Oxley established, through questioning Ms. Stang, that CLECs are not precluded from bringing claims against Qwest if they feel that the QPAP does not adequately compensate them for their losses (transcript pages 217-218).

Recommendation

QSI agrees with the Facilitator.

8. Preclusion of Other CLEC Remedies

Report page 30, Qwest comments page 4, AT&T comments page 10.

Background

CLECs argued they should not be precluded from seeking certain other remedies if they adopted the QPAP. Qwest argued the contrary. The Report gives CLECs the choice of the remedies available in the QPAP or other remedies, but not both or a mix of elements from both.

Analysis

- AT&T cited a section of the CPAP report that allows CLECs to supplement liquidated damages.

Further Analysis

- Ms. Stang noted that the CPAP plan is in reality no different from the QPAP (transcript page 177). She also noted that the CLECs are trying to have their cake and eat it to, by taking protection under the QPAP and still wanting to sue.
- Mr. Oxley questioned Ms. Stang regarding these issues. Ms. Stang noted that nothing prevents CLECs from going to court, but that they would not be allowed to double-damage recovery.

Recommendation

QSI agrees with the Report.

9. Indemnity for CLEC Payments Under State Service Quality Standards

Report page 33

Background

CLECs want the QPAP to provide for their indemnification if Qwest performance means they have to pay fines under state quality of service rules. The Report says the issue is appropriately and adequately dealt with in the Qwest SGAT.

Analysis

- This issue was not challenged.

Recommendation

QSI agrees with the Facilitator.

10. Offset Provision (Section 13.7)

Report Page 34, Qwest comments page 6, AT&T comments page 10.

Background

Qwest wants any award to CLECs by courts or other bodies that duplicates QPAP payments to be offset by the QPAP payments. There are three issues 1. Qwest's ability to unilaterally decide whether or not an offset is allowed, 2. the ambiguity of the term analogous performance, 3. QPAP method of dealing with injury to persons of physical property.

The Report finds that with respect to issue 1., that nothing in Qwest's proposed language would give it the right to offset QPAP payments. The Facilitator notes that the QPAP's dispute resolution process should give adequate opportunity to challenge a decision by Qwest with respect to this issue. The Facilitator then notes that the real issue here is who has the money while the dispute is being heard. The Facilitator resolves this issue by recommending that any dispute resolution include a provision where deemed appropriate by the Commission for interest on awards. With respect to the second issue, the Facilitator agrees that the use of the word analogous introduces some confusion. According to the Facilitator, changing the phrase "same or analogous wholesale performance" to "same underlying activity or omission for which Tier 1 assessments are made under this QPAP" would solve the problem. Finally, with respect to the third issue, the Facilitator recommends that , QPAP Section 13.7 should contain a provision stating that:

Nothing in this QPAP shall be read as permitting an offset related to Qwest payments related to CLEC or third-party physical damage to property or personal injury.

Analysis

- AT&T recommends language contained in FCC approved QPAPs as well as recommended by the Colorado PUC at page 15 of its brief. That language would allow Qwest to argue that an award should be offset with amounts paid under the QPAP.
- AT&T also noted that Qwest (in briefs) did not preclude CLECs from seeking alternative standards of relief, but the total amount of payments is limited by an offset.
- AT&T criticizes the Facilitator's proposed language changes discussed above, saying that in aggregate the ramifications of the resulting language are tremendous. AT&T says that the modified language would allow Qwest *carte blanche*, to re-monopolize local telecommunications without any ramification except QPAP payments with Qwest will easily be able to calculate. AT&T provides an example of Qwest having the ability to put CLECs out of business, leaving the CLEC with no legal recourse.
- AT&T finds this result to be inconsistent with the findings of the Colorado PUC who found that "CLEC's ability to sue for additional contract damages is a safeguard against extraordinary losses that CLECs might suffer as a result of Qwest's poor performance. While the CPAP payment structure will be periodically evaluated as adjusted to reflect fair compensation and average losses incurred by CLECs, there may still be occasions in which poor performance results in unusually high CLEC loss. The SGAT language should allow for the CLECs to recover these losses via court action if there is a valid cause of action."

- AT&T notes that in its opinion, the Facilitator’s language would prohibit it from receiving anything but the “adder”. AT&T goes on to explain that CLECs would be treated unfairly as a result of the Facilitator’s “sloppy legal analysis”.
- In addition to its legal arguments, AT&T points out that the Facilitator’s position gives rise to public policy concerns (page 19). The QPAP under AT&T’s opinion would allow Qwest to rid itself of competition by paying the penalties associated with the plan, but shielding itself from any other legal remedies the CLEC may choose to seek.
- AT&T notes that it is not advocating double recovery, only that the offset be determined by the appropriate legal body, and that Qwest should not be allowed to unilaterally offset payments.
- AT&T further argues that the language proposed by the Facilitator would open the door to unreasonable litigation and appeal. AT&T offers the language of the Texas Public Utilities Commission (as approved by the FCC)⁹, the Utah Division of Public Utilities,¹⁰ and/or the Colorado Public Utilities Commission’s¹¹ language related to offset.

Further Analysis

- Ms Stang at page 177-179 of the transcript explained this issue. Essentially, she explained that the CLEC can sue, but if it does, it forfeits its QPAP payments. This appears to be a reasonable result, since it would allow CLECs

⁹ S9-ATT-JFF-7 at sec. 6.2 (the Texas PAP).

¹⁰ Exhibit A at p. 37.

¹¹ Exhibit B (CPAP) at sec. 16.1. p. 14.

to take serious matters to another level, yet would discourage frivolous litigation and “gaming the system”.

Recommendation

QSI agrees with the Facilitator.

11. 10. Exclusions (Section 13.3)

Report page 36, Qwest comments page 7, WPC comments page 13.

Background

This section deals with force majeure, bad faith, and other exclusions. These are essentially a list of circumstances that would excuse Qwest from having to make payments under the QPAP. The Report contains recommendations regarding CLEC Bad Faith, Duplicative Force Majeure Provisions, Resolving Disputes Over Force Majeure Events, Nexus Between Force Majeure Events and Qwest Performance, Applicability of Force Majeure to Parity Measures, and CLEC Forecast Exclusion.

Analysis

- The WPC recommends a strengthening of section 13.3 to specify the process by which Qwest shall seek a waiver of payment obligations on force majeure grounds. The WPC also advocates that the petition for waiver should be filed no later than the last business day of the month after the month in which payments are being disputed, and that the petition (to the Commission) must include a detailed description of the nature of the petition and the facts supporting it.

Recommendation

QSI agrees with Facilitator.

12. SGAT Limitation of Liability to Total Amounts Charged to CLECs

Report page 41

Background

CLECs want it made clear SGAT and QPAP payments are mutually exclusive. The Report offers recommended language making QPAP and SGAT payments mutually exclusive.

Analysis

- This issue was not challenged.

Recommendation

QSI agrees with Facilitator.

13. Tier 2 Payment Use

Report page 41, Qwest comments page 8, AT&T brief page 22, CAS comments page 2.

Background

Qwest wanted Tier 2 payments limited to use in the Qwest serving territory, while other parties did not. The Report offers language accommodating the fact that some states may require the Tier 2 payments go to their general funds. It also offers a recommendation that some Tier 1 and 2 funds be directed, in the states that allow it, to support of regular review of the QPAP.

Analysis

- AT&T takes significant issue with the Facilitator's proposal to use some of the Tier 1 payments to go to a "common administrative effort". AT&T notes that CLECs are already assessed taxes etc. to pay for such activities.
- AT&T also notes that this recommendation by the Facilitator is the "final lynchpin" in the Facilitator's poor treatment of CLECs.
- AT&T therefore AT&T requests that the utilization of Tier 1 payments be stricken from this provision utilizing the approach of the Utah Division of Public Utilities Staff.
- Qwest has offered language for the "special fund".
- The CAS voiced concerns regarding whether the Wyoming Commission has the authority to accept Qwest's Tier 2 payments into the WUSF. The CAS recommends that the Commission seek guidance from its Chief Counsel and the Attorney general with respect to this issue.

Further Analysis

- Ms. Stang and Mr. Reynolds explained the reason why Qwest opposes AT&T at page 180-181 of the transcripts. Based on that explanation, it appears that the use of these payments would benefit CLECs, and that it is a reasonable use of these funds.

Recommendation

QSI agrees with the Facilitator.

14. Three-Month Trigger for Tier 2 Payments

Report page 42, Qwest comments page 11, AT&T brief page 23, WPC comments page 15.

Background

Qwest wanted the trigger for Tier 2 payments to be three months of noncompliant performance. Other parties argued for immediate payments with one month of noncompliant performance, exactly like Tier 1 payments work. The Report creates a new condition for Tier 2 payments. If Qwest is noncompliant with any Tier 2 performance measurement in two months during any three-month period, it becomes exposed to making Tier 2 payments for the next year following the three-month period (the three-month period also rolls forward continuously). Once this condition is met, Qwest makes Tier 2 payments for performance measurements without Tier 1 counterparts for any month it provided noncompliant performance. For Tier 2 performance measurements with Tier 1 counterparts, payments begin with two consecutive months of noncompliant performance.

Analysis

- The New Mexico Staff notes in its comments that Tier 1 payments currently escalate, thus creating a possibility of moral hazard. The solution is not to cap payments, but rather to have Tier 2 payments, which go to the states, escalate while Tier 1 payments are capped (after determination of the appropriate amount to compensate CLECs for lost customers).
- The New Mexico Staff has suggested an escalation plan for Tier 2 payments. If this escalation plan were adopted, Staff would not object to

capping Tier 1 payments. Study would be necessary to verify its appropriateness, but a cap on Tier 1 escalation after three months paired with escalation Tier 2 payments would be sound policy.

- The QPAP Report recommends moving away from the three consecutive months of failure needed to trigger Tier 2 payments in the original QPAP, but not far enough. The amendment would still allow Qwest to fail one-third of the months without paying remedies.
- The immediate triggering of Tier 2 payments is not only a necessary complement to capping Tier 1 payments, but also consistent with the FCC's criterion that the QPAP structure be designed to detect and sanction poor performance *when* it occurs. Even the modified plan of the QPAP Report would allow failure by Qwest on Tier 2 measurements to lag three months behind first failure. That gap is not an example of sanctioning poor performance when it occurs.
- The WPC argues that the Facilitator's trigger is overly complicated. The WPC therefore advocates an immediate triggering of Tier 2 payments, supporting their position by noting that a lag in payment acts as a disincentive for Qwest to take immediate action to address the performance issues related to Tier 2 measures.

Further Analysis

- QSI agrees that the QPAP payments should act as an immediate sanction against poor performance by Qwest. Qwest explained that this trigger is not tied to Tier 1 payments – which do kick in immediately (transcript

page 183). Therefore, the arguments regarding incentives should be disregarded.

Recommendation

QSI recommends that the Commission consider the arguments made by the New Mexico Staff with respect to this issue.

15. Limiting Escalation to 6 Months

Report page 44, AT&T brief page 23, New Mexico Staff comments page 16.

Background

Qwest wants the escalation of Tier 1 payments to cease after six months of noncompliant performance. Other parties want Tier 1 payments to escalate without limit. The Report recommends keeping the escalation limit at six months.

Analysis

- The same logic that supports doing away with an annual overall cap also is the logic that supports eliminating escalation of payments for individual performance measures (see above).
- The escalation limit is like a cap on individual payments.
- As noted, a cap can create a situation where the benefits of discrimination outweigh the costs. If anything, the individual measurement payment cap is more likely to be harmful than the overall annual cap.
- Qwest could fail to provide compliant performance for a handful of key functions such as the cutting over of customers from Qwest to CLECs or responding to CLEC placement of orders. Because it would be succeeding in

meeting most measures, Qwest would not be approaching a 36 percent overall cap. Yet, it would without a doubt be damaging CLECs' ability to compete.

- It could continue its isolated noncompliance for quite some time if an escalation cap is in place, whereas if there is not, the payments it would make would keep on rising, eventually surpassing the benefit.
- The New Mexico Staff recognizes the problem of Tier 1 payments to CLECs exceeding the level necessary to compensate the CLECs for lost profits due to discrimination. This "moral hazard" could create incentives for CLECs to "game the system." That is, failure might be more lucrative for CLECs than success in competing for customers.
- However, a key element of moral hazard is that the actions of the economic agent be unobserved. CLECs' actions would not go unwatched or unrecorded.
- For example, a CLEC that saves a few dozen orders to be submitted simultaneously to Qwest in hope that the CLEC will receive remedy payments because some portion of the orders will be mishandled. Qwest could easily demonstrate from monthly records that this miscreant CLEC had performed in an inconsistent manner. A gap of weeks with no, or only a few orders, followed by a binge would be suspicious behavior, grounds for investigation, and perhaps for redress to Qwest.
- AT&T notes that the Colorado PUC indicated that Qwest's arguments to freeze escalated penalties makes no logical sense.

- AT&T also notes that in response to the Facilitator's reference to Qwest establishing that it is able to meet its obligations, that since Qwest agreed to them, it should be presumed that it can meet them.
- Continuing escalation of payments should be sufficient to ensure that the penalty is higher than Qwest is willing to pay as a cost of doing business. Qwest does attach a value to suppressing competitive activity – the payment should be sufficient to reflect that value. Continuing escalation of payments would prohibit Qwest from engaging in such strategies.
- AT&T strongly argues against the Facilitator's theory that escalation should be limited because of the possibility that the standards may be flawed, citing evidence that Qwest has already shown that it can meet the standards.
- AT&T recommends that the Facilitator's analysis be rejected.

Further Analysis

- Qwest has agreed to measures previously. (See transcripts page 193). Qwest has done so in previous Groups and has indicated that it is giving something by doing so.
- If Qwest "gives in" on measures, then limits its exposure of not complying (by limiting penalties associated with non-compliance), it could be that Qwest is setting up a situation that they can game (in other words, giving in to something they never intended to comply with). In such a case, there would be a significant potential for discrimination.

Recommendation

QSI agrees with the Colorado PUC's finding that limiting escalation makes no logical sense. Limiting escalation may limit Qwest's incentive to perform.

16. Splitting Tier 2 Payments between CLECs and the States

Report page 45

Background

CLECs argue that they should receive some of the Tier 2 payments even though data for specific CLECs is not available to allocate the payments. The Report recommends retaining the current payment allocation.

Analysis

- This issue was not challenged.

Recommendation

QSI agrees with Facilitator.

17. Requiring Payments for Canceled Orders

Report page 47

Background

CLECs wanted to add this indicator to the performance measurements. The Report does not add the indicator.

Analysis

- This issue was not challenged.

Recommendation

QSI agrees with Facilitator.

18. Requiring Payments for “Diagnostic” UNEs

Report page 48

Background

Qwest has agreed to add performance measures to the payment structure as standards are developed for them. The Report accepts Qwest’s position.

Analysis

- This issue was not challenged.

Recommendation

QSI agrees with Facilitator.

19. Cooperative Testing

Report page 49

Background

Covad wants cooperative testing added to the QPAP as a performance measurement. The Report says there are forums for amending the performance measurements and CLECs should rely on them.

Analysis

- This issue was not challenged.

Recommendation

QSI agrees with Facilitator.

20. Adding PO-15 D to Address Due Date Changes

Report page 49

Background

Covad wants this indicator added to the QPAP as a performance measurement. The Facilitator notes that no procedure exists for dealing with this problem immediately within the QPAP process.

Analysis

- QSI believes a procedure could be developed whereby Covad and other parties could work together to integrate this diagnostic measurement into the QPAP.
- Covad's input into the workshop process was insufficient to allow the Facilitator to pursue this.

Recommendation

QSI agrees with the Facilitator.

21. Including PO-1C Preorder Inquiry Timeouts in Tier 2

Report page 50

Background

AT&T wants to add this measure. The Report declines to add this measure, relying on the PEPP negotiations.

Analysis

- This issue was not challenged.

Recommendation

QSI agrees with Facilitator.

22. Adding Change Management Measures, Adding a Software Release Quality Measure, Adding a Test Bed Measurement, Adding a Missing-Status-Notice Measure

Report page 50, 51, 52, WPC 17.

Background

CLECs want these various items added to the QPAP as performance measurements subject to payments. The Report declines to add the measurements, but notes there is no reason they cannot be added through amendment.

Analysis

- The WPC recommends using the CPAP methodology for the Change Management Process rather than that proposed by the Facilitator. The primary concern of the WPC is the transparency (or lack thereof) of the QPAP particularly the provision within the QPAP that allows for closed-door meetings between Qwest and the independent auditor.

Recommendation

The Commission may want to consider the WPC's arguments. If the Commission feels comfortable with the independent auditor, then the Facilitator's findings should be fine.

23. Aggregating the PO-1 A and PO-1B Performance Measures

Report page 52.

Background

Fourteen submeasurements for these performance measurements were combined in the PEPP. Qwest says two seven-part measures were created, AT&T says seven two-part measures were created. The Report agrees with Qwest.

Analysis

- This issue was not challenged.

Recommendation

QSI agrees with Facilitator.

24. Changing Measure Weights

Report page 53, Qwest comments page 12.

Background

Tier 1 payments vary with the weight accorded a performance measurement. CLECs wanted to increase some weights without reducing others, Qwest agreed with increases but wanted compensating decreases in other measurement weights. No agreement was reached, so the weights are returned to their original values.

Analysis

- This issue was not challenged.

Recommendation

QSI agrees with Facilitator.

25. Eliminating the Low Weighting

Report page 54.

Background

The QPAP has Low, Medium and High weights. CLECs wanted all low measurements moved to Medium. The Report recommended no change in weights.

Analysis

- This issue was not challenged.

Recommendation

QSI agrees with Facilitator.

26. LIS Trunks Weighting

Report page 55.

Background

CLECS want LIS Trunks given a special high weighting given how much they affect CLEC lines. The Report recommended no change in weights.

Analysis

- This issue was not challenged.

Recommendation

QSI agrees with Facilitator.

27. Collocation

Report page 55, Qwest comments page 12..

Background

Staff and other parties want collocation noncompliance treated differently than other performance measurements given its sweeping effect on CLEC capabilities. The Report

recommends that Qwest adopt the Michigan approach recommended by Staff, which Qwest says it has agreed to do.

Analysis

- This issue was not challenged.

Recommendation

QSI agrees with Facilitator.

28. Including Special Access Circuits

Report page 56, WorldCom comments..

Background

CLECs want to include special access circuits as a performance measurement. The Report declines to add special access circuits, noting the issue can be addressed in other forums.

Analysis

- WorldCom¹² urges the Commission to reject the recommendations found in the Facilitator's Report with respect to this issue, and instead asks the Commission to include the performance measures put forward by WorldCom.
- WorldCom notes that its access measurements will permit state monitoring of Qwest's Special Access performance that will ensure that Qwest does not use the added incentive of its entry into the interLATA market to provide poor performance to its competitors.

¹² It should be noted that WorldCom in addition to commenting on this issue, concurs with AT&T's exceptions to the Liberty Consulting Report.

- WorldCom notes that several other states have either ordered, or are considering including performance reporting on special access.

Further Analysis

- Qwest noted at pages 206-207 of the transcript that the ROC has rejected PIDs to measure special access, noting that WorldCom was included in that forum.
- Further, Ms. Stang notes that “the FCC has made it clear in two FCC orders that special access is not required to meet 271”.

Recommendation

QSI agrees with the Facilitator.

29. Proper Measure of UNE Intervals

Report page 58.

Background

Covad said the SGAT Exhibit C should be the source of QPAP standards, not the Performance Indicator Definitions used in the ROC OSS Test. The Report declined to change the standards.

Analysis

- This issue was not challenged.

Recommendation

QSI agrees with Facilitator.

30. Low Volume CLECs

Report page 58, Qwest comments page 12.

Background

Some CLECs said that small companies are undercompensated by the QPAP. They also argued the rounding at small volumes allows Qwest too much leeway in meeting performance measurements. The Report declined to change the payment structure, saying it was fair to CLECs, nor did it change the rounding rule.

Analysis

- This issue was not challenged.
- Because this issue may be of particular importance to Wyoming companies, this issue should be further explored.
- Qwest modified language at section 2.4.

Recommendation

Qwest's language appears to be a reasonable resolution. The Facilitator notes that Qwest has provided substantial evidence that the QPAP would not serve to undercompensate smaller volume CLECs.

31. 6-Month Plan Review Limitations

Report page 59, Qwest comments page 13, AT&T comments page 32, WPC comments page 16, New Mexico comments page 17.

Background

The QPAP provides for review every six months of its contents, with certain limits. Qwest had wanted final approval of any changes. The Report broadens the subject matter of the six-month review and eliminates Qwest's veto power.

Analysis

- AT&T complains that although the Facilitator acknowledges their issues with the 6-month review process, he does not address the issues. AT&T's most fundamental issue with the review process is that Qwest (in AT&T's opinion) would control if any changes would be made or even addressed in the review.
- AT&T disputes the Facilitator's characterization of the Colorado Performance Assurance Plan with respect to whether Qwest would be *asked* or be *required* to effectuate changes identified by the state commission. AT&T supports this language, since it specifically shifts the control away from Qwest and to the Commission.
- AT&T also notes that the Facilitator's Report contains several misleading statements with regard to how the Texas PAP compares to the QPAP. AT&T, however, does not put forth recommendations regarding these statements.
- The New Mexico Staff agrees with the Facilitator, but believes the Commission should not restrict its abilities to make changes to the QPAP in the case that it discovers in the review that the QPAP has been engineered in a manner that has been found to be detrimental to the public interest.
- The WPC voiced similar concerns at page 11 of its comments, and recommends that the relevant Commission modify the QPAP to reflect that it shall retain the ability to unilaterally modify the QPAP.
- Additionally, the WPC disagrees with the Facilitator in that it is not convinced that limiting the escalation to six months will provide appropriate meaningful and significant incentives to Qwest. WPC notes that the CPAP places no limit on escalation payments. WPC agrees with the Colorado approach (Page 16).

Further Analysis

- Qwest (at pages 195-197 of the transcript) states that the WPSC should be precluded from making changes to the QPAP even in the case of Public Interest concerns.

Recommendation

QSI recommends that the Commission not limit its authority to protect the public interest, consistent with the WPC recommendation.

32. Monthly Caps

Report page 62

Background

CLECs want monthly caps removed. The Report agrees, noting it has addressed the problem of monthly payments when the annual cap is reached in the procedural caps discussion.

Analysis

- This issue was not challenged.

Recommendation

QSI agrees with Facilitator.

33. Sticky Duration

Report page 62, New Mexico comments page 23, CAS comments page 3.

Background

Z-Tel argued that Tier 1 payments should remain at the level to which they escalated before Qwest achieved noncompliant performance. The rationale is it took that level of payment to get Qwest to comply, therefore the step-down de-escalation provided for in the QPAP gets away from the level of payment that was necessary to bring about compliance. The Report retains the step-down process in payments.

Analysis

- The economic logic behind sticky duration is sound, contrary to the QPAP Report. If a certain level of payment is required to get Qwest's attention and attend to the problem, letting the payment level drop back to lower levels, even one month at a time for compliant performance, means the payment level will be below that required to get Qwest to stop discriminating.
- CAS asks that the Commission review evidence provided by other parties with respect to this issue.

Further Analysis

- CAS agrees with Z-Tel and Dr. Griffing.

Recommendation

QSI recommends that the Commission consider diverging from the Report, as any limit on the financial exposure to Qwest may limit Qwest's incentive to not backslide..

34. Low Volume Critical Values and Applying the 1.04 Critical Value to 4-Wire Loops

Report page 63 and 65.

Background

The critical value for parity measures was reduced for low volumes for certain performance measurements in the PEPP, thereby making it more likely Qwest will have to make payments. CLECs wanted the value applied to 4-wire loops for low volumes. The Report retained this PEPP agreement for the application of the reduced critical standard, but declined to add 4-wire loops. The Facilitator's rationale was that unlike loops provisioned by Qwest with the capability to provide DS-1 services, 4-wire loops take after-the-fact action by CLECs to make them DS-1 capable. Qwest has neither knowledge nor control over those actions; therefore, the only way feasibly to include them would be to assume that all (or the overwhelming majority at least) of the 4-wire loops are made DS-1 capable by CLEC additions of electronics to them. Additionally, the Facilitator notes that the addition of 4-wire loops would either impose undue PAP administration requirements or require an unsound assumption that all 4-wire loops are DS-1 loops.

Analysis

- It should also be noted that the Facilitator made his decision with respect to the 4-wire loops based on the lack of evidence presented that would show a very high rate of use of 4-wire loops for delivering high value services. He states that should there later be clear and convincing evidence during application of the QPAP's amendment procedures that such use is made of 4-wire loops in excess of 75% of such loops leased as UNEs the issue should be reconsidered during the application of the QPAP's amendment procedures.

Recommendation

QSI agrees with the Facilitator's findings.

35. Measures Related to Low Volume, Developing Markets and Minimum Payments

Report page 66 and 67, Qwest comments page 13..

Background

CLECs want to increase the payments provided for in the QPAP for low-volume markets and increase the minimum payments provided for. The Report declines to change the procedures for low-volume markets, but does modify the minimum payments plan.

Analysis

- This issue was not challenged.

Recommendation

QSI agrees with the Facilitator's findings.

36. 100% Caps for Interval Measures

Report page 68, AT&T brief page 35.

Background

CLECs wanted a form of severity built into payments for interval measures, Qwest did not. The Report declined to accept the CLEC proposal, but said more study of the proposal might show it has merit.

Analysis

- AT&T says that the Facilitator misunderstood the CLEC arguments with respect to a per-occurrence measurement scheme for interval measurements in that he believed that the CLECs were arguing that the per-occurrence scheme should only measure the severity of the deviation from the standard and should not consider the volume of CLEC orders.
- AT&T, in its brief distills this issue.
- AT&T states that for interval measurements, the CLECs and likely Qwest would agree that the per-occurrence scheme is sensitive to the volume of CLEC orders and the severity of the deviation of Qwest's average monthly performance to CLECs from Qwest's average monthly performance to itself. The issue at hand, is therefore, the severity of Qwest's deviation of its average monthly performance to CLECs from its average monthly performance to itself, and whether the payment should be capped at the number of CLEC orders.
- Qwest argues in favor of such a cap to avoid the illogical result of Qwest having to pay on more orders than were actually submitted.
- AT&T argues against the cap by saying that the worse Qwest's performance is, the higher its payment exposure should be. AT&T says there is nothing illogical about that.

Recommendation

QSI agrees with the Facilitator. Section 10 as proposed by Qwest provides incentive for Qwest to perform in developing markets.

37. Assigning Severity Levels to Percent Measures

Report page 70, New Mexico comments page 25.

Background

Z-Tel sponsored a plan for including severity of miss for percent measurements. The Report declined to include severity in the calculation of payments for percentage performance measurements. It noted the levels of penalty Z-Tel proposed were too great and faulted Z-Tel for not offering lower values if it was serious about accepting lower values.

Analysis

- The New Mexico Staff agrees with the Facilitator but believes the Z-Tel proposal has merit and can be brought forward with lower values in a six-month review.

Recommendation

QSI agrees with the Facilitator's findings.

38. Self-Executing Mechanism, Assurances of the Reported Data's Accuracy, and**Other Issues**

Report page 71, Qwest comments page 13 - 18, AT&T comments page 40, WPC comments page 15, CAS comments page 3, New Mexico comments page 25.

Background

These two broad categories address Dispute Resolution (Section 18), Payment of Interest, Escrowed Payments, Effective Dates, QPAP Inclusion in the SGAT and Interconnection Agreements, Form of Payment to CLECs, the Audit Program, PUC

Access to CLEC Raw Data, Providing CLECs Their Raw Data, Late Reports, Prohibiting QPAP Payment Recovery in Rates, No-Admissions Clause, Qwest's Responses to FCC-Initiated Changes, and Specification of State Commission Powers. For the most part, these categories incorporate administrative mechanisms.

Analysis

- With respect to Payment of Interest, AT&T at page 40 of its comments, recommends use of the relevant commission's approved cost of money be used rather than the prime rate as set by the Facilitator.
- With respect to effective dates, AT&T advocated for pre-271 implementation, and notes that the Utah Division of Public Utilities Staff is in agreement. The rationale used is that Qwest is claiming compliance with 271 at the time it files, so there is no reason why the QPAP should not be implemented at that time.
- With respect to "other issues", AT&T petitions the Commission to mandate that ratepayers should not pay for a failure by Qwest to provide adequate service quality to CLECs. Allowing Qwest to pass through the costs associated with non-compliance would seriously undermine the incentives meant to be created by the QPAP. AT&T therefore, recommends the addition of the following language:

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 Section 251(c) of the Telecommunications Act of 1996 and priced pursuant to Section 252(d) of the Telecommunications Act of 1996.

- The WPC puts forth very similar arguments to those put forth by AT&T with respect to this issue. (WPC comments at page 15.
- With respect to the Audit Program, the WPC differs from the Facilitator as far as the multi-state effort to audit and review the QPAP. The WPC points out that performance issues will not be the same in each of the Qwest states. Additionally, jurisdictional issues could arise as a result of this arrangement. The WPC provides examples at page 10 of its comments. QSI notes that if states are forced to compete with each other, as to selecting issues to be addressed, Wyoming could come out poorly due to its size. QSI would therefore agree with the WPC, and strongly recommend that the Wyoming Public Service Commission maintain full and complete authority over reviews, audits, and monitoring of QPAP performance issues in Wyoming. The WPC offers language from the CPAP at page 11 of its comments that would accommodate these concerns.
- With respect to the Form of Payment to CLECs, the WPC again finds the CPAP to be superior to the QPAP, in that rather than using bill credits (which could result in additional administrative disputes), it uses cash payments to CLECs but allows Qwest to credit CPAP payments for bills that are more than 90 days past due. The WPC advises the CPAP method rather than the Facilitator's method.
- The CAS believes that the Facilitator's resolution does not adequately address the public interest requirements of section 271 (page 3).

- The New Mexico Staff argued that the effective date of the QPAP should coincide with Qwest's submission of its 271 application with the FCC, not with the granting of 271 authority by the FCC (the span of application consideration is about three months). Staff said starting the QPAP earlier would ensure Qwest had an incentive to keep its performance compliant in that span.
- The Facilitator apparently agreed with Qwest that the interval was short and if parties were concerned about noncompliant performance in the interval, they could notify the FCC, which would take it into account in its evaluation of Qwest's application. The New Mexico Staff expressed some lack of confidence about the FCC's ability to consider such information, especially given the one-month or more lag in reporting such information and still advocates that the earlier effective date is good policy.

Further Analysis

- Qwest says that there is no reason to put the provision regarding precluding payment recovery from ratepayers in the plan, that the FCC clearly states that payments cannot be passed on to rate payers.
- The CAS thinks that there is more than a backsliding measure to be considered, that the CAS looks at it as Qwest has not met its burden of proof on the checklist (transcript page 242). Therefore, Qwest should be required to make payments prior to when 271 relief is granted.

Recommendation

QSI recommends no changes based on Qwest's response.

Public Interest

Introduction

In addition to the competitive checklist items enumerated at 47 U.S.C. Section 271 (c)(2)(B), the Telecommunications Act requires an applicant to show that “the requested authorization is consistent with the public interest, convenience, and necessity.”¹³ The FCC has emphasized that public interest is a separate inquiry from that to be occasioned by the competitive checklist, and addresses this matter separately in its decisions.¹⁴

The FCC has said that compliance with the competitive checklist provides a strong indication that long distance entry is consistent with the public interest. Citing the FCC, AT&T has pointed, however, that checklist compliance is not conclusive as to the public interest requirement:

In making our public interest assessment, we cannot conclude that compliance with the checklist alone is sufficient to open a BOC’s local telecommunications market to competition. If we were to adopt such a conclusion, BOC entry into the in-region interLATA services market would always be consistent with the public interest requirement whenever a BOC has implemented the competitive checklist. Such an approach would effectively read the public interest requirement out of the statute, contrary to the plain language of section 271, basic principles of statutory construction, and sound public policy.¹⁵

The FCC’s SBC Kansas/Oklahoma Order provides a discussion of the factors that are to be considered in addressing public interest:

[W]e view the public interest requirement as an opportunity to review the circumstances presented by the applications to ensure that no other

¹³ 47 U.S.C. Section 271(d)(3)(c).

¹⁴ Memorandum Opinion and Order, *Joint Application by SBC Communications, Inc., Southwestern Bell Telephone Company, and Southwestern Bell Communications Services, Inc. d/b/a Southwestern Bell Long Distance for provision of In-Region, InterLATA Services in Kansas and Oklahoma*, 16 FCC Rcd 6237 273 (2001) (“SBC Kansas/Oklahoma Order”)

¹⁵ Reply Brief of AT&T Regarding Public Interest and Track A, (AT&T Reply Public Interest Brief).

relevant factors exist that would frustrate the congressional intent that markets be open, as required by the competitive checklist, and that entry will therefore serve the public interest as Congress expected. Among other things, we may review the local and long distance markets to ensure that there are not unusual circumstances that would make entry contrary to the public interest under the particular circumstances of these applications. Another factor that could be relevant to our analysis is whether we have sufficient assurance that markets will remain open after grant of the application. While no one factor is dispositive in this analysis, our overriding goal is to ensure that nothing undermines our conclusion, based on our analysis of checklist compliance, that markets are open to competition¹⁶.

The New Mexico Advocacy Staff, among others, has generally argued that Qwest bears the burden of proof on matters relating to section 271,¹⁷. However, given the FCC's conclusion that checklist compliance is a strong indicator of the satisfaction of the public interest test, it is the Facilitator's belief that it is appropriate to ask those who make public interest assertions to demonstrate the existence of the facts necessary to support their claimed reasons why the public interest would not be served by granting Qwest 271 authority. If nothing else, a simple reliance on the need for order compels the conclusion that those who make specific allegations should be required to prove them.

Thus, while Qwest must bear the burden of proving checklist compliance and the satisfaction of Track A and B requirements generally, the Report would not accept a rule that upon allegations by a third party Qwest must bear the burden of disproving them in order to demonstrate that the public interest would be served by granting it 271 authority. In saying this, however, the Report did not intend to ask any of the participating commissions to constrain their ability to take notice of conditions in their jurisdictions –

¹⁶ SBC Kansas/Oklahoma Order at paragraphs 272 and 273.

¹⁷ Brief of New Mexico Staff on Public Interest Issues (New Mexico Advocacy Staff Initial Public Interest Brief) at page 4.

conditions as to which their long experience in regulating telecommunications services gives them more than sufficient basis for taking notice of them.

Thus, while the inquiry into the public interest, convenience, and necessity is necessarily open-ended, a number of decision criteria are clear:

- Should checklist compliance be shown and should the existence of an adequate PAP be demonstrated, Qwest need make no further affirmative showing to support a conclusion that the public interest has been met
- Beyond these two preceding showings, as to which Qwest bears the burden of proof, those who would oppose the grant of section 271 compliance should be obliged to allege and prove the existence of the unique circumstances that may bear additionally on the public interest question (excluding the participating commissions' powers on their own initiative to take notice of such conditions as they determine to be relevant in their jurisdictions)
- Any allegation that merely serves to restate a checklist test in a manner that would impose a greater burden should not be looked upon with favor; to have distinct significance in examining the public interest an allegation and the evidence or argument that support it must rest at least in part on grounds independent from compliance with the checklist; otherwise, we would be misreading the plain intent of Congress in adopting the checklist and in allowing separate consideration of public interest matters.

Public Interest Issues

1. UNE Prices

Report page 5, Qwest comments page 8, AT&T page 3.

Background

Several CLECs argued that monthly and non-recurring UNE prices were too high to permit CLECs to enter the local exchange market in a profitable way. AT&T's evidence to support this conclusion was that 1FR rates were lower than UNE prices. This evidence was not persuasive; it failed to address other revenue sources (e.g., vertical features, intraLATA toll, and bundling with non-telecommunications services such as cable television) that would contribute to profitability. It also did not address business lines or resale. Moreover, the FCC has noted the difficulty that would arise were it to be required

in the 271 context to address retail rate issues, which the FCC has conceded to be matters subject to state authority.

Analysis

- AT&T notes that even though the Facilitator acknowledges that the price for local exchange service is lower than the price Qwest charges for UNEs, (retail prices are lower than wholesale prices), that the Facilitator is not persuaded.
- AT&T asserts that in order to provide local service it must do so as a “loss leader”, and for example, cable companies should forfeit profits from their cable business in order to absorb local service losses.
- AT&T notes that UNE prices can be as much as ten times higher than the corresponding retail rates, and that CLECs would therefore have to lose money on each and every customer.
- The Facilitator did suggest in the Report other avenues for market entry, since he acknowledges that entering through UNEs would be unprofitable. AT&T correctly points out that the Act provided for three methods of entry, UNEs being one.
- AT&T states that the Facilitator though his conclusion is writing one pathway to competition out of the statute books, and recommends that the Commission reject the conclusion.

Further Analysis

- Qwest would not consent to language saying that the current retail/wholesale relationship would be maintained in Wyoming (transcript, page 40). Qwest notes that essentially, such language does not belong in the SGAT.

Recommendation

QSI agrees with the Facilitator, but finds his explanation as to why it is permissible for CLECs to not have the ability to compete through UNEs puzzling, if not disturbing. The current cost/price relationship in Wyoming eases these concerns in Wyoming.

2. Intrastate Access Charges

Report page 6, Qwest comments page 11, AT&T comments page 6.

Background

Even where Qwest's affiliate pays the same access charges, or they are somehow imputed, concern can arise from access charges that exceed costs. There was CLEC evidence that such charges are in excess of costs in at least some of the participating states. However, the evidence did not address the uses served by the portion of those charges that exceed costs. That evidence also did not address which carriers have access to the above-cost portions. The Facilitator believes that each participating state can best decide whether current access charges are: (a) in excess of costs, and (b) available for Qwest use in a way that squeezes competitors out of the intraLATA toll market.

Analysis

- Once again, the Facilitator notes that the rates at issue are very problematic. The Facilitator also observes that there is a necessity to examine how intrastate costs are recovered and how any added margins are distributed if the Commission is to assure that undesirable barriers to competition are avoided.

- The Facilitator concludes however, that this forum did not provide the evidence that he would need in order to make such a determination, and he pushes this decision off to the individual states.
- AT&T notes that the evidence required to examine this issue is in the hands of Qwest.
- Qwest's defense with respect to this issue is limited to saying that the access charges paid by its affiliate are the same as those paid by its competitors. The Facilitator notes that this premise is questionable, since Qwest's affiliates have the same bottom line as Qwest itself, while Qwest's competitors obviously do not.
- AT&T agrees with the Facilitator's conclusion that this is an important issue, and that it could not be resolved in the SGAT proceeding. AT&T therefore recommends that the Commission postpone a finding of public interest in connection with Qwest's 271 applications until such a time as there have been further Wyoming-specific proceedings to address the issue.

Recommendation

QSI agrees with the Facilitator. This issue is best addressed by individual states.

3. Post-Entry Assurance Plan

Report page 7, Qwest comments page 16.

Background

A sound plan is necessary for assuring that local markets would remain open should Qwest receive 271 approval. The QPAP, which is Qwest's means for providing that assurance, is addressed thoroughly in a companion report (QPAP Report) to this one. That report recommended substantial changes to the plan as filed by Qwest and, should

Qwest agree to those changes, the plan would be sufficient to provide the necessary assurances.

Analysis

- This issue was not challenged.

Recommendation

QSI preliminarily agrees with the Facilitator's conclusion.

4. Lack of Competition

Report page 7, Qwest comments page 16, AT&T comments page 8.

Background

The thrust of the arguments made on this issue was that competition has not reached a level that is sufficient to meet the public interest. The Facilitator believes that he followed the FCC precedent, expressed often in prior 271 application proceedings, that there is no minimum market-entry level required. It would be wrong to apply the general public interest standard in a way that would effectively re-write section 271 Track A or Track B requirements. Competition in the seven states is generally commensurate with levels already deemed adequate by the FCC. The Facilitator therefore believes that the correct use of competition levels as evidence is in the consideration of whether entry has been suppressed by a failure to make local markets open to competition. Issues related to that potential problem have been fully addressed in prior workshops. No new and unique circumstances have been demonstrated to exist here.

Analysis

- AT&T notes that the easiest way to develop facilities-based competition is through the purchase of UNEs from Qwest. However, as noted above, and as

recognized by the Facilitator, such an avenue for entry is prohibited due to retail/wholesale pricing disparities.

- AT&T notes that if the disparity were eliminated, there would be more competition.
- AT&T makes an interesting point with respect to the recent fortunes of CLECs vs. Qwest. AT&T states that until the fortunes of Qwest and CLECs rise and fall as an industry, competition is a “mere dream”.

Further Analysis

- Qwest’s performance in the capital markets has been very similar to CLECs recently.

Recommendation

QSI agrees with the Facilitator.

5. Prior Qwest Conduct

Report page 9, Qwest comments page 18, AT&T comments page 9.

Background

AT&T argued that Qwest’s history of non-compliance with the section 272 separate affiliate requirements and with its obligations to serve CLECs under sections 251 and 252 compels a conclusion that the public interest would not be served by granting 271 authority now. In the workshop report preceding this one, the Facilitator concluded that the predictive value of Qwest’s prior 272 performance was not substantial. The section 251 and 252 examples cited here by AT&T were largely either based on CLEC complaint allegations not yet accepted as true by the authority trying them, insufficiently described

to allow us to determine their significance, or addressed through recommended resolutions of issues that were raised in earlier workshops. To the extent that legitimate claims of problems existed, they were not of a magnitude sufficient to give concern about the ability of a soundly crafted post-entry assurance plan to deter them.

Analysis

- AT&T notes that Qwest has been on its best behavior recently during the 271 proceedings. That good behavior should end once the proceedings are complete according to AT&T.
- The QPAP is designed to provide Qwest with incentive to continue to comply with its obligations, but Qwest notes that the QPAP is untested and may be flawed.
- AT&T argues that the issue is not whether Qwest should be denied 271 authority in order to punish it for its prior and continuing bad acts, but rather is granting 271 authority to Qwest consistent with the public interest, in light of those bad acts.
- AT&T cites several instances of Qwest non-compliance with 271 obligations, and notes that in each case the Facilitator chose to ignore them, including and FCC finding that Qwest was non-compliant.
- QSI notes that the CAS has mounted similar arguments.
- AT&T urges the Commission to find that a granting of 271 authority to Qwest is not in the public interest.

Further Analysis

- Mr. Munn (transcript, pages 46, 47) recognizes that the QPAP is intended to assure that the level of service Qwest provides to CLECs will continue after 271 authority is granted.

Recommendation

QSI agrees with the Facilitator, but notes that the incentive to continue to comply with the SGAT is a function of the decisions the Commission makes regarding the QPAP..

6. Structural Separation

Report page 10, Qwest comments page 20, AT&T comments page 14.

Background

Several CLECs offered structural separation as a means for mitigating the effects of Qwest actions to favor affiliates. The Facilitator is of the opinion that its proponents failed to show how structural separation would at all affect the need for the same efforts (as would be necessary in the absence of structural separation) to deter, detect, and sanction self-dealing or discrimination. Structural separation would certainly burden Qwest with higher internal transaction costs; the lack of any evidence to show that it would provide competitive benefits argues strongly against continuing claims that it is a useful remedy for assuring or allowing more simplistic verification of the existence of arms-length dealing.

Analysis

- AT&T disagrees with the Facilitator, saying that structural separation would open intracompany transactions to the light of day.
- Additionally, structural separation would require the retail affiliate to go through the exact same process as any CLEC in order to offer finished retail services.

Further Analysis

- Mr. Munn notes at page 50 of the transcript that AT&T's plan would involve much higher transaction costs, and at page 51, notes that Wyoming ratepayers would be negatively impacted through such costs.

Recommendation

QSI agrees with the Facilitator.

7. Sustained Checklist Compliance

Report page 11, Qwest comments page 23.

Background

The carrier group ASCENT argued that Qwest should have to show checklist compliance for a sustained period before the public interest would be served by granting it 271 approval. This argument, aside from writing into federal law a requirement not seen there by the FCC, does not take account of two important factors: (a) that prior workshops have addressed claims made by CLECs regarding the problems shown by past performance, and (b) that a soundly crafted post-entry assurance plan is to be preferred

over history as the proper means for assuring that current performance will not slide after 271 entry.

Analysis

- This issue was not challenged.

Recommendation

QSI preliminarily agrees with the Facilitator's conclusion.

8. Inducing Competition

Report page 11, Qwest comments page 23, AT&T comments page 16.

Background

The Facilitator agrees with the general conclusion that 271 entry, where all pre-conditions are met, promotes the public interest. He also believes that both common sense and the evidence presented demonstrate that such 271 approval tends to further induce local market entry by CLECs. These factors militate in favor of 271 entry.

Analysis

- AT&T disagrees with the arguments of Qwest that were accepted by the Facilitator – that a grant of 271 authority would act to induce further competition.
- The “New York experience” Qwest uses to support its assertion, saw greater penetration prior to 271 authority than after. CLECs had a good toe-hold in New York before the granting of the authority, and AT&T states that that is not the case in Wyoming.

- AT&T also notes that since wholesale prices are high (see discussion above) Qwest 271 authority would not induce greater local market competition, but would re-monopolize both long distance and local markets. AT&T supports this assertion by citing to the SBC experience in Texas (age 17).
- The assertion that 271 authority would induce competition is speculative and not consistent with economic conditions that would appear to point towards less, not more competition.
- AT&T therefore urges the Wyoming Public Service Commission to reject as contrary to the public interest that portion of the Report which claims that a grant of 271 authority to Qwest will induce the development of competition in the long distance market.

Recommendation

QSI agrees with the Facilitator.

9. Other Issues

Report page 11, Qwest comments page 24.

Background

Several other issues raised concerns that either have been addressed in earlier workshop reports, are being addressed through other procedures, or are not possible to address here due to lack of evidence:

- *Advanced Services, including DSL:* These issues were fully addressed in the prior workshop report that addressed emerging services; there are no public interest concerns left open by the resolution of the issues proposed there
- *OSS Test:* The results of the test now being conducted under the auspices of the ROC will come before the commissions individually after test completion

- *Change Management:* As noted in the preceding report, which addressed general terms and conditions of the SGAT, we have insufficient evidence to address this issue, given the state of flux that existed in Qwest's proposed change management processes during the prior workshop that was to consider the issue.

Analysis

- This issue was not challenged.

Recommendation

QSI Preliminarily agrees with the Facilitator's conclusion.