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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Performance Measurements and Standards for Unbundled Network Elements and Interconnection	)	CC Docket No. 01-318
	)	
Performance Measurements and Reporting Requirements for Operations Support Systems, Interconnection, and Operator Services and Directory Assistance	)	CC Docket No. 98-56
	)	
Deployment of Wireline Services Offering Advanced Telecommunications Capability	)	CC Docket No. 98-147
	)	
Petition of Association for Local Telecommunications Services for Declaratory Ruling	)	CC Docket Nos. 98-147, 96-98, 98-141

COMMENTS OF QWEST COMMUNICATIONS INTERNATIONAL INC.

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January 22, 2002

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COMMENTS OF QWEST COMMUNICATIONS INTERNATIONAL INC.

Qwest Communications International Inc. ("Qwest") respectfully files these comments on the issue of federal performance measurements and standards for unbundled network elements and interconnection pursuant to the Federal Communications Commission's ("Commission") *Notice of Proposed Rulemaking* ("*Notice*").[1] Qwest files these comments as an incumbent local exchange carrier ("ILEC") (provider of unbundled network elements or "UNEs"), and as a competitive local exchange carrier ("CLEC") (a user of UNEs).

[1] *In the Matter of Performance Measurements and Standards for Unbundled Network Elements and Interconnection, Performance Measurements and Reporting Requirements for Operations Support Systems, Interconnection, and Operator Services and Directory Assistance, Deployment of Wireline Services Offering Advanced Telecommunications Capability, Petition of Association for Local Telecommunications Services for Declaratory Ruling*, CC Docket Nos. 01-318, 98-56,

I. INTRODUCTION AND SUMMARY

The *Notice* requests comment on whether the Commission should set federal performance measurement and filing requirements for ILEC provisioning of UNEs. The *Notice* also requests comment on whether the Commission should set minimum standards for UNE provisioning, possibly including enforcement mechanisms such as forfeitures and payments if standards adopted in this docket are not met.

Qwest urges the Commission to forego attempting to regulate the operational provision of UNEs. Qwest in the states in which it operates as an ILEC, and CLECs have already negotiated comprehensive agreements that identify, measure and provide for enforcement of the provisioning of a multitude of UNE measurements. Over the course of the past two years, Qwest has negotiated Performance Indicator Definitions ("PID") to measure UNE performance. During the past year, as part of the Section 271 process in each in-region state, Qwest negotiated Performance Assurance Plans ("PAP") that are based on these PIDs. These PIDs and PAPs are outlined below. The PAPs call for measurement of Qwest ILEC services which are generally considerably more detailed than anything contemplated by the *Notice*, and call for voluntarily adopted monetary payments if the standards called for in the PAPs are not achieved. Once implemented (upon grant of Section 271 relief in each state where filed), the PAPs encompass all of the issues that the Commission addresses in the *Notice*. Moreover, because Qwest has agreed to automatic payments for missing the deadlines negotiated in the PAPs, the PAPs will achieve considerably more than the Commission would be able to accomplish because it may not assess either self-executing remedies or baseline forfeitures. Qwest, state regulators, and CLECs have

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98-147, 96-98 and 98-141, *Notice of Proposed Rulemaking*, FCC 01-331, rel. Nov. 19, 2001. *See also* 66 Fed. Reg. 59759 (Nov. 30, 2001); *Order*, DA 01-2859, rel. Dec. 7, 2001.

spent literally thousands of hours to devise the PAPs, and further implementation of the PAPs will consume many additional thousands of work hours.

Qwest does not here challenge the Commission's authority to obtain information from ILECs on the provision of UNEs. However, an additional federal layer of reporting and measuring of UNE provisioning is unnecessary and counterproductive. Qwest is, of course, willing to share the results of its PID measurements with the Commission in convenient format consistent with that used by the states, as set forth more fully below. However, it would be wasteful and unwise for the Commission to seek compilation and filing of UNE performance data in any other format. It would be even more unwise if the Commission were to attempt to establish standards for UNE performance or remedies for non-compliance with those standards. Reasonable federal performance standards could only be established on a full record (which would largely duplicate the PAP records in the various states). Moreover, because of due process and statutory constraints, federal enforcement of those standards (absent voluntary consent by ILECs) would be cumbersome and problematic, at best; unlawful at worst.

Outside of reviewing state performance measurements for information purposes, the only reason that could justify the Commission's involvement in measuring or judging the manner in which ILECs are provisioning UNEs would be as part of a comprehensive effort to federalize and standardize performance measurement methodologies (and possibly standards) for UNE provisioning. If the Commission were to occupy the field of UNE performance and override state regulation and agreements, this proceeding could offer a vehicle for accomplishing this objective. There may come a time when such preemption is good policy. However, at present, Qwest is finalizing its negotiations and advocay of its PAPs before the state regulators in all fourteen of the states where it provides ILEC services. Any effort by the Commission to

preempt state PAP efforts would be premature, have the potential to disrupt these important negotiations, and create comity concerns between the Commission and the states. Without preemption of state measurements, any Commission effort to set standards would be duplicative, wasteful, and contrary to the public interest. For so long as UNEs exist and ILECs are required to unbundle them under Section 251 of the Telecommunications Act of 1996 ("1996 Act"), and the states' actions are consistent with the 1996 Act, the Commission should defer to the states.

II. QWEST'S PERFORMANCE ASSURANCE PLANS ARE COMPREHENSIVE

Qwest's approach to UNE (and other interconnection-related) performance monitoring, standards and enforcement has evolved over the years since passage of the 1996 Act. This comprehensive approach to interconnection performance has dual origins. Qwest originally began developing PIDs as soon as it was charged with implementing the 1996 Act. Subsequently, when Qwest began workshops and other industry negotiations preparatory to seeking Section 271 relief, Qwest began developing PAPs. The PAPs incorporate the PIDs as measurement methodologies and standards. These PAPs go beyond measurements and commit Qwest in the realm of assurances and remedies for failure to meet specified performance targets

While the PIDs are incorporated within the PAPs, it is useful to address them separately.

A. PERFORMANCE INDICATOR DEFINITIONS

The history of performance measurements at Qwest (formerly U S WEST) dates back to the passage of the 1996 Act. The 1996 Act set forth three means of competitive entry by CLECs into the local exchange market: (1) facilities-based competition; (2) leasing of UNEs; and (3) resale. To foster each type of entry, Qwest must provide CLECs with nondiscriminatory access to interconnection, UNEs, and resale.

Qwest's performance measures were developed to track the legal standards established by the 1996 Act and demostrate that Qwest was meeting the 1996 Act's nondiscrimination

obligations. The Commission recognized that the purpose of performance measurements and reporting requirements is to allow carriers to observe and verify the extent to which an ILEC is providing nondiscriminatory access to services and facilities.[2] Thus, the performance measures designed by Qwest, CLECs and state regulators were designed to demonstrate that, in the context of the competitive landscape, Qwest is meeting its legal obligations as to interconnection, UNEs and resale.

1. PID Development

From 1996 through 1998 Qwest entered into negotiations of Interconnection Agreements with CLECs, individually and in groups. Parts of these negotiations included discussions of performance standards and were the precursor to the development of more formal performance indicator definitions.

Starting in 1998 and throughout 1999 Qwest began the process of submitting 271 applications in its fourteen-state local exchange territory. Out of that process two independent Third Party Operational Support Systems ("OSS") Tests emerged, one in Arizona and one a thirteen-state collaborative effort known as the Regional Oversight Committee ("ROC"). Test Administration Groups ("TAG") made up of Qwest, competitors, and regulators were formed for both tests. The TAGs determined the need to establish a formal process of developing performance measurements to establish the test criteria and meet the requirements of Section 271 of the 1996 Act. A series of state commission/consultant-directed Performance Measurement workshops began in 1999 with the Arizona TAG to establish the first set of formal PIDs. In early 2000 the ROC adopted the baseline PIDs established in Arizona and began its own workshops.

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[2] Performance measures can serve as a basis for determining whether ILECs are satisfying their

The resulting PIDs have been developed and refined over the last two years in both forums. The workshop participants fleshed out the purpose, description, reporting period, unit of measure, reporting comparisons, level of disaggregation, formula, exclusions and products to be measured, and established the business rules for the calculation of each PID. The TAGs used the measurements negotiated in other Bell Operating Company ("BOC") regions and accepted by the Commission as reference points in this process. These PIDs have been tailored to be compatible with Qwest's systems. The PIDs are the product of thousands of hours of meetings and discussions among Qwest, competitors, and regulators.

2. PID Service Performance Dimensions

Qwest's existing performance indicators cover nearly every aspect of service Qwest provides to its competitors.[3] Categories of measurement include:

- Electronic Gateway Availability – CLECs interface electronically with Qwest using gateway systems. These measures evaluate the quality of access to the electronic gateway systems, focusing on the extent they are actually available to CLECs. Measurements covering this aspect of Qwest's performance are designated as a numbered sequence beginning with the prefix GA.
- Pre-Order/Order – In the process of requesting service CLECs perform a series of functions using Qwest's OSS. These measures cover the initial and ongoing interactions of the CLEC with Qwest, evaluating the timeliness of responses to specific preordering/ordering queries for CLECs using Qwest's OSS. Measurements covering this aspect of Qwest's performance are designated in a numbered sequence beginning with the prefix PO.

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statutory obligations pursuant to Section 251.

[3] *See* Attachment A, ROC 271 Working PID Version 4.0, Oct. 22, 2001 and Attachment B, AZ 271 Working PID Version 7.0, Nov. 12, 2001.

- Ordering & Provisioning – To complete the installation of a CLEC-requested service Qwest performs a number of ordering and provisioning functions. This series of measurements evaluates the effectiveness of Qwest's performance in completing these functions and are designated in a numbered sequence beginning with the prefix OP.
- Maintenance & Repair – Qwest's performance of maintenance and repair are measured under the indicators designated in a numbered sequence beginning with the prefix MR.
- Billing – Qwest provides a variety of billing data enabling the CLECs to complete this function. Under the PIDs identified in a numbered sequence beginning with the prefix BI, Qwest's success in performing these functions is assessed.
- Database Updates – The measurements in a numbered sequence beginning with the prefix DB evaluate Qwest's role in performing updates to Qwest databases utilized by competitors for E911 and LIDB functions.
- Directory Assistance – Qwest's directory assistance service system handles directory assistance calls from CLEC customers along with calls from its own customers. Qwest's directory assistance personnel answering these calls do not know whether a caller or a called party is a Qwest or CLEC customer. The TAGs adopted the DA measurement to monitor Qwest's performance in providing responses to these calls.
- Operator Services – Qwest's operator service system handles calls to operators from CLEC customers along with calls from its own customers. Qwest's operators answering these calls do not know whether a caller or a called party is a Qwest or CLEC customer. The TAGs adopted the OS measurement to monitor Qwest's performance in providing responses to these calls.

- Network Performance – Network performance related to interconnection is measured in PIDs designated in a numbered sequence beginning with the prefix NI and NP.
- Collocation – Collocation allows CLECs to place equipment in Qwest central offices or other structures such as remote terminals. The TAG negotiated the PIDs in a numbered sequence beginning with the prefix CP to assess Qwest's performance of processes related to collocation.

In the *Notice* on UNE metrics the Commission recommends adopting national measurements for key aspects of pre-ordering, ordering, provisioning, and maintaining those facilities and services that the *Notice* describes as critically important to ensuring that CLECs can enter the market for local exchange services as contemplated by the 1996 Act. As can be seen by the scope of the PIDs already implemented by Qwest in response to TAG negotiations, Qwest's existing metrics encompass and exceed the scope of the measurements contemplated by the Commission in this proceeding.

3. Number of Indicators

Over the course of negotiations hundreds of measurements have been defined and Qwest is now reporting using these metrics. As PIDs were refined during the workshop process, new versions were issued. Between January 2000 and December 2001 a total of twelve versions of the ROC PIDs were issued reflecting ongoing negotiations and agreements between Qwest and the CLECs. In Arizona, between the first workshop in 1999 through December 2001 nineteen versions of the PID were generated. Changes in the PIDs were made as the result of CLECs' requests, audit and test findings, continuous improvements initiated by Qwest, and regulators' inputs. The chart below depicts the evolution of the performance indicators.

Qwest's Measurement Progress								
	Nebraska 271 Testimony November 1998		PID Workshop November 1999[4]		271 OSS Test November 2000[5]		271 OSS Test November 2001[6]	
Indicator Category	# of PIDs	# of Measures	# of PIDs	# of Measures	# of PIDs	# of Measures	# of PIDs	# of Measures
Electronic Gateway Availability	1	1	2	4	4	6	6	8
Pre-Order/Order	5	13	6	25	11	89	13	105
Ordering & Provisioning	6	57	7	122	9	534	10	371
Maintenance & Repair	8	45	9	141	9	310	11	316
Billing	2	2	3	3	4	7	4	7
Database Updates	1	1	1	1	2	6	2	4
Directory Assistance	2	2	2	2	2	2	1	1
Operator Services	2	2	2	2	2	2	1	1
Network Performance	1	1	1	2	2	3	2	6
Collocation	3	3	6	12	6	24	4	8
Total	31	127	39	314	51	983	54	827

In the chart above, the column labeled "# of PIDs" tallies what is measured, *e.g.*, Interval, Commitment Met, Accuracy. The quantities in the column labeled "# of Measures" are the result of applying indicators to specified products, systems, and disaggregation levels. In other words, Indicators x Products x Disaggregations = Total Number of Measurements Reported.

The progression of measurements was generated through proceedings in numerous workshops dedicated to defining performance indicators, lengthy discussions in regularly scheduled TAG meetings, and resolution of disagreements in special subcommittees. When agreement could not be reached, the TAGs employed the OSS test's impasse processes to resolve

[4] Count based on AZ 271 Working PID Version 3.1 - Nov. 2, 1999 (not attached).

[5] Count based on ROC 271 Working PID Version 2.0 - Sep. 13, 2000 (not attached).

[6] Count based on ROC 271 Working Pid Version 4.0 - Oct. 22, 2001, plus PO-19 measurement approved after completion of the 4.0 PID (*see* Attachment A). There is also a PO-5E disaggregation in the AZ 7.0 PID, not included in this count.

issues and the TAG ruled on the final definition or standard. As can be seen, the process of defining the PIDs has been collaborative, yet painstaking and laborious.

Each month, Qwest reports its performance results in each state in its region and for the 14-state region as a whole for the measurements developed through this process. Each report covers the prior twelve months for each of the PIDs and their subcategories. The most recent reports available cover the period from December 2000 through November 2001. These reports are made on an aggregated and individual CLEC basis.[7]

4. Collaborative Establishment of PIDs

In conjunction with the development of PIDs as descriptors, Qwest and the CLECs established standards for the PIDS. Working collaboratively in the PID workshops, these entities established two objective performance standards: (1) when a retail analogue exists, wholesale performance must be at parity with retail; and (2) when no retail analogue exists, wholesale performance must meet an agreed benchmark. This approach is consistent with prior Commission decisions on Section 271 applications.[8]

5. Qwest PID Audits

Two separate Performance Indicator audits have been completed. In Arizona, the TAG employed Cap Gemini Ernst & Young ("CGE&Y") to conduct the performance measurement audit. In the final report dated December 21, 2001 CGE&Y reported: "CGE&Y's audit of Qwest's performance measure systems and processes confirmed that these systems and processes were substantially in compliance with the requirements of the Arizona PID for the months

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[7] CLECs can see the aggregate results and their own results.

[8] *In the Matter of Joint Application by SBC Communications Inc., et al., d/b/a Southwestern Bell Long Distance Pursuant to Section 271 of the Telecommunications Act of 1996 to Provide In-Region, InterLATA Services in Arkansas and Missouri*, CC Docket No. 01-194, *Memorandum Opinion and Order*, FCC 01-338, at ¶ 8 (App. D), rel. Nov. 16, 2001.

included within the audit for each particular measure. Generally, Qwest systems and processes provided for the reporting of performance measurement results as required by the PID."[9]

In the ROC, the TAG retained The Liberty Consulting Group ("Liberty") to audit Qwest's systems for gathering and reporting performance under the PIDs. In its final report, Liberty concluded: "the audited performance measures accurately and reliably report actual Qwest performance."[10]

6. Qwest PID Data Reconciliation

In response to CLEC requests for additional verification as to the accuracy of results reported under the PIDs, Qwest agreed to further scrutiny of its measurements via a data reconciliation process. The ROC retained Liberty to reconcile records specified by CLECs with the data used in Qwest's performance reports. As the reconciliation process is still underway a conclusive report is not yet available. However, it will resolve any outstanding issues in the near future.

This overview of the history of performance measurement development at Qwest clearly demonstrates three key points:

- The Qwest PIDs and standards have been collaboratively developed with Qwest, competitors, and regulators throughout its fourteen-state local exchange area.
- Qwest's existing metrics encompass and exceed the scope of the measurements contemplated by the Commission in this proceeding.

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[9] *See* Attachment D, Summary of Audit Findings, Executive Summary of the QWEST PERFORMANCE MEASUREMENTS AUDIT: FINAL REPORT.

[10] *See* Attachment C, MGW-PERF-2, Final Report on the Audit of Qwest's Performance Measures (Liberty Report) at 2-3.

- Qwest's PIDs have been thoroughly audited and reconciled to insure that the results produced can be relied upon accurately to assess Qwest's ability to provide interconnection, collocation, and access to unbundled network elements (UNEs) in a manner that is just, reasonable and nondiscriminatory.[11]

B. PERFORMANCE ASSURANCE PLANS

Qwest has developed, in conjunction with its Section 271 workshop process, PAPs which specify detailed processes and remedies for the provisioning of UNEs. The PIDs described in the previous section are incorporated into the PAPs. Qwest has spent more than 18 months engaged in formal process before the state regulatory commissions negotiating, developing and reviewing its performance plans. Separate reviews were conducted in Arizona, Colorado and the ROC states. The PAPs being considered for each state are based upon the collaboratively developed PIDS.

1. PAP History

Qwest began its first PAP workshop in Arizona in July, 2000. The staff of the Arizona Corporation Commission, assisted by its consultants, Doherty & Company, conducted seven workshops from June, 2000 through April 2001. Numerous CLECs intervened in those workshops, such as Alltel, GST, WorldCom, SBC Telecom, Eschelon Telecom Inc., Electric Lightwave, Inc., Cox Arizona Telecom Inc, espire, Sprint Communications, Z-Tel and Covad. In the first workshops, Qwest, CLECs and the Arizona staff discussed general concepts and principles applicable to a performance assurance plan and the performance measurements to be used in the plan. From the beginning, the participants agreed that PIDs for Arizona would be the foundation of Qwest's performance assurance plan for that state.

[11] 47 U.S.C. § 251.

In August, 2000, eleven of the states participating in the ROC OSS test also began a collaborative, the Post Entry Performance Plan ("PEPP"), to discuss the development of a performance assurance plan to support Qwest's application for those states.[12] Five multi-day workshops, supplemented by teleconferences, were held between October 2000 and May 2001. Staff members from the 11 states as well as AT&T, WorldCom, Z-Tel, Covad, McLeod, Eschelon, SBC Telecom, New Edge Networks and other CLECs participated in the workshop process. Significant agreements were reached in the course of the PEPP collaborative.

Building on the agreements from the ROC PEPP Collaborative, Qwest, CLECs, and nine states participated in unprecedented multi-state hearings before a facilitator appointed by the participating state commissions to address disputed issues. The issues were presented through comments and live testimony subject to cross-examination. The hearings included direct, rebuttal, and sur-rebuttal testimony from eleven witnesses during the seven days of hearings. The facilitator has issued his recommendation and it is being considered by the nine commissions. All parties have filed comments on the facilitator's recommendation and several of the states have already conducted oral arguments or technical conferences to review the recommendation. Responses from the commissions are expected within weeks.

On January 24, 2001, the Colorado Public Utilities Commission ("PUC"), in Decision C01-78, opened Docket 01I-041T "for the purpose of investigating potential mechanisms for ensuring that Qwest will continue to comply with § 271 requirements in the future."[13]

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[12] Participating states included Idaho, Iowa, Nebraska, New Mexico, North Dakota, Montana, Oregon, South Dakota, Utah, Washington, and Wyoming. Arizona and Minnesota declined the invitation to participate. Colorado opened Docket 01I-041T on January 24, 2001 to separately consider a Performance Assurance Plan.

[13] Public Utilities Commission of the State of Colorado, Decision No. C01-078, Docket 01I-041T, January 24, 2001, at 1.

Expressing an interest in exploring a performance assurance plan in Colorado that may not be modeled strictly after the New York or Texas performance assurance plan, the Colorado PUC assigned a single Hearing Commissioner to the docket.[14] The Hearing Commissioner appointed Philip J. Weiser, Associate Professor of Law and Telecommunications at the University of Colorado as Special Master to conduct an expedited proceeding to develop a PAP for Colorado. Intervenors included AT&T Communications of the Mountain States, Inc., WorldCom Inc., New Edge Network, Inc., Covad Communications Company, Pac-West Telecom, Inc., Rhythms Links, Inc., XO Colorado, LLC, Eschelon Telecom, Inc., McLeod USA Telecommunications Services, Inc. and Sprint Communications Company. Qwest and the intervenors spent approximately five months engaged in ex parte meetings with the Special Master addressing a PAP for Colorado The Special Master issued his recommendation in May, the parties have filed comments on it, and the Hearing Commissioner has provided his recommendations. A few issues subject to remand are being reviewed by the Special Master, but the Colorado PAP should be final within weeks.

2. PAP Remedies

Even though the PAPs developed through each of these processes are different, each is based upon the collaboratively-developed PIDs and provides robust remedies for failure to meet the measurement standards. The Qwest PAP developed from the thorough collaborative ROC review process clearly meets the Commissions expectations for an adequate anti-backsliding mechanism.

[14] *Id.* at 2.

The Qwest PAP contains clearly articulated and pre-determined measures and standards that encompass a range of carrier-to-carrier performance. Payments under the Qwest PAP are tied to effective enforcement measures, which are well defined and comprehensive.

There was substantial disagreement over which PIDs should be included in the Qwest PAP at the beginning of the ROC PEPP workshop. While the CLECs proposed that almost every PID be included, Qwest objected because many of the PIDs represented overlapping measures and could result in duplicative payments. In the end, the parties agreed to an approach that resolved disputed performance measurements by using a "family" approach. Nearly all of the disputed PIDs are placed in the operation of the PAP, but some of the payments are based only on the "family member" that generates the highest payment. Under this approach, the incentive for maintaining conforming performance for all "family members" is created while reasonably keeping Qwest from paying multiple times for the same performance deficiency. For example: PO-6 (Work Completion Notification Timeliness) is included with PO-7 (Billing Completion Notification Timeliness) as two families: PO-6a/PO-7a (for notices transmitted via IMA) and PO-6b/PO-7b (for notices transmitted via EDI). Measurements within each family share a single payment opportunity with only the measurements with the highest payment being paid.

Furthermore, Qwest's PAP also contains a built-in review mechanism to ensure that the PIDs continue to be effective measures of Qwest's wholesale performance. Every six months, the Qwest PAP requires a thorough review of the performance measurements, at which time each state commission, Qwest and participating CLECs can consider changes, additions and deletions to the measurements.

The Qwest PAP provides reasonable structure that is designed to detect and sanction poor performance when and if it occurs. Like the Southwestern Bell PAPs, the Qwest PAP is a two-tiered plan. Certain PIDs are categorized as "Tier 1," and for those measurements, Qwest will make payments directly to individual CLECs if Qwest does not satisfy the performance measurements in the plan -- either parity between the service Qwest provides to the CLEC and that which it provides to its own retail customers, or where there is no retail analogue a designated benchmark standard. Certain PIDs are categorized as "Tier 2," and for those measurements, Qwest will make payments to the State. This two-tiered structure assures that Qwest has incentive to maintain satisfactory wholesale performance to individual CLECs, as well as to CLECs in the aggregate.

Payments under the Qwest PAP are on a per occurrence basis, except where the measurements do not lend themselves to that type of assessment. In such cases, the payment is on a per measurement basis. The payment is calculated by multiplying the per occurrence payment amounts specified in the Qwest PAP by the number of consecutive months of non-conforming performance. The performance measures are ranked from low to high and the dollar amounts associated with a miss of each measure increase accordingly. Thus, the level of payment depends on the number of consecutive months of non-conforming performance and escalates the longer the non-conforming performance continues and, like the SWBT PAPs, the escalation continues for six consecutive months.

The Qwest PAP provides self-executing payments for non-conforming service. The plan generates automatic payments to CLECs and to the State based upon the performance results generated under the PID business rules, the statistical methodology, and the payment structure.

CLECs receive Tier 1 payments without any need to prove that they were harmed by the non-conforming performance.

The Qwest PAP provides for extensive data validation and auditing. By the time that the Qwest PAP becomes effective in each state, the performance measurements that form the basis of the Qwest PAP will have undergone not one, but two, comprehensive audits of its data collection, calculation and reporting functions by two different independent auditors.[15] Moreover, Qwest has included in its plan an adaptation of the root cause provisions that Texas agreed to incorporate after Commission approval. Qwest has agreed to investigate any second consecutive Tier 2 miss and consecutive aggregate Tier 1 misses to determine the cause of the miss and to identify the action needed to meet the standard.

Qwest's PAP provides for a detailed and integrated audit program to be conducted on a two-year cycle by an independent auditor to be selected by participating commissions with input from Qwest and CLECs. Giving priority to higher risk areas identified in the OSS report, the audit plan will identify the specific performance measurements to be audited, the specific tests to be conducted and will be coordinated with other audits that may be conducted by other state commissions so as to avoid duplication.

III. STATE PERFORMANCE PAPS SATISFY ANY FEDERAL CONCERNS

This Commission has analyzed state performance measurement plans in the past, and has allowed existing federal standards to be superceded by "comprehensive" state plans. For example, in the docket examining and approving the GTE/Verizon merger, the Commission required the merged entity to submit performance plans which included measurements, standards

[15] The performance measures included in the QPAP were audited both by Liberty Consulting Group in the ROC OSS collaborative and by Cap Gemini Ernst & Young in the Arizona collaborative.

and payments (the payments were adopted voluntarily by the companies). These plans are to be superceded in any state when a "comprehensive" state substitute is filed with the Commission.[16] The PAPs that Qwest is negotiating with the industry and with state regulators are all "comprehensive" in the sense determined by the Commission in the Verizon case -- they measure the same performance areas as the *Notice* proposes to measure at the federal level.[17] In this section we briefly examine each of the proposed measurements set forth in the *Notice* and compare these measurements to the measurement which Qwest will submit to state regulators once its PAP is implemented in each state. For the most part the measurements described herein are standard across Qwest's territory, and are expected to be approved in their current format. The purpose of this section is not to demonstrate in detail that Qwest's PAP in each state is individually "comprehensive," but to help the Commission to understand the close symmetry between the Commission's proposals and the measurements and standards that Qwest and the states are poised to is approve for full implementation. Qwest is able to submit state-by-state information for each measurement in accordance with the format set forth herein. For each measurement described in this section, Qwest has attached a form providing the information requested by the Commission in the format directed by the *Notice*.[18]

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[16] *See* Letter from Carol E. Mattey, Common Carrier Bureau, to Jeff Ward, Verizon Communications, DA 02-14, Jan. 8, 2002 ("Jan. 8, 2002 Mattey Letter"); *Bell Atlantic-GTE Merger Order*, 15 FCC Rcd. 14032, 14294 ¶ 17 (App. D) (2000).

[17] *Bell Atlantic-GTE Merger Order*, 15 FCC Rcd. at 14161-62 ¶ 282, n.637, 14294 n.60 (App. D). In order to determine whether a state plan was comprehensive, the Commission also looked to "the amount of potential liability under the plan, the plan's duration, and the frequency of updates." *Id.*, Jan. 8, 2002 Mattey Letter.

[18] *Notice*, Appendix, National Performance Measurements.

A. PRE-ORDER MEASUREMENT

The *Notice* seeks comment on how to measure the response time to specific queries to the IMA interface (*i.e.*, in the pre-order time frame). Qwest's pre-order response times measurement process (as defined in the PIDs pending in all fourteen states) evaluates the timeliness of responses to specific pre-order/order queries through the use of the IMA user interface. Attachment E-1 sets forth in summary fashion Qwest's measurement of pre-order response times in the format described in the Appendix to the *Notice*. The measurement includes evaluation of the timeliness of responses to specific pre-ordering/ordering queries of Qwest's OSS accessed through the IMA gateway interface. Qwest's measurements are based on a response time standard as negotiated as part of the PAP process. Parity measurements are not possible because Qwest does not share common systems with CLECs. Unlike the assumption in the *Notice* that measurements be based on actual data, Qwest's measurements are often based on simulation results (IRTM scripts).[19]

B. ORDER NOTIFIER TIMELINESS

The *Notice* seeks comment on whether the ILEC should measure the amount of time it takes "to send a notice confirming whether an order placed by a competing carrier has been accepted and indicating the date on which the requested service will be provisioned (FOC Timeliness) and the amount of time [the ILEC] require[s] to notify the competing carrier that an order has been rejected (Reject Timeliness)."[20] Comment is sought on such issues as when the time for this measurement should commence and whether rejected orders should be excluded

[19] IRTM stands for IMA Response Time Measurement. Arizona has already found that IRTM is a reasonable measurement device. Qwest believes that actual measurements are inappropriate and that IRTM is a superior method because actual measurements include factors outside of Qwest's control, often making the measurement invalid.

[20] *Notice* ¶ 39 (citations omitted).

from the measurement.[21] Qwest's equivalent to the proposed Order Notifier Timeliness process as defined in the PIDs pending in all fourteen states is currently monitored by Qwest in two segments, Firm Order Confirmations ("FOC") (*see* Attachment E-2(a)) and Local Service Request ("LSR") Rejection Notice Interval (*see* Attachment E-2(b)).

FOC Timeliness monitors the timeliness with which Qwest returns FOCs to CLECs in response to LSRs/ASRs received from CLECs focusing on the degree to which FOCs are provided within specified intervals. LSR Timeliness and Reject Timeliness measure the interval between the receipt of a LSR and the rejection of the LSR for standard categories of errors/reasons.

C. ORDER COMPLETION NOTIFIER TIMELINESS

Order Completion Notifier Timeliness, as defined in the *Notice*, is a measure of the amount of time between the actual order completion and the distribution of the Order Completion Notice to the competitive carrier. An Order Completion Notice informs a CLEC that the ILEC completed the installation of the service requested by the particular order. Qwest's Work Completion Notification Timeliness evaluates the timeliness of Qwest's Order Completion Notification through electronic notification at an LSR level to CLECs. The notification informs the CLEC that provisioning work on all service orders that comprise the CLEC LSR have been completed in the Service Order Process and the service is available to the customer. Attachment E-3 sets forth in summary fashion Qwest's proposed Work Completion Notification Timeliness measurement in the format described in the Appendix to the *Notice*.

[21] *Id.* ¶ 40.

D. PERCENTAGE OF JEOPARDIES

The *Notice* seeks comment on whether and how to measure the extent to which competing carriers are notified that their customers' orders are in jeopardy of not being completed as scheduled prior to the committed due date (Percentage of Jeopardies). Of particular interest is whether test orders, disconnect orders, ILEC administrative orders and orders that are incomplete or cancelled should be excluded from the measurement calculation. Pursuant to Qwest's measurement, which Qwest calls Timely Jeopardy Notices, when the original due dates are missed, Qwest measures the extent to which customers are notified in advance of the jeopardized due dates. The measurement provides a percentage of late orders for which advance jeopardy notification is provided. Qwest's process for measuring the Timely Jeopardy Notices is set forth in Attachment E-4.

We note here that this measure seems considerably less useful than others discussed in the *Notice*, because it is predicated on advance notice of a prospective missed due date (which ILECs are trying to avoid). Qwest measures this information as described above, but questions its utility.

E. PERCENTAGE OF ON TIME PERFORMANCE

The *Notice* proposes to measure the percentage of orders completed on or before the first confirmed due date (or a subsequent date established by the carrier).[22] The *Notice* further seeks comment on exclusions from this measurement based on customer readiness, and seeks comment on an appropriate performance standard (noting the request of CLECs for a 96% on time performance rate). Qwest's measurement of percentage of on time performance measures the extent to which Qwest installs services for customers by the scheduled due date. Qwest's

[22] *Notice* ¶¶ 48-51.

processes for measuring the percent of on time performance including a variety of exclusions, are set forth in Attachment E-5.

F. AVERAGE DELAYS ON MISSED INSTALLATION ORDERS

Qwest's provisioning measurement Average Delay on Missed Install Orders measures the average number of business days past due on missed installation orders. This measurement assesses the extent to which installations are delayed due to actions attributable to Qwest and includes several exceptions for actions outside the control of Qwest as described in Qwest's processes for measuring Average Delay on Missed Install Orders set forth in Attachment E-6.

G. INSTALLATION QUALITY

The *Notice* requests comment on a measure of the percentage of completed orders for which CLECS file trouble reports (Installation Quality). This measurement would be provided as the percentage of loops or circuits installed where a reported trouble was found in the network within the first 30 days after completion of the order. Installation Quality measurement measures the number of trouble tickets generated within 30 calendar days of new complete installations. However, this measurement is not a valid performance indicator. Qwest recommends that this measurement not be adopted. Qwest has accordingly not submitted an attachment for this category. If Qwest develops an adequate indicator in this category, we will file a proper exhibit at that time.

H. PERCENTAGE MISSED APPOINTMENTS

A measurement, which represents the number of missed customer appointments for competitive carriers (Percentage Missed Appointments), was proposed in the *Notice*. This measurement is redundant in that it is the inverse of Installation Commitments Met. If Qwest does not meet its appointments with its customers and the missed appointments are the fault of

Qwest, the result will be missed installation commitment dates. There is no need for this measurement.

I. OPEN ORDERS IN HOLD STATUS

This measurement the *Notice* captures the order backlog by monitoring the status of past-due orders. The measurement would be the percentage of circuits that are past the committed due date as of the end of the reporting period (Open Orders in Hold Status). Qwest's Interval for Pending Orders Delayed Past Due Date evaluates the extent to which Qwest's pending orders are late, focusing on the average number of days the pending orders are delayed past the applicable due date, as of the end of the report period. Qwest's Interval for Pending Orders Delayed Past Due Date process is set forth in Attachment E-7.

J. TROUBLE REPORT RATE

The *Notice* proposes a measurement of the percentage of provisioned loops or circuits with trouble reported within a certain period of time (Trouble Report Rate). The measurement would allow a competing carrier to determine, on an ongoing basis, whether its customers experience more incidents of trouble than the ILEC's end users. Qwest's Maintenance & Repair: Trouble Report Rate measures the overall rate of trouble reports as a percentage of the total installed base of the service or element. Qwest's process for its Maintenance & Repair: Trouble Report Rate process is set forth in Attachment E-8.

K. REPEAT TROUBLE REPORT RATE

The *Notice* proposes to measure the percentage of trouble tickets that are repeat trouble tickets generated within a 30-day period (Repeat Trouble Report Rate). The *Notice* proposes that disparities in repeat troubles may indicate that an ILEC provides inferior maintenance support in the initial resolution of troubles, or supplies network components of an inferior quality. Qwest's

Maintenance & Repair: Repeat Report Rate evaluates the accuracy of repair actions, focusing on the number of repeated trouble reports received for the same trouble within a specified period (30 calendar days). Qwest's process for the Repeat Report Rate process is set forth in Attachment E-9.

L. TIME TO RESTORE

The *Notice* proposes a measurement of ILEC promptness in restoring services after a competing carrier refers a problem to it for resolution (Time to Restore). This measure would allow the CLEC to gauge whether its customers' services are repaired as quickly as an ILEC's customers. Qwest's measurement Maintenance & Repair: Time to Restore is a measurement of the timeliness of repair, focusing on the length of time it takes to restore service to proper operation. Qwest's process for Time to Restore is set forth in Attachment E-10.

IV. FEDERAL PENALTIES FOR MISSING UNE PERFORMANCE MEASUREMENT STANDARDS WOULD BE UNNECESSARY, DUPLICATIVE AND WOULD RAISE SIGNIFICANT LEGAL QUESTIONS

The *Notice* seeks comment on whether "the Commission should exercise the full panoply of enforcement mechanisms available to it under the Act to enforce any national measurements and standards [that] we might adopt."[23] Among the suggested "enforcement" tools are denial of Section 271 authority to an RBOC which failed to meet the Commission's standards, forfeitures (including "base forfeiture amounts"), and a "self-effectuating liquidated damages rules."[24] Qwest submits that the Commission should not assess any penalties (or create any penalty structure) for failure to meet federal UNE performance standards.

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[23] *Notice* ¶ 21.

[24] *Id.* ¶¶ 21-22.

A. Any Penalties Devised In This Docket Would Duplicate Remedies Agreed To In The Pap Process

Qwest submits that the there is nothing in the state of the current market or record which would make consideration of penalties, fines or damages a proper topic for Commission action at this time. Most significantly, Qwest is negotiating substantial remedies into the PAPs that are part of the Section 271 process. If the Commission were to establish penalties in this proceeding, these remedies would duplicate penalties established in the PAPs. Not only would such duplicative sanctions for what would be the same conduct be of dubious legality, it would be entirely gratuitous. If the Commission were to desire to adopt penalties for missing federal guidelines for UNEs, it should do so only if it preempts state remedies, including those negotiated into PAPs or similar state processes. Qwest submits that there is no basis on which to take such a step, certainly not at this time.

B. Liquidated Damages And "Baseline" Forfeiture Amounts Raise Serious Legal Issues

Moreover, the manner in which the Commission is approaching the issue of forfeitures -- considering the possibility of self-executing damages to third parties and forfeiture processes streamlined by "baseline" forfeiture amounts -- raises significant statutory issues. The assessment of fines, forfeitures, monetary penalties and damages by the Commission is dramatically limited by the Communications Act, which ensures that no monetary penalty will be actually demanded of a carrier unless full due process has been afforded in that particular instance. In fact, no monetary penalty can be enforced against a carrier in the absence of a full judicial proceeding at which the carrier has the right to challenge the Commission's finding that a penalty is due on a *de novo* basis. Imposition of "automatic" damage awards or "baseline" forfeiture amounts would be inconsistent with these legal constraints.

What is more, there is nothing on which the Commission could reasonably determine in advance that any performance was unreasonable under the Act or otherwise worthy of penalties, self-executing or otherwise. Any effort by the Commission to penalize an ILEC for provisioning "deficiencies" in provisioning interconnection-related services, including UNEs, would of legal necessity be fact specific and could be made only after affording the ILEC full due process as called for under the Act.

1. If The Commission Directs A Carrier To Pay Money To Another, The Carrier Is Entitled To A Trial De Novo Before A Court Prior To Paying The Amount

Commission orders directing the payment of money to another are treated in a manner unlike all other Commission orders. Orders that do not involve monetary payments take effect when specified by the Commission, and must be complied with immediately unless the order is stayed by a court of competent jurisdiction.[25] Section 408 of the Act, the operative section dealing with the effective date of Commission orders, expressly states that it applies to all orders "other than orders for the payment of money[.]"[26] In the statutory scheme established by the Communications Act, orders entered under Section 408 are essentially self-executing, and can be challenged only by direct appeal under Section 402 of the Act.[27] In any proceeding to enforce such an order, the order is conclusively presumed to be valid and may not be challenged so long as it has been regularly made and duly served.[28]

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[25] 47 U.S.C. § 408.

[26] *Id.*

[27] 47 U.S.C. § 402(a) or (b).

[28] 47 U.S.C. § 401. *See, e.g.*, *Southwestern Bell v. Public Utility Commission of Texas*, 812 F. Supp. 706, 708 (W.D. Tex. 1993).

Orders for the payment of money are treated differently under Section 407 of the Act.[29] The party ordered to pay money by the Commission is entitled to refuse to pay the money and defend against the lawfulness of the order in a collection action brought against that party in a federal district court.[30] Rather than being binding on the court (as is the case for non-money orders) the Commission's monetary order is only "prima facie" evidence of the facts found in the order -- the order is otherwise subject to full review by the court.

The law regarding the Commission's authority to enforce its own damages awards is set forth in *Atlantic Coast Line*, *supra*:

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[29] 47 U.S.C. § 407 reads:

> If a carrier does not comply with an order for the payment of money within the time limit in such order, the complainant, or any person for whose benefit such order was made, may file in the district court of the United States for the district in which he resides or in which is located the principal operating office of the carrier, or through which the line of the carrier runs, or in any State court of general jurisdiction having jurisdiction of the parties, a petition setting forth briefly the causes for which he claims damages, and the order of the Commission in the premises. Such suit in the district court of the United States shall proceed in all respects like other civil suits for damages, except that on the trial of such suits the findings and order of the Commission shall be prima facie evidence of the facts therein stated, except that the petitioner shall not be liable for costs in the district court nor for costs at any subsequent stage of the proceedings unless they accrue upon his appeal. If the petitioner shall finally prevail, he shall be allowed a reasonable attorney's fee, to be taxed and collected as part of the costs of the suit.

[30] *See ICC v. Atlantic Coast Line R. Co.*, 383 U.S. 576, 594 (1966). Sections 407 and 408 of the Communications Act were lifted directly from their counterpart provisions of the Interstate Commerce Act, which was interpreted by the Supreme Court in *Atlantic Coast Line*. *See* H.R. Rep. No. 1850, 73d Cong., 2d. Sess., June 1, 1934, at 8. *See also MidAmerican Communications Corp. v. U.S. West Communications, Inc.*, 857 F. Supp. 772, 774 (D. Colo. 1994). There are other provisions from the Interstate Commerce Act that also were incorporated into the Communications Act, which has been noted by the Supreme Court. *See, e.g, Federal Maritime Commission v. Seatrain Lines, Inc.*, 411 U.S. 726, 742-43 (1973); *MCI Telecommunications v. American Tel. & Tel.*, 512 U.S. 218, 229-30 (1994); *AT&T v. Central Office Telephone, Inc.*, 524 U.S. 214, 221-22 (1998).

- An order by the Commission directing a carrier to pay money to another private individual or company may be enforced only by a court, not the agency.[31]
- Lawsuits against carriers to enforce Commission damages orders in their favor grant plaintiffs the availability of choice of forum, avoidance of costs and possible award of attorneys fees, but these actions may rely on the Commission order sought to be enforced only as "prima facie" evidence of the factual findings in the order.[32]
- Defending carriers may obtain full review of a Commission liability order in a Section 407 enforcement order.[33]

The vitality of these premises is documented by the fact that stays of Commission money orders are generally denied on the basis that the absence of an obligation to comply with the order eliminates the possibility of irreparable harm if the order is not stayed.[34] The case of *Central Vermont Railway, Inc. v. United States*[35] presented this proposition under the Commerce Act, companion to Section 407. In that proceeding, an ICC administrative damages order had been entered against a carrier. The carrier, in addition to appealing the order, sought a stay of the payment requirement. The reviewing court denied the stay, holding that the carrier was under no duty to pay any damages amount until and unless the shipper had brought a successful collection action under the ICC's version of Section 407 of the Communications Act. The Court observed:

> Since 49 U.S.C.A. Section 16(2) is applicable it means that the plaintiff herein cannot be damaged since it need not pay any of the reparations in issue. It cannot be held in contempt or be forced to make such reparation until a shipper to whom

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[31] *See Atlantic Coast Line*, 383 U.S. at 579-80.

[32] *Id.* at 580-81.

[33] *Id.* at 589-90.

[34] *See Cincinnati Bell Telephone Co. v. FCC*, No. 93-3214, Order (6th Cir., May 7, 1993).

[35] 231 F. Supp. 967 (D. Vt. 1964).

> such reparations are due brings suit under [Section] 16(2) and prevails in the resulting action.[36]

Because the ICC was without power to actually coerce payment of a private damages award, there was not a basis on which to grant a judicial stay of the order.

In other words, an FCC damages award may not be self-executing. A carrier need not pay such an award until a complaining party brings suit in court, and following a full and fair hearing on the merits of the claim itself.

2. Any Forfeiture Or Penalty Order By The FCC Can Be Enforced Only By Way Of An Independent Judicial Action Brought By The Attorney General Pursuant To Section 504 Of The Communications Act

A similar statutory structure limits the Commission's authority to set baseline forfeiture amounts in a manner that would cut off the individual ability of carriers to challenge the legitimacy of the forfeiture action. Forfeiture orders are not only not self-executing, but are interlocutory. Because they are interlocutory, forfeiture orders are not appealable, and can only be challenged if the United States seeks to enforce them through a judicial action under Section 504(a) of the Act. Section 504(a) reads, in pertinent part:

> The forfeitures provided for in this chapter shall be payable into the Treasury of the United States, and shall be recoverable, except as otherwise provided with respect to a forfeiture penalty determined under section 503(b)(3) of this title, in a civil suit in the name of the United States brought in the district where the person or carrier has its principal operating office or in any district through which the line or system of the carrier runs: *Provided*, That any suit for the recovery of a forfeiture imposed pursuant to the provisions of this chapter shall be a trial de novo. . .[37]

In the case of a forfeiture assessed which is covered by this section of the Act (which the forfeitures being considered in the *Notice* would be), the carrier has the right to obtain judicial

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[36] *Id.* at 968.

[37] 47 U.S.C. § 504(a).

review only by insisting that the Government institute action under Section 504(a).[38] The statutory process was described by Judge Douglas Ginsburg in *Action for Children's Television v. FCC*, 59 F.3d 1249, 1254 (D.C. Cir. 1995), *cert. denied*, 516 U.S. 1072 (1996):

> Generally the forfeiture order recapitulates the history of the case, addresses any arguments raised by the broadcaster in response to the [notice of apparent liability], and orders payment of the forfeiture within 30 days. As with any Commission order, the broadcaster may petition for reconsideration, but it may not obtain judicial review at that stage. If the order becomes final and the broadcaster does not pay the forfeiture, the Commission issues progressively stiffer dunning letters, and threatens to refer and after 165 days does indeed refer the matter to the Department of Justice 'for commencement of [a] civil action[.]'

The only exception to this rule is found in Section 503(b)(3) of the Act, which provides for notice and an opportunity for a hearing, specifically provides for judicial review under Section 402(a) of the Act.[39]

Accordingly, in the statutory scheme provided by the Act, no forfeiture assessed by the Commission can be self-executing, with the possible exception of forfeitures levied after a hearing. However, the guaranty of such a hearing would be inconsistent with the notion of "baseline" forfeiture amounts or similar self-executing devices raised by the *Notice*.

V. CONCLUSION

Qwest recommends that the Commission, to the extent that it desires to monitor ILEC UNE performance, adopt flexible rules which rely on ILEC PAP filings (or similar filings by other ILECs) with state regulators. ILECs should not be required to adopt measurement methodologies that are inconsistent with the filings made with the states (in the case of Qwest, the PAP and PID filings and measurements described herein). To adopt a methodology that

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[38] *See Pleasant Broadcasting Company v. FCC*, 564 F.2d 496, 500-03 (D.C. Cir. 1977). *See also Dougan v. FCC*, 21 F.3d 1488, 1490-91 (9th Cir. 1994); *Miami MDS Company v. FCC*, 14 F.3d 658, 661 (D.C. Cir. 1994).

[39] 47 U.S.C. §§ 503(b)(3)(A) and 402(a).

required ILECs to present UNE performance data to the Commission in a format different from what they are currently providing to the states would be unnecessary, burdensome and counterproductive. The same conclusion must be reached with regard to performance standards -- there is no reason why standards other than those established in the PAP process should be imposed on Qwest or other ILECs subject to similar processes.[40] Finally, adoption of federal "enforcement" mechanisms to ensure compliance with federal UNE performance standards would not only be unnecessary and duplicative, but would raise significant legal issues.

Respectfully submitted,

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Its Attorneys

January 22, 2002

[40] If it appears on the record that a significant number of ILECs have not adopted PAPs or their equivalents in state proceedings, the Commission may want to examine these ILECs separately. Their status has no bearing on Qwest's extensive state PAP commitments.

CERTIFICATE OF SERVICE

I, Kelseau Powe Jr., do hereby certify that I have caused the foregoing **COMMENTS OF QWEST COMMUNICATIONS INTERNATIONAL INC.** to be filed with the FCC via its Electronic Comment Filing System,* and served, via e-mail, on the FCC's duplicating contractor, Qualex International at qualexint@aol.com. Ms. Janice Myles of the FCC's Policy & Program Planning Division will also be served via email a copy of the **COMMENTS** and the attachments.

Kelseau Powe Jr.
Kelseau Powe Jr.

January 22, 2002

Qwest was able to file its Comments via the FCC's ECFS system, however, either due to system errors or the size of the attachments, Qwest was unable to file the attachments electronically. Alternatively, Qwest is filing the attachments in hard copy.

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