

112. In an effort to demonstrate that its performance in this area is somehow exemplary, Qwest relies on its own internal audit of service order accuracy rates for Resale, UNE-P and loop orders and its performance results on the New Installation Quality measure. *See* Notarianni/Doherty Decl. ¶ 332. Qwest's internal, self-serving service order accuracy results have never been audited by a third-party.<sup>61</sup> Furthermore, Qwest's internal study is "based on application dates it accurately processed." Notarianni/Doherty Decl. ¶ 332. However, Qwest's internal study on the accuracy of application dates cannot possibly serve as a reliable indicator of the overall accuracy of its manually-processed orders because it does not assess the errors made by Qwest on all other fields in a service order. For these reasons, Qwest's highly-partisan, internal, and incomplete results should be accorded no weight.<sup>62</sup>

113. Qwest also contends that, in response to CLEC arguments regarding the inability of the OP-5 measure to capture all service order accuracy errors, it "examined the treatment of trouble related to local service requests ("LSR")/service order ("SO") mismatches, which is currently captured by OP-5." Williams Decl. ¶ 339. Based upon an examination of orders from June 28 through July 3, Qwest asserts that the volume of "LSR/Order Mismatch" rates ranged between 0.24% and 1.05% and averaged 0.63%. In a July 10 *ex parte* submitted in connection with its first Application, Qwest explained how it arrived at these rates. An

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<sup>61</sup> Hearing Transcript, Docket Nos. UT-003022, UT-003040 (Washington Utilities and Transportation Commission, June 7, 2002 at 8352 (Viveros) (admitting that Qwest's "internal audits have not been audited or reviewed by any outside source").

<sup>62</sup> Even if a service order accuracy measure is ultimately adopted, there is no assurance that it will be included in its performance enforcement plans. *See* Washington Hearing Transcript at 8374 (Viveros) (admitting that it is not known whether Qwest would agree to the inclusion of a service order accuracy measure in its QPAP). Of course, if a service order measure is not included in its remedy plans, Qwest will have no incentive to improve its performance in this area.

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examination of the information provided in Qwest's July 10 *ex parte* confirms that its "LSR/Order Mismatch" rates are unreliable. In this regard, the "mismatch rates" are based only on orders for a period of five calendar days – which began on the day after Qwest implemented its process for "tracking" such mismatches.<sup>63</sup> Furthermore, the "mismatch rates" reported by Qwest are understated, because Qwest has improperly included *all* completed orders (even electronically processed orders that were not manually processed) in the denominator of its calculation.<sup>64</sup> In addition, given the time frame of its orders, Qwest cannot possibly have included in its study "all orders qualified for measurement by OP-5" as it claims in its July 10 *ex parte*, since that measurement encompasses new installations that are free of trouble reports within 30 days of initial installation.<sup>65</sup>

114. Qwest's contention that a measure of the percentage of troubles reported within 30 days can somehow serve as a suitable surrogate for a metric on service order accuracy is equally specious. *See* Notarianni/Doherty Decl. ¶ 335. Although data on troubles reported

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<sup>63</sup> *See* Qwest July 10 *ex parte* at 13 (Tab 4).

<sup>64</sup> Qwest July 10 *ex parte* at 13 (Tab 4)

<sup>65</sup> Qwest July 10 *ex parte* at 13 (Tab 4). Qwest contends that it analyzed "all orders from June 28 through July 3 to determine the volume of the LSR/order mismatch situations as a percentage of all orders qualified for measurement by OP-5." *Id.* In order to ensure that "all orders qualified for measurement by OP-5" were included in its analysis, however, Qwest would be required to wait until August 2 (30 days after the orders completed on July 3, which was the last day of the time period used by Qwest). Because Qwest filed its data in its *ex parte* letter of July 10 – more than three weeks prior to August 2 – its analysis could not have encompassed the universe that it describes. CLECs and their customers may not discover problems that resulted in "mismatches" (such as the failure to provision features ordered by the customer) until well after the seven-to-twelve day period that elapsed between the June 28-July 3 period used by Qwest in its analysis and the July 10 *ex parte*. For example, a customer may not attempt to use features that it ordered (such as three-way calling), or discover that the feature had not been installed, until several weeks – or even more than 30 days – after the scheduled installation date. Such a situation would not have been captured in Qwest's study (or, in some instances, in the OP-5 metric itself).

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within 30 days of installation provide some information on installation quality, that measurement does not and cannot capture only those service failures that are attributable to provisioning accuracy. Conversely, the installation trouble report measure cannot accurately capture all service failures attributed to provisioning accuracy.<sup>66</sup> As a result, the measure is both overinclusive and underinclusive.

115. Furthermore, Qwest has not accepted KPMG's recommendation regarding the implementation of a measure on the accuracy of rejection notices. A BOC's failure to provide accurate and timely status notices impedes a CLEC's ability to provide quality customer service. If Qwest returns a rejection notice that is patently inaccurate, a CLEC must expend considerable time and effort to resolve such problems. Until the problem is resolved, the customer will not receive services and will undoubtedly attribute the delay to the CLEC. After receiving a rejection notice that is clearly erroneous, a CLEC cannot, as a practical matter, send a supplemental order until it determines the basis for the first erroneous rejection. Only after learning the root cause of the problem would the CLEC have any assurance that the supplemental order is correct and will pass through Qwest's gateway. However, Qwest has declined to propose

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<sup>66</sup> For example, if a customer orders Call waiting, but Caller ID is provisioned instead, a new order rather than a trouble report could be issued to address the problem. Although such a provisioning mistake could result in significant customer dissatisfaction, it would not be captured in a metric on troubles reported within 30 days of installation. *See also* Department of Justice Evaluation, *Georgia/Louisiana 271* at 19 (stating that "when BellSouth does not provision a feature because a service representative leaves the item off the manually processed service order, the CLEC must re-order the feature, not submit a request to fix a trouble. Therefore, the usefulness of the provisioning complaints measure as a diagnostic tool is limited, because it does not reflect many ordering errors") (footnote omitted).

a measure on the accuracy of LSR rejection notices, stating that any such discrepancies should be the subject of data reconciliation or audits.<sup>67</sup>

116. Citing the current absence in the PIDs of any measures on the timeliness and accuracy of functional acknowledgements for manually-processed orders, KPMG observed that “it is important that a CLEC receive positive acknowledgement from Qwest of the receipt of all orders so that there is no question as to whether or not Qwest is working on the order.”<sup>68</sup> KPMG also correctly observed that, the overall provisioning cycle can be delayed “if the order is not being processed by Qwest, and neither party is aware of that fact.” *Id.* However, Qwest has declined to propose a new PID on the timeliness of functional acknowledgements for manually-processed orders and claims that it is unaware of any problems “that have risen to a level that would support creating a new measurement.”<sup>69</sup>

117. In its Adequacy Study, KPMG also recommended the development of a new measure of Conformance of FOC Due Dates with the Service Interval Guide. Noting that CLECs rely on the Service Interval Guide and “pre-order queries to plan their business activities, and to help establish the requested due date submitted in orders,” KPMG found that “the relationship between the SIG/query intervals, and the actually committed-to interval implied by the FOC due date, is important so that a material divergence between the two does not exist for an extended period of time.”<sup>70</sup> As explained in the accompanying AT&T OSS Declaration, Qwest’s own performance data show that Qwest modifies the due dates more often for orders

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<sup>67</sup> See Qwest’s Response to Adequacy Study, Qwest Exhibit LN-055-23 at 9.

<sup>68</sup> KPMG Adequacy Study at 3.

<sup>69</sup> Qwest’s Response to KPMG Adequacy Study, Qwest Exhibit LN-055-23 at 8.

<sup>70</sup> KPMG Adequacy Study at 5.

from CLECs than orders from its own retail customers. KPMG's proposed measure would assess whether CLECs are assigned the standard intervals to which they are entitled. However, Qwest has declined to propose such a measure.<sup>71</sup>

118. In all events, although Qwest touts the comprehensiveness of the PIDs, the sheer number of measures is meaningless unless they accurately capture the performance they are intended to measure. The current PIDs are deficient because they exclude measures which are important to detecting discriminatory conduct.

**F. Qwest's Performance Results are Misleading.**

119. Qwest contends that its reported results show that it has processed CLEC orders on a nondiscriminatory basis. However, Qwest's performance results are misleading because they obscure the impact of Qwest's policy of rejecting CLEC orders for which there are no facilities available or current engineering jobs in place that can accommodate the order.

120. In this regard, in the Spring of 2001, Qwest announced that it had changed its policy with respect to its handling of CLEC UNE orders for which no facilities are available. Before that policy change, whenever a retail customer or CLEC submitted an order for which no facilities were available, Qwest held the order until facilities became available or until the CLEC or retail customer cancelled the order.

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<sup>71</sup> Other important metrics are omitted from the PIDs. For example, there are currently no measures on the completeness or accuracy of Daily Usage Feed ("DUF"). Although the BI-1 measurement tracks the time to provide usage records, there is no measurement of the completeness and accuracy of Qwest's DUF. The fact that Qwest failed KPMG's DUF test five times because of inaccurate and incomplete DUF records demonstrates the need to have a measurement in place once KPMG is no longer telling Qwest that its DUF files are incomplete and inaccurate.

121. However, in the Spring of 2001, Qwest implemented a new policy. Under the new policy, Qwest can reject CLEC UNE orders for which no facilities are available after Qwest verifies that there are no current engineering jobs that can accommodate the order. In stark contrast to this new policy, if a retail customer submits an order for which no facilities are available, the retail order can still be held indefinitely until facilities become available or the customer cancels the order.

122. This disparate treatment is troubling standing alone; however, it also has a profound impact on four metrics: OP-3 (Installation Commitments Met); OP-4 (Installation Interval); OP-6B (Delayed Days for Facility Reasons); and OP-15B (Interval for Pending Orders Delayed Past Due Date for Facility Reasons). Since parity is the performance standard under all of these measures, the rejection of CLEC orders in these circumstances has a significant impact on performance results. Thus, for example, assume, for the sake of argument, that 10% of all orders (for both CLEC and retail orders) cannot be filled immediately due to a lack of facilities. If one half of the CLEC orders are rejected because of lack of facilities and none of the retail orders are rejected for the same reason but are eventually completed, the related OP-3 provisioning results for CLECs will appear to be 5% better (or more) than those for retail customers.

123. In this regard, OP-3 (Installation Commitments Met) measures the percentage of orders for which the scheduled due date is met. It is virtually certain that Qwest will miss the committed due date for all orders for which no facilities are available. Using the hypothetical described above, if 10% of all orders cannot be filled immediately due to a lack of facilities and if 5% of those orders cannot be filled with current engineering jobs or jobs within the 30 day window, then 5% of CLEC orders will be rejected over and above orders that are

rejected for other reasons. Of course, under the new Qwest policy, retail orders are not rejected in these circumstances. To make matters worse, the CLEC orders are not rejected at random. The rejected CLEC orders are those which had been held for a given period of time. When 5% of the CLEC orders are rejected, Qwest's retail results on OP-3 (Installation Commitments Met) will appear to be 5% worse than CLEC results. If 10% of CLECs are rejected (which may be the case for DS-1 loops), Qwest's retail results for OP-3 will appear to be 10% worse than CLEC results.

124. OP-4 (Installation Interval) measures the average interval between the application date and completion date. Qwest's policy of rejecting CLEC orders when no facilities are available will have a more dramatic impact on OP-4 than OP-3. Because the only orders that are being rejected are those that would have had long installation intervals as they wait for facilities to become available, the exclusion of these orders from reported results will make it appear that Qwest's retail intervals are longer than those for CLECs. Using the same hypothetical above, if the average installation interval for 90% of all orders is three days and the average interval for 10% of held orders is 60 days, the exclusion of 50% of the CLEC held orders will skew the CLEC installation interval dramatically. Using that example, the average Qwest interval would be 8.7 days, while the average CLEC interval would be 6 days – a difference of 31%. If twice as many CLEC orders are rejected due to lack of facilities, the difference between the Qwest average and the CLEC average would be about 50%. The current OP-4 differences between retail and CLEC orders in many categories consistently show CLECs with significantly better performance than Qwest retail. The rejection of CLEC orders for lack of facilities could be the reason for this difference.

125. OP-6B (Delayed Days) measures the average number of business days that service is delayed beyond the due date for facility reasons that are attributable to Qwest. For this metric, the problems introduced by the rejection of CLEC held orders are more subtle. For example, assume that 5% of CLEC and retail orders can be filled with an engineering job, and that these orders are held for 30 days. Assume further that the average interval for the remaining held retail orders is 90 days. Because the analogous CLEC orders are rejected, all things being equal, the OP-6B results will show the CLEC with average delay days of 30 days, and Qwest retail orders with an average delay days of 60 days – a 50% difference. If all CLEC orders that are delayed for facilities are cancelled, then no CLEC orders will be included in OP-6B. A quick review of the OP-6B results shows that there are very few data points for CLEC orders. Qwest's performance for CLECs looks too good in comparison to the results for Qwest's retail customers. OP-15 is similarly impacted.

126. PO-3 (Rejection Notice Interval) ostensibly measures "the timeliness with which Qwest notifies CLECs that electronic and manual LSRs were rejected." Significantly, it does not appear that LSRs which are rejected for lack of facilities are being captured by this metric. Indeed, the description of PO-3 does not specifically reference the rejection of orders for lack of facilities. Relatedly, there was no spike in Qwest's reported results in the April/May 2001 timeframe when Qwest rejected a backlog of CLEC orders as a result of the new policy. In addition, the results of the PO-3 measure are reported in hours and minutes for IMA and GUI interfaces. The rejections for held orders would be days and weeks. Qwest's reported results in the various states for PO-3 do not reflect rejections that occurred days or weeks after the application date. Notwithstanding Qwest's assertion that it includes orders rejected for lack of facilities in the PO-3 results (Williams Decl. at 119), Qwest's performance results suggest that

Qwest does not include orders rejected for lack of facilities in the PO-3 results, and that the one order in Wyoming cited by Qwest was mistakenly included rather than included as a matter of policy.

127. Using the same hypothetical, assume that 5% of the orders that are being held for no facilities are rejected after 20 days, and that normal rejections are returned within four hours. If this phenomenon were captured in PO-3, Qwest's results would change dramatically. Typically Qwest's reported results for manual orders show a rejection rate of approximately 4%, with an average rejection interval of about 3 hours. If 5% of the orders that were rejected after 20 days are added to this metric, the results for PO-4 would average 268 hours instead of 3 hours. This shows the substantial impact this type of rejection would have on PO-3 and demonstrates that Qwest is not including this type of rejection in its reported results. Qwest must include orders that are rejected for no facilities in PO-3 metric before this metric can be deemed accurate.

128. PO-4 (LSRs Rejected) purportedly measures "the extent LSRs are rejected as a percentage of all LSRs." As demonstrated above and based upon an examination of the PID, it does not appear that Qwest is not counting rejections due to a lack of facilities in this metric. If 5% of all orders are rejected for lack of facilities, then the average rejections would increase by that percent in every category. This would cause a substantial increase in the percentage of manual rejects (as to which the current rejection rate is approximately 4%) and a less dramatic increase for orders that are electronically rejected (as to which the rejection rate is currently around 25%). In any event, Qwest must include this type of rejection in PO-4 before the metric and results can be deemed accurate.

129. Although the numbers used above are hypothetical, these examples show that Qwest's policy has a substantial impact on its reported results. Moreover, the foregoing

illustrates that Qwest's claims regarding its exemplary provisioning performance are highly suspect, and that its reported results cannot be trusted.<sup>72</sup>

**III. QWEST'S COMMERCIAL DATA SHOW THAT IT HAS NOT MET ITS SECTION 271 OBLIGATIONS.**

130. Qwest asserts that its own commercial performance data show that it has fully satisfied its Section 271 obligations. *See* Williams Decl. ¶¶ 57-332. Qwest is wrong.

131. As a preliminary matter, no commercial data are reported for scores of measures for the four States included in the Application. Thus, in many instances, there are no commercial data to support Qwest's claims of checklist compliance. Even Qwest's own incomplete and inadequate data show that its performance for CLECs in many areas is worse than its performance for its own retail operations. As to other measures, Qwest missed the benchmark standards that have been established. What is even more troubling about Qwest's performance is that it occurred during periods of relatively modest CLEC order activity that should have posed no difficulties for its systems. Set forth below are a few examples of Qwest's performance failures.

**A. Region-Wide Data**

132. Qwest's own data show that it is not satisfying its obligation to perform ordering processes on a commercially reasonable basis. As explained more fully in the Finnegan/Connolly/Menezes Declaration ("AT&T OSS Declaration"), in order for CLECs to compete effectively in the marketplace, CLEC orders must flow-through Qwest's systems,

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<sup>72</sup> Similar issues have been investigated with respect to interconnection trunks when Qwest has cancelled orders held for over eight months and failed to include the data for these orders in the metrics. Liberty acknowledged that this was in fact occurring during data reconciliation.

without rejection and without falling out for manual processing, to the same extent as Qwest's retail orders. High rejection rates and excessive-reliance on manual processing create obstacles to competition because of the attendant risks of error and delay. Qwest's rejection rates are unacceptably high, and its flow-through rates at current levels are wholly inadequate to give CLECs a meaningful opportunity to compete with Qwest's retail operations.

133. As explained in the AT&T OSS Declaration, in May 2002, approximately 31% of LSRs received over Qwest's IMA-GUI and 23% of LSRs received over the IMA-EDI were rejected electronically by Qwest's systems. These percentages do not include the LSRs that were manually rejected. When both categories of orders are combined, the data show that approximately one-third of all electronically-submitted LSRs were rejected in May 2002. Qwest's historical results reveal that the percentages of orders rejected electronically have ranged from 22% to 32%, depending upon the interface.

134. The high incidence of rejection rates reflected in Qwest's commercial data is fully consistent with KPMG's findings during the OSS test. During its third-party tests, KPMG found that: 25.3% of LSRs submitted *via* the IMA-GUI interface were rejected in the Eastern Region; 25% of LSRs submitted via IMA GUI interface were rejected in the Central Region; and 20.2% of the LSRs submitted via this same interface were rejected in the Western Region.

135. The KPMG Report also reveals that the rejection rates for LSRs submitted via the IMA EDI interface are higher. In the Eastern Region, 33% of the LSRs submitted over IMA-EDI were rejected; while 40.5% of the LSRs submitted over this interface were rejected in the Central Region. Furthermore, KPMG found that over one-third of all LSRs submitted over IMA-EDI were rejected in the Western Region.

136. These high rates of rejection pose considerable problems. A rejection notice requires the CLEC to resubmit a new or supplemental order which lengthens the provisioning process and increases the CLECs' costs. Furthermore, as explained in more detail in the AT&T OSS Declaration, the problems resulting from high rejection rates are exacerbated by the low-flow through rates for orders which are not rejected. Indeed, according to Qwest's nationwide May data, approximately 40% of unbundled loop orders, 30% of LNP orders, 33% of UNE-P POTS orders and 25% of resale orders fell out for manually processing after they were electronically submitted over the IMA-EDI interface. As described in more detail below, Qwest's state-specific flow through data are no better. Qwest's excessive reliance on manual processing necessarily increases the risk of error and provisioning delays. Moreover, Qwest cannot legitimately contend that CLECs have a meaningful opportunity to compete when CLEC orders are subject to such high rates of rejection and low flow through rates.

**B. Montana**

137. **Flow-Through.** In its Application, Qwest touts its performance in meeting the benchmarks for electronic flow-through. Notarianni/Doherty Decl. ¶ 286; Williams Decl. ¶ 100. However, in describing its performance in this area, Qwest focuses *only* upon its performance under PO-2B which measures its flow-through rates for all LSRs that are designed to flow-through and is silent regarding its total flow-through rates for all electronically-submitted LSRs that are measured under PO-2A, a diagnostic measure. *Id.* Qwest does so for good reason. Qwest's total flow-through rates for CLEC orders are woefully inadequate.

138. As explained in more detail in the AT&T OSS Declaration, in May 2002, Qwest's total flow-through rates under PO-2A for resale orders submitted over IMA-EDI from

February through May 2002 have ranged from 0% in February to 33.33% in May 2002.<sup>73</sup>

Similarly, the total flow-through rates for loop orders submitted over IMA-GUI from February through May 2002, have ranged from 14.04% to 72.04%. In May, the total flow-through rate for loop orders submitted over IMA-GUI was only 49.10%. *Id.* at PO-2A-1. Additionally, the total flow-through rates for LNP orders submitted over IMA-GUI have been unacceptably low, ranging from 28% to 37.31%.

139. Remarkably, however, Qwest also has failed to meet the benchmark standards under the PO-2B metric which assesses the percentage of orders that are designed to flow through and which actually flow through Qwest's systems. In this regard, Qwest concedes that, in February, March and May 2002, it failed the resale benchmark standard under the PO-2B measure for orders submitted *via* IMA-EDI. Williams Decl. ¶ 101. Qwest also admits that it missed the PO-2B benchmark standard for LNP orders submitted *via* IMA-GUI. Williams Decl. ¶ 103. In both cases, Qwest claims that the low order volumes associated with these measures are insufficient for evaluating its performance in this area. Thus, Qwest's assertion is tantamount to an admission that its commercial data are inadequate to show checklist compliance. In all events, Qwest cannot have it both ways. Qwest cannot assert that performance failures associated with low order volumes should be ignored, while simultaneously claiming that it has otherwise satisfied the checklist because it met performance standards for measures with low order volumes.<sup>74</sup>

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<sup>73</sup> Montana Statewide Performance Summary, February – May 2002 (PO-2A-2).

<sup>74</sup> The charts attached as Attachment 2 are Qwest's "blue charts" which have been revised to show the instances in which Qwest is asserting checklist compliance based upon low order volumes. Indeed, Qwest asserts that it has satisfied the checklist based upon its performance on 831 measures that have low order volumes in the four States included in its Application. *See*

140. **Billing.** Qwest concedes that, in April and May 2002, Qwest failed to meet the parity standard for the BI 3A measure which evaluates the accuracy of resale and UNE bills. Williams Decl. ¶ 157. Qwest attributes these performance failures to a “one-time cost docket adjustment” and “the inclusion of adjustments for certain Nonrecurring Charges (NRCs) for unbundled loop Disconnect/New Service orders that should have been suppressed and were not.” *Id.* In an effort to divert attention from its performance failures in Montana, Qwest invites the Commission to rely instead on its performance results in Washington where it achieved parity on this measure during three of the past four months. *Id.* ¶ 159. Qwest’s reliance on its performance results in Washington to support its Application for Section 271 approval in Montana is misplaced.

141. This Commission has found that it must “make a separate determination of checklist compliance for each state.” *Kansas/Oklahoma 271 Order* ¶ 35. The Commission has held that, even when a BOC has obtained Section 271 approval for “the ‘anchor’ state,” “evidence of satisfactory performance in another state cannot trump convincing evidence that an applicant fails to provide nondiscriminatory access to a network element in the applicant state.” *Id.*, ¶ 36. Accordingly, to obtain Section 271 approval for long distance entry in Montana, Qwest must demonstrate checklist compliance based upon evidence from the State of Montana and should not be permitted to rely on its Washington billing performance results as a surrogate for its performance results in Montana.

142. Qwest also admits that, in March, April and May 2002, it missed the parity standard for BI-4A which assesses the completeness of UNE and resale bills. Williams Decl.

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Attachment 3. In Montana, Qwest claims that it has satisfied the checklist based upon 157 measures with low order volumes. *Id.*

¶¶ 162-164. Qwest contends that it did not meet the performance standard because it failed to discover in time that certain unbundled loop disconnect orders had not been completed in the Central region. Although Qwest contends that certain changes to the completion process should eliminate these problems in the future, this is nothing more than a paper promise entitled to no weight. *See, id.*, ¶¶ 163-164.

**C. Utah**

143. **Flow-Through.** Qwest admits that, in February and May 2002, it failed the resale benchmark standard under PO-2B. Williams Decl. ¶ 105. Similarly, Qwest concedes that in February, March and May, it missed the LNP benchmark standard for orders submitted *via* IMA-GUI. Williams Decl. ¶ 107. In both cases, Qwest's insistence that its performance misses are due to low order volumes is essentially an admission that its own commercial data are insufficient to demonstrate statutory compliance.

144. Qwest's total flow-through rates in Utah under PO-2A have been inadequate. From February through May 2002, Qwest's total flow-through rates for loop orders submitted over IMA-GUI have ranged from 19.87% to 29.78%. In May 2002, the total flow-through rate for loop orders submitted over IMA-GUI was an unacceptably low 25.45%.<sup>75</sup>

145. The total flow-through rates for loop orders submitted over IMA-EDI during the past four months have ranged from 45.33% to 54.97%. From April to May, Qwest's total flow-through rate for loop orders submitted over IMA-EDI declined from 54.97% in April to 49.48% in May. *Id.* (PO-2A-2).

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<sup>75</sup> Utah Statewide Performance Summary, February – May 2002 (PO-2A-1).

146. For LNP orders submitted over IMA-GUI, Qwest's total flow-through rates have ranged from 2.687% to 11.59%. In May 2002, the total flow-through rate for LNP orders submitted over IMA-GUI was only 8.11%. *Id.* (PO-2A-1).

147. **FOCs.** Qwest concedes that, in March and April, it missed the resale benchmark standard for PO-5C(a) which measures the timeliness of FOCs provided for manual LSRs. Williams Decl. ¶ 122. Qwest attributes its performance misses to low order volumes. *Id.* However, Qwest cannot have its cake and eat it too. Qwest cannot legitimately dismiss its performance for all failed measures with low order volumes, while heralding its performance with respect to other measures with low order volumes.<sup>76</sup>

148. **Jeopardy Notices.** The Commission has repeatedly stressed the "critical" importance of having incumbent LECs provide timely jeopardy notices to CLECs so that they can inform their customers when new services will not be installed on the scheduled due date and promptly reschedule the time for service installation. *BellSouth South Carolina 271 Order*, ¶ 139; *Second BellSouth Louisiana Order* ¶ 131. The PO-8 measure "[e]valuates the timeliness of jeopardy notifications, focusing on how far in advance of original due dates jeopardy

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<sup>76</sup> Qwest contends that, with minor exceptions, it satisfied all of the benchmark standards for FOC timeliness in all states that are covered in its Application. Williams Decl. ¶ 122. However, Qwest's performance is hardly cause for celebration. When Qwest's performance is viewed in the context of the number of due date changes it makes per order under the PO-15 PID, its FOC timeliness performance cannot reasonably be viewed as exemplary. The reason why Qwest's FOC timeliness rates appear to be satisfactory is because Qwest frequently fails to verify that facilities are available after receiving an order and simply issues a FOC reflecting whatever due date the CLEC requested. As explained in the AT&T OSS Declaration, once Qwest finally reviews the LSR and determines the due date it can actually meet, it changes the due date. Qwest's regional data show that Qwest changes the due dates for approximately 7% to 12% of CLEC orders per month. The CLEC rate of changes in due dates is two to three times higher than that for similarly situated retail customers and is worse by a statistically significant margin. Thus, Qwest's statements in its Application touting its FOC timeliness rates simply highlight the fact that Qwest views its performance in terms of timeliness, no matter how abysmal its quality.

notifications are provided to CLECs (regardless of whether the due date was actually missed).<sup>77</sup>

The performance standard for this measure is parity with retail.

149. Qwest's own performance data show that it has not provided jeopardy notices at parity with retail operations. Qwest admits that, in February 2002, it missed the parity standard under PO-8 for UNE-P POTS orders. Williams Decl. ¶ 128. In an effort to rationalize its performance, Qwest contends that it "missed the parity standard in February because a total of only four jeopardy notices were issued to CLECs that month, as compared to 572 issued for Retail context during that period." Williams Decl. ¶ 128 (footnote omitted). Qwest's explanation is nonsensical. The PO-8 measure evaluates how far in advance of the original due date jeopardy notices are distributed to CLECs. Qwest did not miss the parity standard in February because it issued only four jeopardy notices. Qwest missed the parity standard because its own data show a statistically significant lack of parity in the timeliness of its jeopardy notices for CLEC and retail orders.

150. Qwest also admits that, from February through May, it consistently missed the parity standard under PO-9 (which measures the percentage of orders receiving timely jeopardy notices) for unbundled loops. Williams Decl. ¶ 130. Thus, for example, in February 2002, 32.21% of Qwest retail orders were issued timely jeopardy notices, while only 9.62% of CLEC unbundled loop orders received timely jeopardy notices.<sup>78</sup> In May 2002, the percentage of CLEC unbundled loop orders for which timely jeopardy notices were issued decreased. In May 2002, 30.54% of Qwest's retail orders were issued timely jeopardy notices, while a paltry 1.01% of CLEC unbundled loop orders were issued timely jeopardy notices. *Id.*

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<sup>77</sup> Qwest Service Performance Indicator Definitions (PIDs), Version 6.0.

151. In an effort to diminish these failures, Qwest contends that its performance results under PO-9 should be discounted because “few jeopardy notices had to be issued and evaluated under PO-9” and its performance results were adversely affected by the “Qwest’s Build/Hold Process.” Williams Decl. ¶¶ 131-132. Qwest’s arguments are devoid of merit.

152. Although Qwest attempts to downplay the significance of its performance failures by pointing to the “few jeopardy notices “issued, the fact of the matter is that, in Utah, Qwest had 123 opportunities to issue a timely jeopardy notice to CLECs for unbundled loop orders. Williams Decl. ¶131 n. 131. Significantly, Qwest’s own results show that, with respect to those 123 missed CLEC orders, Qwest discriminated against the CLECs in favor of its retail customers when issuing timely jeopardy notices.

153. Qwest’s argument regarding the purported adverse impact of the Build/Hold process on its PO-9 results is also meritless. Qwest contends that, under the Build/Hold procedures, Qwest can hold a CLEC order for lack of facilities for 30 days before rejecting CLEC orders. Qwest also contends that, because it issues jeopardy notices to CLECs but does not include such notices when calculating PO-9 results “unless facilities are found and the order is completed,” the volume of jeopardy notices reported in PO-9 is understated. Williams Decl. ¶131. Qwest’s analysis cannot withstand scrutiny.

154. The current Utah SGAT does not have a 30 day hold order provision. Furthermore, although Qwest contends that the Build/Hold process has adversely affected its PO-9 results in Utah, Qwest nowhere explains why this same policy did not negatively affect its performance results in Montana, Washington and Wyoming where it achieved parity on this

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<sup>78</sup> Utah Statewide Performance Summary, February – May 2002 (PO-2B).

measure. Moreover, even assuming that Qwest is correct when it states that the PO-9 measure does not include jeopardy notices that it actually issued under the Build/Hold process, it offers no empirical data demonstrating that these “phantom” jeopardy notices were issued in a timely manner and would have satisfied the performance standard.

155. **Provisioning.** In order to show parity for provisioning, Qwest must demonstrate that it provisions CLEC orders within the same amount of time and with the same degree of quality that it provisions the same or comparable services for its own retail customers. *See Michigan 271 Order*, ¶ 164, 171, 185, 212. Qwest’s own data show that it is not provisioning CLEC orders at parity. Qwest admits that, its own data show that, during two of the past four months, it failed to perform at parity on the new service installation quality measure for ISDN-capable loops. Williams Decl. ¶ 221.

156. Qwest also concedes that, even though order volumes are not substantial, it failed to meet the parity standard for two of the past four months for its measure on installation commitments met for EELs. Williams Decl. ¶ 204. Relatedly, during its third party test, KPMG found that Qwest did not satisfy Evaluation criteria 14-1-14 which assesses whether “Qwest provisions EEL Circuits by adhering to documented method and procedures tasks.” KPMG Report at 191-192.<sup>79</sup> KPMG found that Qwest failed to meet the 95% benchmark standard established during the test for complying with methods and procedure when installing EELs. In one test, Qwest satisfied only 87% of the tasks in compliance with methods and procedures, and, in a second test, Qwest’s performance deteriorated to 60%. *See Disposition Report on KPMG*

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<sup>79</sup> KPMG Disposition Report, Exception 3104 dated February 26, 2002.

Exception 3104. Therefore, there is absolutely no evidence in this record, be it commercial or test data, to show that Qwest can timely provision EELs as required by law.

157. **Maintenance and Repair.** Qwest acknowledges that it failed to meet the parity standard under the repeat trouble report measurement for nondispatch UNE-P POTS orders in three of four months. Williams Decl. ¶ 182. Qwest contends that, if the no troubles found (“NTFs”) are excluded, it would have achieved parity in two of the three months. This is nothing more than a red herring.

158. Elsewhere in its Application, Qwest states that, because it frequently found in responding to a trouble report, that the service “is functioning properly,” it submitted a proposal to the TAG to exclude from OP-5 (New Service Installation Quality); MR-7 (Repair Repeat Report Rate); and MR-8 (Trouble) “trouble reports as to which (1) Qwest found no problem, and (2) no additional trouble repair was logged within the next 30 days.” Williams Decl. ¶ 21. Qwest also claims that, although the TAG “could not reach agreement on including this approach in the PIDs, “it has provided such data in its Application for informational purposes.” *Id.* Qwest’s arguments are wide of the mark.

159. On August 23, 2001, the ROC TAG expressly rejected Qwest’s proposal to modify measures by excluding reports as to which no trouble was found. In September 2001, Qwest submitted a slightly revised version of its proposal; however, Qwest ultimately withdrew that proposal.

160. Moreover, Qwest’s “adjusted” recalculation of its trouble report rates based upon the exclusion of so-called “no trouble found” should not be credited. Qwest has provided no empirical data demonstrating that a trouble report is somehow invalid simply because a Qwest technician is unable to find a trouble reported by a customer. Indeed, in

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commenting on Qwest's proposal to exclude such troubles, a Montana Commission Staff member flatly rejected the notion that a "no trouble found" code somehow proves that the trouble report "was not legitimate."<sup>80</sup>

1. There is no reason to assume that a trouble report was not legitimate just because Qwest is unable to find trouble when it responds to customer's trouble report. I would posit that, in the great majority of instances, some problem with phone service prompts a customer to submit a trouble report, even if the problem may no longer be present when Qwest tests the line or tries to isolate the trouble. Excluding these disposition codes from these PID results will mean a significant chunk of trouble reports are not included in Qwest's performance results. According to data Qwest provided to the FCC for ARMIS reports, 29% of residential trouble reports and about 35% of business trouble reports region wise were closed out to "no trouble found" in 1999, the most recent year shown on the FCC chart.

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2. Qwest's proposal to include a TOK/FOK/NTF trouble report in the performance results only if the customer reports a trouble in the subsequent 30 days that is found to be caused by a Qwest network problem makes the inappropriate assumption that a trouble report for which Qwest is unable to find the cause was not a legitimate trouble report unless the customer has recurring trouble. It is not necessarily the case that a trouble report for which Qwest was unable to determine the cause will recur in a month's time, or ever.

161. For these same reasons, this Commission should reject Qwest's "adjusted" recalculation of trouble report rates which exclude trouble reports as to which no trouble was allegedly found.

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<sup>80</sup> Electronic message from Kate Whitney dated September 14, 2001 (attached as Attachment 4).

162. Qwest's Application reveals other examples where Qwest has failed to satisfy its obligation to perform at parity in the area of maintenance and repair. For example, Qwest failed the parity standard for the repair appointments met measure for UNE-P POTS orders for three of four months. Williams Decl. ¶ 182. In February 2002, Qwest met 90.7% of its repair commitments for its retail orders, but only 73.81% of its repair appointments for UNE-P POTS orders. In May 2002, Qwest met 93.96% of its repair appointments for retail customers, but only 82.61% of the repair appointments for UNE-P POTS orders.<sup>81</sup> Similarly, in two of four months, it failed to perform at parity under the repair appointment met measure for dispatched repairs within MSAs for UNE-P Centrex 21 orders. Williams Decl. ¶ 185.

163. In an effort to divert attention from these failings, Qwest claims that the MR-9 "repair appointment performance is somewhat redundant to measurements of troubles cleared within 24 and 48 hours, which are at parity or 100% every month." Williams Decl. ¶ 182. An examination of the PID definitions and performance results for measures MR-3, MR-4, and MR-9 reveals that Qwest's statement is not true.

164. When a CLEC reports a trouble to Qwest, Qwest provides the CLEC with a time by which it believes the trouble will be cleared. This is the repair appointment time. MR-9 measures Qwest's performance in meeting the appointment time. For out of service conditions, the appointment time may not always be twenty-four hours from the time the trouble is reported. Likewise, for service-affecting troubles, the appointment time may not always be forty-eight hours from the time the trouble is reported. If Qwest always provides a twenty-four hour appointment for out-of-service troubles and always provides a forty-eight hour appointment

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<sup>81</sup> Utah Statewide Performance Summary, February – May 2002 (MR-9).

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for service-affecting troubles, then the results for MR-4 (all troubles cleared within 48 hours) should be identical to the results for MR-9 (Repair Appointments Met). A review of the Utah Statewide Performance Summary, Feb.-May 2002, shows quite different results for MR-4 and MR-9:<sup>82</sup>

	Feb. Result	Feb. Volume	Mar. Result	Mar. Volume	Apr. Result	Apr. Volume	May Result	May Volume
MR-4 (D)	98.78%	82	97.47%	79	98.88%	89	98.84%	86
MR-9 (D)	73.81%	84	78.85%	80	95.56%	90	82.61%	92
Difference	24.97%		18.62%		3.32%		16.23%	

165. The results show that, for repairs requiring a dispatch, Qwest fails to meet the committed repair time a significant percentage of the time on an absolute level and provides discriminatory treatment to CLECs on a relative level. The repair appointment time is the time the CLEC uses to establish repair expectations with the CLEC's customer. If Qwest is not meeting that appointment time, even if the appointment is set at an interval less than 24 hours, the CLEC's customer will be disappointed. For all of these reasons, Qwest's contention that its results on MR-9 should be discounted because the measure is "somewhat redundant" to MR-3 and MR-4 is plainly contrary to the evidence.

166. Qwest also concedes that, with respect to two of the four months of data on which it relies, it missed the parity standard for the trouble rate for ISDN-capable loops. Williams Decl. ¶ 223. Admitting that it "achieved parity only in May" with respect to trouble rates for high capacity loops, Qwest acknowledges that it missed the parity standard for this product category in February, March and April. Williams Decl. ¶ 226.

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<sup>82</sup> Utah Statewide Performance Summary, February – May 2002, at 9.

167. Qwest's own reported data show "multiple disparities between February and May" with respect to its performance on the all troubles cleared within 24 hours and the mean time to restore measures for line sharing orders where a dispatch is needed. Williams Decl. ¶ 246. Additionally, Qwest admits that it missed the parity standard under MR-8 in two of the past four months for DS3 transport. Williams Decl. ¶ 259. Qwest discounts the significance of these performance failures by noting that order volumes were low. As noted above, however, Qwest cannot rely on metrics showing low order volumes to satisfy checklist compliance and dismiss its performance failures on metrics with similar low order volumes.

168. In February, March and May 2002, Qwest failed to perform at parity with respect to trouble rates for resold DS1. Williams Decl. ¶ 327. Qwest contends, that if NTF reports were excluded from its performance results, it would have met the parity standard for resold DS1 orders in February and March. Williams Decl. ¶ 327, n. 410. As noted above, a NTF report is not conclusive evidence that the trouble report was invalid. Furthermore, Qwest essentially admits that it would have failed the parity standard in May even if NTFs had been excluded.

169. **Billing.** Qwest admits that it missed the parity standard for BI-4A in April and May 2002. Williams Decl. ¶ 165. Qwest states that it missed the performance standard after it discovered that certain Unbundled Loop disconnect orders had not been completed. Although Qwest contends that its "revised completion process" should reduce these kinds of errors in the future, this is simply an unfulfilled promise which is of no probative value in the context of this proceeding.

**D. Washington**

170. **Flow-Through.** Qwest's reported results show that, in Washington, it failed to meet benchmark standards under the PO-2B measure which measures the flow-through eligible orders that actually flow through Qwest's systems. In February and April 2002, Qwest failed the resale benchmark standard under PO-2B for orders submitted *via* IMA-EDI in Washington. Williams Decl. ¶ 109. In February and April 2002, Qwest missed the PO-2B benchmark standard for UNE-P orders submitted over IMA-EDI. *Id.* ¶ 112. In attributing its performance misses for these products to low order volumes, Qwest essentially concedes that its Washington commercial data are inadequate to show its performance in this area. In all events, Qwest cannot rely on low order volumes to satisfy checklist compliance and simultaneously dismiss low volume metrics where it has missed the performance standard.

171. Qwest also contends that, in May 2002, it failed to meet the unbundled loop benchmark standard under PO-2B due to CLEC error. Williams Decl. ¶ 110; Notarianni/Doherty Decl. ¶ 301. This argument is specious. As of March 2002, Qwest excludes non-fatal rejects from its PO-2B performance results. Fatal rejects have been a valid exclusion from PO-2 results for quite some time. As a consequence, its performance failure in May could not be the result of CLEC error.

172. Qwest's total flow-through rates under PO-2A are also inadequate. From February to May 2002, Qwest's total flow-through rates for loop orders submitted over IMA-GUI have ranged from 9.40% to 27.69%. Qwest's total flow-through rates for loop orders submitted over IMA-GUI declined from 26.6% in April to 20.03% in May.<sup>83</sup> Qwest's total flow-through

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<sup>83</sup> Washington Statewide Performance Summary, February – May 2002 (PO-2A-1).

rates under PO-2A for loop orders submitted over IMA-EDI have ranged from 40.18% to 54.26%. *Id.* (PO-2A-2).

173. For LNP orders submitted *via* IMA-GUI, Qwest's total flow-through rates under PO-2A have ranged from 46.89% to 55.05%. In May 2002, the total flow-through rate for LNP orders submitted over IMA-GUI was 49.51%. *Id.* (PO-2A-1).

174. With respect to UNE-P POTS orders submitted *via* IMA-GUI, Qwest's total flow-through rates have ranged from 45.28% to 61.60%. In May, 59.06% of UNE-P POTS orders submitted *via* IMA-GUI flowed through Qwest's systems. *Id.* (PO-2A-1). From February to May 2002, the flow-through rates for resale orders submitted *via* IMA-EDI have ranged from 4.35% to 50%. *Id.* (PO-2A-2). Thus, Qwest's own data show that substantial volumes of CLEC orders are falling out for manual intervention in Washington.

175. **Provisioning.** Qwest has not performed at parity during the provisioning process in Washington. Qwest admits that it missed the parity standard for the installation of UNE-P Centrex 21 orders in March and May 2002. Williams Decl. ¶ 191. Qwest also concedes that, with respect to two of the four months of data included in its Application, it failed to perform at parity when completing UNE-P Centrex dispatch orders. Williams Decl. ¶ 193. Similarly, even Qwest concedes that it has not performed at parity in meeting its installation commitments for EELs in Washington. Williams Decl. ¶ 204.

176. In March and April 2002, Qwest missed the parity standard under OP-5 for ISDN-capable loops. Williams Decl. ¶ 234. Qwest also admits that, during two of four months, it failed to meet the parity standard under the installation service quality measure for ADSL-capable loops. Williams Decl. ¶ 235. In March, April and May 2002, Qwest admittedly failed

the parity standard for the new installation quality measure for resold DS1. Williams Decl. ¶ 328 n. 415.

177. **Maintenance and Repair.** The Commission has repeatedly stated that a BOC “must provide competitors with equivalent access to all repair and maintenance OSS functions that [the BOC] provides to itself.” *BellSouth Second Louisiana Order*, ¶ 145. Qwest claims that its commercial performance data show that it has satisfied its statutory obligations in this area. Qwest’s assertions cannot withstand analysis.

178. Qwest has not provided maintenance and repair services on a nondiscriminatory basis. Qwest concedes that it missed the parity standard for repeat troubles for non-dispatch UNE-P-POTS orders in two of four months. Williams Decl. ¶ 190. Qwest contends that “[a] contributing factor to the higher than expected repeat report rate is the number of NTF reports Qwest takes from CLECs.” *Id.* Qwest’s argument is without merit. Simply because a Qwest technician closes out a trouble with a “NTF” code does not mean the trouble report was invalid.

179. Qwest admits that, during the period from February through May 2002, it never met the parity standard with respect to trouble rates for CLEC UNE-P Centrex orders. Williams Decl. ¶ 195. Qwest acknowledges that, in two of four months, it missed the parity standard for the trouble rate under MR-8 for ISDN-capable loops. Williams Decl. ¶ 234.

180. Similarly, Qwest admits that, during three of four months, it failed to perform at parity under the mean time to restore measure for high capacity loops. Williams Decl. ¶ 240. Qwest also admits that it missed the parity standard for two months with respect to trouble rates for high-capacity loops. *Id.* Qwest once again attempts to shift the blame for these failures by asserting that its performance results include NTF troubles. *Id.* As noted above, an

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NTF code is not incontrovertible evidence that the trouble report is erroneous. Although Qwest contends that it has implemented programs to reduce its trouble rates, it remains to be seen whether these purported corrective measures will actually result in parity performance.

181. Qwest has failed to provide nondiscriminatory service in clearing troubles reported for line-sharing orders. With respect to the mean time to restore measure for line sharing orders, Qwest failed to perform at parity in two of four months for dispatch<sup>84</sup> and nondispatch orders. Williams Decl. ¶ 249. In an effort to diminish the significance of these performance failures, Qwest notes that one DLEC requested it to repair a trouble in the future, and that it included all of the waiting time in calculating performance results under MR-3, MR-4, and MR-6. Williams Decl. ¶ 249. Qwest also notes that it is currently assessing whether it has the ability to exclude such waiting time from its performance results as “no access time.” *Id.* Conspicuously absent from Qwest’s Application is any information as to whether its own retail customers also request that repairs be completed in the future. If Qwest’s retail customers request such future repairs, Qwest cannot legitimately seek to exclude from its CLEC results the waiting time associated with such repairs without excluding the waiting time for similar repairs requested by its own retail customers.

182. Qwest’s performance in the area of maintenance and repair has been substandard in other important respects. In February and March 2002, Qwest failed the parity standard for trouble rates for DS-3 transport. Williams Decl. ¶ 263. Qwest also concedes that it failed the parity standard for trouble rates for resale business orders in April, March and February

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<sup>84</sup> For example, in April 2002, 98.13% of Qwest’s retail troubles were cleared within 48 hours, while only 75% of CLEC line sharing orders were cleared within 48 hours. Washington Statewide Performance Summary, February – May 2002 (MR-4).

2002. Williams Decl. ¶ 329 nn. 419, 420. Qwest further admits that, from February to May 2002, it missed the parity standard for trouble rates for resale DS1 orders. Williams Decl. ¶ 329 n. 419.

183. Qwest concedes that, in February, March and April 2002, it failed the parity standard for repeat trouble reports for resale nondispatch business orders. Williams Decl. ¶ 329 n. 424. Qwest contends, however, that if NTF reports had been excluded, it would have met the parity standard in February and April. As noted above, an NTF code by a Qwest technician is not dispositive proof that a trouble report is illegitimate. In all events, Qwest essentially admits that, even if NTFs were excluded, it still would have failed the parity standard in March. *Id.*

184. **Billing.** Qwest admits that it failed to meet the parity standard for the BI-4A measure in April 2002 “because certain service orders were not included on the next available bill due to delays in the posting process.” Williams Decl. ¶ 168. Although Qwest asserts that improved quality control procedures should reduce these errors in the future, this is nothing more than an unfulfilled commitment entitled to no weight. *Id.*

**E. Wyoming**

185. **Rejection Intervals.** Qwest contends that its performance in Wyoming under the PO-3 measure (which measures rejection notice intervals) was adversely affected in May because its results included an unbundled loop order that was rejected for lack of facilities under the Build Policy. Williams Decl. ¶ 119. In this regard, Qwest contends that the inclusion of this rejection notice – that was issued 30 days after the LSR – skewed Qwest’s performance results. Qwest also contends that, as a result of its evaluation of the PID, it has concluded that

held orders under the New Build Policy which are “rejected are not one of the standard categories of errors/reasons listed in the PID and consequently [Qwest] will discontinue including rejects for this reason in the measurement beginning with results reported in August.” *Id.* Qwest’s analysis is fundamentally flawed.

186. Qwest’s argument that the New Build Policy had an adverse impact on its May PO-3 performance results in Wyoming is nonsensical. Qwest’s current Wyoming SGAT has no 30 day wait period before orders can be rejected for lack of facilities. Indeed, in Wyoming, orders can be rejected at any time when facilities are not available.

187. Furthermore, as noted above, Qwest announced in the Spring of 2001 that it would reject orders under the New Build Policy. At that time, Qwest advised the CLECs in workshops that, pursuant to this new policy, it was rejecting hundreds of orders that were in the backlog. Although Qwest claims that it included the one held order in its May PO-3 performance results, Qwest’s performance results otherwise suggest that Qwest has *excluded* held orders from its performance results.

188. It must also be emphasized that Qwest’s recently-announced decision to exclude from its PO-3 performance results orders held and rejected for lack of facilities was solely unilateral. This decision is troubling because a performance measurement plan cannot serve its intended purpose if it is subject to such unilateral redefinition by the BOC. Equally infirm is Qwest’s assertion that the PIDs somehow support its view that orders held and rejected under the New Build Policy should be excluded from performance results. The standard reason for rejecting an order under PO-3 is that the “request is outside established parameters of service.” Having facilities in place to provide service should be one of the established parameters for service. If no facilities are in place and if Qwest does not intend to build such

facilities, the request would fall “outside the established parameters for service.” As a consequence, orders that are held and rejected for lack of facilities should be included in PO-3.

189. **Flow-Through.** Qwest’s flow-through rates in Wyoming are inadequate. Qwest concedes that it missed the resale PO-2B benchmark for orders submitted *via* IMA-GUI in February, March and April 2002. Williams Decl. ¶¶ 113, 115. Once again, Qwest attributes these misses to low order volumes and CLEC error. *Id.* ¶ 115. Qwest’s attempt to dismiss its performance results because of low order volumes is an admission that its commercial data are insufficient to prove checklist compliance. Furthermore, Qwest’s attempt to blame CLEC error for its performance misses in March and April is meritless since Qwest has been excluding non-fatal rejects from its performance results since March.

190. Qwest’s total flow-through rates under PO-2A are far too low. As explained in the AT&T OSS Declaration, from February to May 2002, the flow-through rates for UNE-POTS orders submitted *via* IMA-EDI have ranged from 36.47% to 54.17%.<sup>85</sup> The resale total flow-through rates for orders submitted over IMA-GUI have ranged from 46.15% to 60.27% (*id.* (PO-2A-1)), while the resale total flow-through rates for orders submitted *via* IMA-EDI have ranged from 4.08% to 9.09% during the four months covered by the Application (*id.* (PO-2A-2)). In May 2002, the total flow-through rate for loop orders submitted over IMA-EDI was 60.71%. *Id.* (PO-2A-2). During that same month, none of the loop orders that were submitted *via* IMA-GUI flowed through Qwest’s systems. *Id.* (PO-2A-1).

191. **Provisioning.** Qwest has not consistently performed at parity during the provisioning process in Wyoming. Qwest admits that, in three of four months, it failed the

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<sup>85</sup> See Wyoming Statewide Performance Summary, February – May 2002 (PO-2A-2).

benchmark standard for installation commitments met for conditioned loops. Williams Decl.

¶ 243. Qwest also admits that, in February and March 2002, it failed the benchmark standard for the PO-6 measure on work completion notices for orders submitted over IMA-EDI. Williams Decl. ¶ 125. Although Qwest touts the fact that it met the performance standard in April and May, performance failures during two of four months (50%) can hardly be considered exemplary.

192. **Maintenance and Repair.** Qwest has not consistently met the parity standard in the area of maintenance and repair. Qwest admits that, from February through May 2002, it missed the parity standard under the trouble rate measurement for UNE-P Centrex. Williams Decl. ¶ 201. In March and April 2002, Qwest also failed the parity standard for trouble rates for resold Centrex orders. Williams Decl. ¶ 331.

193. **Billing.** Qwest admits that it missed the parity standard for the BI-4A measure in March 2002 “because certain service orders were not included on the next available bill due to delays in the posting process” and because it failed to discover in time that certain Unbundled Loop Disconnect orders had not been completed. Qwest asserts that improvements to the completion and posting processes should minimize these errors in the future, however, these are nothing more than paper promises which have no probative value in the context of this proceeding.

#### **IV. QWEST’S PERFORMANCE ASSURANCE PLANS CANNOT DETER BACKSLIDING.**

194. There is no factual basis for Qwest’s claims that its performance enforcement plans establish a comprehensive system of remedies that will ensure that it will continue to satisfy its performance obligations to CLECs after it receives long distance authorization. *See* Reynolds Decl. ¶ 6. Indeed, it is clear that those remedy plans provide no

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meaningful protection against backsliding in the event that Qwest is authorized to provide long distance services.

195. As the Commission has recognized, the public interest analysis in Section 271(d)(3)(C) is an independent element of the “statutory checklist” that “requires an independent determination.”<sup>86</sup> As part of that analysis, the Commission has recognized that a BOC’s performance monitoring and enforcement plan can “constitute probative evidence that the BOC will continue to meet its Section 271 obligations and that its entry would be consistent with the public interest.”<sup>87</sup>

196. The principal purpose of an anti-backsliding plan is to provide sufficient monetary incentives for a BOC to continue providing CLECs the nondiscriminatory support that is required after Section 271 approval. After a BOC is authorized under Section 271 to provide long distance services, it will no longer have the powerful business incentives provided by the lure of Section 271 approval to provide nondiscriminatory support for CLECs. Indeed, after Section 271 approval, the BOC will have powerful incentives to exploit its position as the supplier of facilities and services essential to competitors to drive those competitors out of both the local and long distance markets.

197. As a consequence, it is necessary to counterbalance the BOC’s very real, anticompetitive business incentives with the prompt application of monetary consequences based on an anti-backsliding plan that will promptly detect and deter such behavior. In order to offset the anticompetitive incentives that are inherent in the BOC’s position, an anti-backsliding plan must have sufficient and definite consequences to preclude the BOC from rationally concluding

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<sup>86</sup> *New York 271 Order* ¶ 423.

that it stands more to gain by discriminating and paying the consequences under the remedy plan, than by competing fairly on a level playing field.

198. As the Commission explained in its *Michigan 271 Order*, to provide the most effective possible deterrent against discriminatory performance after a Section 271 application is granted, an anti-backsliding plan should include “appropriate, self-executing enforcement mechanisms that are sufficient to ensure compliance with the established performance standards.”<sup>88</sup> To meet this standard, an anti-backsliding plan must have sufficient and immediate monetary consequences to dissuade the BOC from exercising its natural incentives to leverage its monopoly power in the local market, together with its position as the primary supplier of wholesale inputs to CLECs, to harm competition in both the local and long distance markets. In that connection, the Commission has emphasized the importance of remedial measures that are “automatically triggered” by noncompliant conduct.<sup>89</sup>

[A]s part of our public interest inquiry, we would want to inquire whether the BOC has agreed to private and self-executing enforcement mechanisms that are automatically triggered by noncompliance with the applicable performance standard without resort to lengthy regulatory or judicial intervention. The absence of such enforcement mechanisms could significantly delay the development of local exchange competition by forcing new entrants to engage in protracted and contentious legal proceedings to enforce their contractual and statutory rights to obtain necessary inputs from the incumbent.

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<sup>87</sup> *New York 271 Order* ¶ 429.

<sup>88</sup> *Michigan 271 Order* ¶ 394. See also *Second BellSouth Louisiana Order* ¶ 364.

<sup>89</sup> *Michigan 271 Order* ¶ 394.

199. In its *New York 271 Order*, the Commission identified the following key elements in a performance monitoring and enforcement plan that would support a showing “that markets will remain open after grant of the application.”<sup>90</sup>

- 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 is accurate.<sup>91</sup>

200. Qwest asserts that the performance assurance plans in the States included in its Application satisfy all of the key criteria identified by this Commission in its *New York 271 Order*. Qwest’s assertion is meritless.

**A. Qwest’s Inaccurate Data Fatally Compromise the Remedy Plans.**

201. No performance enforcement plan can be effective unless it is based upon a comprehensive set of measures which produce accurate results, as well as self-executing enforcement mechanisms that can effectively deter a BOC from engaging in anticompetitive conduct after Section 271 entry. The performance enforcement plans presently in place in the States which are the subject of Qwest’s Application cannot possibly serve as effective tools to assure future statutory compliance.

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<sup>90</sup> *New York 271 Order* ¶ 423.

<sup>91</sup> *Id.* ¶ 433.

202. As noted above, Qwest's performance data are inaccurate and untrustworthy. Although Qwest asserts that the audits and data reconciliation processes conducted to date have verified the accuracy and reliability of its performance data, the audits and processes on which Qwest relies were so limited in scope and procedurally and substantively flawed that they cannot reasonably be characterized as reliable indicators of the integrity of Qwest's data.

203. Significantly, even these flawed audits and data reconciliation processes reveal that Qwest's performance monitoring and reporting processes are plagued with errors that cannot and must not be brushed aside. Because performance data serve as the springboard for performance remedies payments under the QPAPs, the unreliability of Qwest's performance data fatally compromises that efficacy of all of the performance remedy plans that are the subject of this Application. However, even assuming *arguendo* that Qwest's data are accurate and trustworthy - - and they certainly are not - - the structural defects in Qwest's remedy plans preclude them from serving as effective tools to prevent future backsliding.

**B. The Remedy Plans Omit Important Measures.**

204. No antibacksliding plan can achieve its intended goal of deterring anticompetitive conduct unless, *inter alia*, it is based on a robust set of measures. *New York 271 Order*, ¶ 433. The current versions of the QPAPs included in the Application are flawed both in their comprehensiveness and their ability to capture actual performance. The performance plans cannot possibly capture Qwest's actual performance in full because they exclude measures that are necessary to detect discriminatory performance. As a result, Qwest will suffer no financial consequences under its remedy plans even for grossly discriminatory conduct in these areas.

Moreover, the exclusion of these measures in the performance remedy plans violates the basic requirement that an enforcement plan must “encompass a comprehensive range of carrier-to-carrier performance.” *New York 271 Order* ¶ 433.

205. The omitted measures – measures that KPMG strongly recommended are necessary in order to detect the full extent to which Qwest makes errors during the manual processing of orders – are neither trivial nor insignificant. *See* ¶ 110, *supra*. One striking example is the failure of the current QPAPs to include any measure on service order accuracy. Thus, under Qwest’s current remedy plans, it suffers no financial consequences for poor performance in this area. Given the substantial problems in Qwest’s performance monitoring and reporting processes that are, in large measure, attributable to human error, it is absolutely critical that Qwest’s performance monitoring and remedy plans include measures that can monitor and accurately capture that performance.

**C. No Remedy Plan Is In Place In Wyoming.**

206. As the Commission has recognized, “in all of the previous applications [the FCC has] 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.” *Pennsylvania 271 Order* ¶ 127 n. 439. Significantly, *there is no performance remedy plan presently in place in Wyoming*. In its Application, Qwest has invited this Commission to approve its Application based upon a defective QPAP that the WPSC rejected, finding that it was not “consistent with the public interest.”<sup>92</sup> The Commission should decline

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<sup>92</sup> *See Order on SGAT Compliance, In the Matter of the Application of Qwest Corporation Regarding Relief Under Section 271 of the Federal Communications Act of 1996, Wyoming’s Participation in a Multi-State Section 271 Process and Approval of its Statements of Generally*

that invitation. In order to place these issues in context, a short history of the events leading to the rejection of Qwest's proposed QPAP by the WPSC follows.

207. On January 30, 2002, the WPSC issued its First Order on Group 5A Issues in which the WPSC required QPAP to implement certain changes to its proposed QPAP.<sup>93</sup> The First Wyoming QPAP Order, *inter alia*, required Qwest to remove its proposed maximum annual cap, eliminate any limitations on the ability of CLECs to seek remedial relief because of Qwest's subpar performance, and include provisions confirming the WPSC's authority to implement changes to the QPAP. The First Wyoming QPAP Order also required Qwest to modify the QPAP in accordance with these directives.

208. On February 28, 2002, Qwest filed a "Petition for Reconsideration of the Commission's Recommendation," stating that the WPSC's First Wyoming QPAP Order "lacked the hallmarks of rational decision making."<sup>94</sup> After hearings, the WPSC denied Qwest's motion and directed Qwest, once again, to revise the QPAP in accordance with the First Wyoming QPAP Order.<sup>95</sup>

209. On April 16, 2002, Qwest filed a "Submission of Modification to Qwest Performance Assurance Plan" that did not comply with the WPSC's Orders. Thus, for example,

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*Available Terms*, Wyoming Pub. Serv. Comm., Docket No. 70000-TA-00-599, July 9, 2002 at 4 ("Order on SGAT Compliance").

<sup>93</sup> First Order on Group 5A Issues, *In the Matter of the Application of Qwest Corporation Regarding Relief Under Section 271 of the Federal Communications Act of 1996, Wyoming's Participation in a Multi-State Section 271 Process and Approval of its Statements of Generally Available Terms*, Wyoming Pub. Serv. Comm., Docket No. 70000-TA-00-599, January 30, 2002 ("First Wyoming QPAP Order").

<sup>94</sup> Qwest Corporation Petition for Reconsideration of the Commission's QPAP Order at 4.

<sup>95</sup> Order Denying Petition for Reconsideration and Setting Public Hearing and Procedures at 6-7.

in the First Wyoming QPAP Order, the WPSC explicitly rejected any cap on remedy payments.<sup>96</sup> Instead of complying with the WPSC's Order, Qwest submitted a QPAP which provided that, if Qwest projected that its payments would exceed 24% of its Wyoming ARMIS net return, it could cease making payments and file a petition with and seek relief from the WPSC.

210. In its First Wyoming QPAP Order, the WPSC also rejected a provision which provided that Tier II payments to the State would be triggered only after three months of non-compliant performance. *Id.*, ¶ 8. Instead of eliminating this provision, Qwest retained the three month restriction and imposed additional conditions for Tier II payments.

211. The First Wyoming QPAP Order also rejected provisions in the QPAP which imposed a cap on escalating payments for non-compliant performance. *Id.*, ¶ 9. However, the QPAP that Qwest presented to the WPSC restricted payment escalation after six consecutive months of non-compliant performance.

212. The Wyoming First QPAP Order also rejected Qwest's provisions providing for the de-escalation of payment levels after a period of compliant performance. *Id.*, ¶ 10. However, Qwest ignored the WPSC's Order and failed to eliminate these provisions.

213. In the Wyoming First QPAP Order, the WPSC stated that the QPAP should not limit the remedies that CLECs can pursue for substandard performance. *Id.*, ¶ 11. The WPSC also rejected Qwest's provisions giving Qwest "veto power over changes in the QPAP." *Id.*, ¶ 13. Notwithstanding these directives, Qwest proposed provisions which limited the remedies that CLECs could pursue and restricted the State's ability to implement changes to the plan.

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<sup>96</sup> First Wyoming QPAP Order ¶ 7.

**Declaration of John F. Finnegan**  
**WC Docket No. 02-189**

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214. On May 3, 2002, the WPSC initiated a hearing to address Qwest's revised QPAP. Because Qwest's proposed QPAP did not comply with the WPSC's Orders, the proceeding was terminated after a 3-0 vote by the WPSC.<sup>97</sup>

215. On June 12, 2002, Qwest notified the WPSC that it planned to collaborate with a Wyoming public interest group, the Consumer Advocate Staff ("CAS"), and prepare a new performance enforcement plan. Although Qwest never met with CAS, Qwest eventually filed a so-called "Compromise QPAP" which once again failed to comply with the WPSC's Orders. On June 26, 2002, AT&T and Covad submitted a joint opposition to the "Compromise QPAP." In its Order on Consideration of General Compliance issued on July 3, 2002, WPSC again found that Qwest's QPAP failed to conform to its prior orders.<sup>98</sup>

To date, Qwest has not filed a QPAP for our consideration which accurately or completely reflects the decisions of this Commission as expressed and reaffirmed continuously since January 30, 2002. The latest filing by Qwest of a 'compromise' QPAP, a filing not directed by the Commission to be made, continued to offer language not in compliance with the Commission's direction.

\* \* \*

We find that the QPAP, in the final form suggested by Qwest, is in significant ways non-compliant with our orders, especially our order of January 30, 2002, herein . . . . We cannot consider it sufficient to our public interest purposes in this case; and we do not believe that, in light of all of the facts and circumstances coming

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<sup>97</sup> See also Reynolds Decl. ¶ 26 (conceding that the WPSC "terminated the hearing as a result of its determination that Qwest had filed alternative proposals for certain issues, rather than provisions that were strictly compliant").

<sup>98</sup> Order on Consideration of General Compliance, *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 Process and Approval of Its Statement of Generally Available Terms*, Docket No. T 0000-TA-00-599 (Record No. 5924), Wyoming Public Service Commission, issued July 3, 2002 ("Order on Consideration of General Compliance") at 8, 23.

before the Commission in this proceeding concerning telecommunications in Wyoming, that it meets the FCC's criteria set forth, *supra*.

216. Similarly, in its Order on SGAT Compliance issued on July 9, 2002, the WPSC, finding that Qwest failed to comply with its Orders and that Qwest's proposed QPAP suffered from "significant deficiencies," rejected Qwest's QPAP, finding that it failed the public interest standard.<sup>99</sup>

217. In its Application, Qwest concedes that its proposed QPAP submitted to this Commission for approval was expressly rejected by the WPSC and admits that there is no QPAP presently in place in Wyoming. Reynolds Decl. ¶ 28. In rationalizing its decision to submit its rejected QPAP to this Commission for approval, Qwest contends that the provisions the WPSC directed it to implement fall outside the Commission's "zone of reasonableness standard." See Reynolds Decl. ¶ 40. In this regard, Qwest contends, *inter alia*, that the WPSC's rulings on the provisions in its proposed QPAP on, *inter alia*, the maximum annual cap, billing measures, and QPAP change control process are plainly erroneous. Reynolds Decl. ¶¶ 40, 54, 68. Qwest is wrong.

218. Qwest's proposed Wyoming QPAP in its Application imposes a 36% cap on total payments and permits the WPSC to increase the cap only when "Qwest payments equal or exceed the annual cap for two years in a row or equal or exceed 1/3<sup>rd</sup> of the annual cap in a combination of two consecutive months."<sup>100</sup> Additionally, Qwest's proposed QPAP provides that the "maximum annual cap that shall apply to the aggregate total of Tier 1 liquidated damages, include[es] any such damages paid pursuant to this Agreement, any other

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<sup>99</sup> Order on SGAT Compliance at 5.

<sup>100</sup> See Qwest Wyoming SGAT Sixth Revision, Exhibit K, July 8, 2002, ¶ 12.2.

interconnection agreement, or any other payments made for the same underlying activity or omission under any other contract, order or rule and Tier 2 assessments or payments made by Qwest.” *Id.*, ¶ 12.1. Thus, under Qwest’s proposed QPAP Qwest’s total liability for conduct falling within or outside the ambit of the QPAP is capped at 36% of net ARMIS return.

219. However, the WPSC in its First QPAP Order expressly rejected a cap on payments, stating:

Regarding the Workshop Report’s recommended 36% cap on payments by Qwest under the QPAP, we find no evidence proving the advisability of a particular cap in terms of a specific percentage or otherwise. Likewise, we find that there has been no demonstration of a reason to place a dollar limit on compensation derived from such a cap. . . . The dynamism of competitive telecommunications markets keeps a fixed cap from being a ‘meaningful and significant incentive to comply’ with performance standards. The artificiality of a cap also introduces many administrative and other complications into the administration of the QPAP. Further, it could focus the behavior of competitors on obtaining compensation rather than concentrating on competing. Not having a cap comes much closer to creating a ‘reasonable structure designed to defect and sanction poor performance when and if it occurs’ and is more apt to function as ‘a self-executing mechanism. . . .’ which does not rely on the regular intervention of courts, regulators or special masters to make the QPAP function adequately.<sup>101</sup>

220. Similarly, in its Order on SGAT Compliance, the WPSC once again rejected Qwest’s proposal, stating:<sup>102</sup>

Despite our orders to the contrary, Qwest again proposes a complex and administratively burdensome cap on its liability under the QPAP. It further compounds the problem by offering new language which purports to do away with the Commission’s jurisdiction to review this complex cap except in certain limited circumstances acceptable to Qwest (see, QPAP Section 12.2).

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<sup>101</sup> First Wyoming QPAP Order, ¶ 7.

<sup>102</sup> Wyoming Order on SGAT Compliance at 4.

Even then the Commission would only be allowed to open a proceeding to 'request' that Qwest explain its non-conforming performance in extreme circumstances, after Qwest reaches the cap for two consecutive years or when it pays out a third of the cap 'in two consecutive months.' This clearly weakens the QPAP and diminishes the ability of the Commission to act in the public interest in telecommunications matters under the Federal Act and under the Wyoming Telecommunications Act of 1995. It diminishes the ability of the Commission to act in efficient partnership with federal regulators under the Federal Act.

221. In its Application, Qwest suggests that the WPSC's decision eliminating any cap on remedy payments is inherently unreasonable and contrary to this Commission's precedent. Reynolds Decl. ¶ 40. However, this Commission has never held that a performance assurance plan *must* impose a cap on liability. Indeed, the New Jersey performance assurance plan that was included in Verizon's New Jersey 271 application has a procedural cap, but does not impose an absolute hard cap on liability.<sup>103</sup>

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<sup>103</sup> *New Jersey 271 Order*, ¶ 178 (noting that "the New Jersey IP does not impose an absolute cap on the Verizon's potential liability"). Furthermore, in its Application Qwest attempts to leave the impression that the provisions relating to the cap in each of the States included in the Application are essentially identical. Reynolds Decl. ¶ 37. However, there is one difference between the Wyoming cap provision and the cap provisions in the other QPAPs included in the Application. The cap provision in the proposed Wyoming QPAP – which has been rejected by the WPSC – states explicitly that the cap "constitutes a maximum annual cap that shall apply to the aggregate total of Tier 1 liquidated damages, including any such damages paid pursuant to the Agreement, any other interconnection agreement, or any other payments made for the same underlying activity or omission under any *other contract, order or rule* and Tier 2 assessment or payments made by Qwest for the same underlying activity or omission under any other contract, order or rule." Wyoming SGAT Sixth Revision, Exhibit K, ¶ 12.1. Thus, under the Wyoming QPAP proposed by Qwest, if Qwest is required to pay damages to a CLEC pursuant to a court order for conduct which arguably could be construed as the same activity or omission for which Qwest made payments under the QPAP, those damages would be counted as part of the maximum annual cap. Moreover, Qwest's QPAP is so broad that Qwest's total liability both within and outside the plan for the "same underlying activity or omission" is capped. In contrast, the cap provisions in the other three QPAPs in the Application do not include as part of the maximum annual cap payment damages that are collected outside the QPAP. See Qwest Montana SGAT Fifth Revision, Exhibit K, July 3, 2002, ¶ 12.1; Qwest Utah SGAT Sixth Revision, Exhibit K, ¶ 12.1; Qwest Washington SGAT Eighth Revision, Exhibit K, ¶ 12.1. In all events, Qwest has

222. Qwest also notes that, although it eliminated “the six-month limit on payment escalation” as directed by the WPSC, it refused to comply with the WPSC’s Order requiring it to remove provisions “to keep individual billing measurements capped at \$30,000 per CLEC per month.” Reynolds Decl. ¶ 68. Qwest contends that the WPSC’s Order is unreasonable because “single payments to a CLEC could reach extraordinary amounts, resulting in windfalls to CLECs.” *Id.* This argument is specious.

223. In evaluating Qwest’s argument that uncapped billing measures “would create ‘the potential for exceptionally harsh and unfair payment requirements,’” the WPSC emphasized that it “will act to curb abuses by any party, but the abuses must be real and not speculative or theoretical.”<sup>104</sup> The WPSC also found that it was not in the public interest to “establish arbitrary limitations now” or an “inflexible QPAP” with “preemptive caps,” particularly where there is no evidence that “[a]ny payment made under the QPAP” has resulted “in an abusive outcome.” *Id.* Importantly, the WPSC also emphasized its willingness, post-implementation, to discuss and implement “caps on *any* measure shown to be functioning abusively and against the public interest.” *Id.* at 20. Thus, the WPSC’s decision which directed Qwest not to impose caps on billing measures was not unreasonable as Qwest suggests, but rather reflected the WPSC’s unease in imposing “arbitrary” and “preemptive caps” without sufficient basis therefor.

224. Equally flawed is Qwest’s assertion that the WPSC acted unreasonably in rejecting Qwest’s provisions regarding the change control process. The WPSC, in discussing the

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cited no Commission precedent for the proposition that a QPAP must contain a cap, and that the cap should include payments made by a BOC outside the QPAP.

<sup>104</sup> Order on Consideration of General Compliance at 19.

six month review process, made clear that the State must have a “continuing role in the process” and the unfettered right to make changes to the QPAP. *Id.* at 21. To remove any doubts regarding the authority of the State to modify the QPAP as needed, the WPSC directed Qwest to include the following provision in its proposed QPAP: “The Commission may initiate a proceeding to review the QPAP at any time and to order changes to any provision of the QPAP, after notice and hearing in accordance with the Wyoming Administrative Procedure Act.” *Id.* at 21-22. The WPSC emphasized that “[t]his simple and unequivocal statement is all that is needed.” *Id.* at 22.

225. Instead of inserting this plain and “unequivocal statement” in its QPAP, Qwest disregarded the WPSC’s directive and included the following provision in its QPAP on the six month review process:

16.1. Every six (6) months, beginning six months after the effective date of Section 271 approval by the FCC for the state of Wyoming, Qwest or CLECs may request the Commission to initiate a proceeding, or the Commission may initiate a proceeding on its own motion at any time, to review and evaluate the QPAP and, after notice and hearing and in accordance with the Wyoming Administrative Procedure Act and consistent with other rights of the parties, the Commission thereafter may make changes to the QPAP consistent with any independent authority under law. Qwest and CLEC agree that no new performance measurement shall be added to this QPAP that has not been subject to observation as a diagnostic measurement for a period of 6 months unless ordered otherwise by the Commission, after notice and hearing. Any changes made at the six-month review pursuant to this section shall apply to and modify this agreement between Qwest and CLEC.

226. In its Application, Qwest contends that the WPSC acted unreasonably in rejecting this provision. Qwest is wrong again. The WPSC found that Qwest’s proposed Section 16.1 “remains unacceptable because of Qwest’s persistent inclusion of the phrase ‘consistent with any independent authority under law’ in the description of when the Commission

may order changes in the QPAP.”<sup>105</sup> Indeed, the WPSC found that, by including this language “Qwest thereby seeks again to insulate itself going forward from scrutiny of the QPAP.” *Id.* Moreover, the WPSC also found that this language “also creates an opportunity for additional delay and increased expense” as a result of litigation challenging the independent authority of the States to impose changes to the plan. *Id.* The WPSC emphasized that it “directed a simple and unequivocal statement of the Commission’s continuing role in the process” and that Qwest failed to comply with that directive.

227. Additionally, the WPSC was also troubled “by the last sentence of Section 16.1 in Qwest’s proposed QPAP which states that: ‘Any changes made in the six-month review pursuant to this section shall apply to and modify this agreement between Qwest and CLEC.’” *Id.* at 5. The WPSC stated that this sentence suggests that changes implemented “at other times pursuant to a Commission mandate might *not* modify this “agreement.” *Id.* (emphasis in original). The WPSC also determined that “Qwest includes limitations and ambiguities which favor it and which increase delay and expense to other parties” – “limitations and ambiguities” which contravene the public interest standard in the Telecommunications Act, as well as the Wyoming Telecommunications Act of 1995. *Id.* at 5.

228. The WPSC’s decision confirming the authority of the State to monitor and implement changes to a performance remedy plan is consistent with this Commission’s precedent. This Commission has emphasized that “state performance monitoring and post-entry

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<sup>105</sup> Order on SGAT Compliance at 5.

enforcement”<sup>106</sup> mechanisms are “*critical* complements to the Commission’s authority to preserve checklist compliance pursuant to section 271(d)(6).”<sup>107</sup>

229. Thus, for example, in approving Bell Atlantic’s New York 271 application, the Commission emphasized that the New York PSC was “committed to supervising the implementation of [performance assurance] plans” that were designed to assure that the markets remained open in the wake of Section 271 relief. *New York 271 Order* ¶ 12. Because of the vital role that the New York PSC played and would continue to play in monitoring and adjusting the performance monitoring and remedy plan as needed, this Commission was confident that the New York monitoring and enforcement plan would be revised as needed “to reflect changes in the telecommunications industry and in the New York market.” *Id.*, ¶ 438.

230. In approving SWBT’s Kansas and Oklahoma 271 applications, the Commission acknowledged that both the Kansas and Oklahoma Commissions had the authority to review and modify the performance measurement plans and take swift action if SWBT failed to comply with its performance obligations. *Kansas/Oklahoma 271 Order* ¶ 275 n. 839.

231. Similarly, in its *Pennsylvania 271 Order* the Commission stated that:<sup>108</sup>

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

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<sup>106</sup> *Texas 271 Order* ¶ 420.

<sup>107</sup> *Texas 271 Order* ¶ 420, n. 1219 (emphasis added); *New York 271 Order* ¶ 429, n. 1316; *Kansas/Oklahoma 271 Order* ¶ 269, n. 828; *Massachusetts 271 Order*, ¶ 236, n. 757.

<sup>108</sup> *Pennsylvania 271 Order* at ¶ 128 (footnote omitted) (emphasis added).

actual commercial performance in the local marketplace.

232. In its *Georgia/Louisiana 271 Order*, the Commission again recognized the critical importance that state agencies must play in revising remedial plans “to most accurately reflect actual commercial performance in the local marketplace:”<sup>109</sup>

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 these 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. We note that both the Georgia and Louisiana Commissions anticipate modifications to BellSouth’s SQM from their respective pending six-month reviews.

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

233. Thus, there is no sound basis upon which Qwest can legitimately contend that the WPSC’s decision is plainly unreasonable. As the WPSC made clear, the provisions on the six month review process that Qwest has proposed – rather than “simple and unequivocal statement” that the WPSC ordered – create the very real risk that Qwest could mire the CLECs in protracted legal battles in which it could challenge the authority of the State to impose any changes to the plan. Moreover, Qwest’s refusal to include within its QPAP the “simple and unequivocal” statement ordered by the WPSC – which explicitly acknowledges the authority of

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<sup>109</sup> *Georgia/Louisiana 271 Order* at ¶¶ 294, 300 (footnote omitted).

the State to change the plan – is telling proof that the specter of such a challenge by Qwest is not illusory.

**D. The Washington QPAP Permits Qwest to Challenge the Authority of the State.**

234. Contrary to Qwest’s claim, the Washington QPAP does not meet this Commission’s criterion that it be a self-executing mechanism that “does not leave the door open unreasonably to litigation and appeal.” The Washington QPAP states that, “[n]othing in this QPAP constitutes a granting of authority by either party to this agreement nor does it constitute a waiver. . . of any claim that Commission lacks jurisdiction to make any modifications to this QPAP.” Washington SGAT Exhibit K, ¶ 16.1.1. The mere fact that Qwest remains free under the Washington QPAP to challenge, at any time, the State’s authority to impose any changes to the plan demonstrates that it fails to satisfy one of the key characteristics that this Commission has deemed essential in evaluating the effectiveness of enforcement plans.

235. Throughout the proceedings on the QPAP in Washington, Qwest strenuously objected to any provision in the QPAP authorizing the State to implement changes to the plan. Indeed, Qwest insisted that “Qwest’s approval [is required] before any changes [to the QPAP] are made.”<sup>110</sup> Furthermore, Qwest argued that the State regulatory authority “lacks the authority to impose the plan on Qwest, and therefore does not have any authority to subsequently

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<sup>110</sup> Thirtieth Supplemental Order, Commission Order Addressing Qwest’s Performance Assurance Plan, *In the Matter of the Investigation Into U S West Communications, Inc.’s Compliance With Section 271 of the Telecommunications Act of 1996*, Docket No. UT-003022, *In the Matter of U S West Communications, Inc.’s Statement of Generally Available Terms Pursuant to Section 252(f) of the Telecommunications Act of 1996*, Docket No. UT-003040, issued April 5, 2002 at 37 (“Thirtieth Supplemental Order”).

modify it.”<sup>111</sup> And Qwest also denie[d] “that the FCC has allowed state commissions the sole authority to make changes to a performance plan.” *Id.*

236. In its Thirtieth Supplemental Order, the WUTC rejected Qwest’s arguments, finding that “Qwest must modify the QPAP to allow the Commission authority to determine whether changes ought to be made to the QPAP.” Thirtieth Supplemental Order at 39. The WUTC also directed Qwest to strike from its proposed QPAP the provision requiring Qwest’s approval of any proposed changes and to substitute therefor the following language: “After the Commission considers such changes through the six month process, it shall determine what set of changes should be embodied in an amended SGAT that Qwest will file to effectuate these changes.” Thirtieth Supplemental Order at 39.

237. On April 15, 2002, Qwest filed a Petition for Reconsideration of the Thirtieth Supplemental Order, requesting that the Commission reconsider several issues, including its finding on QPAP change control. Qwest once again contended “that state commissions have no authority to order changes to the QPAP and cannot assert such authority in the QPAP.”<sup>112</sup> Although Qwest “acknowledge[d] that the FCC recognizes the role of state commissions in administering plans, Qwest dispute[d] the idea that states have ‘change control’ over the plan.” *Id.* at 11. Qwest also argued that it should “continue to retain approval authority over changes to the QPAP.” *Id.* In its 33<sup>rd</sup> Supplemental Order, the WUTC once again rejected Qwest’s arguments and denied Qwest’s request for reconsideration of this issue.

238. In its 37<sup>th</sup> Supplemental Order, the WUTC directed Qwest to submit a revised SGAT including Exhibit K, the performance assurance plan. In that Order, the WUTC

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<sup>111</sup> Thirtieth Supplemental Order at 38.

once again directed Qwest to modify its QPAP in accordance with the Thirtieth Supplemental Order. Thus, in three separate orders, the WUTC emphasized that the QPAP must contain language recognizing its authority to modify the plan.

239. On June 25, 2002, Qwest filed its revised SGAT which included Exhibit K. Instead of complying with the WUTC's directives issued on three separate occasions, Qwest insisted that the following language be adopted in the QPAP:

16.1.1. Nothing in this QPAP precludes the Commission from modifying the QPAP based upon its independent state law authority, subject to judicial challenge. Nothing in this QPAP constitutes a granting of authority by either party to this agreement nor does it constitute a waiver by either party to this agreement of any claim either party may have that the Commission lacks jurisdiction to make any modifications to this QPAP, including any modifications resulting from the process described in Section 16.1.

240. On June 28, 2002, AT&T, WorldCom, Covad, Time Warner and ELI submitted a joint letter requesting that the WUTC reject Qwest's proposed provision. In that submission, the CLECs argued that the WUTC had, on three separate occasions, specifically rejected Qwest's attempt to limit the authority of the State to implement changes to the plan. Moreover, the CLECs pointed out that Qwest's proposed language would permit Qwest to mount legal challenges to the authority of the WUTC to impose any changes to the plan that were not to Qwest's liking. Indeed, the Washington QPAP provides that any changes to the plan that are made by the WUTC must derive from the WUTC's "independent State law authority" even though it is clear that the State's authority to monitor performance remedy plans is based on state

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<sup>112</sup> 33<sup>rd</sup> Supplemental Order, Docket Nos. UT-003022 and 003040, issued May 20, 2002 at 10.

and federal law. *New York 271 Order*, ¶ 429, n. 1316. Inexplicably, the WUTC reversed course and permitted Qwest's proposed language to be included in the final QPAP.<sup>113</sup>

241. Qwest's Washington QPAP is contrary to this Commission's decisions which explicitly recognize the role that States must play in implementing changes to performance enforcement plans to reflect the dynamism in the marketplace. The Washington QPAP – which explicitly permits Qwest to challenge the authority of the State to make any changes to the plan — poses a significant risk that CLECs will be faced with litigation whenever the State imposes changes to the plan. Numerous state commissions, mindful of the vital role that they should and must play in shaping the contours of performance assurance plans, have adopted plans which confer no such rights of challenge upon the BOC. For example, performance enforcement plans in New York,<sup>114</sup> Pennsylvania,<sup>115</sup> and Vermont<sup>116</sup> contain no provisions granting the BOC the right to challenge the authority of the State to change the plan. As the California Public Utilities Commission recently found, in order to meet the public interest test “Pacific will need to agree

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<sup>113</sup> See 39<sup>th</sup> Supplemental Order, Docket Nos. UT-003022 and UT-003040, served July 1, 2002.

<sup>114</sup> Compliance Filing of New York Telephone Company, d/b/a Bell Atlantic-New York for the Performance Assurance Plan, Cases 97-C-027 1 and 99-C-0949, April 7, 2000 at 20 (noting that the annual review to assess whether modifications to the plan are needed “will not be subject to limitation”, that “[a]ll disputes will be resolved by the Commission,” and that “[a]ny modifications to the Plan will be implemented as soon as is reasonably practical after Commission approval of the modifications”).

<sup>115</sup> *Pennsylvania 271 Order* ¶ 132 (noting Verizon's “withdrawal of its previous lawsuit challenging the Pennsylvania Commission's authority to implement a PAP”) (footnote omitted).

<sup>116</sup> Vermont Performance Assurance Plan, 11(K) (August 7, 2001) at 23 (noting that, during the annual review, “[a]ll aspects of the Plan . . . will be subject to review” and “[a]ny modifications to the Plan will be implemented as soon as is reasonably practical after Commission approval of the modifications.”)

that the Commission retains jurisdiction over the plan, including the authority to modify any provision . . . .”<sup>117</sup>

242. If Qwest is free to challenge the authority of the State to make any changes to the PAP, Qwest could render the QPAP a static document that would never evolve at a pace that is consistent with the dynamics in the telecommunications market. Qwest simply cannot have it both ways. Qwest should not be permitted to rely on a QPAP for 271 approval and claim that it does not leave open the door unreasonably to appeal, while simultaneously reserving the right to challenge the authority of the State to make any changes to the QPAP. Indeed, reservation of such rights undermines the Commission’s stated goal of having “self-executing enforcement mechanisms that are automatically triggered by noncompliance with the applicable performance standard without resort to lengthy regulatory or judicial intervention.” *Michigan 271 Order* ¶ 394. For all of these reasons, the Washington QPAP cannot possibly meet the public interest requirements under Section 271.

**E. The Montana QPAP Permits Qwest to Challenge the Authority of the State.**

243. Similarly, the Montana QPAP is also seriously flawed because it too permits Qwest to challenge the authority of the State to revise the plan. In this regard, on April 19, 2002, the Montana PSC issued a Final Report on Qwest’s Performance Assurance Plan (“Final Report”) in which it ordered Qwest to submit a performance enforcement plan that was consistent with its Final Report. In its Final Report, the Montana PSC found “it should maintain ‘change control’ over the QPAP.”<sup>118</sup>

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<sup>117</sup> Opinion on the Performance Incentives Plan for Pacific Bell Telephone Company, Public Utilities Commission of the State of California, Rulemaking 97-10-016 (March 6, 2002) at §V.

<sup>118</sup> Final Report on Qwest’s Performance Assurance Plan, Montana PSC, April 19, 2002 at 56.

244. On June 18, 2002, Qwest submitted its revised QPAP. On June 28, 2002, AT&T and Covad filed a submission arguing that Qwest's revised QPAP did not comply with the Final Report. After the Montana PSC staff identified provisions in the revised QPAP that it deemed to be inconsistent with the Final Report, Qwest submitted another revised QPAP on June 30, 2002.

245. In its Supplemental Report Regarding Qwest's Performance Assurance Plan issued on July 5, 2002 ("Supplemental Report"), the Montana PSC acknowledged that Quest added the following language "in its compliance filing and therefore was not noticed to the parties for comments":<sup>119</sup>

16.1 ... Nothing in this QPAP prevents the Commission from modifying the PAP based upon its independent state law authority, subject to judicial challenge. Nothing in this PAP constitutes a grant of authority by either party to this agreement nor does it constitute a waiver by either party to this agreement of any claim it may have that the Commission lacks authority to make any modifications to this PAP, including any modification described in this section 16.1.

16.1.1 Notwithstanding section 16.1, if any agreements on adding, modifying or deleting performance measurements are reached between Qwest and CLECs participating in an industry Regional Oversight Committee (ROC) PID administration forum, those agreements shall be incorporated into the PAP and modify the agreement between CLEC and Qwest at any time those agreements are submitted to the Commission, whether before or after a six-month review.

246. Conceding that the parties to the Montana proceeding did not have the opportunity to comment on Qwest's proposed Sections 16.1 and 16.1.1, the Montana PSC noted that these provisions would be subject to its "review and consideration following the receipt of

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<sup>119</sup> Supplemental Report Regarding Qwest's Performance Assurance Plan, *In the Matter of the Investigation Into Qwest Corporation's Compliance With Section 271 of the Telecommunications*

comments from interested parties as part of the first six-month review of the performance assurance plan.” *Id.* In the interim, however, the provisions that Qwest added to the QPAP make clear that the Montana PSC cannot modify the QPAP unless it “is based upon its independent state law authority, subject to judicial challenge,” and that Qwest (as well as other parties) can challenge the authority of the State to make any modifications.<sup>120</sup>

247. The change control provisions in the Montana QPAP are seriously flawed because they expressly permit Qwest to challenge the very authority of the State to impose any changes to the plan. These provisions leave open the very real possibility that Qwest could seek to dismantle every change to the plan with which it disagrees. A critical issue under the public interest test is whether “the BOC has agreed to private and self-executing enforcement mechanisms that are automatically triggered by noncompliance with the applicable performance standard without resort to lengthy regulatory or judicial intervention.” *Michigan 271 Order* ¶ 394. Such automatic compliance is crucial, because “forcing new entrants to engage in protracted and contentious legal proceedings to enforce their contractual and statutory rights” can “significantly delay the development of local competition. . . .” *Id.* Given Qwest’s on-the-record statements challenging the very authority of the State to impose any changes to the QPAP, the specter of future challenges by Qwest is highly likely.

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*Act of 1996*, Docket No. 2000.5.70 (Montana PSC), July 5, 2002 at 2 (“Supplemental Report”).

<sup>120</sup> The Montana QPAP, like the Washington QPAP, provides that the State’s modifications to the plan must derive from its “independent State law authority” even though the Commission has found that performance remedy plans “are generally administered by state commissions and derive from authority the states have under state law or under federal Act”). *New York 271 Order*, ¶ 429 n. 1316. Additionally, although Section 16.1.1 of the Montana QPAP provides that changes to the QPAP which are agreed to by Qwest and CLECs during the ROC PID forum can be added to the plan, that section also makes clear that provisions that are not to Qwest’s liking cannot be added to the plan.

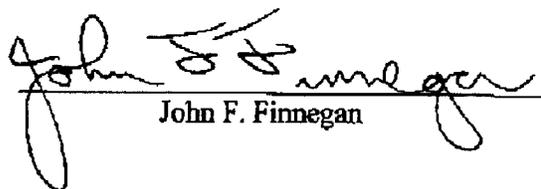
**CONCLUSION**

248. Qwest's performance data provide no support for its claims that it has met its Section 271 obligations. The record evidence reveals that Qwest's performance monitoring and reporting processes are riddled with error that assure inaccuracies in performance results. These errors were revealed and confirmed in the very audits and data reconciliation processes upon which Qwest relies to support its Application. The final reports of the data reconciliations conducted by both Liberty and KPMG, in combination with Qwest's own inadequate commercial performance data, show that Qwest's claims of statutory compliance should not be credited. Indeed the pool of evidence shows that CLECs are subject to high rejection rates and low total flow through rates which increase the risk of errors and delays in the provisioning process. The evidence also shows that Qwest discriminates against CLECs in the ordering, provisioning, maintenance and repair and billing processes.

249. Moreover, Qwest's performance enforcement plans are wholly inadequate to deter future anticompetitive conduct. Since Qwest's performance data serve as the point of departure against which any remedies will be calculated, the inaccuracies in Qwest's data necessarily compromise the effectiveness of any remedy plan. In addition, because the performance measurement and remedy plans at issue omit important measures, Qwest will suffer no financial consequences for even grossly discriminatory conduct. Worse yet, there is no performance remedy plan currently in place in Wyoming, and the change control provisions in the Washington and Montana QPAPs virtually guarantee that the plan will never evolve at a pace reflecting the changes in the marketplace. For all of these reasons, Qwest's Application must be rejected.

I hereby declare under penalty of perjury that the foregoing is true and accurate to the best of my knowledge and belief.

Executed on August 1, 2002

  
John F. Finnegan