

BEFORE THE MINNESOTA PUBLIC UTILITIES COMMISSION

Gregory Scott	Chair
Edward A. Garvey	Commissioner
Marshall Johnson	Commissioner
LeRoy Koppendrayner	Commissioner
Phyllis A. Reha	Commissioner

In the Matter of Qwest's Performance  
Assurance Plan

ISSUE DATE: July 29, 2002

DOCKET NO. P-421/CI-01-1376

ORDER ADOPTING PLAN AND SETTING  
FURTHER PROCEDURAL SCHEDULE

**PROCEDURAL HISTORY**

The Telecommunications Act of 1996 (the Act) generally prohibits an incumbent Regional Bell Operating Company (RBOC) from selling certain long-distance services – specifically, calls between local access transport areas (interLATA calls) originating within the service area in which the RBOC is the incumbent local service provider. 47 U.S.C. § 271(a). But the Act's § 271 provides for an RBOC to petition the FCC for permission to enter this long-distance market in a state if the RBOC fulfills certain requirements in that state.

In an Order<sup>1</sup> issued September 11, 2001 establishing proceedings related to the Section 271 application of Qwest Corporation (Qwest), the Commission directed Qwest to file testimony on its Performance Assurance Plan (PAP). A PAP establishes standards for wholesale services, and establishes penalties payable to the state and to wholesale customers for non-compliance.

On November 6, 2001, Qwest filed its PAP (the QPAP), based on a PAP approved by the Public Utility Commission of Texas and accepted by the Federal Communications Commission (FCC).

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<sup>1</sup> *In the Matter of an Investigation Regarding Qwest's Compliance with Section 271 of the Telecommunications Act of 1996 with Respect to the Provision of InterLATA Services Originating in Minnesota*, Docket No. P-421/CI-96-1114, NOTICE AND ORDER FOR HEARING.

On January 3, 2002, comments were filed by Qwest, by a coalition of competitive local exchange carriers and state agencies (the CLEC/Agency Coalition),<sup>2</sup> and jointly by WorldCom, Inc. (WorldCom) and AT&T Communications of the Midwest, Inc. (AT&T).

On February 6, 2002, the Commission issued its ORDER SETTING PROCEDURAL SCHEDULE FOR QPAP PROCEEDING.

On February 28, 2002, the Commission received comments from the Department of Commerce (the Department), from the Office of the Attorney General's Residential and Small Business Utilities Division (OAG-RUD); jointly from Onvoy Inc. (Onvoy) and a coalition of competitive local exchange carriers<sup>3</sup> (CLEC Coalition), jointly from AT&T and Covad Communications Company (Covad), and jointly from WorldCom and Time Warner Telecom of Minnesota, LLC (TWTM).

On April 4, 2002, the Commission received Qwest's responses to these comments.

On April 11, 2002, May 2, 2002, May 23, 2002 and June 3, 2002, the Commission received AT&T's Statements of Supplemental Authority. These statements contain orders from public utility commissions in other states served by Qwest regarding performance assurance plans.

On April 24, 2002, the Commission received WorldCom comments proposing, among other things, that the Commission adopt the PAP ordered by the Colorado Public Utilities Commission (the CPAP) as the Minnesota PAP.

On June 20, 2002, the Commission met to consider this matter. At the hearing, some parties encouraged the Commission to receive more comments from the parties, especially regarding the CPAP. Qwest offered to distribute a copy of the CPAP to all parties.

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<sup>2</sup> The CLEC /Agency Coalition consists of the Department of Commerce, Office of the Attorney General's Residential and Small Business Utilities Division, AT&T Communications of the Midwest, Inc., Covad Communications Company, Eschelon Telecom of Minnesota Inc., Global Crossing Local Services, Inc., McLeodUSA, Inc., New Edge Networks Inc., Onvoy Inc., WorldCom, Inc., Encore Communications L.L.C., North Star Access L.L.C., US Link and Time Warner Telecom.

<sup>3</sup> Ace Telephone Association; BEVCOMM, Inc; Encore Communications, HomeTown Solutions, LLC; Hutchinson Telecommunications, Inc; Mainstreet Communications Inc.; NorthStar Access, LLC; Otter Tail Telcom, LLC; Paul Bunyan Rural Telephone Cooperative; Tekstar Communication Inc.; Unitel Communications; U.S.Link, Inc.; and VAL-ed Joint Venture, LLP, d/b/a 702 Communications.

## FINDINGS AND CONCLUSIONS

### **I. Background**

#### **A. Section 271 Requirements**

As noted above, the Act's § 271 provides for an RBOC to petition the FCC for permission to enter a state's interLATA long-distance market if the RBOC fulfills certain requirements in that state. These requirements include demonstrating that –

- the RBOC satisfies the requirements of “Track A” (applicable if the RBOC faces competition from a facilities-based carrier) or “Track B” (applicable otherwise), as set forth at 47 U.S.C. §§ 271(c)(1)(A) and (B), respectively;
- the RBOC offers access to interconnection with its system that meets the 14-point competitive checklist set forth at 47 U.S.C. § 271(c)(2)(B);
- the RBOC will offer the long distance service only through an affiliate that is sufficiently independent of the RBOC's wholesale service division to fulfill the requirements of 47 U.S.C. § 272; and
- the RBOC's entry into the long-distance market is “consistent with the public interest, convenience, and necessity.” 47 U.S.C. § 271(d)(3)(C).

#### **B. The Public Interest Requirement and “Performance Assurance Plans”**

The public interest requirement provides –

an opportunity to review the circumstances presented by the application to ensure that no other relevant factors exist that would frustrate the congressional intent that the market be open, as required by the competitive checklist, and that entry will therefore serve the public interest as Congress expects.<sup>4</sup>

In evaluating whether granting an RBOC's petition is consistent with the public interest, the FCC considers whether the RBOC provides “sufficient assurance that markets will remain open after grant of the application,” and “whether a RBOC would continue to satisfy the requirements of section 271 after entering the long distance market.”<sup>5</sup> The FCC has relied on post-entry “performance assurance plans” developed collaboratively by the RBOC, competitive carriers, and the states in finding that there are performance monitoring and enforcement mechanisms in place

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<sup>4</sup> See Memorandum Opinion and Order, *Application by Bell Atlantic New York for Authorization Under Section 271 of the Communications Act to Provide In Region, InterLATA Service in the State of New York*, 15 FCC Rcd 3953, 4161-62 (1999) at ¶ 423, *aff'd*, 220 F.3d 607 (D.C. Cir. 2000).

<sup>5</sup> *Id.* at ¶ 429.

that would, “in combination with other factors, provide strong assurance that the local market will remain open after [the RBOC] receives section 271 authorization.”<sup>6</sup>

In approving § 271 applications, the FCC applies a “zone of reasonableness test” for determining whether a performance assurance plan is “likely to provide incentives that are sufficient to foster post-entry performance.”<sup>7</sup> The FCC considers five factors in applying its zone of reasonableness test:

1. Potential liability that provides a meaningful and significant incentive to comply with the designated performance standards;
2. Clearly-articulated, pre-determined measures and standards, which encompass a comprehensive range of carrier-to-carrier performance;
3. A reasonable structure that is designed to detect and sanction poor performance when it occurs;
4. A self-executing mechanism that does not leave the door open unreasonably to litigation and appeal; and
5. Reasonable assurances that the reported data are accurate.<sup>8</sup>

The FCC does not impose any structural requirements on these plans. Rather, the FCC recognizes that “state commissions will continue to build on their own work and the work of other states” in developing plans. The FCC evaluates each plan to see whether it is likely to be effective “in practice in deterring and enforcing against backsliding behavior by the RBOC.”<sup>9</sup>

## II. Procedural Questions

Some parties have asked for the Commission to take more comments, especially regarding the CPAP. The procedural posture of this case, however, does not accommodate delay.

The practice of including PAPs within a § 271 application is evolving, and aspects of it remain unpredictable. In particular, it is unclear how the FCC would regard a PAP filed by an RBOC that had not received the approval of the state commission. The Commission does not wish to unduly prejudice Qwest’s § 271 application before the FCC; nor does the Commission wish to lose its opportunity to influence the content of Qwest’s PAP. Consequently, the Commission will not delay its decision in this matter further. It will adopt the best PAP presented for its consideration. While the need for prompt action precludes the Commission from delaying a decision in this matter, it does not preclude reconsideration of that decision. While all three plans provide for

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<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> *Id.* at ¶ 433.

<sup>9</sup> *Id.* at ¶ 429.

revising the PAP every six months, parties indicate that they would like to bring new information or arguments to the Commission's attention more immediately. The circumstances of this case predispose the Commission to granting such petitions.

To facilitate this matter, while coordinating it with other pressing dockets, the Commission will establish a new procedural schedule for comments on requests for reconsideration. Initial comments will be due by July 31, 2002, with replies due August 14, 2002.

### **III. Scope of Review**

Before turning to the analysis of the parties' proposals, the Commission will address Qwest's argument about the appropriate scope of review in this docket. Qwest argues that the Commission's task is not to select an optimal PAP, but merely to determine whether the PAP offered by Qwest fits within the FCC's "zone of reasonableness." Because the QPAP is based on the Texas PAP that the FCC has already approved, Qwest argues that the Commission should simply affirm this fact and close the docket.

As noted above, the practice of including PAPs within a § 271 application is evolving, and the Commission must gather insights from the experiences of other states. At a minimum, this Commission cannot see why it would adopt for Minnesota a PAP with terms that are inferior to those available in other states. Moreover, the Commission observes that other states have made changes to PAPs proposed by their RBOCs. In particular, the Commission observes that the CPAP resulted from changes made to the PAP offered by Qwest; whatever Qwest's concerns about the Colorado process, it ultimately embraced the PAP approved by that commission. CPAP at ¶ 19.1. Given the process employed in other states, this Commission will decline to restrict its review of this matter solely to an analysis of the QPAP.

### **IV. Analysis of Proposed Plans**

The Commission will analyze the three plans currently recommended for the Commission's consideration: the plan proposed by Qwest, and the plan ordered by the Colorado Public Utilities Commission and accepted by Qwest, and the plan devised by a coalition of CLECs and state agencies in a separate proceeding, the Qwest Wholesale Service Quality docket.<sup>10</sup>

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<sup>10</sup> *In the Matter of Qwest Wholesale Service Quality Standards*, Docket No. P-421/M-00-849, Initial Post-Hearing Brief of the CLEC/Agency Coalition (November 2, 2001), Attachment A, incorporated by reference in, among others, Department Comments (February 24, 2002) at 3.

### **A. Coalition proposal**

At the outset, the Commission will decline to adopt the coalition plan. First, the Commission is concerned that the plan addresses only 12 measures. Having reviewed PAPs approved by other states, the Commission is not persuaded that it should adopt a plan with so limited a scope. Second, the Commission knows that this plan will receive a more thorough analysis in the Qwest Wholesale Service Quality docket. For that reason, the Commission knows that it is not depriving itself of the opportunity to adopt such a plan, and is not depriving any other party of an opportunity to advocate for that plan's adoption, in that context.<sup>11</sup>

### **B. The CPAP and the QPAP**

As between the two remaining plans, the Commission favors the CPAP. The CPAP is the product of a review process that is similar to the Minnesota Commission's process. But the Colorado Commission began its PAP docket before the Minnesota Commission did, and therefore the Colorado process is further along. As a consequence, the CPAP provides a more developed analysis of critical issues pending in our case. This Commission will seek to benefit from the work of our sister state in the interest of administrative efficiency. For these reasons, the Commission will provisionally approve for Minnesota a PAP with terms identical to those adopted by the Colorado Public Utilities Commission.

### **C. Revisions to the CPAP**

Parties proposed various modifications to plans offered by others. But because WorldCom proposed the CPAP relatively late in these proceedings, the only party to be in a position to propose modifications to this plan is WorldCom itself.

The Commission's faith in the merits of the CPAP is bolstered by the fact that it has been embraced by another commission, and by Qwest. In contrast, WorldCom's modifications have not even been subject to comment by others. On this basis, the Commission will refrain from tampering with the CPAP at this time. As noted above, the Commission will grant reconsideration of this matter to any party that requests it. The procedural schedule would permit any party to propose modifications to the CPAP, and any other party to comment on them. This process should provide the Commission with a better record for evaluating such modifications.

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<sup>11</sup> See also CLEC Coalition/Onvoy Comments (February 28, 2002) at 2 (concluding that "[i]t is not possible to determine whether the final Docket 849 wholesale service standards would also provide the level of incentive needed to also be an adequate QPAP"; WorldCom/TWTM Comments (April 24, 2002) (acknowledging support for Coalition position, but proposing that Commission adopt the CPAP).

To facilitate references to the CPAP, the Commission will accept Qwest's offer to provide a uniform copy of that plan to all parties. This document should reflect the amendments approved by the Colorado Commission, as discussed at the Minnesota Commission's June 20 meeting.

The Commission will so order.

**ORDER**

1. The Commission approves a Performance Assurance Plan with terms identical to the plan approved by the Colorado Public Utilities Commission.
2. Qwest shall file a copy of the Colorado Performance Assurance Plan, and to make a copy available to all parties, by June 21, 2002.
3. The Commission will accept requests for reconsideration of this Order.
4. Requests for reconsideration are due by July 31, 2002.
5. Reply comments are due by August 14.
6. This Order shall become effective immediately.

BY ORDER OF THE COMMISSION

Burl W. Haar  
Executive Secretary

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