

BEFORE THE MINNESOTA PUBLIC UTILITIES COMMISSION

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Chair  
Commissioner  
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In the Matter of Qwest's Performance  
Assurance Plan

ISSUE DATE: November 26, 2002

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

ORDER ON RECONSIDERATION  
AMENDING PERFORMANCE  
ASSURANCE PLAN

**PROCEDURAL HISTORY**

On July 29, 2002, the Commission issued its ORDER ADOPTING PLAN AND SETTING FURTHER PROCEDURAL SCHEDULE. In it, the Commission provisionally approved a performance assurance plan (or PAP, discussed below) with terms identical to the PAP adopted in Colorado (the CPAP). But the Commission clarified that it would entertain motions for reconsideration.

On July 31, 2002, the Commission received requests for reconsideration from Qwest Corporation (Qwest), and from a coalition of competitive local exchange carriers and state agencies (the CLEC/Agency Coalition).<sup>1</sup>

On August 14, 2002, the Commission received replies from Qwest, the CLEC/Agency Coalition, and a coalition of MCI WorldCom and Time Warner Telecom of Minnesota, LLC (WorldCom/TWTM). On August 27, AT&T concurred in the WorldCom/TWTM replies.

On September 13, 2002, Qwest filed a response to the WorldCom/TWTM replies.

The matter came before the Commission on September 19, 2002.

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<sup>1</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.

## FINDINGS AND CONCLUSIONS

### **I. Background**

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 and transport areas (interLATA calls<sup>2</sup>) 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 a RBOC to petition the Federal Communications Commission (FCC) for permission to enter this long-distance market in a state if the RBOC fulfills certain requirements in that state. These requirements include demonstrating that 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).

In evaluating whether a 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>3</sup> In response, RBOCs have offered post-entry “performance assurance plans” developed collaboratively by the RBOC, competitive carriers, and state commissions. These plans generally provide expectations for service quality, provide for monitoring of service quality, and provide for sanctions if the expectations are unfulfilled.

### **II. Plan Description**

The CPAP establishes measurable expectations for Qwest’s wholesale services and automatic sanctions for failing to meet those expectations. According to the CLEC/Agency Coalition, the CPAP focuses on requiring Qwest to provide CLECs with service of comparable quality to the service it provides to its own retail operations, but the CPAP does not always establish specific goals or “benchmarks” for that service.

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<sup>2</sup> The term “LATA” comes from the break-up of American Telephone & Telegraph Co. (A.T.& T.). In 1982 A.T.& T. agreed to settle an antitrust suit by divesting its local telephone business to form the RBOCs, while continuing to providing long-distance service. To implement this change, the settlement defined 196 geographic areas called “local access and transport areas” (LATAs). A RBOC was prohibited from completing a call that crosses LATA boundaries. *United States v. Western Electric*, 552 F.Supp. 131 (D.D.C. 1982), affirmed sub nom. *Maryland v. United States*, 460 U.S. 1001, 103 S.Ct. 1240, 75 L.Ed. 472 (1983). The Telecommunications Act of 1996 retains the LATA concept for purposes of defining the limits on a RBOC’s provision of long-distance service. 47 U.S.C. §§ 151(25), 271.

<sup>3</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 ¶ 429, aff’d, 220 F.3d 607 (D.C. Cir. 2000).

Many of the performance expectations are set forth in the CPAP's Appendix A. They are based on performance indicator definitions (PIDs) developed by Qwest, CLECs and the Regional Oversight Committee (ROC), a joint effort of thirteen public utilities commissions with jurisdiction over Qwest's local services.

The CPAP directs Qwest to report on its performance. It provides for an auditor to scrutinize this data and to offer recommendations on changing Qwest's data collection practices. CPAP § 14. And it provides for an independent monitor to serve as a kind of referee for implementing the PAP, including evaluating the performance of the auditor. CPAP § 17.

The CPAP establishes various groups, or "tiers," of remedies for non-compliance. For some violations, Qwest must pay stipulated damages to the affected CLEC. For some violations, Qwest must pay penalties into the "Tier 2 Special Fund." CPAP § 2. This fund would pay for the auditor and independent monitor, discussed above. The Commission could spend the fund's surplus monies to promote telecommunications in a competitively neutral manner that does not directly benefit Qwest.

The CPAP is subject to review and revision every six months, except for certain "fundamental changes" that can only be made during a period occurring three years and six years after the plan's adoption, barring "highly exigent" circumstances. CPAP § 18.7. The CPAP provides for the Commission to order changes at the three-year review, provided that those changes do not impose "new obligations" on Qwest. CPAP § 18.10. In addition, the CPAP limits the Commission's authority to increase aggregate penalties during the six-month reviews. CPAP § 18.8.

With some exceptions, the CPAP limits Qwest's aggregate annual liability under the plan to \$100 million. CPAP § 11. Parts of the plan expire in six years. CPAP § 18.11.

### **III. Request for Reconsideration**

In its July 29, 2002 Order, the Commission explained that, while it could not delay adopting a PAP for Minnesota, it was disposed to entertain motions for reconsideration. All parties have filed such motions, arguing that the CPAP warrants modification.

But Qwest's motion is, in large part, a motion to reject reconsideration. With few exceptions (discussed below), Qwest opposes changing the CPAP. Qwest argues that this exhaustively crafted document balances the concerns of a number of parties and that changes would upset that balance. According to Qwest, the CPAP began with "six intense months of state-specific customization"<sup>4</sup> before a Special Master and then underwent nine months of further proceedings involving nearly a dozen CLECs and the Colorado Office of Consumer Counsel, culminating in a draft report on April 19, 2001. Following more input, this report was modified on June 11, 2001; September 26, 2001; November 5, 2001; April 10, 2002; and April 26, 2002.

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<sup>4</sup> Colorado Performance Assurance Plan, *Investigation Into Alternative Approaches for a Qwest Corporation Performance Assurance Plan in Colorado*, Decision No. R01-99-I, Docket No. 01I-041T, Colo. Pub. Utils. Comm'n (Sept. 26, 2001) at 2, as cited in Petition for Reconsideration of Qwest Corporation (July 31, 2002) at 5, n.17.

Qwest's appeal is unpersuasive. This Commission, like the Colorado Commission, is unwilling to forgo the opportunity for state-specific customization. And, whatever careful balance Qwest was able to negotiate in the draft report, the Colorado Commission was not dissuaded from making multiple rounds of revisions to that report. The Minnesota Commission will not be constrained in this regard either.

In its July 29, 2002 Order, this Commission found it expedient to use the CPAP as a starting point rather than starting from one of the other proposals in the record, or starting from scratch. But that expedience no more constrains this Commission's discretion than if the Commission had crafted the CPAP language itself. Ultimately, this Commission must be guided in this matter by its statutory duty to ensure that Qwest acts in the public interest for the citizens of Minnesota.

The motions for reconsideration will be granted. The Commission will consider each proposed change on its own merits.

#### **IV. Issues**

##### **A. Generally**

Having granted reconsideration, the Commission has reviewed the record and the arguments of all parties. The Commission finds that most of the arguments do not raise new issues, do not point to new and relevant evidence, do not expose errors or ambiguities in the original Order, or otherwise do not persuade the Commission that it should change its original decision. Except as discussed below, the Commission concludes that the language of the CPAP establishes policies that are the most consistent with the facts, the law, and the public interest.

##### **B. References to the Department and the RUD-OAG**

The CLEC/Agency Coalition asks the Commission to incorporate references to the Department and the RUD-OAG into the PAP by amending CPAP §§ 9.2, 13.1, 13.2, 14.3, 14.5, and 14.8 in the manner set forth in its comments. The Coalition argues that the public interest would be served by having these agencies receive the same reports as the Commission, and by giving them a voice in selection of the auditor.

No party opposes this proposal. The Commission finds the proposed modification reasonable, and will adopt it.

##### **C. PAP's Effective Date**

###### **1. CLEC/Agency Position**

CPAP §§ 16.1 and 18.1 make the PAP effective on the date Qwest obtains § 271 approval to enter the interLATA long-distance market in Minnesota. The CLEC/Agency Coalition ask the Commission to modify this language to make the PAP effective on the date of the Commission's order approving the PAP. The sooner the plan's self-executing remedies takes effect, the Coalition argues, the sooner the parties can learn whether it is effective, and how it can be improved. The Coalition notes other states that have made the PAP effective before the grant of § 271 approval.

## **2. Qwest Position**

Qwest opposes this change. As noted above, a PAP exists to ensure that a RBOC continues to fulfill its duties under the Telecommunication Act of 1996 *after* receiving § 271 approval. Consequently, Qwest argues, making the plan enforceable before § 271 approval is unwarranted. Moreover, Qwest argues that to do so would be unconstitutional. The CPAP's self-executing remedies involve fines, often based on mere statistical disparities. Statistical inferences are always rebuttable, according to Qwest, and Qwest would have a right to due process before it could be deprived of property (money). Until these due process rights are waived, Qwest argues, the Commission cannot impose the PAP on Qwest. Finally, Qwest observes that many states have ruled that their PAPs do not take effect until after § 271 approval.

## **3. Commission Action**

The Commission will decline to grant the Coalition's request to make the PAP effective immediately. Qwest correctly observes that the current docket is designed to create a plan to influence Qwest's behavior after § 271 approval. The Coalition's concerns are more appropriately addressed in the wholesale service quality docket.<sup>5</sup>

That being said, in the interest of accelerating the PAP's implementation, the Commission will authorize CLECs to begin incorporating the PAP into their interconnection agreements. While its terms will not become effective until § 271 approval is granted, the CLECs should be permitted to complete the administrative steps beforehand.

### **D. Election of Remedies**

#### **1. CLEC/Agency Position**

CPAP § 16.4 begins:

In electing the CPAP, CLEC shall surrender any right to remedies under state wholesale service quality rules ... or under any interconnection agreement designed to provide such monetary relief for the same performance issues addressed by the CPAP.

The CLEC/Agency Coalition opposes this policy. The Coalition argues that this policy would make CLECs choose between remedies for discriminatory service and remedies for unreasonable service. According to the Coalition, the CPAP provides remedies if Qwest discriminates in providing wholesale services, but provides inadequate remedies if Qwest provides poor quality service. The Coalition advocates adopting more standards for gauging reasonableness in the ongoing wholesale service quality docket. But a CLEC may well be justified in seeking remedies for both unreasonable and discriminatory service. In any event, a CLEC should not have to make such an election before wholesale service quality standards are in place, according to the Coalition.

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<sup>5</sup> *In the Matter of Qwest Wholesale Service Quality Standards*, Docket No. P-421/AM-00-849.

## **2. Qwest Position**

Qwest disputes the Coalition's arguments. First, Qwest emphasizes the injustice that would result if a single lapse in wholesale service quality should result in double compensation to CLECs – once under the PAP and once under the wholesale service quality standards. Second, Qwest argues that the dilemma posed by § 16.4 is not so stark when placed in context. A CLEC's election would last only until the expiration of the relevant interconnection agreement; the CLEC could make a different election thereafter. In addition, Qwest observes that most current interconnection agreements have terms establishing penalties for low-quality service ("direct measures of quality" or "DMOQs"). Thus, a CLEC electing to forgo the PAP could instead receive the benefits of future wholesale service quality standards as well as the DMOQs. Qwest observes that many states provide for a similar choice.

Finally, Qwest argues that the Coalition's concerns are moot because the Commission lacks the authority to impose standards for "reasonable" service, as opposed to discriminatory service.

## **3. Commission Action**

The content of future wholesale service quality standards is beyond the scope of this Order; the Commission will decline to address that matter here.

The Commission is not persuaded to eliminate the terms of § 16.4 entirely. A CLEC should not be able to penalize a wholesale provider twice for the same conduct. But a choice of this magnitude should be an informed choice, and should be changeable for cause. Consequently, the Commission will modify the language of § 16.4 to provide "windows of opportunity" for a CLEC to change its choice. Specifically, if a CLEC chooses to be governed by the PAP in lieu of wholesale service quality standards, the CLEC may reverse that choice –

- during the six months after the Commission has issued a final Order in its wholesale service quality docket, or
- upon mutual agreement between Qwest and the CLEC, or
- in response to a specific order by the Commission regarding the CLEC's election.

### **E. Independent Monitor**

As noted above, CPAP § 17 provides for an independent monitor to act as a kind of referee for implementing the PAP. The CLEC/Agency Coalition asks the Commission to incorporate references to the Office of Administrative Hearings (OAH) by amending § 17 in the manner set forth in the Coalition's comments. Specifically, the Coalition suggests –

- specifying that the "independent monitor" would be an administrative law judge (ALJ) appointed by the OAH,
- incorporating the expedited and informal proceeding practices from the Commission's rules of practice and procedure,
- allowing the ALJ to adjust those procedures as needed to ensure a just decision, and
- replacing the removal process at § 17.3 with the removal provision in Minnesota Rules, part 1400.6400.

These changes merely incorporate the Minnesota-specific institution of the OAH into the Colorado-drafted PAP, according to the Coalition.

While Qwest generally opposes changing the CPAP, at hearing Qwest said that it found this proposed change acceptable. No party has opposed it. The Commission finds the proposed modification reasonable and will adopt it.

## **F. Commission Authority to Change the PAP**

### **1. CLEC/Agency Position**

The CLEC/Agency Coalition urges the Commission to preserve more discretion to make changes to the PAP in the future. According to the Coalition, the CPAP imposes more limits on a commission's authority to make changes than perhaps any other PAP approved in a state served by Qwest. The Colorado Commission is constrained in changing the statistical methodology, caps, plan duration, payment regime structure, legal operation, dispute resolution, and measures that do not relate directly to measuring and/or providing payments for non-discriminatory wholesale performance until reviews that occur three and six years after Qwest would obtain § 271 approval.

The Coalition also objects to the plan's six-year duration, a provision limiting the Commission from instituting any new obligation upon Qwest, and a provision limiting the Commission's authority to increase penalty amounts by more than 10% above Qwest's baseline payment liability. The Coalition argues that the Commission has state and federal authority to create, monitor, and curtail provisions of a performance assurance plan when it believes it is appropriate. Washington, New Mexico, Wyoming, Nebraska, Arizona, Utah, and North Dakota have all found that they have the authority to modify the plan if necessary, according to the Coalition.

In place of CPAP § 18.5.1 to § 18.11, the Coalition recommends the Commission adopt the following language derived from the North Dakota PAP:

18.6 The Commission retains the right to add topics and criteria to the six-month review, retains the ability to order changes if the MPAP [Minnesota performance assurance plan] is not in the public interest, and retains the ability to hear any disputes regarding the six-month review. The Commission may conduct joint reviews with other states. Any changes in the six month review pursuant to this section shall apply to and modify this agreement between Qwest and CLEC.

18.7 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 MPAP and modify the agreement between CLEC and Qwest at any time those agreements are submitted to and approved by the Commission, whether before or after a six-month review.

## 2. Qwest Position

Qwest opposes this change for several reasons. First, a PAP represents an obligation voluntarily undertaken by Qwest. In evaluating whether to accept the obligation, Qwest argues that it needs a degree of certainty as to its key structural and financial elements. Section 18 was designed to provide that certainty.

Second, the CPAP permits a commission to make changes to the variables listed in § 18.7 every three years. According to Qwest, the Colorado Commission concluded that the variables listed at § 18.7 were simply not the kinds of variables that the Commission would be likely to change on a more frequent basis.

Third, contrary to the Coalition's implications, Qwest asserts that the CPAP does not limit the kinds of changes a Commission can make to the plan. It merely provides that those changes may be held in abeyance pending judicial review. CPAP § 18.7.1.

Finally, Qwest argues that the CLEC/Agency Coalition's proposal to adopt language from the North Dakota PAP is taken out of context.

## 3. Commission Action

As noted above, PAPs are not mandated by statute or rule; rather, they developed as a means of fulfilling the Act's requirements that § 271 approval be consistent with the public interest, convenience and necessity. In the absence of controlling statutes or rules, a review of the decisions of other agencies can provide some perspective on a commission's authority to change a PAP.

The FCC conceives of PAPs as organic documents, growing as a commission's understanding grows.

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 actual commercial performance in the local marketplace.<sup>6</sup>

The FCC elaborated further about the relationship between PAPs and state agencies in the context of the BellSouth § 271 application in Georgia and Louisiana.

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<sup>6</sup> *In the Matter of Application of Verizon Pennsylvania Inc., Verizon Long Distance, Verizon Enterprise Solutions, Verizon Global Networks Inc., and Verizon Select Services Inc. for Authorization To Provide In-Region, InterLATA Services in Pennsylvania*, CC Docket No. 01-138, FCC 01-269 (rel. September 19, 2001), ¶ 128 (citations omitted).

[T]he development of performance measures and appropriate remedies is an evolutionary process that requires changes to both measures and remedies over time. We note that both the Georgia and Louisiana Commissions anticipate modifications to BellSouth's SQM [Service Quality Measurement plan] from their respective pending six-month reviews. 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.

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We are further encouraged that the ongoing work by the Georgia and Louisiana Commissions to revise the performance measurements and standards, and to evaluate the operation of the plans, will further enhance the operation of the plans and will address any additional concerns of parties as they arise.

....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.<sup>7</sup>

Other state commissions have reached a similar conclusion about the flexible nature of PAPs and the authority of Commissions. The Washington Utilities and Transportation Commission concluded that –

At the heart of this issue is a fundamental disagreement over whether this Commission has authority to require changes to the QPAP. The nature of performance assurance plans is that they not be frozen in time. They should remain flexible to address issues that may arise over time, including, but not limited to whether the performance measures must be adjusted. It is necessary for the states to retain authority for ongoing oversight over the plan and to retain flexibility over how a plan should be changed. [N]o one knows how things will change in the future, and the QPAP should not be self-limiting....<sup>8</sup>

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<sup>7</sup> *In the Matter of Joint Application by BellSouth Corporation, BellSouth Telecommunications, Inc. and BellSouth Long Distance, Inc. for Provision of In-Region, InterLATA Services in Georgia and Louisiana*, Memorandum Opinion and Order, CC Docket No. 02-35, FCC 02-147 (rel. May 15, 2002) at ¶¶ 294, 299, 300 (citations omitted).

<sup>8</sup> *In the Matter of the Investigation Into U S WEST COMMUNICATIONS, INC.'s Compliance With Section 271 of the Telecommunications Act of 1996*, Washington Utilities and Transportation Commission Docket No. UT-003022 37<sup>th</sup> Supplemental Order, Commission Order Addressing Qwest's Compliance with Commission Orders Concerning Qwest's SGAT and Performance Assurance Plan (QPAP) (June 20, 2002) at 14-15.

The New Mexico Public Regulations Commission ruled similarly.

[The FCC] expects state commissions to play a significant roll in modifying and improving the performance metrics in performance assurance plans. Qwest's insistence on a unilateral right to reject any changes in the plan would preclude [Service Quality Measurement plan] any meaningful Commission role in overseeing the plan.

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As to the scope of the six-month reviews, neither the parties nor the Commission has any experience, nor can it be predicted, how the plan will work once it is in operation in New Mexico. For this reason, the Commission believes it would be unreasonable to preclude or limit the Commission's authority to examine issues that may arise in the course of operation of the plan.<sup>9</sup>

And Nebraska:

The Commission finds that it is in the public interest to assure that the Commission has the ultimate authority to determine if and when changes should be made to the QPAP. Therefore, this Commission reserves the right to initiate a proceeding regarding the QPAP at any time. While the normal review should be periodic and the six-month interval will generally suffice, parties should be able to raise serious issues before the Commission at any time. The Commission will decide if such issue needs to be immediately addressed or if it should be considered in the next six-month review. Finally the Commission wants to make clear that it should also have the ultimate authority to change any provisions of the QPAP after notice and hearing.<sup>10</sup>

Against this background, Qwest argues both that the CPAP limits Commission authority to modify the plan,<sup>11</sup> and that a Commission would retain the authority to make any changes it might reasonably need to. For example, Qwest argues that –

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<sup>9</sup> *In the Matter of Qwest Corporation's Section 271 Application and Motion for Alternative Procedure to Manage the Section 271 Process*, New Mexico Public Regulations Commission Utility Case Nos. 3269, 3537, ORDER REGARDING QWEST'S PERFORMANCE ASSURANCE PLAN (May 29, 2002), ¶¶ 179, 181.

<sup>10</sup> Nebraska Public Service Commission Case 1830, ORDER APPROVING QUEST'S CHANGE MANAGEMENT PROCESS (June 12, 2002) at 11.

<sup>11</sup> See *Section 271 Compliance Monitoring of Southwestern Bell Telephone Company*, Tex. Pub. Util. Comm'n, Project No. 204500, Southwestern Bell Telephone, L.P. d/b/a Southwestern Bell Telephone Company's Response to the Performance Remedy Plan (August 8, 2002) at 21-22 (rejecting assertion that commission may modify PAP without company's consent).

while section 18.7 states that six core elements of the CPAP are “off the table” during the six month review, there is nothing that precludes the Commission from exercising independent authority to order changes to any aspect of the plan subject to judicial review.<sup>12</sup>

Qwest seems to be arguing that the CPAP does not give the Commission authority to modify the PAP’s terms but does not interfere with the Commission using its independent authority to do so. The language of § 18.7, however, does not support this argument. Section 18.7 says “The following areas of the CPAP will be eligible for change *only* at the three-year and six-year reviews....” (Emphasis added.) This language plainly attempts to constrain Commission discretion, whatever the source.

In a final appeal, Qwest emphasizes that CPAP §§ 18.7 and 18.7.1 provide for the Commission to order any change, subject to judicial review. In effect, these sections acknowledge that the Commission has discretion – provided that the courts agree that the Commission has discretion. This is a mere tautology. The scope of a court’s jurisdiction is a matter beyond the power of a PAP to alter. But once a court asserts jurisdiction, it would decide whether the Commission had waived its authority based on the PAP’s substantive provisions – provisions such as § 18.7’s statement that “areas of the CPAP will be eligible for change *only* at the three-year and six-year reviews....” Upon reconsideration, the Commission is disinclined to approve a PAP containing this language.

For the foregoing reasons, the Commission grants the request of the CLEC/Agency Coalition to adopt their proposed language in lieu of CPAP § 18.5.1 to § 18.11.

## **G. Collocation**

To help create a “level playing field” between an ILEC and CLECs, the Act provides for CLECs to rent space within the ILEC’s facilities, to install their equipment there, to interconnect their equipment with the ILEC’s equipment, and to transmit calls for customers.

### **1. CLEC/Agency Coalition Position**

The CLEC/Agency Coalition complains that Qwest often fails to permit collocation in a timely manner, and that the CPAP provides inadequate incentive to remedy this behavior. Citing evidence from the wholesale service quality docket, the Coalition argues that the benefit Qwest reaps from delaying a competitor’s entry into the market is greater than the penalty Qwest would face for delaying that entry. While the Coalition argues for a penalty of \$10,000 per day of delay, it concedes that a penalty of \$2500 per day would be reasonable.

In addition, the Coalition complains that the CPAP fails to establish a standard for determining when a collocation is due, and consequently when penalties would begin to accrue. Qwest has a history of rejecting collocation requests for contrived reasons, the Coalition alleges. This practice

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<sup>12</sup> Qwest Corporation’s Reply to CLEC/Agency Coalition’s Petition for Reconsideration (August 14, 2002) at 5.

delays collocation without clearly triggering DMOQ sanctions. As part of a remedy, the Coalition asks for a 90-day deadline for providing collocation space. Additionally, the Coalition asks for language specifying that the 90 days begins to run from the date a CLEC submits an acceptable application. Finally, the Coalition asks the Commission to adopt the FCC's process for addressing defects in an application. This includes providing Qwest ten calendar days to identify defects in the application, and providing the CLEC ten days to cure the defect or cancel the application.

## **2. Qwest Position**

Qwest characterizes these changes as a naked attempt to extract more money from Qwest. The CPAP's payment scheme reflects a thoroughly-analyzed balancing of interests, according to Qwest, and any increase in one penalty should warrant an offsetting decrease in another. Moreover, the CPAP's collocation penalties are already higher than those in other PAPs, Qwest alleges. Finally, Qwest argues that the Coalition fails to provide support for its estimates of the financial consequences of delayed collocation. In particular, Qwest disputes the Coalition's claim that delayed collocation precludes competition. According to Qwest, most collocation requests are placed by CLECs that are already in the market and are merely seeking to expand their capacity.

## **3. Commission Action**

The CPAP provides that –

The applicable standard for making collocation space available shall be [established by] the CLEC's interconnection agreement, the Commission standard or the FCC regulation, whichever is applicable.<sup>13</sup>

The Coalition proposal is largely consistent with this language. Aspects of the proposal – the 90-day deadline for providing collocation, the \$2500/day penalty for delay – merely maintain the terms that exist in many interconnection agreements today.

The Commission reaffirms the conclusion it reached when approving DMOQ provisions that \$2500/day is an appropriate penalty for a delayed collocation. The \$2500 figure is as well supported as any other figure in the record, and the Commission is not persuaded that past penalty levels have been too high. Furthermore, the practice of using the FCC's process for addressing defects, including a schedule for identifying and curing defects, appears to be a well-tailored remedy to a problem experienced by the parties. While Qwest opposes the higher penalty amount, Qwest does not articulate a reason to oppose the Coalition's clarifying language and procedural changes. The Commission finds the Coalition's proposal reasonable, and will incorporate it into the PAP.

## **V. Procedural Matters**

### **A. Compliance filing**

To ensure that the decisions set forth above are implemented, the Commission will direct Qwest to produce a compliance document within 14 days of this Order.

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<sup>13</sup> CPAP Appendix A, "COLLOCATION."

## **B. Tier 2 Special Fund**

As noted above, the CPAP directs Qwest to deposit penalty monies into the “Tier 2 Special Fund” to pay for the auditor, the independent monitor, and other purposes. But, being crafted for Colorado, the CPAP may not entirely conform to Minnesota law. Additional changes to the CPAP, or even statutory changes, may be warranted.

Consequently, the Commission will solicit comments from all parties about what changes are needed to fully implement the Tier 2 Special Fund. The Commission will authorize its Executive Secretary to establish a schedule for receiving such comments.

### **ORDER**

1. The parties’ motions to reconsider the Commission’s ORDER ADOPTING PLAN AND SETTING FURTHER PROCEDURAL SCHEDULE (July 29, 2002) are granted.
2. The PAP’s §§ 9.2, 13.1, 13.2, 14.3, 14.5, and 14.8 are amended to add references to the Department and the RUD-OAG, as proposed by the CLEC/Agency Coalition.
3. CLECs may amend their interconnection agreements with the CPAP immediately even though remedies will not apply until Qwest receives 271 relief
4. The language in the PAP’s § 16.4 shall be modified to say that a CLEC’s choice to be governed by the PAP, surrendering its rights to be governed by wholesale service quality standards, may be reversed –
  - during the first six months after the Commission has issued its final Order in Docket No. P-421/AM-00-849 *In the Matter of Qwest Wholesale Service Quality Standards*, or
  - upon mutual agreement between Qwest and the CLECs, or
  - in response to a specific order regarding the CLEC's election by the Commission.
5. The language in the PAP’s § 17 regarding an independent monitor shall be modified to –
  - specify that the independent monitor would be an administrative law judge appointed by the Office of Administrative Hearings,
  - incorporate the expedited and informal proceeding practices from the Commission’s rules of practice and procedure,
  - allow the ALJ to adjust those procedures as needed to ensure a just decision, and
  - replace the removal process at § 17.3 with the removal provision in Minnesota Rules, part 1400.6400.
6. The PAP’s § 18.5.1 to § 18.11 shall be replaced with the following “change control” language:

18.6 The Commission retains the right to add topics and criteria to the six-month review, retains the ability to order changes if the MPAP is not in the public interest,

and retains the ability to hear any disputes regarding the six-month review. The Commission may conduct joint reviews with other states. Any changes in the six month review pursuant to this section shall apply to and modify this agreement between Qwest and CLEC.

18.7 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 MPAP and modify the agreement between CLEC and Qwest at any time those agreements are submitted to and approved by the Commission, whether before or after a six-month review.

7. The language in the PAP's Appendix A regarding collocation shall be modified as follows:
  - Direct Qwest to pay \$2,500 for each day a collocation is provided late.
  - State that the applicable standard for making collocation space available shall be 90 days, determining the due date from the date the CLEC submits an acceptable application, approving the FCC process for addressing defects in the original application, allowing Qwest 10 calendar days to identify deficiencies found in the collocation application, and allowing the CLEC 10 calendar days to cure the defect. If the CLEC fails to cure the defect within the 10 calendar days, the application would be considered cancelled.
8. Qwest shall produce a compliance document within 14 days of this Order.
9. The Executive Secretary shall establish a schedule for a comment period to finalize draft PAP language and/or legislation on the Tier 2 Special Fund issue.
10. This Order shall take effect immediately.

BY ORDER OF THE COMMISSION

Burl W. Haar  
Executive Secretary

(S E A L)

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