

BEFORE THE MINNESOTA PUBLIC UTILITIES COMMISSION

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In the Matter of Qwest's Wholesale Service
Quality Standards

ISSUE DATE: February 17, 2004

DOCKET NO. P-421/AM-00-849

ORDER ACCEPTING AFFIDAVIT AND
ADOPTING PARTIAL STAY

PROCEDURAL HISTORY

On June 28, 2000, the Commission initiated this case to develop service quality standards for wholesale transactions between U S WEST Communications, Inc. (U S WEST) and competitive local exchange carriers (CLECs). CLECs bought U S WEST's services to resell to their customers, and bought U S WEST's network elements to incorporate into their own finished retail services. As a condition of obtaining Commission approval of the merger of U S WEST and Qwest Corporation, the combined entity (Qwest) agreed to assume U S WEST's regulatory obligations and to "participate and cooperate in an expedited proceeding to establish permanent wholesale service quality standards."¹

On May 8, 2003, the Commission voted to approve the Minnesota Wholesale Service Quality Plan (MN WHSQ Plan), establishing standards for gauging the quality of the services and elements that Qwest provides to CLECs. The Commission authorized CLECs to adopt these standards, including a schedule of payments for non-compliance, into their interconnection agreements with Qwest. On July 3, 2003, the Commission issued its ORDER ADOPTING WHOLESAL SERVICE QUALITY STANDARDS (July 3, 2003 Order) memorializing this decision.

On July 16, 2003, Qwest filed a Request for Reconsideration and a Request for Stay of the Commission's July 3, 2003 Order.

¹ See *In the Matter of the Merger of the Parent Corporations of Qwest Communications Corporation, LCI International Telecom Corp., USLD Communications, Inc. and U S WEST Communications, Inc.*, Docket No. P-3009, 3052, 5096, 421, 3017/PA-99-1192, ORDER ACCEPTING SETTLEMENT AGREEMENTS AND APPROVING MERGER SUBJECT TO CONDITIONS (June 28, 2000), citing Stipulation and Agreement Between U S WEST, Qwest, the Minnesota Department of Commerce and the Minnesota Office of the Attorney General. The quoted language appears at § VII(A) of the stipulation.

On September 17, 2003, the Commission issued its ORDER DENYING RECONSIDERATION AND STAY, declining to grant Qwest's request for stay "at this time."

On September 25, 2003, Qwest asked the Minnesota Court of Appeals to review the Commission's July 3, 2003 Order and to stay the Order's effect in the meantime. On October 22, the Commission responded to Qwest's motion opposing the motion and proposing a partial stay.

On November 13, 2003, in response to complaints that Qwest was not complying with the July 3, 2003 Order, the Commission voted to affirm its prior Order and later memorized this decision in its ORDER AFFIRMING PRIOR ORDER (December 8, 2003).

On November 19, 2003, the Court of Appeals denied Qwest's request for a stay but did not preclude consideration of a future request for stay.

On November 21, 2003, Qwest again asked the Commission to stay the effect of its July 3, 2003 Order pending review. Qwest's petition included an affidavit from Mr. Dean W. Buhler.

On December 15, 2003, the Commission received comments opposing Qwest's stay request from the Minnesota Department of Commerce (the Department); jointly from AT&T Communications of the Midwest, Inc., and TCG of Minnesota, Inc. (collectively, AT&T); and jointly from a coalition of CLECs consisting of Eschelon Telecom, Inc.; MCI Communications, Inc.; McLeodUSA, Inc.; NorthStar Access, LLC; Onvoy, Inc.; Otter Tail Telecom, LLC; US Link, Inc.; and VAL-Ed Joint Venture LLP d/b/a 702 Communications (collectively, CLEC Coalition).

On December 19, 2003, Qwest filed reply comments.

On January 15, 2004, this matter came before the Commission.

FINDINGS AND CONCLUSIONS

I. WHOLESALE SERVICE QUALITY

As discussed in the July 3, 2003 Order, the focus on "wholesale services" in the telecommunications market is a relatively recent phenomenon. In the mid-1990s, state and federal law changed to promote competition in the local telecommunications market; see the Minnesota Telecommunications Act of 1995² and the federal Telecommunications Act of 1996³ (the 1996 Act). These laws gave rise to transactions between telecommunications providers for services and "network elements," triggering concerns about the quality of those services and elements.

The 1996 Act seeks to promote competition in the local exchange telephone market by directing each incumbent telephone company –

² Laws of Minnesota 1995, chapter 156.

³ Pub. L. No. 104-104, 110 Stat. 56 (codified throughout title 47, United States Code).

- to permit competing firms to interconnect with its system,
- to permit a competitor to purchase its services at wholesale rates for resale, and
- to permit a competitor to rent the use of elements of its network, unbundled from undesired elements, at “rates, terms and conditions that are just, reasonable and nondiscriminatory...”⁴ 47 U.S.C. § 251(c).

A competitor desiring to provide local exchange service may seek agreements with an incumbent related to interconnecting to the incumbent’s network, the purchase of finished services for resale, and the purchase of the incumbent’s unbundled network elements (UNEs).⁴ If the incumbent and the competitor cannot reach agreement, either party may ask the state commission to arbitrate the dispute.⁵

Qwest is the largest telephone company in Minnesota. Over the years the Commission has approved various schemes for gauging and ensuring the quality of its wholesale services, including the following ones.

A. Interim Service Quality Standards

In order to obtain authority to merge with US WEST, Qwest agreed to assume US WEST’s regulatory obligations and to participate in the current docket. Additionally, Qwest agreed to comply with certain wholesale service quality benchmarks and payments to be in effect for some interim period deemed adequate to complete this “expedited proceeding to establish permanent wholesale service quality standards....”⁶ But the process of establishing the permanent standards has taken so long that the interim standards have now expired.⁷

B. Performance Assurance Plans

The 1996 Act’s § 271⁸ prohibits a Regional Bell Operating Company (RBOC) from competing in the long-distance market without the permission of the Federal Communications Commission (FCC). To gain the FCC’s permission the RBOC must demonstrate that it has adequately opened its local market to competitors⁹ and that the RBOC’s entry into the long-distance market would be “consistent with the public interest, convenience, and necessity.”¹⁰

⁴ 47 U.S.C. §§ 251(c), 252(a).

⁵ 47 U.S.C. § 252(b).

⁶ See n.1, *supra*.

⁷ See Qwest Corporation’s Proposal for Wholesale Service Quality Standards (December 19, 2002) at 10.

⁸ 27 U.S.C. § 271.

⁹ 47 U.S.C. § 271(c)(2)(B).

¹⁰ 47 U.S.C. § 271(d)(3)(C).

In making this public interest judgment, the FCC considers whether the RBOC provides “sufficient assurance that markets will remain open after grant of the application,” and “whether an RBOC would continue to satisfy the requirements of section 271 after entering the long distance market.”¹¹ The FCC has relied on post-entry “performance assurance plans” (PAPs) developed collaboratively by the RBOC, competitive carriers, and the states in finding that there are performance monitoring and enforcement mechanisms in place that would, “in combination with other factors, provide strong assurance that the local market will remain open after [the RBOC] receives section 271 authorization.”¹²

In 2002 the Commission approved Qwest’s PAP for purposes of § 271 compliance.¹³ Qwest incorporated the PAP into its § 271 application to the FCC,¹⁴ thereby agreeing to be bound by its terms. This plan remains in effect today, and Qwest claims to welcome CLECs seeking to adopt its terms.

C. Qwest’s Wholesale Service Quality Plan for Minnesota

Most recently the Commission approved its MN WHSQ Plan. The PAP and the MN WHSQ Plan have a similar structure and most of the terms are identical, but the plans differ in some respects. Most notably, the PAP generally directs Qwest to serve CLECs’ wholesale needs on the same basis that it serves its own retail operations (the so-called “parity standard”); in contrast, the MN WHSQ Plan contains more instances where Qwest is directed to meet fixed performance goals (called “benchmarks”).

The MN WHSQ Plan is also in effect today, although CLECs claim that Qwest declines to implement it.

¹¹ 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).

¹² *Id.*

¹³ *In the Matter of Qwest’s Performance Assurance Plan*, Docket No. P-421/AM-01-1376 (PAP Docket), ORDER ADOPTING PLAN AND SETTING FURTHER PROCEDURAL SCHEDULE (July 29, 2002), ORDER ON RECONSIDERATION AMENDING PERFORMANCE ASSURANCE PLAN (November 26, 2002) and as revised on April 30, 2003.

¹⁴ Federal Communications Commission Wireline Competition Bureau Docket No. 03-90 *In the Matter of Qwest Communications International, Inc. for Authorization to provide in-region, interLATA services in the State of Minnesota*, Application Appendix B (Statement of Generally Available Terms), Exhibit K; Appendix E. (See <http://www.qwest.com/wholesale/clecs/sgatswireline.html>).

II. WHETHER TO ACCEPT BUHLER AFFIDAVIT

In asking the Court of Appeals to stay enforcement of the Commission's July 3, 2003 Order, Qwest offered the affidavit of Mr. Mark Reynolds attesting to the magnitude of the payments Qwest would need to make to CLECs if Qwest failed to provide service of the quality prescribed by the MN WHSQ Plan. Qwest alleged that it would suffer irreparable harm if it had to make such payments to CLECs because Qwest might not be able to recover these sums from CLECs if the court later struck down the MN WHSQ Plan. In response, the Commission proposed a partial stay (discussed further below) whereby the contested level of payments would be held in escrow pending the court's review of the Plan's merits.¹⁵ With such a stay, the Commission argued, Qwest would be unable to demonstrate irreparable harm.

In support of its renewed request for stay, Qwest offers the affidavit of Mr. Dean W. Buhler regarding the administrative costs of implementing the MN WHSQ Plan. Qwest argues that it would suffer irreparable harm if it had to incur such administrative costs and the court later struck down the MN WHSQ Plan.

The CLEC Coalition asks that the new affidavit be stricken from the record.

A. The Buhler Affidavit

The affidavit makes a number of factual assertions, including the following:

- Qwest cannot comply with the MN WHSQ Plan immediately.
- The MN WHSQ Plan's payment obligations "balloon to massive amounts" relative to the PAP's payment obligations.
- In the absence of a stay that relieved Qwest of retroactive liability for having failed to implement the MN WHSQ Plan, Qwest would need to make changes to implement the MN WHSQ Plan or potentially incur "significant liabilities" for having failed to do so. The cost of the necessary changes would be "substantial," although estimating the cost of those changes would be "very difficult."
- The MN WHSQ Plan is "preempting the will of the parties" to a multi-state collaborative process wherein certain performance indicator definitions (PIDs) were defined for the purpose of evaluating Qwest's compliance with § 271 of 1996 Act.
- Qwest has no process to enable Qwest to give advance notice 95% of the time that Qwest misses an installation order, as the MN WHSQ Plan directs. It is not always possible to know in advance when Qwest will miss an installation order. Qwest's network is made up of millions of components of varying ages and conditions. Qwest's wholesale operation

¹⁵ *In the Matter of Qwest's Wholesale Service Quality Standards*, Court of Appeals No. A03-1409, Response of the Minnesota Public Utilities Commission to Qwest's Motion for Stay Pending Appeal of Order Adopting Wholesale Service Quality Standards (October 22, 2003).

generally gives CLECs such “jeopardy notices” at the same rate that it gives notice to its own retail operation. But the MN WHSQ Plan’s standard is unattainable given Qwest’s existing systems. Changing Qwest’s systems to accommodate the jeopardy notice standard would be “costly and time-consuming.”

- Qwest has been accustomed to having more time to provide LIS trunks than the MN WHSQ Plan provides. Compliance with the new standard would require hiring and training additional people and changing systems and would be “virtually impossible” in less than 60 days.
- Making the changes necessary to comply with the MN WHSQ Plan’s reporting requirements would take approximately three months.

In addition, the affidavit contains arguments about the merits of using a parity standard in lieu of benchmarks and the alleged shortcomings of some of the MN WHSQ Plan’s benchmarks.

B. Comments of the Parties

The CLEC Coalition asks the Commission to strike Mr. Buhler’s affidavit. The Coalition argues that the affidavit is untimely, noting that its allegations are not supported by the three-year record of this proceeding and were not even included in Qwest’s initial petition for stay. The Coalition argues that the allegations are often vague and unsubstantiated; and where the affidavit makes substantial statements of fact, those statements have not been subject to scrutiny and cross-examination. And finally, the Coalition offered counter-argument to Mr. Buhler’s arguments about the relative benefits of parity standards and benchmark standards and the shortcomings of specific benchmarks.

Qwest asks the Commission to accept the affidavit solely for the purpose of evaluating Qwest’s request to stay the effect of the Commission’s July 3, 2003 Order. Qwest argues that it offered the affidavit in response to Commissioners’ questions. Moreover, according to Qwest, the Court of Appeals granted Qwest leave to renew its request for a stay without specifically limiting Qwest to the record as it existed; by implication, Qwest is entitled to supplement the record. Finally, Qwest asserts that it would be unfair to use the lack of record evidence as a basis to oppose Qwest’s complaint that the Commission lacked adequate record evidence for making its decision.

The Department argues that the Commission need not consider the affidavit because it is untimely. The Department denies that the Court of Appeals somehow implied that the Commission should re-open the record for purposes of considering a future request for stay. But if the Commission were to decide to take the affidavit into consideration, the Department argues that the affidavit is focused on the merits of Qwest’s appeal and contributes little to the analysis of whether the Commission should grant a stay.

C. Commission Action

Given the nature of Qwest’s allegations about the lack of factual record regarding the MN WHSQ Plan’s effects, the Commission will err on the side of more fully developing the record. Consequently the Commission will accept Mr. Buhler’s affidavit into evidence for purposes of evaluating Qwest’s request for stay and accord his statements the weight they are due, recognizing that they were not subject to cross-examination.

III. WHETHER TO GRANT STAY

A. Comments of the Parties

1. Qwest's Request

Qwest has asked the Minnesota Court of Appeals to find that the Commission lacks authority to compel Qwest to implement the MN WHSQ Plan; this matter is under judicial review. In the meantime Qwest potentially faces adverse consequences if it begins implementing the Plan, and other adverse consequences if it does not.

- Qwest argues that taking the necessary steps to provide service of the quality prescribed by the MN WHSQ Plan, and making the prescribed payments to CLECs for occasional lapses in service quality, would be expensive. If Qwest were to implement the Plan and a court later concluded that Qwest need not have implemented the Plan, then the cost Qwest incurred to implement the Plan would have been wasted.
- If, on the other hand, Qwest were to refrain from implementing the MN WHSQ Plan pending judicial review and the courts ultimately uphold the Plan, then Qwest would be retroactively liable for all the time that it failed to provide services at the quality prescribed by the Plan as well as potentially liable for failing to comply with Commission orders.

Thus far Qwest has refrained from implementing the MN WHSQ Plan, but claims that it is not willing to continue incurring potential liability for failing to comply with the MN WHSQ Plan. In the absence of an order relieving it of this potential retroactive liability, Qwest claims that it will incur the costs of complying with the Plan even at the risk that a future court decision will render those expenditures unwarranted. As a consequence, Qwest will be effectively denied a meaningful opportunity to obtain judicial review of the Commission's July 3, 2003 Order.

The only way to preserve the status quo and enable Qwest to maintain an opportunity for judicial review, according to Qwest, is to relieve Qwest of liability for failing to comply with the MN WHSQ Plan prior to a final judicial decision on the merits of the July 3, 2003 Order. This relief would need to be effective even if Qwest were ultimately to lose its case; otherwise, Qwest would feel compelled to begin implementing the MN WHSQ Plan immediately in order to minimize its risk of losing. Failure to grant this stay would have the effect of depriving Qwest of its property without due process of law.

Qwest argues that granting such a stay would impose no great hardship on CLECs because any CLEC may opt into the PAP and be assured of the PAP's level of service quality and payments prospectively.

2. Opposition to Qwest's Request, and Counter-Proposal

AT&T, the CLEC Coalition and the Department argue that Qwest fails to make a persuasive case for a stay. First, they argue that Qwest is unlikely to prevail on the merits of its claim because the July 3, 2003 Order is amply supported by the record and the Commission provided all parties with notice and the opportunity to participate.

Second, the parties also argue that staying implementation of the MN WHSQ Plan would not preserve the status quo because the status quo consists of Qwest being subject to benchmark-based wholesale service quality standards. From the first day that Qwest began operations as an incumbent telephone company in Minnesota, Qwest had been subject to the benchmark-based interim service quality standards. These standards were intended to last until the permanent standards would be in place, and the MN WHSQ Plan was developed specifically to replace the interim standards. Given that the interim standards have now expired, a stay of the MN WHSQ Plan would deprive CLECs of the benefits of benchmark-based wholesale service quality standards.

Third, the parties dispute Qwest's suggestion that a CLEC's interests are adequately protected by adopting the PAP. Qwest cannot argue that the MN WHSQ Plan requires a higher level of service than the PAP while simultaneously denying that CLECs' interests would be sacrificed if CLECs must abandon the MN WHSQ Plan in the interim.

Fourth, the parties note that a stay is an equitable remedy and argue that Qwest is not entitled to equitable relief due to "unclean hands." While Qwest complains about the administrative challenge of calculating payments retroactively, the parties note that much of this challenge is the result of Qwest's own choices. The Commission declared its intent to adopt new service quality standards in 2000. The Commission voted to adopt the current standards on May 8, 2003; the resulting Order issued on July 3, 2003; CLECs did not actually begin adopting the Plan until sometime thereafter. Qwest had all this time to prepare to record its service quality performance, and has since had more than six additional months to come into compliance. By Qwest's own assessment, changes to the reporting system should have been completed in approximately three months. CLECs and their customers should not be deprived of the service quality to which they are entitled in order to accommodate Qwest's decision not to implement the Commission's Order or even to collect the necessary records.

Nevertheless, in an effort to address Qwest's concerns the Department and the CLECs support adopting the Commission's offer of a partial stay. That is, for each CLEC that had adopted the MN WHSQ Plan, Qwest would calculate the payment levels prescribed both by the MN WHSQ Plan and the PAP. Qwest would then pay the CLEC as prescribed by the PAP. If the amount that Qwest owed under the MN WHSQ Plan exceeded the amount owed under the PAP, Qwest would place the balance into escrow until the courts determine the merits of the MN WHSQ Plan. Finally, at regular intervals Qwest would disclose its calculations of amounts paid and amounts placed in escrow for each CLEC.

A partial stay would ensure that a CLEC received at least the level of service quality, or payments in lieu thereof, that is not in dispute while preserving the CLEC's right to secure higher payments if the courts uphold the MN WHSQ Plan. By escrowing the difference between the PAP level of payments and the MN WHSQ Plan level of payments, the partial stay would protect the interests of both Qwest and the CLECs in securing the funds; moreover, it would ensure that Qwest engages in an ongoing accounting of the level of these funds and makes that accounting available to the CLECs.

While Qwest protests that the proposed partial stay would be administratively burdensome, the Department reminds the Commission that Qwest is already obligated to implement terms

substantially similar to those of the partial stay as part of its new interconnection agreement with AT&T.¹⁶

3. Qwest's Reply

Qwest opposes granting a partial stay in lieu of the complete stay Qwest has requested. Qwest argues that this partial stay would impose on Qwest the administrative burden of calculating payment levels twice. Moreover, because the partial stay would not relieve Qwest of potential liability for failing to meet the MN WHSQ Plan's standards, Qwest would feel compelled to begin implementing those standards immediately, incurring all the resultant costs. In so doing, Qwest would effectively be deprived of the benefits of its appeal.

B. Standard

The Commission may grant a stay "upon such terms as it deems proper."¹⁷ While the Commission need not apply the same standards that a court considers when granting a preliminary injunction, that analysis is instructive. In determining when a preliminary injunction is proper, Minnesota courts consider a number of factors, including the following:

1. The nature and background of the relationship between the parties preexisting the dispute giving rise to the request for relief.
2. The harm to be suffered by the plaintiff if the temporary restraint is denied as compared to that inflicted on the defendant if the injunction issues pending trial.
3. The likelihood that one party or the other will prevail on the merits when the fact situation is viewed in light of established precedents fixing the limits of equitable relief.
4. The aspects of the fact situation, if any, which permit or require consideration of public policy expressed in state and federal statutes.
5. The administrative burdens involved in judicial supervision and enforcement of the temporary decree.¹⁸

¹⁶ *In the Matter of the Petition of AT&T Communications of the Midwest, Inc. for Arbitration of an Interconnection Agreement with Qwest Corporation Pursuant to 47 U.S.C. § 252(b)*, Docket No. P-442, 421/IC-03-759 ORDER RESOLVING ARBITRATION ISSUES AND REQUIRING FILED INTERCONNECTION AGREEMENT (November 18, 2003) (*AT&T Arbitration*) at 37-38.

¹⁷ Minn. Stat. § 14.65.

¹⁸ *Dahlberg Bros. v. Ford Motor Co.*, 272 Minn. 364, 137 N.W.2d 314 (1965), *State v. Northern Pacific Ry. Co.*, 22 N.W.2d 569 (Minn. 1946); as applied to Commission dockets, see *In the Matter of the Petition of Interstate Power Company For Authority to Increase its Rates for Electric Service in Minnesota*, Docket No. E-001/GR-86-384, ORDER DENYING STAY, ORDERING RATE REDUCTIONS, AND ORDERING REFUNDS (Jan. 21, 1988); *In the Matter of the Minnesota Independent Equal Access Corporation's (MIEAC) Application for a Certificate of Public Convenience and Necessity*, Docket No. P-3007/NA-89-76, ORDER DENYING STAY AND REQUIRING ALTERNATIVE LANGUAGE ON BALLOTS (July 30, 1991); *In the Matter of an Investigation into IntraLATA Equal Access and Presubscription*, Docket No. P-999/CI-87-697, ORDER DENYING REQUEST FOR STAY (March 16, 1995).

Finally, in crafting the terms of a stay, the Commission should include “such terms ... as it considers proper for the security of the rights of the adverse party.”¹⁹

The Commission considers these factors below.

C. Analysis

1. Relationship between parties

The nature and background of the relationship between the parties is complex: CLECs are both Qwest’s customers and Qwest’s competitors. CLECs buy Qwest’s wholesale elements and services, but also pursue the same telephone customers pursued by Qwest’s retail operations. This dynamic gives Qwest an incentive to conduct its wholesale operations in a manner that favors its retail operations to the detriment of the CLECs, and gives CLECs an incentive to allege that Qwest is doing so. This docket was prompted in part to establish standards for addressing such allegations.

Throughout the pendency of this three-year proceeding, however, Qwest has retained broad discretion to set service quality levels and CLECs have had to compete without the benefit of these service quality standards. Given the delay that CLECs have already experienced, equity does not favor prolonging their wait.

2. Harm to parties from stay

Qwest alleges that it would suffer irreparable harm unless the Order is stayed. Specifically, Qwest alleges that it would be deprived of property without due process of law and that it is entitled to “meaningful backward-looking relief to rectify any unconstitutional deprivation.”

As the CLEC Coalition observes, the Order is the result of three years of process; suggestions that Qwest was deprived of notice and an opportunity to be heard are meritless. Qwest’s concerns for “meaningful backward-looking relief” are similarly unpersuasive. The Commission has already granted Qwest the discretion to raise rates for many services.²⁰ And Qwest could have had the opportunity to pursue a general rate increase if it had not recently asked the Commission to extend its agreement not to file a rate case.²¹ In any event, Qwest’s current moratorium on rate cases is

¹⁹ Minn. R. Civ. App. P. 108.01, subd. 6.

²⁰ See *In the Matter of the Petition of U S WEST Communications, Inc., for Approval of its Alternative Form of Regulation Plan*, Docket No. P-421/AR-97-1544 Modified Alternative Form of Regulation Plan for the State of Minnesota (January 11, 1999), § IV.G.3. (“Non-Price-Regulated Services”).

²¹ See *In the Matter of the Petition of Qwest Corporation for Approval of its Revised Alternative Form of Regulation (AFOR) Plan*, Docket No. P-421/AR-03-1688 ORDER ADOPTING PROCEDURES FOR AFOR RENEWAL PROPOSAL AND SETTLEMENT CONFERENCE (November 26, 2003), citing Qwest’s extension requests of June 30, 2003 (rejected) and October 31, 2003 (accepted with conditions).

due to expire on July 30, 2004, and cannot be extended without Qwest's permission.²² Consequently the suggestion that Qwest lacks an opportunity to recover costs is, at the very least, unsupported by the record.

Mr. Buhler's affidavit does not provide persuasive evidence that implementing the MN WHSQ Plan would subject Qwest to irreparable harm. The affidavit consists mainly of arguments addressing the merits of the MN WHSQ Plan rather than the need for a stay pending appellate review. Where the affidavit does make factual assertions – such as the assertion that complying with the July 3, 2003 Order would impose “substantial costs” on Qwest – the Commission finds these assertions vague, conclusory and insubstantial.

Mr. Reynold's affidavit provides some evidence that the MN WHSQ Plan would cause Qwest to make larger payments to CLECs than the PAP would, assuming that Qwest makes no effort to provide the levels of service prescribed by the Plan. But given that Qwest intends to take steps to implement the MN WHSQ Plan and mitigate these costs if the July 3, 2003 Order is not stayed, this affidavit does not contribute much to the Commission's analysis.

Finally, a complete stay would leave the interests of CLECs and the public unsecured. After years of proceedings, the Commission has now established a standard of service quality to which CLECs are entitled for the benefit of their customers. Staying the Commission's order would deprive CLECs, throughout the appeal, of any assurance that they will receive wholesale services necessary to promote the public interest.

In particular, the PAP is not an adequate substitute for the MN WHSQ Plan. Consistent with the objectives of the 1996 Act's § 271, the PAP protects CLECs from *discriminatory* service. But it was not designed to define *appropriate* service; that was the purpose of the MN WHSQ Plan. While CLECs are not compelled to adopt the Plan, the public's interest in high-quality phone service is served when every CLEC interconnected with Qwest has the option of adopting the Plan. Staying the Plan would not serve the public interest.

3. Likelihood of prevailing on the merits

For the reasons set forth in the July 3, 2003 Order, the Commission finds little likelihood that Qwest's appeal will succeed on the merits. The Commission's Order is grounded in a voluminous record and is designed to promote the public interest as reflected in Minnesota Statutes.

4. Public policy

As the July 3, 2003 Order notes, the Commission is charged with the duty under state law,²³ and authorized by the 1996 Act,²⁴ to promote high service quality and competition in the local telephone market. While CLECs are the direct beneficiaries of these rules, the ultimate beneficiaries are Minnesota's telephone users. As noted above, a stay would do nothing to promote their interests.

²² *Id.* at 5, Ordering Paragraph 14.

²³ July 3, 2003 Order at 13-18, citing Minn. Stat. §§ 216B.23, 237.011, 237.02, 237.03, 237.06, 237.081, 237.082, 237.09 and 237.16.

²⁴ 47 U.S.C. §§ 251(d)(3), 252(e)(3), 261(b) and (c).

5. Feasibility

The Commission foresees no administrative obstacles to staying its Order. But if the purpose of a stay is to maintain the status quo, the Commission finds no practical way to achieve this objective.

First, as the parties have observed, the MN WHSQ Plan was designed to take the place of the benchmark-based interim service quality standards. Those standards have now lapsed. Given the choice between granting a stay and leaving the competitive environment without a benchmark-based plan for wholesale service quality, or denying the stay and leaving the MN WHSQ Plan in place, the Commission finds the latter option more consistent with the goal of maintaining the status quo.

More generally, maintaining the status quo in the context of an evolving competitive market is impossible. Any delay in the provision of high-quality wholesale services will affect a CLEC's ability to attract and retain customers. Where a decision establishes rules for competition between parties – and that competition is already underway – neither the Commission nor the courts have the power to remedy the harm resulting from delay. As the Commission has noted,

Even when the Commission is able to retroactively punish anticompetitive conduct, that power may be insufficient to encourage fair and reasonable competition in the present. The Commission has little authority to undo a customer's choice, even if that choice was influenced by the vendor's wrongful conduct. Quite simply, the Commission cannot un-ring the bell.²⁵

In sum, staying the July 3, 2003 Order would be possible, but the staying the effects of that stay would not.

D. Commission Action

1. Complete Stay

In sum, the Commission finds that the relationship between the parties, the harm that would arise from granting a complete stay, Qwest's likelihood of prevailing on the merits, sound public policy, and a due regard for the interests of adverse parties all militate against granting a stay. On the other hand, a complete stay would be administratively feasible.

Weighing these factors, the Commission will decline to grant Qwest's request for a complete stay. The Commission recently granted a partial stay in the *AT&T Arbitration* case under similar circumstances, concluding:

Qwest is entitled to the benefits of legal process, including the opportunity to have this Commission and the courts review orders for substantive and procedural defects. In equity, occasionally this process includes staying the effect of Commission orders while the merits of Qwest's arguments are reviewed. The MN WHSQ Plan Order may be an example of one such order.

²⁵ *Id.*, ORDER MODIFYING USWC'S ALTERNATIVE REGULATION PLAN (September 28, 1998) at 19-20.

But if Qwest loses its challenge of the MN WHSQ Plan, then there would be no equitable reason for Qwest to gain – and CLECs and their customers lose – from the delay caused by the challenge. Indeed, if Qwest were able to achieve such benefits even when its claims fail, then Qwest would have an incentive to seek to stay all manner of decisions, regardless of the merit of Qwest’s claims, simply to achieve delay. The Legislature has directed the Commission to make its decisions in a manner that discourages litigation.²⁶ This directive would be frustrated if Qwest were able to gain permanent advantages by launching litigation regardless of the merits of its claims.

* * *

While a court’s decision may influence the relationship between Qwest and its CLEC customers, Qwest’s decisions about litigation strategy should not. If the Commission was justified in adopting the MN WHSQ Plan, then the CLECs that choose this plan – and their customers – are entitled to those benefits regardless of Qwest’s decision to contest the plan and seek a stay. [The Commission should adopt a policy] designed to ensure that CLECs and their customers receive all the benefits to which they are entitled without depriving Qwest of the due process rights to which it is entitled.²⁷

The Commission will consider the merits of a partial stay next.

2. Partial Stay

As noted above, the Commission proposed a partial stay in its filing with the court, and adopted a partial stay in the context of the recent *AT&T Arbitration Case* wherein AT&T sought to incorporate the MN WHSQ Plan into its interconnection agreement.

The partial stay reflects the fact that the PAP’s terms are available to any CLEC and therefore represent the baseline level of service quality standards that a CLEC should expect from Qwest. Even if a court were to reject the MN WHSQ Plan entirely, the PAP’s terms would remain available to CLECs. Indeed, in the absence of the MN WHSQ Plan, all of Minnesota’s CLECs would likely be operating according to the PAP today. Consequently Qwest has no basis to withhold from CLECs the benefits of the PAP’s level of service quality, including the PAP’s payment structure.

²⁶ Minn. Stat. § 237.011(8).

²⁷ *In the Matter of the Petition of AT&T Communications of the Midwest, Inc. for Arbitration of an Interconnection Agreement with Qwest Corporation Pursuant to 47 U.S.C. § 252(b)*, Docket No. P-442, 421/IC-03-759 ORDER RESOLVING ARBITRATION ISSUES AND REQUIRING FILED INTERCONNECTION AGREEMENT (November 18, 2003) at 37-38.

In contrast, because Qwest is challenging the MN WHSQ Plan, Qwest has articulated an interest in avoiding the obligations of that Plan, at least to the extent that they exceed the obligations of the PAP. By putting the contested amount of payments into escrow, Qwest can be assured of recovering these disputed amounts if the courts rule in Qwest's favor, and CLECs can be assured of receiving these amounts if the courts rule against Qwest.

Qwest would be given a deadline to account for any past-due obligations arising under the MN WHSQ Plan and for fulfilling these obligations through payments to CLECs or into escrow as appropriate. Finally, Qwest would be compelled to render regular accounting about service quality performance, the calculation of amounts paid under the PAP, and the calculations of additional amounts due under the MN WHSQ Plan and paid into escrow. In this manner, any dispute about these computations can be identified and resolved as quickly as possible.

This partial stay accommodates Qwest's concerns to the maximum extent possible while "secur[ing] the rights of the adverse parties," including the public. The Commission finds that this partial stay represents the most equitable arrangement under the circumstances, and should be adopted during the pendency of Qwest's current appeal.

ORDER

1. For purposes of considering Qwest's stay request, the affidavit of Dean W. Buhler is accepted into evidence.
2. The Commission's July 3, 2003 Order is stayed in part as follows: During the pendency of the appeal, for each CLEC that has notified or will notify Qwest of its intent to adopt the MN WHSQ Plan, Qwest shall do the following:
 - Calculate the remedy payments that would be payable under the PAP and under the MN WHSQ Plan to the CLEC from the date the CLEC provided notice of its intent to adopt the MN WHSQ Plan.
 - Make the remedy payments that would be due to the CLEC if the CLEC had adopted the PAP in lieu of the MN WHSQ Plan.
 - If the total amount owed to the CLEC under the MN WHSQ Plan exceeds the total amount paid to the CLEC under the PAP, deposit the difference into an interest-bearing escrow account maintained by Qwest to be allocated, after further Commission review and order, consistent with the outcome of judicial review.
 - No later than February 28, 2004, make payments to the CLEC and into the escrow account from the date the CLEC opted into the MN WHSQ Plan, to make its status current.
 - No later than March 3, 2003, and every four months thereafter, file with the Commission an accounting of amounts actually paid to the CLEC under the PAP and amounts due to the CLEC under the MN WHSQ Plan.

3. This Order shall become effective immediately.

BY ORDER OF THE COMMISSION

Burl W. Haar
Executive Secretary

(S E A L)

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