

BEFORE THE IDAHO PUBLIC UTILITIES COMMISSION

**IN THE MATTER OF U S WEST)
COMMUNICATIONS, INC.'S MOTION FOR) CASE NO. USW-T-00-3
AN ALTERNATIVE PROCEDURE TO)
MANAGE ITS SECTION 271 APPLICATION.) COMMISSION DECISION ON
) QWEST'S PERFORMANCE
) ASSURANCE PLAN
)**

BACKGROUND

In 1984, local exchange telephone companies divested by AT&T and referred to as Bell Operating Companies (BOCs) were barred from providing long-distance services outside specific Local Access Transport Area (LATA) boundaries. The Telecommunications Act of 1996 allows that restriction to be lifted by the Federal Communications Commission (FCC) if a BOC meets certain requirements specified in Section 271 of the Act. For example, Section 271(c)(2)(B) contains terms for access and interconnection to its network a BOC must provide to competitor telecommunication companies. The FCC must also find that the BOC request "is consistent with the public interest, convenience and necessity." 47 U.S.C. § 271(d)(3)(C).

The FCC evaluates the BOC's satisfaction of the access and interconnection and other requirements at the time the BOC's application is filed, and the Act does not call for ongoing review by the FCC once it grants interLATA authority to the BOC. Accordingly, to insure the BOC continues to satisfy the Section 271 requirements, the FCC has determined the public interest may require the BOC to have a Performance Assurance Plan (PAP or Plan) in place.¹ A PAP provides specific standards for the BOC's delivery of services to competitor telecommunications providers and automatic penalties if the standards are not met.

The development and review of Qwest's Plan (QPAP) began in earnest in August 2000 in a collaborative process created by the Regional Oversight Committee (ROC). The ROC is comprised of representatives of the state commissions that oversee Qwest's local exchange service. The ROC collaborative process included five workshops, numerous conference calls

¹ The parties and Commission have used the acronym QPAP for either "Quality Performance Assurance Plan" or "Qwest Performance Assurance Plan," see Order No. 28788. Hereafter, PAP will refer to Performance Assurance Plans in general, and QPAP will refer to Qwest's PAP.

and exchanges of proposals, supporting data, and other information designed to seek the creation of a consensus PAP. The ROC process terminated in May 2001, with many significant issues resolved by consensus, but also with many issues remaining unresolved.

Qwest thereafter on July 16, 2001, filed its Plan with this Commission, stating it “is voluntarily submitted for the purpose of demonstrating to the [FCC] that Qwest will have compelling economic incentive to continue meeting the requirements of Section 271 after it obtains approval to offer long distance services in the state.” Qwest’s Filing of QPAP p. 1. Thus, despite disagreement over some of the Plan’s terms by other telecommunications companies and Qwest competitors, Qwest was apparently satisfied its Plan would pass muster with the FCC. Rather than let the Plan stand as filed, however, the Commission determined, “along with the other states in the Section 271 proceeding, to include evaluation of the QPAP in the Section 271 process.” Order No. 28788, issued July 23, 2001. The Commission asked the Facilitator coordinating the multi-state Section 271 case to receive evidence and conduct hearings on the Plan, and provide a written report to the state commissions. In this way, evaluating the QPAP “as part of the Section 271 requirement will provide a record for the FCC to determine whether Qwest has satisfied the public interest requirements for Section 271 approval.” Order No. 28788, p. 3.

Pursuant to the schedule adopted by the Commission, the Facilitator conducted hearings, received written comments and briefs, and filed his QPAP report in October 2001. After written comments on the report were filed, the Commission on November 9, 2001, issued a notice that the QPAP report and comments had been filed. On January 3, 2002, the Commission issued a Notice of Hearing on Oral Argument for the QPAP, which convened on January 24, 2002.

THE FACILITATOR’S REPORT

The Facilitator in his report described the ROC collaborative process that preceded inclusion of the QPAP in this case. The Facilitator found the ROC QPAP proceeding to be “comprehensive, well conducted, subject to wide participation, and thorough in addressing the broad range of issues and subjects appropriate to a post entry plan expected by the FCC.” QPAP Report, p. 2. The Plan blueprint put forward by Qwest in the ROC proceeding was the PAP approved by the FCC for Southwestern Bell in its Section 271 application for Texas. The Facilitator identified significant changes agreed to in the ROC collaborative, noting that the

QPAP was changed “significantly and positively to address discussions occasioned by that collaborative.” QPAP Report, p. 4.

The Facilitator identified the standard of review provided by the FCC for its evaluation of Plans, described as a “zone of reasonableness” standard. According to the reasonableness test, a plan should meet five characteristics:

Meaningful and significant incentive to comply with designated performance standards.

Clearly articulated and predetermined measures and standards encompassing a range of carrier-to-carrier performance.

Reasonable structure designed to detect and sanction poor performance when and if it occurs.

Self-executing mechanism that does not open the door unreasonably to litigation and appeal.

Reasonable assurance that the reported data are accurate.

QPAP Report, p. 4.

To further clarify review of a plan for meeting the objectives identified by the FCC, the Facilitator also stated eight questions for consideration in a plan review:

Does it comport with the cornerstone elements common to previous plans existing under approved 271 applications?

Do the gives and takes that distinguish it from those other plans balance out on a net basis?

Does the Plan provide adequate compensation for actual harm for which CLECs could reasonably expect to be compensated if their relationship with Qwest were more typical of commercial arrangements of similar size, complexity, and mutual risk and opportunity?

In the final analysis, will the Plan (considering not just those elements designed to compensate CLECs for harm) provide sufficient incentive for Qwest to ‘continue to satisfy the requirements of Section 271 after entering the long-distance market’ as the FCC put it in ¶ 275 of the SBC Kansas/Oklahoma order, after it may receive 271 approval?

Will the Plan provide that incentive in a manner that does not place any more strain than is necessary on the sound principal that damages should bear a reasonable relationship to harm caused?

Do the incentive aspects of the Plan (i.e., costs that go beyond the compensating CLECs for actual harm) impose a price on in-region, inter-LATA entry that it would be irrational for a BOC to pay for the privilege for such entry, recognizing that the range of expected values of potential payments, not a theoretical maximum with minimal likelihood of occurring, is much more meaningful?

Does the Plan adequately respond to any unique circumstances proven by the evidence to be applicable here?

Are there administrative or procedural details in the Plan that are not sufficiently functional, and that can be repaired without a major shift in balance?

QPAP Report, p. 6.

With this standard of review in mind, and after considering the evidence presented, the Facilitator recommended changes to the QPAP in 29 different sections. Among the more significant changes, the Facilitator recommended allowing movement of the cap on the total financial exposure to Qwest, establishment of a QPAP administration process accessible to multiple states, and providing for minimum payment penalties to CLECs with annual order billing of less than 1,200. With the changes recommended in his 88 page report, the Facilitator is satisfied the QPAP meets the FCC's zone of reasonableness standard.

THE PARTIES' WRITTEN COMMENTS

Written comments in response to the Facilitator's Report were filed at the Commission by Qwest, AT&T, WorldCom, Covad, and the Commission Staff. Qwest called its comments "Errata and Replacement Filing," indicating its acceptance of, if not agreement with, nearly all of the recommendations made by the Facilitator in his report. Qwest addressed each of the recommendations and stated how it was addressed in the latest QPAP, which Qwest filed with its comments. Qwest argued in conclusion that its QPAP, improved by CLEC negotiations and state Commission Staff recommendations, "is more than sufficient to meet the FCC's expectations and assure that FCC approval of Qwest's Application for 271 relief is in the public interest." Qwest Comments, p. 17.

The Commission separately discusses issues addressed by the commenters and makes its findings in the following section of this decision. Recommendations made in the

Facilitator's report that were not disputed or are not specifically addressed by the Commission in this decision are adopted by the Commission.

DISCUSSION OF DISPUTED ISSUES

1. Meaningful and Significant Incentive (QPAP Report, pp. 12-45). The QPAP as Qwest proposed it placed at risk no more than 36% of Qwest's annual net income from local exchange services in each state. For Idaho, that amounts to approximately \$24 million based on Qwest's 1999 ARMIS report for local services. The Facilitator recommended the cap be allowed to increase four percentage points upon order of the Commission in cases where the cap would have been exceeded for any consecutive period of 24 months. The Facilitator also recommended the cap be allowed to decrease the same amount by Commission order for any consecutive period of 24 months which produces calculation of total payments that is eight or more percentage points below the cap amount.

In their comments, AT&T, Covad and the Commission Staff recommended changes that affect the total payment liability represented by the 36% cap. Staff and Covad recommended the data on which the cap amount is based be updated and not fixed to the 1999 ARMIS report. AT&T argued that the 36% cap is inadequate and should be raised to at least 44% of net revenue from Qwest's local service, and in any event, that the cap should not be allowed to reduce below 36%. Covad also argued that the 36% cap "will result in under compensation of CLECs." Covad Comments, p. 5.

The Commission approves the recommendation made by the Facilitator for a 36% cap, with the possibility that it will increase after a Commission determination based on a 24-month performance period by Qwest. The Facilitator and the parties recognize that the FCC has approved Plans that contain a 36% net revenue cap on the aggregate amount for penalties that might be incurred by the BOC. Thus it is difficult for this Commission to conclude that a similar cap on the potential liability for Qwest does not meet the FCC's zone of reasonableness test. In addition, it is possible for the cap to increase if Qwest fails to provide adequate service to the CLECs. Finally, the QPAP will be reviewed six months after it becomes effective and again at two years from its effective date. Those reviews will enable the Commission to evaluate the continued propriety of the QPAP cap at that time.

The Commission agrees with the comments of Covad and Staff, however, regarding the currency of information on which the cap is based. The cap amount should be revised each year based on the Company's most recent report of net intrastate revenues for Idaho.

a. Compensation for CLEC Damages. Pages 26 through 36 of the QPAP report address compensation for CLEC damages, including whether an objective of the Plan and its penalties is to compensate CLECs for actual damages that might result from Qwest's poor performance. Related issues are the question of compensating CLECs for contractual damages, whether it is appropriate for the QPAP to liquidate such damages, whether CLECs need to provide evidence of actual harm, whether the QPAP should preclude other CLEC remedies in exchange for automatic penalty provisions, and whether Qwest should be allowed to make an offset of damages by an amount paid from the QPAP provisions. These issues were addressed by AT&T and Covad in their comments.

In his review, the Facilitator discussed applicable provisions in the Texas PAP and in a special master report prepared for the Colorado PAP. Those provisions allow for limiting recovery of damages based on contract theories of action when a CLEC has been compensated by payments resulting from the PAP. A CLEC that elects PAP remedies would not be precluded from seeking recovery from non-contractual theories of liability, for example, by federal enforcement under Section 271(d)(6), or anti-trust, tort and consumer protection remedies.

The Commission finds that the recommendations by the Facilitator on these points are appropriate. The Commission is not convinced, however, that the right of offset provided to Qwest in the QPAP is appropriate because it grants to Qwest too much authority to determine the offset. The Commission thus approves the following language adopted by the Colorado and Montana Commissions for the QPAP in those states:

If for any reason a CLEC agreeing to this QPAP is awarded compensation for the same harm for which it received payment under the QPAP, the court or other adjudicatory body hearing such claim may offset the damages resulting from such claim against payments made for the same harm.

b. Incentive to Perform. The QPAP is intended to provide the incentive for Qwest to perform at least on a level of set standards or measures, called Performance Indicator Definitions (PIDs), and provides for payments to the CLECs or states should Qwest fail to meet the set standards. Measures in the QPAP are divided between Tier 1, whose accompanying

penalties provide compensation to CLECs, and Tier 2, whose penalties derive to the states to fund administration of the QPAP, as discussed later in this decision.²

The issues under this heading in the report address the use of Tier 2 payments, a three month trigger for Tier 2 payments, limiting escalation of QPAP remedies to six months, and splitting Tier 2 payments between CLECs and the state. These issues were addressed by AT&T, Covad and the Commission Staff in their written comments. AT&T objected to the Facilitator's recommendation that a portion of Tier 1 payments may be used to help fund a special fund available for states participating in a common administration effort. AT&T and Staff objected to the three-month trigger for Tier 2 payments, recommending that Tier 2 payments be available for each month of non-compliance by Qwest. AT&T and Commission Staff disagreed with the Facilitator's capping of the escalation of QPAP penalties to six months, at which point the payment amounts would continue for continued bad performance, but would level out.

The Commission finds that Tier 1 payments for CLECs should not be used for administration provided by the special fund, and that all Tier 2 payments should be available for the special fund administration. Sections 11.3.1 and 11.3.2 of the QPAP must be amended to incorporate these changes. The Commission agrees with the Facilitator's recommendation that Idaho and other state commissions participate in a joint effort to oversee administration of the QPAP. Qwest has agreed to initially fund the special administration fund with \$500,000. That amount may be reduced if less than six states participate in the joint administration effort. Section 11.3.3 of the QPAP must be modified to reflect Qwest's commitment to deposit to the special fund. The Commission directs the Staff to pursue this matter with other state commissions participating in the multi-state Section 271 proceeding and propose a collaborative effort for administering the QPAP provisions. The Commission otherwise approves the Facilitator's recommendations on these points.

2. Clearly Articulated and Predetermined Measures (QPAP Report, pp. 46-59). Most of the comments in this category were made by Staff, whose primary recommendation related to allowing performance measures to be added or changed in the QPAP. Similarly, Covad argued that performance indicators "that are converted from a diagnostic status to a benchmark or a parity standard prior to Qwest receiving effective Section 271 relief will be

² Should the penalties from Tier 2 measures ever exceed the amount required to provide special fund administration, the Commission will then determine the best use of the excess funds.

incorporated in the QPAP.” Covad Comments, p. 19. WorldCom argued that measures for the provisioning of special access circuits should be included in the QPAP.

The Commission will not address each performance measure discussed by the parties, because the significant point is that the QPAP must have some flexibility both before and after it becomes effective. The Commission agrees that diagnostic measures that are converted to permanent measures should be so designated in the QPAP. The Commission also leaves open the possibility that completion of the ROC OSS test will result in proposed changes to some performance measures that should be incorporated into the Plan. Additionally, as will be further discussed, the Commission approves the QPAP’s provision for a review in six months to determine effectiveness of measurements and to allow for changes. The FCC in its review of the Texas PAP endorsed flexibility to make alterations, saying the “continuing ability of the measurements to evolve is an important feature because it allows the plan to reflect changes in the telecommunications industry and in the [state telecommunications] market.” We are satisfied the Facilitator’s recommendations for this part of the QPAP are appropriate, so long as measures are allowed to change prior to the effective date of the QPAP, and thereafter by the review process described in the Plan.

3. Structure to Detect and Sanction Poor Performance as It Occurs (QPAP Report, pp. 59-71). The comments by AT&T, Covad and the Staff regarding this section of the QPAP report addressed limitations on the review that will occur after six months, low volume critical values, and 100% caps of interval measures. The QPAP itself calls for a review six months after it becomes effective, but limits it to (1) the addition, deletion or changes of measurement, (2) change of benchmark standards to parity standards, (3) changes in weighting of measurements, and (4) movement of measures from Tier 1 to Tier 2. The Facilitator noted the Texas PAP contained similar limitations on the six-month review, thus preventing a general re-opening of the plan to amendment. The Facilitator also noted the more general review scheduled for three years after the effective date, and recommended the broader review instead occur at two years.

The Commission approves the limitations placed on the initial review at six months, except that the QPAP should leave open the possibility that the Commission may broaden the review if necessary to respond to circumstances arising from actual experience with the QPAP. In addition, Section 16.1 of the QPAP describing the six-month review does not permit changes without Qwest’s agreement. That language must be modified to state that Qwest will make

changes if the Commission so directs, whether Qwest agrees or not with the changes. The Commission approves the remaining recommendations made by the Facilitator for this section of the QPAP.

4. Self-Executing Mechanism (QPAP Report, pp. 71-86) and Other Issues (QPAP Report, pp. 86-88). AT&T in its comments briefly addressed issues covered in these portions of the QPAP, specifically recommending that (1) the interest rate applicable to any QPAP payments should be the rate set by a state commission or law rather than the prime rate, (2) the effective date for the QPAP should be the date Qwest files its Section 271 application with the FCC rather than the date its application is approved, and (3) the QPAP should state explicitly that Qwest will not be able to recover in rates the payments it makes under the QPAP. On the last point, the Facilitator stated, “neither the FCC nor the state commissions require guidance in how or when to determine what to do about QPAP payment recovery in rates.”

The Commission concurs with the Facilitator’s recommendations on these points. Because the QPAP eventually will be effective in several states, using one interest rate for payments where applicable will ease the administration burden, and the prime interest rate is appropriate for this purpose. Tying the effective date of the QPAP to the date Qwest achieves interLATA authority is logical because the QPAP is intended to measure and direct Qwest’s performance once it receives Section 271 authority. Finally, we agree with the Facilitator that the QPAP need not state whether Qwest can seek recovery of QPAP payments in customer rates.

CONCLUSION

It is clear that Qwest and many other parties have significantly contributed to development of a QPAP to satisfy the objectives described by the FCC. The current QPAP began with a Plan already approved by the FCC, was tested and revised through a lengthy collaborative process, then was submitted for dispute resolution to the Facilitator, and finally was revised through comments and decision of this Commission. On this record the Commission believes the QPAP is well on its way to meeting the FCC’s zone of reasonableness standard. The Commission is not yet prepared to recommend approval of the QPAP, however, because changes must still be made. First, Qwest must make the changes set forth in this decision. Second, Qwest must also allow for the change in QPAP measurements that might come from completion of the OSS test process. Finally, the Commission believes it is in Qwest’s interest that the QPAP, to the extent possible, be uniform among all the states in its local service area.

The Commission accordingly directs Qwest and the Staff to monitor other state commission activity on the QPAP and report to this Commission significant changes ordered by other states. For example, according to supplemental comments filed by AT&T, the Montana and Wyoming commissions recently issued preliminary decisions on the QPAP, which may lead to changes to the QPAP that should be included in the Idaho Plan. The Commission will accept additional supplemental QPAP comments that are limited to recommending changes resulting from the OSS test or significant changes ordered by other participating state commissions.

DATED at Boise, Idaho this 6th day of March 2002.

PAUL KJELLANDER, PRESIDENT

MARSHA H. SMITH, COMMISSIONER

DENNIS S. HANSEN, COMMISSIONER

ATTEST:

Jean D. Jewell
Commission Secretary

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