Decision No. C03-0295

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

DOCKET NO. 02M-259T

RE: IN THE MATTER OF QWEST CORPORATION'S COLORADO PERFORMANCE ASSURANCE PLAN.

ORDER GRANTING EXCEPTIONS IN PART

Mailed Date: March 25, 2003
Adopted Date: March 5, 2003

I. BY THE COMMISSION:

A. Statement

1. By Decision No. C02-735, mailed June 28, 2002, the Commission requested comment from parties on a proposed Colorado Performance Assurance Plan (CPAP) measurement for CLEC-affecting product and process changes in the Change Management Plan (CMP). The Commission previously stated in Decision No. C02-339 that, "Once a tiered definition [of CLEC-affecting changes] is agreed to in the Change Management Plan, it shall be incorporated into the CPAP. Appropriate penalty levels will be determined and ordered at that time."

2. On June 3, 2002, Qwest Corporation (Qwest) filed Section 5.4 of the CMP document entitled "Qwest Initiated Product/Process Changes." This section of the CMP document defines the categories, or levels, of CLEC-affecting changes initiated by Qwest for products and processes. The changes are categorized into five levels, with Level 0 having no effect on the competitive local exchange carriers (CLECs), up to Level 4 changes, which have great effect on the CLECs. Parties were directed to file comments on the Commission proposed measurement contained in Decision No. C02-735, by July 10, 2002.

3. On July 10, 2002, AT&T Communications of the Mountain States, Inc. (AT&T), and WorldCom, Inc. (WorldCom), filed comments on the proposed measurement. WorldCom requested an opportunity to file reply comments. Reply comments were due on July 31, 2002. WorldCom, Qwest, and Eschelon Telecom, Inc. (Eschelon), filed reply comments on July 31, 2002. WorldCom stated that Covad Communications Company, AT&T, and Eschelon concurred in its reply comments.

4. Qwest's reply comments requested that the Commission hold a one-day hearing on this matter to permit the Commission and the parties the opportunity more fully to explore and understand the ramifications of the proposals. This request was granted with Decision No. C02-892, the matter was assigned to Chairman Raymond Gifford to act as hearing commissioner, and a hearing was set for September 5, 2002. This date was later vacated and reset for September 25, 2002.

5. On September 25, 2002, the hearing commissioner heard proposals and testimony from Qwest, WorldCom, and AT&T. The Office of Consumer Counsel also participated in the hearing.

6. At the conclusion of the hearing, the parties requested the opportunity to present statements of position in response to the Qwest proposal and the information that was exchanged at the hearing. After an extension of time, the parties filed closing statements of position on October 15, 2002.

7. On January 24, 2003, Hearing Commissioner Gifford issued his interim order on this matter, Decision No. R03-0092-I. Attached to the decision is the measurement that Hearing Commissioner Gifford ordered Qwest to include in its CPAP to conclude this proceeding.

8. On February 13, 2002, Qwest filed Exceptions to Decision No. R03-0092-I. In its exceptions Qwest requests the Commission reverse and/or modify the hearing commissioner's decision. Namely, Qwest files exception to the hearing commissioner's findings on the amount of payments for Levels 3 and 4, the 100 percent standard, and the inclusion of the content of the notifications in the measurement.

9. Qwest, in its filed exceptions, states that there is no evidence in the record to support the Levels 3 and 4 payment amounts or the 100 percent standard ordered by the hearing commissioner. Qwest states that the payment amounts are extraordinary and unreasonable in light of the 100 percent standard and the CLECs would be given the opportunity for significant windfalls if these payments are affirmed by the Commission. Qwest asserts that this measure is based on a collaborative document that was intended to facilitate business-to-business activity between Qwest and the CLECs rather than any specific legal obligation such as parity for resold services. Qwest states that the payment levels have no self-evident relationship between the notification activity and the actual impact to the CLEC. The circumstances unique to a CLEC would govern whether that CLEC was truly affected by a notice, and to what degree. Qwest indicates that it is undisputed that there is no evidence as to the nature or amount of harm a CLEC would suffer as a result of a missing or inadequate CMP product and process notice.

10. Qwest calculates in its exceptions that if it were to miss just one Level 4 notice at $5,000 and 100 percent for 129 CLECs,[1] Qwest would be liable for $2,580,000 dollars. Qwest states that because the payments are self-executing, Qwest would be required to pay this amount without any CLEC showing proof of harm.

[1] Qwest uses 129 as the number of affected CLECs because this is the number of interconnection agreements it currently has with CLECs.

11. Additionally, Qwest takes issue with the 100 percent standard ordered in Decision No. R03-0092-I, stating that the 100 percent standard is not supported by evidence or rationale. Qwest states that the Federal Communications Commission (FCC) does not require perfection in order to obtain section 271 approval and that even for PO-16, the CMP software notification measurement in Colorado, the parties agreed to a three-day grace period that applies when considering whether Qwest made a timely notification. Qwest also points out that the CLECs in this record proposed a standard of perfection for Levels 3 and 4, but for Levels 1 and 2, they proposed a 98 percent standard with an allowance of one miss when the volume of deliverables for a particular month was less than ten. Qwest states that there is no evidence that it can meet a 100 percent standard. The testimony relied upon by the commission only references Qwest's ability to meet certain CMP requirements 98 to 99 percent over the relevant time period.

12. Qwest also asserts that the conclusion that the levels in the CMP correspond to the degree of financial harm incurred by a CLEC is not supported by the evidence. As an example, Qwest points out that if a particular type of change is not on one of the "Level lists" in the CMP document, Qwest is required to categorize that change as a Level 3 change, even if it is insignificant. A change from Level 3 to a different level would have to be done by a majority vote of the CMP forum. If Qwest misses the timeliness and content requirement for such a change for both the initial and final notices, Qwest would be liable for $4,000 per CLEC under the hearing commissioner's decision, regardless of the actual harm to the CLECs. Qwest maintains the payment amounts per level should be proportional as well as reasonable in amount.

13. Qwest also takes issue with the hearing commissioner's interpretation of the Special Master's report cited in Decision No. C02-399 and his basis for increasing the proposed payment amounts above those proposed by Qwest. Qwest states that the Special Master

envisioned a payment regime through a process that established appropriate measures of harm and a definition of "affected CLECs." Qwest's proposal balances the fact that it was not possible to identify the affected CLECs on a self-executing basis, by compensating CLECs in general, but at reduced amounts. Qwest believes the payments in its proposal were sufficient, but offer that payment amounts of $500 and $1,000 for Levels 3 and 4, respectively, would be acceptable, in addition to the other modifications requested in its exceptions.

14. On the topic of content, Qwest indicates that the Commission's measurement goes beyond the requirements of the CMP by including the Product Catalog (PCAT) and Technical Publication (Tech Pub) changes and the history log in the notification. Qwest states that these requirements are not for the content of the notification itself, but rather are in addition to the notification. Qwest asserts that it should not be required to make payments for failing to include something in notifications when the CMP does not require that information to be included.

15. Similarly, Qwest indicates that the Commission's measurement includes a new requirement for Levels 2 through 4 notifications, namely, "[t]he proposed PCAT and Non-FCC Tech Pubs shall be available on the Document Review site at least until the totality of the proposed changes have been implemented." Qwest states that there is no such requirement in the CMP and that Qwest should not be liable for a payment for failing to do something that is not required in the CMP.

16. In its exceptions and its Motion to Supplement the Record, Qwest directs the Commission's attention to a newly revised CMP document which revised sections 5.4.3.1, 5.4.4.1, and 5.4.5.1. This revision requires minor changes to the measurement. Specifically, Qwest's prior obligation for Level 1 changes was to provide an exact cut and paste of the

changes highlighted in green for PCATs or redline for Tech Pubs. The revision now states that the PCAT or Tech Pub will be available on the Document Review site in red-lining for all changes.

17. Finally, Qwest asks the Commission to modify the hearing commissioner's decision as to the implementation date for this measure. Qwest asks the Commission provide that data under this measurement need not be accumulated until the first of the month following a Commission decision on exceptions and reported during the month after that.

18. AT&T and WorldCom jointly filed a Response to Exceptions of Qwest Corporation Regarding CLEC Affecting Changes on February 27, 2003 (Response). AT&T and WorldCom state in this Response that the Commission should affirm the hearing commissioner's decision and deny Qwest's exceptions.

19. AT&T and WorldCom state in their Response that the product/process CMP clearly falls within the scope of change management as defined by the FCC. The FCC's broad definition of "OSS" includes "all of the automated and manual functions a BOC has undertaken to provide access to OSS." In addition, AT&T and WorldCom state that this Commission shares the FCC's broad definition of the scope of CMP by our declaration that we "did not agree with Qwest's assertion that its CMP is complete without Product and Process CMP."[2]

20. AT&T and WorldCom maintain that the five levels of changes noted in section 5.4 of the CMP document were identified based upon the severity of a failure to provide a particular type of notice. This ranking was done by agreement in the collaborative CMP redesign meetings.

[2] Decision No. C02-718, p. 141.

AT&T and WorldCom state that if there were no self-evident relationship between the notification activity and the impact upon a CLEC, as Qwest claims, there would have been no reason for Qwest and the CLECs to identify the five levels or define each level based upon agreed upon impact to CLECs.

21. In addressing Qwest's exception that redlined changes of proposed PCAT or non-FCC Tech Pubs should not be considered a requirement for a change notification, AT&T and WorldCom assert that the intent of the CMP is for Qwest to notify CLECs of a proposed change with sufficient detail for the CLECs to understand the change and have sufficient time to comment and/or prepare for the change. The redlined PCAT or non-FCC Tech Pub changes are an integral part to the CLECs' understanding of the proposed change. AT&T and WorldCom also state that it is their experience that Qwest's practice is to include in the change notification an Internet link to its redlined documents. Qwest argues that it is administratively more efficient to send the link rather than attach the whole document to the notification. Qwest has argued in CMP meetings that e-mailing a large number of notices with attachments would be bulky and would cause inbox problems for some CLECs. However, AT&T and WorldCom state that Qwest should not be permitted to use semantics and administrative efficiency as a means to avoid its requirement to comply with the CMP notification requirements.

22. AT&T and WorldCom take issue with Qwest's assertions that there is no evidence in the record that it can meet a 100 percent standard for product/process change notifications. They state that over a four-month period, Qwest only missed one deliverable out of about 160 opportunities. Therefore, Qwest met a 100 percent standard for three out of the four months used as an example during the hearing on this matter. Over the last nine months of reported data, AT&T and WorldCom state that Qwest has achieved a 100 percent compliance for the PO-

16 measurement, Timely Release Notifications. This measurement focuses on systems notifications while the Commission's measurement focuses on product and process notifications. In addition, AT&T and WorldCom maintain that Qwest has total control over compliance with the notification requirements. If Qwest discovers that it has failed to provide advance notice of a change, it can simply provide the notice and delay implementation until such time as the implementation date would meet the requirements of CMP.

23. AT&T and WorldCom also address Qwest's potential liabilities calculated in its exceptions. AT&T and WorldCom state that Qwest has inflated the potential payment liabilities by assuming that 129 CLECs in Colorado would qualify for payments. However, the hearing commissioner ordered a set of criteria for an "affected CLEC" that includes not only the presence of an approved interconnection agreement, but also: 1) having a tariff or price list on file with the Commission; 2) holding itself out to provide local exchange service in Colorado; and 3) having a certificate of public convenience and necessity.[3] Qwest's witness, Mark Reynolds, testified at hearing that the number of affected CLECs would likely be considerably less when the criteria are applied. AT&T and WorldCom state that the Commission should discount the payments that Qwest suggests it could be liable for until Qwest provides more accurate information on the actual number of CLECs that would meet the criteria indicated by the hearing commissioner.

24. AT&T and WorldCom reiterate in their closing statement that Qwest's exceptions should be denied and the hearing commissioner's decision, R03-0092-I, should be affirmed.

[3] We note that in addition to these criteria enumerated in the Response, the hearing commissioner also required an affected CLEC to: 1) opt into the CPAP; and 2) subscribe to the appropriate categories of notifications on the Qwest wholesale website.

B. Analysis

25. The general guidance given to the Commission by the Special Master on the CLEC-affecting changes contained in the CMP document was to tailor more closely the penalty regime to fit with the actual harm caused to the CLECs from lack of adequate notice of these changes. The affect of a change is highly variable, ranging from no impact for a change such as re-formatting, to great impact such as a new order submission process. The Commission's original proposal used the terms of section 5.4 of the CMP document and assigned penalties to Levels 1 through 4. The hearing commissioner's decision lowered those proposed penalty levels, refined the deliverables to include timeliness and content, and set a standard of 100 percent.

26. Qwest has stated to this Commission and to the FCC that it has reached the milestones set in the CMP document 98 to 99 percent of the time. To set a lower standard for all notifications at this point would be giving Qwest too much leeway to lower its performance. While we do not believe that Qwest should be penalized for good performance in the past, it is our position that this measurement is important enough to the CLECs' business relationship with Qwest to hold Qwest accountable for each and every notification.

27. We do not agree with Qwest that no evidence exists to support a 100 percent standard. Qwest itself presented evidence at hearing that it had maintained 100 percent compliance with the proposed deliverables in three out of four months that it reported. While it is true, as Qwest claims, that a CLEC's exact amount of harm due to a missed notice is not known, Qwest collaborated with the CLECs to develop the categories, lists, and level of changes that are incorporated into this measurement. In doing so, Qwest obviously realized that its changes to products and processes impact CLECs' business, albeit with different severities.

28. We do recognize that a difference exists between the various notification levels and the impact a missed notification has on a CLEC. The lower level notifications are defined as having less of an impact and, therefore, if Qwest misses a Level 1 or 2 notification, CLECs will be less harmed than if Qwest misses a Level 3 or 4 notification. Therefore, we will grant Qwest's exception in part and lower the standard to 98 percent for Levels 1 and 2, while maintaining a 100 percent standard for Levels 3 and 4. In addition, we will allow Qwest to apply the "one free miss rule" found in section 6.2 of the CPAP to Levels 1 and 2 when volumes for a particular month are less than ten.

29. In accepting the Special Master's recommendation that this addition should be made to the CPAP, the Commission concluded in Decision No. C02-399 that, "[w]e agree with the Special Master that the flat $1,000 fine for unapproved or unnoticed changes that minimally affect CLECs' business is too high. For changes that dramatically affect CLECs' business, the penalty is too low." We have some sympathy with Qwest's statement that it has broadened the base of affected CLECs in order for this plan to be more self-executing, and therefore it lowered the penalty amounts. However, we do not agree that the liability amounts presented by Qwest in its exceptions are realistic for two reasons. First, Qwest uses 129 CLECs as the basis for its calculations. This is the number of interconnection agreements Qwest has with CLECs. Qwest did not apply the hearing commissioner's criteria for an affected CLEC which would have lowered this number significantly. Second, Qwest's calculations express what would happen if Qwest were to miss every single deliverable in every month for every CLEC. Given Qwest's historic performance of 98 to 99 percent compliance, these numbers are completely unrealistic. Further, we agree with AT&T and WorldCom's response when they stated, "[i]f it (Qwest) discovers that it has failed to provide advance notice of a change, it can simply provide the notice

and delay implementation until such time as the implementation date would meet the requirements of CMP." We would add that Qwest not only can cure this potential miss if it discovers a problem, but also if a CLEC discovers a problem. It simply has to notice or re-notice a change before implementation and adhere to the CMP timeframes to avoid a payment.[4]

30. What does compel us to re-examine the payment amounts, however, is Qwest's statement that the payments should be proportional, as well as reasonable in amount. The amounts ordered by Hearing Commissioner Gifford are acceptable to us, with the exception of the Level 4 payment. We lower the penalty for the Level 4 measurement to $2,500 from $5,000. This will more closely correlate the payment amounts with the descriptions of each level of change and not have a jump of $4,000 between Levels 3 and 4. All other payment amounts shall remain as ordered by Hearing Commissioner Gifford.

31. We agree with the hearing commissioner that a deliverable on timeliness of a notification has little meaning without a deliverable on content. These two go hand-in-hand to ensure a CLEC's ability to plan for a product or process change. Section 5.4 of the CMP document clearly sets forth the requirements for content in each notification. We affirm that for each notification, there will be two associated penalties, one for the notice not being sent on time and the second for the applicable information not being included. For example, if a Level 2 initial notice is sent out on time, according to the timelines in section 5.4.3.1, but the description of the change is not included, Qwest will be required to make one payment to the affected

[4] We recognize Level 1 and 2 notifications have shorter timeframes required before implementation and would not allow the same opportunity to cure. This fact was taken into account by our lowering the standard to 98 percent for those levels.

CLECs. By further example, if that notice is not on time *and* does not include the required information, Qwest will have to make two payments to the affected CLECs.

32. We do agree with Qwest, however, that the Tech Pubs, PCAT, and history log are not required by the CMP to be in the actual notification. The CMP at sections 5.4.2.1, 5.4.3.1, 5.4.4.1, and 5.4.5.1 contain requirements for redlined Tech Pubs, PCATs, and history logs, but those are not requirements for the actual notifications themselves. We also find the AT&T and WorldCom Response somewhat counterintuitive. Qwest's administrative efficiency is an issue here. Also, many of these notifications could cause inbox problems were the documents attached. Therefore, we have changed the content information to require a statement that the documents are available for review on the document review site, rather than including them in the notification.

33. Likewise, Qwest points out in its exceptions that there is no requirement that the redlined documents be on the review site until the totality of the changes have been implemented, as was ordered by the hearing commissioner. This was advocated by the CLECs in the hearing process and in the joint statement of position filed by AT&T and WorldCom. We see no need to go beyond the bounds of the CMP document. Since this document was collaboratively written, the CLECs could have attempted to add this language through the redesign process. We do not choose to make this an additional requirement for our CPAP measurement.

34. As outlined above in paragraph 16, we accept Qwest's suggested language changes to the measurement that arose as a result of the revision to the CMP document completed on January 6, 2003. We also grant Qwest's Motion to Supplement the Record filed on February 13, 2003.

35. The result of these decisions on exceptions is contained in the attached measurement. Qwest is ordered to include this measurement in Exhibit K to its Statement of Generally Available Terms and Conditions and begin reporting on its performance for the measurement the first full month following the effective date of this decision, according to the provisions of the CPAP. In other words, if this order is effective on March 21, 2003, Qwest must report the performance results of the full month of April, 2003, at the end of May, 2003, and make its first payment, if any, by the end of June, 2003.

II. ORDER

A. The Commission Orders That:

1. Qwest Corporation's Exceptions to Decision No. R03-0092-I are granted in part and denied in part consistent with the above discussion.

2. Qwest Corporation is ordered to include the Timely and Complete Notifications of Product/Process Changes measurement attached to this Decision in its Colorado Performance Assurance Plan.

3. Qwest Corporation is ordered to begin measuring and reporting its performance under this measurement consistent with the above discussion.

4. Qwest Corporation's Motion to Supplement the Record is granted.

5. This Order is effective on its Mailed Date.

B. ADOPTED IN COMMISSIONERS' WEEKLY MEETING March 5, 2003.

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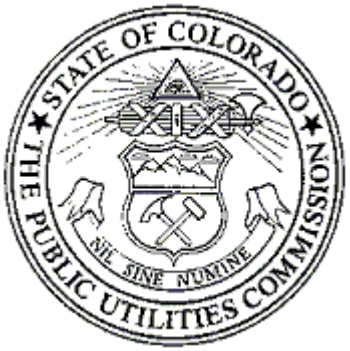

ATTEST: A TRUE COPY

Bruce N. Smith
Director

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

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Commissioners

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