

Decision No. R03-0092-I

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

Mailed Date: January 24, 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 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 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. Qwest, WorldCom, AT&T, and the Office of Consumer Counsel participated in the hearing.

6. At the hearing, Qwest presented a new proposal as Exhibit 2 (Qwest proposal), that differed significantly from the one contained in its comments and reply comments. This new proposal incorporated some of the CLECs' suggestions from their comments and reply comments and was received by the parties as a compromise on Qwest's part. The highlights of the Qwest proposal are that Qwest would be accountable for the initial notification for Level 1 changes, and the initial and final notifications for Levels 2 through 4. The format of the final notifications would also be measured for completeness, however, there would be only one "miss"

for a final notification regardless of if both format and timeliness were neglected. The Qwest proposal results in Tier 1 payments made to CLECs for any misses, has a benchmark of 95 percent for all levels, and the “one free miss rule” from section 6.2 of the CPAP would apply to Level 4 notices. The payment structure would follow that already established in the CPAP for Tier 1 A, B, and C. Level 1 would carry a payment of \$25.00, Levels 2 and 3 payments would be \$75.00, and Level 4 would be \$225.00. Qwest’s proposal also contains two business rules, as follows:

- Any notice for which an exception is approved in accordance with Section 16 of the CMP shall be excluded from the performance calculations under this provision.
- Due to the region-wide nature of CMP change notifications, Qwest will not be required to duplicate payments made to CLECs in another jurisdiction for the same change activity.

CLECs eligible for payment under the Qwest proposal would have to subscribe to the relevant category of notice via the CMP web site, opt into the CPAP, and be actively offering local service to customers in Colorado at the time of the notice.

7. Qwest stated on cross-examination, that section 5.3.1 of the CMP document should also be included in this measurement for the notice procedures for CLEC-initiated product and process changes.

8. AT&T expressed concerns with the Qwest proposal, in part because the format of the measurement did not reflect the detail of information required for the auditing and measuring of a true performance indicator definition (PID), as contained in Exhibit B to the Statement of Generally Available Terms (SGAT). AT&T stated that the “no-PID” approach makes Qwest the sole decision-maker for exclusions. AT&T requested two additional months to work

collaboratively on a PID. AT&T did not reject the Qwest proposal outright, however, it did not agree with the payment levels for Levels 3 and 4 and stated that they should be more in the range of the Commission's proposal of \$5,000 and \$10,000 respectively. The Qwest proposal lacked one key deliverable, according to AT&T. The proposal does not account for a payment if Qwest fails to issue *any* notice for a change that is implemented when one is actually required. AT&T stated that this type of miss should be incorporated into the measurement as well.

9. WorldCom addressed the Qwest proposal by stating that the initial and final notifications are not the only "milestones" that impact CLECs. For instance, if the CLEC comment cycle is not allowed to run its full course, or if Qwest fails to respond to CLEC comments, it would greatly impact the CLECs' ability to implement the change on their side of the business. WorldCom concurred with AT&T's position that a collaborative discussion and development of a PID would flesh-out and resolve this and other open issues.

10. 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.

11. WorldCom and AT&T jointly filed their statement of position expressing that they still had concerns with the Qwest proposed CLEC-affecting changes measurement. They again stated that this measurement should be a full PID developed in a collaborative effort between the CLECs and Qwest. They further argue that measurement should include criteria for the product or process being implemented. The Qwest group that implements the proposed change should be required to provide evidence of when the changes were implemented. It should address whether

Qwest provides the correct level of notification, the content of the notifications should be a deliverable, and there should be a part of the measurement that holds Qwest accountable for “failed” notifications, or notifications that were required but not sent.

12. WorldCom and AT&T maintain that the 95 percent standard is too low and does not reflect Qwest’s actual performance that it has touted in various Federal Communications Commission (FCC) and state filings. The CLECs propose that for Level 3 and 4 changes, Qwest not be permitted to miss any deliverables. For Levels 1 and 2, the CLECs propose a standard of 98 percent, with an allowance of one miss for volumes of less than ten.

13. The CLECs state that “affected CLEC” is too vaguely defined in Qwest’s proposal and needs more detail and specificity. The CLECs suggest a definition for “actively offering local service” that includes, among other things, the certification by this Commission, filing of a local tariff or price list, and approval of an interconnection agreement. Tied to this, the CLECs also suggest that this Commission require Qwest to use the information required on the CLEC New Customer Questionnaire as a check to see if a particular CLEC is affected by a missed deliverable. This information could narrow the number of CLECs affected by a miss, particularly with Levels 3 and 4, which are likely to be more specific to a particular wholesale or resale product.

14. Finally, the CLECs state that Qwest’s requirement to allow the offsetting of monies paid in other states for the same changes, is premature. There are no other Qwest states currently contemplating inclusion of such a PID and until that happens no duplicative payments could be made. If necessary, this could be addressed in the six-month review process.

15. The CLECs attached their proposed PID to the statement of position.

16. Qwest's statement of position reiterates its proposal from the hearing with few changes. Qwest argues that the deliverables should only include the initial and final notifications. This is reasonable, Qwest states, because the primary function of these notifications is to give CLECs a minimum period of advanced notice of a proposed change. The CMP does not require Qwest to implement a change on a date certain, or even within a certain interval, but rather, it merely prohibits Qwest from implementing the change within the notification window. Qwest's actual implementation date may be at any time after the notification window.

17. Further, Qwest states that if it meets the initial notification requirement, it will automatically satisfy the comment cycle requirement. The comment period is triggered by the initial notification, and Qwest cannot unilaterally change this period. CLECs can submit comments either by the web-based tool or by email. Therefore, Qwest says that window for comments is always open. Similarly, Qwest asserts, it would be inappropriate to include a separate deliverable for Qwest's response to CLEC comments because Qwest's response is already included in the final notification deliverable under Qwest's proposal.

18. The final notification sets forth the CLEC comments, if any, and Qwest's responses to those comments. This notification establishes the earliest date on which Qwest may implement the change and sets the actual date on which Qwest plans to implement the change. Qwest states that even if a final notification is not issued following standard practice after the responses to CLEC comments were due, there would be no impact to CLECs as long as Qwest issued that final notification in advance of the minimum period allowed between final notification and implementation.

19. On the issue of the definition of “affected CLEC,” Qwest asserts that its proposal is a self-executing plan that includes payments to all potentially affected CLECs that may rely on Qwest’s CMP notifications to do business. Qwest trades-off lower penalty levels for a broader base of CLECs to which the payments would be made. Qwest states the CLEC proposal of using the CLEC Questionnaire as a reference for service/products purchased by CLECs is not appropriate. CLECs can include any products or services in their interconnection agreement on those questionnaires regardless of if they are actually ordering the product/service. Qwest affirms that CLECs who were actually harmed by an amount greater than the penalty amount may seek additional payments through CPAP section 16.6.

20. Qwest asks the Commission to adopt its proposal as attached to its statement of position.

B. Analysis

21. The general guidance given to the Commission by the Special Master on the CLEC-affecting changes contained in the CMP document was more closely to tailor 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 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. Now, some seven months, a hearing, and briefings later, I believe the record is ripe for a decision on this matter.

22. I do not agree with the CLECs that there is a need for further collaboration in another forum to develop a PID. There are other CMP measures in the CPAP that are not part of an actual “PID” per se. That does not make these existing measures any less auditable or

understandable. This new measurement falls into that category. The measurement that is attached to this order is reflective of other PIDs in Exhibit B to the SGAT and should contain enough detail to make it easily manageable and understandable. If this is not the case, a review of this measurement can be done at the first six-month review.

23. As an initial matter, I agree with the CLECs that a deliverable on timeliness of a notification has little meaning without a deliverable on content. These two go hand-in-hand for a CLEC's ability to plan for a product or process change. Section 5.4 of the CMP document clearly lays-out the requirements for content in each notification. While I will not go so far as to make each requirement a separate deliverable, I do order this measurement to contain both a timeliness and a completeness component. 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 to be 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 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.

24. The definition of an affected CLEC, and thereby the CLECs which receive payments, must be balanced between ease of administration and some semblance of actual harm. I do not agree with the CLECs that Qwest should monitor or keep track of the products and services CLECs indicate they might purchase from Qwest contained on the CLEC Questionnaire. This does not constitute a promise or a requirement to purchase from Qwest. The compilation of this information would not gain Qwest any better understanding of affected CLECs for a particular product or service, nor, as Qwest points out, does it help with notifications for process

changes. However, I do agree with the CLECs that Qwest's proposed list of requirements for an "affected CLEC" needs to be refined. I will accept, therefore, the CLEC definition of "actively offering local service" from page 13 of its statement of position, with some minor changes. This will be incorporated in the measurement.

25. I do not agree with the 95 percent benchmark, or standard, set in Qwest's proposal for all four levels of changes. 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 at this point would be giving Qwest too much leeway to lower its performance. While I do not believe that Qwest should be penalized for good performance in the past, it is my position that this measurement is important enough to the CLECs' business relationship with Qwest to hold Qwest accountable for each and every notification. Therefore, for all four levels at issue in this measurement, the standard will be 100 percent. Likewise, I do not see the need, but do see the downfall, in allowing the "one free miss" rule for Level 4 change, as proposed by Qwest. These changes, by definition, are the most impacting to CLECs and normally have less volume than the lower level changes per month. In fact, according to the Qwest information provided at hearing, Qwest averages only two Level 4 changes a month. If Qwest is allowed to miss one deliverable each month on these greatly impacting changes, CLECs could be harmed significantly.

26. Qwest's proposed payment levels are also not adequate. 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, "We 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." Qwest has

ignored this directive by setting its highest proposed penalty amount at only \$225. I 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 amount. To reconcile this, I lower the penalties from the Commission's original proposal, but not to the Qwest proposed amounts.

27. I accept Qwest's proposal in dealing with implementations of changes for which notifications were not sent. CLECs should be required to challenge the change as requiring notice and "win" the challenge either through the CMP or a dispute resolution process before Qwest is obligated to make payments.

28. I include a provision barring double payment of penalties from other state plans. No other state has a similar measurement in its Performance Assurance Plan, so I can foresee the need for additional work to sort these double-recovery issues out. Nevertheless, the principle of barring double recovery should be self-evident and non-controversial.

29. The result of these discussions and decisions is contained in the attached measurement. Qwest is ordered to include this measurement in Exhibit K to its SGAT 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 January 24, 2003, Qwest must report the results of the month of February, 2003 at the end of March, 2003 and make its first payment, if any, the end of April, 2003.

II. ORDER**A. It Is Ordered That:**

1. 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.
2. Qwest Corporation is ordered to begin measuring and reporting its performance under this measurement consistent with the above discussion.
3. This Order is effective on its Mailed Date.

(S E A L)**ATTEST: A TRUE COPY**

Bruce N. Smith
Director

**THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO**

RAYMOND L. GIFFORD

Hearing Commissioner