

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

DOCKET NO. 02M-259T

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

QWEST MOTION FOR CLARIFICATION

Mailed Date: June 30, 2004

Adopted Date: June 2, 2004

I. BY THE COMMISSION

A. Statement

1. This matter comes before the Commission for consideration of Exceptions¹ to the April 28, 2004 Order of the Independent Monitor Concerning Performance Indicator Definition PO-20--Manual Service Order Accuracy. In Decision No. C04-0147, we directed the Independent Monitor to conduct a hearing to establish performance measures for PO-20. The Order resolved several disputes between the parties. Qwest Corporation (Qwest) filed its Exceptions to the Order, and the Competitive Local Exchange Carriers (CLECs)² filed their Response to the Exceptions. Now being duly advised in the premises, we issue the following rulings on the issues raised in the Exceptions.

¹ The discussion *infra* clarifies that we consider Qwest's objections to the Order of the Independent Monitor to be Exceptions under § 40-6-109, C.R.S.

² The CLECs are AT&T Communications of the Mountains, Inc., and TCG Colorado; Eschelon Telecom, Inc.; MCI Metro Access Transmission Services, LLC; and MCI WorldCom Communications, Inc., formerly known as MFS Intelenet, Inc.

2. First, Qwest requests clarification that these proceedings to establish performance measures for P0-20 are being conducted pursuant to the Commission's procedural statutes and the Commission's Rules of Practice and Procedure, and not under § 17 of the Colorado Performance Assurance Plan (CPAP or Plan). The Motion points out that, in Decision No. C04-0147 (¶ 51), we assigned this matter to the Independent Monitor, instead of an Administrative Law Judge (ALJ) for the Commission, for hearing on disputed issues relating to PO-20. In Decision No. C04-0147 we stated:

The hearing shall be held pursuant to §§ 17.5 and 17.7 of the CPAP. At the conclusion of the hearing, we expect the Independent Monitor to issue a decision that resolves the disputed issues and orders Qwest to implement reporting and penalties for misses for this new PID.

3. Qwest argues that, in these directives, although the Commission assigned the case to the Independent Monitor established in the CPAP, the Independent Monitor was to act as an ALJ pursuant to standard Commission procedures. According to Qwest, establishing new performance measures for CPAP--this is the basic issue in this proceeding--is beyond the scope of duties assigned to the Independent Monitor in § 17. Qwest, therefore, concludes that its objections to the Independent Monitor's decision on PO-20 constitute Exceptions under Rule 92, Commission Rules of Practice and Procedure, 4 *Code of Colorado Regulations* 1; these objections do not constitute an appeal under § 17.10 of the Plan.

4. We agree with Qwest and now grant the Motion for Clarification. We clarify that these proceedings are being conducted under the Commission's standard procedures. Consequently, Qwest's objections to the Independent Monitor's decision on PO-20 are properly considered as Exceptions under Rule 92.

B. Qwest Motion to Strike

5. On April 23, 2004, Qwest filed its Motion to Strike Portions of CLEC Post-Hearing Brief Regarding Treatment of PO-20. Generally, Qwest argues that the CLEC's post-hearing brief refers to information that was not presented at hearing, and, therefore, is not in the record. The Motion cites 11 separate sections in the CLEC brief which, according to Qwest, proffer arguments based upon extra-record information. Qwest contends that this material should be stricken inasmuch as it had no opportunity to review the information prior to hearing, and no opportunity to cross-examine witnesses on that information. Qwest concludes that the "finder of fact" (*i.e.*, the Independent Monitor) cannot consider this information in rendering a decision in this case.

6. The CLECs filed their Response to Qwest's Motion to Strike on May 7, 2004. In general, the Response points out that the vast majority of information cited in the Motion to Strike was, in fact, placed into the record prior to hearing. Specifically, the Response notes that much of the information was included in the CLECs' Initial Comments to the Independent Monitor. The Independent Monitor ruled that Initial Comments, along with attachments, are to be considered part of the record in this case. Moreover, the Response points out, the CLECs sponsored witnesses at hearing in support of the Initial Comments, and those witnesses were subject to cross-examination relating to the information to which Qwest now objects. The Response also observes that Qwest is, in some cases, really objecting to inferences and arguments properly based upon factual information clearly in the record. Next, the Response suggests that, with respect to some of the subject information, the Independent Monitor and the Commission may take administrative notice of some material even if not formally offered into the record. Finally, the Response asserts that there is no evidence that the Independent Monitor

relied on any of the information to which Qwest now objects. As such, Qwest can show no prejudice from the inclusion of that material in the post-hearing briefs.

7. We deny the motion. Notably, the Motion to Strike (filed on April 23, 2004) was addressed to the Independent Monitor (who issued his decision on April 28, 2004). We now consider the Motion only because the Independent Monitor did not enter a ruling on Qwest's request. In any event, the CLECs are correct that there is no indication that the Independent Monitor's decision was based upon any of the information to which Qwest objects. The Exceptions themselves do not raise any issue related to the information cited in the Motion to Strike, nor do the Exceptions even assert that the Independent Monitor's decision was based upon that information. However, in our review of the record in this proceeding, we find no evidence of either the Minnesota Staff Briefing Papers³ or the Arizona Staff Report⁴ other than the references in the CLEC Post-Hearing Brief. We will, therefore, not reference these documents in our review of the merits of Qwest's Exceptions filing.⁵ The Motion is denied as moot.⁶

C. Qwest's Exceptions

8. On May 5, 2004, Qwest filed its Exceptions to the April 28, 2004 Order of the Independent Monitor Concerning Performance Indicator Definition PO-20 -- Manual Service Order Accuracy (Exceptions). On May 13, 2004, AT&T Communications of the Mountain

³ CLEC Post-Hearing Brief Regarding the Treatment of PO-20 filed April 12, 2004 at pages 13 and 14.

⁴ *Id.* at page 29.

⁵ We note, that while we partially grant the Motion to Strike in regards to these two documents, Qwest did not reference either one in its Exceptions filing. Therefore, the grant is one of little significance.

⁶ Furthermore, we largely agree with the Response that the Motion should have been denied on its merits. The CLECs are correct that most of the information cited in the Motion was placed into the record pursuant to proper procedure. For example, most of the material was identified in Initial Comments and Qwest was notified by the Independent Monitor prior to hearing that this material would be considered part of the record. The CLECs also presented witnesses who were subject to cross-examination on much of this material. Additionally, the Response is also correct that Qwest, in part, is objecting to proper inference and argument based upon information in the record.

States, Inc., Eschelon Telecom, Inc. (Eschelon), and MCI WorldCom Communications, Inc. (CLECs), jointly filed the CLEC Response to Qwest's Appeal of or Exceptions to the April 28, 2004 Order of the Independent Monitor (Joint Response).

9. In its Exception filing, Qwest indicates that it objects to the Independent Monitor's decisions regarding the standard used in determining the benchmark for PO-20 in addition to the ascending nature of the benchmark; the 10 percent collar as contemplated by § 18.8 of the CPAP; the tier designation; and the failure to permit one free miss for PO-20. We will address each of these issues separately.

10. On the first issue, the benchmark ordered by the Independent Monitor, Qwest has maintained throughout this proceeding that the appropriate benchmark for PO-20 is 95 percent. Instead, the Independent Monitor ordered an escalating benchmark that begins at 95 percent on August 1, 2004 and increases to 97 percent by August 1, 2005. In its Exceptions, Qwest states that the Independent Monitor improperly looked to the potential impact a miss under PO-20 might have on a CLEC or its end user to justify the higher benchmark. Qwest asserts that just because there was an error in the service order does not mean that there was an impact or harm to either the CLEC or the end user. Qwest continues by referencing the Special Master's Report to the Commission⁷ on the formulation of the CPAP. Qwest contends that the Special Master's report stated that neither impact nor harm to a CLEC or an end user is an appropriate consideration when determining the standard for a particular measure. Yet that is what the Independent Monitor has done. In Qwest's opinion, the proper analysis is: What standard gives the CLECs a meaningful opportunity to compete for customers?

⁷ Final Report and Recommendation of the Special Master, Professor Phil Weiser, in Docket No. 01I-041T, dated June 8, 2001 (*Special Master's Report*).

11. Qwest continues in its Exceptions to state that an escalating benchmark does not provide Qwest with the incentive to meet the benchmark. The opportunity for human error is significant during this manual process. The only rationale that the Independent Monitor gives for an escalating benchmark is that it will “provide Qwest with the proper incentive to minimize the levels of human error on a going-forward basis, while still accounting for the inevitability of such mistakes.” According to Qwest, there is no record evidence supporting this conclusion. The Independent Monitor’s order seems to suggest that if Qwest were to dedicate sufficient resources, it could obtain a pre-determined level of accuracy. Qwest asserts that there is no support for this statement. If the Independent Monitor’s logic were followed then it would result in benchmarks constantly being escalated, because once Qwest exceeds a benchmark, the benchmark should be raised to give Qwest the added incentive to perform even better than before.

12. Finally, Qwest asserts that its 95 percent proposal is appropriate because benchmarks for other similar Performance Indicator Definitions (PIDs) are generally 95 percent. The only other PIDs that exceed 95 percent are generally PIDs associated with gateway availability or electronic systems or processes. Other Regional Bell Operating Companies’ (RBOCs) benchmarks for similar PIDs are also 95 percent. Qwest states as further support for a 95 percent benchmark that during the Operational Support System (OSS) § 271 test, KPMG Consulting (KPMG) determined that in the absence of a documented Qwest standard for PID accuracy of provisioning, a 95 percent benchmark was reasonable.

13. The CLECs, in their Joint Response, state that the Independent Monitor’s 97 percent benchmark is appropriate and necessary to protect CLECs, their end users, and competition from the harm that results from Qwest’s manual service order errors. They state that

the Commission established in Decision No. C02-718 that the manual service order accuracy measure benchmark should be set at a level that: 1) is a timely and proper incentive to minimize human error levels on a going forward basis; 2) is reasonable; and 3) ensures that the level of human error associated with Qwest's OSS does not interfere with competition. The CLECs believe that the Independent Monitor's decision is entirely consistent with that guidance.

14. The CLECs assert that Qwest has never previously argued that the standard in the Special Master's Report for a PID was a "meaningful opportunity to compete" standard. Professor Weiser did not speak to setting standards for PIDs in his report but rather spoke of this opportunity to compete in reference to the three-year PAP review. The CLECs contend that it is an "incredible reach" for Qwest to suggest that the Independent Monitor's decision somehow violated a precedent established by Professor Weiser.

15. Continuing in its Joint Response, the CLECs state that Qwest severely distorted the truth stating that Special Master Weiser was uninterested in how deficient Qwest performance would harm CLECs and end users. Throughout his report, Weiser spoke of potential harm as his basis for payments, according to the CLECs. They assert that the Independent Monitor appropriately considered potential harm to the CLECs and the end users in his evaluation and establishment of the benchmark. The harm goes to the very heart of what it means to provide a meaningful opportunity to compete. According to the CLECs, the Independent Monitor was correct when he stated that problems experienced in the switching of a customer "may harm not only the competitive LEC who 'won' the customer but also the competitive market place as a whole."

16. The CLECs site to Qwest's own witness who testified to the way in which Qwest can minimize the frequency of human errors. As the result of manual reviews of sample of orders, Qwest continues to implement additional edits to catch service order errors. Also, Qwest has stated that additional training resources should result in a decrease in the frequency of inaccurate, manually processed orders, according to the CLECs.

17. The Joint Response states that the sliding benchmark approach is generous to Qwest because it provides Qwest with additional time to prepare for the 97 percent standard.

18. We agree with Qwest, grant its exceptions on this issue, and order the benchmark for PO-20 to be set at 95 percent. Qwest has provided ample justification for a 95 percent standard including the fact that a measure that is set to capture human error will never be 100 percent without misses. In addition, the scheduled phasing-in of the PO-20 definition will increase the number of Local Service Request fields measured and therefore will greatly increase the opportunity for error.

19. We agree with Qwest that similar measures in the CPAP have a 95 percent standard while the only measures that have a higher standard, as listed by Qwest in its Exceptions, are electronic systems and electronic processes that do not require human intervention. Likewise, we are convinced by Qwest's comparison of its manual service order accuracy measurement to other RBOCs including SBC-SW, Bell South, and Verizon. We believe that the 95 percent standard is appropriate for PO-20 as well.

20. This Commission has endeavored not to set standards to punish Qwest for good behavior, but rather provide incentive to continue that good behavior while monitoring its performance.

21. The second issue raised in Qwest's Exceptions is the Independent Monitor's decision not to include PO-20 in the 10 percent collar outlined in § 18.8 of the CPAP. Qwest believes and has advocated that the 10 percent collar should apply. Qwest contends that the CPAP at § 18.8 states that changes made as part of the six-month review process are subject to the 10 percent collar. Because PO-20 was initially to be included in the CPAP as part of the Commission's first six-month review, but was then held over to the second six-month review, the collar should apply.

22. Qwest quotes Decision No. C02-718, "[t]his PID shall be added to the CPAP at the first six-month review," and states that if the Independent Monitor had referenced the entire paragraph contained in the Commission's decision rather than just a part of the paragraph, he would have come to a different conclusion than he did. According to Qwest, the Independent Monitor failed to provide the appropriate context for the quotation used in his decision by omitting several sentences that made it clear the Commission was going to implement PO-20 through the six-month review process. Qwest asserts the simple fact that the § 271 order mentioned that a manual service order accuracy PID should be developed does not negate that the Commission contemplated that the PID would be introduced into the CPAP through the six-month process or the language that requires measures flowing from six-month reviews to be subject to the 10 percent collar.

23. The CLECs in their Joint Response state that they argued that this issue was not properly before the Independent Monitor for decision because the Commission had already ordered that PO-20 would be added to the CPAP as a condition of receiving a favorable recommendation for § 271 approval. The CLECs believed that Qwest had withdrawn this issue

for decision by the Independent Monitor. The Qwest witness did not mention this as an issue at hearing, nor was it mentioned in Qwest's Statement of Position.

24. The CLECs contend that in Decision No. C02-718 the Commission stated that, if Qwest and the CLECs could come to an agreement on PO-20 before the first six-month review, it should be filed according to § 18.9. (Section 18.9 deals with modifications of PIDs outside the six-month review.) The CLECs assert that PO-20 is a measure that the Commission has ordered be included in the CPAP prior to the first six-month review and is, therefore, outside of the six-month review process. They state that any amounts paid by Qwest as a result of penalties for violating PO-20 should be included in the baseline CPAP described in CPAP § 18.8, and should not be considered part of a revised CPAP arising from a six-month review.

25. We deny Qwest's exceptions on this issue; the 10 percent collar contained in § 18.8 should not apply to the penalties owed as a result of Qwest missing the standard for PO-20. By Decision No. C02-718, the Commission ordered Qwest to add a manual service order accuracy PID to the CPAP. This decision was made as a contingency for a favorable recommendation to the Federal Communications Commission on Qwest's § 271 approval. The Commission recognized a problem with the OSS test performed by KPMG and, rather than order retesting, the Commission chose to order Qwest and the CLECs to define a measure to capture Qwest's manual performance. This decision was not made as a result of a six-month review, as called for in § 18.8. The first and second six-month reviews were used simply as procedural tools for the Commission to receive reports and updates on the progress, or lack of progress, being made on the PO-20 definition.

26. The third issue on Exceptions is that of the appropriate tier designation for PO-20. The Independent Monitor ordered PO-20 to be designated as a Tier 1B measure. Qwest believes that it should instead be a Tier 1C measure. Qwest states in its Exceptions that the Independent Monitor used the wrong standard when determining the tier designation for PO-20. Qwest asserts the appropriate analysis involves the potential impact a PO-20 miss could have on a CLEC or its end user, as well as an examination of whether PO-20 measures “critically sensitive areas of wholesale performance.” Qwest states that the Special Master’s Report makes it clear that this is the proper analysis for tier designation.

27. Qwest contends that the Independent Monitor ignored this standard for analysis as well as Qwest’s arguments regarding the standard, by attempting to marginalize some of Qwest’s arguments by stating, “[t]here is no indication in previous Commission pronouncements that the number of data points to examine was a factor in its designation of PO-20 as a Tier 1B PID.” Qwest states that its analysis was not focused on the “number of data points” but rather the fact that the impact a PO-20 miss could have on a CLEC and its end users has been minimized. Qwest asserts that the fact that the overwhelming majority of the potentially customer-impacting errors that PO-20 will capture are associated with feature-only activity is critical to a determination of the appropriate tier designation under Professor Weiser’s tier designation scheme in the CPAP.

28. The potential misses do not involve interconnection, switching of customers, collocation, or access to loops. Therefore, Qwest believes that the evidence and analysis clearly demonstrates that PO-20 should be given a Tier 1C designation in the CPAP.

29. The CLECs disagree with Qwest's assertions. They state that the Commission has already determined that PO-20 should be designated as a Tier 1B measurement on multiple occasions. Therefore, the CLECs did not think this matter was appropriately before the Independent Monitor. In Decision Nos. C02-1029 and C03-0961, the Commission reiterated its previous statement that PO-20 will be a Tier 1B measure.

30. The CLECs contend that there is no reason to alter the decisions of the Commission. Only pure billing issues (which affect the wholesale bill, not the end user bill) have a Tier 1C designation. The Commission's decision to assign a Tier 1B designation to PO-20 is generous to Qwest, according to the CLECs, as PO-20 reporting for loop products will be at a lower tier than the generally applied Tier 1A.

31. We deny Qwest's exceptions on this issue and order PO-20 to be designated a Tier 1B measure. We agree with the CLECs and the Independent Monitor on this issue. Qwest has not supported a change from our previous decisions that PO-20 should be a Tier 1B measure. The Commission was aware when it made this decision that PO-20 was going through changes and iterations. Qwest's argument, that the current PO-20 is not the same as the PO-20 of 18 months ago, is not compelling.

32. In Qwest's exceptions, it often makes reference to the small chance that an end user will be impacted by this type of error. To Qwest, this justifies a Tier 1C designation. We do not believe that Qwest has supported its conclusion that end users will not be impacted whether it is an "inward line activity" order error or an "inward feature activity" order error. The safety net that Qwest refers to assumes that CLECs and Qwest will catch most of the order errors prior to completion. This assumption relies in large part on the CLECs reviewing the Pending Service

Order Notification (PSON) information provided by Qwest. The only CLEC on record that uses the PSON is Eschelon. Eschelon has indicated that this review is time and labor intensive and a similar review could be done internal to Qwest. Qwest does not include this evident CLEC impact in its analysis.

33. We also find convincing the fact that some of the manual service order errors, those reported by the CLEC on the due date or after order completion for inward line activity, are actually captured by PID OP-5B, New Service Quality. OP-5B is a Tier 1B measure.

34. The final issue Qwest raises in its Exceptions is the Independent Monitor's decision not to apply the "one free miss" rule to PO-20. Currently in the CPAP Qwest is allowed to have one bad occurrence or "miss" with volumes of ten or less per month on Tier 1A benchmark measures. *See* CPAP § 6.2. Qwest requested that this rule be applied to PO-20 for volumes of less than 20.

35. Qwest states that as a result of the Independent Monitor's decision, Qwest will be required to make a payment under PO-20 for an individual CLEC if that CLEC's order volumes are less than 20 per month, even at a 95 percent benchmark. Denying Qwest the one free miss holds Qwest to a standard of perfection. According to Qwest, the Independent Monitor states that the one free miss rule only applies to Tier 1A measurements. However, Qwest states that the Commission has applied it to other measures such as the Timely and Complete Notifications of Product/Process Changes measure. Therefore, contrary to the Independent Monitor's decision, there is precedent for the one free miss rule to apply to specific performance measures.

36. Qwest contends, that just as it is within the Commission's discretion to apply the one free miss rule to PO-20, it is also within the Commission's discretion to expand the "normal" rule of volumes of 10 or less to volumes of less than 20 in this case.

37. Qwest states that if the Commission grants its request for the application of the one free miss rule, it should be set according to the final ordered standard as follows:

95 percent – 20 or less

96 percent – 25 or less

97 percent – 33 or less.

38. The CLECs disagree with Qwest's Exception. They state that the Timely and Complete Notification measure that Qwest references as having the one free miss rule has standards of 98 percent for Levels 1 and 2 and 100 percent for Levels 3 and 4, much higher standards than the standards at issue here. The CLECs assert that Qwest should not be allowed to claim that this decision demonstrates that the Independent Monitor has "discretion" to apply non-Tier 1A measures without also acknowledging that this decision also demonstrates that the Independent Monitor has the discretion to set a 100 percent benchmark, and the discretion not to apply the one free miss.

39. We deny Qwest's exception on this final issue. Our decision on this issue is closely tied to our decision on the tier designation above. Only Tier 1A benchmark measures are afforded the one free miss for volumes of ten or less. Because we have now confirmed the Independent Monitor's Tier 1B designation, we do not believe the one free miss rule should apply. Qwest has not provided us with a compelling argument for why we should apply this rule

for a Tier 1B PID when it is not applied to other Tier 1B PIDs.⁸ Qwest's reference to the Timely and Complete notification measurement is inappropriate in this context. That measurement does not have a tier designation, but rather was added last year as a separate change management measurement with its own penalties separate from the Tier 1X penalties.

40. Because we have designated PO-20 as a Tier 1B measure all other rules associated with the tiering should apply.

II. ORDER

A. The Commission Orders That:

1. The Motion for Clarification by Qwest Corporation is granted.
2. The Motion to Strike Portions of CLEC Post-Hearing Brief by Qwest Corporation is denied consistent with the above discussion.
3. The Exceptions by Qwest Corporation are granted in part, and denied in part consistent with the above discussion.
4. The 20-day period provided for in § 40-6-114, C.R.S., within which to file applications for rehearing, reargument, or reconsideration begins on the first day following the Mailed Date of this Decision.
5. This Order is effective on its Mailed Date.

⁸ We note that at the six-month review, Qwest is free to present empirical evidence that the 95 percent standard as applied to volumes of 20 or less has resulted in unfair or overburdensome penalties. We note that there has been no such showing as part of Qwest's exceptions.

**B. ADOPTED IN COMMISSIONERS' WEEKLY MEETINGS
June 2, 2004.**

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

Commissioners