

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

DOCKET NO. 02M-259T

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

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**ORDER DENYING EXCEPTIONS**

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Mailed Date: November 1, 2004

Adopted Date: October 14, 2004

**I. BY THE COMMISSION**

**A. Statement**

1. On September 15, 2004, MCI Inc., formerly known as WorldCom, Inc., on behalf of its regulated subsidiaries (MCI) and DIECA Communications, Inc., doing business as Covad Communications Company (Covad) (collectively the CLECs) filed Exceptions to Decision No. R04-1011 RE: Changes to OP-4 Standard for Line Sharing/Line Splitting (Recommended Decision). The CLECs take exception to Administrative Law Judge (ALJ) Kirkpatrick's decision on Issue No. 2, as identified in his Recommended Decision.

2. ALJ Kirkpatrick agreed with Qwest Corporation's (Qwest) position on this matter that no linear relationship exists between OP-3 (installation commitments met) and OP-4 (installation interval), and therefore any change to OP-4 should be made for substantive reasons and not just because OP-3 was changed.

3. The CLECs state that, contrary to the conclusion reached by the ALJ, the correct standard for OP-4 for the line sharing/line splitting product category should be 3.15 days, rather than 3.3 days. When the Commission, in Decision No. C03-0733, ordered Qwest to change the

standard for OP-3 (installation commitments met) from 90 percent to 95 percent, by the language in the Colorado Performance Assurance Plan (CPAP), the standard for OP-4 should have automatically been changed as well.

4. The CLECs assert that the original language in the CPAP first approved by the Commission specifically and unambiguously ties the standards for OP-3 and OP-4 together for line sharing/line splitting. The pertinent language from the original CPAP is as follows:

Line sharing/line splitting together – the interval for line sharing and line splitting, which shall be measured on an aggregate basis, is 3 days. Thus, OP-3 shall be that 90% of the loops shall be installed within 3 days. As for OP-4, the relevant installation interval shall be set at 3.3 days, which reflects the recognition that 10% of such loops will not be installed within 3 days, so that the relevant interval should be marginally greater than the interval.

5. Now that the OP-3 standard has been changed to 95 percent, the CLECs believe that the same methodology should be used: 5 percent of 3 days is .15 days. Adding .15 days to 3 days, results in an interval of 3.15 days for OP-4.

6. The CLECs state that while Qwest asserted, and the ALJ accepted, that there is no linear relationship between OP-3 and OP-4, there is no documentation in the record to confirm what Qwest's witness, Mr. Williams, or other Qwest representatives may have actually discussed with Professor Phillip Weiser, the Special Master for the CPAP, setting the interval for OP-4 line sharing/line splitting.<sup>1</sup> Further, they state that neither the Special Master nor the Commission explained why they used the wording they did for the OP-4 standard.

7. The CLECs contend that without a factual basis to support his ultimate conclusion, the ALJ's ultimate finding that the language is ambiguous must also fall. The CLECs

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<sup>1</sup> Mr. Williams testified at hearing that he presented the standard for OP-4 to Professor Weiser during meetings on the development of the CPAP. Transcript p. 31.

make the argument that the CPAP language should be read under the rules of statutory construction to give the words in the CPAP their “plain and ordinary meaning.”

8. Therefore, the CLECs ask that the Commission reverse the findings of the ALJ and direct Qwest to modify the CPAP language so that the standard for line sharing/line splitting for measure OP-4 be set at 3.15 days.

9. On September 29, 2004, Qwest filed a Response to the Exceptions of MCI and Covad. In this response, Qwest states that the Commission should only change the OP-4 standard if there is a legitimate substantive reason to do so. The language at issue does not create any relationship between OP-3 and OP-4, but merely explains how the standard for OP-4 was derived, according to Qwest.

10. Further, Qwest states that the MCI witness stated at hearing the OP-3 and OP-4 measure two completely different aspects of the performance. Therefore, the CLECs could not provide a substantive reason as to why the standards should be linked. The CLECs are simply relying on a mechanical application of their interpretation of the language contained in the CPAP rather than a statistical relationship.

11. Qwest contends that the CLECs chose not to cross-examine Qwest witness, Mr. Kobbervig, on his convincing testimony that there is no statistical relationship between the two measures. Likewise, the CLECs choose not to ask Mr. Williams about his conversations with Professor Weiser regarding the derivation of the standard for OP-4.

12. Further, Qwest states that the CLECs offered no support for the proposition that the CPAP should be treated like a statute. Common law principles of statutory construction do not apply to the CPAP and they are in direct conflict with the very specific terms of the CPAP which entitle Qwest to a hearing on disputed issues.

13. Qwest asserts that the Commission should deny MCI and Covad's exceptions and uphold the ALJ's decision.

14. We agree with Qwest that the exceptions should be denied. The CLECs did not present any evidence in the record, beyond their interpretation of the language in the CPAP, to support a connection in the standards for OP-3 and OP-4. We agree with Qwest that the language at issue goes to how the standards were derived originally, not to a linear relationship that dictates how the standards must be changed in the future. When asked by the ALJ if the Commission had the discretion to change one standard and not the other, MCI's witness Mr. Warner indicated that the Commission can make any relative change we want to the PAP, based on the arguments or positions put in front of us.

15. There is a relationship between OP-3 and OP-4 because they each measure aspects of time for installation. However, as the ALJ points out in his order, Qwest can meet OP-3 and not OP-4, or vice versa. The CLECs have not proven that these measures have a linear relationship that can and must be reduced to a formula so that when one standard changes, the other must as well.

16. As the ALJ notes in footnote 5 of his decision, the CLECs can raise the issue of changing the standard for OP-4 at a six-month review, if they have a substantive reason for doing so.

17. The change that the ALJ orders to the CPAP language removes this ambiguity that is the cause of this proceeding and the exception filing. The removal of the language is also upheld to prevent the same confusion in the future.

**II. ORDER**

**A. The Commission Orders That:**

1. MCI, Inc. and DIECA Communications, Inc.'s Exceptions to Decision No. R04-1011 are denied, consistent with the above discussion.

2. This Order is effective on its Mailed Date.

**B. ADOPTED IN COMMISSIONERS' WEEKLY MEETING  
October 14, 2004.**

THE PUBLIC UTILITIES COMMISSION  
OF THE STATE OF COLORADO

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Commissioners