

BEFORE THE PUBLIC SERVICE COMMISSION OF WYOMING

IN THE MATTER OF THE)
APPLICATION OF QWEST)
CORPORATION REGARDING RELIEF)
UNDER SECTION 271 OF THE)
FEDERAL TELECOMMUNICATIONS)
ACT OF 1996, WYOMING'S)
PARTICIPATION IN A MULTI-STATE)
SECTION 271 PROCESS, AND)
APPROVAL OF ITS STATEMENT OF)
GENERALLY AVAILABLE TERMS)

Docket No. 70000-TA-00-599
(Record No. 5924)

FIRST ORDER ON GROUP 5A ISSUES
(Issued January 30, 2001)

This matter is now before the Wyoming Public Service Commission (Commission) for consideration of the Group 5A issues concerning the public interest and the Qwest Performance Assurance Plan (QPAP). The federal Telecommunications Act of 1996, at 47 U.S.C. § 271, sets forth some specific criteria for the nature of the access and interconnection Qwest Corporation (Qwest) must offer to competitors before it is allowed into the in-region interLATA market in Wyoming. We must also determine the extent to which Qwest's Statement of Generally Available Terms (SGAT) for Wyoming provides for the development of a competitive telecommunications market in Wyoming under Sections 251 and 252 (d) and (f) of the federal Act. Overriding considerations in this portion of the proceeding are focused on the broad issues of how Qwest should be expected to perform in a post-271 environment and whether granting it the authority to offer in-region originating interLATA services serves the public interest. The Commission, having reviewed the Workshop Report materials filed in this portion of the proceeding and the written comments and arguments of the parties, having heard oral arguments in open hearing, having reviewed applicable telecommunications utility law and its files concerning this case and the participants, and being otherwise fully advised in the premises, HEREBY FINDS AND CONCLUDES:

1. On October 22, 2001, the consultant retained by the states participating in the Qwest Section 271 multi-state compliance proceeding (the Consultant), with the assistance of state commission staff members, issued his Report on Qwest's Performance Assurance Plan and on the same day issued his Public Interest Report (when referred to collectively, the Workshop Reports) giving recommendations to the participating commissions on the disposition of Group 5A issues in this case.

2. To provide for the full and fair consideration of the Group 5A issues, the Commission, on November 6, 2001, issued its Order Providing for Separate Consideration of Group 5 and Group 5A Issues, and Setting Oral Arguments and Deliberations on Group 5 and Group 5A Issues.

3. Pursuant to due notice, the Commission held oral arguments on Group 5A workshop issues beginning at 9:00 a.m. on December 10, 2001, in the Commission's hearing room in Cheyenne, Wyoming. Qwest and the Consumer Advocate Staff appeared through counsel and participated to the extent they deemed necessary in the proceedings. QSI Consulting participated in the proceeding as consultants and advisors to the Commission.

4. The Commission's deliberation in this portion of the case was held on January 18, 2002 at 2:00 pm, at the Commission's hearing room in Cheyenne, Wyoming, pursuant to its Second Order Rescheduling Deliberations on Group 5A Issues. At the deliberation, the Commission directed the preparation of this order consistent therewith.

The Qwest Performance Assurance Plan

5. The QPAP is intended to provide assurances that Qwest will live up to its obligations under Section 271 if it is allowed to enter the in-region originating interLATA market. We understand from the Federal Communications Commission that it clearly does not expect that all post-entry performance plans, like the QPAP, will be identical:

"We recognize that states may create plans that ultimately vary in their strengths and weaknesses as tools for post-section 271 authority monitoring and enforcement. We also recognize that the development of performance measures and appropriate remedies is an evolutionary process that requires changes to both measures and remedies over time. We anticipate that state commissions will continue to build on their own work and the work of other states in order for such measures and remedies to most accurately reflect commercial performance in the local marketplace." (Verizon Pennsylvania Order, FCC 01-029, released Sept. 19, 2001, paragraph 128.)

The FCC has also developed a simple and logical set of criteria for evaluating the QPAP and similar plans on a rational and consistent basis. Plans should contain:

- 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;

- A self executing mechanism that does not open the door unreasonably to litigation and appeal; and
- Reasonable assurance that the reported data are accurate.

6. After a review of the Workshop Report on the Qwest QPAP, the transcript of the oral arguments presented to us and other material in the record of this proceeding, including multi-state material, we find that the QPAP in its latest iteration generally satisfies the evaluation criteria for such plans; and we accept and adopt the Workshop Report on the QPAP, except as specifically discussed below. Regarding the nature of the QPAP, it is Exhibit K to the Qwest Wyoming SGAT; and it is designed to give a measure of assurance that Qwest will be adequately motivated to sustain an acceptable level of market openness and fair dealing with competing local service providers after, and if, Section 271 approval is ultimately granted to it. The QPAP is heavily enmeshed in federal and state telecommunications law and public policy and is not, either by itself or as a part of the SGAT, capable of being analyzed merely as a simple contract.

7. Regarding the Workshop Report's recommended 36% cap on payments by Qwest under the QPAP, we find no evidence proving the advisability of a particular cap in terms of a specific percentage or otherwise. Likewise, we find that there has been no demonstration of a reason to place a dollar limit on compensation derived from such a cap. If the reason for a cap is simply to limit Qwest's liability to a certain level which it supports or does not oppose, that is not a sufficient reason for the existence of a particular arbitrary cap. The dynamism of competitive telecommunications markets keeps a fixed cap from being a "meaningful and significant incentive to comply" with performance standards. The artificiality of a cap also introduces many administrative and other complications into the administration of the QPAP. Further, it could focus the behavior of competitors on obtaining compensation rather than concentrating on competing. Not having a cap comes much closer to creating a "reasonable structure designed to detect and sanction poor performance when and if it occurs" and is more apt to function as "a self executing mechanism . . ." which does not rely on the regular intervention of courts, regulators or special masters to make the QPAP function adequately. It is impossible to state that a payment cap would continue into the future to be either "meaningful" or "significant." We can state that a cap would be less so, and Qwest has termed the cap, as proposed by the Consultant, to be "reasonable." (See, Qwest's November 7, 2001, Comments on the Facilitator's Final QPAP Report, p. 2.) We note that the purpose of the QPAP is not to limit Qwest's liability for poor performance but to provide incentives discouraging that type of performance.

8. The Workshop Report on the QPAP proposes that some Tier 2 payments, those which go to the states rather than individual companies, begin after a three-month period of non-compliant performance. The Workshop Report analysis also bases Tier 2 payment liability in part on whether or not the prohibited

behavior has a Tier 1 counterpart. Here, the most important decisional criterion is that the QPAP should “detect and sanction poor performance when and if it occurs.” Therefore, if certain poor performance violates the QPAP, the penalty should attach at once rather than after a period of time has elapsed. We do not believe that a “meaningful” penalty is created when prohibited behavior is allowed to continue over a period of time before it is penalized. The proper approach here, if there were any objection to Tier 2 payments, would be to object to the characterization of the behavior as prohibited or to object to the level of penalty payment associated with it. We will discuss a QPAP modification process below. We note here our conclusion that Tier 2 payments should be made to the Wyoming Universal Service Fund for the benefit of all Wyoming telecommunications subscribers, whether or not they reside in Qwest service areas. Although the “penalty” value for Qwest would appear to be lessened by this use of the funds, it is appropriate and the beneficiaries are the consumers themselves rather than the companies providing the service.

9. The Workshop Report advocates that payments under the QPAP be allowed to escalate during the period of noncompliance by Qwest to increase the motivation for Qwest to change its behavior. However, the Workshop Report also suggests that the escalation stop after six months, and Qwest supports this additional limitation on its potential QPAP liability. (Workshop Report on the QPAP, p. 44.) We do not believe it is the role of the QPAP to set a price on noncompliance but to encourage it not to happen or to correct such noncompliant behavior if it occurs. Therefore, we do not believe that an arbitrary limit on escalation of payments is warranted or demonstrated to be necessary. Qwest has argued, testified and shown us documentary evidence that it is either meeting its performance indicators or working hard to do so in the future. If this is true, the likelihood of payments under the QPAP is relatively low and should be considered by Qwest as a manageable financial risk largely under its own control. Additionally, we have not been provided with cogent reasons why there should be a limit on the escalation of payments or that a limit of six months is somehow compelled by the facts of the case. We therefore will allow the escalation of QPAP payments without a time limit.

10. The Workshop Report on the QPAP advocates that payment levels should de-escalate after a certain period of corrected performance. The argument seems to be that lowering payment levels should be considered a reward for good behavior by Qwest. We disagree. The actual reward for good behavior should be not having to make payments under the QPAP because Qwest’s performance complies with it. The idea of encouraging good behavior and then lessening the payment for bad behavior as a reward for an interim period of good behavior is a perverse incentive. We therefore decide that escalated penalties should be “sticky.” That is, once a payment has escalated to a level at which Qwest complies with a provision of the QPAP, that particular payment should remain at that level. Again, compliance should be rewarded and this is the better way to encourage this

behavior. The QPAP should not lend itself to a “cost-benefit” analysis under which the price of noncompliance might be weighed and found by Qwest to be an acceptable cost of doing business.

11. It is possible that litigation between Qwest and a local service competitor could arise if problems could not be otherwise resolved under the QPAP or the SGAT. The QPAP draft removes the ability of a competitor to go into court and sue Qwest for contract damages or damages that could be proven under a contractual theory of liability. It would force the competitor to elect the QPAP as a “liquidated damages” remedy. It would be a mistake to consider the QPAP or the SGAT in general as a simple contract; and it would be a further mistake to require simple precepts of general contract law to limit its effectiveness. The QPAP is a document based on the requirements of federal telecommunications law, and its formation is driven not by a mutual desire to engage in local exchange telecommunications service competition but by the legal requirement that Qwest’s local markets be fairly opened to competition. Qwest’s goal is not simply to open its local markets but to be allowed into the lucrative in-region interLATA originating long distance market now denied to it by law. Thus the analysis of this case and the QPAP has public policy and public interest dimensions beyond simple contract law. None of the parties to either the Wyoming or the multi-state proceeding could produce evidence showing that there could not be instances in which the QPAP might be an inadequate remedy for unfair, anticompetitive or monopolistic behavior by Qwest. We also do not believe that we, or any of the parties, can foretell the future with sufficient accuracy to say that the QPAP is now a perfect remedy and that it suffices in all cases. Therefore, we will not allow the QPAP to limit the ability of a competitor to go into court on *any* theory of liability or with regard to any element of damages. The avenues to recovery should be open for Qwest and its competitors. Even though QPAP payments should suffice to compensate CLECs, there may be instances in which poor performance by Qwest causes unusually high losses by competitive local exchange carriers. The QPAP and the SGAT should allow CLECs to recover these losses through court action if there is a valid cause of action.

12. We agree with the FCC that the QPAP should be “a self executing mechanism that does not open the door unreasonably to litigation and appeal.” This is one of the reasons for our conclusions on payments as stated above. However, we also do not want the QPAP to become simply a profit source for potential competitors. Double recovery, under the QPAP and in court, should not be allowed to happen. Therefore, Qwest should be able to offset against any ordered award any sum it proves to the tribunal to be a valid offset of QPAP payments directly related to the subject matter of the proceeding.

13. The QPAP wisely provides that it should be reviewed every six months but less wisely restricts the issues which can be discussed and least wisely gives

Qwest the power to veto any changes. Our directions in this order make adequate provision for the initial functioning of the QPAP, but we realize that there is much that cannot be known about the future behavior of the dynamic and volatile telecommunications markets. Qwest's reaction to this problem was, *inter alia*, to place limits on its liability and give itself veto power over changes in the QPAP. We do not believe that this is the best course of action. The Commission has only the public interest to look after and is not a partisan force in the process. We have also developed considerable familiarity and experience with the issues so ably presented by the parties to the Wyoming and multi-state Section 271 process. The better model for modification of the QPAP is a proceeding before the Commission which preserves the due process and other rights of the parties and retains the Commission's ability to act in the public interest regarding this document. Reviews of the plan should be made by the Commission in light of Wyoming-specific issues and the subjects which may be addressed should not be circumscribed. This will function as a protection for all parties. For example, if it appears later that competitive local exchange carriers are abusing Qwest under the QPAP or that limits should, *in the light of actual Wyoming experience*, be placed on Qwest's potential obligations, this can be done at that later time. Review should be periodic and the six month interval suffices, but parties should be able to come before the Commission at any time if a serious problem arises. At once, this answers the question of whether Qwest should have to endure unbearable burdens under the QPAP and the question posed by the Consumer Advocate Staff regarding how to plan for a competitive future with so many unknowns and a lack of a Qwest track record on the subject. This ability to bring the document back before the Commission for public proceedings to reform it, in whole or in part, will also help to adjust for situations unique to the Wyoming market, the availability of technological solutions to problems or otherwise in which a lack of performance by Qwest should not be penalized at all because the company is not at fault. This is the type of protection that should be afforded rather than allowing the document to be inflexible. We do not believe that it would be realistic for Qwest to be required to develop a track record before it moves into its desired long distance market, but we also believe that we must therefore make adequate provision so that the QPAP remains a viable tool for the fair encouragement of local service competition -- goals shared by the federal Act and the Wyoming Telecommunications Act of 1995.

14. Because the QPAP is designed to promote good behavior by Qwest in its local markets as the quid pro quo for allowing it to enter the in-region interLATA originating long distance market, we do not believe that it should go into effect until Qwest obtains this authority from the FCC.

The Public Interest

15. 47 U.S.C. § 271(d)(3) lists the findings which the FCC would have to make in order to grant Qwest's request for Section 271 relief once it is filed. 47

U.S.C. § 271(d)(3)(C) requires a finding that “the requested authorization is consistent with the public convenience and necessity.” Because this criterion is stated separately from the Section 271 competitive checklist and the other specific things Qwest must prove under the federal Act, it must therefore be read as a separate requirement. We agree with the FCC that this public interest criterion allows a general review of all of the facts and circumstances in the case to see whether the intent that local markets be fairly opened to competition is likely to be frustrated. Qwest does not, in our opinion, have the burden of raising and disproving every possible problem imaginable. Their burden is to provide the demonstrations required by the federal Act, but they need only to rebut any allegations by others as to special problems or circumstances which might warrant not granting the recommendation sought by Qwest here. In general, we agree with the comments of the Consultant in the Workshop Report that Qwest has satisfied the generalized public interest requirement of the federal Act; but this agreement is conditional. It is based in part on the existence of a QPAP consistent with our findings and conclusions above. Our agreement on the public interest issue is also conditioned on a satisfactory showing in the Regional Oversight Committee’s independent Operational Support System test and the emergence therefrom of Performance Indicator Definitions (PIDs) satisfactorily identifying and covering the necessary performance by Qwest to show that there are “clearly articulated and predetermined measures and standards encompassing a range of carrier-to-carrier performance.”

16. Regarding the public interest issues concerning Unbundled Network Element (UNE) prices and intrastate access charges brought up by the Workshop Report on public interest issues, we agree with the Report that these issues are best left to the states. We also note that the pricing provisions of the Wyoming Telecommunications Act of 1995 have mooted, in Wyoming and at least for the time being, many of the questions raised about overpriced access and the unrealistic relationship of UNE prices to local service prices which exist in some other states.

Further Proceeding on Group 5A Issues

17. The changes which we have directed hereinabove require numerous revisions to various parts of the QPAP to comply with our directives and to remove language rendered superfluous. We will not therefore try to rewrite the QPAP but direct that Qwest do so, starting with its November 6, 2001, draft version of the “Exhibit K” QPAP, and incorporating all of the changes required by this order. Qwest shall thereafter file the revised QPAP with the Commission and serve copies on all parties to the Wyoming proceeding on or before February 28, 2002. With this filing it must also submit conforming changes necessary to bring the SGAT into harmony with the revised QPAP. The Commission will thereafter hold a public hearing on the revised QPAP beginning at 9:00 a.m. on Monday, March 18, 2002, at its hearing room at 2515 Warren Avenue, Suite 300, Cheyenne, Wyoming.

18. Our findings and conclusions hereinabove are supported by the substantial evidence in the record of this proceeding, including evidence adduced in the multi-state proceeding.

NOW THEREFORE, IT IS HEREBY ORDERED THAT:

1. Qwest shall promptly file a changed QPAP conforming to the directives hereinabove and the same shall be considered in public hearing, all at the times appointed hereinabove.

2. Conditioned on the development of a conforming QPAP, proper PIDs and the successful completion of the ROC OSS test, the Commission recommends that Qwest has satisfied the general public interest criteria as described hereinabove.

3. This order is effective immediately.

MADE and ENTERED at Cheyenne, Wyoming, on January 30, 2002.

PUBLIC SERVICE COMMISSION OF WYOMING

STEVE ELLENBECKER, Chairman

STEVE FURTNEY, Deputy Chair

(SEAL)
Attest:

KRISTIN H. LEE, Commissioner

STEPHEN G. OXLEY, Secretary and Chief Counsel