

BEFORE THE NEBRASKA PUBLIC SERVICE COMMISSION

In the Matter of Qwest) Application No. C-1830
Corporation, filing its notice)
of intention to file its Section)
271(c) application with the FCC) MOTION FOR REHEARING
and request for the Commission) GRANTED IN PART, DENIED IN
to verify compliance with) PART
Section 271(c).)
) Entered: May 29, 2002

APPEARANCES:

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BY THE COMMISSION:

On April 23, 2002, this Commission entered its initial order finding that Qwest's Performance Assurance Plan (QPAP) was "Approved in Part." (QPAP order.) Subsequently, Qwest Corporation (Qwest) filed a Motion For Rehearing of QPAP Recommendations on May 6, 2002. The Commission heard oral arguments on Qwest's Motion on May 22, 2002, with appearances as shown above.

This order addresses the Motion For Rehearing filed by Qwest with respect to this Commission's April 23, 2002, order, which addressed the adequacy of the QPAP filed in Nebraska. Four competitive local exchange carriers (CLECs) submitted a joint response to Qwest's motion.

For the reasons set forth below, the Commission has determined that rehearing was warranted and modifies its QPAP order accordingly.

O P I N I O N A N D F I N D I N G S

Exclusivity/Offset

In its original QPAP order, the Commission rejected the language of Sections 13.6 and 13.7 of Qwest's proposed QPAP, stating that it "differs from the Federal Communications Commission (FCC) mandate, as well as the Texas Plan." (Order, paragraph 20.) In place of the multi-state facilitator's recommended election language for Section 13.6, the Commission included language that AT&T alleged was from the Colorado Performance Assurance Plan (CPAP) and which related to the treatment of Tier 1 payments as liquidated damages. In place of Qwest's proposed Section 13.7, the Commission included language from the SBC Texas plan addressing offsets.

In Qwest's Motion for Rehearing, Qwest raised an objection to the Commission's recommended language in Section 13.6, asserting that the Commission's proposed Section 13.6 did not accurately or fully reflect key aspects of the Colorado provision and was inconsistent with the existing Section 13.5 of the Nebraska order, which specifies that Tier 1 payments are to be treated as liquidated damages and which is identical to the same provision in numerous other FCC approved plans. Qwest also objected to the ordered Section 13.6 because it eliminated any requirement that the CLEC elect between duplicative standards and remedies. Furthermore, Qwest objected to the Commission's revisions to Section 13.7 on the basis of its belief that language recommended by the multi-state facilitator was consistent, if not the same as the Texas plan.

Following the Commission's hearing on Qwest's Motion for Rehearing, AT&T made a post-hearing filing with this Commission stating that as to these sections of the QPAP referenced above,

"the Washington language is completely acceptable to AT&T. The same holds true with the Colorado language . . ."¹

Upon review of its order, the Commission agrees that the language originally ordered for paragraphs 13.6 and 13.7, is not a full and accurate excerpt from the Colorado CPAP. The Washington Commission in its order on Qwest's petition for reconsideration² picked out the corresponding Colorado provisions, which the parties agreed were acceptable. Qwest has apparently filed a compliance filing in Washington that includes in the QPAP, language, as ordered by the Washington Commission and based upon the CPAP, which addresses these issues.

In light of Qwest's and AT&T's acceptance of such language, the Commission finds this the most acceptable resolution to this issue. This Commission likewise directs Qwest to incorporate language similar to what Washington ordered based on the Colorado provisions for Sections 13.6, 13.6.1, 13.6.2 and 13.7, rather than the Sections 13.6 and 13.7 previously ordered by this Commission.

As such, Qwest shall incorporate the following modifications to its revised QPAP:

13.6

This PAP contains a comprehensive set of performance submeasures, statistical methodologies and payment mechanisms that are designed to function together, and only together, as an integrated whole. To elect the PAP, CLEC must adopt the PAP in its entirety, into its interconnection agreement with Qwest in lieu of other alternative standards or relief, except as stated in Sections 13.6.1, 13.6.2, and 13.7.

13.6.1

In electing the PAP, CLEC shall surrender any rights to remedies under state wholesale service quality rules or under any interconnection agreement designed to provide such monetary relief for the same performance issues addressed by the PAP. The PAP shall not limit either non-contractual legal or non-contractual regulatory remedies that may be available to CLEC.

¹ AT&T's RESPONSE TO QWEST'S SUPPLEMENTAL AUTHORITY ON ITS MOTION FOR REHEARING, FILED IN APPLICATION C-1830, MAY 28, 2002.

² 33RD SUPPLEMENTAL ORDER; ORDER DENYING IN PART, AND GRANTING IN PART, QWEST'S PETITION FOR RECONSIDERATION OF THE 30TH SUPPLEMENTAL ORDER, COMMISSION ORDER ADDRESSING QWEST'S PERFORMANCE ASSURANCE PLAN, May 20, 2002.

13.6.2

Tier 1 payments to CLECs are in the nature of liquidated damages. Before CLEC shall be able to file an action seeking contract damages that flow from an alleged failure to perform in an area specifically measured and regulated by the PAP, CLEC must first seek permission from the Nebraska Public Service Commission. This permission shall be granted only if CLEC can present a reasonable theory of damages for the non-conforming performance at issue and evidence of real world economic harm that, as applied over the preceding six months, establishes that the actual payments collected for non-conforming performance in the relevant area do not redress the extent of the competitive harm. If CLEC can make this showing, it shall be permitted to proceed with this action. Any damages awarded through this action shall be offset with payments made under this PAP. If the CLEC cannot make this showing, the action shall be barred. To the extent that CLEC's contract action relates to an area of performance not addressed by the PAP, no such procedural requirement shall apply.

13.7

If for any reason CLEC agreeing to this PAP is awarded compensation for the same harm for which it received payments under the PAP, the court or other adjudicatory body, hearing such claim may offset the damages resulting from such claim against payments made for the same harm. Only that relevant finder of fact, and not Qwest in its discretion, can judge what amount, if any, of PAP payments should be offset from any judgment for a CLEC in a related action.

Tier 2 Escalation

In the Commission's April 23, 2002, QPAP order, the Commission determined that it was appropriate to "take the issue of escalation one step further," by initially recommending unlimited escalation for Tier 2 payments. (Order, paragraph 38.) However, in Qwest's Motion For Rehearing, Qwest noted that Tier 2 payments under the Texas plan do not escalate, nor do they escalate under any other SBC Performance Assurance Plans (PAPs) approved by the FCC.

While this argument alone does not persuade the Nebraska Commission, testimony related to the significant potential financial impact on Qwest of such unlimited escalation does raise concern. Therefore, in light of these arguments, the Commission is of the opinion that such escalation should be capped at six months.

Sticky Duration

The Commission also modifies its decision by eliminating the requirement of "modified sticky duration." As Qwest noted, the FCC has repeatedly approved plans submitted by SBC that permit much more accelerated de-escalation of monthly payment levels following months of compliance.

Upon reconsideration, the Commission does believe that such "sticky duration" could ignore, at least in part, certain levels of successful performance by Qwest. Therefore, as long as the Commission retains the ability to review and make changes to the QPAP, the Commission is willing to strike the modified sticky duration requirement.

The Commission remains firm in its belief that the FCC recognizes that the Nebraska Commission must be allowed to create a PAP that ultimately varies in its strengths and weaknesses as a tool for post-section 271 authority monitoring and enforcement.³ By limiting Tier 2 escalation and removing "sticky duration", in our opinion, this order reflects that appropriate balance.

In light of the size, character, composition and physical distribution of Nebraska's telecommunications markets, as well as the level of cost of providing service in our state, a QPAP for Nebraska can clearly be different from other states. The Nebraska Commission has a legitimate basis for the additional requirements that have been set forth, as it is acting in a manner consistent with the pro-competitive and public interest intent of the Federal Telecommunications Act of 1996, the FCC and Nebraska law.

Finally, the Commission reiterates that it is in the public interest to assure that the Commission has the ultimate authority to determine if and when changes should be made to the QPAP.

³ SEE VERIZON PENNSYLVANIA ORDER, FCC 01-029, RELEASED SEPT. 19, 2001, PARAGRAPH 128.

Therefore, the Commission reemphasizes that it reserves the right to initiate a proceeding regarding the QPAP at any time. While the normal review should be periodic and the six-month interval will generally suffice, parties must be able to raise serious issues before the Commission at any time. The Commission will decide if such issue needs to be immediately addressed or if it should be considered at the next six-month review.

In regards to all other aspects of Qwest's Motion for Rehearing, Qwest's motion is denied. Qwest is hereby directed to make the revisions set forth in the Commission's initial QPAP order, dated April 23, 2002, except as modified above.

C O N C L U S I O N

IT IS THEREFORE ORDERED by the Nebraska Public Service Commission that Qwest shall make the revisions set forth in the Commission's initial QPAP order, dated April 23, 2002, except as modified above, and file such with the Commission on or before June 4, 2002.

IT IS FINALLY ORDERED that once compliance is achieved, the Commission will recommend to the FCC that the revised QPAP satisfies the public interest for the citizens of Nebraska.

MADE AND ENTERED at Lincoln, Nebraska, this 29th day of May, 2002.

NEBRASKA PUBLIC SERVICE COMMISSION

COMMISSIONERS CONCURRING:

Chair

ATTEST:

Executive Director