

**BEFORE THE NEW MEXICO PUBLIC REGULATION COMMISSION**

IN THE MATTER OF THE DEVELOPMENT )  
OF AN ALTERNATIVE FORM OF )  
REGULATION PLAN FOR QWEST )  
CORPORATION. )  
\_\_\_\_\_ )

Case No. 05-00466-UT

**FINAL ORDER ON PRICING AND QUALITY OF SERVICE**

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**THIS MATTER** comes before the New Mexico Public Regulation Commission (“Commission”) pursuant to its authority under the New Mexico Telecommunications Act, NMSA 1978, § 63-9A-1, *et seq.*, and other applicable law, to develop and adopt an Alternative Form of Regulation (“AFOR”) for Qwest Corporation (“Qwest”). Public hearings in this matter were conducted by the Commission beginning on April 17, 2006. The Commission, having considered all of the evidence admitted from the hearings, the record and the pleadings in this case, and arguments of counsel, and being fully apprised of the premises, adopts the following as its *Final Order on Pricing and Quality of Service* in this proceeding.

#### **I. STATEMENT OF THE CASE**

1. On November 29, 2005, following the Notice of Inquiry issued on November 8, 2005 in Case No. 05-00437-UT, the Commission issued its *Order Closing Case No. 05-00437-UT and Docketing Case No. 05-00466-UT*, “for the purpose of developing, through an adjudicated case, an AFOR for Qwest to apply after expiration of Qwest’s current AFOR.”

2. In that Order, the Commission appointed James C. Martin as Hearing Examiner, with authority limited to procedural and discovery matters. On December 2, 2005, Hearing Examiner Martin issued an Order Scheduling Pre-Hearing Conference, to be held on December 20, 2005.

3. On December 12, 2005, Qwest filed a Motion for Admission *Pro Hac Vice* of George Baker Thomson, Jr.

4. On December 13, 2005, Hearing Examiner Martin issued an Order Rescheduling Pre-Hearing Conference, to be held on December 20, 2005 at 1:30 p.m.

5. On December 13, 2005, the Commission, *sua sponte*, issued a Notice of Work Session, placing this case on the agenda of December 20, 2005, “for a discussion between interested persons and the Commission on the scope and timing of this case.”

6. On December 29, 2005, Hearing Examiner Martin issued an Order on Motion to Appear *Pro Hac Vice*.

7. On December 29, 2005, Hearing Examiner Martin issued a Notice and Procedural Order. In the Order, Qwest and Commission Staff (“Staff”) were deemed to be parties to the case. The Order set forth provisions for publication, intervention, and public hearing. Qwest was directed to file its proposed AFOR, with supporting testimony, by January 25, 2006. Staff and Intervenors were given until February 22, 2006, to submit modifications or alternative AFORs, with supporting testimony. All parties were to file modified AFORs and/or testimony in response by March 29, 2006.

8. On December 29, Staff filed its Motion for Clarification of Scope, Expedited Response to Discovery and Expedited Relief.

9. On January 5, 2006, the New Mexico Attorney General (“AG”) filed a Motion for Leave to Intervene and Request for Discovery.

10. On January 9, 2006, Qwest filed a Motion for Protective Order.

11. On January 9, 2006, the General Services Department of the State of New Mexico (“GSD”) filed a Motion to Intervene.

12. On January 11, 2006, Qwest filed its Response to Staff Motion for Clarification of Scope, Expedited Response to Discovery and Expedited Relief.

13. On January 18, 2006, Qwest filed an Affidavit of Publication in The Albuquerque Journal.

14. On January 19, 2006, the Commission issued its Order Clarifying Scope of Discovery.

15. On January 20, 2006, Citizens for Integrity and Transparency in Utility Matters (“CITUM”) filed a Motion for Leave to Intervene and Request for Discovery.

16. On January 23, 2006, the City of Albuquerque filed a Motion to Intervene and Request for Discovery Documents.

17. On January 24, 2006, the Hearing Examiner issued a Protective Order.

18. On January 24, 2006, the United States Department of Defense and All Other Federal Executive Agencies (“DoD/FEA”) filed a Request to be Added to the Official Service List.

19. On January 25, 2006, Qwest filed the Direct Testimonies of David L. Teitzel and Michael Horcasitas.

20. On January 30, 2006, the Hearing Examiner issued an Order on Staff’s Request for Expedited Responses.

21. On February 1, 2006, Qwest filed Qwest Corporation’s Motion to Temporarily Stay Discovery and Proceedings in Cases Number 05-00094-UT & 05-00466-UT.

22. On February 10, 2006, GSD filed its Opposition to Qwest Corporation’s Motion to Temporarily Stay Discovery and Proceedings in Cases Number 05-00094-UT & 05-00466-UT.

23. On February 14, 2006, the AG filed its Opposition to Qwest’s Motion to Temporarily Stay Discovery and Proceedings in Cases Number 05-00094-UT & 05-00466-UT.

24. On February 14, 2006, Staff filed its Opposition to Qwest’s Motion to Temporarily Stay Discovery and Proceedings in Cases Number 05-00094-UT & 05-00466-UT.

25. On February 14, 2006, Staff filed its Motion to Compel and Permit Supplemental Testimony.

26. On February 21, 2006, Staff filed its Motion for Extension of Time.

27. On February 22, 2006, the Hearing Examiner issued an Order on Motion for Extension of Time.

28. On February 24, 2006, Staff filed its Identification of Witnesses for Staff's Direct Testimony and Motion to Excuse Filing of Prefiled Written Testimony.

29. On February 24, 2006, Qwest filed its Response to Staff Motion to Compel and Permit Supplemental Testimony, and Request to File Out of Time.

30. On February 24, 2006, the AG filed the Direct Testimony of Timothy J. Gates.

31. On February 24, 2006, GSD filed the AFOR Responsive Testimony of John J. Martinez.

32. On February 24, 2006, Staff filed the Direct Testimonies of Susan Oberlander, Michael S. Ripperger and Chandan Choudhary.

33. On February 27, 2006, Staff filed its Motion for Interim AFOR.

34. On March 7, 2006, the Commission issued its Interim Order Extending AFOR.

35. On March 7, 2006, the Commission issued its Order Denying Qwest Corporation's Motion to Temporarily Stay Discovery and Proceedings in Cases Number 05-00094-UT & 05-00466-UT.

36. On March 10, 2006, Staff filed its Notices of Deposition for Balan Nair, Jack Bartlett and Robert Tregemba.

37. On March 14, 2006, the Commission issued its Order Establishing Interim AFOR.

38. On March 14, 2006, Staff filed its Motion to Compel Depositions and Related Requests for Production of Documents.

39. On March 14, 2006, the Commission held a hearing on Staff's Motion for Interim AFOR.

40. On March 15, 2006, the Hearing Examiner issued an Order on Motion to Compel, Etc. and an Order on Request for Expedited Response.

41. On March 20, 2006, Qwest Corporation filed its Response to Order on Motion to Compel, Etc.

42. On March 20, 2006, Qwest Corporation filed its Motion for Protective Order and Brief Regarding Noticed Depositions of Qwest Employees Nair, Tregemba and Bartlett, and its Amended Motion for Protective Order and Brief Regarding Noticed Depositions of Qwest Employees Nair, Tregemba and Bartlett.

43. On March 20, 2006, Qwest Corporation filed its Motion to Permit Interlocutory Appeal.

44. On March 21, 2006, the Hearing Examiner issued an e-mail Order allowing responses to Qwest's Motion for Protective Order.

45. On March 23, 2006, Staff filed its Response to Qwest's Amended Motion for Protective Order and Brief Regarding Depositions of Qwest Employees Nair, Tregemba and Bartlett.

46. On March 23, 2006, the AG filed its Response to Qwest's Amended Motion for Protective Order and Brief Regarding Depositions of Qwest Employees Nair, Tregemba and Bartlett.

47. On March 28, 2006, Staff filed its Response to Qwest Corporation's Motion to Permit Interlocutory Appeal.

48. On March 30, 2006, the Hearing Examiner issued an Order on Motion to Compel and Motion for Protective Order.

49. On March 31, 2006, Qwest filed the Response Testimonies of David L. Teitzel, Michael Horcasitas, M. Lynn Norsworthy, Rachel Torrence, Mary Ferguson LaFave and Michael G. Williams.

50. On March 31, 2006, Staff filed the Response Testimonies of Susan Oberlander, Michael S. Ripperger and Chandan Choudhary.

51. On March 31, 2006, the AG filed Rebuttal Testimonies of Timothy J. Gates and Sidney L. Morrison.

52. On April 3, 2006, Staff filed its First Amended Notices of Depositions of Balan Nair, Jack Bartlett and Robert Tregemba.

53. On April 3, 2006, Qwest Corporation filed its Motion to Permit Interlocutory Appeal and Designation of Proposed Alternate Deponent.

54. On April 4, 2006, Staff filed its Response to Qwest Corporation's Motion to Permit Interlocutory Appeal and Designation of Proposed Alternate Deponent.

55. On April 4, 2006, the Hearing Examiner issued a Minute Order and Errata to Minute Order.

56. On April 4, 2006, the Commission issued an Order Setting Status and Prehearing Conference.

57. On April 5, 2006, Qwest Corporation filed its Motion in the Alternative to Strike the Testimony of Sidney L. Morrison or Extend the Procedural Schedule.



58. On April 6, 2006, Qwest filed its Motions to Strike Portions of the Direct and Rebuttal Testimonies of Timothy J. Gates.

59. On April 6, 2006, Qwest filed its Motion for Leave to Supplement Response Testimony of David L. Teitzel.

60. On April 10, 2006, Qwest Corporation filed its Response to Order Setting Status and Prehearing Conference.

61. On April 10, 2006, Qwest filed a Motion to Strike Testimony.

62. On April 12, 2006, Staff filed its Response to Order Setting Status and Prehearing Conference.

63. On April 13, 2006, Qwest filed its Motion for Rehearing of Order Establishing Interim AFOR.

64. On April 14, 2006, the AG filed its Combined Opposition to Qwest's Motions to Strike Testimony of Mr. Morrison and Mr. Gates.

65. On April 14, 2006, GSD filed its Pre-Hearing Conference Statement.

66. The Commission, sitting *en banc*, held public hearings in this matter on April 17, 18, 19 and 20, 2006, receiving public comment at the commencement of each day's hearing. Ms. Margaret Caffey-Moquin, Associate General Counsel, advised the Commission.

67. Commenters included Mr. Warren Salomon of AARP, Mr. Milo Chavez of Pojoaque Pueblo, Sandoval County Commissioner Don Leonard, Colfax County Commissioner William H. Conley and Jaime Flores for Mescalero Apache Telecom, Inc.

68. Appearances for the parties were as follows:

George Baker Thomson, Jr., Esq.  
Qwest Corporation, and  
Thomas W. Olson, Esq.  
Montgomery & Andrews, P.A,

Qwest;

Brian Harris, Esq.	AG;
David Mittle, Esq.	CITUM;
Richard H. Levin, Esq.	GSD;
Carolyn S. Fudge, Esq.	City of Albuquerque; and
Roy E. Stephenson, Esq.	
Joan T. Ellis, Esq.	
Ashley C. Schannauer, Esq.	Staff.

69. The following witnesses presented pre-filed testimony and were cross-examined at the hearing:

Qwest	David L. Teitzel Michael Horcasitas M. Lynn Norsworthy Rachel Torrence Mary Ferguson LaFave Michael G. Williams
AG	Timothy J. Gates Sidney L. Morrison
GSD	John J. Martinez
Staff	Susan Oberlander Michael S. Ripperger Chandan Choudhary

70. In addition to the witnesses who had submitted pre-filed testimony, Staff offered into evidence the deposition transcripts, and exhibits thereto, of certain Qwest employees. Three of these had been taken in Case No. 5-00094-UT, namely the depositions of Billie Whitlow, Sarah Nicholls and Chris Brown. Three other employees had been deposed in this docket, namely Balan Nair, Robert Tregemba and Jack Bartlett.

71. On April 26, 2006, the Commission issued an Order Extending Time to File Responses and Extending Time for Commission Decision.

72. On May 3, 2006, GSD filed its Response to Commission Bench Request.

73. On May 4, 2006, the AG filed its Response to Quality of Service Bench Request.

74. On May 4, 2006, Staff filed its Response to Bench Request.

75. On May 5, 2006, Staff filed its Response to Qwest's Motion for Rehearing of Order Establishing Interim AFOR.

76. On May 5, 2006, GSD filed its Response to Qwest's Motion for Rehearing of Order Establishing Interim AFOR.

77. On May 5, 2006, the AG filed its Motion in Opposition to Qwest's Motion for Rehearing of Order Establishing Interim AFOR.<sup>1</sup>

78. On May 5, 2006, Qwest Corporation filed its Responses to Bench Requests.

79. On May 11, 2006, the Commission issued a Procedural Order regarding the Rural Extension Fund.

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<sup>1</sup> Pursuant to 17.1.2.39.F.4 NMAC, Qwest's Motion for Rehearing of Order Establishing Interim AFOR is deemed denied by operation of law.

## **II. INTRODUCTION**

Pursuant to the Commission's authority under the New Mexico Telecommunications Act, NMSA 1978, § 63-9A-1, *et seq.*, and other applicable law, specifically including NMSA 1978, §§63-9A-2, 63-9A-8.2 and 63-9A-8.3, we develop and adopt, through this Order, an Alternative Form of Regulation ("AFOR") for Qwest Corporation ("Qwest") that covers pricing provisions and quality of service ("QOS") standards; accordingly, we refer as appropriate in this Order to the "*AFOR II Pricing and Quality of Service Plan.*"

### **A. Background**

In our first AFOR case, Utility Case Nos. 3215, *et al.*, we adopted and approved a Stipulation among Qwest and most of the other parties to that case that set out the first AFOR Plan designed specifically for Qwest. On March 8, 2001, we issued our Final Order in that case, giving rise to "AFOR I."

We find it appropriate to engage in a brief recital of the events emanating from AFOR I, observing, as we have had prior occasion to observe, that a regulatory instrument contemplates interpreting that instrument in light of the circumstances giving rise to it. *See* Case 04-00237-UT, *Final Order*, issued on April 14, 2005, at p. 30. As the parties in this proceeding are well aware, at the end of Period 2 of AFOR I, the Commission's Utility Division Staff ("Staff") expressed concern about an apparent decline to pre-AFOR levels in Qwest's reported New Mexico infrastructure investment levels. We issued our *Order Commencing Investigation* on July 15, 2004, opening a new docket in Case No. 04-00237-UT to investigate whether Qwest was and would remain in compliance with its AFOR I obligations, and to consider what remedial measures would be necessary in order to ensure compliance through the entire term of AFOR I. In that proceeding, the Commission determined that a new incentive was necessary to encourage

Qwest to comply with its investment obligations under AFOR I, and that Qwest would likely be deficient in its investment obligations in the amount of approximately \$220 million by the end of AFOR I.<sup>2</sup>

The Commission found and concluded in Case No. 04-00237-UT that, for Period 4, it would consider whether credits or refunds should be required, and that it would require credits or refunds pertaining to Period 5 if the AFOR requirements were not met at the close of the 5-year life of the AFOR I Plan. Qwest appealed our order, which was affirmed in its entirety by the New Mexico Supreme Court on June 29, 2006. On September 19, 2006, the Supreme Court rejected Qwest's motion for rehearing on its merits.

On November 29, 2005, we instituted this proceeding ("AFOR II") by issuing our *Order Closing Case No. 05-00437-UT and Docketing Case No. 05-00466-UT*, "for the purpose of developing, through an adjudicated case, an AFOR for Qwest to apply after expiration of Qwest's current AFOR." During the pendency of this proceeding, we found it necessary to establish an "Interim AFOR" for Qwest. *See, Interim Order Extending AFOR*, issued on March 7, 2006; and *Order Establishing Interim AFOR*, issued on March 14, 2006; *see also, Statement of the Case*, herein, at ¶¶ 34, 37, 39, 63, 75-77.

### **B. Scope of this Order**

In this AFOR II proceeding, the Commission has before it for consideration pricing proposals encompassing pricing, quality of service, investment in infrastructure, and deployment of advanced services that have been submitted in varying degrees of comprehensiveness by the parties. In this Order, the Commission addresses only the pricing and QOS provisions of AFOR

<sup>2</sup> In addition, the Commission opened a separate docket in Case No. 05-00094-UT for implementation and enforcement of its decision in the Case No. 04-00237-UT, and for the consideration of remaining or ongoing AFOR I issues, including how credits or refunds should be determined and passed on to Qwest's customers. A final order in Phase I of that case is now pending.

II, reserving for a later time our decision regarding the investment requirements applicable to AFOR II, and any enforcement standards applicable to those requirements.

**C. Statement of Jurisdiction**

The Commission undertakes this proceeding pursuant to its authority under the New Mexico Telecommunications Act, NMSA 1978, § 63-9A-1, *et seq.*, and other applicable law, to develop and adopt a second Alternative Form of Regulation (“AFOR”) plan for Qwest Corporation (“Qwest”). The Commission is a constitutionally created administrative body with broad regulatory powers over telecommunications carriers:

The commission shall have responsibility for regulating public utilities, including electric, natural gas and water companies; transportation companies, including common and contract carriers; transmission and pipeline companies, including telephone, telegraph and information transmission companies; insurance companies and others engaged in risk assumption; and other public service companies in such manner as the legislature shall provide.

N.M. CONST., Art. XI, § 2 [emphasis added].

The Commission is vested with exclusive jurisdiction to regulate the rates, services, and practices of telecommunications companies within the State of New Mexico. N.M. CONST., art. XI, § 2; New Mexico Telecommunications Act, NMSA 1978, § 63-9A-1, *et seq.* The New Mexico Legislature has given the Commission broad and exclusive power over telecommunications companies because of the need to protect consumers and because of the importance of reliable and affordable telecommunications service to the citizens and to the economy of the State. *See* NMSA 1978, §§ 63-9A-2, -5, and -8.2(B)(1).

The Commission “may attach to the exercise of rights granted by the certificate [of public convenience and necessity] such terms and conditions as, in its judgment, the public convenience and necessity may require or as otherwise authorized.” NMSA 1978, § 63-9A-6(C). Qwest is a Colorado corporation that provides telecommunications services, including local exchange

telephone service, in areas throughout New Mexico. As such, Qwest is affected with the public interest (NMSA 1978, § 63-9A-5), and is subject to regulation by this Commission pursuant to N.M. CONST., Art. XI, § 2; NMSA 1978, § 63-7-1.1, and the New Mexico Telecommunications Act, NMSA 1978, §§ 63-9A-1, *et seq.*

As noted above, this proceeding is the second Qwest AFOR case to be undertaken under the specific authority granted to this Commission by the New Mexico Legislature through its enactment of House Bill 400. House Bill 400 amended the New Mexico Telecommunications Act, in part by directing the Commission to “eliminate rate of return regulation of incumbent telecommunications carriers with more than 50,000 access lines and implement an *alternative form of regulation* that includes reasonable price caps for basic residence and business local exchange services.”<sup>3</sup> NMSA 1978, § 63-9A-8.2(C) [emph. added].

#### **D. Authority to Impose Quality of Service Standards**

Throughout these proceedings, Qwest and the other parties have been in fundamental disagreement concerning the proper application of NMSA 1978, § 63-9A-8.2, which governs this proceeding. We should therefore examine and consider the legal arguments of the parties concerning our jurisdiction in this proceeding. For ease of reference, the statute is set forth in full below:

- A. No later than December 31, 2000, the commission shall review existing rates for public telecommunications services offered by incumbent local exchange carriers with more than fifty thousand access lines and identify all subsidies that are included in the rates. The commission shall issue rules requiring that the identified subsidies appear on customer bills and establish a schedule not later than April 1, 2001 whereby implicit subsidies be eliminated through implementation of the state rural universal service fund or through revenue-

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<sup>3</sup> HB 400 was enacted as NM Laws 2000, Chapter 102, and is now codified as NMSA 1978, §§63-9A-2, 63-9A-8.2 and 63-9A-8.3.

neutral rate rebalancing or any other method consistent with the intent of the New Mexico Telecommunications Act.

- B. No later than January 1, 2001, the commission shall adopt rules that:
- (1) establish consumer protection and quality-of-service standards;
  - (2) ensure adequate investment in the telecommunications infrastructure in both urban and rural areas of the state;
  - (3) promote availability and deployment of high-speed data services in both urban and rural areas of the state;
  - (4) ensure the accessibility of interconnection by competitive local exchange carriers in both urban and rural areas of the state; and
  - (5) establish an expedited regulatory process for considering matters related to telecommunications services that are pending before the commission.
- C. No later than April 1, 2001, but in no case prior to the adoption of the rules required in Subsection B of this section, the commission shall eliminate rate of return regulation of incumbent telecommunications carriers with more than fifty thousand access lines and implement an alternative form of regulation that includes reasonable price caps for basic residence and business local exchange services.

Qwest argues in favor of a spartan interpretation of the statute that would limit the Commission's AFOR II authority to setting price caps for basic residence and business local exchange services. According to Qwest's construction of the statute, "...the Commission lacks the statutory authority to impose quality of service and investment requirements in an AFOR plan." *BIC*, p. 10. Qwest goes even further, arguing, "...the Commission lacks the statutory authority to impose an AFOR on Qwest." *Horcasitas Direct Testimony*, p. 3. For the reasons discussed below, we conclude that Qwest's narrow interpretation concerning our authority is erroneous as a matter of law.

Staff, GSD, and the AG all assert that Qwest's statutory construction and interpretation is both overly narrow and incorrect. According to the Staff, GSD, and the AG, the Commission has broad discretion under the statute to determine what proposals may be lawfully entertained for inclusion in the AFOR, provided such proposals are supported by substantial evidence and



are demonstrably in the public interest. The Staff, GSD, and the AG argue that the Legislature has furnished the Commission with two sources of authority concerning the imposition of quality of service requirements: NMSA 1978, § 63-9A-8.2(C), which provides broad authority over the review and approval of AFOR plans, and § 63-9A-8.2(B)(1), which directs the Commission to adopt rules containing consumer protection and quality of service standards. *See, e.g.*, GSD Reply Brief, p. 5.

The Staff, GSD, and the AG point out that the language of § 63-9A-8.2(C) merely directs the Commission to *include* price caps for basic residential and business local exchange service in an alternative regulation plan; it does not command the Commission to implement an alternative regulation plan consisting *only* of price caps for basic residential and business local exchange service. The Staff, GSD, and the AG contend that, since the Legislature provided no other guidance as to what should or should not be included in an alternative form of regulation plan, the Commission must use its discretion and expertise to devise an alternative form of regulation that will advance the goals of the New Mexico Telecommunications Act and, at the same time, protect the public interest. The Staff, GSD, and the AG assert that the adoption of quality of service standards for inclusion in AFOR II falls well within the boundaries of the Commission's discretion and expertise. AG BIC, pp. 26-29; GSD BIC, pp. 4-6; Staff BIC, pp. 6-8.

The Commission's duties and obligations relating to the oversight of telecommunications activities in the state must be derived from a reading of the New Mexico Telecommunications Act as a whole, in association with other statutes that provide relevant guidance concerning the legal boundaries within which the Commission must operate in the exercise of those duties and obligations.

Moreover, as the Staff, GSD, and the AG have pointed out, there is no language in the AFOR statute that could give rise to a reasonable inference that the alternative form of regulation mandated by the Legislature is so limited as to include only price caps on residential and business local exchange service. Nor could this Commission reasonably conclude that it was the Legislature's intent to direct us to create an alternative form of regulation for Qwest that would be devoid of standards governing the quality of the telecommunications services to be provided. To the contrary, the Legislature has declared a clear statutory purpose for the New Mexico Telecommunications Act [NMSA 1978, §§ 63-9A-1, *et seq.*], as follows:

It is the purpose of the New Mexico Telecommunications Act to permit a regulatory framework that will allow an orderly transition from a regulated telecommunications industry to a competitive market environment. It is further the intent of the legislature that the encouragement of competition in the provision of public telecommunications services will result in greater investment in the telecommunications infrastructure in the state, *improved service quality* and operations and lower prices for such services.

NMSA 1978, § 63-9A-2 [emph. added]. It is evident from the Legislature's declaration of purpose that one of the intended competitive outcomes is that service quality be improved. As is discussed in the "Pricing" section of this Order, on the record of this proceeding, the existence of "effective competition" has not been demonstrated for Qwest's New Mexico service territory. Until the existence of "effective competition" is demonstrated on a full factual record, the statutes that govern the actions of this Commission direct us to ensure that the quality of the telecommunications services provided by Qwest to its New Mexico customers is not only maintained, but is also improved. Absent reasonable quality of service standards, it would be impossible, to ensure that this outcome is achieved.

The Commission concludes, as a matter of law, that it has authority to impose quality of service standards upon Qwest in this proceeding.

### **E. Enforcement Authority**

Pursuant to the Commission's authority to "conduct investigations as necessary to carry out the commission's responsibilities," NMSA 1978, § 8-8-4(B)(7), and to enforce its orders "by appropriate administrative action and court proceedings," § 8-8-4(B)(5), we must also consider how best to maintain appropriate regulatory oversight and to provide effective enforcement mechanisms for the implementation of AFOR II. Enforcement mechanisms for AFOR II are absolutely necessary in light of New Mexico's experience with Qwest's first AFOR. See "Background" discussion, herein.

This Commission's authority to require compliance with its Final Order in the AFOR I case was confirmed and clarified in the June 29, 2006, decision of the New Mexico Supreme Court in *Qwest Corporation v. New Mexico Public Regulation Commission*, 2006-NMSC-042, in which the Court found "that the New Mexico Telecommunications Act explicitly authorized the PRC to enter into the AFOR Plan and add the consumer or refund order incentive." 2006-NMSC-042, ¶ 17.

The Commission may use all of its available authority to enforce this Order. Consistent with general, accepted principles of regulatory law, the Commission has continuing jurisdiction over the parties and subject matter of this case. We adapt for present purposes certain language from the final order we issued in the AFOR I case. See Utility Case Nos. 3215, *et al.*, Final Order, p. 23. The Commission is charged with continuing regulatory oversight of AFOR II, including matters pertaining to its implementation and enforcement, to Qwest's compliance with this AFOR II Order, and to any changes of facts or circumstances that may affect the AFOR II plan and the public interest in how it is, or should be, implemented. If necessary, we may review any aspect of AFOR II, either upon the Commission's own motion, or upon the application or

complaint of any interested person, including Commission Staff. If circumstances warrant, we may, after notice and hearing, change any aspect of AFOR II as the public interest may require. If, during the term of AFOR II, the Commission determines that the compliance benefits or the enforcement mechanisms provided in this Order do not provide sufficient incentives to Qwest to abide by the pricing provisions or to meet the QOS standards set out herein, the Commission may, after public notice and opportunity for hearing, modify the AFOR II requirements to ensure future compliance with pricing provisions or QOS standards.

Having considered our constitutional and general statutory jurisdiction, and having considered the legal arguments of the parties concerning the statutory authority delegated to this Commission by the Legislature through NMSA 1978, § 63-9A-8.2, we have concluded that we have jurisdiction to adopt and to enforce an order in this proceeding with regard to the pricing provisions and QOS standards that will apply to Qwest during the term of its second AFOR. We now move forward under the same authority we exercised in AFOR I to consider and adopt the appropriate pricing provisions and QOS standards that will best serve the public interest in New Mexico during the term of AFOR II.

### III. PRICING

We begin by addressing two threshold issues: first, whether a finding of “effective competition” is required as a predicate to a consideration of pricing flexibility in this proceeding; and, second, whether we should consider wholesale pricing here. We then consider, in turn, price caps, tariff changes, new services, promotional offerings, packaging of products and services, individual contracts, price floors, competitive zones, adjustments for exogenous cost changes, customer surcharges, and discontinuance of service. Lastly, in Appendix A to this Order, we set forth specific provisions pertaining to the pricing requirements we establish here.

#### A. Threshold Issues

There are two threshold issues that should be addressed at the beginning of the analysis of the pricing issues in this proceeding. The first is whether or not the Commission can extend pricing flexibility to all of Qwest’s non-price capped services without first making a determination that there is “effective competition,” as defined in accordance to NMSA 1978, § 63-9A-8, for those services. Qwest seeks pricing flexibility for every service other than Residential and Business Single Line, Featureless Single Line Flat, and Measured Local Exchange Service. The second issue to be addressed is whether or not this proceeding is the appropriate one in which to address wholesale pricing issues.

#### 1. “Effective Competition” and Pricing Flexibility

The GSD, AG and Staff argue that the Commission must first find that “effective competition” exists in the relevant market area before the Commission can remove regulation of rates and services in Qwest’s service territory.<sup>4</sup> Staff and the AG point out that the relevant

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<sup>4</sup> See, for example, Staff *BIC* at page 13, AG *BIC* at page 29 and GSD Opening Brief at page 13. See also NMSA 1978, § 63-9A-8(A).

considerations in determining whether effective competition exists for a particular market area are, according to the relevant statute:

- (1) the extent to which services are reasonably available from alternate providers in the relevant market area;
- (2) the ability of alternate providers to make functionally equivalent or substitute services readily available at competitive rates, terms and conditions; and
- (3) existing economic or regulatory barriers.

NMSA 1978 § 63-9A-8(B) (2001). According to Staff and the AG, both of whom argue that the “effective competition” provision is co-equal with the AFOR provision, such a predicate finding is required. Staff points out that “...the law in New Mexico regarding the interrelationship between two statutes is very clear — if statutes appear to conflict, they must be construed, if possible, to give effect to each.” *BIC*, p. 14. Staff acknowledges that Qwest should be free to compete where competition prevails. *BIC*, p. 1. GSD concurs with the AG and Staff. *BIC*, p. 13.

Qwest asserts that a finding of effective competition under § 63-9A-8 is not a prerequisite to pricing flexibility, arguing that this is but one way permitted by the statute for obtaining pricing flexibility. According to Qwest, § 63-9A-8.2 provides another way by which the Commission can grant pricing flexibility or price deregulation without resorting to a finding of “effective competition.” As Qwest interprets it, § 63-9A-8.2 “eliminated rate of return regulation for certain carriers and replaced it with an alternative form of regulation including price caps for basic local exchange services, Section 8.2 requires capping rates only for basic local exchange services, however, and it follows that other services may be accorded flexible pricing or freed from price regulation altogether.” *BIC*, p. 5

When arriving at a decision regarding the provision of telecommunications services in the state, the Commission must read all of the governing statutes; and, if those statutes appear to

conflict, they must be construed, if possible, so as to give effect to each. Staff *BIC*, p. 14; AG *BIC*, p. 29.

When interpreting a statute, “the entire act . . . is to be read as a whole and each part construed in connection with every other part so as to produce a harmonious whole.” *Trujillo v. Romero*, 82 N.M. 302, 481 P.2d 89 (1971); *Burroughs v. County of Bernalillo*, 88 N.M. 303, 540 P.2d 233 (1975); *Methola v. County of Eddy*, 95 N.M. 329, 333, 622 P.2d 234, 238 (1980); *High Ridge Hinkle Joint Venture v. City of Albuquerque*, 126 N.M. 413, 970 P.2d 599 (1998). We find that taken as a whole, the New Mexico Telecommunications Act requires a finding of “effective competition,” as defined in § 63-9A-8, as a prerequisite for granting Qwest the full scope of pricing flexibility it seeks in these proceedings for all services it provides, except for the price capped services of 1 FR and 1 FB (basic residential and basic business service, respectively), Switched Access, and Residential Public Interest Features and Services.

Qwest claims that it is exposed to effective competition now. *BIC*, p. 2. In contrast, according to Staff, there is sufficient evidence in the record to conclude that effective competition does not yet exist in New Mexico. *BIC*, p. 15. Staff asserts that Qwest presents only “indications” of competition, at best, and that, on cross-examination, Qwest’s witness Teitzel admitted wireless is not a substitute for landline service; VOIP and wireless offer incomplete access to E-911; no cable telephony exists yet in New Mexico; and there is still no business competition at all in some of Qwest’s New Mexico territory. *BIC*, p. 15.

While Qwest claims “there is competition throughout the state for virtually all of Qwest's services,”<sup>5</sup> the anecdotal evidence provided by Qwest witness Teitzel in support of that claim is

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<sup>5</sup> Tr. Vol. 1, p. 91.

insufficient to support an affirmative finding that “effective competition” exists within the meaning of Section 63-9A-8. To the contrary, anecdotal evidence in the record indicates a *lack* of competition for telecommunications services in the state.<sup>6</sup> We note that Qwest has chosen not to petition the Commission for a finding of effective competition for those services for which Qwest here seeks pricing flexibility. The Commission therefore finds that Qwest has failed to meet its burden of proof on this issue. Accordingly, flexibly pricing is not appropriate for Qwest’s New Mexico products or services, except for the limited downward pricing flexibility and for the pricing flexibility for New Services, provided in this Order.

## **2. Wholesale Pricing**

The AG urges us to include in this proceeding a consideration of wholesale pricing issues in New Mexico. The AG views wholesale pricing as inextricably linked to retail services, in part because the same network provides both services – presenting opportunity for an anticompetitive price squeeze. Moreover, the AG observes, wholesale pricing directly affects CLECs’ ability to compete.<sup>7</sup> The AG thus recommends including the provision of wholesale network elements within the scope of AFOR II. *BIC*, pp. 2-3. Overall, the AG would reduce Qwest’s SGAT rates to 25% below Qwest’s regional average. *BIC*, pp. 17-19.

Qwest states that wholesale pricing issues are not relevant here, because the order opening this case ties this case so closely to AFOR I, which by its own terms was limited to retail

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<sup>6</sup> See Tr. Vol. 1, at pp. 96-100, where wireless service is shown to be complementary, rather than a substitute; pp. 101-105, where Qwest Witness Teitzel admits that wireless and VOIP E-911 capabilities are not fully implemented in New Mexico; pp. 110-115, where, upon cross-examination by Commissioner Marks, Mr. Teitzel admits that there is no business competition in some of Qwest’s territory, and that Comcast Cable (an Albuquerque and Santa Fe cable provider) is not yet offering voice telephony.

<sup>7</sup> AG’s witness Gates’s testimony is the subject of a pending Qwest motion to strike.



matters. Also, the Commission has conducted other cases like the Cost Docket in Case 3180 that have been addressed primarily to wholesale matters. *BIC*, pp. 45-47.

Staff also views wholesale pricing issues as being more appropriate for a separate docket, noting that, “Wholesale matters are subject to a rather complex layer of federal laws, rules and regulatory requirements that are more efficiently addressed in separate proceedings.” *Staff Reply Brief (SRB)*, pp. 11-12. Furthermore, Staff points out that potential decisions regarding wholesale issues in the current docket may affect parties who are not participating in this proceeding. *SRB*, p. 12. GSD concurs with Staff. *BIC*, p. 13.

The Commission finds that this issue should continue to be addressed in stand-alone proceedings. The Commission will continue to deal with wholesale pricing and wholesale service quality issues in cases docketed specifically for those purposes. Furthermore, as noted by Staff, the federal pricing laws and regulation play a significant role in establishing wholesale prices, and therefore wholesale pricing issues, to a large extent, should not be commingled with the pricing of retail services.<sup>8</sup> We see no reason to depart from that practice in this proceeding.

### **B. Pricing Provisions**

On this section, we discuss and consider, on an issue-by-issue basis, the previous provisions we require in the AFOR II Plan.

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<sup>8</sup> In our wholesale proceedings, parties have been permitted to present evidence on the relationship between wholesale and retail prices, and the degree to which the wholesale prices might squeeze an efficient wholesale firm out of the market. The Commission remains open to hearing evidence on this issue in future proceedings, which we believe would be the appropriate forum for addressing the AG’s concern about the relationship between wholesale and retail prices.

## 1. Price Caps

Qwest proposes that price caps should apply only to the retail prices for 1 FR and 1 FB. Qwest also proposes that those prices remain capped at the rate prevailing as of the effective date of the AFOR II Plan. *BIC*, p. 6. Qwest proposes that rates for 1FB and 1FR services may be decreased the day after filing with the Commission, and that these rates are not to be priced below the cost of service.<sup>9</sup> *Teitzel Direct Testimony, Exhibit DLT-1*, p. 1.

Staff proposes applying price caps to primary single line 1FR and to the *first three* 1 FB lines at rates prevailing as of the effective date of this Plan. *BIC*, p. 16. Staff proposes extending the same price caps to cover Residential Public Interest Features and Services when these are sold with primary line 1FR service.<sup>10</sup> *BIC*, p. 16; 4 Tr. 774-75. Staff would define Residential Public Interest Features and Services to consist of the following:

- Per line and per call blocking,
- Call trace,
- Busy line verification,
- Busy line interrupt and
- Nonlisted and unpublished services.

*BIC*, p. 16, n.16. The AG supports Staff's position on the expanded list of services to be included within the price cap. *BIC*, p. 23. As to pricing issues generally, GSD concurs with the AG and Staff. *BIC*, p. 13.

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<sup>9</sup> See discussion concerning "Price Floors," herein.

<sup>10</sup> For switched access services, Staff recommends that any reductions in intrastate switched access services ordered by the Commission be implemented in a manner that is revenue-neutral to Qwest. *Exhibit MSR-2*, p. 1.

*a) IFR and Residential Public Interest Features and Services*

Qwest argues that Staff has failed to meet its burden of proof in support of its proposal to extend the price cap to cover Residential Public Interest Features and Services. *BIC*, pp. 7-9. According to Qwest, Staff merely copied its recommendations concerning “residential public interest services” from rules adopted by the Colorado Public Utilities Commission, asserting, without evidence, that these services are regarded by many people of limited means as indispensable and non-optional. Staff makes no response to these assertions.

Qwest opposes Staff’s proposal to extend the price cap to cover Residential Public Interest Features and Services when these are sold with primary line IFR service. The features selected by Staff as falling into this category are used to protect privacy, to track down people making harassing or threatening phone calls, and to assist people who may have an urgent need to contact someone in an emergency. There has been no showing in this case that these services, or their functional equivalent, are available to Qwest’s residential customers from other providers at reasonable prices and under reasonable terms and conditions. There also has been no showing in these proceedings that Qwest, as the firm providing these services, is not a dominant provider of these services.

Assuming that Staff looked to Colorado Public Utilities Commission rules as a model for its proposal, the Commission finds nothing wrong with that. When appropriate, this Commission may look to other states for regulatory ideas vis-à-vis issues under deliberation in New Mexico, although, as a matter of law, other states’ regulatory decisions do not bind this Commission. Therefore, Staff’s proposal is not impaired by virtue of its origin in Colorado Public Utility Commission rules. It is true that Staff has provided no evidence in support of its assertion that people of limited means see as indispensable the services and features Staff has designated as

Residential Public Interest Residential Features and Services. However, the fact that these same features and services have been identified by the Colorado Commission as being indispensable to Colorado's residential customers and, as such, amenable to closer regulatory oversight in relation to pricing, lends some weight to Staff's policy proposal, and adds credibility to Staff's testimony as it relates to consumer needs in New Mexico.

The Commission finds that provision of these services at affordable rates is in the public interest, and that these services are distinguishable from other optional services that can be combined with a 1FR line; *e.g.*, voice messaging. The fact that there has been no compelling showing that a competitive alternative for obtaining these services is available causes the Commission to establish appropriate pricing safeguards such as those recommended by Staff. For these reasons, the Commission adopts Staff's proposed extension of the price cap to cover Public Interest Residential Class Features and Services (Per Line and Per Call Blocking, Call Trace, Busy Line Verification, Busy Line Interrupt, and Nonlisted and Unpublished Services).

However, the Commission does not accept Staff's proposal that these public interest services only be capped for the primary 1FR service. A household's need to protect privacy, to track down people making harassing or threatening phone calls, or to contact someone outside the household in an emergency, is not limited to the primary line into the residence — especially if that household happens to include elderly parents or teenagers with additional lines. The Commission finds that the same price caps should extend to Public Interest Residential Class Features and Services for all 1FR service lines.

**b) 1FB Services**

Qwest also objects to Staff's proposed capping of the first three business lines at a customer's location. Qwest asserts that this would result in needless confusion, as other business lines at the same location would be priced at different levels. *Teitzel Response Testimony*, p. 32.

The Commission agrees with Qwest that Staff's proposal to cap the first three 1FB lines at a business would result in needless confusion. Staff's intent with this proposal was apparently to protect those small business owners who might not be sought out by competitive providers while providing a certain flexibility to Qwest. We adopt here a better way of reaching this objective, *viz.*: to cap all 1FB lines (*i.e.*, flat-rated business local one-party access line service). Our rationale is twofold. First, the record evidence does not support a finding that competitive alternatives are available for the 1FB product. Second, those large businesses most likely to be targeted by Qwest's competitors would typically not utilize the 1FB product for their telecommunications needs.

The Commission likewise finds that it should cap *all* 1FR lines, rather than adopt Staff's recommendation that only the primary line be subject to the price cap. As with the 1FB service, the record evidence does not support a finding that competitive alternatives are available for the 1FR product.

c) Other Services

Staff proposes placing price caps of a different design on all services *other than* 1FR Primary lines, the first three 1FB lines, Residential Public Interest Features and Services, new services, services subject to effective competition, and packaged services. Staff's price cap design would permit prices for such services to increase four percent (4%) per year, for a total twelve percent (12%) allowable increase over the proposed three-year term of the AFOR II Plan. *BIC*, p. 16.

The AG argues that Staff's proposed 4% annual increase has no basis in fact and could result in rate shock in the third year of AFOR II, should Qwest decide to accumulate the annual increases and apply them all in the third year, as Staff's proposal might enable them to do. *BIC*, p. 24. As an alternative, the AG proposes pegging annual rate increases for these other services to the Gross Domestic Product Price Index (GDPPI), which, the AG asserts, the FCC has utilized in making inflation-related adjustments to rates over the years. *BIC*, p. 24. Staff argues that the AG's GDPPI proposal is not referenced in the record in these proceedings and so should be rejected. *Staff Response Brief*, p. 11, n.14.

Qwest also argues against Staff's proposed 4% annual increase, asserting that Staff's proposal is based solely on the limits set by AFOR I and that Staff performed no new studies or analyses to justify these proposed caps. *BIC*, p. 8. Qwest asserts that Staff's proposals are inconsistent with the pricing flexibility given to Valor,<sup>11</sup> which, according to Qwest, is permitted to increase the price ceiling of "public interest" services, except for 911 services, up to ten

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<sup>11</sup> Since the completion of its 2006 merger with Alltel, Valor has become known in New Mexico as WindStream.

percent (10%) in any twelve-month period, and to increase prices for non-basic services (other than custom calling services) up to five percent (5%) per year. *BIC*, p. 8.

The Commission finds that use of an objective price index is preferable to the selection of an arbitrary rate of increase. Such an index will automatically match the allowable rate of increase to the overall price increase in the economy. Rate adjustments utilizing the GDPPI have long been employed by other state commissions<sup>12</sup> in making inflation-related adjustments to products and services that are deemed to be non-competitive. We believe that, at this stage in the evolution of New Mexico's telecommunications marketplace, this is the better methodology to utilize.

This AFOR II Plan will become effective several months after the expiration of Qwest's AFOR I Plan in March 2006. Due to the length of time associated with the resolution of this case, an Interim AFOR was ordered to be effective during the gap between the expiration of AFOR I and the effective date of this AFOR II Plan. Because there has been a substantial delay, the Commission also finds that, in the interest of fairness, Qwest should be authorized to raise its prices on the day this AFOR II Order becomes effective, by an amount reflective of the price increases that would have been permitted had AFOR II gone into effect on March 8, 2006. Accordingly, the Commission grants Qwest permission to increase its rates on the effective date of this Order by an amount to be determined by calculating the number of days that have passed since March 8, 2006, and dividing that number by the number of days in the year, 365. The quotient resulting from this operation is then to be multiplied by the annual GDPPI.

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<sup>12</sup> For example, in West Virginia, vertical services are allowed to rise by the rate of inflation (GDPPI). *State Retail Rate Regulation of Local Exchange Providers as of September 2004*, NRRI, at page 13. The document is available at <http://www.nrri.ohio-state.edu/dspace/bitstream/2068/261/1/04-13.pdf>.

The applicable 12 month GDPPI rate will be determined using the most recently available twelve month period whose end date is as close as possible to the date a filing is made by Qwest for a price increase under the terms of this section of the Order. The percentage change in GDPPI prices shall be calculated using the logarithmic rate of change. For example, if the index increases from 156 to 158, the percentage change is  $\ln(158/156) = 0.012739$ , or 1.27%.

**d) Rate Decrease Notice Requirements**

Qwest proposes that rates for 1FB and 1FR services may be decreased the day after filing with the Commission. *Teitzel Direct Testimony, Exhibit DLT-1*, p. 1. Staff objects to Qwest's proposed one-day notice provision, arguing that price changes should be submitted for a 10-day tariff review filing in order to ensure that time is allowed for protest if the rates are suspected to be offered below cost, or if the proposed terms and conditions of service appear not to be in the public interest. *Ripperger Direct Testimony*, p. 17.

The Commission finds reasonable, and accepts, Qwest's proposal that rates for 1FB and 1FR services may be decreased one business day after filing a request with the Commission. The Commission also believes that this provision should be applied to all other services and products whose prices are controlled under AFOR II, including Residential Public Interest Features and Services; provided, as discussed herein, that no retail prices are to be set below the cost of service.<sup>13</sup> Given the changing nature of the telecommunications environment and the rapid response times that are often required of companies operating in that environment, to grant a one-day implementation period after the filing of a request for a rate decrease is not unreasonable. As discussed below, rate decreases will still be subject to objection and possible suspension and review.

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<sup>13</sup> See the discussion of "Price Floors," herein.



**e) Relationship to Other Carriers' AFORs**

Qwest continues to assert that it should be afforded the same regulatory treatment under this AFOR Plan that has been afforded Valor under Valor's AFOR. We reject Qwest's arguments, just as the New Mexico Supreme Court rejected them in Qwest's appeal of the Commission's Final Order in Case No. 04-000237-UT concerning the AFOR I decision. The Supreme Court said,

In Qwest's AFOR order, the PRC explained the importance of evaluating AFOR plans on a case-by-case basis. The PRC specifically recognized that Qwest's AFOR plan "should have no precedential value." Therefore, Qwest had notice that VALOR's AFOR plan and Qwest's AFOR plan, and any subsequent investigations, would not have precedential value for the other. VALOR's AFOR plan was created under distinct circumstances and created different obligations than those developed under Qwest's AFOR plan.

*Qwest v. New Mexico Public Regulation Commission*, 2006-NMSC-042, ¶ 42. Moreover, mid-sized carriers are to be regulated separately and differently from larger carriers, pursuant to NMSA 1978, §63-9A-5.1 and §63-9A-8.2.E. Qwest does not fit within the statutory definition of a "mid-sized telecommunications carrier" and is therefore not entitled to the regulatory treatment provided in the cited statutory sections. Instead, a separate regulatory scheme was established by the Legislature in NMSA 1978, § 63-9A-8.2(C).

Furthermore, when the Commission adopted and later revised its Quality of Service Rules, it expressly anticipated that it might choose to adopt AFOR standards for a particular company that might differ from corresponding standards articulated in the Rules. As is spelled out in 17.11.22.2(A) NMAC and 17.11.17.2(A) NMAC,

Where the Commission has approved an alternative form of regulation plan for an ILEC, and a provision in the approved plan is inconsistent with a provision in this rule, the provision in the approved plan shall apply.

Especially when read in light of the recent opinion of the Supreme Court, our Rules make plain that consistency between approved AFOR plans, or between a particular rule and an approved AFOR plan, is not necessarily something this Commission has sought to achieve when developing a company-specific AFOR plan. Each plan is developed on a case-by-case basis. Consequently, we find that it would be inappropriate to extend to Qwest the distinctive AFOR provisions that apply to Valor pursuant to the Telecommunications Act, the Commission's Mid-Sized Carrier Rules, and Valor's AFOR. Accordingly, we again decline to do so.

## 2. Tariff Changes

Staff proposes subjecting all price and price cap changes and changes to terms and conditions to tariffs to a 20-day tariff review with a 10 business day deadline for filing of protests. Under Staff's proposal, the only basis for protesting a price or price cap change would be "...either that the new price or price cap does not cover cost, or that the non-price related terms or conditions of the tariff do not comply with applicable law or Commission rules, or not in the public interest by review of Staff, or that the new price or price cap exceeds the applicable increases allowed under the cap." *Exhibit MSR-2*, p. 2.

Qwest proposes replacing the requirement to file a tariff for any rate, term or condition with a requirement to make a "filing" with the Commission. In support of this position, Qwest notes, "a mid-sized carrier, such as Valor, is only required to maintain tariffs containing the price ceiling and effective price, by service area, for each basic service, non-basic service, package and bundle that the carrier offers." *Teitzel Response Testimony*, p. 34. Qwest presents no argument in support of its proposed language, beyond its assertion that, because Valor can, Qwest should

be able to do the same. Concerning this line of reasoning, *see* our discussion of “Relationship to Other Carriers’ AFORs,” herein.

Staff argues that Qwest’s proposal would deprive retail customers “of the protections which the filing of terms and conditions of service under Commission review affords.” *Ripperger Direct Testimony*, p. 21.

At this stage of development in New Mexico’s telecommunications services marketplace, the Commission finds it premature to cease requiring Qwest to file tariffs with the Commission. The Commission agrees with Staff that the protections afforded retail customers by maintaining this requirement continue to serve the public interest by keeping Qwest’s retail pricing practices relatively transparent.

On the other hand, the Commission also finds that, subject to the consumer protections afforded by tariff filing and review, Qwest should be permitted greater flexibility to respond to competitive forces. For this reason, the Commission finds that Qwest’s AFOR II should permit the company to reduce prices on a single day’s notice. This will allow the company to implement reduced prices prior to the expiration of the tariff review period. The AFOR I mechanisms that govern enforcement, including tariff suspension and the ability to invoke the Commission’s fining authority, will continue to be available in the event that an Intervenor or Staff asserts that a filed tariff violates a Commission Rule or Order.

### **3. New Services**

Staff’s proposal closely matches that of Qwest’s AFOR I, in that new services would not be subject to price caps. Staff’s proposal incorporates language from AFOR I that defines a new telecommunications service as “a service providing features, functions and capabilities that were not offered by Qwest in New Mexico on the effective date of the plan.” *BIC*, p. 16. In support

of this proposal, Staff argues that it is important to maintain this definition for new service in order to avoid the possibility of current services being repackaged on the basis of price and refiled as new services not subject to the proposed price cap provisions of the plan. *Ripperger Direct Testimony*, p. 22. Qwest has made no objection to Staff's proposal.

The Commission finds that Staff's proposed language concerning New Services provides Qwest with the pricing flexibility it seeks in bringing new services to market, while at the same time ensuring that Qwest does not try to repackage old services as new. Accordingly, the Commission adopts Staff's proposal concerning New Services, provided that any and all New Services that have been introduced by Qwest during the period of AFOR I or the Interim AFOR are also to be considered New Services for the purposes of AFOR II.

#### 4. Promotional Offerings

Staff's and Qwest's proposals would both halve the time required under AFOR I for a promotional offering to become effective, such that promotional offerings would become effective in 5 days instead of 10 days from the date of filing with the Commission. *Staff BIC*, p. 16; *Teitzel Direct Testimony, Exhibit DLT-1*, p. 4. Qwest advocates that promotional offerings be exempt from the price cap provisions of AFOR II. *Teitzel Direct Testimony, Exhibit DLT-1*, p. 4. Staff would prohibit the price of the sum of the regulated services in a promotional offering from exceeding the highest prices of the *à la carte* prices of the regulated services available in the promotional package.

Staff would limit the duration of promotions to 90 days. *Ripperger Direct Testimony*, p. 23. According to Staff, promotional offerings should not be permitted to extend indefinitely as this could result in Qwest offering a tariffed retail service under a promotional offering for a different price, term or condition for an indefinite time, instead of filing a new tariff for that

service with the Commission, thereby circumventing the Commission's tariffing process. *MSR Direct Testimony*, p. 24. Qwest objects to Staff's proposed 90-day limit on promotional offerings, arguing that such a limit is unnecessary because the FCC imposes resale obligations with respect to promotions lasting more than 90 days. Qwest argues that Staff's proposed limitation is unfair because Qwest's New Mexico competitors are able to make promotional offerings without the artificial time limits Staff seeks to impose on Qwest. *Teitzel Response Testimony*, p. 34 – 35.

The only point of contention for the Commission to resolve concerning New Services is the 90-day limit on Qwest's promotional offerings that has been proposed by Staff. On this issue, the Commission finds itself in agreement with Qwest. Qwest's competitors do not have a 90-day limit imposed upon their promotional offerings; moreover, the FCC's resale obligations would effectively control the resale price of a service, should Qwest attempt to prolong a promotional offering indefinitely.<sup>14</sup> Furthermore, should Qwest attempt to utilize the lack of a limit on its promotional offerings in order to circumvent the Commission's tariffing process, an aggrieved party may seek redress from this Commission.

Accordingly, the Commission adopts Staff's and Qwest's proposed 5-day effective date for promotional offerings, adopts Staff's proposed pricing treatment for promotional offerings, and declines to adopt Staff's proposed language concerning the imposition of a 90-day limit on Qwest's promotional offerings.

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<sup>14</sup> This issue was addressed by the Commission's predecessor agency in State Corporation Commission Docket No. 97-35-TC, *Findings Of Fact, Conclusions Of Law And Order*, at ¶¶ 232-239.

## 5. Packaging of Products and Services

Given that Qwest and Staff have proposed identical language for this section, and that no other party to these proceedings has filed objections to, or commented on, their proposed language, the Commission adopts that language, as contained in *Staff Exhibit MSR-2*. The Commission anticipates that the public interest will be served because Qwest should thereby be enabled and encouraged to develop innovative packaged products and services to offer to New Mexico's consumers.

## 6. Individual Contracts

The language proposed by Staff for this section is a carryover from AFOR I, with additional language which, if adopted, would:

- (a) Address certain terms and conditions;<sup>15</sup>
- (b) Bring this section of AFOR II in line with the statutory requirement that an individual contract be filed within 10 days after the conclusion of negotiations with the customer;
- (c) Replace the AFOR I paragraph calling for Qwest and Staff to sign a Global Protective Agreement and pursue the promulgation of a Global Protective Rule with language pursuant to which the Commission could issue a protective order, in compliance with NMSA 1978, § 63-9A-9, in order to ensure the confidentiality of contracts filed with the Commission; and
- (d) Keep the 60-day window during which the Commission can issue an order based on a Staff affidavit that recommends disapproval.

*Ripperger Direct Testimony*, pp. 28-29, citing NMSA 1978, § 63-9A-9. Qwest's proposal would reduce the time allowed to 30 days.

The Commission finds Staff's proposed additions to be reasonable, because they would clarify the filing requirements with regard to the content of applications and would bring the filing deadline requirements into line with statutory requirements. The Commission adopts Staff's proposed AFOR II language concerning Individual Contracts.

<sup>15</sup> See Staff Proposal, at § V.H.3.D; see also, § XI.D of AFOR I.

## 7. Price Floors

Staff's proposal, if adopted, would add a new provision specifically addressing price floors for services offered under the terms of Staff's proposed AFOR II. Staff believes, and the Commission agrees, that it is important to establish a specific section of AFOR II addressed to this issue. The proposed section would simply state that services regulated under the AFOR II plan may not be priced below the cost of providing the service, and that competitive services shall not be subsidized with non-competitive services. There is no specific provision for price floors in either Qwest's AFOR I or its AFOR II proposal; however, both of these contain language to the effect that regulated services may not be offered at, or decreased to, a level below the cost of the service. *See Ripperger Direct Testimony*, pp. 29-30.

Attorney General witness Timothy Gates testified in favor of establishing price floors as well as price ceilings in the event that pricing flexibility is granted to Qwest. Mr. Gates stated that pricing flexibility should only be granted in those instances where the Commission has established that "effective competition" has been found to exist. *Gates Direct Testimony*, p. 34. According to Mr. Gates, the Commission should consider establishing a price floor for retail prices that would consist of the following two cost elements:

- (a) Imputed costs of all the UNEs and/or services used by CLECs to provide service, and
- (b) A measure of minimum, retail related costs.

*Gates Direct Testimony*, p. 45. Staff expressed concern that Mr. Gates's recommended methodology might lead to a situation where the price floor set for a service could be set above the retail rate, because some currently approved wholesale UNE rates, *e.g.*, the 1FR loop rate, are higher than the retail rates for those elements or services. *Ripperger Response Testimony*, p. 4.

Staff's proposed language for Price Floors reads:

All regulated products and services, including those included in promotional and packaged offerings, shall be priced above the cost of providing those individual products or services. Competitive services shall not be subsidized with noncompetitive services.

Staff's proposal to have AFOR II state explicitly that no regulated products or services can be priced lower than the cost of providing them is laudable but does not go far enough. It would be better to state explicitly that the costs to which the Price Floor requirements refer are those costs determined by the methodologies discussed in the *Minimum Pricing Policy* section of NMAC 17.11.13.17.

We also find merit in addressing the AG's concerns, as voiced by Mr. Gates, that retail prices might change under price caps and prices that once passed an imputation test would fail it at some later point when the retail price was reduced. To alleviate this concern, we will require Qwest to file an affidavit stating that any new rates it proposes for consideration will pass an imputation test.

For these reasons, we accept Staff's proposed language, modified, as follows:

All regulated products and services, including those included in promotional and packaged offerings, shall be priced above the cost of providing those individual products or services discussed in the *Minimum Pricing Policy* section of NMAC 17.11.13.17. Competitive services shall not be subsidized with noncompetitive services. Qwest is required to file an affidavit stating that any rate changes will pass an imputation test.



## 8. Competitive Zones

The AFOR II proposal submitted by Qwest does not address Competitive Zones. Staff's proposal for Competitive Zones, if adopted, would modify the Competitive Zones section of Qwest's AFOR I substantially. Staff's proposed language, if adopted, would:

- (a) Allow other parties to petition the Commission for the creation of a competitive zone or zones in Qwest's service territory;
- (b) Expand the parameters under which a competitive zone may be created;
- (c) Change to 180 days the time frame contained in the provision in Qwest's AFOR I that allows for a proceeding for the creation of a competitive zone or zones to commence and end within 120 days from the date of the petition by an interested party; and
- (d) Add a provision stating that the creation of a competitive zone must be consistent with the procedures and required showings prescribed in NMSA 1978, § 63-9A-8, *Regulation of Rates and Charges*.

Staff proposed the last of these changes ((d)) because Qwest is also regulated under NMSA 1978, § 63-9A-8, which sets out the conditions under which a service may be deemed effectively competitive in a relevant market area. Staff believes this section of the New Mexico statutes must be cited in the Competitive Zone Section of AFOR II because Staff believes that any grant of pricing flexibility to Qwest by this Commission can only be done upon a showing that complies with the provisions of this section of the statutes. *Ripperger Direct Testimony*, pp. 31-32.

Qwest argues against the adoption of Staff's proposed language on the grounds that a "competitive zones" structure is out of alignment with the current manner in which telecommunications competition is evolving. *Teitzel Response Testimony*, p. 35-36.

The Commission finds Staff's proposal to be reasonable because it explicitly ties the establishment of Competitive Zones to Qwest's statutory obligations under NMSA 1978, § 63-9A-8. Qwest's objections to the establishment of Competitive Zones appear to be rooted in its contention that "effective competition" for a service does not have to be demonstrated in order for that service to be granted pricing flexibility — a contention which we have addressed and dismissed in the Pricing section of this Order.

Qwest also contends that the Competitive Zone structure makes no sense given the intermodal competition Qwest is currently facing. We note that because Staff's proposed language for this section would not delineate specific competitive zone boundaries, Qwest would remain free to petition the Commission to declare as a Competitive Zone any market for which Qwest makes a compelling case for the existence of "effective competition" for its products and services. Accordingly, we adopt Staff's proposed language with regard to Competitive Zones.

We address *sua sponte* the issue of pricing flexibility for specific geographic areas within New Mexico, finding that, although there could be merit to offering that kind of flexibility, the record does not address the issue. Accordingly, we find that Qwest must continue to file statewide tariffs.

### **9. Adjustments for Exogenous Cost Changes**

Qwest's AFOR II proposal does not address Exogenous Cost Changes. Staff's proposal would modify the third paragraph of the Exogenous Cost Changes section of AFOR I (*id.* at § XI.H) and would eliminate any reference to 47 C.F.R. §61.45(d)(1), the formation of an EAS, and the definition of an exogenous cost change. Staff's modified third paragraph would simply state that the Commission may grant a petition for a change in Qwest's costs based on exogenous cost changes where it finds there has been a showing of good cause. This would give greater

flexibility to the Commission in determining what an exogenous cost change is, and under what circumstances it should grant a petition for a change in Qwest's rates due to a claimed exogenous cost change. *Ripperger Direct Testimony*, pp. 33-34.

The Commission finds that including a section on exogenous cost changes would be contrary to the Legislature's imperative that we facilitate the transition from cost-based, rate of return regulation to an AFOR. The Commission finds that it would be inappropriate to adjust rates routinely under Qwest's AFOR II based on cost changes such as those that might be caused by changes in the tax laws. While it is conceivable that an exogenous cost change could have a significant impact on the company, the threshold to have such a change reviewed by the Commission should be high. Allowing the company to petition the Commission to address an exogenous change through a re-opening of the entire AFOR would be preferable to incorporating a clause that invites reconsideration of isolated pricing matters. Accordingly, we decline to include in our AFOR II Order the existing Exogenous Cost Changes section of AFOR I.

#### **10. Customer Surcharges**

Both Staff's and Qwest's proposals would retain the language included in Qwest's AFOR I with regard to customer surcharges. *Ripperger Direct Testimony*, p. 34; *Teitzel Direct Testimony, Exhibit DLT-1*, p. 1. Adoption of the Customer Surcharge language proposed by both Qwest and Staff would be reasonable, because it would shield Qwest from having to count any surcharge resulting from actions of this Commission or of the FCC as an increase in the capped price of the 1FR or the 1FB services. Accordingly, we adopt Qwest's and Staff's proposals insofar as they retain the existing language of AFOR I.

## 11. Discontinuance of Service

Qwest's AFOR I does not address discontinuance of service. Staff offers a slight modification to the language relating to discontinuance of service that Qwest has put forward in its price cap proposal. Staff would add a provision whereby, if no comments are submitted by a person or interested party, or if no issues are raised by the Commission, a discontinuance of service would go into effect within the allowable 30-plus days proposed therein, in Section V.M. *Ripperger Direct Testimony*, p. 35.

The Commission understands the language in this section to pertain to the discontinuation of an *entire* service. With that understanding, the Commission finds that the language proposed by Staff should be adopted.

#### **IV. QUALITY OF SERVICE STANDARDS AND REQUIREMENTS**

Having determined that the Commission has authority to impose quality of service standards in this proceeding, we now set forth reasonable QOS standards and requirements for the term of AFOR II. We begin by examining the proposals for QOS standards and requirements that have been presented for our consideration by the parties, then we set forth our consideration of those proposals. In *Appendix B* to this Order, we set forth specific provisions pertaining to the QOS standards and requirements we establish here.

##### **A. Qwest's Argument**

As we have noted and discussed, Qwest claims that the Commission lacks authority to impose quality of service standards in this proceeding, and that, on that basis, Qwest is not required to submit a QOS proposal. Qwest urges the Commission not to adopt the QOS standards proposed by Staff and the GSD and supported by the AG, and, instead, to adopt and apply for AFOR II purposes the Commission's QOS rule for large carriers, 17.11.22 NMAC. *Qwest BIC*, p. 16-20. Qwest argues that Staff and the Intervenors have presented no evidence in this case that the existing QOS rules, 17.11.22 NMAC, are unjust, unreasonable, unlawful, inadequate, improper, or contrary to the public interest in accordance with 17.11.22.25 NMAC.

Qwest asserts that the Commission's existing QOS rules, 17.11.22 NMAC, "...already impose standards more stringent than those applicable in other states, particularly those similarly situated to New Mexico." *Williams Response Testimony*, pp. 7-8. Qwest also argues that Staff's proposal of even more stringent QOS standards is divorced from customer expectations of service quality, given that "service quality complaints by Qwest customers have declined

significantly over the term of the AFOR and represent minuscule percentages of the lines in service.” *Qwest BIC*, p. 25.

Qwest further asserts that the NARUC white paper and supporting ARMIS study relied upon by Staff to support its QOS proposal was mischaracterized by Staff witness Oberlander. According to Qwest, the results of the white paper and the ARMIS study can be characterized neither as national standards nor as NARUC recommendations. *Qwest BIC*, p. 22. In opposition to Staff’s proposed recommendations, Qwest witness Williams states, “The average standards in the nine least most densely populated states (excluding New Mexico) that are more similarly situated to New Mexico are...” lower than those proposed by Staff. *Williams Response Testimony*, p. 8. Qwest also argues that Staff has misapplied the FCC ARMIS data, in that the FCC intended ARMIS data to be used to monitor trends in service quality, not to establish QOS standards for the provision of service. *Qwest BIC*, p 24.

In addition, Qwest asserts, “Staff’s proposals are also out of step with the trends in other states. Commissions with jurisdiction over Qwest’s service area have been actively reducing or eliminating service quality regulation.” *Qwest BIC*, p. 25. Qwest goes on to argue that, in violation of Qwest’s equal protection rights, Staff’s recommendations are more stringent than those imposed upon other New Mexico carriers. *Qwest BIC*, pp. 26-27.

In response to Qwest’s assertions that Staff’s proposed recommendations violates Qwest’s equal protection rights, Staff argues that its recommendations are made pursuant to the specific authority of NMSA 1978, §§ 63-9A-5.1 and -8.2, which, as Staff points out, “...explicitly provides for the regulation of carriers with over 375,000 access lines in a manner different from smaller carriers.” Staff Reply Brief, p. 12. Staff goes on to argue that, as the sole carrier currently regulated under §63-9A-8.2 of the Act, Qwest ought to have expected that it

would face different regulatory requirements than those demanded of Valor and smaller carriers. *Staff Reply Brief*, p. 12.

### **B. Staff's Proposal**

Staff's proposed QOS standards combine certain of the QOS standards we adopted in AFOR I with specific recommended changes. Staff's recommended changes are derived from three principal sources: (1) Staff's review of Qwest's performance under AFOR I; (2) the *Service Quality White Paper* of the National Association of Regulatory and Utility Commissioners (NARUC); and (3) the *Summary and Analysis of FCC's ARMIS Quality of Service Data for Major ILECs: 1993 to 2002*, produced in support of the NARUC white paper by the National Regulatory Research Institute (NRRI). *BIC*, pp. 5 and 22; *Oberlander Direct Testimony*, Exh. SO-4.

In some instances, Staff's proposal would relax or eliminate AFOR I QOS standards. For example, Staff's proposal would eliminate the wireless alternative service requirement under AFOR I, § I.B.3, "Alternative Service." However, most of Staff's proposal would result in greater stringency than AFOR I with respect to QOS. More stringent standards are necessary, according to Staff, for two main reasons.

First, according to Staff, is that Qwest has historically failed to meet existing AFOR I QOS standards. Staff points to the Out-of-Service Reports I.D.2.b standard, which Staff asserts that Qwest has missed for 14 out of the last 18 months in New Mexico. *Oberlander Direct Testimony*, p. 8. Staff recommends raising the standard for Out-of-Service Reports I.D.2.b over the three-year term of AFOR II from 85% of out-of-service reports restored within 24 hours to 90% of out-of-service reports restored within 24 hours. Staff argues that the more stringent

standard is necessary in order to provide Qwest with the incentive to maintain and upgrade the quality of its network in New Mexico. According to Staff, “Qwest’s performance on this metric has declined as its investment dropped sharply since Period 2 and the condition of the network gradually worsened over time.” *Oberlander Direct Testimony*, p. 9. In support of this assertion, Staff states, “...the Qwest official actually responsible for New Mexico repairs during Period 4 testified during a deposition that Qwest’s quality of service violations were caused by deteriorated plant – cracked sheathing protecting cable and damaged and deteriorated terminals, cross-boxes and splice boxes that allowed moisture to penetrate to active copper and electronics.” *Staff Reply Brief*, p 17.

A second reason for raising the bar, according to Staff, is that Qwest’s general level of performance in meeting standards, and that of carriers nationwide, has improved due to technological advances. As an example, Staff points to the AFOR I Repeat Trouble Reports I.D.2.c standard, which Staff recommends changing over the three-year term of AFOR II from the “...current standard of 18% repeat trouble reports as a percentage of total trouble reports to 10% repeat trouble reports as a percentage of total trouble reports.” *Oberlander Direct Testimony*, p. 9. Staff’s recommended 10% comes from the NRRI report. *Oberlander Direct Testimony, Exhibit SO-4*, p. 6. Staff asserts that the 10% value is more than reasonable, given that Qwest’s performance in New Mexico over the course of AFOR I has been running between 4% and 5.56%. *Oberlander Direct Testimony*, p. 10.

A similar situation also obtains for the AFOR I Trouble Reports I.D.2.a standard, which Staff recommends increasing over the term of AFOR II from 5 trouble reports per 100 lines to 2 trouble reports per 100 lines. Staff based this recommendation on the observation that Qwest’s



average during the AFOR I has been 1.76 trouble reports per 100 lines. *Oberlander Direct Testimony*, p. 7.

Staff is proposing requirements more stringent than those of AFOR I and more stringent than those found in the Commission's existing QOS rules, 17.11.22 NMAC, for the following standards:

- Held Orders,
- POTS Provisioning Interval,
- Designed Service Installation Interval,
- Trouble Report Rate,
- Out of Service Reports, and
- Repeat Trouble Reports.

Staff is also introducing a *Held Order Greater than 180 Days* standard that does not appear in our Rules or in AFOR I. *Williams Response Testimony*, p. 5. Staff asserts that its recommended standards are similar to those found in other states, pointing out that at least thirty other states, including Qwest states, had standards for out-of-service restored in less than 24 hours that were higher than 85%, the current New Mexico standard. *Staff BIC*, p. 22.

Staff urges the Commission to adopt the more stringent standards it has recommended and to adopt more significant penalties for missing those standards. Staff argues that both of these actions are necessary in order to bring New Mexico to an acceptable network performance level and to provide Qwest with further incentives to invest in New Mexico. *Oberlander Direct Testimony*, p. 16.

### C. GSD's Proposal

GSD urges the Commission to accept Staff's proposed QOS standards overall, but GSD also requests that the Commission supplement those standards with the following recommendations put forth by GSD witness John Martinez:

#### Service Order Installation

All Periods: Qwest will provision 90 percent of all orders which require a dispatch within five days of order.

All Periods: Qwest shall have no greater than 1.5 percent of dispatched installations require service of re-installation within 30 days of installation.

#### Primary and Regular Services Repair Standards

All Periods: Qwest shall resolve the problem and restore service within 24 hours of the network trouble report in 85 percent of all cases that require a technician visit to repair.

#### Repeat Trouble Reports

Qwest's number of network trouble reports on switched access lines received within 30 days of a closed trouble report concerning the same problem on the same line shall not exceed the following levels.

All Periods: 15 percent of all dispatched reports.

*Martinez Responsive Testimony*, p. 6; *Martinez Attachment A*, p. 1. Witness Martinez requests adoption of these standards so as to better track Qwest's QOS performance in the provision of mass market services. According to Mr. Martinez, these indicators would better capture Qwest's performance in those situations where a truck roll is required outside of the central office.

Staff does not agree with Mr. Martinez's added metrics and recommends that the Commission not adopt them. According to Staff, the outcome Mr. Martinez seeks to obtain through these metrics can be better and more easily obtained by simply increasing the stringency

of the current metrics to match performance levels. Staff argues that this approach is preferable to increasing the number of standards that Qwest must track and report in the AFOR, in contrast to Mr. Martinez's proposal. *Oberlander Rebuttal Testimony*, pp. 3-4.

Qwest also disagrees with Mr. Martinez's proposal, arguing that it is based on the mistaken assumption that activities requiring a truck roll are separate and unique activities from those that occur in the central office. In support of this position, Qwest asserts that dispatched orders and tickets frequently require coordination between a technician at the central office and the dispatched technician for task completion, so that separating the activities of the two technicians would be inappropriate. Qwest also argues that the service quality metrics GSD proposes for measuring responsiveness to situations where a truck roll is required outside of the central office will not actually provide a useful measurement of responsiveness. *Williams Response Testimony*, pp. 25-26.

#### **D. The Attorney General's Proposal**

The AG agrees with Staff's QOS proposals concerning standards and urges their adoption by this Commission. *Gates Direct Testimony*, p. 22. The AG requests the Commission to recognize expressly in this Order that a successfully functioning telecommunications market depends on the relationship between retail and wholesale QOS. The AG suggests that the Commission state specifically that QOS for both retail and wholesale services in New Mexico is mandated by NMSA 1978, § 63-9A-8.2. *BIC*, p. 25.

The AG remarked on the need for QOS provisions and penalties to ensure that Qwest offers and maintains high QOS standards for its customers.<sup>16</sup> The AG argues that high QOS standards are necessary, because although competitive pressure could help to ensure the maintenance of high quality of service standards to end users, Qwest is under no competitive pressure in its New Mexico market. The AG argues that the absence of competitive pressure on Qwest in New Mexico compels the Commission to impose QOS standards on Qwest. *Gates Direct Testimony*, pp. 18-20.

#### **E. Discussion and Consideration of QOS Proposals**

Earlier this year, the Commission promulgated revised quality of service rules at 17.11.22 NMAC that would apply to Qwest, in the absence of superseding matter in an AFOR plan. The proceedings that gave rise to these rules were a major undertaking by the Commission, stretching over several years and encompassing many days of hearings and of Commission working sessions. Qwest, PRC Staff, and other parties to this case were among the actively participating interested parties in the rule making. In adopting the Quality of Service rules, the Commission selected quality standards and compliance penalties for basic services that were generally similar to the standards and penalties applicable to Qwest during the final three years of AFOR I. Standards for some designed services were tightened.

We recognize Staff's QOS recommendations, as put forward for our consideration in this proceeding, as being reasonably related to the goals of the New Mexico Telecommunications Act

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<sup>16</sup> The AG also remarked on the inclusion of QOS in discussion relating to AFOR II investment and infrastructure requirements, which are not addressed in this Order.

and firmly rooted in record evidence concerning Qwest's QOS track record. However, in light of the recent rule revision, we decline to adopt Staff's proposed QOS changes at this time.

Our review of Staff's and Qwest's arguments against the adoption of GSD's proposed metrics persuades us (1) that the performance objectives GSD seeks to have Qwest attain would be better and more easily reached through other means; and, (2) that the proposed additional metrics would add a needless layer of complexity. For these reasons, the Commission declines to adopt GSD's proposed QOS metrics for inclusion in Qwest's AFOR II.

We conclude that we should incorporate 17.11.22 NMAC, in its entirety, into Qwest's AFOR II, with the two additions set forth below.<sup>17</sup>

The first addition is, in effect, a clarification of what implicitly exists in the applicable Rules, as they currently stand. 17.11.22.22.C NMAC provides as follows:

**Held orders in excess of 180 days:** For each month during a calendar year in which an ILEC had, as of the last day of the month, one or more held orders pending for more than 180 days, an ILEC shall incur the following credit obligations:

- (1) For each month with 1 to 5 such orders as of the last day of the month: .01 percent of an ILEC's total intrastate revenues for the year;
- (2) For each month with 6 to 10 such orders as of the last day of the month: .015 percent of ILEC's total intrastate revenues for the year; and
- (3) For each month with 11 or more such orders as of the last day of the month: .02 percent of ILEC's total intrastate revenues for the year.

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<sup>17</sup> We note that Staff could have presented its proposed changes to Qwest's QOS standards, along with the NRRI, NARUC, and ARMIS data it has relied on in developing its proposed changes, during the course of the rulemaking proceeding, when the Commission was focused solely on this issue. However, we appreciate Staff's time, effort, and commitment in developing and supporting its proposed QOS standards in this proceeding.

As Staff correctly points out, the Rule contains no language establishing a Held Order Standard providing the basis for the imposition of these penalties. In order to correct for this, the Commission finds it reasonable to adopt Staff's proposed language, in relevant part, for inclusion in this Order. Accordingly, the Commission orders that the following language be added to Qwest's AFOR II quality of service obligations:

No Held Order, as of the last day of the month, shall be pending for more than **180** days.

The second addition is the adoption of a *Repair Commitment Customer Remedy*. This addition is necessary in order to ensure that customers have recourse in the event Qwest misses a dispatched service repair call for primary or regular services. Accordingly, the Commission orders that the following language be added to Qwest's AFOR II quality of service obligations:

A *Repair Commitment Customer Remedy* shall be in effect, such that, if Qwest misses a dispatched service repair call for Primary or Regular services, Qwest shall automatically issue a credit of \$12 for residential service or \$40 for business service to the account of the customer impacted by the missed call.

#### **F. QOS Enforcement**

In the due exercise of its enforcement authority, the Commission will take appropriate action, based on Staff's reports and recommendations, and may impose penalties as set out in the rules as the Rules may from time to time be changed. *See also*, "Enforcement" discussion, herein.

Qwest shall submit quarterly compliance reports for review by Staff, which shall have one month from the date of filing to complete and report on its review. In order to assist in Staff's review, Qwest shall response to any Staff request for additional information within seven (7) calendar days. Staff shall promptly submit to the Commission the results of its review, together with recommendations as to whether any action should be taken.

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## G. Additional QOS-Related Matters

### 1. Force Majeure

GSD, through its Witness, John Martinez, proposes changes to the Force Majeure provision, which changes are designed, Mr. Martinez asserts, to ensure that Qwest meets its responsibility to provide “diversely routed interoffice fiber” at all of its wire centers in the state. *Martinez Responsive Testimony*, p. 4. Mr. Martinez points out that the most serious quality of service problem occurs when an entire community or area loses all service. Mr. Martinez argues that, while nothing can completely eliminate the possibility of this occurring, the existence of “diversely routed interoffice fiber” in all wire centers, meaning the presence of at least two separate fiber communications links (which links are also physically separated from each other by being placed in different locations) between a wire center and the rest of Qwest’s network, can drastically reduce the possibility of such an occurrence. *Martinez Response Testimony*, pp. 4-5.

Neither Qwest nor the Attorney General responded to GSD’s proposed changes to the Force Majeure provision for AFOR II. Staff asks the Commission not to adopt the *force majeure* definition advanced in Mr. Martinez’s testimony. According to Staff, rejection is warranted because GSD’s proposed definition contains neither a process nor a timeframe within which Qwest must petition for waiver of a QOS standard based on *force majeure*. Staff also argues that GSD’s proposed definition does not require Qwest to make an explicit showing that Qwest used due diligence to maintain its network infrastructure in order to accommodate reasonably foreseeable events. *Oberlander Rebuttal Testimony*, p. 4.

The Commission declines to add the Force Majeure provision proposed by GSD to the language proposed for AFOR II. The Commission finds that the language proposed by GSD

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would not add anything meaningful to the QOS language already contained in 17.11.22.22 NMAC.

## **2. Relation to Annual Price Cap Increases**

GSD proposes that Qwest's annual price cap increases be tied to the Company's achievement in reaching its annual QOS goals. Under GSD's proposal failure to reach the annual QOS goals for a given year will result in a denial Qwest's price cap increase for that year in addition to which Qwest would be required to issue service credit amounts to customer's account in a proportionate manner. *Martinez Responsive Testimony*, pp. 3 and 7.

Staff recommends rejection of this proposal on the grounds that:

- a) It is not necessary to tie price cap increases or decreases to proposed quality of service or investment standards if those measures are coupled with appropriate enforcement mechanisms, as Staff asserts its proposal is; and
- b) Coupling price cap increases or decreases to quality of service and investment criteria may add an unnecessary level of complexity to AFOR II.

*Ripperger Response Testimony*, pp. 5-7.

Qwest does not address this specific proposal in its filings, other than to state generally that all of GSD's recommendations should be rejected by the Commission as they were supplied without any foundational supporting evidence. *Qwest's Response Brief*, p. 37.

The Commission declines to adopt GSD's proposed tying of price cap increases to QOS achievement. The Commission agrees with Staff's assessment that such a tie is unnecessary in



AFOR II, given adequate enforcement of the QOS standards and the levying of penalties should those standards fail to be achieved.

### 3. Wholesale issues

The Commission accepts the AG's observation that a successfully functioning telecommunications market depends on the relationship between retail and wholesale QOS. Although we do not regard this idea as a controversial one, we conclude that QOS wholesale issues are better handled in a separate proceeding.

### 4. New Mexico Employment

The AG proposes that AFOR II contain a provision requiring a minimum percentage of Qwest employees to be stationed in-state, asserting a presumed beneficial impact on quality of service. *BIC*, p. 20. The AG proposes the following language for this provision: "Qwest shall maintain employment at a level consistent with the level of employment at the time this AFOR is ratified by the Commission." *AG BIC*, p. 21.

Staff disagrees with the AG's proposal, arguing that a broadly-stated requirement to maintain Qwest's current level of employment is not an appropriate response to those QOS shortcomings that may be attributable to reductions in the number of network technicians employed in New Mexico. According to Staff, the AG's proposal is deficient for two reasons: first, even the current New Mexico employment level may not be adequate to improve service quality standards; and, second, the proposed employment standard fails to recognize the fact that Qwest draws from a pool of employees of different classifications who are assigned different tasks. Thus, decreasing the number of one classification of employees may be an appropriate response, just as increasing the numbers of workers with another skill set might be. Staff argues

that the AG's proposal to hold Qwest's New Mexico employment level constant would limit the company's flexibility in this regard. *Staff Reply Brief*, p. 23.

Qwest argues that there is no New Mexico statute that grants the Commission the authority to dictate what Qwest's employment levels in the State ought to be, or how its employees ought to be deployed. *Qwest Response Brief*, p. 34.

The Commission finds itself in agreement with Staff on this issue. We find that, for the reasons advanced by Staff, the practical effect of the AG's New Mexico employment proposal would not necessarily guarantee better QOS. Accordingly, we decline to adopt the Attorney General's New Mexico employment proposal for inclusion in the AFOR II Plan.

**THE COMMISSION FINDS AND CONCLUDES:**

1. The Commission has jurisdiction over the parties and the subject matter of this case.
2. The Statement of the Case, the Introduction, all discussion, and all findings and conclusions stated in this Order, whether or not separately stated, numbered or designated as findings or conclusions, are hereby adopted as Findings and Conclusions of the Commission.
3. Qwest Corporation is a Colorado corporation that provides telecommunications services, including local exchange telephone service, in areas throughout New Mexico. As such, Qwest is affected with the public interest (NMSA 1978 § 63-9A-5), and is subject to regulation by this Commission pursuant to N.M. Const., Art. XI, § 2; NMSA 1978, § 63-7-1.1, and the New Mexico Telecommunications Act, NMSA 1978, §§ 63-9A-1, *et seq.*
4. Due, proper and legally sufficient notice has been given of these proceedings.
5. The AFOR II Pricing and Quality of Service Plan, as set forth herein, is reasonable under the circumstances presented, consistent with and in the public interest, consistent with NMSA 1978, § 63-9A-8.2(C) and other applicable law, and satisfies the requirement of NMSA 1978, § 63-9A-8.2(C) that the Commission implement an alternative form of regulation that includes reasonable price caps for basic residence and business local exchange services. Finally, the AFOR II Pricing and Quality of Service Plan, as set forth herein, provides a balanced and reasonable resolution to the pricing issues under consideration in this proceeding. Approval of the AFOR II Pricing and Quality of Service Plan, as set forth herein, is therefore in the public interest.
6. The AFOR II Pricing and Quality of Service Plan, as set forth herein, should be approved as provided by this Order.

**IT IS THEREFORE ORDERED:**

- A. As provided by this Order, the *AFOR II Pricing and Quality of Service Plan*, as set forth herein, is hereby adopted, approved, and entered as an Order of the Commission.
- B. Also as provided by this Order, the Appendices attached hereto are hereby adopted, approved, and incorporated into this Order.
- C. The term of the AFOR II Pricing and Quality of Service Plan shall be three (3) years, commencing with the effective date of this Order.
- D. The AFOR II Pricing and Quality of Service Plan shall become effective beginning on **January 1, 2007**, and shall remain effective until and through **December 31, 2009**; *provided*, that the Commission may investigate or otherwise address any matter related hereto, consistent with the provisions of this Order, as set forth herein; and *further provided*, that any rate changes affecting 1FR and 1FB customers that are to go into effect on the effective date of the AFOR shall go into effect no sooner than with Qwest's first billing cycle for **January 2007**.
- E. The procedural time frames and deadlines set out in the AFOR II Pricing and Quality of Service Plan, as set forth herein, are hereby approved; provided, that any procedural time frame or deadline set out herein, or otherwise established by this Order, may be altered by the Commission *sua sponte*, or upon the filing of an appropriate motion by an interested person, for good cause.
- F. As approved and as provided by this Order, the provisions of the AFOR II Pricing and Quality of Service Plan shall be carried out and shall be complied with.
- G. Qwest shall file an advice notice as soon as possible containing tariff amendments consistent with the AFOR II Pricing and Quality of Service Plan, as approved by this Order and as necessary for its implementation, subject to Staff review for compliance with applicable

Commission rules and orders. No later than **January 31, 2007**, Qwest and Staff shall file written reports on their studies of the feasibility of posting reports, tariffs and other documents required to be filed pursuant to the AFOR II Plan on, respectively, Qwest's and the Commission's web sites. Those reports shall furnish any appropriate recommendations relative thereto, and provide reasons for all recommendations and conclusions.

H. In accordance with 17 NMAC 1.2.37.4.1, the Commission has taken administrative notice of all Commission orders, rules, decisions, transcripts and other relevant materials in all Commission proceedings cited in this Order.

I. Any outstanding matter not specifically ruled on during the hearing or in this Order is disposed of consistent with this Final Order.

J. Copies of this Order, with the Appendices hereto, shall be mailed to all persons listed on the attached official Certificate of Service for this case. This Order, along with the Appendices hereto, shall be posted on the Commission's web site ([www.nmprc.state.nm.us](http://www.nmprc.state.nm.us)) as soon as possible.

K. This Order is effective immediately.

L. This Docket shall remain open until further order of the Commission.

**ISSUED** under the seal of the Commission at Santa Fe, New Mexico, this  
\_\_\_\_ day of November, 2006.

**NEW MEXICO PUBLIC REGULATION COMMISSION**

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**BEN R. LUJAN, CHAIRMAN**

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**JASON MARKS, VICE CHAIRMAN**

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**DAVID W. KING, COMMISSIONER**

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**LYNDA M. LOVEJOY, COMMISSIONER**

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**E. SHIRLEY BACA, COMMISSIONER**

**BEFORE THE NEW MEXICO PUBLIC REGULATION COMMISSION**

**IN THE MATTER OF THE DEVELOPMENT )  
OF AN ALTERNATIVE FORM OF )  
REGULATION PLAN FOR QWEST )  
CORPORATION. )**

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**Case No. 05-00466-UT**

**APPENDIX A:**

**PRICING**

**BEFORE THE NEW MEXICO PUBLIC REGULATION COMMISSION**

IN THE MATTER OF THE DEVELOPMENT )  
OF AN ALTERNATIVE FORM OF )  
REGULATION PLAN FOR QWEST )  
CORPORATION. )  
\_\_\_\_\_ )

Case No. 05-00466-UT

**APPENDIX B:**

**QUALITY OF SERVICE**



**PRICE CAPS FOR BASIC RESIDENCE, BASIC BUSINESS LOCAL EXCHANGE SERVICES, AND INTRASTATE SWITCHED ACCESS SERVICES**

**A. Definitions**

**Packaged Services:** Shall mean a number of regulated retail services that are tariffed and offered together by Qwest as a single offering.

**Promotional Offering:** Shall mean a temporary offering of products or services which may include discounts, temporary rate waivers, special incentives or other inducements designed to promote the products or services included as part of the promotional offering.

**Residential Public Interest Features and Services:** Shall mean those residential telecommunications features and services associated with the Primary line 1FR that have been identified for purposes of this plan as those features and services that have a unique public interest value.

**B. 1FR and 1FB, Switched Access, and Residential Public Interest Features and Services Price Caps**

Qwest's prices for 1FR (flat rated residence local one party access line service), 1FB (flat rated business local one party access line service), switched access services and residential public interest features and services, as defined by Section A., shall be capped as set forth below.

1. The statewide 1FR price shall be capped at the rate as of the effective date of this Plan.
2. Public Interest Residential Class Features and Services are identified as follows: per line and per call blocking, call trace, busy line verification, busy line interrupt, non-listed and non-published services. The rates for Public Interest Residential Class Features and Services associated with the 1FR service shall be capped at the rates for these services as of the effective date of this plan.
3. The statewide 1FB price shall be capped at the rate as of the effective date of this Plan;
4. Prices for a service subject to this section may be decreased as provided in Section D, below. Prices may not be decreased to a level below the cost, as defined in Section I, below, for the particular service.
5. If the Commission orders reductions in intrastate switched access prices after the implementation of this Plan, such price reductions may be implemented in a revenue neutral manner to Qwest and may include increases to the 1FR and 1FB line rates, or a flat-rated end user charge.

**C. Services other than 1FR and 1FB access lines, switched access services and Residential Public Interest Features and Services**

Prices for telecommunications services other than 1FRs, and 1FBs, residential public interest features and services, new services, and services subject to effective competition are capped as follows:

1. Prices for a service subject to this section may be decreased as provided in Section D, below. Prices may not be decreased to a level below the cost, as defined in Section I, below, for the particular service.

2. During the term of the Plan, annual price cap adjustments for services subject to this section are to be increased on annual basis by no more than the Gross Domestic Product Price Index (GDPPI). The applicable 12 month GDPPI rate will be determined using the most recently available twelve month period whose end date is as close as possible to the date a filing is made by Qwest for a price increase under the terms of this section. The percentage change in GDPPI prices shall be calculated using the logarithmic rate of change.

3. Any filing for a change in price cap shall provide information sufficient for the Commission to determine whether the proposed price cap complies with Section C.2, above.

4. Services that are determined by the Commission to be subject to effective competition pursuant to the New Mexico Telecommunications Act shall not be subject to the price caps set forth in this section.

**D. Tariff Changes.**

1. Rate decreases may take effect 1 business day after a tariff change is filed; *provided*, that such decreases shall be subject to objection and Commission review, as set forth in Section D.3-5, below.

2. Rate increases may take effect 10 business days after a tariff change is filed with the Commission; *provided*, that such increases shall be subject to objection and Commission review, as set forth in Section D.3-5, below.

3. The previous rate shall be in effect pending final determination as provided herein.

4. Staff or any interested person may file an objection to a price or price cap change within 10 business days after the filing. The only grounds on which an objection to a price or price cap change will be permitted are either that the new price or price cap does not cover cost, as defined in Section I, below, or that the non-price related terms or conditions of the tariff do not comply with applicable law or Commission rules, or are not

in the public interest by review of Staff, or that the new price or price cap exceeds the applicable increases allowed under a cap set by Section B, above.

5. Within 20 calendar days after the objection is filed, the Commission will determine whether good cause exists to investigate the objection. If the Commission determines that good cause exists for an objection to a price cap change, then the tariff is suspended and Commission shall resolve the objection within 60 calendar days after the filing of an objection. If the Commission does not issue an order within 60 calendar days after the filing of an objection, then the price cap is deemed to be effective.

#### **E. New Services**

New telecommunications services shall not be subject to price caps. A “new telecommunications service” is a service providing features, functions, or capabilities that were not offered by Qwest in New Mexico on the effective date of the Plan. New services introduced by Qwest during the period of AFOR I are to be considered New Services for the purposes of AFOR II as well.

#### **F. Promotional Offerings**

1. Any promotional offering shall be effective upon 5 business days of filing with the Commission and may include any combination of primary or regular telecommunications services, non-telecommunications services, advanced telecommunications services, and enhanced services.

2. The filing shall include a description of the period in which the promotional offer will be available, the duration of the promotional terms, the types of products and services offered, the geographic range of the offering, the class of customers to whom the promotion is offered and the type of discounts, temporary rate waivers, special incentives or other inducements included as part of the promotional offering.

3. The price of the sum of the regulated services in a promotional offering shall not exceed the highest prices of the à la carte prices of the regulated services available in the promotional package.

#### **G. Packaging of Products and Services**

1. Packaged products and services shall be exempt from the price cap provisions of this plan, provided that the individual regulated products and services or products in the package are made available separately. Packaged offerings shall be effective within 10 business days of filing with the Commission.

2. The filing shall include a description of the packaged offering, including the price or prices for the packaged offering, and types of regulated products and services included in the packaged offering.

3. The price of a package shall be no higher than the sum of the highest prices of the à la carte prices of the services available for the package.

#### **H. Individual Contracts**

1. Contracts shall become effective 10 calendar days after the filing of a verified application with the Commission, unless otherwise ordered by the Commission.

2. Contracts shall be filed with the Commission within 10 days after the conclusion of negotiations between the provider of public telecommunications services and the customer.

3. The verified application shall include:

- a. A copy of the contract;
- b. A description of the telecommunications services to be provided under the contract;
- c. An identification of the service prices that vary from the tariffed prices for such services;
- d. An identification of the terms and conditions that vary from the tariffed terms and conditions for such services;
- e. An affidavit identifying telecommunications carriers that are offering the customer competing services; and
- f. A cost study, performed pursuant to one of the cost methodologies discussed in the *Minimum Pricing Policy* section of NMAC 17.11.13.17, and a supporting affidavit attesting to the accuracy of the cost study, briefly describing a methodology of the cost study and indicating that the prices in the contract cover cost.

4. Staff shall file an affidavit within five working days making a recommendation to approve or disapprove the proposed contract. If Staff does not file an affidavit or files an affidavit recommending approval, then the contract shall become effective 10 calendar days after the filing of the application.

5. The only grounds for a Staff recommendation of disapproval are:
  - a. That the application does not contain the information identified in Section H.3.,
  - b. That the subject or comparable services are not being offered to the customer by a telecommunications carrier other than Qwest,
  - c. That the prices do not cover cost, or
  - d. That the terms and conditions of the contract are in conflict with Commission rules or orders.

6. Upon receiving a Staff affidavit recommending disapproval, the Commission shall act upon the application within the time periods established by NMSA 1978 Section 63-9A-9. No hearing shall be required unless ordered by the Commission.

7. If the Commission does not issue and order on the Staff's affidavit of disapproval within 60 days of the filing of the application, the contract shall be deemed effective.

8. Nothing in this Section ((H)) shall preclude any person from asserting any rights or remedies existing under the law.

9. Individual Contracts shall be filed with the Commission on a confidential basis subject to an appropriate protective order as determined by the Commission in compliance with NMSA 1978, § 63-9A-9.D.

#### **I. Price Floors**

All regulated products and services, including those included in promotional and packaged offerings, shall be priced above the cost of providing those individual products or services as determined in the Minimum Pricing Policy section of NMAC 17.11.13.17. Competitive services shall not be subsidized with noncompetitive services.

#### **J. Competitive Zones**

1. Qwest, or any other party of interest, may request that the Commission commence a procedure for the approval for the creation of a competitive zone or zones for the regulation of public telecommunications services under this plan. The creation of a competitive zone or zones will allow for a different, and more flexible pricing scheme within the designated competitive zone or zones.

2. The creation of a competitive zone must be consistent with the procedures and showings prescribed in NMSA 1978, § 63-9A-8.

3. Any procedure initiated before the Commission for the creation of a competitive zone or zones under this plan will commence and end within 180 days from the date of a petition by an interested party.

**K. Customer Surcharges**

A customer surcharge authorized by the Commission or the FCC, or implemented in response to an FCC or Commission decision, including, but not limited to, a surcharge pursuant to Commission rules related to funding of the State Universal Service Fund, shall not constitute an increase in the price of the 1FR or 1FB service for purposes of the price cap established in this section, and such surcharges may be added to the price cap without violating this plan.

**L. Discontinuance of Service**

1. At least 30 days prior to the proposed date of discontinuance, Qwest shall file with the Commission a petition to discontinue a service. At the same time, Qwest shall provide notice of such filing to the affected customers of its intent to discontinue the service.

2. Persons or interested parties shall have 10 days from the date of filing to file comments on the petition. Reply comments may be filed 5 days after the initial comments.

3. If comments are filed, or issues raised by the Commission, the Commission shall hold such hearings as it deems appropriate and issue a final order within 90 days of the filing of the petition by Qwest. If no comments are filed, or if no issues are raised by the Commission such that a hearing is deemed necessary, the discontinuance of service shall proceed within the timeframe allowed under this section.

**M. Term and Duration**

The term of the AFOR II Pricing and Quality of Service Plan shall be three (3) years, commencing with the effective date of this Order. The AFOR II Pricing and Quality of Service Plan shall become effective beginning on January 1, 2007, until and through December 31, 2009.

**QUALITY OF SERVICE STANDARDS AND REQUIREMENTS**

<b><u>STANDARD</u></b>	<b><u>REQUIREMENT</u></b>
<b>Held Order Standard</b>	An ILECs <b>annual</b> held order rate for primary local exchange lines shall not exceed <b>0.035 percent</b> .  Rule 17.11.22.19.B
<b>Held Orders -180 Days</b>	<b>No Held Order</b> , as of the last day of the month, shall be pending for more than <b>180 days</b> .
<b>POTS Interval</b>	An ILEC shall complete at least ninety-six (96) percent of all requests for installation of primary local exchange lines within the time frames established 17.11.22.12 NMAC.  Rule 17.11.22.19.A
<b>Designed Services Interval</b>	C. <b>Installation interval – facilities available.</b> Where facilities exist, the installation interval shall be ten (10) business days. D. <b>Installation interval – new facilities required.</b> Where new facilities are needed to provide designed service, the ILEC shall install the service within forty-five (45) calendar days, unless the customer requests a later date. If the order is not completed within forty-five (45) calendar days or the later date requested by the customer, the customer shall receive a credit of the nonrecurring charge except when the ILEC can establish that delay was caused by circumstances beyond its reasonable control.  Rule 17.11.22.14.C.D
<b>Out of Service</b>	(1) An ILEC shall clear eighty-five (85) percent of out-of-service trouble reports in each month within twenty-four (24) hours, on a wire center basis. (2) The monthly average repair interval in a wire center shall not exceed twenty (20) hours.  Rule 17.11.22.19.D
<b>Trouble Report Rate</b>	An ILEC's trouble report rate shall not exceed five (5) trouble reports per month per 100 access lines in service per wire center.  Rule 17.11.22.19.C.(1)
<b>Repeat Trouble Reports Standard</b>	An ILEC's repeat trouble report rate shall not exceed 18% of total monthly trouble reports, on a wire center basis.  Rule 17.11.22.19.C.(2)

<b>Held Order up to 180 days Penalty</b>	<p>For any calendar year in which an ILEC failed to achieve, on a statewide basis, the 0.035% held order standard, the ILEC shall incur the following credit obligations:</p> <p>(1) for each .001 increment from .001 to .005 percentage points in excess of the benchmark: .06 percent of the ILEC's total intrastate revenues for the year;</p> <p>(2) for each .001 increment from .006 to .01 percentage points in excess of the benchmark: .1 percent of ILEC's total intrastate revenues for the year;</p> <p>(3) for each .001 increment from .011 to .015 percentage points in excess of the benchmark: .13 percent of the ILEC's total intrastate revenues for the year; and</p> <p>(4) for each .001 percentage point increment over .015 percentage points in excess of the benchmark: .16 percent of ILEC's total intrastate revenues for the year.</p> <p>Rule 17.11.22.22.B</p>
<b>Held Order &gt; 180 Days Penalty</b>	<p>C. Held orders in excess of 180 days: For each month during a calendar year in which an ILEC had, as of the last day of the month, one or more held orders pending for more than 180 days, an ILEC shall incur the following credit obligations:</p> <p>(1) for each month with 1 to 5 such orders as of the last day of the month: .01 percent of an ILEC's total intrastate revenues for the year;</p> <p>(2) for each month with 6 to 10 such orders as of the last day of the month: .015 percent of ILEC's total intrastate revenues for the year; and</p> <p>(3) for each month with 11 or more such orders as of the last day of the month: .02 percent of ILEC's total intrastate revenues for the year.</p> <p>Rule 17.11.22.22.C</p>
<b>Provisioning Interval Penalty - POTS</b>	<p>If Qwest has not achieved the benchmark for <b>each exchange</b> on a <b>quarterly</b> basis for installation of Primary and Regular Services, Qwest shall incur a potential credit as follows:</p> <p>a. For each exchange and for each additional percentage point in the range from .1 to 2.0 percentage points short - \$10,000</p> <p>b. For each exchange and for each additional percentage point in the range from 2.1 to 4.0 percentage points short - \$15,000</p> <p>c. For each exchange and for each additional percentage point in the range from 4.1 to 11.0 percentage points short - \$20,000</p> <p>d. For each exchange and for each additional percentage point 11.0 percentage points short - \$50,000</p>



<p><b>Provisioning Interval Penalty - Design Services</b></p>	<p>The following credits shall apply when an ILEC fails to meet designed services installation intervals during the preceding calendar year.</p> <table border="1" data-bbox="593 338 1392 730"> <thead> <tr> <th>% installed within installation interval</th> <th>Amount per day late to be credited to customer for failure to meet held order standard</th> </tr> </thead> <tbody> <tr> <td>85% to 100%</td> <td>no credit applies</td> </tr> <tr> <td>75% to 84%</td> <td>\$ 200</td> </tr> <tr> <td>65% to 74%</td> <td>\$ 500</td> </tr> <tr> <td>55% to 64%</td> <td>\$1,000</td> </tr> <tr> <td>45% to 54%</td> <td>\$1,500</td> </tr> <tr> <td>35% to 44%</td> <td>\$3,000</td> </tr> <tr> <td>0 to 34%</td> <td>\$5,000</td> </tr> </tbody> </table> <p>Rule 17.11.22.14.E</p>	% installed within installation interval	Amount per day late to be credited to customer for failure to meet held order standard	85% to 100%	no credit applies	75% to 84%	\$ 200	65% to 74%	\$ 500	55% to 64%	\$1,000	45% to 54%	\$1,500	35% to 44%	\$3,000	0 to 34%	\$5,000
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<p><b>Out of Service Penalty</b></p>	<p>For any calendar year in which an ILEC failed to achieve, on a statewide basis, an average out-of-service clearance rate of eighty-five (85) percent in twenty-four (24) hours, the ILEC shall incur the following credit obligations:</p> <ol style="list-style-type: none"> <li>(1) for each percentage point from .1 to 3.0 percentage points less than the benchmark, .02% of the ILEC's total intrastate revenues for the year;</li> <li>(2) for each percentage point from 3.1 to 7.0 percentage points less than the benchmark, .03% of the ILEC's total intrastate revenues for the year;</li> <li>(3) for each percentage point from 7.1 to 12.0 percentage points less than the benchmark, .04% of the ILEC's total intrastate revenues for the year; and</li> <li>(4) for each percentage point beyond 12.0 percentage points less than the benchmark, .05% of the ILEC's total intrastate revenues for the year.</li> </ol> <p>Rule 17.11.22.22.E</p>																

<p><b>Trouble Reports Penalty</b></p>	<p>For any calendar year in which an ILEC failed to achieve, on a statewide basis, an average trouble report rate of 5.0 trouble reports per 100 access lines, the ILEC shall incur the following credit obligations:</p> <p>(1) for an annual average trouble report rate from .1 to 2.0 reports per 100 access lines in excess of the benchmark, .06% of the ILEC's total intrastate revenues for the year;</p> <p>(2) for an annual average trouble report rate from 2.1 to 4.0 reports per 100 access lines in excess of the benchmark, .1% of the ILEC's total intrastate revenues for the year;</p> <p>(3) for an annual average trouble report rate from 4.1 to 6.0 reports per 100 access lines in excess of the benchmark, .13% of the ILEC's total intrastate revenues for the year; and</p> <p>(4) for an annual average trouble report rate more than 6.0 reports per 100 access lines in excess of the benchmark, .16% of the ILEC's total intrastate revenues for the year.</p> <p>Rule 17.11.22.22.D</p>
<p><b>Repeat Trouble Reports Penalty</b></p>	<p>For any calendar year in which an ILEC failed to achieve, on a statewide basis, an average repeat trouble report rate of eighteen (18) percent, the ILEC shall incur the following credit obligations:</p> <p>(1) for a repeat trouble report rate from 0.1 to 5.0 percentage points in excess of the benchmark, .06% of total intrastate revenues for the year;</p> <p>(2) for a repeat trouble report rate from 5.1 to 10.0 percentage points in excess of the benchmark, .1% of total intrastate revenues for the year;</p> <p>(3) for a repeat trouble report rate from 10.1 to 15.0 percentage points in excess of the benchmark, .13% of total intrastate revenues for the year; and</p> <p>(4) for a repeat trouble report rate more than 15.0 percentage points in excess of the benchmark, .16% of total intrastate revenues for the year.</p> <p>Rule 17.11.22.22.F</p>
<p><b>Held Order Customer Remedy</b></p>	<p>An ILEC shall provide alternative service to a customer whose order is held, unless the customer was the cause of the delay.</p> <p>A. Where wireless phone service or equivalent service is available, an ILEC shall offer to pay for the customer to receive such service.</p> <p>(1) The ILEC shall cover all nonrecurring charges, including charges for the wireless handset, all monthly recurring charges, and unlimited local calling until the ILEC completes the service request. The ILEC may supply the customer with a wireless handset and a prearranged service plan or a voucher to obtain the same from a third party.</p>

	<p>(2) The customer shall be responsible for paying roaming and long distance charges.</p> <p>B. Where wireless phone service or equivalent service is not available, the ILEC shall offer the customer free of charge a telephone number, a listing, and the customer's choice of either:</p> <p>(1) free remote call forwarding of that number until service is provided; or</p> <p>(2) a free voice mailbox to which the customer's calls may be directed until service is provided.</p> <p>Rule 17.11.22.13</p>
<p><b>Provisioning Interval Customer Remedy -POTS</b></p>	<p>A. Out-of-service clearances. A LEC shall automatically make appropriate adjustments to a customer's bill whenever service from the LEC is interrupted and remains out of order for more than eight (8) hours during a continuous twenty-four (24) hour period after the customer reports it or the LEC finds it, whichever occurs first.</p> <p>(1) The LEC shall provide a credit on the monthly bill for LEC services that is proportional to the duration of the service interruption. Each occurrence of a loss of service for eight (8) hours during a twenty-four (24)-hour time period shall count as one day and every month shall be considered to have thirty (30) days.</p> <p>(2) The LEC shall not be required to provide an adjustment for loss of service due to:</p> <p>(a) the negligence or willful act of the customer;</p> <p>(b) a malfunction of facilities other than those under control of the LEC;</p> <p>(c) force majeure; or</p> <p>(d) the inability of the LEC to gain access to the customer's premises when necessary.</p> <p>B. Held orders. For each customer whose order is held, an ILEC shall:</p> <p>(1) provide a credit of \$45 for each primary residential line, and a credit of \$135 for each primary business line it fails to install within the time frames set forth in 17.11.22.12 NMAC;</p> <p>(2) pay the sum of \$300 and three (3) times the installation charge for each primary residential or business line not installed within seven (7) days of the time frames set forth in 17.11.22.12 NMAC;</p> <p>(3) waive the service charge for the first month of service once service is provided; and,</p> <p>(4) for each customer whose premises is located where wireless phone service or equivalent service is not available, provide a credit of two (2) times the basic local exchange service rate for every month or partial month the customer's order is held.</p> <p>Rule 17.11.22.23</p>

<p><b>Installation Commitment Customer Remedy</b></p>	<p>A. Out-of-service clearances. A LEC shall automatically make appropriate adjustments to a customer's bill whenever service from the LEC is interrupted and remains out of order for more than eight (8) hours during a continuous twenty-four (24) hour period after the customer reports it or the LEC finds it, whichever occurs first.</p> <p>(1) The LEC shall provide a credit on the monthly bill for LEC services that is proportional to the duration of the service interruption. Each occurrence of a loss of service for eight (8) hours during a twenty-four (24)-hour time period shall count as one day and every month shall be considered to have thirty (30) days.</p> <p>(2) The LEC shall not be required to provide an adjustment for loss of service due to:</p> <ul style="list-style-type: none"> <li>(a) the negligence or willful act of the customer;</li> <li>(b) a malfunction of facilities other than those under control of the LEC;</li> <li>(c) force majeure; or</li> <li>(d) the inability of the LEC to gain access to the customer's premises when necessary.</li> </ul> <p>B. Held orders. For each customer whose order is held, an ILEC shall:</p> <ul style="list-style-type: none"> <li>(1) provide a credit of \$45 for each primary residential line, and a credit of \$135 for each primary business line it fails to install within the time frames set forth in 17.11.22.12 NMAC;</li> <li>(2) pay the sum of \$300 and three (3) times the installation charge for each primary residential or business line not installed within seven (7) days of the time frames set forth in 17.11.22.12 NMAC;</li> <li>(3) waive the service charge for the first month of service once service is provided; and,</li> <li>(4) for each customer whose premises is located where wireless phone service or equivalent service is not available, provide a credit of two (2) times the basic local exchange service rate for every month or partial month the customer's order is held.</li> </ul> <p>Rule 17.11.22.23</p>
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<p><b>Out of Service Customer Remedy -POTS</b></p>	<p>A. Out-of-service clearances. A LEC shall automatically make appropriate adjustments to a customer's bill whenever service from the LEC is interrupted and remains out of order for more than eight (8) hours during a continuous twenty-four (24) hour period after the customer reports it or the LEC finds it, whichever occurs first.</p> <p>(1) The LEC shall provide a credit on the monthly bill for LEC services that is proportional to the duration of the service interruption. Each occurrence of a loss of service for eight (8) hours during a twenty-four (24)-hour time period shall count as one day and every month shall be considered to have thirty (30) days.</p> <p>(2) The LEC shall not be required to provide an adjustment for loss of service due to:</p> <ul style="list-style-type: none"> <li>(a) the negligence or willful act of the customer;</li> <li>(b) a malfunction of facilities other than those under control of the LEC;</li> <li>(c) force majeure; or</li> <li>(d) the inability of the LEC to gain access to the customer's premises when necessary.</li> </ul> <p>B. Held orders. For each customer whose order is held, an ILEC shall:</p> <ul style="list-style-type: none"> <li>(1) provide a credit of \$45 for each primary residential line, and a credit of \$135 for each primary business line it fails to install within the time frames set forth in 17.11.22.12 NMAC;</li> <li>(2) pay the sum of \$300 and three (3) times the installation charge for each primary residential or business line not installed within seven (7) days of the time frames set forth in 17.11.22.12 NMAC;</li> <li>(3) waive the service charge for the first month of service once service is provided; and,</li> <li>(4) for each customer whose premises is located where wireless phone service or equivalent service is not available, provide a credit of two (2) times the basic local exchange service rate for every month or partial month the customer's order is held.</li> </ul> <p>Rule 17.11.22.23</p>
<p><b>Repair Commitment Customer Remedy</b></p>	<p>If Qwest misses a dispatched repair service call for Primary or Regular services, Qwest shall automatically issue a credit of \$12 for residential service or \$40 for business service to the account of the customer affected.</p>

<p><b>Provisioning Interval Customer Remedy -Design Services</b></p>	<p>C. Installation interval – facilities available. Where facilities exist, the installation interval shall be ten (10) business days.</p> <p>D. Installation interval – new facilities required. Where new facilities are needed to provide designed service, the ILEC shall install the service within forty-five (45) calendar days, unless the customer requests a later date. If the order is not completed within forty-five (45) calendar days or the later date requested by the customer, the customer shall receive a credit of the nonrecurring charge except when the ILEC can establish that delay was caused by circumstances beyond its reasonable control.</p> <p>(1) When the delay is caused by circumstances beyond the ILEC's reasonable control and the commission has granted a waiver of the held order standard pursuant to 17.11.22.25 NMAC, the period of delay shall be added to the time period allowed for installation of the service.</p> <p>(2) An ILEC shall report any case in which it claims the delay is caused by circumstances beyond the reasonable control of the ILEC to the affected customer who shall have the right to challenge the exception.</p> <p>17.11.22.14.C.D</p>
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<p><b>Out of Service Customer Remedy -Design Services</b></p>	<p><b>A.</b> When service is out for the designated time period, then unless the customer caused the out-of-service condition, an ILEC shall credit the stated amount to the customer's account, unless otherwise determined by customer contract.</p>																															
	<table border="1"> <thead> <tr> <th style="text-align: left;">Period out of service, in clock hours, whether continuous or discontinuous</th> <th style="text-align: center;">Credit for DS-1 services</th> <th style="text-align: center;">Credit for DS-3 services</th> <th style="text-align: center;">Credit for ISDN-BRI services</th> </tr> </thead> <tbody> <tr> <td>Less than 4 hours in a 12 hour period</td> <td style="text-align: center;">no credit</td> <td style="text-align: center;">no credit</td> <td style="text-align: center;">no credit</td> </tr> <tr> <td>4 to 8 hours in a 24 hour period</td> <td style="text-align: center;">\$120</td> <td style="text-align: center;">\$1000</td> <td style="text-align: center;">no credit</td> </tr> <tr> <td>8 to 16 hours in a 36 hour period</td> <td style="text-align: center;">\$210</td> <td style="text-align: center;">\$2100</td> <td style="text-align: center;">no credit</td> </tr> <tr> <td>16 to 24 hours in a 48 hour period</td> <td style="text-align: center;">\$240</td> <td style="text-align: center;">\$2400</td> <td style="text-align: center;">no credit</td> </tr> <tr> <td>24 to 48 hours in a 60 hour period</td> <td style="text-align: center;">\$300</td> <td style="text-align: center;">\$3000</td> <td style="text-align: center;">\$10 per day</td> </tr> <tr> <td>More than 48 hours in a 72 hour period</td> <td style="text-align: center;">The greater of \$420 or 100% of the total monthly recurring charge</td> <td style="text-align: center;">The greater of \$4000 or 100% of the total monthly recurring charge</td> <td style="text-align: center;">\$10 per day</td> </tr> </tbody> </table>	Period out of service, in clock hours, whether continuous or discontinuous	Credit for DS-1 services	Credit for DS-3 services	Credit for ISDN-BRI services	Less than 4 hours in a 12 hour period	no credit	no credit	no credit	4 to 8 hours in a 24 hour period	\$120	\$1000	no credit	8 to 16 hours in a 36 hour period	\$210	\$2100	no credit	16 to 24 hours in a 48 hour period	\$240	\$2400	no credit	24 to 48 hours in a 60 hour period	\$300	\$3000	\$10 per day	More than 48 hours in a 72 hour period	The greater of \$420 or 100% of the total monthly recurring charge	The greater of \$4000 or 100% of the total monthly recurring charge	\$10 per day			
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<p><b>B.</b> Whenever an ILEC fails to repair an out-of-service condition for DS-1 or DS-3 service within twenty-four (24) clock hours of notification, it shall credit the pro rata cost of the circuit and trunks to the customer's account.</p>																																
<p>Rule 17.11.22.15</p>																																

<b>Force Majeure</b>	<p>circumstances beyond the reasonable control of an ILEC means delays caused by:</p> <ol style="list-style-type: none"> <li>(1) a vendor in the delivery of necessary equipment or supplies, where the ILEC has made a timely order of the equipment or supplies;</li> <li>(2) local or tribal government entities in approving easements or access to rights-of-way, where the ILEC has made a timely application for such approval;</li> <li>(3) the customer;</li> <li>(4) negligent or willful misconduct by third parties not in privity with the ILEC; or</li> <li>(5) force majeure (meaning causes which are outside the control of the ILEC and could not be avoided by the exercise of due care, including but not limited to terrorism, explosions, fires, floods, severe storms, epidemics, civil unrest, wars, injunctions, strikes, work stoppages, and other emergencies and catastrophes);</li> </ol> <p>Rule 17.11.22.7.F.5</p>
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