

THE NEW MEXICO PUBLIC REGULATION COMMISSION

UTILITY DIVISION AGENDA
SPECIAL FORMAL OPEN MEETING

PERA BUILDING
4TH FLOOR HEARING ROOM
1120 PASEO DE PERALTA
SANTA FE, NEW MEXICO

THURSDAY
MARCH 8, 2001
4:00 P.M.

UTILITY CASE NO. 3215	IN THE MATTER OF U S WEST COMMUNICATIONS, INC.'S PETITION FOR APPROVAL OF AN ALTERNATIVE FORM OF REGULATION PLAN.
UTILITY CASE NO. 3008	IN THE MATTER OF AN INVESTIGATION INTO THE RATES AND SERVICES OF U S WEST COMMUNICATIONS, INC.
UTILITY CASE NO. 3007	IN THE MATTER OF A COMMISSION INVESTIGATION INTO THE 1998 EARNINGS OF U S WEST COMMUNICATIONS, INC., IN NEW MEXICO.
UTILITY CASE NO. 2938	IN THE MATTER OF THE HELD ORDERS OF U S WEST COMMUNICATIONS, INC.
UTILITY CASE NO. 2939	IN THE MATTER OF WAIVERS OF HELD ORDERS OF U S WEST COMMUNICATIONS, INC.
UTILITY CASE NO. 3162	PROCEEDINGS ON AN ORDER TO SHOW CAUSE WHY ADMINISTRATIVE FINES SHOULD NOT BE IMPOSED ON U S WEST FOR VIOLATION OF THE ZERO-HELD ORDERS STANDARD.

<p>UTILITY CASE NO. 2922</p> <p>UTILITY CASE NO. 3147</p> <p>UTILITY CASE NO. 3429 (James Martin)</p>	<p>IN THE MATTER OF U S WEST COMMUNICATIONS, INC.'S INTRODUCTION OF ITS INTEGRATED SERVICES DIGITAL NETWORK.</p> <p>IN THE MATTER OF THE COMMISSION'S ORDER TO SHOW CAUSE WHY U S WEST COMMUNICATIONS, INC.'S CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY SHOULD NOT BE REVOKED, MODIFIED, OR AMENDED IN NEW MEXICO,</p> <p>U S WEST COMMUNICATIONS, INC.,</p> <p>RESPONDENT.</p> <p>IN THE MATTER OF U S WEST'S TARIFF REVISIONS TO ITS SWITCHED ACCESS SERVICE TARIFF AND ITS INTRASTATE ACCESS SERVICE TARIFF.</p> <p><u>FINAL ORDER</u></p>
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BEFORE THE NEW MEXICO PUBLIC REGULATION COMMISSION

IN THE MATTER OF U S WEST)
COMMUNICATIONS, INC.'S PETITION)
FOR APPROVAL OF AN ALTERNATIVE) UTILITY CASE NO. 3215
FORM OF REGULATION PLAN)

IN THE MATTER OF AN INVESTIGATION)
INTO THE RATES AND SERVICES OF) UTILITY CASE NO. 3008
U S WEST COMMUNICATIONS, INC.)

IN THE MATTER OF A COMMISSION)
INVESTIGATION INTO THE 1998)
EARNINGS OF U S WEST) UTILITY CASE NO. 3007
COMMUNICATIONS, INC., IN)
NEW MEXICO)

IN THE MATTER OF THE HELD ORDERS)
OF U S WEST COMMUNICATIONS, INC.) UTILITY CASE NO. 2938

IN THE MATTER OF WAIVERS OF HELD)
ORDERS OF U S WEST) UTILITY CASE NO. 2939
COMMUNICATIONS, INC.)

PROCEEDINGS ON AN ORDER TO SHOW)
CAUSE WHY ADMINISTRATIVE FINES)
SHOULD NOT BE IMPOSED ON U S WEST) UTILITY CASE NO. 3162
FOR VIOLATION OF THE ZERO-HELD)
ORDERS STANDARD)

IN THE MATTER OF U S WEST)
COMMUNICATIONS, INC.'S)
INTRODUCTION OF ITS INTEGRATED) UTILITY CASE NO. 2922
SERVICES DIGITAL NETWORK)

IN THE MATTER OF THE COMMISSION'S)
ORDER TO SHOW CAUSE WHY U S WEST)
COMMUNICATIONS, INC.'S CERTIFICATE)
OF PUBLIC CONVENIENCE AND)
NECESSITY SHOULD NOT BE REVOKED,)
MODIFIED, OR AMENDED IN NEW MEXICO)

UTILITY CASE NO. 3147

U S WEST COMMUNICATIONS, INC.,)

Respondent.)

IN THE MATTER OF U S WEST'S)
TARIFF REVISIONS TO ITS SWITCHED)
ACCESS SERVICE TARIFF AND ITS)
INTRASTATE ACCESS SERVICE)
TARIFF)

Utility Case No. 3429

FINAL ORDER

FINAL ORDER
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THIS MATTER comes before the New Mexico Public Regulation Commission ("Commission") upon the Amended Joint Stipulation of the Staff of the New Mexico Public Regulation Commission, Qwest Corporation, and the NMISPG as Their Petition for Approval of an Amended Alternative Form of Regulation Plan and for Dismissal of Pending Utility Cases ("Amended Stipulation"), and upon the Amended Alternative Form of Regulation Plan, Including Investment and Service Quality Commitments, for Qwest Corporation ("Amended AFOR") that accompanied the Amended Stipulation. The proponents of the Amended AFOR, namely Qwest Corporation ("Qwest" or the "Company"), the Commission's Utility Division Staff ("Staff"), AT&T Communications of the Mountain States, Inc. ("AT&T") and the New Mexico Internet Service Providers Group ("NMISPG") seek Commission approval of an alternative form of regulation (i.e., the Amended AFOR) pursuant to NMSA 1978, § 63-9A-8.2, and by the same vehicle wish to settle and resolve a set of nine existing cases before the Commission. A public hearing on the original and Amended AFORs was conducted on December 20, 28-29, 2000, January 3-4, 24, and 31, and February 1-2 and 5-7, 2001, including submission of oral and written public comment. The Commission, having considered all of the evidence admitted at the hearing, the record and the pleadings in this case, and arguments of counsel, and being fully informed of the premises, enters the following as its Final Order in this proceeding.

I. STATEMENT OF THE CASE

Following the merger of Qwest Communications International Inc. and U S WEST, Inc., on June 30, 2000, Qwest initiated discussions with Staff aimed at a stipulated resolution of the issues in nine contested cases and establishing an AFOR that complied with NMSA 1978, § 63-9A-8.2. These discussions culminated in the filing,

on October 27, 2000, of a Joint Stipulation petitioning for approval of an AFOR with the Commission. The proposed AFOR was signed and supported by Staff, Qwest, and AT&T, and was filed concurrently with the Joint Stipulation. See Qwest Exs. 1-2.

Motions for leave to intervene were filed at various times by (1) the Attorney General of New Mexico ("AG"), (2) AT&T, (3) the NMISPG, (4) e.spire Communications, Inc. and ACSI Local Switched Services, Inc., d/b/a e.spire Communications ("e.spire"), and (5) WorldCom, Inc. ("WorldCom"). Each of the motions to intervene was deemed allowed pursuant to 17 NMAC 1.2.26.4.1.

Following the filing of the Joint Stipulation, statements in opposition to the AFOR were filed by the AG, e.spire and NMISPG. During the course of the proceedings, the AG also filed various procedural objections and numerous motions to dismiss the case. The AG's filed objections were not sustained, and all of the motions to dismiss were denied.

By procedural order issued on November 9, 2000, the Commission ordered that nine cases pending before the Commission be considered for possible resolution: *In the Matter of the Petition of U S WEST Communications, Inc. for Approval of its Alternative Form of Regulation Plan* (Utility Case No. 3215), *In the Matter of an Investigation into the Rates and Services of U S WEST Communications, Inc.* (Utility Case No. 3008), *In the Matter of a Commission Investigation into the 1998 Earnings of U S WEST Communications, Inc., in New Mexico* (Utility Case No. 3007), *In the Matter of the Held Orders of U S WEST Communications, Inc.* (Utility Case No. 2938), *In the Matter of Waivers of Held Orders of U S WEST Communications, Inc.* (Utility Case No. 2939), *Proceedings on an Order to Show Cause Why Administrative Fines Should Not Be Imposed on U S WEST for Violation of the Zero-Held Orders Standard* (Utility Case No.

3162), *In the Matter of U S WEST Communications, Inc.'s Introduction of Its Integrated Services Digital Network* (Utility Case No. 2922), *In the Matter of the Commission's Order to Show Cause Why U S WEST Communications, Inc.'s Certificate of Public Convenience and Necessity Should Not Be Revoked, Modified, or Amended in New Mexico* (Utility Case No. 3147), and *In the Matter of U S WEST's Tariff Revisions to Its Switched Access Service Tariff and Its Intrastate Access Service Tariff* (Utility Case No. 3429).

In the same procedural order, the Commission scheduled a public hearing in this matter. Pursuant to the order, Qwest caused a Notice of Hearing to be published in the *Las Cruces Sun News* on November 15, 2000, in the *Albuquerque Journal* on November 16, 2000, and in *The New Mexican* on November 17, 2000.

On November 28, 2000, direct testimonies in support of the Joint Stipulation and AFOR were filed by John E. Curl and Gary G. Roybal on behalf of Staff, and Charles L. Ward, John Badal, and Nita Taylor on behalf of Qwest. Also on November 28, 2000, New Mexico Vecinos United filed a Motion for Acceptance of a Proposal Regarding the AFOR.

On December 11, 2000, direct testimonies in opposition to the Joint Stipulation and AFOR were filed by James W. Currin on behalf of the AG, Marianne Granoff and Jane M. Hill on behalf of NMISPG, and David Kaufman on behalf of e.spire.

Following a pre-hearing conference, the Commission issued a revised procedural order on December 13, 2000, rescheduling the hearing in this case. The order noted that all parties in attendance at the pre-hearing conference except Vecinos United had agreed to the procedural schedule adopted therein.

Pursuant to notices of bench requests issued by the Commission, Qwest filed responses to a first set of bench requests on December 12, 2000, and confidential

responses to a second set of bench requests on January 3, 2001. On February 2, 2001, Qwest filed responses to the Bench Request issued by the General Counsel in hearings on January 3, 2001. 3 Tr. 133-135; PRC Exs. 2, 3, 4.¹ The AG filed her own responses to the first and second sets of bench requests and Qwest's responses thereto on December 18, 2000 and on January 8, 2001.

As scheduled, the Commission heard oral public comments on the proposed AFOR on December 20, 2000 and at various times during the public hearings that followed and also received written comments. Numerous public comments were presented to the Commission. The commentators who spoke on December 20 and at later times during these proceedings are listed immediately below by the date of their comments.

December 20, 2000:

Judy McMullin, President, Communication Workers of America, Local 711

Howard Balmer, City Councilor, City of Rio Rancho, District 4

Valerie Pink, Executive Director, Rio Rancho Chamber of Commerce

Jerry Easley, President & CEO, Santa Fe Chamber of Commerce

Carroll Cagle, Executive Director, Alliance for Affordable Phones

Robert Kosslyn, Director of Technology, Santa Fe Public Schools

Roberto Salazar, Director of Information and Technology, State of New Mexico

Edward O'Leary, President and CEO, First Security Bank of New Mexico, Chairman of the Telecommunications Task Force Of the Greater Albuquerque Chamber of Commerce

Chris Stag, Chairman of the Association of Commerce and Industry, and Mayor of Taos Ski Valley

¹ Transcript citations herein correspond to the hearing day. For example, because January 3, 2001, was day 3, it will be cited as "3 Tr. ___."

Lisa Hill, Chupadero, NM

Mike Nestor, Chupadero, NM

Jack Miller, Past Fire Chief of Tesuque Area, Chupadero, NM

Kathy Harums, Chupadero, NM

Mike Reese, Associate Superintendent, Moriarty Schools

John Garcia, Secretary of Economic Development, Representing Governor Johnson

Bridget Jacober, Santa Fe, NM

Mary Lou Chavez, Director, Belen Chamber of Commerce

John Peña, Mayor of Gallup

Jean Grant, Competitive Alliance of NM

Melissa Lane, Executive Director, Farmington Chamber of Commerce

Janet Montoya, NM Vecinos United

John Dowling, President, Western Bank of Gallup, Chairman of McKinley Development Foundation

Irvin Harrison, McKinley County Manager

Dwayne Jordan, McKinley Foundation

Robert Tacker, Director of Information Services for NM Tech and a member of the Information Technology Commission (speaking on own behalf)

Warren Salomon, AARP

(Also commented on January 31, 2001 and February 7, 2001)

Jim Hall, Chief Operating Officer of Oso Grande Technologies

(Also commented on January 31, 2001)

Jimmie Glenn, NM Retail Association, NM Restaurant Association, NM Tourism Association

Craig Fields, Economic Development Planner, City of Santa Fe
(Also commented on February 7, 2001)

Scott Karns, Santa Fe, NM

January 4, 2001:

Eric Stroble, San Miguel Economic Development, Inc. Chamber of Commerce

George Davis, Stanley, NM

Fred Peralta, Mayor of Taos

Andrew Otoli, Pueblo of Zuni, Economic Development Specialist, Office of Planning and Development, former Lt. Governor of Pueblo of Zuni Tribal Council

Andres Valdez, Executive Director, NM Vecinos United

February 7, 2001:

John Carey, President, Association of Commerce and Industry of New Mexico

Gene Grant, Executive Director, Competitive Alliance of New Mexico

In accordance with its procedural directives, the Commission heard testimony and evidence on December 28-29, 2000, January 3-4, 24, and 31, and February 1-2 and 5-7, 2001. Present and presiding at the hearings were Chairman Bill Pope, and Commissioners Herb H. Hughes, Jerome D. Block, Lynda M. Lovejoy and Tony Schaefer. James C. Martin and Karl O. Wyler appeared for the Commission's Office of General Counsel. The following persons entered appearances in this proceeding:²

For Qwest

Todd Lundy, Esq., and Thomas Olson, Esq.

For the Attorney General

David Mittle, Assistant Attorney General

² Persons who entered appearances were not necessarily present during all of the hearings.

For NMISPG

Bruce Throne, Esq.

For e.spire

Patricia Salazar Ives, Esq.

For Sprint

M. Karen Kilgore, Esq.

For AT&T

Gary B. Witt, Esq., and Mark Mowery, Esq.

New Mexico Vecinos United

Andres Valdez

Utility Division Staff

Charles F. Noble, Esq.

During the course of the hearing, on January 23, 2001, an Amended Joint Stipulation and an Amended AFOR Plan were filed with the Commission. Upon leave of the Commission, the Amended AFOR was substituted in place of the original AFOR as the regulation plan under consideration in this case. 5 Tr. 77; Qwest Exs. 6A, 6B. In addition to Qwest, the Staff, and AT&T, the NMISPG became a signatory and supporter of the Amended AFOR.

The Commission ordered the submission of written testimony in support of the Amended AFOR and allowed parties in opposition to submit written responsive testimony.

Supplemental testimonies in support of the Amended AFOR were filed on January 25, 2001, by John Badal on behalf of Qwest, and John E. Curl and Gary G. Roybal on behalf of Staff.

Supplemental testimonies in opposition to the Amended AFOR were filed on January 31, 2001, by James W. Currin on behalf of the AG, and on February 1, 2001, by David Kaufman on behalf of e.spire.

II. BACKGROUND OF THE AMENDED STIPULATION AND AMENDED AFOR

The AFOR had its genesis in the convergence of two developments. First, in HB 400 (NM Laws 2000, Ch. 102; now codified as NMSA 1978, §§ 63-9A-2, 63-9A-8.2 and 63-9A-8.3) the Legislature, among other things, directed the Commission to “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.” Section 63-9A-8.2(C). Shortly after the enactment of HB 400, the Commission approved (by a Final Order entered on June 27, 2000) the AFOR presented by a stipulation between Staff and VALOR Telecommunications of New Mexico, LLC (“VALOR”) in Utility Case No. 3358. While the Commission’s decision in the VALOR AFOR case does not serve as a precedent for this proceeding,³ that case has some significance here because VALOR is the only other incumbent telecommunications carrier in New Mexico besides Qwest that has more than fifty thousand access lines, and because the VALOR AFOR was the first one approved under the relevant provision of HB 400.

The second important development was the merger of Qwest and U S WEST. In the wake of the merger, the new Qwest management stated its willingness to invest in this state more than its predecessor, and began an initiative to resolve a number of

³ Decretal ¶ F of the Final Order in the VALOR AFOR case provides that “[a]pproval of the Joint Stipulation and Amended AFOR Plan is not of precedential value.” *See also*, 17 NMAC 1.2.23.4.

pending regulatory controversies and to work toward a comprehensive solution to the service problems that Qwest had inherited in New Mexico.

Qwest and Staff claim that these two developments provided an opportunity for the establishment of an AFOR that sets out investment and service quality commitments designed to resolve principal telecommunications needs in Qwest's service territory and at the same time to frame the regulatory environment necessary to justify and sustain those commitments. Thus, on October 27, 2000, after almost three months of negotiations among Qwest, Staff, and other industry participants including AT&T and WorldCom, the Joint Stipulation and AFOR were signed and filed.

On January 4, 2001, after the first four days of hearings on the AFOR, the Commission called a recess and encouraged the parties to meet and attempt to resolve as many of the issues among them as possible. Negotiations ensued and continued through the following two weeks among Qwest, the Staff, AT&T, NMISPG, the AG, and e.spire. The Amended Joint Stipulation and Amended AFOR are the products of those negotiations. NMISPG, which had originally opposed the AFOR, is now a party to both the Amended Stipulation and the Amended AFOR. The AG and e.spire continued their opposition to the AFOR.

III. SUMMARY OF THE TESTIMONY

Testimony was offered at the hearing by the following nine witnesses: Charles L. Ward, John Badal, and Nita Taylor for Qwest; John E. Curl and Gary G. Roybal for Staff; James W. Currin for the AG; Marianne Granoff and Jane M. Hill for NMISPG; and David Kaufman for e.spire.

Qwest witness Charles L. Ward is the Regional Vice President for Qwest's Eastern Region. Mr. Ward discussed why he believes the AFOR offers a comprehensive

solution to the full range of telecommunications policy objectives in New Mexico, from stimulating investment in infrastructure, to deploying advanced communications services, to improving service quality, to maintaining reasonable prices. Mr. Ward testified that the balance reached in the AFOR is the best that could be reached under the circumstances presented in the existing cases and under the rulemakings proposed by the Commission under Section 63-9A-8.2. Qwest Ex. 4.

Qwest witness John Badal is Qwest's Vice President and General Manager for the State of New Mexico. Mr. Badal provided an overview of the AFOR, and later the Amended AFOR, and Qwest's reasons for asking the Commission to approve the Amended AFOR. He testified that the Amended AFOR provides a means to create a regulatory environment in New Mexico that encourages investment, provides incentives for new service deployment, promotes competition, enhances service quality, and furthers the policy initiatives of the federal Telecommunications Act of 1996 and HB 400. Qwest Ex. 5. In supplemental direct testimony, Mr. Badal also described the new and revised provisions in the Amended AFOR and explained why he believes these changes improve Qwest's AFOR as originally proposed. Qwest Ex. 7. When his supplemental testimony and Qwest Exs. 6A, B and C were introduced, Mr. Badal also noted certain corrections to page 46 of the Amended AFOR. 6 Tr. 34-35.

Qwest witness Nita Taylor is Qwest's Director of Regulatory Affairs in New Mexico. Ms. Taylor described the background and procedural status of each of the cases currently pending before the Commission that will be resolved if the Commission approves the Amended AFOR. Qwest Ex. 8. Ms. Taylor's testimony also describes how each of the existing cases will be resolved through the terms of the proposed AFOR plan.

During her testimony, Ms. Taylor also noted a further correction to Section X.B.2.a of the Amended AFOR. 8 Tr. 142-143.

Staff witness John E. Curl is the Director of the Commission's Utility Division. Mr. Curl explained why, in Staff's view, the Joint Stipulation and AFOR should be approved. He testified that the Joint Stipulation is a better solution to the crisis in telecommunications with which New Mexico is now struggling than continuing with litigation against Qwest. It will best serve the public interest by bringing about a rapid resolution of investment, rate, and service quality issues that are now in contention. It will result in improvements in basic telephone service and advanced services, while maintaining reasonable prices for both. Further protracted litigation, in Staff's view, will not bring such improvements in the near future to anyone. Staff Exs. 4, 5.

Staff witness Gary G. Roybal is Deputy Director and Telecommunications Bureau Chief for the Commission's Utility Division. Mr. Roybal presented an overview of the utility cases now pending before the Commission that will be settled and resolved if the Commission approves the Joint Stipulation and AFOR. In addition, Mr. Roybal provided an overview of the provisions of the AFOR itself, both as originally proposed and as amended. Staff Exs. 6, 7.

The AG's witness James W. Currin is a Senior Consultant with the firm of Snively, King, Majoros, O'Connor & Lee, Inc. Mr. Currin focused on the service quality standards in the original AFOR and testified that those standards will not likely produce an improvement in customer service, but rather may allow the quality of service in some areas to decline. Mr. Currin also recommended specific modifications of some of the standards. Concerning the Amended AFOR, he testified that the Amended AFOR is a better regulatory plan than the original proposed AFOR, that the Amended

AFOR responds to some of his concerns, but that it does not respond to all of them. AG Exs. 25, 39.

Marianne Granoff testified on behalf of the NMISPG, an *ad hoc* group of Internet access service providers that was convened for the purpose of participating in this proceeding. In her initial testimony, Ms. Granoff proposed modifying the provisions in the original AFOR addressing retail designed services in an effort to bring about substantial improvement in the installation and repair of those services. After further negotiations that occurred in January of 2001, NMISPG joined in the Amended Stipulation as well as the Amended AFOR, which incorporates additional standards on the provisioning and repair of designed services. NMISPG Exs. 9, 10; *see* Qwest Ex. 6A, 6B.

NMISPG witness Jane M. Hill is President of Cyber Mesa Computer Systems, an Internet service provider. Ms. Hill discussed problems that Cyber Mesa has had with Qwest's installation and repair of designed services, and she urged the Commission to adopt the service quality standards for designed services described initially by Ms. Granoff and later incorporated, in large part, in the Amended AFOR. NMISPG Ex. 7.

e.spire witness David Kaufman is Director of Regulatory Affairs for e.spire. Mr. Kaufman testified that e.spire supports many parts of the AFOR, but recommended that the Plan be supplemented with standards governing Qwest's provisioning of designed services as well as certain procedural safeguards favored by e.spire. e.spire Ex. 3. In supplemental direct testimony, Mr. Kaufman acknowledged that a number of the changes requested by e.spire in response to the original AFOR were incorporated into the Amended AFOR; but he contended that still more changes favored by e.spire

should be made in the Amended AFOR. The changes desired by e.spire were specifically set out by Mr. Kaufman in e.spire Ex. 4.

IV. SUMMARY OF THE AMENDED AFOR'S TERMS

The Amended AFOR sets the terms and conditions of regulation that will apply to Qwest's retail services⁴ in New Mexico during the term of the Plan. Mr. Badal and Mr. Roybal have each provided an overview of the Plan. *See generally* Qwest Ex. 5, at 15-18; Qwest Ex. 7, at 4-33; Staff Ex. 6, at 6-22; Staff Ex. 7, at 1-4. In summary, the Amended AFOR proposes the following terms:

- Section IV: The term of the Plan is five years. As originally proposed, the Plan was to take effect on January 1, 2001. The Amended AFOR provides that the effective date is to be determined by the Commission. Under NMSA 1978, §63-9A-8.2(C), the Commission must implement an AFOR by April 1, 2001.
- Section V: The Plan caps the prices for 1FR (residence basic exchange service) at \$10.66 and 1FB (business basic exchange service) at \$34.37 during the term of the Plan. This establishes the 1FR and 1FB rates at the levels ordered by the Commission in Utility Case No. 3007. On the condition that Qwest meets its average yearly investment and other specified service commitments, including the deployment of digital subscriber line services ("DSL") and integrated services digital network

⁴ All services covered by Qwest's AFOR Plan are retail unless specifically stated otherwise. The Plan does not affect Qwest's wholesale rates or provision of wholesale services, nor does it affect the Commission's jurisdiction to set wholesale rates and establish standards, incentives, enforcement mechanisms or otherwise regulate Qwest's wholesale services, except as specifically stated in the Plan. Wholesale services are services provided by Qwest to another telecommunications service provider which are used by that provider to provide service to its retail customers.

services ("ISDN"), the grooming of loops to allow any carrier to provide DSL, and the clearing of existing high cost held orders, the 1FR price cap can be increased to \$12.25 30 days after Qwest submits its annual compliance report for Period 1, which ends June 30, 2002, and to \$13.50 after Period 2 ends (June 30, 2003). Switched access rates would be reduced such that Qwest's annual revenues will decrease over 40% or approximately \$14 million; \$7 million annually as of the effective date of the Plan, and an additional \$7 million annually beginning January 1, 2003. The \$3.30 per month and the one-time \$113.00 outside the base rate area charges would be eliminated effective January 1, 2002, to the benefit of approximately 98,000 residential customers and 40,000 business customers. The elimination of the outside the base rate area charge equates to an annual revenue reduction to Qwest of about \$6.5 million.

- Section VI: Price caps for services other than 1FR, 1FB, Switched Access and New Services shall be up to 20% above current prices, provided that the new price cap is no greater than the average price offered by Qwest for the same service in the other 13 states in Qwest's region, and there is no more than a 5% price cap increase in any one year (except that Qwest may carry over and accumulate permitted price cap increases from year to year and thereby implement a price cap increase of more than 5%). Prices for services subject to effective competition and new services deployed after the effective date of the Plan are not capped.

- Section VII: As of the effective date of the plan, four new extended area service ("EAS") zones are established: Angel Fire, Peñasco, Questa, Red River and Taos ("Taos Cluster"); Hatch and Las Cruces; Artesia and Roswell; and Cimarron, Springer and Raton ("Raton Cluster"). Qwest agrees to implement these new EAS arrangements without an EAS surcharge. At the time these arrangements are implemented and because of the increase in the size of their local calling area, rate group 1 residential prices will increase to \$10.66 per month, and rate group 1 business prices will increase to \$34.37 per month.⁵ These customers, however, will no longer incur long distance charges for calls within their EAS zone, and many will no longer be subject to the \$3.30 charge for service outside base rate areas.
- Section VIII: Qwest is obligated to invest not less than \$788 million over the term of the Plan, under various terms and timeframes. Attachment A to the Amended AFOR describes the anticipated investment projects and time frames. Included within this investment is the commitment to deploy DSL within 6 months of the effective date of the Plan in the following wire centers: Taos, Farmington main, Roswell main, Gallup main and Alamogordo. Further, within 18 months of the effective date of the Plan, Qwest commits to deploy ISDN in five of ten identified wire centers, and within 24 months of the effective date of the Plan, Qwest will

⁵ Rate Group 1 is comprised of the municipalities of Angel Fire, Cimarron, Hatch, Peñasco, Questa, Red River and Springer. The current Rate Group 1 price is \$9.93 for 1FR and \$30.06 for 1FB customers.

deploy ISDN in the five remaining wire centers. Another component of Qwest's investment commitment to advanced services is the agreement to groom loops capable of providing DSL in the wire centers where Qwest deploys DSL.

- Section IX: Qwest undertakes service quality commitments, including specific service quality benchmarks for Primary and Regular Services for: provisioning (on an exchange basis), repair within 24 hours for out-of-service conditions, trouble reports per 100 access lines (on a wire center basis), repeat trouble reports, held orders, and held orders over 180 days. This section of the Amended AFOR also sets provisioning benchmarks on a wire center basis for designed services. A revised held order waiver process is established and includes monthly, quarterly and annual reporting obligations. Qwest has committed to working with the Commission to ensure that all necessary information is reported on a timely basis.

The Amended AFOR permits waivers from the benchmarks applicable to the provision of basic and designed services, but only when the circumstances underlying the waiver request are outside of the control of the company. The Amended AFOR removes the cost of reinforcing feeder and distribution as a basis for requesting a waiver from the standards and benchmarks governing provisioning of basic and designed services. The Amended AFOR imposes extensive data tracking and reporting obligations on Qwest. These reporting requirements explicitly correlate with the service quality benchmarks set by the Plan.

The AFOR would resolve the existing high cost held order litigation through Qwest's commitment to clear within 18 months of the effective date of the Plan all high cost held orders existing as of the effective date of the Plan. Also, the AFOR requires Qwest to clear all unfilled designed service orders as of the effective date of the Amended AFOR on a quarterly schedule over the first 18 months of the Plan, without regard to whether the unfilled designed services order is wholesale, retail, interstate, or intrastate in nature.

- Section X: Guarantees, credits and incentives are established in relation to the specific service quality benchmarks in Section IX. These include transactional credits for missed service calls, failure to provision primary service within 10 or 20 days, and restoring service within 72 hours. Under the Amended AFOR, designed service customers also receive transactional, customer-specific credits if Qwest fails to meet installation and repair standards. Alternative service solutions via wireless technology are provided for held order customers.

In addition, substantial annual customer bill credits are imposed if Qwest fails to meet service quality standards, including designed services standards. In response to initial concerns about how credit obligations are triggered, the Amended AFOR clarifies that Qwest will incur credit obligations on the same basis as the applicable provisioning and trouble report benchmarks. Thus, both the benchmarks and the credit obligations for provisioning are keyed to Qwest's performance within each individual exchange, or, in the case of designed services, within each wire

center. The benchmarks and credit obligations for trouble reporting are keyed to Qwest's performance within each wire center.

Moreover, in response to concerns that Qwest's maximum potential credit obligations were not high enough in early periods of the AFOR's five-year term, the Amended AFOR increases the total credit limitations in the earlier periods, with corresponding adjustments in the credit limits in the later periods. In addition, in order that Qwest may seek to fix underlying problems leading to substandard performance in provisioning or repair, the Amended AFOR gives Qwest the option under some circumstances to discharge its credit obligations by applying an equal amount in investments or expenditures.

- Section XI: Rules are established for tariff filings to introduce new services, change prices, terms or conditions, or withdraw services. They also cover promotions, service packages, individual contracts, competitive zones and EAS during the term of the Amended AFOR. Additional price reductions are also imposed. Toll restriction charges for those customers whose credit history requires them to maintain toll restriction on their telephone service are eliminated. The toll restriction charge for customers who choose to take the service is reduced from \$2 per month to \$1 per month effective January 1, 2002. The price for non-published service is reduced from \$3.00 per month to \$2.10 per month, and the price for non-listed service is reduced from \$1.50 per month to \$1.20 per month, effective January 1, 2002. In addition, over the term of the Plan, Qwest commits to using its best efforts to reduce its interexchange toll rates to

achieve a total reduction of \$7 million in annual revenues subject to the existing rules requiring the imputation of access charges as a price floor.

V. DISCUSSION

A. The Commission's Regulatory Oversight Authority, and the "Reopener" Provisions

At the hearing, significant time and concern were devoted to what came to be known as the "reopener" provisions of the Amended AFOR, and in particular section X.B.5.e. *See, e.g.*, 7 Tr. 48-50, and 86-90. That section allows the Commission to modify the AFOR to ensure compliance with the AFOR's service standards or investment commitments if the Commission finds that the benefits and credits provided in the plan do not provide sufficient incentives. The other reopener, section IX.I.2, provides that Staff will review Qwest's overall performance at the end of each period of the plan to determine whether additional quality of service standards may be necessary to address areas of service not already covered by the AFOR, or by the quality of service rules adopted in Utility Case No. 3437. Staff may solicit comments from interested persons in conducting its reviews. In the event Staff concludes that such standards are needed, this provision also establishes a procedure, with no specific deadlines, by which the standards and related enforcement incentives may be negotiated or litigated, and ultimately approved by the Commission.

There was disagreement among the parties regarding the adequacy of section X.B.5.e. Both the AG and e.spire felt that this reopener should be broadened. e.spire proposed an amendment to that effect, which the AG supported. *See e.spire's Proposed Findings of Fact and Conclusions of Law, 18-19; AG's Brief-in-Chief, 19-20.*

By contrast, there was agreement among the parties that, should the Commission approve the AFOR, it would retain the authority to reexamine any aspect

of the AFOR at any time during its five-year term. The signatories to the AFOR specifically addressed this question. During the hearing, counsel for Staff pointed out that upon Commission approval of the AFOR or any other stipulated plan, it becomes an order of the Commission, "and the Commission has the ability make changes, if necessary, if it's based on the evidence and changed circumstances." 7 Tr. 48-49. *See also*, 9 Tr. 65-66 (Curl). Qwest's witnesses agreed with, or did not dispute, this principle. *See, e.g.*, 3 Tr. 16-17, 19-20, and 21-22 (Ward); 7 Tr. 88-89 (Badal). *See also*, Qwest's Post-Hearing Brief, 48 ("The Amended AFOR is, after all, an order of the Commission, and as counsel for Staff noted the Commission may use all of its available authority to enforce that order. 7 Tr. 49-50. Nothing in the Amended AFOR purports or attempts to limit the Commission's ability to exercise its authority in that regard."). In its Brief, the NMISPG also agreed that the AFOR will become an order of the Commission that is subject to the Commission's continuing jurisdiction. Brief of the [NMISPG] in Support of (Corrected) Amended AFOR Plan for Qwest Corporation, 29-30.

Notwithstanding their agreement on this subject, the parties, with the exception of the NMISPG, did not attempt to cite the specific legal authority that underlies the Commission's post-approval authority over the AFOR. Because that is an important matter, we take this opportunity to outline the sources of our authority.

Generally, the Commission has broad power to "determine any matters of public convenience and necessity with respect to matters subject to its regulatory authority as provided by law" (NMSA 1978, § 63-7-1.1(A)(2)). Another section of this same statute declares that the Commission "has the power, after notice and hearing of record, to determine and decide any question and to issue orders relating to its powers and duties." NMSA 1978, § 63-7-1.1(D). Included within the Commission's regulatory

authority are the fixing and supervision of all charges and rates of telephone companies within the state (§ 63-7-1.1(A)(1)), and the obligation to “change, amend and rescind rates.” Section 63-7-1.1(A)(5). 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).

The Commission is authorized 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.” Section 8-8-4(B)(5). Under NMSA 1978, § 63-9A-11(A), the Commission may receive and consider complaints “by any interested party setting forth any act or omission by a provider of telecommunications services alleged to be in violation of any provision of the New Mexico Telecommunications Act or any order or rule of the commission issued pursuant to that act.”

The Commission is not necessarily bound by past ratemaking decisions or policy where there is substantial evidence of changes in factual circumstances. See, Hobbs Gas Co. v. New Mexico Public Service Commission, 94 N.M. 731, 616 P.2d 1116 (1980); Application of General Telephone Co., 98 N.M. 749, 652 P.2d 1200 (1982). In general terms, “[t]he Commission has an ongoing, affirmative duty to establish rules and regulations, issue orders, examine records, conduct investigations, grant continuances and do all other things necessary to insure that the public has fair telephone rates and that the utility is fairly treated. Its role is not a passive one.” Mountain States Tel. & Tel. v. New Mexico State Corporation Commission, 90 N.M. 325, 332, 563 P.2d 588 (1977) (citations omitted). More specifically, the

Commission retains continuing jurisdiction to make any subsequent orders or determinations regarding any matter decided by the Commission as the factual situation before it, the public interest and due process may require. See, Public Service Company v. New Mexico Public Service Commission, 92 N.M. 721, 594 P.2d 1177 (1979); White River Shale Oil Corp. v. Public Service Commission of Utah 700 P.2d 1088 (Utah 1985); Montana-Dakota Utilities Co. v. Wyoming Public Service Commission, 746 P.2d 1272 (Wyo. 1987). See also, Reaveley v. Public Service Commission of Utah, 436 P.2d 797, 799 (Utah 1968) (“[t]he Commission is best suited to say what its orders mean....”).

Related to this authority, but independent of it, is the Commission’s authority to modify terms of stipulations such as the AFOR if supported by law or substantial evidence in the record. PNM Gas Services v. New Mexico Public Utility Commission, 2000-NMSC-008, 128 N.M. 747, 749, 998 P.2d 1198, 1200. See also, Bell Atlantic-Pennsylvania v. Pennsylvania Public Utility Commission, 763 A.2d 440 (Pa.Cmwlt. 2000).⁶ Again, the parties do not contest the Commission’s authority to

⁶ In that case, the court found that the PUC could issue a decision that had the effect of modifying Bell Atlantic’s AFOR plan if the law and facts warrant such action. *Id.*, 763 A.2d at 475. Of equal significance to the case at hand, the Pennsylvania court also held that “adoption of a plan clearly does not freeze a utility’s status into immobility for ten years.” The court went on to declare that,

[W]e do not expect that Bell, ...would maintain the position that the Plan makes existing measures unchangeable. To claim that the Commonwealth regulatory body, the PUC, could not touch any of those measures without Bell’s consent is equally unthinkable.

The carrier’s commitment to competition via the plan does not immunize it from the PUC’s oversight for as long as ten years, particularly if changing circumstances, exogenous or otherwise, inflate its revenues from noncompetitive elements.

Id., 763 A.2d at 476.

modify the AFOR, but instead urge the Commission to stay its hand in the exercise of that authority. *See, e.g.*, 3 Tr. 19 (Ward); 9 Tr. 66 (Curl).

The Commission's continuing jurisdiction necessarily extends to the regulation of Qwest's delivery of telecommunications services under its AFOR as required by HB 400 and other applicable provisions of the New Mexico Telecommunications Act. NMSA 1978, 63-9A-8.2(C). Indeed, the ongoing jurisdiction and involvement of the Commission in the implementation and enforcement of the AFOR are at least tacitly recognized in the body of the AFOR itself by virtue of the reports that must be made to the Commission and the determinations the Commission may be called upon to make.

In short, we are charged with continuing regulatory oversight of the AFOR, including matters pertaining to its implementation and enforcement, to Qwest's compliance with the AFOR and this Order, and to any changes of facts or circumstances that may affect the AFOR and the public interest in how it is, or should be, implemented. If necessary, we may review any aspect of the AFOR either upon the Commission's own motion or upon the application or complaint of any interested person. If circumstances warrant, we may, after notice and hearing, change any aspect of the AFOR as the public interest may require.

Given the AFOR's scope, its importance to the State of New Mexico, and its duration, we view with the utmost gravity our responsibility for continuing regulatory oversight. In light of that responsibility and the authority that goes with it, we see no need to revise the AFOR's reopener provisions.

B. Commission Authority to Consider and Adopt Stipulations

We turn to the issue of the Commission's authority to consider and approve stipulated agreements entered into by some or all of the parties to a proceeding. It is

clear that this Commission has the authority to approve stipulated agreements of parties. New Mexico Industrial Energy Consumers v. New Mexico Public Service Commission, 104 N.M. 565, 725 P.2d 244 (1986). This is true even in those circumstances where not all parties agree to the stipulation or were involved in the negotiations. Attorney General v. Public Service Commission, 111 N.M. 636, 808 P.2d 606 (1991).

In the proceeding currently before the Commission, the AG, e.spire and Vecinos United have challenged one or more of the provisions of the Amended AFOR Plan through the submission of a statement in formal opposition to the Joint Stipulation and Amended AFOR. 17 NMAC 1.2.23.2.2 requires the submission of such a statement in opposition. Additionally, of course, both the AG and e.spire have furnished testimony in opposition to certain provisions of the Amended AFOR.

The Commission can adopt and enter an order approving a contested stipulated agreement if substantial evidence in the record as a whole supports the Commission's balancing of interests and determination that the stipulation is reasonable. New Mexico Industrial Energy Consumers v. New Mexico Public Service Commission, *supra*, at 570-571. Approval of a Stipulation is only of precedential value if the Commission explicitly so provides. 17 NMAC § 1.2.23.4. We concluded in the VALOR AFOR case that the Commission should evaluate AFOR plans on a case-by-case basis. Final Order, Utility Case No. 3358, 47. *See also* in that case, the testimony of Staff witness Roybal. Tr. p. 214. The same holds true for the case now before us. Accordingly, our approval of the Joint Stipulation and Amended AFOR in this case should have no precedential value.

The New Mexico Supreme Court has commended the Commission for allowing a process that results in stipulations. New Mexico Industrial Energy Consumers v. New Mexico Public Service Commission, *supra*, at 568. It is equally clear that the Commission Staff has the ability to enter into a stipulation, because Staff is "an autonomous participant making presentations to the Commission and eliciting rulings from it." Attorney General v. Public Service Commission, 111 N.M. 636, 639, 808 P.2d 606 (1991).

We now consider the matters at issue in this proceeding.

C. Objections and Contested Issues Relative to the Amended AFOR

Objections to the Amended AFOR have been raised by three parties, the Attorney General, e.spire and New Mexico Vecinos United. We begin with the AG's objections.

1. The Attorney General's Objections

The AG, through her witness, Mr. Currin, made a variety of recommendations, which were initially directed to the AFOR as originally proposed. AG Ex. 25 (Currin Direct). In supplemental testimony filed in response to the Amended AFOR, Mr. Currin acknowledged that the Amended AFOR incorporated changes in response to many of his recommendations, and that "[t]he Amended AFOR Plan resolves several of the problem areas that were identified in the Original AFOR Plan." AG Ex. 39, at 1-2, 27. He acknowledged, in particular, that the Amended AFOR eliminated what he saw as a discrepancy between service quality benchmarks, which are measured on an exchange or wire center basis, and credits, which he had originally understood to be imposed on a statewide basis. *Id.* at 2. He also acknowledged that the service quality measurements in the Amended AFOR "will likely improve the level of service in many areas," although

he maintained that there are “some areas where further modification is still warranted.” *Id.* at 3-4, 27. He reiterated his contentions regarding some of the specific service quality benchmarks as to which he recommended changes. *Id.* at 9-21. Mr. Currin’s own conclusion with regard to the Amended AFOR, however, is as follows: “My general assessment is that the Amended AFOR is a better regulatory plan than what was originally proposed by Qwest.” *Id.* at 2.

The basis of Mr. Currin’s proposal for making the Amended AFOR’s service quality standards more restrictive is that the standards proposed in the Amended AFOR are less rigorous than Qwest’s actual, historical performance. Mr. Currin relied on Qwest’s ARMIS reports as the basis for his statements about Qwest’s historical performance. AG Ex. 25, at 8, 16-21 & ex. JWC-1. As Mr. Currin admitted on cross-examination, however, the ARMIS data do not, in fact, indicate whether the standards in the Plan are less rigorous than Qwest’s historical performance for several reasons. The ARMIS statistics are aggregated at a statewide level whereas Qwest’s service quality commitments in the Plan are measured more rigorously at the exchange or wire center level. 4 Tr. 37-39. In his supplemental testimony, Mr. Currin appears to recognize this difference between the statewide ARMIS data and the service quality standards measuring performance at the exchange or wire center level. For example, Mr. Currin appears to have abandoned his initial recommended changes to the trouble report standard. AG Ex. 39, at 16-17.

Similarly, in the ARMIS data the intervals in which Qwest has committed to provision service are unspecified, whereas the Amended AFOR commits Qwest to provision service within five days and further specifies the minimum number of cases, progressing from 94% to 97%, in which the commitment must be met. *Id.* at 29-31. In

other words, if the Company stated to a customer that it was committing to provision service within 20 days, and the Company provided service on the 20th day, then the ARMIS data counted that order as satisfying the applicable criteria. Under the Qwest Amended AFOR, however, any order cleared after the 5th day would not count as satisfying the applicable criteria. And, as stated above, the ARMIS percentages are on a statewide basis, not an exchange basis. These examples show that the ARMIS data upon which the AG relies are not accurate measures of Qwest's performance criteria and standards for purposes of the Amended AFOR. Further, as demonstrated in Staff's cross-examination of Mr. Currin, Qwest's performance must improve in several geographic areas for Qwest to satisfy the standards contained in the Amended AFOR. 4 Tr. 75-78.

In both his initial and supplemental testimony, Mr. Currin criticized the provisions of Section VI.A.4 of the Plan on the ground that they permit interested parties to object to certain price changes (for services other than 1FR, 1FB, switched access, new services, and services subject to effective competition) within 10 days only on the ground that the new prices do not cover costs. AG Ex. 25, at 24; AG Ex. 39, at 22-23. On cross-examination, however, Mr. Currin acknowledged that interested parties may object to price changes on other grounds as well – they may also object on the grounds that the new price exceeds the average price charged in the other 13 states in Qwest's territory; or that the new price is greater than five percent in one year (except that price increases may in some cases be aggregated over prior years to a maximum of 20% over the term of the Plan). 4 Tr. 50-52.

If no objections are filed, the price cap increase is deemed effective by operation of law. Within 20 days of the filing of any objections, the Commission is to determine

whether good cause exists to investigate the objections. If the Commission determines that good cause does not exist, or does not act within 20 days of the filing of the objections, the price cap increase is deemed effective. If the Commission determines that good cause exists, it must resolve any objections within 60 days of their filing. Section VI.A.4 and 5.

We think the procedure for objections to price cap increases for services other than 1FR, 1FB, switched access and new services, should be conformed to the procedure for objections to new services and price changes. We discuss the latter below. For those tariffed services covered by section VI, a tariff must be filed with the Commission and should become effective after ten business days unless objections are filed consistent with section VI.A. Copies of proposed tariffs must be served upon all persons listed on the official Certificate of Service for this Order, any other persons requesting service, and must be posted on Qwest's web sit (unless the report required by this Order demonstrates that such posting is not feasible). In the event a tariff filed under Amended AFOR section VI.A is objected to, the Commission will undertake an expedited review in order to determine whether there is good cause to investigate the objection(s). A Commission determination that good cause does not exist will permit Qwest's proposed tariff to become effective the date the Commission so determines. If good cause is found, the Commission will begin a proceeding to investigate the objection and reach any other appropriate decisions as quickly as possible. In that event, the proposed tariff(s) will not take effect until expressly authorized by the Commission.

Earlier in this proceeding, the AG argued that any rulemaking in this case must await the outcome of the HB 400 rulemakings in Utility Case Nos. 3237, 3437, 3438, and 3439. Once those rulemakings concluded, however, the AG shifted her focus to the

contention that the Commission is without power to establish service quality standards that are implemented through an alternative form of regulation.

But HB 400 does not dictate the means of implementation. To begin with, the statute directs the Commission to adopt rules (1) establishing consumer protection and quality of service standards; (2) ensuring adequate investment in the telecommunications infrastructure in both urban and rural areas of the State; (3) promoting the availability and deployment of high-speed data services in both urban and rural areas of the State; (4) ensuring the accessibility of interconnection by competitive local exchange carriers in both urban and rural areas of the State; and (5) establishing an expedited regulatory process for considering telecommunications matters before the Commission. NMSA 1978, § 63-9A-8.2(B). HB 400 also directs the Commission to eliminate rate of return regulation of telecommunications carriers such as Qwest and to implement in its place an alternative form of regulation that includes reasonable price caps for basic residence and business local exchange services. *Id.* § 63-9A-8.2(C). Nothing in the statute prevents the Commission from complying with these two mandates by approving the Amended AFOR, which achieves compliance with both.

The Commission has, in fact, previously propounded its authority to adopt rules in compliance with HB 400 within an alternative form of regulation plan. It did exactly that by approving the VALOR AFOR, which establishes, among other things, quality of service rules and investment commitments for VALOR that meet the requirements of HB 400. *See*, Final Order on Joint Petition and Stipulation, issued in Case No. 3358 on June 27, 2000. Even though this Order was approved prior to the Commission's

adoption of the generic HB 400 rules,⁷ the AG did not challenge or appeal the Commission's approval of the VALOR AFOR, nor did it object to the Commission's adoption of rules in compliance with HB 400 as part of the terms and conditions of that AFOR. See Qwest Ex. 5, at 13.

The AG has also opposed the price cap provisions in the Amended AFOR, including the provisions permitting future increases in residence basic exchange rates as incentives to meet investment and service quality benchmarks. The AG's position, in substance, is that the price cap provisions are not supported by substantial evidence. New Mexico Vecinos United voiced a similar objection. As explained in more detail below in the discussion of Related Cases, and Utility Case No. 3008, in particular, the record in that case supports a determination that the price caps proposed in the Amended AFOR for basic residence (\$10.66 per month) and business (\$34.37 per month) service are just and reasonable. The price caps adopt existing rates after the interim rate reduction ordered in Utility Case No. 3007. Thus, they represent an annual revenue reduction of \$28.9 million. By agreeing to these price caps, Qwest has accepted an annual revenue reduction that is far closer to the AG's estimate of its revenue requirement in Case No. 3008 (a negative revenue requirement of \$78.14 million), Dirmeier Dir. 5, than it is to Qwest's own estimate of its revenue requirement in that case (a positive revenue requirement of \$54.2 million), Redding Dir.9; Ex. GAR-1. Also in Case No. 3008, Staff proposed an annual revenue reduction of \$102.68 million. Roybal Dir. 12. But importantly, while Staff advocated a \$102 million revenue decrease

⁷ These rules were approved by the Commission on December 12, 2000, and became effective January 1, 2001. The term of the VALOR AFOR is five years, commencing April 1, 2001. Final Order, Case No. 3358, 15.

in that case, Staff has since agreed to the Amended Stipulation and Amended AFOR as advancing the best interests of the State. That is, Staff is a proponent of the Amended AFOR and concurs that the price caps and other elements of the investment and rate plan are appropriate, particularly in the present telecommunications environment, in which the objectives of encouraging competition and greater investment now predominate over the traditional regulatory focus on a company's rate of return. Staff Ex. 4, at 4-7; Staff Ex. 6, at 22.

Mr. Currin admitted on cross-examination that in arriving at his recommendations, he did not consider either the VALOR AFOR or the Commission's order implementing the VALOR AFOR. 3 Tr. 201. Nor did he consider the study performed by Michael Ripperger and filed in Utility Case No. 3358, which concludes that the service quality standards in the VALOR AFOR are among the most stringent in the United States. *Id.* at 202.

The VALOR AFOR as approved by the Commission establishes quality of service rules and investment commitments in compliance with HB 400. Mr. Currin agreed that the service quality standards in Qwest's proposed AFOR meet or exceed the standards of the VALOR AFOR. 3 Tr. 207. Mr. Currin contended in his supplemental testimony that the standards established for VALOR are not appropriate for Qwest because VALOR serves many customers in rural areas. AG Ex. 39, at 27. This contention overlooks the fact that Qwest actually serves many more rural customers than VALOR; indeed, Qwest serves more customers in rural areas of New Mexico than all other carriers in the State combined. Qwest Ex. 5, at 26.

Mr. Currin also admitted that Qwest's service quality commitments in the Plan, including its commitment to provision existing high-cost held orders, will

unquestionably cost a significant amount of money and will require a good deal of investment. 4 Tr. 10-12. Although Mr. Currin has presented his own proposals for service quality standards, those proposals do not address their implications for ongoing investment and commitment of resources in this State.

Finally, the AG advocates that the term of the Amended AFOR be changed from five years to three. AG's Brief-in-Chief, 16-18. The AG's argument is based on the testimony of Mr. Currin. In particular, the AG relies on the following statement:

In two or three years, Qwest will have developed an operating history that would provide the Commission with a basis for evaluating what conditions or restrictions, if any, should be implemented. I believe that the Commission should have the opportunity to react to the changing telecommunication industry and customer requirements. Having a fixed five-year plan would not permit such an opportunity.

AG Ex. 39 (Currin Supplemental Direct), 24-25.

However, Mr. Currin's premise is that the AFOR, once approved, will be fixed and untouchable for its duration. That premise ignores the Commission's continuing jurisdiction and oversight of the AFOR, described above. Given that jurisdiction and oversight, the Commission will have sufficient opportunity to react to any relevant changes in customer requirements and in the telecommunications industry. Moreover, it is not clear at this point that two or three years is enough of an operating history to assess whether any changes to the AFOR might be needed. Indeed, we cannot now know whether more or less time will be required. Mr. Currin's crystal ball is no less cloudy than anyone else's.

Qwest's lead negotiator has described the Company's minimum \$788 million infrastructure commitment as "a five year investment package." Qwest Ex. 4 (Ward Direct), 4 (emphasis in original). There is nothing in the record that indicates this is an

unreasonable term for the Amended AFOR, and the investment package included therein, as long as it is subject to the Commission's ongoing regulatory oversight.

For these reasons, and as provided by this Order, we will approve the five-year term proposed by the signatories to the Amended AFOR.

2. e.spire's Objections

Through its witness, Mr. Kaufman, e.spire expressed support for much of the AFOR but proposed several "safeguards" relating to the provisioning of designed services. Specifically, Mr. Kaufman proposes that Qwest be required (i) to provision all designed services orders within 15 days from receipt of a customer order; (ii) to waive all nonrecurring charges for orders not provisioned within 30 days; (iii) to provide designed services free of charge for 1 month for each 15-day delay in provisioning beyond the first 30 days; (iv) to provision the services without any right to a waiver except as specified in Section IX.D.4.a, .b, and .c of the AFOR; and (v) to separate its operations into wholesale and retail units if, after one year, it does not meet these proposed provisioning requirements. Mr. Kaufman contends that these provisioning requirements must be added to the AFOR to prevent Qwest from engaging in anti-competitive behavior.

With one narrow exception, neither the original AFOR nor the Amended AFOR is intended to deal with wholesale services. To make that intention absolutely clear and even though e.spire is not a party to the plan, the signatories added footnote 1 to the Amended AFOR at e.spire's request. 10 Tr. 17-19. Footnote 1 states that, except as specifically stated, nothing in the Amended AFOR is intended to affect Qwest's wholesale rates, Qwest's provision of wholesale services, or the Commission's jurisdiction to set wholesale rates and establish standards, incentives, and enforcement

mechanisms, or otherwise regulate Qwest's wholesale services. The single exception, as Mr. Kaufman noted, is Qwest's commitment to clear existing held orders for both wholesale and retail designed services within the first 18 months that the plan is in effect (§ IX.K.1). e.spire Ex. 4, at 2; 10 Tr. 19.

Notwithstanding the foregoing, and although no wholesale rate or service matters are among the nine cases being considered in this proceeding, e.spire focused much of its testimony on wholesale service issues. e.spire is the only New Mexico certificated CLEC that opposes the Amended AFOR. It is the only CLEC that seeks to interject wholesale rate and service issues in this case. Two of Qwest's major competitors and customers of designed services, AT&T and WorldCom, on the other hand, support the Amended AFOR.

Much of e.spire's testimony in this case objects to practices that e.spire contends are anticompetitive – Qwest's objections to paying reciprocal compensation for Internet-bound traffic and its alleged refusal to provision enhanced extended links (“EEL”). e.spire Ex. 3, at 4-8; e.spire Ex. 4, at 4. By its own admission, however, e.spire seeks no relief with respect to these matters in this case. e.spire Ex. 3, at 7. Instead, e.spire acknowledges that its reciprocal compensation complaints are the subject of another pending proceeding before this Commission (NMSCC Docket No. 98-150; now Utility Case No. 3043) and its contentions regarding the EEL are pending in a case before the FCC. e.spire Ex. 3, at 6-8. Accordingly, we need not address those matters here.

e.spire also asks the Commission to accelerate the schedule for filling existing held orders for designed services. In the Amended AFOR, the retail designed services providers comprising the NMISPG agreed to require Qwest to fill retail and wholesale designed services orders that are unfilled as of the effective date of the AFOR within 18

months of the effective date. Section IX.K.1. This period is too long, according to e.spire, which advocates that Qwest be required to fill all unfilled wholesale designed service orders within three months of the AFOR's effective date. e.spire's Proposed Findings of Fact and Conclusions of Law, 15.

NMISPG members, AT&T and WorldCom purchase designed services in substantial volumes and also have orders that are currently held. These parties have nevertheless endorsed the Amended AFOR and the provisioning schedule for the existing backlog of held orders. e.spire, moreover, offers no valid criticism of the feasibility or the cost of the current 18-month schedule. Further, e.spire fails to acknowledge the impact of its recommendations on Qwest's other commitments under the plan, such as Qwest's front-end obligations to fill all high cost primary service held orders, deploy DSL and ISDN, and achieve other provisioning and repair benchmarks for primary regular and designed services.

Although e.spire's concern in this regard may nonetheless have some merit, it offers insufficient evidence to establish why it should be treated differently than other customers. Even so, the held orders problem carried over from the regime of U S West has been serious and persistent, and for these reasons is one of our paramount concerns. We will afford Qwest every reasonable opportunity to resolve this problem under the AFOR, but we intend to keep a close eye on Qwest's efforts and will revisit this matter if need be.

One of e-spire's chief recommendations is a series of amendments it proposed to the streamlined and expedited regulatory procedures created by the Amended AFOR.⁸ We discuss some of these recommendations separately. Others are addressed elsewhere in this Order.

Under section XI.A, tariffs filed by Qwest that introduce,⁹ withdraw or change the prices of a retail public telecommunications service of a retail public telecommunications service will become effective ten business days after the filing is made with the Commission unless Staff or an interested person protests the proposed tariff. This section does not specify the type of notice Qwest will give when it files such tariffs. Under section XI.C, special promotions are effective upon 10 business days' notice to the Commission. That same section permits Qwest to provide bundled service offerings, but is silent about whether a tariff or notice must be filed with the Commission, and appears to allow such offerings to go into effect without filing or possible review by Staff or the Commission. e.spire contends that interested persons must be provided notice of Qwest's new service, special promotion, and bundled service filings, and be given an opportunity to raise objections with the Commission. Such a procedure, says e.spire, would protect against attempts by Qwest either to reap

⁸The specific recommendations were made in Mr. Kaufman's supplemental testimony submitted on February 1, 2001, i.e., e.spire Ex. 4. Qwest argues that because these recommendations were first proposed in e.spire's supplemental testimony, they are untimely and prejudicial to Qwest and other AFOR proponents, and could be rejected. However, Qwest stops short of objecting to e.spire's Ex. 4, or moving to strike it. Qwest's Post-Hearing Brief, 40, n.3. In any event, e.spire Ex. 4 was offered and admitted without objection from Qwest or anyone else. 9 Tr. 201-202; 10 Tr. 1.

⁹ "New services" are defined in AFOR section VI.C. If, after the effective date of the AFOR, Qwest introduces a new service in New Mexico that had not been offered in this State prior to that effective date, "the service shall not have a price cap for purposes of the pricing provisions of this plan."

monopoly profits by pricing a new service far above its actual cost, or to force competitors out of the market by drastically undercutting their prices. e.spire's Proposed Findings of Fact and Conclusions of Law, 13-14.

e.spire would have the protest procedure for the filing of new services or price changes apply to the filing of special promotions and bundled service offerings. How extensive notice of such filings should be, e.spire does not say. E.spire Ex. 4 (Kaufman Supplemental Direct), at DK-2, pp. 46-47.

We agree that protests by interested persons should be permitted for each of these categories of services. For each such service, a tariff or similar filing must be made with the Commission and should become effective after ten business days unless protests are filed in accordance with section XI. Copies of proposed tariffs or similar filings must be served upon all persons listed on the official Certificate of Service for this Order, any other persons requesting such service, and must be posted on Qwest's web site (unless the report required by this Order demonstrates that such posting is not feasible). In the event a filing under Amended AFOR section XI.A or C is protested, the Commission will undertake an expedited review in order to determine whether there is good cause for the protest(s). A Commission determination that good cause does not exist will permit Qwest's filing to become effective the date the Commission so determines. If good cause is found, the Commission will commence a proceeding to review the subject filing(s) as quickly as possible. In that event, the filings will not take effect until expressly authorized by the Commission.

The Individual Contracts provision contained in section IX.D, claims e.spire, is "less onerous on Qwest" in terms of the filing requirements than the comparable provision in the Commission's CLEC rules (17.11.19.17 NMAC; adopted in Case No.

3237) are on CLECs. As a result, says e.spire, Qwest will have a competitive advantage over CLECs. e.spire's Proposed Findings of Fact and Conclusions of Law, 17. But e.spire furnishes no evidence to show that such a competitive advantage will in fact result. If it does, e.spire and other CLECs will have ample opportunity to ask for reconsideration of this provision, to pursue a complaint, or to seek other appropriate remedies.

The Amended AFOR's Force Majeure clause, found at section X.C, contains standard limitations concerning Qwest's obligation to pay customer credits or remedies for failure to meet the AFOR's service quality standards. e.spire urges that strikes, work stoppages, and vendor/supplier delays be stricken from this clause because Qwest has "at least some measure of control" over these matters, especially vendor or supplier delays. e.spire's Proposed Findings of Fact and Conclusions of Law, 16. This clause, however, is clear that should any delays result from vendor or supplier issues, Qwest can only be excused from the above obligation by showing that such delays were "outside of Qwest's control." There is, moreover, nothing in the record to back e.spire's claims that Qwest necessarily has control over the other matters listed. There being no grounds to amend the Force Majeure clause as e.spire requests, that request should be denied.

Section XI.E allows Qwest to ask the Commission to approve the creation of a competitive zone that would allow Qwest to respond to competition by charging lower prices in the competitive zone than Qwest charges in the rest of its New Mexico service area. Under this section, Qwest will not request the creation of a competitive zone until it receives § 271 approval from the FCC, and in no event prior to January 1, 2003. A request for the creation of a competitive zone requires the Commission to issue public

notice, conduct a hearing, and make a decision within 120 days after the filing of such a request. e.spire thinks this is too short a time for a Commission decision. E.spire's Proposed Findings of Fact and Conclusions of Law, 17-18. Since no one has yet acquired experience under this provision, neither e.spire nor anyone else can say at this point whether this 120-day period will be enough time to render a careful and informed decision. Regardless, because this procedural time frame will, like all others in the AFOR, be subject to modification for good cause, it does not have to be modified at this time.

e.spire asks that section XI.J be deleted from the AFOR because that section "at least tacitly accepts the premise that tariffing requirements should be at parity between CLECs and Qwest." e.spire's Proposed Findings of Fact and Conclusions of Law, 11. In support of its argument, e.spire cites the Commission's conclusions in two of the Final Orders in the HB 400 rulemaking cases that incumbent local exchange carriers must be treated differently than competitive local exchange carriers until competition has taken effect throughout New Mexico. Final Order Adopting 17.11.16 NMAC, 17-18, Utility Case No. 3437 (adopting Quality of Service Rule); Final Order Adopting 17.11.19 NMAC, 4, Utility Case No. 3237 (adopting Expedited Procedures for Competitive Local Exchange Carriers Rule). The AFOR's section XI.J, says e.spire, should be deleted because it is at variance with established Commission precedent.

The Commission did conclude in the context of the above-referenced HB 400 rulemakings that different treatment of ILECs and CLECs is appropriate. It is, however, premature for the Commission to decide in this proceeding whether the non-opposition of Staff and Qwest to any possible future requests by CLECs or IXC's for waivers of "the more burdensome rules or provisions adopted by the Commission," or

whether the requested waivers themselves, would necessarily be inconsistent with established Commission policy or, even if so, what if any harm might result therefrom. Be that as it may, this section does not commit the Commission to any particular results when presented with a waiver request. And it hardly need be said that the merits of any such waiver requests, and any attendant issues, will be considered on a case-by-case basis as they are presented. Consequently, it is unnecessary to delete section XI.J from the Amended AFOR.

In two of the HB 400 rulemaking proceedings, the Commission determined that when a carrier is operating under a Commission-approved AFOR plan, any provisions in that plan will take precedence over corresponding provisions in the rule. If the AFOR does not address a particular provision in the rule, then the rule would apply. Final Order Adopting 17.11.22 NMAC (Quality of Service Standards Rule), 18, Case No. 3437; Final Order Adopting 17.11.17 NMAC (Infrastructure and High Speed Data Services Rule), 4-5, Case No. 3438. The AG and e.spire essentially ask the Commission to reconsider that determination, with the latter suggesting that where there is any inconsistency between any Commission adopted rules and the rules contained in the Amended AFOR, Qwest should be required to seek a variance from the Commission's rules. AG's Brief-in-Chief, 24; e.spire's Proposed Findings of Fact and Conclusions of Law, 19-20.

Neither the AG nor e.spire show why the determination in question should be reconsidered. Their request should therefore be denied.

Finally, e.spire argues that the standards and incentives for wholesale designed services should not be the same as those being proposed for retail designed services in the Amended AFOR. Acknowledging that this is a matter that is more properly the

subject of a separate proceeding, e.spire recommends that the Commission “should immediately open a docket to establish standards, incentive, and enforcement mechanisms and otherwise regulate Qwest’s wholesale services.” e.spire’s Proposed Findings of Fact and Conclusions of Law, 21-22. The Commission will consider whether a docket of the sort requested by e.spire should be opened.

The expanded investment, the extended deployments of advanced services and attendant loop grooming, and the price caps on services other than basic business and residence local exchange service are commitments that Qwest is undertaking pursuant to the Amended AFOR and that might not otherwise be required by either the elimination of rate of return regulation or the rules promulgated by the Commission pursuant to NMSA 1978, § 63-9A-8.2. An offsetting benefit to Qwest is the streamlined regulatory processes the plan will establish. The Commission retains every bit of its regulatory authority. The AFOR and this Order require that the Commission exercise its authority promptly whenever possible and, absent the need for Commission action, allows Qwest to proceed. Even then, as explained in more detail above, the Commission will retain its investigative authority and its authority to hear and determine complaints. If circumstances warrant, in other words, the Commission will, among other things, act to withdraw consents and approvals, whether implicit or explicit.

For the most part, the processes contemplated by the Amended AFOR are at least as rigorous as the procedures applicable to CLECs. In fact, when the Commission issued its final CLEC rules, it was noted that 17.11.19.16 NMAC requires CLECs to give notice of proposed tariff changes at least 10 *business* days before implementation and the original AFOR proposal required only 10 days’ notice. Section XI.A.1 was therefore changed in the Amended AFOR to require the same notice period of Qwest.

We have also applied the 10 business day standard to similar provisions in the Amended AFOR where such clarification or consistency was needed. With these modifications, the AFOR will be more internally consistent, more readily understood and more accessible to interested persons.

D. Other AFOR Matters Considered

In this section, we discuss matters that, generally speaking, have garnered less attention in the course of this proceeding than have other issues and questions. We offer this as a simple observation, and in so observing intend no criticism. There have been many issues and details to consider in this proceeding, and the parties unavoidably had to choose those on which to concentrate. Regardless, the matters discussed in this section are of no small importance and should be addressed by the Commission.

1. Qwest's Annual Compliance Reports

The AFOR commits Qwest to the filing of annual compliance reports (in addition to the annual report for telecommunications carrier prescribed by Commission rule) concerning Qwest's progress in carrying out the infrastructure development and service quality requirements contained in the AFOR. Sections VIII.E and IX.G.4. These reports are to be filed at the end of each period. Copies of these reports will be sent to all the persons on the official Certificate of Service for this proceeding, the Commission's telecommunications service list, and to other listed groups and persons.

We recognize that this method for the distribution of copies of these reports is designed to maximize public information and access regarding the content of these reports. Even so, such access could be expanded all the more if Qwest were to post these reports and other pertinent AFOR filings on its web site. For the same reason, it

may be desirable to post these filings on the Commission's web site. Qwest and Staff should be given sixty (60) days from the date of this Order to study the feasibility of the web site postings and to file a written report on the results and proposals of these respective studies with the Commission.

The AFOR now restricts objections to these reports to matters of form. Section IX.G.5. We think objections should also be permitted to the content of these reports. Ten business days should be sufficient for the filing of any such objections. If objections are filed, the Commission will conduct an expedited review to determine whether there is good cause for the objection(s). Should good cause be found, the Commission will commence a proceeding as necessary for the purpose of considering what, if any, relief may be appropriate. If interested persons simply wish to note their objections for the record, no further review or proceedings may be necessary. As with other procedural deadlines set in the AFOR or established in this Order, extensions and other modifications may be permitted for good cause.

2. Notice of Substantial Compliance

The two increases in the 1FR (residence basic exchange service) price caps allowed in section V of the AFOR must be initiated by the filing of notices by Qwest of its substantial compliance with the investment and quality of service commitments set out in the AFOR. The first increase would go into effect thirty days after Qwest submits its annual compliance report and its notice of substantial compliance for period 1, which ends on June 30, 2002. The second increase would go into effect thirty days after Qwest submits the requisite report and notice for period 2, which ends on June 30, 2003. In both instances, the Amended AFOR provides that only Staff or the AG may object if either one contends that Qwest has failed to demonstrate the necessary substantial

compliance. Objections must be filed within 10 (calendar) days, the Commission must determine whether good cause for an investigation exists within twenty days of the filing of objections, and the Commission must resolve the matter within sixty days of the issuance of a ruling on the existence of good cause. Otherwise, the price cap increase goes into effect by operation of law. Section V.A.1.

The time frame allotted for objections is insufficient for a matter as serious as a prospective increase in the statewide price caps for Qwest's 1FR service. Nor do we believe that due process permits the limitation of objections to just Staff and the AG. Many other persons may also have an interest in these price cap increases. We will therefore allow any interested person to file objections to a notice of substantial compliance filed by Qwest by no later than 10 business days after the filing of the notice. The Commission will determine whether there is good cause for an investigation within thirty days of the filing of timely objections. A Commission order resolving any such objections will be entered by no later than ninety days after a ruling determining good cause. If no objections are filed, the price cap increase will be deemed to be effective. If objections are filed and the Commission determines that good cause does not exist, the price cap increase will be deemed to be effective as of the date of that ruling. If the Commission determines that good cause does exist, then the proposed price cap increase will not take effect until expressly authorized by the Commission. These procedural times and deadlines are subject to modification by the Commission for good cause.

3. Possible Review of Second Price Cap Increase

As noted immediately above, the second price cap increase allowed by the Amended AFOR would not take effect until more than two years from the date of this

Order. There can be little doubt that a number of changes in circumstance and unanticipated events could occur during that time. If such changes take place, they could affect the timing, amount and other facets of the second price cap increase. While these are mere possibilities at present, nevertheless the Commission cannot at this time rule out the prospect that some of these possibilities may materialize and, correspondingly, that there may be a need for a Commission review of the second price cap increase prior to the time that it is to take effect. Accordingly, we reserve the right to undertake such a review at the appropriate time should it appear to be necessary.

E. The Amended AFOR Addresses Serious Telecommunications Issues in New Mexico

Over the past few years, consumers, small and large businesses, commissioners, lawmakers, educators, the medical community, and the media have voiced their interests in resolving and improving several telecommunications issues facing the State of New Mexico. These issues also serve as the public policy basis for the passage of HB 400, and include the following:

- increasing investment into the network infrastructure
- relieving held orders for primary services
- improving service quality through benchmarks and appropriate credit incentives
- deploying advanced services
- ensuring investment and service quality in both rural and urban areas of the state
- streamlining regulatory procedures

The Amended AFOR as approved by this Order addresses each of these key telecommunications issues within Qwest's service area.

First, Qwest's commitment to invest at least \$788 million in New Mexico over the next five years represents an increase of approximately \$154 million over the average U S WEST investment for the years 1995-1999. Qwest Ex. 6B, at 14. Within the total investment commitment contained in the Plan, Qwest has agreed:

- To provision high-cost held orders subject to waiver requests as of the effective date of the Plan, most of which are in rural areas of the state, within 18 months of the effective date of the Plan on a specified quarterly schedule.
- To provision designed services orders that are unfilled as of the effective date of the Plan within 18 months thereafter on a specified quarterly schedule.
- To deploy DSL in the rural wire centers of Alamogordo, Farmington, Gallup, Roswell and Taos within six months of the effective date of the Plan.
- To deploy ISDN in rural areas of the state in five wire centers within 18 months, and in five additional wire centers within 24 months, after the effective date of the Plan.
- To groom the loops in the 18 wire centers where Qwest offers or will offer DSL service within 12 months of the effective date of the Plan.
- To upgrade existing digital switching equipment to relieve line congestion, accommodate traffic growth, and support new features. Specific digital switching investments may include the installation of high-capacity line cards and the upgrading of processors, switch hardware, switch software supporting new features and services, and

other related switching equipment. The work on switches and common systems would improve the quality of existing service by allowing the switches to take full advantage of Inter-Office Facility upgrades.

- To relieve congestion on routes at or near capacity, or marked by high line growth, to enhance the quality of traditional telephone service, and to facilitate the introduction of advanced services such as DSL. This work will address, among other things, the replacement of lead cable, cross boxes and pedestals, the improvement of existing service quality, and increased protection against outage.
- To deploy or upgrade fiber transport facilities on interoffice routes at or near capacity, or marked by high growth, in order to relieve congestion and improve service.

Qwest Ex. 5, at 20-22; Qwest Ex. 7, at 26-27; Staff Ex. 4, at 7-8; Staff Ex. 5, at 3; Staff Ex. 6, at 11-12.

The Qwest Amended AFOR measures provisioning and trouble reports on an exchange and wire center basis, which places incentives upon the Company to invest in every rural exchange and wire center in order to satisfy the benchmark. In comparison, VALOR's standards are measured on a statewide basis. Further, the Qwest Amended AFOR establishes standards and credits on customer-specific, transactional, and annualized basis for provisioning and repair of designed services. Also, the Qwest Amended AFOR measures the provisioning standards and credits for designed services on a wire center basis. By comparison, the VALOR plan has an annualized provisioning standard on a statewide basis for designed services.

The Amended AFOR also increases the maximum credit obligations for which Qwest is potentially responsible in the early periods of the Plan, in recognition of the public interest in increasing the incentives for Qwest to satisfy performance benchmarks for provision and repair of services as soon as possible. Qwest Ex. 7, at 8-9; Staff Ex. 5, at 2-3; Staff Ex. 7, at 4. Further, the Qwest Amended AFOR refined the credit obligations in order to make them correspond to the service quality benchmarks, which measure Qwest's performance on an exchange or wire center basis. Qwest Ex. 7, at 8; Staff Ex. 5, at 2; Staff Ex. 7, at 3-4.

Penalties for failure to achieve service quality standards are not imposed for the first nine months in VALOR's case, compared with perhaps three months for Qwest. Qwest Ex. 7, at 17. Credits payable to VALOR customers for failure to meet designed services standards flow back as credits on all customer bills. Under Qwest's Amended AFOR, transactional credits generated due to Qwest's failure to meet the designed services standards for provisioning or out-of-service conditions flow back as credits to the specific designed services customers who are affected by the failure to meet the provisioning and repair standards. *Id.* at 9-11; Staff Ex. 5, at 2. Qwest is also subject to more detailed reporting requirements, such as reports on the status of held order waiver conditions, and reports on designed services provisioning and repairs. Qwest Ex. 5, at 24; Qwest Ex. 7, at 22-33.

F. The Amended AFOR Addresses Recently Enacted Legislative Objectives for Telecommunications

As adopted by this Order, the Amended AFOR responds to major legislative objectives for the telecommunications industry. First and foremost, it complies with the Legislature's mandate to eliminate rate of return regulation and to establish an alternative form of regulation in its place. *See* NMSA 1978, § 63-9A-8.2(C).

In doing so, the Amended AFOR is also consistent with other objectives set out in HB 400. It holds Qwest to a commitment to invest a minimum of \$788 million over the next five years in New Mexico's telecommunications infrastructure and in the deployment of high speed data services. Beyond the \$788 million commitment, Qwest is at risk to invest as required to meet stringent service quality obligations. At current service levels, the \$788 million commitment is equivalent to roughly \$189 per access line per year.¹⁰

The Amended AFOR provides for investment in rural as well as urban areas of New Mexico. Qwest serves approximately 80% of the access lines outside of the recognized metropolitan statistical areas in New Mexico – more rural access lines than all other carriers in the state combined.¹¹ The Amended AFOR assures that Qwest's investment commitments will benefit its rural and small exchange customers. For example, Qwest will resolve all existing high-cost held orders subject to waiver requests, the great majority of which are in rural areas. The service order installation standards are prescribed on an exchange basis for primary and regular services and a wire center basis for designed services (section XI.E.1), and the trouble report standard is on a wire center basis for primary and regular services (section XI.E.2), thus assuring that rural and urban areas will be subject to comparable quality standards. Qwest will deploy

¹⁰ By way of comparison, according to VALOR's testimony its investment commitment was equivalent to about \$162 per line per year, while investments by the Regional Bell Operating Companies as a group averaged \$138 per year during the period 1996 through 1998. Qwest Ex. 4, at 4, 6; Qwest Ex. 5, at 25-26; Qwest Ex. 6B, § VIII.F n.5. See also, NMSA 1978, § 63-9A-8.2(B)(2) (mandating adoption of rules to ensure adequate investment in the State's telecommunications infrastructure).

¹¹ The total number of Qwest's access lines in New Mexico is about 833,840. Qwest's Post-Hearing Brief, 21.

DSL in five additional wire centers and ISDN in 10 additional wire centers. DSL will thus be available in wire centers serving approximately 70% of Qwest's access lines, and ISDN will be available in wire centers serving about 90% of its access lines. Qwest Ex. 5, at 27-28; Staff Ex. 4, at 7-8. *See also*, NMSA 1978, §§ 63-9A-8.2(B)(2)-(3) (calling for rules ensuring adequate investment and promoting availability and deployment of high-speed data services in both urban and rural areas of New Mexico).

The Amended AFOR addresses other important legislative objectives. It establishes expedited regulatory processes for telecommunications services matters. Qwest Ex. 5, at 27-28; *see* NMSA 1978, § 63-9A-8.2(B)(5) (requiring adoption of rules to establish expedited regulatory processes for telecommunications matters). It imposes price caps for basic residence and business local exchange services, while creating incentives to achieve investment and service quality milestones by providing for limited opportunities to earn back a portion of the residence basic exchange revenues that were reduced in the interim 1997 and 1998 earnings cases. Qwest Ex. 5, at 27; Staff Ex. 6, at 7-8; *see* NMSA 1978, § 63-9A-8.2(C) (mandating implementation of alternative form of regulation that includes reasonable price caps for basic residence and business local exchange services).

The Amended AFOR also complies with legislative objectives in regard to service quality. HB 400 directs the Commission to set service quality standards by rule, and the Amended AFOR meets that requirement with standards that meet or exceed standards that the Commission has already found are some of the toughest in the nation and that "will put New Mexico at the forefront of the effort to ensure that its citizens are receiving quality telecommunications services." Utility Case No. 3358, Final Order on Joint Petition and Stipulation 24 (June 27, 2000). Service quality

standards must be met exchange by exchange and, in some cases, wire center by wire center. Under the Amended AFOR, Qwest's credit obligations accrue on the same basis. The service order benchmark for primary and regular services must be measured and met for each exchange, and the provisioning benchmark for designed service orders must be measured and met for each wire center. Trouble report benchmarks must be reported and met for each wire center. In addition, four new EAS zones are established, in which toll charges will be eliminated, facilitating rural access to the Internet. In addition, nonrecurring and recurring surcharges for service outside base rate areas will be eliminated. Qwest Ex. 5, at 26-27; Qwest Ex. 7, at 5-18; Staff Ex. 6, at 13-21; see NMSA 1978, § 63-9A-8.2(B)(1) (requiring adoption of rules that establish customer protection and quality of service standards).

G. The Enhancements Made by the Amendments to the Original AFOR Establish Additional Protections and Benefits

An additional area in which the Amended AFOR marks a substantial step forward in service quality standards is designed services. NMISPG objected to the original AFOR based on what it saw as a failure to set adequate standards for the provisioning and repair of designed services. According to the parties, intensive negotiations between Qwest and NMISPG resulted in an agreement on the Amended AFOR, which substantially increases Qwest's obligations in this area. The amendments also strengthen the AFOR by providing stronger incentives for Qwest to more quickly achieve the quality of service standards and benchmarks for all of Qwest's retail services in both rural and urban areas.

The enhancements made in the Amended AFOR fall into four categories:

First, in response to concerns raised in the first few days of hearings, the Amended AFOR addresses various provisioning, repair, and service credit standards for designed services. Qwest Ex. 7, at 9-15; Staff Ex. 5, at 2.

Second, changes and improvements have been made in the program of service credits established under the original AFOR. Among these changes are increased limits on the aggregate credit caps in early portions of the Amended AFOR's five-year term (periods 1 and 2), a system of credits that better correlates with the benchmarks for primary and regular services, and, in limited cases, allowance for additional investment and expenditures as an alternative to the payment of credits. These investments and expenditures are in addition to the commitment to invest \$788 million over the five-year term of the Plan and will target the wire centers and exchanges where Qwest's performance has not satisfied the applicable benchmarks. Qwest Ex. 7, at 5-9, 15-17; Staff Ex. 5, at 2-3; Staff Ex. 7, at 3-4.

Third, the Amended AFOR provides for changes in reporting requirements. It prescribes more detailed and inclusive reporting obligations that are also better correlated with the prescribed service standards and benchmarks. Qwest Ex. 7, at 22-33.

Fourth, the Amended AFOR makes a number of clarifications, as opposed to major substantive changes. Some of these revisions are consistent with the intention of the document as Qwest had always understood it. Additional changes were requested by parties other than Qwest, which Qwest does not oppose. Finally, some changes were necessary in recognition of the fact that the Plan will not be implemented on January 1, 2001, as originally proposed, but at a later date determined by this Order. Qwest Ex. 7, at 17-22; Staff Ex. 5, at 3.

H. The Related Cases

As presented to the Commission, the Amended AFOR is intended to resolve eight pending cases in addition to Utility Case No. 3215 (in which Qwest's predecessor, U S West, proposed its AFOR plan). For the limited purpose of considering the proposed plan, the Commission considered the eight other cases together with Utility Case No. 3215, and the procedural orders issued by the Commission have been served on the parties of record in each case. A review of the eight consolidated cases and the manner in which they are resolved by the Amended AFOR follows:

1. The Rate Investigations

Two of the pending cases, Utility Case Nos. 3007 and 3008 involve investigations of Qwest's earnings and rates. The investigations were initiated by the Commission upon petitions from Staff.

a. Utility Case No. 3007 (1998 Earnings Investigation)

Staff initiated this case on April 15, 1999, by petitioning for an order directing Qwest (then known as U S WEST Communications, Inc.) to show cause why its rates should not be reduced by approximately \$29 million per year. The prospective rate reduction was described as interim and subject to refund or surcharge upon the conclusion of a general rate case. On June 29, 1999, the Commission issued a Notice of Investigation and Order (the "Notice") in which it announced:

An expedited investigation is hereby commenced and docketed concerning whether U S West is earning a return that exceeds its authorized rate, whether U S West's earnings for calendar year 1998 were proper, and concomitantly whether U S West's rates should be reduced on an interim basis, subject to refund or surcharge pending the outcome of the rate case ordered this date in Utility Case No. 3008.

The Notice directed the Company to file "testimony and other supporting materials regarding the propriety of its earnings for the year ending December 31, 1998." It

further provided that the Company's "testimony shall furnish other facts and evidence, including but not limited to level of earnings and expenses, that would give the Commission information to assist it in determining what further action would be appropriate and in the public interest." After the Company and Staff filed testimony, the case was heard in September 1999 before Hearing Examiner Michael Barlow. In addition to the Company and Staff, the AG and GST appeared through counsel. After initially intervening, AT&T withdrew from the case. No other intervenors appeared or requested to be excused. Upon motion by Staff, the Hearing Examiner struck portions of proffered rebuttal testimony by the Company's witness David Teitzel and all of the proffered rebuttal testimony by the Company's witness Barbara Wilcox. The testimonies filed by the remaining witnesses on behalf of the Company and Staff were admitted, and the witnesses submitted to cross examination.

The Hearing Examiner received post-hearing briefing from the parties, and issued a Recommended Decision on November 10, 1999. One of the principal issues in the case was whether and to what extent the Commission was required to consider the Company's test-year presentation in setting interim rates. In his Recommended Decision, the Hearing Examiner decided that "there [was] insufficient time to examine all aspects of rates and establish an appropriate fully developed cost of service," and (consistent with the Supreme Court's then recent decision in, In the Matter of a Commission Investigation Into the 1997 Earnings of U S West Communications, Inc. in New Mexico, 1999-NMSC-016, 127 N.M. 254, 980 P.2d 37) that consideration of the Company's test-year presentation should therefore await the general rate case, Utility Case No. 3008. The Hearing Examiner based his ruling on the Company's 1998 annual report, concluding that the Company's rates should be reduced

on an interim basis by the amount proposed by the Staff, \$28,939,000 per year. He determined that the interim rate reduction should be subject to refund or surcharge after conclusion of Utility Case No. 3008. Finally, he recommended that the interim rate decrease should be allocated to dial-tone rates on the "tiered" basis that the Staff had recommended.

The Company filed timely exceptions to the Recommended Decision on November 23. On February 15, 2000, the full Commission issued an Order Adopting Recommended Decision in Part, in which the Commission determined that the Company's exceptions to the Hearing Examiner's recommendations should be denied "[f]or the reasons stated in the Recommended Decision." The Commission adopted the Hearing Examiner's recommendation to reduce the Company's rates on an interim basis by \$28,939,000 annually, subject to refund or surcharge pending the outcome of Utility Case No. 3008. The Company's rates were to be reduced, and interest at the statutory rate was to begin accruing, effective immediately. The Commission took under advisement, however, the form in which the rate reduction should be made.

On April 25, 2000, the Commission issued a Final Order directing that the reduction of the Company's rates "should be implemented in the manner recommended by the Recommended Decision." The Company filed a timely notice of appeal from the Commission's Final Order in the Supreme Court on May 23, 2000, and the appeal is currently pending before the Court (Case No. 26,358).¹² Meanwhile the Company has implemented the interim rate reduction and associated refund credits in accordance with the order.

¹² In response to a joint motion by the Commission and Qwest, the Court is holding this appeal in abeyance pending the outcome of this Qwest AFOR proceeding.

Subject to the disposition of the appeal, this case has been completed. The Amended AFOR obligates the Company to dismiss the appeal and, through the price caps on basic residence and business service, locks in the interim reductions ordered in this case. For the benefit of consumers, the Plan thus avoids the risk of future surcharges that may result either from reversal of the Commission's decision on appeal or from a determination in Utility Case No. 3008 that the interim reductions were unwarranted in whole or in part. Similarly, the Company would benefit by avoiding the risk of future rate reductions that might result either from affirmance of the Commission's decision on appeal or from a determination in Case No. 3008 that further rate reductions are warranted. We comment further on the benefits of the Amended AFOR in the context of the general rate investigation below.

b. Utility Case No. 3008 (Investigation of Rates and Services)

Contemporaneously with its petition initiating Utility Case No. 3007, on April 15, 1999, Staff also petitioned the Commission for a broad-based investigation of the Company's current rates, earnings, investments and expenditures, and service quality. On June 29, 1999, the same day it docketed the 1998 earnings investigation, the Commission issued its Order Initiating Investigation of Rates and Services (the "Docketing Order") commencing the requested investigation. As specified by the Commission, the investigation included the following six inquiries:

- (i) Whether U S West's current New Mexico [r]ates and charges are just and reasonable;
- (ii) Whether U S West's earnings as a whole within New Mexico are reasonable;
- (iii) Whether U S West's investments and expenditures as a whole within New Mexico are reasonable;

(iv) Whether U S West's investments in basic infrastructure [are] reasonable and sufficient, among other things, to avoid held orders;

(v) Whether U S West's investments in data services [are] reasonable; and

(vi) Whether the telecommunications services currently provided by U S West to its New Mexico customers are adequate.

Docketing Order at 9. The Commission also appointed Michael Barlow as Hearing Examiner for the case.

Prehearing proceedings were lengthy and complex. Following the hearings, Staff prepared and circulated a detailed statement of the case in which the parties concurred.

The Company filed a direct case that included testimony and exhibits from seven witnesses addressing each of the specifications of the Docketing Order. Staff filed a direct case that included testimony and exhibits from seven witnesses, the AG filed a direct case that included testimony and exhibits from five witnesses, and AT&T submitted direct testimony and exhibits by one witness. The Christian Coalition also submitted direct testimony that was later stricken as irrelevant. The Company also filed rebuttal testimony and exhibits from 13 witnesses. Hearings commenced before the Hearing Examiner on June 19, 2000 and continued for 18 days, concluding on July 25, 2000. Post-hearing briefs and replies were filed and the Hearing Examiner took the matter under advisement on September 28, 2000.

The case produced highly divergent estimates of the Company's jurisdictional revenue requirement developed in accordance with traditional test-year, rate of return methodology. In its direct case as filed, the Company estimated an annual earnings deficiency of \$31.2 million and an annual revenue deficiency of \$54.2 million. Redding

Dir.9, Ex. GAR-1.¹³ The AG's study proposed an annual revenue decrease of \$78.14 million, and the Staff proposed an annual revenue reduction of \$102.68 million. Dirmeier Dir. 5; Roybal Dir. 12. The Company and Staff's original estimates of the annual revenue requirement were thus separated by more than \$150 million. A handful of issues were key contributors to that difference: (i) test-year depreciation expense and amortization of the depreciation reserve deficiency; (ii) the fair rate of return on rate base; (iii) imputation of directory advertising revenue; (iv) implementation of the change in accounting treatment for software investment pursuant to SOP 98-1; and (v) the amortization adjustment for deferred recovery of other post-employment benefits (OPEBs). See Staff's Opening Brief at 21-55 and Reconciliation Statements (Sept.14, 2000); Qwest Corporation's Opening Brief at 33-1104, 106-108, 132-134 (Sept.14, 2000); Qwest's Proposed Findings, Conclusions and Order with Reconciliation Statements (Sept.14, 2000).

Utility Case No. 3008 was potentially affected by the enactment of HB 400 and SB 123 during the 2000 legislative session. These two identical bills were signed into law and became effective on March 7, 2000, and mandate extensive changes in the regulation of telecommunications carriers, such as Qwest, that serve more than 50,000 access lines. Among other things, the Commission is directed to eliminate rate of return regulation of such carriers and implement an alternative form of regulation that includes reasonable price caps for basic residence and business local exchange service by April 1, 2001, and to identify implicit subsidies in existing telecommunications rates by

¹³During the case, the Company accepted certain adjustments and corrections that reduced its estimated annual revenue deficiency to \$43.36 million. The Company's Proposed Findings, Conclusions and Order with Reconciliation Statements 14 (Sep. 14, 2000).

December 31, 2000 and establish a schedule not later than April 1, 2001 whereby such subsidies will be eliminated through universal service funding, revenue-neutral rate rebalancing, or another method consistent with the intent of the Telecommunications Act. NMSA 1978, § 63-9A-8.2. Questions of whether and, if so, how the policies reflected in these acts and their requirements should factor into the resolution of Utility Case No. 3008 were vigorously debated. *See, e.g.*, Qwest Corporation's Opening Brief at 4-30 (Sept.14, 2000); Staff's Opening Brief at 5-9 (Sept.14, 2000). In any event, April 1, 2001, is only a few weeks away and with it comes the Commission's deadline for eliminating rate of return regulation of Qwest and implementing an alternative form of regulation plan.

Beyond that, however, as presented to the Commission and as approved by this Order, the Amended AFOR provides a just and reasonable balancing of interests, including those of the public as well as the parties to this proceeding, and therefore a proper conclusion to the investigation which the Commission commenced in Utility Case No. 3008. The Amended AFOR is also consistent both with the Commission's objectives in commencing the investigation and the Legislature's objectives in enacting HB 400.

The record in Utility Case No. 3008 provides evidence that the price caps proposed in the Amended AFOR for basic residence (\$10.66 per month) and business (\$34.37 per month) service are reasonable. As noted, these are the interim rates that were set in Utility Case No. 3007 and, of themselves, equate to an annual revenue reduction of almost \$29 million. Thus, by agreeing to these caps, Qwest has accepted an annual revenue reduction that is approximately midway between its own estimate of its revenue requirement and Staff's estimate and well past the midpoint between its estimate and the AG's.

These are not the only revenue reductions inherent in the plan, however. As previously discussed, the Amended AFOR will also implement significant reductions in switched access rates and intrastate long distance rates, eliminate surcharges for service outside base rate areas, expand local calling areas for 12 exchanges without the customary EAS surcharges, and reduce other toll restriction and listing service charges. Coupled with the \$154 million in incremental investment commitments over the term of the plan (which carry no offsetting revenue increases) and even taking into account the residence price cap increases permitted in Periods 2 and 3, the annualized average revenue impact of the fully implemented Amended AFOR amounts to a reduction of between \$53 and \$63.5 million. Staff Ex. 8; 9 Tr. 97-101. Again, these results fall comfortably within the zone of reasonableness established by the testimony and recommendations before the Commission in Utility Case No. 3008.

Of similar importance are the commitments to invest at least \$788 million in infrastructure and deployment of advanced services, to fill all existing high cost held orders for primary services and all unfilled orders for designed services, and to achieve a variety of rigorous and demanding quality of service standards which the Commission has already found to be among the toughest in the country. The purposes of the investigation in Utility Case No. 3008 also included these matters as well as an examination of Qwest's earnings and rates.

Staff witness John Curl gave the best summary of the considerations at play concerning Case No. 3008 and the imperatives of HB 400:

The old system of rate of return regulation simply does not work in this environment. We could continue to seek to reduce rates because U S West's investment was too paltry to justify their revenue levels, but I think it had become clear that such a solution would not solve the real problems: lack of investment and poor quality of service. A

satisfactory outcome of a rate cased (sic) based upon traditional rate of return standards would surely lead to more litigation from U S West's new owner, Qwest. Following through with the rate case would not lead to more investment or improvement in service.

Staff Ex. 4 (Curl Direct), at 7. Conventional rate of return regulation, in a competitive and technologically changing environment may discourage investment, innovation, and service improvement. The Amended AFOR offers solutions to the problems cited by Mr. Curl that may well not be achievable through rate-of-return-driven revenue restrictions.

The Amended AFOR thus offers both a workable transition to the regulatory regime envisioned by the 2000 amendments to the Telecommunications Act and a reasonable resolution of the investigation which the Commission initiated in Case No. 3008.

2. The Held Order Cases

a. Utility Case No. 2938 (Held Orders Investigation)

Utility Case No. 2938 (formerly NMSCC Docket No. 94-192-TC) is the seminal case concerning the Company's held orders for basic exchange service. The Commission docketed the case on its own motion on May 26, 1994, to investigate reported increases in the numbers of held orders through the first few months of 1994. After a series of interim orders, portions of which were based on stipulations among the Company, Staff and the AG, the Commission issued a final order, captioned "Supplemental Findings of Fact, Conclusions of Law and Order" ("Supplemental Order II") on February 1, 1996, establishing what has sometimes been referred to as a "zero held orders standard"

applicable to the Company's orders for primary residence and business local exchange service.¹⁴

As defined by Supplemental Order II, the standard required the Company to have no primary orders for basic residence or business basic local exchange service held over thirty days, except orders for which waiver requests were either pending or had been granted. Supplemental Order at 33, 43. Other exceptions from the standard included orders involving extensions for which customer contributions were required and orders delayed by causes attributable to the customer, such as failure to complete construction or to provide necessary facilities. Unusual circumstances comprising grounds for waivers from the standard were based on the Supplemental Order, and included, but were not limited to delays in obtaining necessary rights of way or other permits, weather delays, unreasonable costs, and additional time required for necessary construction. Supplemental Order at 7-9. As characterized by the Commission, "the waiver process and other requirements of the Stipulation and Supplemental Order ensure that an unlimited duty to serve is not imposed on U S WEST." Supplemental Order II at 33, n.2. Supplemental Order II also prescribed a program of alternative services and billing credits to be provided to customers whose service orders were delayed.

The Company appealed Supplemental Order II to the New Mexico Supreme Court. The Court upheld the decision, relying, in part, on the availability of and grounds for waivers. In the Matter of the Held Orders of U S WEST Communications, Inc., 1997-NMSC-031, 123 N.M. 554, 943 P.2d 1007. In 1996, the

¹⁴ Two of the important interim orders are the "Order on Stipulation" entered on November 14, 1994, the "Supplemental Order" entered on August 7, 1995.

Commission's predecessor established a separate docket, NMSCC Docket No. 96-115-TC (Utility Case No. 2939) to deal with the Company's requests for waivers from the held orders standard. Proceedings in that case are discussed below. There are no matters currently pending in Utility Case No. 2938, and the Commission stated its intention to close the case in an order issued on October 5, 1999, absent a showing of cause within 31 days why it should remain open. Order on Joint Motion for Summary Disposition and for Joint Petition to Require U S WEST to Submit Plans and Time Tables and Order to Show Cause, 17 (Oct. 5, 1999). Because of the perceived relevance of the orders and proceedings in that case to other matters then pending, Staff and the AG on November 18, 1999, sought leave to file a motion to reopen (or not to close) Utility Case No. 2938. The Commission has that motion under advisement.

The proposed Amended AFOR establishes held orders standards and waiver procedures and requirements that will supersede the standards established in Utility Case No. 2938. In addition, the Commission has recently issued a quality of service rule, 17.11.22 NMAC, that also prescribes standards, procedures and requirements applicable to held orders and waivers that would apply in the absence of an approved AFOR. Accordingly, it is clear that there will be no further proceedings in Utility Case No. 2938, and the case can and should be closed.

b. Utility Case No. 2939 (Held Order Waivers)

As noted above, Utility Case No. 2939 (NMSCC Docket 96-115-TC) was established by the Commission for proceedings concerning waivers requested by the Company from the held orders standard adopted in Utility Case No. 2938. As of December 29, 2000, the record of this case reflects that the Company had filed approximately 3241 requests for waivers since the commencement of the case. For the

most part, Staff has denied these requests, and the Company has appealed Staff's denials to the Commission. To date, the Commission has conducted two sets of hearings on the appeals.

The first round of hearings occurred during June and July 1998 and concerned waivers requested for approximately 140 service orders that remained open through the time of hearing. On December 15, 1998, the Commission issued its Findings of Fact, Conclusions of Law, and Order on Held Orders Waiver Petitions (the "December 15 Order") in which the Commission affirmed Staff's denial of all of the pending requests based on unreasonable cost, and all of the pending requests which were filed more than thirty days after the requested service date. The Commission also found that the Company would have been entitled to waivers for many of its requests based on need to obtain rights of way and other unusual circumstances but for its failure to file within the thirty-day period or, in some cases, to attach supporting right of way documentation. December 15 Order at 47, 60, 63-66. The Company appealed the December 15 Order to the New Mexico Supreme Court (Cause No. 25,560), and the Court currently has the appeal under advisement.¹⁵

The second round of hearings occurred during May and June, 2000, and concerned approximately 1100 waivers requested between April 1, 1998 and December 31, 2000. The issues in these hearings, which occurred before Hearing Examiner Peter Springer were similar to the first round.¹⁶ Staff had again denied all of the waivers

¹⁵ In response to a joint motion by Qwest and the Commission, the Court has stayed its decision pending determination of the instant case.

¹⁶ The Commission also referred to the Hearing Examiner the issue of whether the Company should be required to fill the high cost orders that are the subject of the pending appeal from the first round. As noted below, however, Qwest has agreed to fill these and the other pending high cost orders if the Amended AFOR is approved.

requested on the basis of unreasonable cost. Staff also denied almost all of the waivers requested because of right-of-way issues or other unusual circumstances because concluded that the Company's had failed to show that the circumstances were beyond its control. Finally, Staff again applied and the Company again challenged the reasonableness and applicability of the thirty-day filing requirement. Also at issue, in light of the Commission's procedural order and the proceedings in the previous round of hearings, was whether requests involving orders which had been filled or canceled prior to the hearings, had become moot. Post-hearing briefs were filed in August, 2000, and the matter is now under consideration by the Hearing Examiner.

Since January 1, 2000, the Company has requested approximately 1400 waivers. Staff has denied most of the requests, and the Company has appealed the denials to the Commission.

The lengthy and protracted proceedings in this case demonstrate that the held order standard and the waiver procedures established in Utility Case No. 2938 have been the object of difficult, time consuming and expensive enforcement proceedings, and have produced considerable controversy and litigation between the Company, on the one hand, and Staff and the AG on the other. Were the same standards and procedures to continue, moreover, there is not much prospect that the litigation and controversy would end in the foreseeable future. Meanwhile, the Company is uncertain of its service obligations and customers are uncertain of their entitlements to service.

The Amended AFOR offers a reasonable and balanced conclusion to this impasse. Notably, over the 18-month period following approval of the Plan, Qwest has agreed to fill all of the pending "high cost" primary orders, that is, orders for which waivers have been requested on the ground of unreasonable cost. Qwest has also agreed to eliminate

unreasonable cost as a ground for future waivers.¹⁷ When and under what circumstances the Company is entitled to such waivers, has been perhaps the most hotly contested aspect of the standards adopted in Utility Case No. 2938.

Rather than referring simply to unusual circumstances, the Amended AFOR establishes that waivers will be available only when Qwest must construct facilities and the construction cannot be completed within the permitted time due to circumstances beyond Qwest's control. The Plan also enumerates the specific types of circumstances that may qualify. Qwest Ex. 6B § IX.D.4.

Finally, the Plan, like the Commission's recently adopted service quality rules and the VALOR AFOR, recognizes that at least some held orders will occur, and the standard and the sanctions therefore tolerate a reasonable, but very nominal level of held orders (0.025% of access lines by period 3). Qwest Ex. 6B, § IX.C.1.

Approval of the Amended AFOR will therefore resolve the pending proceedings in Utility Case No. 2939. New provisioning standards will take the place of the standards and procedures adopted in Utility Case No. 2938 that resulted in seemingly endless rounds of litigation. To the extent they are still pending, Qwest will fill the "high cost" held orders at issue in the 1998 and 2000 hearings and those for which waivers have since been requested. Qwest will also forgo the right to seek such waivers in the future. In addition, Qwest must either fill orders for which waivers have been previously requested on other grounds, or qualify them for waivers under the conditions established by the Amended AFOR. Finally, the conditions under which Qwest will be

¹⁷ The Amended AFOR, Section IX.D.4.f, provides a narrow exception for orders requiring line extensions of less than 1000 feet that would cost more than \$5,000. Even the AG's witness agreed, however, that this circumstance would arise rarely, if ever, and that in the Amended AFOR Qwest has essentially accepted the AG's position on high cost waivers. 4 Tr. 6-9.

entitled to future waivers are much more explicitly defined. Although there is disagreement as to certain provisions of the Amended AFOR, no party has contended that, if approved, the plan should not resolve Utility Case No. 2939. Accordingly, with approval and implementation of the Amended AFOR, Utility Case No. 2939 will be closed and Qwest and the Commission will seek dismissal of the pending appeal.

3. Utility Case No. 3162 (Administrative Fines)

Docketed by the Order on Joint Motion for Summary Disposition and for Joint Petition to Require U S WEST to Submit Plans and Time Tables and Order to Show Cause which the Commission issued on October 5, 1999, Utility Case No. 3162 is a proceeding to determine whether the Company should be fined for apparent violations of the held orders standard adopted in Utility Case No. 2938 that were reflected in the Company's monthly reports to the Commission during 1998 and 1999.¹⁸ Utility Case No. 3162 was also referred to Hearing Examiner Springer and was heard on the merits in March 2000. Post-hearing briefs were submitted in May 2000 and the matter is currently under advisement.

The Company's testimony and exhibits showed that it had reported 260 held orders during the period. Nineteen of the reported orders were duplicates, leaving a total of 241 separate orders in issue. The Company contended that many of the orders were reported in error for various reasons. The Company, nevertheless, conceded that there were 87 orders for which waivers could and should have been requested but were not.

¹⁸ Hearing Examiner Peter Springer subsequently determined that the proceeding would include violations reflected in the reports filed for the months of November 1998 through October 1999. Procedural Order at 10 (Jan. 6, 2000).

Staff and the AG contended that fines should be imposed for as many as 178 of the reported orders. Staff recommended fines totaling \$2,599,000 for the 154 violations Staff counted, and the AG recommended fines totaling \$3,773,500 for the 178 violations her witness counted.

The Company contended that, except for the 87 orders for which the Company conceded it had not requested waivers, the AG and Staff had failed to prove violations of the held orders standard. As to the 87 orders, moreover, the Company claimed that 86 had been filled and the requested service provided. The Company also contended that fines were inappropriate because the failure to request waivers had not adversely affected customers and had been caused by inadvertent oversights in carrying out complex procedures involving numerous persons.

The Amended AFOR directly resolves the questions before the Commission in Utility Case No. 3162 by offering an acceptable alternative to fines to address the service issues at the heart of the held orders cases. Were the Commission to assess fines in this case, the purpose, in addition to being punitive, would be to motivate better compliance with the service standard. The Amended AFOR offers a more direct route toward motivating better compliance. Instead of paying fines, Qwest will invest \$788 million in improving and reinforcing its network and deploying advanced services, will provide service to the high cost customers in rural areas whose orders have been held under the existing standard, and will commit on a forward looking basis to tougher service standards in each of its exchanges.

Notwithstanding the disagreements as to certain features of the Amended AFOR, no party has contended that Utility Case No. 3162 should not be resolved by the plan as ultimately approved. Staff and Qwest's proposal to resolve Utility Case No.

3162 by approval and implementation of the Amended AFOR is, therefore, reasonable and appropriate.

4. Utility Case No. 2922 (ISDN Rates and Deployment)

Utility Case No. 2922 (formerly NMSCC Docket No. 95-769-TC) was docketed by the Commission on November 22, 1995, for the purpose of hearing and considering the rates and tariffs under which the Company proposed to deploy ISDN service. After lengthy hearings, the Commission issued a final order on May 13, 1996, (the "ISDN Order") setting rates for both ISDN Basic Rate Interface ("BRF") and Primary Rate Interface ("PRI"), requiring statewide deployment of ISDN in all central offices except those for which the Company could obtain waivers, providing a procedure for seeking waivers, and establishing other requirements, including a demand survey of business and residential customers by an independent firm. The Company sought review of the ISDN Order by the New Mexico Supreme Court, and on September 15, 1998, the Court issued a decision upholding the Commission. U S WEST Communications, Inc. v. New Mexico State Corp. Comm'n, 1998-NMSC-032, 125 N.M. 798, 965 P.2d 917 (1998) (the "*ISDN Opinion*"). Among other things, the Court noted with respect to the Commission's deployment requirements that the "waiver provision of the [ISDN] Order allows U S West to ensure that its costs are covered for each of those [central] offices." *ISDN Opinion* at ¶ 27, 125 N.M. at 807. The proceedings in the case are described in more detail in the ISDN Order and the *ISDN Opinion*.

Since the Court remanded the case, proceedings have mainly concerned the scope and contents of the demand survey and whether deployment should be waived for particular central offices. Following negotiations between the Company and Staff and a series of clarifying orders from the Commission, the demand survey was completed in

two phases in the summer and fall of 1999 by Research and Polling, Inc. Based on the results of the survey, the Company applied on October 4, 1999, for waivers of BRI deployment in 34 central offices and waivers of PRI deployment in 43 central offices. On February 8, 2000, Staff submitted the testimony of Michael Ripperger responding to the Company's waiver requests. Mr. Ripperger agreed that waivers for PRI in all offices included in the first phase of the survey, and waivers for BRI in all but eight offices included in the first phase, were appropriate. He recommended denying BRI waivers for the remaining eight offices surveyed in the first phase, and BRI and PRI waivers for offices not surveyed. Finally, he withheld any recommendations with respect to the offices included in the second phase pending completion of Staff's review of the results. No procedural order has been issued with respect to the pending waiver requests and Staff's recommendations.

Qwest's testimony in Utility Case No. 3008 claims that ISDN BRI is already deployed in 29 wire centers serving 87.3% of business lines and 78.9% of residence lines, and that PRI is already available in 20 wire centers serving 71.7% of business lines and 61.3% of residence lines. NMPRC Utility Case No. 3008, Sanchez Reb. 4-5. In the Amended AFOR Qwest commits to deploy ISDN in ten additional central offices. Qwest also commits to deploy DSL service in five additional central offices, for a total DSL deployment of 18 central offices serving over 70% of Qwest's access lines in New Mexico. The AFOR also establishes procedures for monitoring DSL demand in remaining exchanges for possible further deployment.

Qwest thus commits to extensive deployment of high-speed data services in both rural and urban areas consistent with the Commission's objectives in Utility Case No. 2922, and with the legislative objectives reflected in the recent amendments to the

Telecommunications Act. Standing alone, the additional ISDN deployment is a reasonable resolution of Qwest's waiver requests and Staff's recommendations on the record in Utility Case No. 2922. Approval of the AFOR would therefore bring a reasonable conclusion to the proceedings in Utility Case No. 2922.

5. Utility Case No. 3147 (Order to Show Cause)

Acting on its own motion, the Commission initiated the investigation docketed as Utility Case No. 3147 on October 5, 1999, by issuing an Order to Show Cause requiring the Company to provide specified information regarding its services and investment in New Mexico, to show cause why it was not in violation of the Telecommunications Act and the Commission's rules and orders, and to show cause why it should not be fined and why its certificate of convenience and necessity should not be revoked, modified or amended. The Company answered the order and filed testimony by four witnesses on December 6, 1999. The AG filed testimony by two witnesses and Staff filed testimony by four witnesses on December 22, 1999. The Company filed its rebuttal testimony on December 28, 1999. On January 5, 2000, the Commission issued an order vacating the scheduled hearing pending further notice. No proceedings have since been scheduled.

No party recommended that the Company's certificate be revoked, amended or modified or that any specific fines be imposed. In its testimony, Staff noted that the Company had responded to each of the specifications of the Order to Show Cause and that the Commission already had open dockets regarding each of the subjects of the order. De Cesare Dir. 14-15. The Company also maintained that the proceedings in Utility Case No. 3215 and the AFOR it had then proposed offered an opportunity to deal with the issues underlying the Order to Show Cause comprehensively rather than on a piecemeal basis. U S WEST's Comments (Jan. 4, 2000).

The AFOR now before the Commission resolves the issues addressed in the Order to Show Cause. Although various provisions of the Amended AFOR are in controversy, no party has contended that the investigation in Utility Case No. 3147 should proceed. The investment commitments, the rate commitments, the commitments for deployment of advanced services, and the service quality standards and commitments, including resolution of pending held orders, are reasonable responses to the concerns that the Commission cited in the Order to Show Cause, and further proceedings in the case are therefore unnecessary.

6. Utility Case No. 3429 (Switched Access Reform)

On January 31, 2000, Qwest filed proposed new switched access tariffs intended to restructure its local transport services and rates in a manner replicating the local transport reforms at the federal level. New Mexico is the only state in Qwest's region that still maintains the old local transport rate structure. To achieve revenue neutrality, the reductions in transport rates were offset by a proposed increase in the carrier common line charge ("CCL"). The filing was removed from the monthly telecommunications agenda and docketed as Utility Case No. 3429, but no procedural schedule has yet been issued in the case.

The proposed reforms were also addressed in the general rate case, Utility Case No. 3008. The restructure of the local transport elements was generally endorsed by the parties to that case, although the offsetting increase to the CCL was opposed. See *generally* Wilcox Reb. 2-3; 7 Tr. 86-87; Dunkel Rate Design 57-60; Starr 21; 11 Tr. 154.

The proposed Amended AFOR includes implementation of restructured local transport rates as proposed in Case No. 3429, but without the offsetting increase to the CCL. Qwest Ex. 6B, § V.A.3. Thus, instead of a revenue-neutral restructure,

implementation under the Amended AFOR will result in an immediate reduction of switched access revenue to Qwest by approximately \$7 million annually. The initial reduction will also be followed by a reduction in the CCL, also equating to approximately \$7 million annually, to become effective January 1, 2003. No party objected to these features of the AFOR, and approval of the AFOR renders further proceedings in Utility Case No. 3429 unnecessary.

THE COMMISSION FINDS AND CONCLUDES:

1. The Statement of the Case, Summary of the Evidence, the Discussion, and all findings and conclusions stated therein or elsewhere 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.

2. The Commission has jurisdiction over the parties and subject matter of this case.

3. Qwest Corporation, formerly known as U S WEST Communications, Inc., 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. On October 27, 2000, Qwest and Staff filed their Joint Stipulation together with their proposed AFOR plan. AT&T was also a signatory to the proposed AFOR plan.

5. By its Procedural Order issued on November 9, 2000, the Commission commenced its consideration of Utility Case No. 3215 and the other above-captioned cases for purposes of hearing and considering the Joint Stipulation and proposed AFOR.

6. Due, proper and legally sufficient notice has been given of these proceedings.

7. On January 23, 2001, Qwest, Staff, and the NMISPG filed their Amended Joint Stipulation accompanied by the Amended AFOR. Qwest Exs. 6A, B, and C. AT&T and MCI WorldCom also supported the Amended AFOR. In open hearing on January 24, 2001, the Commission accepted the Amended AFOR in substitution for the original proposal filed on October 27, 2001. 5 Tr. 77. A copy of the Amended Joint Stipulation is attached to this Order as Exhibit A.

8. The proponents of the Amended AFOR have met their burden of proving by substantial evidence that their proposed Amended Joint Stipulation and Amended AFOR are reasonable under the circumstances presented, consistent with and in the public interest, consistent with HB 400 and satisfy the HB 400 requirements that the Commission adopt rules that, (a) establish consumer protection and quality of service standards; (b) ensure adequate investment in the telecommunications infrastructure in both urban and rural areas of the state; (c) promote availability and deployment of high-speed data services in both urban and rural areas of the state; and (d) establish an expedited regulatory process for considering matters related to telecommunications services that are pending before the Commission. The proposed Amended AFOR is also consistent with, and satisfies the requirement of HB 400 that, by no later than April 1, 2001, the Commission implement an alternative form of regulation that includes reasonable price caps for basic residence and business local exchange services. Finally,

the Amended AFOR provides a balanced and reasonable resolution to the Commission cases under consideration in this proceeding. Approval of the Amended AFOR is therefore in the public interest.

9. The Amended AFOR should reflect the corrections noted by Mr. Badal (6 Tr. 34-35) and Ms. Taylor (8 Tr. 142-143). In addition, it should also reflect the clarifications suggested by Commissioner Schaefer to Sections V.A.1.d.5 and VIII.B.2, and a related change to Section VIII.E. 6 Tr. 47-51. The Corrected Amended AFOR attached to this Order as Exhibit B incorporates those corrections and clarifications.

10. With the procedural modifications set out in the body of this Order, and the corrections and clarifications noted immediately above, the Amended Joint Stipulation and the Amended AFOR should be approved as provided by this Order.

IT IS THEREFORE ORDERED:

A. As provided by this Order, the Amended Joint Stipulation and the Amended AFOR in the form attached to this Order as, respectively, Exhibits A and B, are hereby adopted, approved, and entered as an Order of the Commission.

B. Procedural time frames and deadlines set in the Amended AFOR are hereby approved as modified by this Order, or unless otherwise provided. All procedural time frames or deadlines set out in the Amended AFOR or 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.

C. As approved and as provided by this Order, the provisions of the Amended Joint Stipulation and the Amended Alternative Form of Regulation Plan shall be carried out and complied with.

D. The Amended AFOR is effective the date of this Order.

E. Qwest shall file an advice notice as soon as possible containing tariff amendments consistent with the Amended AFOR Plan as approved by this Order and as necessary to implement the AFOR, subject to Staff review for compliance with applicable Commission rules and orders. 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 April 2001.

F. No later than May 7, 2001, 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 on, respectively, Qwest's and the Commission's web sites. These reports shall state whether such web site posting is feasible, furnish any appropriate recommendations relative thereto, and provide reasons for all recommendations and conclusions.

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

H. This Order shall also constitute the Final Order in Utility Case Nos. 3215, 3007, 3008, 2938, 2939, 3162, 2922, 3147, and 3429.

I. Any outstanding matter in Utility Case No. 3215 or in any of the eight cases consolidated with Utility Case No. 3215 not specifically ruled on during the hearing or in this Order is disposed of consistent with this Final Order.

J. Copies of this Order, without Exhibits A and B hereto, shall be mailed to all persons listed on the attached official Certificate of Service for this case. This Order, along with Exhibits A and B, shall be posted on the Commission's web site (www.nmprc.state.nm.us) as soon as possible.

K. This Order is effective immediately.

L. The dockets for Utility Case Nos. 3215, 3007, 3008, 2938, 2939, 3162, 2922, 3147, and 3429 are hereby closed. Copies of this Order shall be placed in the official case file for each of these cases.

ISSUED under the Seal of the Commission at Santa Fe, New Mexico, this 8th day of March, 2001.

NEW MEXICO PUBLIC REGULATION COMMISSION

TONY SCHAEFER, CHAIRMAN

HERB H. HUGHES, VICE CHAIRMAN

BILL POPE, COMMISSIONER

JEROME D. BLOCK, COMMISSIONER

LYNDA M. LOVEJOY, COMMISSIONER