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BEFORE THE ARIZONA CORPORATION COMMISSION

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Arizona Corporation Commission

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IN THE MATTER OF QWEST) Docket No. T-01051B-03-0859
CORPORATION'S PERFORMANCE)
ASSURANCE PLAN) **QWEST CORPORATION'S REPLY**
) **COMMENTS ON QPAP SIX-MONTH**
) **REVIEW PROCESS**
)

Pursuant to the Procedural Order dated June 18, 2004 in this matter, Qwest Corporation ("Qwest") submits the following comments in reply to the comments filed by AT&T, Covad, MCI, and Eschelon, relating to the first Six-Month Review of Qwest's Performance Assurance Plan ("PAP").

I. Introduction

In its initial comments Qwest reviewed Section 16.0 of the PAP, which provides for the Six-Month Review. Qwest noted the provisions of Section 16.0 which set forth the scope of the review, the process to be followed, and the standard of review. In these Reply Comments Qwest identifies issues raised by the other parties that are outside the scope of review. Issues which are outside of the scope of review identified by Section 16.0 are not proper subjects in this matter.

Further, Qwest states its view of the procedure which should be followed. With respect to matters that have been the subject of the Long Term PID Administration (“LTPA”), the matters upon which Qwest and the CLECs have agreed and which are within the scope of Section 16.0 can be modified to the extent of such agreement. However, the LTPA facilitator made recommendations on issues with respect to which Qwest did not agree. With regard to those matters that were not agreed upon (or which are not subsequently agreed upon), Qwest must be afforded notice, the opportunity for hearing, and written and/or oral argument.

Last, Eschelon proposes that the Commission should admit LTPA documents into the record of this proceeding, including impasse documents, party comments, Facilitator recommendations, and state staff votes. Qwest objects to this proposal on the grounds that the LTPA documents lack legal relevance. Further, the LTPA documents would add to the record matters which are outside the scope of the six-month review established by Section 16.0.

II. Issues Outside the Scope of Review

Section 16.0 defines the scope of review of the performance measurements. The scope is “whether measurements should be added, deleted, or modified; whether the applicable benchmark standards should be modified or replaced by parity standards; and whether to move a classification of a measure of High, Medium, or Low or Tier-1 to Tier-2.” For the most part, the issues identified by the other parties fit within that scope. However, three issues outlined by the CLECs do not relate to the limited scope of the six-month review.

A. Aggregate PAP Performance and Payment Reports Are Outside the Scope of Review.

The MCI comments urge that Qwest should make available CLEC aggregate PAP performance and payment reports at the product level.¹ This proposal does not meet the scope of review criteria. It does not involve the addition, deletion, or modification of measurements, the standards, or the classification of a measurement.

B. Proposal to Admit LTPA Documents Into the Record Would Be Overly Broad and Burdensome.

Eschelon advocates that the LTPA documents should be admitted into the record.² However, Eschelon does not provide any guidance on whether or how the extensive LTPA documents should be examined and sifted to sort out those which are outside the scope of the review permitted by Section 16.0. Certainly, those that are outside the scope should not be admitted. Qwest submits that the importation of the voluminous LTPA records, which Qwest estimates to consist of over 2,500 pages, would present an unreasonable burden upon the parties to review the records, digest them, and comment on them.³ The benefit to be derived is doubtful, and certainly less than the benefit that can be expected to be gained by testimony, cross examination, and argument directly on point on the issues that are ultimately singled out under the Six-Month Review before this Commission.

¹ MCI Comments on QPAP Six Month Review Process (“MCI Comments”), Section 2.D., at page 3.

² Eschelon’s Comments on the Scope and Procedures for the First Six-Month Review of the QPAP (“Eschelon Comments”), section C at pages 6-7.

³ The importation of the LTPA record into evidence in the QPAP Six Month Review would also suffer from significant legal infirmities, which are addressed in Section II.D. of these Reply Comments.

C. **Qwest's Participation in LTPA is Outside the Scope of the Six-Month Review.**

Eschelon implies that Qwest's decision to drop its participation in the LTPA should be reviewed by the Commission.⁴ Qwest does not know of the basis upon which such a review would be undertaken. This Commission has not ordered that Qwest must participate in any regional forum or collaborative. Nor does the PAP itself contain any such requirement.

Qwest's position is that there is a more efficient method for collaborating with individual or groups of customers on issues that impact them directly. Qwest will continue PID discussions with CLECs regarding specific issues through their account management team, either individually or with groups that have common concerns. Qwest's process does not envision individual CLECs, or Qwest itself, driving changes to the PIDs and PAPs without industry discussion.

Certainly, whether or not Qwest participates in the LTPA does not relate to whether any measurements should be added, deleted, or modified, whether the applicable benchmark standards should be modified or replaced by parity standards, or whether a measure should be reclassified. Qwest's participation in LTPA is thus not properly within the scope of the Six-Month Review.⁵

III. Procedural Issues

As a self-executing remedy plan, the PAP encourages Qwest, primarily through monetary mechanisms, to provide nondiscriminatory wholesale service comparable to its

⁴ Eschelon Comments, Section II.A., page 3; Section II.B.2., page 6.

⁵ In recent Qwest PAP Six-Month Review proceedings before the Washington State Utilities and Transportation Commission, the Administrative Law Judge ordered that LTPA continuation was rejected as an issue in the proceeding, ruling that the Commission could not force Qwest to participate in the collaborative process. Docket No. UT-043007, Order No. 6, Prehearing Conference Order;; Modifying Procedural Schedule, para 5 (July 13, 2004).

own retail services. Section 16.0 of the PAP states that “Staff shall seek the mutual consent of the parties to any proposed changes.” As Qwest noted in its initial comments, if parties wish to make Six Month review proposals (which must fall within the scope of review identified in Section 16.0), the interested parties should make proposals, and the Staff should then in turn facilitate a process by which the CLECs and Qwest review each other’s proposed changes. If mutual consent cannot be reached, the Commission may review and examine the matter; however, in that case the parties should be afforded notice, the opportunity to testify, cross examine witnesses and make written and /or oral argument.

A. “Ministerial Changes” to PIDs Based on Agreements Reached in LTPA May Not be Ordered Summarily.

Eschelon states that CLECs and Qwest have agreed in LTPA to certain benchmark/parity standards, relating to EELs, and the PID OP-4 (installation interval), for DS-1 capable loops.⁶ Qwest acknowledges that it agreed upon these matters, and that the agreement should be brought forward into the PAP as part of this Six-Month Review. However, Section 16.0 provides for a process by which measurements are to be modified, and that process does not permit automatic incorporation. Qwest is not repudiating any agreements it has made. However, these benchmarks should only be brought forward into the PAP precisely as they were agreed, and Qwest should be afforded the opportunity to review and confirm that any changes to the PAP fully conform to the agreements made regarding PIDs prior to the adoption of any PAP additions, deletions or

⁶ Eschelon Comments, section II.B.1., pages 3-4.

modifications. Absent such agreement, the standards may not be added or modified without notice and hearing.

B. Agreed to Changes Incorporated into Exhibit B (Qwest's May 3, 2004 SGAT Revision) should be Brought Forward into Exhibit K).

MCI proposes that changes to measures in Exhibit B under Qwest's May 3, 2004 SGAT revision to reflect LTPA agreements filed in Docket No. T-01051B-99-0068 should result in complementary changes to Exhibit K for measures addressed in the PAP.⁷ Qwest concurs, subject to alignment of the proposed changes with the LTPA agreements and approval by the Commission.

C. Hearings for Disputed Matters.

Qwest reserves the right to request an evidentiary hearing with respect to the matters raised in the Six Month Review of its performance plan and the associated PIDs. Although the LTPA provided the parties with an opportunity to explore PID issues and attempt to find resolutions and acceptable compromises, questions of fact and areas of disagreement remain on certain issues. An evidentiary hearing, with cross examination of witnesses, and the opportunity for written and/ or oral argument, is consistent with the provisions of Section 16.0 with respect to matters about which parties do not agree. Further, as a general rule, A.R.S. § 40-252 requires that before the Commission modifies or amends any prior order or decision, it must provide the corporation affected notice and an opportunity to be heard as upon a complaint.

⁷ MCI Comments, section 2.E., page 3.

D. LTPA Documents Should Not Be Admitted.

In Section II.B.3. above, Qwest points out that Eschelon's proposal to admit LTPA documents into the record of this proceeding would improperly sweep in matters outside the permissible scope of this Six-Month Review, and would be unduly burdensome. As a procedural and evidentiary matter, the Eschelon proposal is also flawed. Eschelon asks the Commission to admit the LTPA documents into the record of this proceeding on its own motion, essentially taking judicial notice of the matters contained in those documents, without formal presentation of evidence.

First, the LTPA documents in their entirety are of doubtful probative value in relation to the high risk of confusion or unfair prejudice. To the extent that they are offered to prove the truth of the matters asserted, they are inadmissible hearsay in this proceeding, because of the inability to cross examine the declarants.

Second, the LTPA was not adjudication by an authority having jurisdiction over the matter. It was not established as an arbitration, or even as a mediation. It was described as a "collaborative." While there was a facilitator for the discussions, who ultimately made recommendations, those recommendations are not binding on the participants. There was not a formal record, and there were no hearings where evidence was presented and an opportunity provided for cross-examination. In view of these facts, there is nothing about the LTPA with respect to which the Commission may take judicial notice.

Last, because of the informal, non-binding nature of the LTPA, no recommendations made by the facilitator are subject to the doctrines of res judicata or

collateral estoppel.

E. Issues Which Are Properly Within Scope of Six-Month Review, But With Respect to Which Qwest Disagrees on Treatment, Implementation, or Inclusion in PAP.

The parties raise a number of other issues. Following is a list of those issues that Qwest agrees are properly raised in the Six-Month Review. With respect to these matters, however, Qwest disagrees on whether and how the matters should be addressed in the PAP.

- Line Splitting—what standard should be used for this product for PIDs MR- 3, 4, 6, 8 and OP-5. (MCI Comments at page 2)
- Loop Splitting—should this product be added to PIDs PO-5, OP-3, 4, 5 and 6, and MR 3, 4, 6, 7 and 8 and if so what standard should apply (MCI Comments at page 2)
- PO-20—implementation issues surrounding Tier assignment and provisions for a measurement stabilization period. (Qwest Comments at page 5. MCI Comments at page 2, and Eschelon Comments at page 5)
- OP-5B—new sub-measurement created to ensure Qwest would report all customer impacts associated with service order processing. (Eschelon Comments at page 5)
- Revise list of PIDs included in the PAP to include PO-2 and BI-5. (Eschelon Comments at pages 5-6)
- Revise list of products included in the PIDs to add the product xDSL-I capable loops as recommended by the LTPA facilitator. (MCI Comments

at page 6.)

These issues should be the focus of efforts by Staff to seek the mutual consent of the parties, if possible, under Section 16.0. Failing consensus, Qwest believes that hearings are appropriate in these matters.

RESPECTFULLY SUBMITTED, this 17th day of July, 2004.

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