

BEFORE THE NEW MEXICO PUBLIC REGULATION COMMISSION

**IN THE MATTER OF THE)
ENFORCEMENT OF QWEST)
ALTERNATIVE FORM OF REGULATION)
PLAN II)
_____)**

Case No. 08-00189-UT

**OPINION CONCURRING IN PART AND DISSENTING IN PART
FROM COMMISSION ORDER ON PRELIMINARY RECOMMENDED
DECISION OF THE HEARING EXAMINER**

I respectfully dissent from the Commission’s Order in this matter, agreeing with the Commission’s result on most matters at issue, but diverging from the Order’s legal analysis with respect to force majeure. I would also have required Qwest to make a filing into the record restating its trouble reports in conformity with the Commission’s Order and specifying with particularity what they have elected to exclude.

Concurring Material

When, as here, a decision turns upon the meaning of words in a statute or regulation, a legal question is presented. *Trust of Bingham v. Commissioner*, 325 U.S. 365, 65 S.Ct. 1232, 89 L.Ed. 1670 (1945). The meaning of a statute or rule is primarily determined by its language, and when it is unambiguous, no further construction is required. PRD at 11, *citing Southern Union Gas Co. v. N.M. Pub. Svc. Comm’n*, 82 N.M. 405, 482 P.2d 75 (Ct. App. 1973). Where there is ambiguity, interpretation is required, focused on determining legislative intent, and such intent is determined primarily from the language actually contained in the rule. PRD at 11 *citing State v. McHorse*, 85 N.M. 753, 517 P.2d 75 (Ct. App. 1973).

The QOS Rule’s objective is the establishment of “standards, procedures, reporting requirements, penalties, and customer credits to ensure that carriers provide

telecommunications services to retail customers at an adequate quality of service level and in a manner consistent with the promotion of universal service.” 17.11.22.6 NMAC

The QOS Rule at 17.11.22.7(W) NMAC defines the term “trouble report in sufficient detail to explicitly address and resolve many of the issues in contention:

notification of trouble or perceived trouble by a subscriber, third party, or employee acting on behalf of a subscriber to a LEC's repair office; it shall include troubles reported on access lines by the LEC's own retail customers and the retail customers of LECs that purchase wholesale services from the LEC but shall not include troubles associated with customers' unfamiliarity with new features or customer premises equipment, or extraordinary or abnormal conditions of operation[.]

As an ILEC, Qwest is required to maintain a record of all trouble reports and report by wire center the rate of trouble reports, the rate of trouble reports cleared within 24 hours, and the rate of repeat trouble reports. 17.11.22.8 NMAC. The rate of trouble reports may not exceed 5% per wire center per month, repeat trouble reports may not exceed 18% of trouble reports, and the ILEC must clear 85% of all trouble reports within 24 hours. 17.11.22.19 NMAC. Failure to achieve these standards is sanctioned by the automatic imposition of customer credits. 17.11.22.22 NMAC. Thus, what is included and what is excluded from being reported as a trouble report in the Commission's Order ultimately affects Qwest's liability to customers under the trouble report standard, the repeat trouble report standard, and the clearance of trouble report standard.

As the Commission's Order finds, the language of the definition of trouble reports explicitly includes reports from “retail customers of LECs that purchase wholesale services from the LEC.” In order to give effect to this language, Qwest *must* include in its reporting of trouble reports those reports that originate with retail customers of its

wholesale customers, whether those reports come directly to Qwest from the retail customer, or from a Qwest wholesale customer acting on behalf of the retail customer.

Trouble reports are to include “troubles reported on access lines . . .” 17.11.22.7(W) NMAC. The QOS Rule, at 17.11.22.7(A) NMAC, defines “access line” as “a dial tone line that provides local exchange service from a carrier’s switching equipment to a point of termination at the customer’s network interface[.]” Troubles reported by wireless customers of Qwest-branded services are unrelated to the access lines defined in the QOS rule. Furthermore, extending the QOS to cover wireless (CMRS) services, which are not within the services certificated to a LEC, does not fit within the purposes or objectives of the QOS rule. Qwest should be permitted to exclude trouble reports related to wireless services from its QOS reporting. Similarly, with regard to internal Qwest services, trouble reports related to such lines may also be excluded, as the Rule speaks to customers, i.e., “subscribers” of a LEC.

The definition of a trouble report explicitly includes “perceived” as well as actual malfunctions, while excluding “troubles” associated with customers’ unfamiliarity with LEC or the customer’s own equipment. 17.11.22.7(W) NMAC. As discussed above, the definition of trouble reports exists to establish the foundation for reporting and credits under three standards: trouble reports, repeat trouble reports, and clearance of trouble reports with 24 hours. In order to best give effect to purpose of the rule, as well as the explicit language that includes “perceived troubles” within the scope of the definition and reporting, the Commission should -- and has -- differentiated between the counting of trouble reports for the purpose of calculating the trouble report rate and the counting of trouble reports for the purpose of calculating cleared trouble reports. The clear intent of

the rule is to give the ILEC the obligation to investigate and clear trouble reports within 24 hours, either by effectuating a repair or by determining and informing the customer that perceived problem does not actually exist or that it does not originate within facilities for which the ILEC is responsible. E.g., for a problem that originates on the customer's side of the network interface device (NID), the rule's expectation is that the customer will be informed of this within the 24 period, so that the customer can then take appropriate action to restore service. If, as Qwest contends, "no problem found" and problems related to customer premises equipment are to be excluded from reporting under the QOS rule, not only would the word "perceived" be given no effect, there would also be no mechanism to ensure that customers had these types of reports cleared within the designated period.

However, including "no problem found" and problems originating on the customer side of the NID in the trouble report rate for which the ILEC can be sanctioned in 17.11.22.22(D) and (F) does not further the purpose of the rule. The Commission therefore appropriate found that Qwest should include these types of trouble reports in both the numerator and denominator of the trouble reports cleared within 24 hours rate, but not otherwise count these reports. In order to give effect to the language in the rule, Qwest should exclude from all reporting trouble reports determined to have originated with customer unfamiliarity with features or equipment, if it is able to distinguish these reports from other "no trouble found" reports.

Under the definition in the rule, trouble reports related to the operation of pay phones should be treated consistent with the findings above; i.e. if the problem originates on a Qwest access line or equipment, the trouble report should be counted for all

purposes, but if the problem is located on phone equipment on the other (non-Qwest) side of the NID, it should only be counted for the purposes of the cleared within 24 hour standard.

Dissenting Material Related to Force Majeure Issues

The specific exclusionary language that encompasses third-party damage, weather, and similar causes in the definition of a trouble report, 17.11.22.7(W) is “extraordinary or abnormal conditions of operation.” Extraordinary generally means circumstances that could not reasonably been foreseen. *See State v. Marquez*, 2008-NMCA-133, ¶ 9; *Maestas v. Alameda Cattle Co.*, 36 N.M. 323, 17 P.2d 733, 737 (1932). As staff argues, any *general* cause such as adverse weather, that results in thousands of outages each year should not be considered extraordinary or abnormal. However, specific instances of adverse weather could rise to a level that is extraordinary.

The QOS Rule also contains at 17.11.22.7(F) NMAC a definition for “circumstances beyond the reasonable control of an ILEC” which is “*delays* caused by:

- (1) a vendor in the delivery of necessary equipment or supplies, where the ILEC has made a timely order of the equipment or supplies;
- (2) local or tribal government entities in approving easements or access to rights-of-way, where the ILEC has made a timely application for such approval;
- (3) the customer;
- (4) negligent or willful misconduct by third parties not in privity with the ILEC; or
- (5) *force majeure* (meaning causes which are outside the control of the ILEC and could not be avoided by the exercise of due care, including but not limited to terrorism, explosions, fires, floods, severe storms, epidemics, civil unrest, wars, injunctions, strikes, work stoppages, and other emergencies and catastrophes)[.]”

(emphasis added)

The defined term “circumstances beyond the reasonable control of an ILEC” is used to excuse or exclude the specified delays from being counted against QOS standard related to installation of new services. See 17.11.22 NMAC at 8.E, 12.C, 14.D, and 25.B.

While it may be reasonable from a policy perspective to apply the broader definition of excusable failures to the counting of trouble reports, this approach is not present in the rule. The rule states specific criteria for exclusion in the trouble report definition: “extraordinary or abnormal.” If anything, the more generous definition for excusable delays elsewhere in the rule demonstrates that the Commission knew how to write broader criteria and, by clear inference, chose not to incorporate the events listed in 17311.22.7(F) in either the definition of trouble report or the procedures for counting or reporting trouble reports and trouble report rates.

Nevertheless, “extraordinary or abnormal conditions of operation,” which turns on foreseeability, is effectively similar to *force majeure* as defined in 17.11.22.7(F)(5), which incorporates the phrase “could not be avoided by the exercise of due care.” Thus, the QOS expects that an ILEC’s network will be constructed and operated in such a manner as to be able to continue to function properly under the expected range of conditions.

The Commission addressed *force majeure* in Case 05-00094-UT. In that case, the Commission rejected Qwest’s attempt to excuse its failure to meet the AFOR I standard for clearance of trouble reports due to weather conditions. Staff’s claim that Qwest’s New Mexico telecommunications network should be constructed and operated so as to survive the range of weather conditions that occurs in New Mexico, at first

glance, is consistent with the Commission decision in Case No. 05-00094-UT concerning weather-related Qwest claims. However, in that case, the Commission denied Qwest's *force majeure* claims, not *a priori*, but, rather due to Qwest's failure to establish, based on the evidentiary record, a lawful excuse for particular and significant compliance failures.

Whether the specific events that Qwest claims as an excuse to non-compliance with the QOS trouble report standards is a question of fact. Qwest should have been required to make a filing within 30 days of the Commission Order including each report that is to be filed to date under AFOR II related to trouble reports and cleared trouble reports. In this filing, Qwest should have been required to report the incidence of trouble reports as specified in the present Order. I would have requested Qwest exclude from its reporting and statistics those trouble reports it contends are related to extraordinary or abnormal conditions of operation (consistent with the discussion of that term herein); however, it should have separately listed such excluded trouble reports along with the event or circumstance that is claimed to excuse each trouble report, with sufficient specificity to allow Qwest's claims to be assessed.

I support the Commission's direction that the parties attempt to reach a resolution on the factual *force majeure* issues, with the assistance of a mediator. I believe that the reporting specified above would have facilitated that effort. In the event that remaining issues could not be resolved through that mechanism, I would have remanded the case to the Hearing Examiner for further proceedings to determine whether the events claimed by Qwest as weather-related or third-party related fall outside the range of conditions that should be reasonably expected and whether damage to the network could have been

avoided if the ILEC had exercised due care, but only when such a determination has an effect upon the customer credits payable under the QOS rule. I would have explicitly directed the Hearing Examiner not to conduct any further proceedings with respect to any group of disputed (or potentially) trouble reports that could not cause Qwest to exceed the threshold for issuance of customer credits or increase the amount of customer credits that might be payable.

FILED at Santa Fe, New Mexico, this 5th day of May, 2009.

JASON MARKS, COMMISSIONER