

Minnesota Public Utilities Commission

Staff Briefing Paper

Meeting Date: December 3, 2015.....** Agenda Item # 4

Companies: CenturyLink QC & Competitive Local Exchange Carriers

Docket No. P-421/M-00-849
In the Matter of Qwest Wholesale Service Quality Standards

Issues: Should the Commission discontinue the Wholesale Service Quality Plan?

Staff: Kevin O'Grady.....651-201-2218

Relevant Documents

CenturyLink Petition..... June 1, 2015
Comments: Joint CLECs..... July 10, 2015
Comments: DOC..... July 10, 2015
Replies: MN Cable Comm. Assoc. July 30, 2015
Replies: CenturyLink July 30, 2015
Replies: DOC July 30, 2015
MPAP Quality Performance Report (Trade Secret)(Docket 13-733)..... September 22, 2015
Wholesale Plan Quality Performance Report (Trade Secret) September 30, 2015

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Filing Background

On June 1, 2015, CenturyLink QC (CenturyLink) petitioned the Commission to eliminate the Wholesale Service Quality Plan (WSQP or Wholesale Plan) that the Commission adopted in 2003 in this docket.

On July 10, 2015, the Joint CLECs indicated that they did not oppose CenturyLink's request.¹ DOC made no recommendation.

On July 30, 2015, CenturyLink, the Minnesota Cable Communications Association (MCCA), and DOC submitted reply comments. MCCA opposes elimination of the Wholesale Plan at this time.

Wholesale Service Quality in Minnesota

The Telecommunications Act of 1996 (Act) opened local service markets to competition. The Act and subsequent FCC orders recognized the disparity in market power between Regional Bell Operating Companies (RBOCs or BOCs; in Minnesota, US WEST → Qwest → CenturyLink QC) and the new entrants, the Competitive Local Exchange Carriers (CLECs). Two key features of the new landscape are most relevant here:

- (1) To reduce barriers to entry RBOCs were now required to provide wholesale products to CLECs as inputs to CLEC retail services. This requirement allowed the newcomers to gradually establish network footholds and brand loyalty, advantages already possessed by the RBOCs. CLECs could avoid the prohibitively high cost of constructing expansive and duplicative networks before offering service.
- (2) The RBOCs now operated in both the wholesale and retail markets; they supplied inputs to CLECs and competed with CLECs at a retail level. CLECs could purchase wholesale services from RBOCs in the hope of attracting RBOC retail customers. Thus, wholesale service quality became a critical feature of the competitive market.

¹ The Joint CLECs comprise Integra Telecom of Minnesota, Inc. and Eschelon Telecom of Minnesota, Inc. (collectively "Integra"), Level 3 Communications, LLC, tw telecom of Minnesota llc, Broadwing Communications, LLC, Global Crossing Local Services, Inc. (collectively "Level 3 affiliated companies"), TDSMetrocom LLC, and Velocity Telephone, Inc.

Any decline in wholesale service quality could reduce CLEC retail quality and drive customers back to the RBOC.

Recognizing the need for wholesale service quality standards the Commission embarked on two distinct paths, leading to the development of the Wholesale Plan and the Minnesota Performance Assurance Plan (MPAP). CLECs may elect to incorporate either plan into their interconnection agreements (ICAs). That there are now two separate service quality plans derives from their different legal underpinnings and different views as to how to best assure quality.

It should be noted that wholesale service quality is fundamental to the development and maintenance of competitive local service markets. In Minnesota, since 1996, Qwest, CenturyLink, the CLECs, DOC and Commission Staff have, collectively, devoted uncounted person-years to the development of standards, standards that were developed in painstaking and exhausting detail.

Early Efforts

On December 2, 1996, pursuant to the Act, the Commission approved the first arbitrated ICAs in Minnesota. The Commission consolidated three individual arbitrations into one, the arbitrations between US WEST (the ILEC) and three CLECs: (1) AT&T, (2) MCImetro Access Transmission Services and (3) MFS Communications Company.² The approved ICAs contained fixed wholesale quality and performance measures. Upon reconsideration the Commission found that quality and performance measures required more in-depth analysis and opened a docket to that end.³ Ultimately, in October, 1999, the Commission closed that docket acknowledging that multi-state proceedings could lead to confusion and noted that the issue would be revisited at the conclusion of the multi-state proceedings.⁴

Genesis of the Wholesale Plan

The wholesale quality issue re-emerged almost immediately in a different context. In August of 1999, the Commission received a joint application for merger between Qwest and US WEST.⁵ In the following months the parties reached a settlement agreement and, ultimately, the

² See Dockets 96-729, 96-855 and 96-909.

³ Reconsideration in Dockets 96-729, 96-855 and 96-909, March 17, 1997, opening Docket 97-381.

⁴ Closing Docket 97-381, October 18, 1999.

⁵ Docket 99-1192.

Commission accepted the agreement and approved the merger. The settlement required Qwest to propose comprehensive wholesale service quality standards by July 1, 2000.⁶

It is Qwest's submission in 2000 that marks the beginning of the current docket (00-849) and of what has come to be today's Wholesale Plan. On July 3, 2003, after several years of proceedings and hearings, the Commission approved the Wholesale Plan. The Wholesale Plan was updated in 2008 and in 2013.⁷

Genesis of the MPAP

The Minnesota Performance Assurance Plan (MPAP) is a creature of the federal Act. In opening the local market to competition Congress imposed substantial regulatory restrictions on the RBOCs, restrictions designed to reduce barriers to CLEC entry. However, in addition to the regulatory stick, Congress offered the RBOCs a carrot by allowing the RBOCs to enter the interLATA long distance market, a market previously closed to them. For an RBOC this carrot was conditioned upon a showing that it had (1) opened the market to competition (based on a 14-point checklist of criteria) and (2) put in place assurances that the market would remain open. The FCC viewed the offering by an RBOC of a wholesale service quality plan as evidence of a commitment on the part of the RBOC to keep the market open.

Between 2001 and 2003 the Minnesota Commission examined and modified the MPAP proposed by Qwest. In April of 2003, Qwest submitted the MPAP to the FCC as part of its inter-LATA market bid. The FCC approved Qwest's petition in June 2003, granting to it inter-LATA market entry. The MPAP went into effect in August, 2003. It was last updated in 2013.⁸

By the autumn of 2003, CLECs had the option of incorporating either the Wholesale Plan or the MPAP into their ICAs.

Performance Indicator Definitions

At a conceptual level both Plans define indicators of quality and provide for measurement and reporting of performance results. These indicators are referred to as Performance Indicator Definitions (PIDs). Both Plans address critical thresholds for the PIDs and repercussions for

⁶ Docket 99-1192, June 28, 2000.

⁷ Order in Dockets 00-849 and 01-1376, February 14, 2008. Order in Docket 13-733, October 25, 2003. These Orders modified the MPAP, but Section 15.7 of the Wholesale Plan required such changes to be incorporated into that Plan.

⁸ Order in Docket 13-733, October 25, 2003.

failure to meet standards (more on that below). PIDs are defined in considerable detail. For example, one of the MPAP PIDs for Electronic Gateway Availability, (GA – 1 Gateway Availability – LSR (Local Service Request)), is shown in Table 1. The MPAP is offered by CenturyLink as part of its Negotiations Template Agreement (Exhibits B and K), a comprehensive ICA template offered as a baseline for negotiations with CLECs.⁹

Distinction between the MPAP and the Wholesale Plan

As mentioned above, the Wholesale Plan derives from the Commission's exercise of its authority under state law to approve mergers and establish service quality standards. The MPAP emerges from the dictates of federal law. In terms of the substance of the two Plans the two main differences are (1) fixity of standards, and (2) self-executing remedies.

Fixity of Standards

The MPAP comprises **parity** standards, that is, the standards are tied to the level of service quality that CenturyLink provides its own retail customers. In contrast, the Wholesale Plan contains several key performance standards that are **benchmarks**, that is, the standards represent fixed minimum service requirements.¹⁰ The Wholesale Plan establishes benchmarks for:

- (1) installation commitments and intervals,
- (2) new service installation quality,
- (3) jeopardy notices (timely notice of CenturyLink's failure to meet deadlines),
- (4) timeliness of service repairs,
- (5) repeat service problems, and
- (6) trunk blocking (how often high-capacity trunks between a CLEC's office and CenturyLink's office are blocked, as when the demand for the trunk exceeds its capacity).

In adopting the Wholesale Plan, the Commission stated its preference for benchmarks for the six quality-sensitive areas above:

Certain PIDs, identified by the Coalition [CLECs], have a peculiarly strong influence on service quality, and on the promotion of competition. Consequently, those PIDs warrant special consideration in the development of service quality standards.

⁹ <http://www.centurylink.com/wholesale/clecs/nta.html#>.

¹⁰ The Wholesale Plan also includes parity standards.

Table 1. GA – 1 Gateway Availability – LSR (Local Service Request)

Purpose: Evaluates the quality of CLEC access to the gateway systems offered by CenturyLink QC for CLECs to submit LSRs and associated systems that facilitate access to the gateway(s), focusing on the extent they are actually available to CLECs.		
Description: GA-1-<Name of LSR Gateway or Associated System> ^{NOTE 1} : Measures the availability of the gateway interfaces through which CLECs process LSRs, and reports the percentage of Scheduled Availability Time the interface is available for view and/or input. <ul style="list-style-type: none">Scheduled Up Time hours for preorder, order, and provisioning transactions are based on the currently published hours of availability found on the following website: http://www.centurylink.com/wholesale/cmp/ossHours.html.Time Gateway is Available to CLECs is equal to Scheduled Availability Time minus Outage Time.Scheduled Availability Time is equal to Scheduled Up Time minus Scheduled Down Time.Scheduled Down Time is time identified and communicated that the interface is not available due to maintenance and/or upgrade work. Notification of Scheduled Down Time for routine maintenance and/or upgrade work will be provided no less than 48 hours in advance.An outage is a critical or serious loss of functionality, attributable to the specified gateway or component affecting CenturyLink QC’s ability to serve its customers. An outage is determined by CenturyLink QC technicians through the use of verifiable data, collected from the affected customer(s) and/or from mechanized event management systems.		
Reporting Period: One month	Unit of Measure: Percent	
Reporting Comparisons: CLEC aggregate results	Disaggregation Reporting: Region-wide level.	
Formula: ([Number of Hours and Minutes Gateway or system is Available to CLECs During Reporting Period] ÷ [Number of Hours and Minutes of Scheduled Availability Time During Reporting Period]) x 100		
Exclusions: None		
Product Reporting: Reported by gateway or associated system, for each LSR submittal gateway and for each system that facilitates access to the LSR gateway(s), to the extent availability is not counted as part of the LSR-processing gateway(s).		Standard: Diagnostic
Availability: Available (Prior to turn-up of new systems that replace those addressed in this measurement, parties will work together to establish a time frame for reporting and review of the new measure.)		Notes: 1. Such as “GA-1-IMA-GUI,” “GA-1-XML,” ^{NOTE 2} or “GA-1-SIA,” with other gateways or systems being limited to those that replace these gateways. 2. GA-1-XML replaces the former GA-8 PID.

Source: CenturyLink QC ICA Amended Exhibit B, Version 10.0, July 1, 2013:

<http://www.centurylink.com/wholesale/clecs/nta.html#>.

Parity standards are not designed to ensure high quality service. Benchmark standards are.

Parity standards can potentially impede the development of competitive markets because they are not always competitively neutral. They place one actor in a competitive market in a position to influence the service quality provided to all other competitors. And, because competitors may have different sensitivities to service quality fluctuations, a standard that permits fluctuations may affect carriers in an unequal way. Benchmark standards improve predictability and reduce the influence that any competitor can wield over any other.

Parity standards can impede the development of a competitive market because they deprive competitors of the fundamental information that they need to sell their products. A benchmark standard provides that information.¹¹

Self-Executing Remedies

That Minnesota's CLECs, at present, prefer the MPAP, despite the attractiveness of fixed benchmarks, may be attributed to the remedies available to the CLECs under the two Plans. The MPAP provides for direct payments by CenturyLink to CLECs in the event some parity standards are not met. In contrast, the Wholesale Plan lacks such remedies. When initially approved by the Commission in 2003, the Wholesale Plan did provide for remedies but, on appeal of the Commission's order, the Minnesota Supreme Court, in August of 2005, determined that the **Commission did not have authority under state law to impose self-executing payments** upon Qwest.¹² However, significantly, the Court found that the **Commission's authority to impose standards was not preempted** by federal law.

In 2006, in response to the Court's reversal of the Commission's order with respect to self-executing remedies, the Commission determined that the Wholesale Plan would otherwise remain in effect and available to requesting CLECs (denying Qwest's request to retire the Plan). The Commission reasoned:

[T]he Commission will decline to repeal the MN WHSQ Plan. The Commission adopted the Plan to establish the minimum service standards to which CLECs are entitled. This fulfills the Commission's statutory mandate to ensure that rates bear a reasonable relationship to the services received, that competition for local telephone service is fair and reasonable, that service quality is maintained and improved, that

¹¹ Order in Docket 00-849, July 3, 2003, p. 22.

¹² In the Matter of Qwest's Wholesale Service Quality Standards. August, 18, 2005. 702 N.W. 2d 246.

customers have a choice among desirable alternatives, and that high quality telephone service is available throughout the state. Whatever the merits of the parity standard reflected in the PAP, it does not fulfill all these purposes. It does not ensure high quality, it is not competitively neutral, and it does not develop a competitive market.

The fact that the PAP proves to be more popular among CLECs is not a reason for repealing the MN WHSQ Plan. While it is gratifying to observe that CLECs have access to an alternative that they currently prefer to this minimum standard, the Commission cannot know that they will continue to prefer this alternative in the future. Therefore the reasons for adopting the MN WHSQ Plan remain.

Similarly, the Commission will decline to eliminate the MN WHSQ Plan's reporting requirements. The Minnesota Supreme Court did not identify any fault with the Plan's reporting requirements or the Commission's authority to adopt them. The Commission will therefore continue to exercise this authority and require Qwest to report on the extent to which its wholesale services meet the MN WHSQ Plan's requirements in order to monitor the state of wholesale service quality.¹³

Thus, the Wholesale Plan stands today as an option available to CLECs. The Plan includes language regarding dispute resolution and review processes. The Commission has authority to oversee the Plan and ICAs, in general.

Positions of the Parties

CenturyLink Petition

CenturyLink asks the Commission to vacate the requirement that it maintain the Wholesale Plan. Although the wholesale standards are similar to those in the MPAP, they do not include financial remedies. In Minnesota, every CLEC has chosen to have its relationship with CenturyLink governed by the MPAP instead of the Wholesale Plan. Thus, the Wholesale Plan standards impose administrative costs with little or no discernible benefit. The Wholesale Plan requires CenturyLink to spend resources in order to track performance and make modifications to the plan in order to keep it consistent with MPAP measurements. Because no CLEC has chosen to be governed by the plan, any utility that remains with the Wholesale Plan is minimal.

¹³ Order in Docket 00-849, September 11, 2006, pp. 4-5 [footnotes omitted]

The statistical information in each plan will be identical moving forward. The Wholesale Plan and the MPAP are designed to be identical. Section 15.7 of the Wholesale Plan provides that changes agreed upon by the industry related to performance measurements will be incorporated into the Wholesale Plan. The reason the measurements differ somewhat at this time is because changes to the performance measurements that have been made to the MPAP have not yet been incorporated into the Wholesale Plan pending resolution of this issue. Thus, any differences in measurements at this time are temporary and not significant. For all practical purposes, the products and services measured by both plans are identical.

In reviewing the importance of the benchmarks in the Wholesale Plan, the Commission should consider the fact that (1) the benchmarks have not been an issue in any proceeding before this Commission in the 12 years the Plan has been in place; (2) CLECs have the ability to file a complaint with this Commission in the event performance falls to unacceptable levels; (3) DOC and the Commission have the ability to investigate in the event performance falls and can do so with the data provided in the MPAP performance reports; and (4) benchmarks will not go away entirely; the MPAP contains benchmarks where an appropriate retail comparison does not exist.

The reporting requirements of the Wholesale Plan are unnecessarily burdensome. The Commission can gain a sense of the burden simply by taking a look at the extensive filings that must be repeated by filing the same data twice. The docket sheet for the MPAP proceeding reflects 1,434 filings as of July 23, 2015. The docket sheet for the Wholesale Plan docket shows 883 filings. Simply loading the dockets on the computer is a slow process. The majority of the filings in each docket are performance reports and each performance report encompasses pages and pages of data. Most of that data is repeated between the dockets and it is unclear whether much of it is scrutinized.

In addition, discontinuing the Wholesale Plan will allow CenturyLink to avoid the costs of modifying the plan for the changes made in the Redesigned MPAP ordered by the Commission in October 2013 (Docket 13-733). Section 15.7 of the Wholesale Plan reads:

If any agreements on adding, modifying or deleting applicable performance measurements are reached between Qwest and CLECs participating in an industry ... administration forum, these agreements shall be incorporated into the MN WHSQ Plan and modify the agreement between CLEC and Qwest at any time those agreements are submitted to and approved by the Commission

Rather than align the changes ordered by the Commission in the Redesigned MPAP into the Wholesale Plan, CenturyLink would like to forgo the expense of the conversion by discontinuing

the Wholesale Plan altogether. By aligning the changes the Wholesale Plan would not be significantly different from the Redesigned MPAP itself.

Joint CLECs Position

The Joint CLECs rely upon the MPAP and do not separately review or use the information contained in the Wholesale Plan. The MPAP can only be changed upon approval by the Commission and the Commission has authority to resolve disputes that arise under the MPAP. The Joint CLECs do not take a position on CenturyLink's request to discontinue the Wholesale Plan, and will not oppose CenturyLink's request.

MCCA Position

MCCA believes that CenturyLink perceives the MPAP to be voluntary in nature. Eliminating the Wholesale Plan would present a substantial risk that Minnesota could be without any wholesale service quality standards after April 1, 2016. That is the date prior to which CenturyLink has indicated that it will not seek to eliminate the MPAP.

It is premature to discontinue the Wholesale Plan. Many of CenturyLink's ICAs with Minnesota CLECs are in evergreen status, awaiting replacement by successor agreements that may have substantially different terms and conditions than exist today. If the Commission grants CenturyLink's request to discontinue the Wholesale Plan, a scenario can be envisioned in which CenturyLink also disavows the MPAP after April 1, 2016, on the advent of a new round of ICA negotiations and arbitrations. Further, the Commission is currently considering changes to the retail service quality rules and such changes could negatively affect wholesale quality standards that are tied to the retail quality rules.

MCCA would be much less apprehensive about CenturyLink's request if CenturyLink committed to extending its commitment not to initiate or support any action to eliminate the MPAP until, and for as long as, new interconnection agreements are in place with the majority of CLECs operating in Minnesota. Prior to that time, the Commission may want to consider a proceeding to determine whether and how the MPAP and the Wholesale Plan could be integrated into a single permanent set of wholesale service quality standards. Short of that, the Wholesale Plan is the only sure backstop to a substantial decline in wholesale service quality should CenturyLink disavow the MPAP after April 1, 2016, and legal action does not compel its continued existence.

MCC recommends the Commission refrain from doing away with the Wholesale Plan altogether. The reason no CLECs operate under the Wholesale Plan is not due to CLECs' lack of enthusiasm for fixed wholesale benchmark standards. It has everything to do with the fact that self-executing remedies are only available under the MPAP. The benchmark standards in the Wholesale Plan, simply by virtue of being in effect, and even without self-executing remedies, could be resulting in a higher quality level of wholesale service than what would result if only a parity standard under the MPAP were in effect. We do not know if is the case. CenturyLink has not provided any evidence demonstrating that benchmark standards under the Wholesale Plan have no effect on wholesale service quality.

Instead of throwing out the entire Wholesale Plan, more narrowly tailored relief could be crafted by the Commission that provides CenturyLink the relief it seeks while not putting at risk the entire wholesale service quality regime in Minnesota. The Wholesale Plan, as adopted by the Commission, specifically allows the Commission to grant relief from duplicative reporting requirements.

The Commission may determine that a particular report otherwise provided for under this section would be duplicative of reporting conducted under the MPAP. In such a case, the Commission may forego the reporting under the MN WHSQ Plan and may bar parties from pursuing duplicative reporting.¹⁴

There is nothing preventing the Commission from relieving CenturyLink of duplicative reporting requirements without tossing out the entire Plan. To the extent there are standards under the Plan that are entirely redundant of standards under the MPAP, the Commission could invite additional comment to help the Commission identify those standards and decide the extent to which reporting on such standards could be reduced or eliminated. Moreover, if the reporting requirements were shown in their entirety to be redundant, then MCCA would support requiring reporting only under the MPAP.

DOC Position

To the extent that (i) CenturyLink finds the Wholesale Plan reporting requirement to be administratively burdensome, (ii) CLECs do not use or review the reports, and (iii) the reports do not provide significant value, DOC recommends that the Wholesale Plan standards and reporting requirement be eliminated as CenturyLink requests.

¹⁴ Docket 00-849, Wholesale Plan, Section 10.10, filed May 5, 2003, approved July 3, 2003.

Note that DOC's reply comments were filed the same day as those filed by MCCA. As such, DOC has not responded to MCCA's argument.

DOC reminds the Commission of its approval of the Wholesale Plan initially, and again in 2006 when Qwest sought elimination of the Plan. At that time, all commenting CLECs, despite having opted into the MPAP, opposed Qwest's request to discontinue the Wholesale Plan. Almost nine years have passed, and that is no longer the case. The Joint CLECs indicate that they rely exclusively upon the MPAP to monitor and protect wholesale service quality.

To the extent that CLECs have found the MPAP and its automatic payment provisions are adequate to maintain wholesale service quality at a level that is acceptable to the CLECs, and do not find the Wholesale Plan standards and reporting useful, DOC questions the utility of maintaining the Plan and its reporting requirements.

Staff Comment

Staff believes the Commission should retain the Wholesale Plan for all the reasons that it previously found the Plan to be beneficial, and because the availability of the MPAP beyond April 1, 2016, may be in question. Staff also supports reducing CenturyLink's administrative burden where appropriate.

Future of the MPAP

Staff is unaware of CenturyLink's intentions regarding its support for the MPAP beyond April 1, 2016. However, MCCA's concerns about the longevity of the plan may be well grounded. Recognizing that there may be room for argument Staff believes there are several factors that would likely come to bear on the issue should CenturyLink seek to withdraw the MPAP. First, the MPAP itself makes reference to its voluntary nature. Section 1.1 of the MPAP states:

As set forth in this Agreement, Qwest Corporation dba CenturyLink QC ("CenturyLink QC") and CLEC voluntarily agree to the terms of the following Performance Assurance Plan ("PAP" or "Plan"), ...

Section 18.1 states:

This PAP represents CenturyLink QC's voluntary offer to provide performance assurance.

And section 17.4 states:

Neither CenturyLink QC nor any CenturyLink affiliate or successor will initiate or support any action or proceeding before April 1, 2016 that seeks to eliminate any PAP in any CenturyLink QC former RBOC state.

Second, to the extent the Commission might seek to require CenturyLink to involuntarily make the MPAP available to CLECs the Commission can look to the Court decision in 2005 for insight. The Commission may be able to impose a version of the MPAP on CenturyLink, but only a version without the self-executing remedies.

Third, it's not clear that the FCC would prevent CenturyLink from withdrawing the MPAP. In granting Qwest's request to enter the interLATA market, pursuant to § 271 of the Act, the FCC noted that Congress did not require RBOCs to offer wholesale quality of service plans to CLECs.¹⁵

[We] find that the PAP that will be in place in Minnesota provides assurance that the local market will remain open after Qwest receives section 271 authorization in this state. We find that this plan will likely provide incentives that are sufficient to foster post-entry checklist compliance. ... Although it is not a requirement for section 271 authority that a BOC be subject to such performance assurance mechanisms, the Commission has stated previously that the existence of a satisfactory performance monitoring and enforcement mechanism would be probative evidence that the BOC will continue to meet its section 271 obligations after a grant of such authority. The Minnesota PAP, in combination with the Minnesota Commission's active oversight of that PAP, and provisions for comprehensive review to determine whether modifications are necessary, provide additional assurance that the local market in Minnesota will remain open. [¶ 69, footnotes omitted]

Congress made provision for the FCC, after notice and opportunity for hearing, to sanction an RBOC that has ceased to meet any of the conditions for interLATA entry.¹⁶ Staff speculates that any party seeking to retain the MPAP would need to make its case to the FCC that retention of

¹⁵ Memorandum Opinion and Order. *In the Matter of Application by Qwest Communications International Inc., for Authorization to Provide In-Region, InterLATA Services in Minnesota*. WC Docket No. 03-90, FCC 03-142, June 26, 2003.

¹⁶ 47 USC § 271(d)(6).

the Plan constitutes a condition of interLATA market entry approval. Here, the Minnesota Commission's role would be that of an intervenor, not the decision maker.

Future ICA Negotiations

Staff shares MCCA's concern that, if the Commission grants CenturyLink's request, the CLECs would have no ready-made wholesale plan to fall back on should CenturyLink withdraw the MPAP. Both the MPAP and the Wholesale Plan have been vetted via exhaustive industry proceedings. Renegotiation of a new wholesale service quality plan as part of ICA negotiations could be very costly, perhaps inordinately so for the CLECs. Further, transition to a new plan could be disruptive to current practices and business plans.

The typical ICA contains language setting a termination date and dictating how the parties may proceed beyond that date. For example, the ICA between Charter FiberLink and CenturyLink approved by the Commission in 2009 sets the term of the agreement at three years. Once the term expires either party may terminate the agreement upon notice of no less than thirty days.¹⁷ Absent such notice the contract continues to govern. Seldom do the parties seek a new agreement immediately upon termination of the old one, preferring to operate under the old agreement, patching it up with amendments as needed. The industry uses the term "evergreen status" to refer to the period that the contract continues to govern the parties after the termination date.

Substantial uncertainty may surround ICAs in evergreen status, each party knowing that, in short order, it may need to devote increased resources to negotiate a new agreement and, perhaps, to modify its internal operations. Without the Wholesale Plan as a ready-made fallback that uncertainty would be heightened.

Administrative Burden

CenturyLink refers to three sources of burden: (1) the ongoing reporting requirement for the Wholesale Plan, (2) transitioning to new software to support the reporting requirement, and (3) the incorporation of ongoing MPAP changes into the Wholesale Plan as required by the Commission.

¹⁷ Docket 08-952, compliance filing August 18, 2009; approved September 16, 2009; sections 5.2.1 and 5.2.2.

Ongoing Reporting

CenturyLink notes that the docket sheet for the MPAP proceeding reflects 1,434 filings as of July 23, 2015. The docket sheet for the Wholesale Plan shows 883 filings. CenturyLink points out that simply loading the dockets on the computer is a slow process. The majority of the filings in each docket are performance reports and each performance report encompasses pages and pages of data. Most of that data is repeated between the dockets and it is unclear to CenturyLink whether much of it is scrutinized.

Sections 10.1 and 10.2 of the Wholesale Plan address reporting requirements:

10.1 Qwest will provide the Commission, the Department, the OAG-RUD, and CLECs opting into the MN WHSQ Plan with a monthly report of Qwest's performance for the PIDs. These reports shall contain any carry-over payment amounts and calculations as well as the current month's information. Qwest will collect, analyze, and report performance data for these PID measurements. Qwest will store such data in easy-to-access electronic form for three years after they have been produced and for an additional three years in an archived format. Any failure to follow these requirements shall be treated as a violation of the MN WHSQ Plan integrity requirements discussed in Sections 14.5 and 14.8.

10.2 On or before the last business day of each month following the relevant performance period, Qwest shall post the individual CLEC monthly reports to a secure part of the MN WHSQ Plan website and the aggregate state report to the public part of the MN WHSQ Plan website. In addition, Qwest must officially file with the Commission, the Department and the OAG-RUD one hard copy and one electronic copy in an Excel format, of all CLEC individual monthly reports under seal and one hard copy and one electronic copy in an Excel format of the state aggregate report in the public file. If CLEC requests a hard copy of its individual report, Qwest should make that hard copy available at no cost to CLEC.

Although CenturyLink has not supported its argument with any formal (or informal) cost study, Staff believes CenturyLink's argument has some merit. The most recent Wholesale Plan service quality compliance filing is a 226-page document. It comprises numerous tables and line graphs displaying performance data for the previous twelve months. These reports are submitted monthly. The most recent MPAP compliance filing is a 29-page document. The data covers only one month, July, 2015. The difference in the size of the documents is likely due, at least in part, to the lack of bulky tables and charts in MPAP filing. In its initial comments DOC noted that the Wholesale Plan has over 40 performance measures that are no longer included in the

MPAP. This difference may account for some of the reduced bulk of the MPAP report. In Staff's experience creating, organizing and verifying large volumes of data can require significant resources. Staff supports Commission action to relieve CenturyLink of the reporting requirements of Sections 10.1 and 10.2 of the Wholesale Plan.

Software Transition

CenturyLink argues that the software used to create the Wholesale Plan reports is no longer supported and that accurately converting the reports to other software is burdensome. Again, CenturyLink has not provided any formal or informal cost studies to support its argument. But here too Staff believes that CenturyLink's argument has some merit. Aside from the cost of new software (not known here) transitioning large data sets to new software can be resource intensive, especially for verifying the accuracy of the transition.

Incorporating Updates

In 2013, CenturyLink and a number of CLECs agreed to modifications of the PIDs and the MPAP, now termed the Redesigned MPAP. On October 25, 2013, at CenturyLink's request, the Commission approved the Redesigned MPAP. CenturyLink, here, seeks to avoid the burden of flowing through the modified PIDs into the Wholesale Plan. CenturyLink makes reference to Section 15.7 of the Wholesale Plan:

If any agreements on adding, modifying or deleting applicable performance measurements are reached between Qwest and CLECs participating in an industry Regional Oversight Committee (ROC) PID administration forum, those agreements shall be incorporated into the MN WHSQ Plan and modify the agreement between CLEC and Qwest at any time those agreements are submitted to and approved by the Commission, whether before or after a six-month review.¹⁸

CenturyLink states that it has been preparing to flow through the PID changes to the Wholesale Plan metrics, but has delayed implementation pending the outcome of this petition. Staff does not have a sense of the weight of the burden here from which CenturyLink seeks relief. However, given the precise and detailed nature of the PIDs, Staff speculates that this flow-through must be accomplished with substantial care. Staff supports Commission action to relieve CenturyLink of the flow-through requirement of Section 15.7 of the Wholesale Plan.

¹⁸ Docket 00-849, Wholesale Plan filed May 5, 2003, approved July 3, 2003.

Staff Conclusion

In light of the uncertainty surrounding the future of the MPAP, Staff recommends the Commission retain the Wholesale Plan as an option for CLECs. Although parties negotiating an ICA are free to establish individual wholesale service quality plans to suit their needs, the existence of a ready-made plan, vetted by the Commission, can provide a known anchor point for negotiations that may reduce the likelihood and/or cost of arbitration. Further, Staff recommends the Commission relieve CenturyLink of its reporting requirement and flow-through requirement. Although CenturyLink has not provided the Commission with a precise estimate of its burden, the record does not demonstrate a downside to providing relief to CenturyLink.

Renewal Activation

It may be useful to consider what event should activate the renewal of CenturyLink's reporting requirements. Perhaps the simplest and most obvious trigger would be a request by a CLEC for incorporation of the Wholesale Plan into its ICA. Staff speculates that a CLEC would not readily seek the Wholesale Plan as long as the MPAP is available. As such, the activation trigger, effectively, may rest under CenturyLink's finger. As long as CenturyLink maintains the MPAP such that it is sufficient to the CLECs' needs the Wholesale Plan could lay dormant indefinitely.

In the event that the MPAP ceases to become available in the near future (or before the Commission approves any new changes to it), a CLEC request for the Wholesale Plan could automatically obligate CenturyLink to (1) begin reporting again (presumably with newer software), and (2) complete the flow-through of the 2013 changes to the MPAP.

In the longer term, the MPAP may change as the parties find better ways to collectively meet their needs. In that case, if the MPAP is eliminated, a CLEC request for the Wholesale Plan could automatically obligate CenturyLink to (1) begin reporting again, and (2) complete the flow-through to the MPAP of the 2013 changes and any subsequent changes, newer changes taking precedent over older changes if there is a conflict.

As an alternative to automatic activation, any party could approach the Commission to address issues arising from a need to renew reporting requirements. For that matter, even if activation is automatic, there is nothing to prevent any party from petitioning the Commission to address its concerns.

Staff recommends automatic activation as discussed above. That choice would provide some certainty to all parties going forward.

Note that this issue was not aired in the comments or replies. The Commission could benefit from input from the parties.

Differences Between Plans

There was some broad discussion in the record of differences between the Plans (aside from the self-executing remedies). DOC stated that there are 40 PIDs in the Wholesale Plan that are not in the MPAP. CenturyLink argued that the statistical information in each Plan will be identical going forward. MCCA suggested that the Plans could be compared and CenturyLink could continue to report performance for non-redundant standards.

The record does not provide the Commission with a precise, word-for-word, measure-for-measure comparison of the Plans. But, Staff believes there is no need for a detailed comparison at this time. That the Plans may be different need have no bearing on CenturyLink's present request. The CLECs have opted for the MPAP and any changes to the MPAP can be vetted through industry discussions.

Should CenturyLink cease to support the MPAP the Commission may entertain arguments at that time regarding the content of the Wholesale Plan. The CLECs and the state agencies could benefit from knowledge of the specific date CenturyLink plans cease to offer the MPAP.

Commission Options

1. Deny CenturyLink's request.
2. Discontinue the Wholesale Plan, eliminating CenturyLink's obligations under the Plan and eliminating the availability of the Plan for adoption by Minnesota CLECs.
3. Retain the Wholesale Plan for adoption by CLECs. Relieve CenturyLink of the reporting requirements of Sections 10.1 and 10.2, and of the flow-through requirements of Section 15.7 of the Wholesale Plan, until such time as any Minnesota CLEC seeks to incorporate the Wholesale Plan into its ICA. Upon incorporation CenturyLink shall again become subject to the requirements of Sections 10.1, 10.2, and 15.7 of the Wholesale Plan.

4. Retain the Wholesale Plan for adoption by CLECs. Relieve CenturyLink of its reporting requirements under the Wholesale Plan to the extent that those requirements are duplicative of the reporting requirements of the MPAP.
5. Take other action.

Staff recommends option 3.