

**BEFORE THE WASHINGTON STATE  
UTILITIES AND TRANSPORTATION COMMISSION**

In the Matter of the Petition of	)	DOCKET UT-061625
	)	
QWEST CORPORATION	)	ORDER 08
	)	
For an Alternative Form of Regulation	)	ORDER ACCEPTING, SUBJECT TO
Pursuant to RCW 80.36.135	)	CONDITIONS, AFOR CARRIER-TO-
	)	CARRIER SERVICE QUALITY
	)	PLAN AND GRANTING MOTION
	)	TO FILE REPLY TO COMMENTS
.....	)	

1 *Synopsis: The Commission accepts, subject to conditions, the AFOR carrier-to-carrier service quality plan filed by Qwest Corporation and grants its motion to file reply comments.*

**MEMORANDUM**

**I. Background and Procedural History**

2 On October 20, 2006, Qwest Corporation (Qwest) filed with the Washington Utilities and Transportation Commission (Commission) a request for an alternative form of regulation (AFOR) under RCW 80.36.135. On March 6, 2007, Qwest, the Commission’s Regulatory Staff (Staff)<sup>1</sup>, the Joint CLECs<sup>2</sup>, the Northwest Public Communications Council, Washington Electronic Business and Telecommunications Coalition and the Department of Defense and all other Federal Executive Agencies, filed a multi-party Settlement Agreement and modified AFOR.

<sup>1</sup> In formal proceedings such as this case, the Commission’s regulatory staff functions as an independent party with the same rights, privileges, and responsibilities as any other party to the proceeding. There is an “ex parte” wall separating the Commissioners, the presiding ALJ, and the Commissioners’ policy and accounting advisors from all parties, including Staff. *RCW 34.05.455*.

<sup>2</sup> Covad Communications Company, Integra Telecom of Washington, Inc., Time Warner Telecom of Washington, LLC, and XO Communications (collectively referred to as the Joint Competitive Local Exchange Carriers or Joint CLECs).

3 On July 24, 2007, the Commission entered Order 06 approving the modified AFOR, subject to conditions. We found that the modified AFOR did not meet the requirement in RCW 80.36.135(3) for a carrier-to-carrier service quality plan, and required, among other conditions, that Qwest file an acceptable plan. We allowed other parties to file comments on the plan within 14 days of its filing.

4 On July 31, 2007, Qwest filed its carrier-to-carrier service quality plan relying heavily on the Qwest Performance Assurance Plan (QPAP).<sup>3</sup> On August 10, 2007, Qwest replaced the original filing with the currently effective QPAP.<sup>4</sup> Qwest stated that it inadvertently filed proposed updates to the plan rather than the currently effective plan.

5 The Joint CLECs filed comments on August 13, 2007. Staff filed comments on August 14, 2007. On August 15, 2007, Qwest filed a motion for leave to file a reply to the comments accompanied by its reply.

## II. Discussion and Decision

### A. Qwest's Carrier-to-Carrier Service Quality Plan.

6 In response to Order 06, Qwest asserts that the modified AFOR, as set forth in the Settlement Agreement, meets the statutory requirement that an AFOR contain a proposal for ensuring adequate carrier-to-carrier service quality. Qwest's plan is "the simple statement that the AFOR *does not, in any way* affect existing carrier-to-carrier service quality requirements."<sup>5</sup> Qwest asserts that it will not argue the merits of whether its original proposal is sufficient under RCW 80.36.135(3), and argues that the following existing service quality requirements fulfill the statutory obligation: the QPAP; service quality provisions for tariffed switched access and payphone services;

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<sup>3</sup> The QPAP was developed as part of a multi-state collaborative in the Commission's Sec. 271 proceeding to allow Qwest to enter the long-distance market. It contains a series of detailed wholesale quality assurance measures with metrics and self-effectuating penalties payable to other CLECs and to the Commission. It was adopted by the Commission in Dockets UT-003022 and UT-003040, April 5, 2002, and is scheduled to expire by its terms in December 2008.

<sup>4</sup> The initial filing included Qwest's requested modifications to the QPAP filed in Docket UT-073034.

<sup>5</sup> Qwest Submittal, ¶ 1. (Emphasis in original).

Provision 3 of the modified AFOR;<sup>6</sup> and wholesale service quality standards and requirements in existing Commission rules.<sup>7</sup>

7 Qwest explains that the QPAP is a major component of existing carrier-to-carrier service quality requirements and that the QPAP is included in Qwest's Statement of Generally Available terms (SGAT) and the interconnection agreements of numerous CLECs. Qwest states that it is required under the QPAP to make payments to CLECs and the Commission for failure to provide service quality in parity to that it provides to its retail customers. Qwest asserts that the QPAP contains specific performance measures and self-executing remedies for failure to achieve those measures thus fulfilling its purpose to serve as an anti-backsliding mechanism. Qwest argues that the QPAP ensures adequate service quality because it provides a monetary incentive to Qwest to provide good service and compensates wholesale customers who are impacted when service falls below a certain standard.

8 Qwest acknowledges it has proposed modifications to the QPAP that are currently pending in Docket UT-073034.

### **B. Comments on Qwest's Plan.**

9 The Joint CLECs contend that current carrier-to-carrier service quality standards are not sufficient to ensure service quality during the term of the AFOR because Qwest's QPAP is subject to potential modification in several ways. First, Qwest has requested approval from the Federal Communications Commission (FCC) to forbear from providing unbundled network elements (UNEs) in the Seattle Metropolitan Statistical Area (MSA).<sup>8</sup> If granted, the CLECs assert the petition would render the QPAP almost meaningless. Second, the QPAP, by its own terms and conditions, is scheduled to expire December 23, 2008. Third, they say, Qwest views the QPAP as

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<sup>6</sup> This provision applies if the Commission were to revoke previously-granted competitive classification for DS-1 or DS-3 private line services.

<sup>7</sup> See Qwest Submittal, ¶ 14, citing WAC 480-120-401 (network performance standards), -411 (safety standards), -402, (network maintenance standards), and -560 (collocation requirements).

<sup>8</sup> WC Docket No. 07-97 filed April 27, 2007, nearly two months after the parties, including the CLECs, reached their settlement in this matter. We note that Staff in its prefiled direct testimony in support of the settlement recommended that the Commission direct Qwest not to seek FCC forbearance from its unbundling obligations during the term of the AFOR (see Wilson: 142C, P.73).

subject to revision even when it has been included in Commission-approved interconnection agreements.<sup>9</sup>

- 10 The Joint CLECs argue that Qwest should be permitted to use the QPAP as a carrier-to-carrier service quality plan for the AFOR only if Qwest agrees to: (1) maintain the current QPAP for the term of the AFOR unless modified by the Commission and (2) apply the QPAP to all services Qwest provides to other carriers as a substitute for UNEs if the FCC grants Qwest's petition for forbearance in the Seattle MSA.
- 11 Staff concurs with Qwest that existing service quality requirements ensure adequate service quality and meet the statutory mandate of RCW 80.36.135(3). Staff notes that the Commission does not relinquish any authority over service quality standards by accepting the AFOR and could act to augment the requirements for carrier-to-carrier service quality through the QPAP review process or through adoption of rules. However, Staff recommends that the QPAP not be permitted to expire entirely during the term of the AFOR.
- 12 Staff suggests that if the Commission concludes that Qwest's proposal does not meet the statutory requirements, it could provide Qwest with guidance on how it could fulfill those requirements and allow Qwest to file an augmented plan to cure the deficiency. Staff asserts that if the Commission concludes that the modified AFOR meets the statutory requirements, the Commission could still adopt rules in a separate proceeding that would apply to all carriers, including Qwest, or extend or augment the QPAP.
- 13 Qwest requested leave to file a reply in order to address new issues raised for the first time in the comments of other parties.<sup>10</sup> We grant Qwest's motion and allow the Company to reply to the comments filed by the Joint CLECs and Staff. Qwest's need to respond to new arguments raised in the comments constitutes cause for allowing a reply.<sup>11</sup>

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<sup>9</sup> In its petition to modify the QPAP in Docket UT-073034, Qwest requests the Commission apply all approved changes to interconnection agreements with all carriers in Washington that have adopted the QPAP in their agreements.

<sup>10</sup> WAC 480-07-370(d)(i).

<sup>11</sup> *Id.*

14 In reply, Qwest asserts the Joint CLECs' comments are not consistent with supporting the Settlement. In addition, Qwest asserts that the Joint CLECs seek relief that exceeds the Commission's jurisdiction, is not relevant to an AFOR, or is not supported by the record in this case.

15 While Qwest notes that Staff continues to support the Settlement, Qwest opposes Staff's proposal to extend the term of the QPAP or include commercial agreements under the QPAP in this proceeding.

### C. Decision.

16 The purpose of the AFOR statute is to achieve a number of public policy goals, including promoting diversity in the provision of telecommunications services and products in Washington and permitting flexible regulation of telecommunications companies previously regulated under traditional rate of return/rate base methodology. We must "order implementation of [an AFOR] unless [we] find that, on balance, an alternative plan as proposed or modified fails to meet" the policy considerations in subsection (2) of the statute.<sup>12</sup>

17 In contrast to the broad policy considerations of subsection (2), the directive of the AFOR statute on carrier-to-carrier service quality is specific. Independent of any other federal or state requirements, an AFOR "must include a proposal for ensuring carrier-to-carrier service quality, including service quality standards or performance measures for interconnection, and appropriate enforcement or remedial provisions in the event a company fails to meet those service quality standards or performance measures."<sup>13</sup> This provision of the statute is mandatory. The statutory standard is not simply a broad "consistency with the public interest" test. Rather, an AFOR's proposed carrier-to-carrier service quality plan must include required elements (standards or performance measures and remedies) and "ensure" wholesale service quality for the term of the AFOR.

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<sup>12</sup> RCW 80.36.135.

<sup>13</sup> *Id.*

- 18 In essence, adequate carrier-to-carrier service quality to preserve or enhance effective competition is part of the *quid pro quo* to replace traditional regulation at the retail level with an AFOR plan. We evaluate Qwest's proposal under this statutory standard.<sup>14</sup>
- 19 Qwest's submission fails to meet the statutory standard. We disagree with Qwest and Staff that the statutory requirement is met because of their assertion that the modified AFOR does not affect existing service quality measures. Simply referring to existing service quality measures, including the Commission's authority to adopt service quality rules or initiate a complaint to address service quality deficiencies, does not constitute a "plan" under the statute. Further, relying on existing measures, without more, does not "ensure" that the measures will remain in place for the term of the AFOR. As we have repeatedly noted, the law requires an AFOR to include specific carrier-to-carrier service quality measures or standards and appropriate enforcement or remedial provisions in the event the company fails to meet those standards.
- 20 All parties appear to agree that the current QPAP establishes service quality standards for the majority of services and facilities competitors obtain from Qwest and provides an incentive for Qwest to comply with those standards through self-effectuating penalties. We recognize that the current QPAP is effectively the only carrier-to-carrier service quality plan that covers the majority of products and services purchased by competitors. That said, we are not persuaded that the QPAP ensures adequate service quality within the meaning of the AFOR statute.
- 21 The QPAP fails to ensure adequate service quality while the AFOR will be in effect because it expires earlier. The AFOR is approved for a four-year term. The QPAP is scheduled to expire on December 23, 2008.<sup>15</sup> By its own terms and conditions, the QPAP cannot provide a carrier-to-carrier service quality plan for the full term of the AFOR. Second, even prior to the QPAP's expiration, Qwest has proposed changes in

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<sup>14</sup> We need not address directly the comments of parties regarding the effect of federal matters, outcomes of potential rulemaking proceedings, or pending cases in other jurisdictions in our consideration of the terms of a proper AFOR for Qwest in the state of Washington.

<sup>15</sup> Qwest Washington SGAT Eighth Revision, Ninth Amended – Exhibit K – November 30, 2004, ¶¶ 13.1, 16.3.

the QPAP that would reduce the Company's carrier-to-carrier service obligations.<sup>16</sup> The statutory emphasis on the importance of these obligations as integral to any AFOR persuades us that any changes to the QPAP must be measured against the standards of RCW 80.36.135(3) before approval by the Commission. Finally, the QPAP is only applicable to unbundled network elements, interconnection, collocation, and resale under interconnection agreements. This limitation does not ensure adequate carrier-to-carrier service quality for any other wholesale services competitors may use to compete with Qwest during the term of the AFOR.

22 Accordingly, we conclude that the QPAP must be modified to fulfill the requirements of RCW 80.36.135(3). Subject to the following conditions, the current provisions of the QPAP, together with other existing measures, should constitute an adequate carrier-to-carrier service quality plan within the meaning of the statute. First, the QPAP must remain in place for the full four-year term of the AFOR, unless modified by the Commission. This condition recognizes the current provisions of the QPAP including the requirement to review the QPAP after five and one-half years to determine whether to modify or terminate the QPAP, remain in effect.<sup>17</sup> Absent modification, the QPAP will provide carrier-to-carrier service quality standards for the full term of the AFOR.

23 Second, the QPAP must remain available to all wholesale carriers in its current form unless modified by the Commission. This condition does not preclude Qwest, or any other party, from seeking Commission approval of changes to the QPAP, such as those changes currently under consideration in a separate proceeding.<sup>18</sup> Third, the QPAP terms and conditions must apply to all wholesale services provided by Qwest as a substitute for unbundled network elements during the term of the AFOR, unless the affected parties agree otherwise.

24 We need not address the argument that we lack jurisdiction to impose QPAP terms and conditions on the provision of wholesale service under commercial agreements or special access services, because an AFOR is consensual. The AFOR terms and

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<sup>16</sup> In Docket UT-073034, Qwest requests approval to modify performance measures and remedies in the QPAP and apply those changes to all CLECs that have incorporated prior versions of the QPAP into their interconnection agreements.

<sup>17</sup> *Id.*, ¶16.3.

<sup>18</sup> *See*, i.e. Docket UT-073034.

conditions will not take effect unless Qwest agrees to these conditions within the time allotted by RCW 80.36.135(4).

**FINDINGS OF FACT**

25 Having discussed above in detail the evidence received in this proceeding concerning  
all material matters, and having stated findings of fact and conclusions upon issues  
and the reasons therefore, the Commission now makes and enters the following  
summary of those facts, incorporating by reference pertinent portions of the detailed  
findings:

26 (1) The Washington Utilities and Transportation Commission is an agency of the  
State of Washington, vested by statute with authority to regulate rates, rules,  
regulations, practices, and accounts of public service companies, including  
telecommunications companies.

27 (2) Qwest Corporation (Qwest) is engaged in the business of furnishing  
telecommunications service within the state of Washington as a public service  
company.

28 (3) Order 06 in this proceeding required Qwest to, among other conditions, file an  
acceptable carrier-to-carrier service quality plan in compliance with RCW  
80.36.135(3).

29 (4) Qwest filed a carrier-to-carrier service quality plan that consists of existing  
wholesale service quality requirements, largely the existing Qwest  
Performance Assurance Plan (QPAP).

30 (5) The QPAP is effectively the only existing carrier-to-carrier service quality  
plan for the majority of services and facilities obtained by competitors from  
Qwest.

31 (6) The QPAP is scheduled to expire on December 23, 2008, during the term of  
the proposed AFOR.

- 32 (7) The QPAP does not apply to all wholesale services Qwest provides to its  
wholesale customers.
- 33 (8) Without modification, the plan submitted by Qwest does not provide the  
degree of certainty necessary to ensure that carrier-to-carrier service quality  
standards are met or that remedial measures will be imposed for failure to  
comply during the term of an alternative form of regulation.

### **CONCLUSIONS OF LAW**

34 Having discussed above all matters material to this decision, and having stated  
detailed findings, conclusions, and the reasons therefore, the Commission now makes  
the following summary conclusions of law, incorporating by reference pertinent  
portions of the preceding detailed conclusions:

- 35 (1) The Washington Utilities and Transportation Commission has jurisdiction over  
the subject matter of, and parties to, this proceeding. *RCW Title 80.*
- 36 (2) A plan for an alternative form of regulation must include a carrier-to-carrier  
service quality plan that ensures carrier-to-carrier service quality standards or  
performance measures are met and provides for remedial measures in the  
event the company fails to meet those standards or measures. *RCW*  
*80.36.135(3).*
- 37 (3) Qwest's existing wholesale service quality requirements fail to meet the  
statutory requirements of RCW 80.36.135(3), and the policy goals included in  
RCW 80.36.300(2) and 80.36.135(2)(d).
- 38 (4) A carrier-to-carrier service quality plan that will not be in effect for the term of  
an alternative form of regulation fails to meet the standard in RCW  
80.36.135(3).
- 39 (5) A carrier-to-carrier service quality plan that does not apply to all wholesale  
services provided during the term of an alternative form of regulation fails to  
meet the standard in RCW 80.36.135(3).

- 40 (6) If accepted, the Commission's modifications to and conditions on Qwest's carrier-to-carrier service quality plan would meet the statutory goals of RCW 80.135.
- 41 (7) The Commission should retain jurisdiction over the subject matters and the parties to this proceeding to effectuate the terms of this Order. *RCW Title 80.*

**ORDER**

THE COMMISSION ORDERS:

- 42 (1) The carrier-to-carrier service quality submission filed by Qwest Corporation is accepted, subject to the modifications and conditions set forth in the body of this Order, specifically:
- (a) The QPAP shall remain in effect for the full four-year term of the AFOR, unless modified by the Commission.
  - (b) The QPAP must remain available to all wholesale carriers in its current form unless modified by the Commission.
  - (c) The QPAP terms must apply to all wholesale services provided by Qwest as a substitute for unbundled network elements during the term of the AFOR, unless the affected parties agree otherwise.
- 43 (2) The AFOR terms and conditions as set forth in Order 06 and this Order will not take effect unless and until Qwest agrees to them within the time allotted by RCW 81.36.135(4).
- 44 (3) Qwest Corporation's motion for leave to file reply comments is granted.

- 45 (4) The Commission retains jurisdiction over the subject matter and parties to this proceeding to effectuate the terms of this Order.

DATED at Olympia, Washington, and effective September 6, 2007.

WASHINGTON STATE UTILITIES AND TRANSPORTATION COMMISSION

MARK H. SIDRAN, Chairman

PATRICK J. OSHIE, Commissioner

PHILIP B. JONES, Commissioner