

BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

In the Matter of the Petition of  
  
QWEST CORPORATION,  
  
for an Alternative Form of Regulation  
Pursuant to RCW 80.36.135.

DOCKET UT-061625

COMMISSION STAFF'S RESPONSE  
TO PETITION TO MODIFY AFOR

**I. INTRODUCTION**

1 Staff submits the following comments in response to the Commission's September 2, 2009, Notice of Opportunity to File Responses. In the Notice, the Commission seeks "comment on the appropriate process and procedures for the Commission to follow in considering" Qwest's August 17, 2009, petition to modify its alternative form of regulation (AFOR).

2 Commission Staff recommends that the Commission establish the following procedure to address Qwest's petition:

- 1) First, require Qwest to clarify whether it seeks authorization to (1) raise recurring and non-recurring charges for basic stand-alone residential flat-rate local exchange (1FR) and measured local exchange (1MR) service, or (2) to adopt new tariff rates for services that are presently treated as competitively classified under the AFOR.
- 2) Establish a deadline, a sufficient time after Qwest clarifies its request, by which parties may file briefs on whether the Commission should reject Qwest's petition as inconsistent with the terms of Order 06, or the AFOR statute, and require the company to pursue other avenues of relief such as a petition to rescind the AFOR, or for a traditional tariff filing.

3           If, following briefing, the Commission decides that it will entertain Qwest’s petition  
to add new terms to the AFOR, the Commission should convene a prehearing conference for  
the purpose of establishing a procedural schedule for the filing of testimony and for  
evidentiary hearings, as necessary, similar to the process for consideration of Qwest’s  
current AFOR terms.

## II. BACKGROUND

4           In its Order 06 in this docket, the Commission adopted an alternative form of  
regulation under which Qwest has the ability to raise rates for all services without prior  
Commission approval, except for stand-alone residential service (1FR and 1MR). The  
Company’s pricing flexibility comes with some restrictions such as limited geographic  
deaveraging prohibitions and a requirement that the price of a bundle must not exceed the  
sum of the a la carte prices of the elements. The Commission characterized this as  
competitive classification of all services other than 1FR and 1MR.<sup>1</sup>

5           In its Order 06, the Commission repeatedly said that Qwest’s flat and measured rate  
stand-alone residential service (1FR and 1MR) is excluded from the AFOR and remains  
under tariff regulation, but the commission authorized the company to raise the 1FR rate  
\$1.00 over the term of the AFOR.<sup>2</sup> Based on Staff’s accounting analysis, the Commission  
concluded that Qwest could increase its 1FR rate \$1.00 over the term of the AFOR and the  
rates would still be fair, just and reasonable and would not subsidize competitive services.<sup>3</sup>

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<sup>1</sup> Order 06, p. 7, ¶ 19.

<sup>2</sup> *Id.*, p. 21 (“The Settlement specifically excludes stand-alone residential service (1FR and 1MR) from the AFOR, but allows Qwest to raise the monthly rate for 1FR service up to \$1.00 during its term.”), p. 25 (“[A]s previously noted, stand-alone residential service is one of the specific exceptions to the AFOR and will remain under tariff. Qwest cannot exercise market power because we will continue to set the rates, terms, and conditions for that service.”), p. 30 (“As previously noted, the modified AFOR excludes stand-alone residential service so there will be no change in its current level of regulation.”).

<sup>3</sup> *Id.*, p. 22, ¶ 65.

The Commission found no evidence that the 1FR rate was subject to effective competition.<sup>4</sup>

6 Qwest filed an August 17, 2009, document that it titles a “Petition to Modify the AFOR.” Qwest references RCW 80.36.135(6), which states that “[u]pon petition by the company, and after notice and hearing, the commission may rescind or modify an alternative form of regulation in the manner requested by the company.” The statute is silent on the hearing process to be afforded for such a petition.

### III. DISCUSSION

7 In its August 17, 2009, petition to modify its AFOR, Qwest claims it is incurring “extraordinary expenses<sup>5</sup> in connection with the relocation of its facilities,”<sup>6</sup> and proposes to establish new AFOR terms that would allow it “recovery of relocation costs the Commission determines to be substantial and beyond the normal course of business.”<sup>7</sup>

8 Under Qwest’s proposal, these allegedly extraordinary expenses would be recoverable through tariffed rates authorized by the Commission. It is unclear, however, to which services or classes of customers these rates would apply. Different statements in the petition imply different results:

- At points it appears that Qwest wants a tariffed surcharge on all access lines, including not only those 1FR and 1MR lines that are presently under tariff, but also business lines or services that are competitively classified or treated as competitively classified under the AFOR. This is suggested by the language providing that the rates are to be “identified as a separate line item on the bill for *all retail access lines*, unless the Commission orders a different cost allocation [emphasis added].”<sup>8</sup>
- At other points, it appears that Qwest wants authority to raise its presently tariffed 1FR and 1MR rates along with rates for services that are treated as competitively classified under the AFOR. This is suggested by the statement

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<sup>4</sup> *Id.*, p. 22, ¶ 66.

<sup>5</sup> Staff questions whether the costs Qwest would seek to recover are properly described as “expenses.” In accounting terms, these expenditures generally would be capitalized.

<sup>6</sup> Petition ¶ 5.

<sup>7</sup> *Id.*, ¶ 6.

<sup>8</sup> Petition Attachment A, ¶ 4.

that” it may be appropriate for Qwest to recover those costs from some or all of its customers, *including those who purchase only tariffed services* [emphasis added].”<sup>9</sup>

- At still other points, it appears that Qwest wants authority to impose a tariff based surcharge on customers residing within the jurisdiction whose road construction activities occasioned the need for Qwest to move its facilities, or perhaps on the public road authority itself. This is suggested by the provision in the proposed “Addendum to Qwest AFOR” that “the Commission shall consider the allocation of costs among *various jurisdictions, customers, and services* [emphasis added].”<sup>10</sup>

It is likely that Qwest wants to leave open all of these possible results. As an initial matter, the Commission should require Qwest to clarify exactly which of the above it is seeking.

9           The chief advantage of competitive classification is that the company has the pricing flexibility to move prices up and down based on its costs and on market conditions. It doesn’t have to ask the Commission’s permission. In Staff’s view it makes no sense to have a tariffed surcharge on top of the price of a service that is treated as a competitively classified. If that is what Qwest is seeking, Staff would argue that the Commission should reject it out of hand.

10           If Qwest is seeking to raise its 1FR or 1MR rates, then Staff would argue that it should make a tariff filing in compliance with the rules applicable to tariff filings. In Staff’s view that this is precisely the result that was intended by keeping Qwest’s non-competitively classified 1FR and 1MR service under tariff regulation.

11           If Qwest is seeking 1FR and 1MR rate increases, or other tariff rates, to apply only within particular local government jurisdictions, this would raise a host of policy and legal questions. For example, unlike a municipal utility tax, expenditures associated with construction or replacement of plant generally are not recovered through a surcharge on

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<sup>9</sup> Petition ¶ 5.

<sup>10</sup> Petition Attachment A. ¶ 2 (That paragraph also states that the Commission would consider “the public body requiring the relocation [and] the geographic area that most directly benefits from the required relocation.”)

customers within the particular geographic area. *See Willman v. Washington Utilities and Transp. Comm'n*, 154 Wash.2d 801, 806 (2005) (“[U]nlike other business expenses, valid jurisdictional taxes may be passed directly to utility ratepayers within that jurisdiction”).

Qwest also mentions recovery of “cost of placing such facilities underground if underground placement is required by the requesting entity”<sup>11</sup> suggesting that Qwest may have in mind to impose a tariff charge on the public road authority itself. *See General Telephone Co. of Northwest, Inc. v. City of Bothell*, 105 Wash.2d 579 (1986) (tariff requiring cities to pay the cost of undergrounding facilities preempted city ordinances requiring telephone company to pay the cost).

12           Although Qwest’s filing obfuscates somewhat on this point, it appears that Qwest wants to impose rate increases under tariff authority, and it admittedly wants to do so without making a tariff filing or having to comply with the requirements that apply to tariff filings that result in a significant rate increase. Instead Qwest wants an expedited process in which it submits evidence of only one category of costs (facilities relocation) and it would then be up to the Commission to determine the extent to which those costs exceed costs incurred in the ordinary course of business, and how those costs should be recovered. Without any evidence (at least so far) of the costs that Qwest’s is actually confronting, Qwest asks the Commission to prejudge “whether it is appropriate to seek such recovery during the term of the AFOR.”<sup>12</sup>

13           Although Qwest says the costs were not anticipated, Staff would argue that the company could have proposed or negotiated for a provision allowing it to obtain rate relief under certain exogenous circumstances and according to predetermined criteria. Because

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<sup>11</sup> Petition Attachment A, ¶ 1.

<sup>12</sup> Petition ¶ 9.

Qwest did not do so, the only reasonable conclusion is that no such avenue for relief was intended. Rather, Qwest's avenue for relief from unanticipated expenditures is to raise its prices for competitive services and/or file a rate case for those services that were exempted from the AFOR and remain under full tariff regulation.

#### **IV. CONCLUSION**

14 For the foregoing reasons, the Commission should (1) require Qwest to clarify the rates it seeks to increase or adopt, (2) establish a subsequent date for parties to file legal briefs on whether the Commission is required to entertain the petition as filed, and (3) if the Commission decides to entertain the petition, convene a prehearing conference for the purpose of establishing testimony and hearing deadlines as necessary to decide the merits of the specific AFOR terms proposed by Qwest.

Dated this 16<sup>th</sup> day of September, 2009.

Respectfully submitted,

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