

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

In the Matter of the Petition of	)	DOCKET UT-061625
	)	
QWEST CORPORATION,	)	ORDER 18
	)	
For an Alternative Form of Regulation	)	ORDER GRANTING MOTION
Pursuant to RCW 80.36.135.	)	FOR LEAVE TO FILE REPLY
	)	AND REQUIRING QWEST TO
	)	SPECIFY RELIEF SOUGHT IN
	)	PETITION TO MODIFY AFOR
.....	)	

**BACKGROUND**

- 1 **NATURE OF PROCEEDING.** Docket UT-061625 involves Qwest Corporation’s (Qwest) request for an alternative form of regulation (AFOR) pursuant to RCW 80.36.135.
  
- 2 **PROCEDURAL BACKGROUND.** The Washington Utilities and Transportation Commission (Commission) approved, subject to condition, Qwest’s request for an AFOR which became effective on November 30, 2007.<sup>1</sup> As explained below, on August 17, 2009, Qwest filed a petition to modify its AFOR to address certain utility relocation costs it believes greatly exceed the levels traditionally experienced by the company in the normal course of business. By Notice entered September 2, 2009, the Commission provided other parties to this proceeding with the opportunity to file a response and comment on the appropriate procedures to be followed should the Commission act on Qwest’s petition. On September 16, 2009, the Commission’s regulatory Staff<sup>2</sup> (Commission Staff or Staff) and the Public Counsel Section of the

<sup>1</sup> Orders 06 and 08, entered July 24, and September 6, 2007, respectively and Order 11, entered November 8, 2007.

<sup>2</sup> In formal proceedings, such as this, the Commission’s regulatory staff participates like any other party, while the Commissioners make the decision. To assure fairness, the Commissioners, the presiding administrative law judge, and the Commissioners’ policy and accounting advisors do not discuss the merits of this proceeding with the regulatory staff, or any other party, without giving notice and opportunity for all parties to participate. *See, RCW 34.05.455.*

Office of the Attorney General (Public Counsel) filed responses to Qwest's petition. On September 23, 2009, Qwest filed a Motion for Leave to File a Reply and Reply.

- 3 Petition to Modify AFOR. Qwest's petition seeks to modify the AFOR to allow it to file tariffs requesting recovery of extraordinary costs associated with the mandatory relocation of Qwest facilities. Citing unprecedented economic issues and the federal government's distribution of monies for infrastructure projects, Qwest asserts that it may incur excessive expenses when it relocates facilities affected by state and municipal public works projects.<sup>3</sup> It argues that the availability of federal stimulus dollars for such projects and the consideration of an Alaskan Way viaduct tunnel are extraordinary circumstances, not contemplated at the AFOR's inception.<sup>4</sup>
- 4 In support of its petition, Qwest cites RCW 80.36.135(6) which allows the Commission to modify an AFOR upon request by the Company and after notice and hearing. As to its contemplated recovery of these extraordinary costs, Qwest states that "it may be appropriate for [it] to recover those costs from some or all of its customers, including those who only purchase tariffed services."<sup>5</sup> Qwest notes that the current AFOR does not afford it pricing flexibility for all services. In particular, stand-alone residential service remains under tariff and is therefore subject to all applicable rules and statutes governing tariffed services.<sup>6</sup> Without modification of the AFOR, Qwest would be unable to increase its rates for those customers taking service under the remaining tariffs.
- 5 As to its preferred process, Qwest argues that the Commission should review any tariff change without requiring a full rate case or other full-blown rate investigation. Qwest proposes to file the requested recovery amount, a list of the services to be assessed, and the term of the assessment together with cost support. It then proposes that the Commission be allowed 90 days to verify the requested cost recovery and determine the method of cost recovery.

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<sup>3</sup> Qwest Petition to Modify AFOR, p. 3, ¶ 7.

<sup>4</sup> In further support of its petition, Qwest cites RCW 80.36.135(6), which allows the Commission to modify an AFOR upon request by the Company and after notice and hearing.

<sup>5</sup> Qwest Petition to Modify AFOR, p. 2, ¶ 5.

<sup>6</sup> Qwest argues that the current AFOR is, effectively, a middle ground between full deregulation and full regulation.

- 6 Commission Staff Response. In response to Qwest's Petition, Staff recommends that the Commission establish the following procedure. First, the Commission should require Qwest to clarify whether it seeks authorization to raise recurring and non-recurring charges for residential basic service or to adopt a new tariff for competitively-classified services. Second, the Commission should establish a deadline, a sufficient time after Qwest clarifies its request, by which the parties may file briefs on whether the Commission should reject Qwest's proposal as inconsistent with the final order in this case or the AFOR statute, and require the Company to pursue other avenues of relief such as rescinding the AFOR or filing for traditional tariff relief.
- 7 If, following briefing, the Commission determines it should consider Qwest's request to modify the AFOR, Staff recommends that the Commission schedule a prehearing conference to establish a process for pre-filing testimony and conducting an evidentiary hearing, similar to the process used to consider Qwest's current AFOR terms.
- 8 Staff notes that the Commission's final order repeatedly states that flat and measured rate residential services are excluded from the AFOR and remain under tariff regulation while allowing Qwest to increase the costs for such service by \$1 per month over the term of the AFOR. Staff states that while Qwest's petition seeks recovery of extraordinary expenses from tariffed rates authorized by the Commission, it is unclear to which services or classes of customers these tariffed rates would apply. Staff concludes that the Commission cannot prejudge the process until it has a clear understanding of the relief Qwest seeks.
- 9 Public Counsel Response. Public Counsel states that Qwest's petition should be considered under an adjudicatory process in the event the Commission determines it should proceed with consideration of the petition. However, Public Counsel argues that the Commission should reserve judgment regarding whether to consider the petition because Qwest seeks significant modifications to key elements of the AFOR structure and significant modifications to the balance of interests and policy considerations reflected in the AFOR plan.

- 10 To the latter point, Public Counsel contends that a core element of the AFOR is retention of tariff requirements for basic local service balanced with price deregulation for many of Qwest's services. Public Counsel states that Qwest voluntarily negotiated this arrangement including a commitment to raise basic local rates by \$1 for the term of the AFOR and argues that Qwest now seeks to open the door to unilateral abrogation of that arrangement, thereby disturbing the balance of interests contained in the agreement approved by the Commission.
- 11 Public Counsel argues further that the petition raises a number of questions which are either not addressed or require clarification including: (1) whether the original settlement precludes Qwest from seeking to unilaterally abrogate the terms of the AFOR; (2) whether the AFOR statute or plan provides for the type of modification sought; (3) how and when Qwest proposes to modify rates for regulated and unregulated services; (4) whether the proposed modification is consistent with statutory AFOR requirements including whether it will protect against the exercise of market power,<sup>7</sup> provide for rates that are fair, just, and reasonable, sufficient, and not unduly discriminatory or preferential,<sup>8</sup> and whether the modification will unduly or unreasonably prejudice or disadvantage any particular customer class.<sup>9</sup> Therefore, as a threshold matter, Public Counsel recommends that the Commission require Qwest to clarify its petition including, stating with specificity the authority it is seeking with respect to each of the services governed by the AFOR and the legal and policy analysis supporting those changes as well as the issues previously raised. Public Counsel proposes that the other parties then be permitted to file legal briefs in response to Qwest's filing.
- 12 Qwest Reply. In reply, Qwest states that both Staff and Public Counsel caution the Commission about even proceeding with the petition. Qwest argues that the Commission should set this matter for hearing under the statute that allows Qwest to petition for modification of its AFOR. Qwest states that it is not attempting to abrogate the settlement; it is seeking modification to its AFOR.

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<sup>7</sup> RCW 80.36.135(2)(c).

<sup>8</sup> RCW 80.36.135(2)(e).

<sup>9</sup> RCW 80.36.135(2)(f).

- 13 Qwest clarifies that it is seeking authorization to file tariffs that would impose a line item relocation cost recovery rate element for residential flat rate and measured rate service. Qwest notes that, under the AFOR, it is not required to seek Commission approval for revision to the rates for competitively-classified services. Qwest contends that it is appropriate to leave rate application flexible because if it narrows its petition, it could limit discussion of cost recovery options. Finally, Qwest disagrees that the AFOR plan imposed a “rate freeze” on tariffed rates during the term of the AFOR and argues that it can seek tariff revisions during its term.

### **DISCUSSION AND DECISION**

- 14 We agree with Commission Staff and Public Counsel that we have insufficient information at this time to rule on Qwest’s petition. According to RCW 80.36.135(6), “[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.*”<sup>10</sup> It is apparent from this statute governing alternative forms of regulation that our authority to modify an AFOR is limited by the “request” contained in the company’s petition. Absent adequate and specific information about the manner in which Qwest seeks to modify the AFOR, it is premature to establish procedures for considering its modification. Accordingly, we find that Qwest should file a petition addressing specifically the relief it seeks in order for us to reasonably and rationally develop procedures for addressing its request.
- 15 We agree with Staff and Public Counsel’s assessment that Qwest’s AFOR modification petition should include more comprehensive information such as identifying: (1) the classes of customers affected; (2) the specific services affected; and (3) the form of rate modification (*e.g.*, recurring or non-recurring rates or surcharges and the geographic scope of the rate modification). Furthermore, its complete petition should include: (1) the effective date of the proposed modification; (2) the term of the rate modification; and (3) the magnitude of the costs it seeks to recover. Although this list of elements is not exhaustive, this information, together with the legal and policy arguments in favor of the requested relief, will aid us in developing procedures for addressing the request, including affording all parties notice and the opportunity to be heard.

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<sup>10</sup> Emphasis supplied.

- 16 We recognize that Public Counsel raises arguments regarding whether Qwest is violating the terms of the multi-party settlement adopted by the Commission, whether the AFOR statute and plan allow the type of modifications Qwest seeks, and the legal standard by which we should review Qwest's petition. We believe that addressing these issues at this juncture would be premature, as an adequate record has not been developed. Accordingly, these issues will be decided when Qwest has submitted a complete petition, a procedural schedule has been established, and all parties have had the opportunity to address the issues raised by its petition with more complete and specific information.
- 17 Finally, we grant Qwest's motion for leave to file its reply. Granting Qwest's motion provides us with additional information on which to base our decision and we considered the argument in Qwest's reply in rendering this decision.
- 18 IT IS SO ORDERED.

DATED at Olympia, Washington, and effective November 12, 2009.

WASHINGTON STATE UTILITIES AND TRANSPORTATION COMMISSION

JEFFREY D. GOLTZ, Chairman

PATRICK J. OSHIE, Commissioner

PHILIP B. JONES, Commissioner