

BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

In the Matter of

QWEST CORPORATION

Petition for Commission Approval of
Stipulation Regarding Certain Performance
Indicator Definitions and Qwest
Performance Assurance Plan Provisions.

DOCKET NO. UT-073034

INITIAL COMMENTS OF
COMMISSION STAFF ON
DISPUTED ISSUES

1 This proceeding is a six-month review of Qwest's Performance Assurance Plan (PAP) and the associated Performance Indicator Definitions (PIDs). The parties filed a joint issues list on December 21, 2007. The parties are filing today a settlement ("2008 Partial Settlement") to resolve all but two of the issues on the issues list. These comments present Staff's recommendations with regard to two remaining contested issues.

I. PROCEDURAL BACKGROUND

2 On June 26, 2007, Qwest Corporation, Eschelon Telecom, Inc., DIECA Communications, Inc. d/b/a Covad Communications Company, and McLeodUSA Telecommunications Services, Inc. filed with the Commission a petition for approval of a stipulation ("2007 Stipulation") regarding various proposed modifications to Qwest's Performance Assurance Plan (PAP) and Performance Indicator Definitions (PIDs).¹ The PAP and PIDs are included as exhibits to Qwest's Statement of Generally Available

¹ Qwest Petition for Approval of PID/PAP Stipulation, ¶ 5.

Terms (SGAT) and to numerous interconnection agreements between Qwest and various CLECs.

3 In its petition, Qwest and the stipulating parties requested the Commission approve the 2007 Stipulation within 60 days of Qwest's filing of the petition on June 26, 2007, pursuant to Section 252(f)(3) of the Telecommunications Act of 1996 governing Statements of Generally Available Terms. Integra Telecom of Washington, Inc., Time Warner Telecom of Washington, LLC, and XO Communications Services, Inc. petitioned to intervene, and the Commission granted the petitions at the prehearing conference held August 21, 2007. The stipulating parties agreed to an extension of the review period until November 30, 2007, allowing parties time to fully investigate the 2007 Stipulation and providing an opportunity for parties to file initial comments and responses concerning the stipulation.

4 During the prehearing conference, Judge Rendahl directed the stipulating parties to file with the Commission documentation "to demonstrate to the commission that the proposal is consistent with the law and the public interest and that it is appropriate for adoption" as required by WAC 480-07-740(2). Qwest and the stipulating CLECs filed documentation ("2007 Narrative") on September 12, 2007. Staff, Qwest, Eschelon, and intervening CLECs filed initial comments on the merits of the proposed changes to the PAP and PIDs on October 5, 2007.

5 Qwest, in response to the comments, filed a motion on October 18, 2007, to convert the proceeding to a six-month review as contemplated by the PAP. Order 04, issued October 25, 2007, partially granted the motion and set a new prehearing conference, which was held November 8, 2007. Order 05, issued November 19, 2007,

established a new procedural schedule, allowing time to establish an issues list, hold settlement discussions, and file initial and reply comments and legal arguments concerning the issues.

6 Parties filed a joint issues list on December 21, 2007, that included issues in addition to those raised by the 2007 Stipulation. The parties have engaged in settlement discussions that resulted in the 2008 Partial Settlement of all but two issues included in the 2007 Stipulation.

II. EXPLANATION OF THE PAP AND PIDs

7 Qwest's performance assurance plan in Washington has two parts. The first is the group of performance measures defined in SGAT Exhibit B, entitled Performance Indicator Definitions (PIDs). The second part is the self-executing remedy plan described in the SGAT Exhibit K, entitled Performance Assurance Plan (PAP). The Washington plan works through the PIDs—specific actions that Qwest is expected to take on behalf of its wholesale customers. The PIDs are listed in categories, such as “Ordering and Provisioning” (OP), and “Maintenance and Repair” (MR), and specific actions are numbered within each of those categories. One example is restoration of service after an outage. This particular action is identified as “MR-6 – Mean Time to Restore,” and requires tracking of about 30 product sub-measures broken down (or “disaggregated”) by specific services like Resale Frame Relay, Unbundled ADSL-Qualified Loops, and E911/911 Trunks.

8 Most performance indicators in the PIDs have an established performance standard either in the form of a benchmark or, as in the restoration of service example, in the form of parity with Qwest's performance with respect to its own retail services.

When the performance standard is parity, it is necessary to determine a “retail analogue”—that is, a service that Qwest offers at retail that is analogous to what the CLECs offer using wholesale inputs from Qwest. Again, in the restoration of service example, the current retail analogue for an Unbundled ADSL-qualified Loop is Qwest DSL.

9 The PAP specifies which indicators trigger automatic payments, and describes how automatic payments to CLECs (called “Tier 1” payments) and the state (“Tier 2” payments) will work if Qwest does not meet the performance standards set out in the PIDs. Performance that directly affects a specific CLEC results in a Tier 1 payment designation for a particular PID, while PIDs that are critical to a CLEC’s ability to compete and PIDs that must be evaluated on a regional basis have a Tier 2 payment designation. Some PIDs have both Tier 1 and Tier 2 payments. The automatic payment amounts also vary with the relative importance of each performance measure, designating each PID as Low, Medium, or High through consideration of the value of services within the PID. Tier 1 and Tier 2 payments are triggered per occurrence or monthly.

10 The PAP includes monthly reporting of performance data and payment data to both CLECs and the Commission. It also provides for regional audits of performance measures or results and requires six-month reviews of the performance measurements.²

III. ISSUES PRESENTED

11 Staff agrees that it is in the public interest to allow several of the less material changes contained in the 2007 Stipulation to go into effect in return for various concessions Qwest made with regard to applying the PAP terms and appropriate PID

² 30th Supplemental Order, Dockets UT-003022 and UT-003040 (consolidated), ¶¶ 136-151 (April 5, 2002).

measures to services Qwest provides as “UNE substitutes” through voluntary commercial agreements (rather than through interconnection agreements regulated under 47 U.S.C. §§ 251, 252). This is described in the parties’ Narrative in Support of 2008 Partial Settlement Agreement filed today.

12 Staff contests the two remaining changes contained in 2007 Stipulation. The issue presented for resolution through these comments, therefore, is whether the parties to the 2007 Stipulation have met their burden of demonstrating a compelling reason to implement the contested “Tier 2 payment” and “one allowable miss” changes to the PAP that is consistent with prior Commission orders and with RCW 80.36.135(3) (pertaining to carrier-to-carrier service quality plans for a company requesting an alternative form of regulation).

IV. BURDEN OF PROOF

A. Qwest and the CLEC parties to the 2007 Stipulation bear the burden of proving that changes to the PAP are necessary and consistent with Commission’s prior orders defining the terms of the PAP and PIDs.

13 This Commission has sometimes characterized its actions with regard to the PAP (and the PIDs that contain the performance standards) as a matter of “approving” those documents as exhibits to the SGAT.³ However, the PAP and PIDs aren’t merely

³ However, approving the QPAP as Exhibits B and K of the SGAT has typically been handled as a kind of compliance filing *after* Commission has already ordered or agreed to a change in some aspect of the QPAP. In its 30th Supplemental Order in Dockets UT-003022 and UT-003040 (consolidated), at ¶ 109, this Commission concluded that it has “independent authority to review Qwest’s overall service quality” and that it “will not relinquish its authority over service quality, nor is it required to do so in approving the QPAP.” *See fn.10, infra. See also*, Docket UT-033020, Order No. 08 (also Docket UT-043010, Order No. 01) (approving Qwest’s petition to modify QPAP in response to Washington’s six-month review and compliance filing in response to Long Term PID Administration recommendation – multistate group); Docket UT-043007, Order No. 07 (also Docket UT-043068, Order No. 01) (approving Qwest’s petition to modify QPAP in response to Long Term PID Administration recommendation – multistate group); Docket UT-043007, Order No. 10 (also Docket UT-043088, Order No. 01) (approving Qwest’s petition to modify QPAP in response to settlement following litigation and hearing); Docket UT-043007, Order No. 15 (also Docket UT-043119, Order No. 01) (approving Qwest’s petition to modify QPAP in response to Arizona’s six-month review).

voluntary offerings by Qwest, nor are they just a contract between Qwest and the CLECs.⁴ Together, they constitute a wholesale service quality requirement that, along with the PAPs of the 13 other states in Qwest's territory, "are administered by state commissions and derive from authority the states have under state law. . . ."⁵ They serve as a complement to the FCC's authority to preserve Qwest's compliance with the competitive checklist of 47 U.S.C. § 271(c)(2)(B)⁶ (i.e., to prevent "backsliding" in Qwest's wholesale provisioning), after Qwest's entry into the market for interLATA toll services.⁷ The key elements of the Washington plan were specified by Commission orders in the docket in which the PAP was developed.⁸

14 The default provision for reviewing requested changes to a Commission order is RCW 80.04.200. That provision provides that a petition for rehearing must set forth the grounds and reasons for such rehearing, which grounds and reasons may comprise and consist of changed conditions since the issuance of such order, or by showing a result injuriously affecting the petitioner

⁴ "The QPAP is not just a contract between Qwest and CLECs. The QPAP is Qwest's performance assurance plan through which it assures this Commission, competing carriers, and the FCC that Qwest will continue to adhere to the requirements of Section 271 after it obtains Section 271 authority." 39th Supplemental Order, Dockets UT-003022 and UT-003040 (consolidated), ¶ 19 (July 1, 2002).

⁵ *In the Matter of Application by Qwest Communications International, Inc. for Authorization to Provide In-Region, InterLATA Services in the States of Colorado, Idaho, Iowa, Montana, Nebraska, North Dakota, Utah, Washington, and Wyoming*, 17 FCC Rcd 26303, ¶ 459 (Dec. 23, 2002).

⁶ The consent decree entered by Judge Greene resolving the antitrust case in which AT&T was broken up into a long distance company and various "Regional Bell Operating Companies (RBOCs)," prohibited the RBOCs (such as Qwest's predecessor US West) from offering interLATA long distance service originating within their service territories. In the 1996 Telecom Act, Congress created a mechanism through which RBOCs could obtain permission from the FCC (with advice from state commissions such as the UTC) to offer interLATA long distance service if they could demonstrate, *inter alia*, that they had satisfied a "competitive checklist" set out in 47 U.S.C. Sec. 271. See Huber, Kellog, and Thorne, *Federal Telecommunications Law*, 2d Ed., at §§1.7, 3.10.3 (1999).

⁷ In its *Verizon New York Order*, 15 FCC Rcd 4164, n. 1316, the FCC stated with regard to performance assurance plans: "These mechanisms are generally administered by state commissions and derive from authority the states have under state law or under the federal Act. As such, these mechanisms can serve as critical complements to the [FCC's] authority to preserve checklist compliance pursuant to section 271(d)(6)."

⁸ See 30th Supplemental Order (establishing QPAP); 33rd Supplemental Order (responding to Qwest petition for reconsideration), 37th Supplemental Order (addressing compliance with Commission orders); 47th Supplemental Order (Order 01, Docket UT-033020) (directing participation in multi-state collaborative), Dockets UT-003022 and UT-003040 (consolidated) (various dates).

which was not considered or anticipated at the former hearing, or that the effect of such order has been such as was not contemplated by the commission or the petitioner, or for any good and sufficient cause which for any reason was not considered and determined in such former hearing.

Thus, while the Commission “may, in its discretion, permit the filing of petition for rehearing at any time,” the petitioner bears the burden of showing a reason for changing the order that was not considered and determined in the former hearing. By proposing that the Commission change PAP terms approved and/or required in previous Commission orders, Qwest and the CLECs that are parties to the 2007 Stipulation bear the burden of proving why the proposed changes are consistent with the purposes for which the PAP was adopted.

15 The PAP itself contains provisions for the review and refinement of the PAP over the lifetime of the plan. One procedural avenue for refinements to the PAP is the so-called six-month review. According to the PAP, a six-month review is

a review of the performance measurements to determine whether measurements should be added, deleted, or modified; whether the applicable benchmark standards should be modified or replaced by parity standards; and whether to [change a] classification of a measurement [(High, Medium, Low, Tier 1, Tier 2)]. Criteria for review of performance measurements, other than for possible reclassification, shall be whether there exists an omission or failure to capture intended performance, and whether there is duplication of another measurement... After the Commission considers changes proposed in the six-month review process, it shall determine what set of changes should be embodied in an amended [PAP] that Qwest will file to effectuate these changes. Parties or the Commission may suggest more fundamental changes to the plan, but unless the suggestion is highly exigent, the suggestion shall either be declined or deferred until the biennial review.⁹

The PAP further states that “nothing in this [PAP] precludes the Commission from modifying the [PAP] based upon its independent state law authority...”¹⁰

⁹ Qwest Performance Assurance Plan, §16.1.

¹⁰ *Id.* at §16.1.2.

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The 2007 Stipulation includes changes that are “more fundamental changes to the plan” than the kinds of measurement changes anticipated for a six-month review. Both the Tier 2 payment and “one allowable miss” modifications opposed by Staff certainly meet this definition. Therefore, those changes arguably should be deferred to a more comprehensive review unless the proponents of the changes meet the burden of showing “highly exigent” need for the changes. On the other hand, no party ever sought to commence the “biennial review” to which Section 16.1 of the PAP refers. Staff does, however, anticipate that Qwest will petition to initiate a five-and-a-half-year review (pursuant to PAP Section 6.3) this summer. In any event, Staff believes that Qwest and the stipulating CLECs bear the burden of demonstrating a compelling reason, consistent with the original purpose of the PAP, for making significant (or “more fundamental”) changes to the PAP’s terms.

B. Qwest and the CLEC parties to the 2007 Stipulation bear the burden of proving that changes to the PAP are consistent with the Commission’s orders in the AFOR proceeding and RCW 80.36.135(3).

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On March 6, 2007, in Docket No. UT-061625 (Qwest’s request under RCW 80.36.135 for an alternative form of regulation, or AFOR) Qwest, Commission Staff, and various intervenors filed a multi-party Settlement Agreement and modified AFOR.

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On July 24, 2007, the Commission entered Order 06 approving the modified AFOR, subject to conditions. The Commission 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.

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In response to Order 06, Qwest asserted that existing service quality requirements, including the QPAP, fulfill the statutory obligation of RCW 80.36.135(3).¹¹ Qwest stated 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 asserted 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 argued 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.¹²

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Qwest acknowledged it had proposed modifications to the QPAP that are currently pending in this docket.

21

In its Order 08, the Commission observed that:

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.' 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.¹³

¹¹ Qwest's Submittal Regarding Carrier-to-Carrier Service Quality Provisions in the AFOR, pp. 1-2, Docket UT-061625 (July 31, 2007).

¹² *Id.* at pp. 2-3.

¹³ *Order Accepting, Subject To Conditions, AFOR Carrier-To-Carrier Service Quality Plan And Granting Motion To File Reply To Comments*, Order 08, p. 5, Docket UT-061625 (Sept. 6, 2007).

The Commission recognized 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.¹⁴ The Commission then said it was not persuaded that the QPAP ensures adequate service quality within the meaning of the AFOR statute. The Commission found that the QPAP fails to ensure adequate service quality *while the AFOR will be in effect* because it is scheduled to expire on December 23, 2008.¹⁵ (During the negotiations for the 2008 Partial Settlement, the parties specifically discussed addressing the expiration of the PAP during the five-and-a-half-year review.¹⁶) Additionally, the Commission noted “even prior to the QPAP’s expiration, Qwest has proposed changes in the QPAP that would reduce the Company’s carrier-to-carrier service obligations,” citing this docket.¹⁷

Finally, the Commission was not persuaded that the QPAP ensures adequate service quality within the meaning of the AFOR statute because “it 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.”

Consequently, as a condition of its approval of the AFOR, the Commission required that:

¹⁴ *Id.* at 6.

¹⁵ *Id.*

¹⁶ Paragraph 6 of the 2008 Partial Settlement (titled “Partial Settlement of Disputed Issues”) filed today states: “The parties expressly agree that the resolution of issues in this docket will not preclude a party from taking a position on any issues in the upcoming review to be conducted under Section 16.3 of the QPAP [concerning the five-and-a-half year review] with regard to the continuation of any measures.”

¹⁷ *Id.* at 6-7.

- the QPAP must remain in place for the full four-year term of the AFOR, unless modified by the Commission;
- the QPAP must remain available to all wholesale carriers in its current form unless modified by the Commission;
- 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.

25 Of greatest relevance to the burden of proof, the Commission stated in Order 08 that “[t]he 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.”¹⁸ On October 1, 2007, Qwest filed a letter with the Commission, advising it that Qwest will proceed with the AFOR as approved by the Commission in Orders 06, 08, and 09. Therefore, Qwest and the stipulating CLECs’ proposal to amend the QPAP (and PIDs) must be considered not only under the anti-backsliding objectives that informed the Commission orders leading to its finding (and recommendation to the FCC) that Qwest had met the requirements of 47 U.S.C. § 271(c)(2)(B). The proposal also must be considered under Qwest’s obligation under RCW 80.36.135(3) to have in place a plan “for ensuring adequate 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.”

¹⁸ *Id.* at 7.

V. ARGUMENT

26 As noted in its comments already filed in this docket on October 5, 2007 (before conversion to a six-month review), Staff concluded that some changes in the 2007 Stipulation were justified by changed circumstances, but that others resulted in a significant reduction in Qwest's potential liability under the PAP, and, therefore, its incentive to provide good wholesale service. Staff did not believe that either Qwest or the other parties to the 2007 Stipulation had offered a meaningful justification for these changes.

27 Once the proceeding was converted to a six-month review and the issues were expanded to include implementation of the AFOR, an opportunity for partial compromise arose. As noted above, the Commission had required as a condition of AFOR approval that the terms of the PAP apply to all wholesale services provided by Qwest as UNE substitutes, "unless the parties agree otherwise." Qwest asserts that the Commission did not require Qwest to offer PAP terms to CLECs under existing, yet-to-expire commercial agreements, because those CLECs had previously agreed that the PAP would not apply to their agreements. Qwest contends that these CLEC customers bargained away the application of the Washington PAP to the services provided in their existing agreements, to which they are currently bound. Staff, on the other hand, believes the Commission made clear that Qwest's acceptance of the AFOR includes making the PAP available to *all* wholesale carriers, including those carriers that have already accepted commercial agreements with Qwest. Whatever the case, the issue was in controversy.

28 As a compromise, Qwest agreed to re-open existing, unexpired commercial agreements, and to make the PAP immediately available to its wholesale customers, with

ordering and provisioning (OP) and maintenance and repair (MR) measures in place. Staff believes that Qwest's agreement to take on this additional potential liability (and additional incentive to provide good wholesale service quality) lends support for Staff, and the Commission's acceptance of the less material aspects of the 2007 Stipulation. Staff does not believe, however, that Qwest's agreement with regard to the disputed AFOR issue justifies two of the largest reductions in potential liability proposed by Qwest in the 2007 Stipulation. Therefore, Staff opposes two PAP changes in the Stipulation that would result in a very significant reduction in Qwest's incentive to provide good wholesale service quality (based on analysis of historical compliance data).

29 Staff anticipates that Qwest will assert that Staff is advocating a "cherry-picking" approach to the 2007 Stipulation that unfairly ignores the "puts and takes" between the parties. Staff believes that neither Qwest nor the CLEC parties to the 2007 Stipulation have demonstrated how the 2007 Stipulation (setting aside the agreement regarding implementation of the Commission's AFOR order) does anything but reduce Qwest's incentive to provide good wholesale service quality.

A. Qwest has failed to demonstrate a compelling reason for adding its "one allowable miss" provision to the PAP §3 for individual CLEC results when the CLEC aggregate results have met the standard.

30 On page eight of its settlement narrative, Qwest describes the addition of a "one allowable miss" provision to the Performance Assurance Plan for individual CLEC results when the CLEC aggregate results have met the standard. Staff analysis of Washington data shows that this change would have reduced Qwest's liability to CLECs by 19 percent in the last year. *See Attachment A.* "One allowable miss" would have reduced payments to 24 of the 27 companies affected by this change. Staff believes this

provision is designed to address situations where a single performance miss in a particular month results in a payment.

31 The PAP, however, in Section 2.4, specifically addresses this issue for performance misses of benchmark standards. If the “benchmark standard and low CLEC volume are such that a 100% performance result would be required to meet the standard ... the determination of whether Qwest meets or fails the benchmark standard will be made using performance results for the month in question, plus a sufficient number of consecutive months so that a 100% performance result would not be required.” In addition, the statistical analysis applied to the parity measures also allows some performance failures without rising to the level of a payment. One allowable miss undermines the careful design of the PAP.

32 Therefore, Staff opposes the change.

B. Qwest has failed to demonstrate a compelling reason for changing the monthly payment trigger in Sections 7.3 and 9 of the PAP, such that Tier 2 payments will be based on the number of performance measurements exceeding critical z-value for three consecutive months unless there have been two misses in any three consecutive months during the past 12 months.¹⁹

33 In 2002, the Commission specifically ordered Qwest to change a provision in its proposed PAP that would have required Tier 2 payments only after three consecutive months of non-performance, stating, “We question whether sufficient Tier 2 incentives will exist if Qwest can fail to meet the performance standards one-third of the time or more without consequence.”²⁰ In its 33rd Order on Reconsideration in the same docket, the Commission found that “a plan that allows Qwest to miss significant performance

¹⁹ Under the proposal, if there have been two misses in any three consecutive months during the last 12 months, Tier 2 payments will be triggered by either two additional consecutive months’ misses (for PIDs that are classified as both Tier 1 and Tier 2) or the current month’s miss (for PIDs that are Tier 2 only).

²⁰ 30th Supplemental Order, Dockets UT-003022 and UT-003040 (consolidated), ¶¶ 81, 86 (April 5, 2002).

measures one-third of the time without consequence does not fall within the FCC's zone of reasonableness, as the plan does not create a meaningful and significant incentive to comply. Nor would the plan adequately detect and sanction poor performance when it occurs."²¹ Qwest and the stipulating CLECs now propose something very similar to that previously rejected provision.

34 Currently, if Qwest fails to meet a standard in a given month, it is liable for payments for that month. Under the proposal, Qwest would not be liable for payments unless it failed to meet a given standard for three consecutive months.

35 Specifically, payments would be based on the number of performance misses for three consecutive months unless there have been two misses in any three consecutive months during the past 12 months. If there have been two misses in any three consecutive months during the last 12 months, Tier 2 payments would be triggered by either two additional consecutive months' misses (for performance indicators that are classified as both Tier 1 and Tier 2) or the current month's miss (for those that are Tier 2 only). Staff review of the Montana Tier 2 payments confirmed that this calculation method results in very low Tier 2 payments.

36 A thorough review of the 14 performance assurance plans in effect in Qwest's region before the filing of the 2007 Stipulation found that seven of the 14 states used some variation of the three consecutive misses to trigger payments to states. Qwest's narrative provides the following justification for changing Washington's Tier 2 payments:

In all the other states where Qwest pays Tier 2 payments consistent with the structure it has proposed in the Settlement for Washington, Qwest

²¹ [Internal quotes and citations omitted.] 33rd Supplemental Order, Dockets UT-003022 and UT-003040 (consolidated), ¶ 102 (May 20, 2002).

states that its performance is comparable to that in Washington, indicating that the higher Tier 2 payments in Washington do not create materially better performance than in other states that already operate under the proposed Tier 2 structure...²²

37 As background evidence, Qwest provided a spreadsheet that aggregated all performance results by major category for 12 of the 14 states. Staff found it difficult to apply this information in the way Qwest suggested for two reasons. First, the states included in Qwest's spreadsheet are not the best comparisons for Washington performance. The two states excluded from Qwest's spreadsheet, Minnesota and Colorado, are the closest in size to Washington (that is, they are comparatively large states). The remaining states, except for Oregon, range from two percent to 48 percent of the CLEC operations in Washington,²³ suggesting that Washington and the other large states are more likely to be the performance driver than those states with smaller CLEC operations. When one considers that half the states have the same monthly performance miss to trigger payments as Washington does, this suggests it is just as likely that the more frequent payment triggers have driven the good performance throughout the region. Staff also found that Qwest has not sought to change either the Colorado or the Minnesota performance assurance plans to include the three-consecutive-month trigger that it has proposed in Washington.

38 The second reason Staff found it difficult to apply the information Qwest provided is that the aggregation of data across a number of widely differing performance measures can mask serious problems. During the development of the PAP, the consultant hired to run the operational support systems tests cautioned that not all test criteria were

²² Qwest Narrative, p. 11.

²³ Qwest Response to UTC Staff Data Request No. 6, July 2006-June 2007 Ordering and Provisioning Items Met.

of equal importance, and that simply counting the number that were satisfied or not satisfied, or stating an average of the results, is not an appropriate way of analyzing the results. The consultant went on to encourage regulators to examine Qwest's performance for all Diagnostic PIDs, and to determine whether or not the level of service delivered to the CLEC is consistent with commercial experience.²⁴ These statements should not be applied directly to the issue before us because they were made before 2002, and before PID results were available. However, they do inform our thinking. A more appropriate comparison from Qwest would have been a state-by-state analysis of a particular performance measure such as OP-3 -- Installation Commitments Met.

39

If the Tier 2 Payment change went into effect, Qwest would enjoy as much as a 56 percent reduction in liability for failing to meet performance standards, based on information that Qwest provided in response to Staff's data requests (even after adjusting for the removal of delisted UNEs). *See Attachment A*. As Qwest observed in its filing under the AFOR, the self-executing remedies are intended to keep Qwest's performance at a high level. Staff is concerned that the three-consecutive-month trigger reduces Qwest's incentive to meet the performance standards set out in the PIDs.²⁵ Staff opposes such a change.

²⁴ 39th Supplemental Order, Dockets UT-003022 and UT 003040, Par. 117.

²⁵ In the FCC's order approving Qwest's application to provide in-region, interLATA toll services in Washington and eight other states, the FCC stated:

We conclude that the nine application states' respective PAPs provide incentives to foster post-entry checklist compliance. As in prior section 271 orders, our conclusions are based on a review of several key elements in the performance remedy plan: *total liability at risk in the plan*; performance measurement and standards definitions; structure of the plan; self-executing nature of remedies in the plan; data validation and audit procedures in the plan; and accounting requirements. . . . The PAPs include provisions for continuing review of the PAP by the state commission. [Emphasis added.]

17 FCC Rcd 26303, ¶ 455 (Dec. 23, 2002).

VI. CONCLUSION

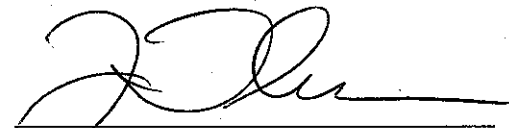
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In its narrative (submitted jointly with the stipulating CLECs), Qwest has failed to show that the disputed changes to its performance assurance plan would result in a plan that provides a meaningful and significant incentive to comply with its obligation to provide non-discriminatory access to its network or that adequately detects and sanctions poor performance when it occurs.²⁶ Qwest also has failed to reconcile the changes with its obligation under RCW 80.36.135(3) to have in place a plan “for ensuring adequate 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 meets those service quality standards or performance measures.” For these reasons, the Commission should reject the contested changes (denoted in yellow highlighting in Attachment 1 to the 2008 Partial Settlement Agreement).

Dated this 2nd day of April, 2008.

Respectfully submitted,

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²⁶ 33rd Supplemental Order, Dockets UT-003022 and UT-003044 (consolidated), ¶ 102 (May 20, 2002).