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 COMMISSION STAFF'S COMMENTS IN RESPONSE TO QWEST'S APRIL 2, 2008, COMMENTS REGARDING REMAINING DISPUTED ISSUES

1 Commission Staff submits the following comments in response to Qwest Corporation's April 2, 2008, Comments Regarding Remaining Disputed Issues.

I. INTRODUCTION

2 Qwest raises some arguments in its April 2, 2008, Comments that are not specific to the two remaining changes to the performance assurance plan (PAP), but instead suggest that, in general, the payment mechanisms under the existing PAP are too strict, and that Qwest needs relief from them. Qwest points out that the contested changes to the performance assurance plan (PAP) are part of a number of PAP changes that were proposed in the 2007 Stipulation between Qwest and various CLECs.[1] As its overall justification for the changes contained in the 2007 Stipulation, Qwest argues that "despite [Qwest's] high level of performance overall, it was still required to spend millions of dollars annually in PAP payments across its region."[2]

[1] Qwest Corporation's April 2, 2008, Comments Regarding Remaining Disputed Issues, at para. 3 (April 2, 2008).
[2] *Id.,* at para. 12.

3 Qwest's argument is based on a false premise. There simply is no objective measure of what constitutes a "high level of performance" except the performance that is necessary to avoid significant payments. Simply put, the PAP requires Qwest to meet certain performance requirements (and this usually means providing CLECs with wholesale service that is at parity with the service Qwest provides itself) or to make payments where it fails.[3] There is not instance in which Qwest makes a payment other than for a failure to meet a performance requirement.

4 But even if one accepts Qwest's assertion that it has a "high level of performance," it is undeniable that this performance was driven by the PAP's potential liability.[4] High performance—if that description is warranted—is simply evidence of the effectiveness of the PAP *in its present form*, and is not in itself a reason to change the PAP to lessen Qwest's financial incentive to meet a high level of wholesale service performance to its competitors.

5 Qwest criticizes Staff's opposition to the remaining disputed issues by stating that that "Staff's opposition appears to be rooted in the financial impact of the proposal rather than its merits."[5] But the fact is, there can be no distinction between the "financial impact" of the changes Qwest proposes and the "merits" of those proposed changes. That is, because the purpose of the PAP is to impose a significant financial incentive on Qwest, in the form of potential payment liability, to meet the PID's performance standards. This Commission noted in the docket in which the PAP was developed that, in approving the Bell Operating

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[3] *See* Initial Comments of Commission Staff on Disputed Issues, at para. 7-10 (April 2, 2008).
[4] Qwest concedes this cause and effect argument in its argument that it performs at least as well in those states that have adopted its proposed three month trigger for Tier 2 Payments as it does in Washington. Qwest's April 2, 2008, Comments, at para. 22. For the reasons stated in its own April 2, 2008, Comments, Staff does not believe that the evidence offered by Qwest proves Qwest's point. Para. 36-38.
[5] Qwest's April 2, 2008, Comments, at para. 18 (April 5, 2002).

Companies' section 271 applications, the Federal Communications Commission (FCC) applied a "zone of reasonableness" test to determine whether a state's performance assurance plan was "likely to provide incentives that are sufficient to foster post-entry performance."[6] As this Commission also noted, the FCC looked at five characteristics of a PAP in applying its zone of reasonableness test, including: "Potential liability that provides a meaningful and significant incentive to comply with the designated performance standards," and "A reasonable structure that is designed to detect and sanction poor performance when it occurs."[7]

6 As Qwest appears to concede,[8] aside from certain changes necessary to reflect current law, virtually all of the proposed changes to the PAP contained in the 2007 Stipulation are aimed at reducing Qwest's potential liability for failing to meet the plan's performance requirements. As justification for these liability-reducing changes, Qwest at one point describes the existing payment requirements of the PAP as "simply punitive."[9] While Staff concedes the theoretical possibility that the payment requirements under the PAP might be set more strictly than necessary to obtain acceptable wholesale service results, there is no way of testing this hypothesis other than by making experimental changes to the PAP. Staff believes that the best way to proceed with such an experiment is by making gradual, incremental changes, rather than broad changes that may have overlapping effects. Moreover, as discussed in Staff's April 2, 2008, Comments, the PAP itself, as approved by the Commission, contains a presumption against changes to its payment mechanisms, stating

[6] *See* 30th Supplemental Order, Docket Nos. UT-003022 and UT-003040 (consolidated), para. 7.
[7] *Id.*
[8] Qwest's April 2, 2008, Comments, at para. 12.
[9] *Id.*, at para. 24.

that, within a six month review, "[p]arties 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."[10]

7 From Staff's perspective, an overarching problem with accepting all of the changes contained in the 2007 Stipulation is that it would require a significant number of changes to the PAP that will reduce Qwest's liability in different ways, and some of those changes are overlapping with the one allowable miss change that Staff opposes. (This overlapping effect is discussed in more detail below.) In addition, Staff believes that, for both of the remaining disputed changes, Qwest fails to raise arguments or concerns that were not known or anticipated in the Commission's adoption of the PAP terms that Qwest now seeks to change. As such, there is no basis to make the changes.[11]

8 The changes recommended by all parties, including Staff, in the 2008 Partial Settlement[12] reduce Qwest's liability, but appropriately limit the scope and sometimes overlapping effect of multiple changes. Staff strongly urges the Commission to reject one allowable miss and the Tier 2 trigger.

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[10] PAP Sec. 16.1; *see* Staff's April 2, 2008, Comments, at para. 15, 16.

[11] As discussed in Staff's comments filed April 2, 2008, at paragraphs 13 and 14, RCW 80.04.200 states 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 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*. [Emphasis added.]

[12] *See* Partial Settlement of Disputed Issues and Narrative in Support (filed April 2, 2008).

II. ONE ALLOWABLE MISS

9 Qwest's main argument with regard to its proposed "one allowable miss" provision is that the PAP includes an "unreasonable performance standard of 'perfection.'" Qwest's comments go on to give the following example: In a month where a CLEC's order volume for Line Splitting is 15, the only way to meet the 95 percent benchmark standard for Installation Commitments Met (OP-3) is for Qwest to meet the due date on all orders, or 100 percent of the time. Qwest's comments suggest that this is an "unanticipated flaw."[13]

10 First, it is not necessarily true that Qwest would be liable for a payment in the situation it describes in its comments. Section 2.4 of the PAP (which Qwest proposes to eliminate and replace with its preferred one allowable miss provision)[14] provides Qwest an opportunity for relief "when a benchmark standard and low CLEC volume are such that a 100% performance result would be required to meet the standard and has not been attained." Existing Section 2.4 states:

> In such a situation, 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 to meet the standard.

Thus, in the situation Qwest describes, it would only be liable for a payment if it were unable to aggregate some combination of consecutive months such that its "miss" in that aggregated period would meet the 95 percent benchmark.

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[13] Qwest's April 2, 2008, Comments, at para. 13.

[14] *See* 2008 Partial Settlement Exhibit 1 (Redlined QPAP) at Sec. 2.4 and Sec. 3.1.4, which Qwest filed with the Commission on April 2, 2008. Language in blue underline and strikeout shows changes that are part of the 2007 Stipulation advocated by Qwest. Where such changes are also highlighted in yellow, this indicates that Staff opposes the change.

11 As this explanation shows, it is simply incorrect that the PAP did not anticipate the problem that a low volume of CLEC activity might result in a requirement of "perfection" on Qwest's part in instances where CLEC volumes were low.

12 Qwest's April 2, 2008, comments provide no explanation of why the existing Section 2.4 of the PAP is inadequate to address its concerns. In fact, Section 2.4 does address the "perfect performance" problem that may arise from low CLEC volumes, but just not in a way that is a forgiving as Qwest would like. The drafters of the PAP certainly could have adopted an administratively simpler "one free miss" provision in the PAP, but they instead adopted the more stringent Section 2.4.

13 Another reason Staff opposes Qwest's proposed one allowable miss provision is that at least two the changes to which Staff has agreed in the 2008 Settlement would tend to reduce the occurrence of the "perfect performance" problem that results from low CLEC volumes. The 2008 Partial Settlement allows Qwest to remove from the PAP certain services that have low CLEC volumes, as well as allowing implementation of the reinstatement/removal clause, which provides a process for eliminating payments when there is low CLEC demand for a particular service.[15] Both of these items clearly have an overlapping effect on the payments Qwest describes above because their intent is to eliminate payment requirements for services that are not frequently used by CLECs. In the "Qwest response to informal request for information," attached to Staff's Initial Comments on Disputed Issues dated April 2, 2008, Qwest specifically states that it is unable to provide

[15] *See* Narrative in Support of Partial Settlement, at para. 10, 20 (April 2, 2008).

an estimate that accounts for the impact of multiple changes collectively, and that this will not be available until the changes are made effective.

14 In summary, Qwest's comments suggest that the one allowable miss corrects an unanticipated flaw in the existing PAP. In fact, Section 2.4 of the PAP clearly anticipated just such a situation. Staff firmly believes that one allowable miss goes too far in undermining the careful design of the PAP and should not be approved.

III. TIER 2 PAYMENTS

15 Qwest makes a number of arguments in support of adopting a three-consecutive month trigger for Tier 2 payments.

16 First, Qwest suggests that in making its prior finding rejecting a three-consecutive month trigger,[16] the Commission was looking at the Tier 2 provision in isolation and without a proven track record on which to rely.[17] In fact, the Commission devoted significant discussion to Tier 2 payments as part of its overall analysis of the PAP's compliance with the FCC's zone of reasonableness.[18] The Commission made its finding based on significant analysis performed by the outside Facilitator, who relied heavily on performance data provided by Qwest. Qwest provided a full year of performance data in September 2001, eight months before the commission issued its 30th Supplemental Order.[19] And as stated

[16] In its 33rd Supplemental Order, Docket Nos. UT-003022 and UT-003040 (consolidated) (May 20, 2002), the Commission found that a three month trigger for Tier 2 payments similar to what Qwest now proposes would not create a meaningful incentive to comply, nor adequately detect and sanction poor performance when it occurs.

[17] Qwest's April 2, 2008, Comments, at para. 19.

[18] 30th Supplemental Order, Docket Nos. UT-003022 and UT-003040 (consolidated) (April 5, 2002) paragraph 7, lists the five parts of the FCC's zone of reasonableness. Paragraphs 80 to 87 discuss Tier 2 payments as part of an overall discussion of Qwest's meaningful and significant incentive.

[19] *See* Qwest's filing of September 7, 2001, in Docket Nos. UT-003022 and UT-003040 (consolidated), available on the Commission's records management system (RMS) database.

above, the fact that Qwest may have achieved good performance under the exiting PAP terms is not a basis for altering the existing terms of the PAP.

17 Second, as Staff anticipated in its own April 2, 2008, comments,[20] Qwest argues[21] that there is a "lack of any demonstrable difference in performance between states" with different Tier 2 triggers. Staff agrees that the data provided by Qwest shows very little difference. However, the two states missing from the data provided by Qwest are Colorado and Minnesota, the states most similar to Washington in size. Again, Staff believes a state-by-state comparison at a more granular level would be needed to prove Qwest's point.

18 Finally, Qwest states that the proposed Tier 2 change would allow Qwest to focus on improving performance where it is needed—where the performance misses the standards on more than just a single month's basis.[22] Staff disagrees that improved performance is only needed where Qwest misses the performance standard in consecutive months. The Commission was very clear that the FCC's "zone of reasonableness test" for a performance assurance plan required monthly Tier 2 payments to create sufficient incentive to perform, and the Commission inferred that monthly Tier 2 payments help detect and sanction poor performance as it occurs.[23] In addition, as the Commission stated in its order addressing Qwest's AFOR, Qwest's wholesale service plan must meet the standard of RCW 80.36.135(3) and its requirement for an appropriate enforcement or remedial provision in the event the company fails to meet service quality standards or performance measures.[24] Staff

[20] para. 36-38.
[21] Qwest's April 2, 2008, Comments, at para. 21.
[22] *Id.,* at para. 25.
[23] *See* footnote 18, *supra.*
[24] *See* Staff's April 2, 2008, Comments, at para. 22-25.

believes the monthly Tier 2 trigger, as a stronger remedial provision, should remain in the PAP.

IV. CONCLUSION

19 The changes recommended by all parties in the 2008 Partial Stipulation reduce Qwest's liability, but appropriately limit the cumulative and overlapping impact of multiple changes. Staff strongly urges the commission to reject one allowable miss and the Tier 2 trigger.

DATED this 25th day of April, 2008.

Respectfully submitted,

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