

**BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION**

In the Matter of the Investigation Into  
U S WEST COMMUNICATIONS, INC.'s  
Compliance With Section 271 of the  
Telecommunications Act of 1996

DOCKET NO. UT-003022

In the Matter of  
U S WEST COMMUNICATIONS, INC.'s  
Statement of Generally Available Terms  
Pursuant to Section 252(I) of the  
Telecommunications Act of 1996

DOCKET NO. UT-003040

RESPONSE OF PUBLIC COUNSEL  
TO QWEST'S PETITION FOR  
RECONSIDERATION OF THE 30<sup>TH</sup>  
SUPPLEMENTAL ORDER

**I. INTRODUCTION**

In response to the Commission's Notice of Opportunity to Respond to Petition for Reconsideration, issued April 22, 2002, Public Counsel hereby comments on Qwest's Petition for Reconsideration of the Commission's Thirtieth Supplemental Order: Commission Order Addressing Qwest's Performance Assurance Plan, Docket Nos. UT-003022, 003040 (April 5, 2002), filed on or about April 15, 2002. Our responsive comments focus on the specific issues addressed previously by Public Counsel in our Comments on Qwest's Performance Assurance Plan (QPAP), filed in this docket on November 21, 2001.

**II. REVIEWS**

**A. Commission Authority**

The Commission's 30<sup>th</sup> Supplemental Order directed Qwest to modify Section 16.1 of the QPAP to strike "Changes shall not be made without Qwest's agreement" and add the following

language: “After the Commission considers such changes through the six-month process, it shall determine what set of changes should be embodied in an amended SGAT that Qwest will file to effectuate these changes.” 30<sup>th</sup> Supplemental Order ¶ 146. Qwest opposes this change on the grounds that it would give the Commission “unlimited authority” to make changes to the QPAP and that it would “render meaningless all of the workshops that have been devoted to developing the QPAP terms.” Qwest petition at 16.

Public Counsel disagrees with Qwest. We concur with the Commission’s decision in the 30<sup>th</sup> Supplemental Order that the Commission should have the authority to determine whether changes should be made to the QPAP. Qwest proposes to incorporate language jointly developed by Qwest and Utah Advocacy Staff. Public Counsel opposes this proposal as it would limit the Commission’s authority to resolving disputes concerning the addition, deletion, or modification of performance measurements—in short, Qwest would retain “veto power” over other changes. Qwest petition at 19. Public Counsel continues to believe that such “veto power” is inconsistent with the primary goals of the QPAP: to deter anti-competitive conduct and compensate CLECs for inferior service.

Public Counsel agrees with the recent finding of the Montana Public Service Commission in their Final Report on the QPAP<sup>1</sup>:

“The Commission continues to find that QPAP change control should rest with the Commission, not with Qwest. Qwest’s argument that the QPAP is voluntary and is not required as a condition of 271 approval by the FCC ignores two facts: (1) this Commission will not recommend that the FCC grant Qwest’s 271 application unless Qwest has in place a performance assurance plan approved by this Commission; and (2) no 271 application has been submitted to and approved by the FCC without inclusion of a

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<sup>1</sup> The Montana Final Report on the QPAP was attached as Exhibit A to AT&T’s Additional Statement of Supplemental Authority Regarding Qwest’s Performance Assurance Plan, filed April 24, 2002.

PAP as a safeguard against backsliding after 271 entry. Qwest's insistence on maintaining the QPAP requirement that gives Qwest veto power over any QPAP change, except for additions of performance measurements, would make a mockery of the multistate collaborative approach this Commission envisions for QPAP reviews because Qwest could and would nix any change not to its liking. Similarly, if the QPAP were revised to require mutual agreement by Qwest and CLECs electing the QPAP, there would likely be issues where mutual agreement was not possible, with the result being an unworkable process that failed to resolve issues at all. The Commission finds, as it did in the preliminary report, that it is its responsibility to administer the QPAP and oversee its operation. The Commission, whether acting on its own or as a member of a multistate QPAP oversight group, will develop a QPAP review process that ensures the due process rights of Qwest and CLECs alike are protected." Montana Public Service Commission, *In the Matter of the Investigation into Qwest Corporation's Compliance with Section 271 of the Telecommunications Act of 1996*, Docket No. D2000.5.70, Final Report on Qwest's Performance Assurance Plan and Responses to Comments Received on Preliminary Report, April 19, 2002 at 59-60.

We concur with the reasoning of the 30<sup>th</sup> Supplemental Order as to the Commission's authority to order changes to the QPAP. We agree that the Commission has authority to modify the QPAP under (1) sections 261(c) and 252(f) of the Telecommunications Act of 1996, (2) the Commission's authority to order changes to the SGAT, and (3) the Commission's broad authority to regulate the rates, services, facilities and practices of telecommunications companies in the public interest. 30<sup>th</sup> Supplemental Order ¶¶ 143-145. Qwest recognizes that the Commission has the authority to enforce interconnection agreements. Tr. 6079. In addition, the QPAP's Tier 2 payments to the State also seem to presume that the State has a role in enforcing and overseeing the operations of the QPAP. Tr. 6076:2-10. It is logical to conclude, as the Montana Commission did, that it is the Commission's role to oversee the operations of the QPAP and when necessary, to order changes to the QPAP consistent with the public interest.

We therefore encourage the Commission to deny Qwest's petition and to affirm its decision in the 30<sup>th</sup> Supplemental Order.

**B. Scope of the Six Month Reviews**

With respect to the scope of the six-month reviews, Section 16.1 of the QPAP, as filed by Qwest on November 6, 2001, would limit the scope of the six-month reviews to a determination of whether performance measures should be added, deleted, or modified; whether any benchmark standards should be replaced with parity standards; and whether the classification of any performance measures should be modified. Public Counsel concurs with the Commission's decision in its 30<sup>th</sup> Supplemental Order. The Order states in relevant part: "we believe it would be unreasonable to preclude or limit the Commission's authority to examine issues that may arise in the course of operation of the plan." 30<sup>th</sup> Supplemental Order ¶ 147. The Commission directs Qwest to modify Section 16.1 of the QPAP to allow Parties or the Commission to "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." *Id.*

We believe the Commission's 30<sup>th</sup> Supplemental Order strikes an appropriate balance regarding the scope of the six-month reviews. It is impossible for any Party to develop a discrete and limited list of issues to be addressed at the six-month review when, as the Commission's Order states, neither Qwest, the CLECs, or the Commission has any experience operating under this PAP in Washington. *Id.*; Tr. 6062:1-11. Rather than make these reviews completely open-ended, however, the Commission requires Parties to demonstrate that an issue is "highly exigent" before it will be considered as part of the review. 30<sup>th</sup> Supplemental Order ¶ 147.

Qwest proposes to include language developed jointly by Qwest and Utah Advocacy Staff. Public Counsel opposes this proposal because it would limit the scope of the six-month review only to the subject of performance measures. In addition, the Commission's authority would be limited to resolving disputes concerning the addition, deletion, or modification of performance measurements. Qwest petition at 19. We also find Qwest's proposed language regarding the criteria for review of performance measures to be unreasonable because it would limit the ability of the Commission to consider other issues that may surface once a QPAP becomes operational. Qwest petition at 19.

In summary, we encourage the Commission to deny Qwest's petition for reconsideration of the Commission's 30<sup>th</sup> Supplemental Order regarding the scope of changes to the QPAP.

### **III. MULTI-STATE AUDIT, INVESTIGATION AND REVIEW PROCESS**

The Commission's 30<sup>th</sup> Supplemental Order directed Qwest to make changes to the section of the QPAP pertaining to audits and investigations. 30<sup>th</sup> Supplemental Order ¶¶ 239-242. We believe these modifications to Section 15.0 of the QPAP are absolutely critical in order ensure that the QPAP audit program achieves its intended objective—to provide “sufficient assurance that a high level of confidence can be placed in the performance results that Qwest measures – results that will drive QPAP payments and will serve as a primary basis for [commission] oversight of wholesale performance.” Liberty QPAP Report at 78-79; 30<sup>th</sup> Supplemental Order ¶ 230. Public Counsel opposes Qwest's petition to retain language in the QPAP to provide for a multi-state audit and review process. Qwest petition at 21-24. In their 30<sup>th</sup> Supplemental Order, the Commission stated very clearly that they would defer making a decision about participating in any multi-state audit process until a later date. 30<sup>th</sup> Supplemental

Order ¶ 241. Given that decision, it would be inappropriate to include language in the QPAP, as Qwest has proposed, that outlines in significant detail the duties, decision-making authority and appeal process for a multi-state audit. We believe those decisions should be made by the state commissions participating in any multi-state effort.

We continue to have concerns with the idea of a multi-state audit program. Specifically, a multi-state effort would severely limit the ability of Washington-specific parties to participate and it reduces the transparency of state regulatory action.

In summary, Public Counsel continues to believe that the Commission should maintain full and complete authority over reviews, audits, and monitoring of QPAP performance issues in Washington. We encourage the Commission to deny Qwest's petition for reconsideration of the Commission's 30<sup>th</sup> Supplemental Order regarding the audit program set forth in the QPAP.

#### **IV. TIER 2 PAYMENTS**

We concur with the Commission's decision in its 30<sup>th</sup> Supplemental Order that Tier 2 payments should be triggered "in any month that Qwest fails to meet the Tier 2 performance standards." 30<sup>th</sup> Supplemental Order ¶ 86. Qwest has petitioned for reconsideration of this decision and asks the Commission to consider a Tier 2 payment trigger scheme stipulated to by Qwest and Utah Advocacy Staff. Qwest petition at 10-11.

Qwest's proposal is to use the Tier 2 trigger recommended by the Liberty QPAP report (and rejected by the Commission in the 30<sup>th</sup> Supplemental Order), accompanied by a new provision that if Qwest's monthly conforming measurement payment percentage is below 85% for any 5 of 12 consecutive months, then Tier 2 Payments would trigger either after a single month of non-conforming performance (in the case of Tier 2 measures without Tier 1

counterparts) or after a second consecutive month of non-conforming performance (Tier 2 measures with a Tier 1 counterpart). Qwest petition at 11. We believe that Qwest’s proposed trigger for Tier 2 payments would allow a significant lag before payment would occur. Such a lag in Tier 2 payments could function as a disincentive for Qwest to take immediate action to address the performance issues related to Tier 2 measures—an issue raised by the New Mexico Advocacy Staff during the multi-state proceeding. Liberty QPAP Report at 43.

We encourage the Commission to deny Qwest’s petition for reconsideration of the 30<sup>th</sup> Supplemental Order regarding the trigger for Tier 2 payments.

## **V. FORCE MAJEURE PROVISION**

The Commission’s 30<sup>th</sup> Supplemental Order directed Qwest to modify Section 13.3 of the QPAP to provide for a waiver process whereby Qwest would file any request for a waiver of payment obligation with the Commission no later than the last business day of the month after the month in which payments are being disputed. 30<sup>th</sup> Supplemental Order ¶ 206. Qwest’s Petition characterizes this waiver process as imposing “an unnecessary administrative hurdle.” Qwest petition at 34. We believe this provision does not place an undue burden on Qwest, and provides for a reasonable, clearly defined and transparent waiver process that will protect against potential abuse of force majeure claims. Accordingly, we request the Commission affirm its decision in the 30<sup>th</sup> Supplemental Order regarding the procedure for requesting a waiver of payment obligation due to force majeure.

## **VI. MONTHLY REPORTS TO PUBLIC COUNSEL**

Public Counsel requests that the Commission affirms its decision to require Qwest to provide copies of its monthly reports to relevant parties such as Public Counsel who request to receive such reports. 30<sup>th</sup> Supplemental Order ¶ 244.

## VII. CONCLUSION

Public Counsel requests the Commission's consideration of the responsive comments made above in its consideration of Qwest's Petition for Reconsideration of the Commission's 30<sup>th</sup> Supplemental Order. It is our position that without a strong performance assurance plan that creates the appropriate incentives and disincentives for Qwest's performance as a wholesale supplier to its retail competitors—its application to the FCC cannot be in the public interest. We look forward to continuing to participate in the Commission's review of the QPAP and its public interest inquiry generally.

DATED this 1st day of May, 2002.

CHRISTINE O. GREGOIRE  
Attorney General

ROBERT W. CROMWELL, JR.  
Assistant Attorney General  
Public Counsel