

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 ANSWER
TO QWEST CORPORATION'S
PETITION FOR ADMINISTRATIVE
REVIEW OF ORDER 07, INITIAL
ORDER

I. INTRODUCTION

1 Commission Staff submits this answer to Qwest Corporation's June 24, 2008,
Petition for Administrative Review of Order 07, Initial Order.

2 Staff agrees with the Initial Order's findings that both of the disputed changes to
Qwest's Washington Performance Assurance Plan ("PAP") are "more fundamental changes"
within the meaning of Sec. 16.1 of the PAP, and that Qwest has not shown a "highly
exigent" reason for adopting the changes. Nonetheless, Staff joins Qwest in urging the
Commission to decide the merits of the PAP changes that are disputed between Qwest and
Staff (one allowable miss, and Tier 2 payments), even though changes of this type are
outside the scope of a six-month review as originally contemplated by Sec. 16.1 of the PAP.
Staff believes that unusual procedural circumstances (discussed below) warrant a decision in
this docket on the merits of Qwest's proposed PAP modifications. The Commission should
not defer a decision of the merits of the disputed changes to the five-and-a-half year review.

3 Unlike Qwest, however, Staff believes that the Commission should deny the proposed PAP modifications under the standards of RCW 80.04.200.¹

II. DISCUSSION

4 The Commission may consider modifications to the PAP at any time. Sec. 16.1.2 acknowledges that “[n]othing in this QPAP precludes the Commission from modifying the QPAP based upon its independent state law authority, subject to judicial challenge.” Indeed, there really is no basis other than the Commission’s “state law authority” on which to consider fundamental modifications to the Washington PAP. As the FCC has said, the various state performance assurance plans in Qwest’s 14-state service territory “derive from authority the states have under state law.”² The key elements of the Washington plan were specified by this Commission in various orders in Docket Nos. UT-003022 and UT-03040 (consolidated).³ As with any of its orders, when warranted, the Commission may change the requirements of its orders establishing the terms of the Washington PAP.⁴ As stated in Staff’s Initial Comments,⁵ the standard for considering a change to a Commission order is set forth in RCW 80.04.200.⁶

¹ Like Qwest, Staff does not repeat its arguments on the merits of the PAP changes here, but simply addresses the initial order’s conclusion that a decision on the disputed PAP changes should be deferred to the five and a half year review. See Initial Comments of Commission Staff on Dispute Issues (April 2, 2008) and Commission Staff’s Comments in Response to Qwest’s April 2, 2008, Comments Regarding Remaining Disputed Issues (April 25, 2008).

² *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).

³ 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 No. UT-033020) (directing participation in multi-state collaborative), Docket Nos. UT-003022 and UT-003040 (consolidated) (various dates).

⁴ RCW 80.04.210.

⁵ See Initial Comments of Commission Staff on Dispute Issues at paragraph 14.

⁶ That provision provides that a petition for rehearing must set forth

5 There are numerous reasons to decide the merits of Qwest's (and the original stipulating CLECs') proposed "one allowable miss" and "Tier 2" modifications to the Washington QPAP at this time, rather than deferring the decision to a later proceeding.

6 First, as Qwest correctly points out, several of the PAP changes that have been implemented through the partial settlement in this proceeding were also "more fundamental changes" for which there was no asserted exigent need. Some of those changes were necessary to implement the requirements of the Commission's AFOR order, or were agreed to by Staff and the intervenor CLECs in return for compromises by Qwest on disputed issues regarding implementation of the AFOR.⁷ Thus, although the proceeding used the procedural vehicle of a "six-month review," the Joint Issues List and the Partial Settlement Agreement developed by the parties (and adopted by the Commission) decidedly transcended the scope of a six-month review as envisioned in Sec. 16.1 of the PAP.

7 Second, the various "reviews" described in part 16 of the PAP have not occurred as contemplated. Although Sec. 16.1 says that fundamental changes to the plan will be declined or deferred "until the biennial review," there has never been a biennial review as described in Sec. 16.2. Moreover, there have not been regular "six-month reviews" since adoption of the PAP, and the parties have no immediate plans to initiate another six-month review following this one.

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.

⁷ Narrative in Support of Partial Settlement Agreement at paragraphs 28-36 (April 2, 2008); Staff Initial Comments on Disputed Issues at paragraph 11 (April 2, 2008).

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Third, no party would be prejudiced by a decision on the disputed PAP changes in the context of this “six-month review” proceeding, even if decided in Qwest’s favor. All parties, including CLECs who did not intervene in this case, have had notice and ample opportunity to object to inclusion of these issues in the proceeding,⁸ and those that intervened have had sufficient opportunity for discovery and briefing.

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Fourth, and most practically, deferring a decision on the merits of these issues, after the parties have briefed them as thoroughly as they will ever be briefed, would frustrate judicial economy. There is no practical reason not to decide the issues at this time. Staff also disagrees with the Initial Order’s decision to defer consideration of the disputed issues to the five-and-a-half year review on the grounds that the proposed changes to the PAP were not properly considered in the context of RCW 80.36.135(3) (requiring a carrier-to-carrier service quality plan as part of an AFOR). The negotiations and the partial settlement included a thorough consideration of PAP changes necessary to implement the Commission’s AFOR Order 08⁹ and thereby make the PAP consistent with the requirements of RCW 80.36.135(3) (the AFOR statute).¹⁰ Although Staff believes that the requirements of the AFOR statute are a reason to impose a high burden on Qwest for changes to the PAP,¹¹ Staff does not believe that the requirements of the AFOR statute provide a reason to defer a decision. If Qwest failed to meet its burden of showing that the PAP changes are

⁸ See Prehearing Conference Order; Notice of Right to Participate in Six-Month Review; Revising Procedural Schedule (November 19, 2007). Note that the Preliminary Issues List in Appendix B included of the “one allowable miss” and “Tier 2 payments” change proposals. See also, Joint Issues List filed on behalf of all parties to the six month review on Dec. 21, 2007, which includes both of the issues that now remain in dispute.

⁹ *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).

¹⁰ Partial Settlement Agreement at paragraphs 8, 20; Narrative in Support of Partial Settlement Agreement at paragraphs 28-35.

¹¹ See Initial Comments of Commission Staff on Disputed Issues at paragraphs 17-25.

warranted under RCW 80.36.135(3), the Commission should deny the proposed changes now, not defer a decision and allow Qwest another “bite at the apple.”

III. CONCLUSION

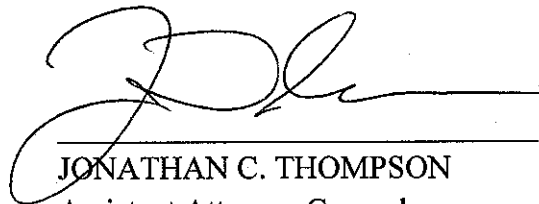
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Although Staff opposes the two remaining PAP changes proposed by Qwest, Staff believes that the Commission should decide in this docket whether Qwest has met the burden of proof that Staff articulated in its Initial Comments, and not simply defer consideration of the changes for failing to meet the “exigency” standard for “more fundamental changes” proposed in the context of a six-month review.

DATED this 7th day of July, 2008.

Respectfully submitted,

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