

June 27, 2002

Via E-Mail and U.S. Mail

Ms. Carole J. Washburn
Executive Secretary
Washington Utilities & Transportation Commission
1300 S. Evergreen Park Dr. S.W.
P. O. Box 47250
Olympia, Washington 98504-7250

Re: WUTC Docket Nos. UT-003022 and UT-003040

Dear Ms. Washburn:

The purpose of this correspondence is to bring to the Washington Utilities and Transportation Commission's attention both Qwest's non-compliance with the Commission's various orders related to Qwest's Performance Assurance Plan and the inappropriateness of Qwest's proffered language found in Qwest's June 25, 2002 QPAP Filing.

On June 20, 2002, the Washington Utilities and Transportation Commission ("the Commission") issued its 37th Supplemental Order, Commission Order Addressing Qwest's Compliance with Commission's Orders Concerning Qwest's SGAT and Performance Assurance Plan (QPAP) (hereinafter "37th Supplemental Order"), requiring specific changes to Qwest's proposed Exhibit K including provisions regarding Commission change control. As explained below, this was the third time that the Commission ordered specific changes and Qwest failed to comply.

In its Thirtieth Supplemental Order, the Commission expressly stated:

Having reviewed the Texas plan, the CPAP, the Utah Staff Report, and recent orders from Wyoming and Montana,¹ we agree with the parties that Qwest must modify the QPAP to allow the Commission authority to determine whether changes ought to be made to the QPAP. **Qwest must amend section 16.1 of the QPAP to strike "Changes shall not be made without Qwest's**

¹ Cites omitted.

agreement,” and add the following: “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.”²

In the same Order, the Commission made clear that it did not wish to relinquish any of its stated authority indicating:

At the heart of this issue is the Commission’s independent authority to review Qwest’s service. While Qwest may argue that the CLECs elect remedies by adopting the plan to the exclusion of all other alternatives, the Commission does not relinquish any authority, nor is it required to do so in approving the QPAP.³

Then, in its Thirty-Third Supplemental Order, when rejecting alternative language that Qwest proposed regarding Commission change control and specifically referencing plans that allow unfettered change control, the Commission **rejected** any changes to its **ordered** language indicating **“(w)e are not persuaded to modify our decision on this issue, and deny Qwest’s request for reconsideration.”⁴**

Instead of complying, Qwest proffered a revised version of the Colorado Performance Assurance Plan language which usurped almost all of the Commission’s change control authority. The Commission addressed this issue in the 37th Supplemental Order. For the third time the Commission ordered Qwest to provide specific language indicating:

At the heart of this issue is a fundamental disagreement over whether this Commission has authority to require changes to the QPAP. The nature of performance assurance plans is that they cannot be frozen in time. They should remain flexible to address issues that may arise over time, including, but not limited to whether the performance measures must be adjusted. It is necessary for the states to retain authority for ongoing oversight over the plan and to retain flexibility over how a plan should be changed. As Public Counsel stated during the argument, no one knows how things will change in the future, and the QPAP should not be self-limiting. In fact, the FCC expects states to continue in an oversight role following the grant of 271 authority.⁵

² Thirtieth Supplemental Order at ¶146, ¶347 and ¶348.

³ *Id.* at ¶ 109.

⁴ Thirty-Third Supplemental Order at ¶46.

⁵ Footnote Omitted.

Also at issue is the fact that, on the one hand, Qwest seeks some finality in the process for a six-month review, and on the other, that this Commission may choose to participate in an as-yet-undefined, multi-state process under development by the ROC.

For the reasons identified in our prior orders on the QPAP, because Qwest's proposal has been made so late in the process, and because Qwest has not demonstrated that its proposal would allow any modification to the QPAP, we deny Qwest's request to modify section 16 of the QPAP as set forth in its compliance filing. We find that the language required in the *30th Supplemental Order* provides the correct balance of stability and flexibility to allow Qwest, the CLECs, and this state to know how the plan will operate, but also to allow the plan to be modified if necessary. We believe the QPAP, as contemplated in our *30th* and *33rd Supplemental Orders*, is a plan that provides "probative evidence that the [Qwest] will continue to meet its section 271 obligations and that its entry is consistent with the public interest."⁶ Qwest, therefore, must modify section 16 of the QPAP as ordered in the *30th Supplemental Order*.⁷

Despite the fact that this Commission (and the parties) have unequivocally addressed the exact same issue three times, Qwest filed its June 25, 2002 QPAP Compliance Filing, "call(ing) to the Commission's attention an additional point of clarification."⁸ It then proposes "clarification language" which is effectively a Motion for Reconsideration without the Motion. Needless to say, this language is extremely problematic and negates the language that the Commission ordered. It effectively takes away the Commission's change control authority because:

- 1) It expressly indicates that Qwest is not granting the Commission change control authority.
- 2) It limits the Commission's change control authority to state law authority (as opposed to the FCC articulated state and federal law authority).
- 3) It makes any change that this Commission would attempt to make contingent upon judicial review. (i.e. because of the definition of "subject", the change would not go into effect until the judicial review was completed.)

The parties and the Commission have addressed these issues in previous pleadings. Furthermore, in its Thirty-Seventh Supplemental Order, the Commission indicated that the last proffer by Qwest was rejected in part because

⁶ Footnote Omitted.

⁷ Footnote Omitted.

⁸ Qwest's June 25, 2002 QPAP Compliance Filing at p. 2.

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“the proposal was made so late in the process.” The equally problematic Qwest proposal was proffered even later. Due to these facts and the fact that Qwest was simply supposed to make a compliance filing and not proffer new controversial and non-compliant language, the Commission has appropriately not provided any further briefing schedule related to Qwest’s Compliance Filing.

Accordingly, AT&T, WorldCom, Time Warner Telecom, Electric Lightwave and Covad Communications are merely notifying this Commission that they believe that the Commission should require Qwest to strike its non-compliant language or face a negative recommendation to the FCC. However, if the Commission were contemplating the newly proffered Qwest language, the parties would request that a briefing schedule be established to allow the CLECs to establish to this Commission that the Qwest proffered language is against the public interest as it would essentially deny this Commission’s ability to administer the plan contrary to FCC precedent.

Very truly yours,

Steven H. Weigler
AT&T Communications of the Pacific Northwest, Inc.

Michel Singer Nelson
WorldCom, Inc.

Megan Doberneck
Covad Communications Company

Gregory J. Kopta
Davis Wright Tremaine LLP
Electric Lightwave, Inc. and Time Warner Telecom of Washington