

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 UT-073034

COMMISSION STAFF'S
RESPONSE TO NOTICE OF
OPPORTUNITY TO FILE
COMMENTS

1 Commission Staff submits the following response to the Commission's October 20,
2008, Notice of Opportunity to File Comments.

2 The Commission's Notice seeks comment on three questions concerning the
application of Section 16.3 of Qwest's Performance Assurance Plan in light of the
Commission's decisions in the Qwest Alternative Form of Regulation (AFOR) proceeding
(Docket UT-061625), and in light of the stipulated modifications to the PAP that the
Commission approved in the present docket.

3 Staff responds to the questions in the order in which they are set out in the Notice.

**Question 1: Is there a need to conduct a five and one-half year review proceeding now,
given the fact that the QPAP remains in place for the duration of the AFOR?**

4 Because the PAP is to remain in place for the duration of Qwest's current AFOR,
Staff does not believe there is any basis to conduct a broad proceeding to consider complete
phase-out of the PAP at this time. However, depending on the Commission's interpretation
of its AFOR orders, there may be a current need for a narrow proceeding to decide whether
to retain the sub-measures and payments other than those listed in Attachment 3 to the PAP.

Phase-Out of the PAP as a Whole

5 As originally drafted, the purpose of the so-called five and half year review proceeding described in Section 16.3 of the PAP was for the Commission to decide whether it would be appropriate to phase out the PAP entirely after the plan's six year anniversary (i.e., December 23, 2008).¹

6 However, as a condition of Qwest's AFOR, the Commission required the PAP to remain in effect for the full four-year term of the AFOR (i.e., until December 1, 2011²), unless modified by the Commission.³ Thus, it does not appear that there is any basis to conduct a broad proceeding to determine whether the PAP should be phased-out, at least until the AFOR review that is to occur nine months prior to the end of Qwest's current AFOR. (Indeed, even at that time, Qwest could well decide that it wishes to retain the QPAP as its carrier-to-carrier service quality plan, under RCW 80.36.135(3), for purposes of a new AFOR.)

Phase-Out of the Non-Attachment 3 Sub-Measures

7 Depending on how the Commission interprets the requirements of its AFOR orders, and depending on the response from the affected competitive local exchange carriers, there may nonetheless be a need for a proceeding at that present time to decide whether to retain certain sub-measures past six years.

8 Staff understands Qwest's position to be that certain sub-measures in the PAP will automatically expire at the six year anniversary of the PAP, regardless of whether the Commission conducts a review at this time. Qwest bases its argument on the language in PAP Section 16.3 stating that "[o]nly the sub-measures identified in Attachment 3 and

¹ Please see Staff's response to Question 3, below.

² For the effective date of the AFOR, see Order 14 in UT-061625 (Nov. 30, 2007).

³ UT-061625, Order 08, paragraphs 22, 42.

payments will continue beyond six years of the PAP effective date . . .”. Although the parties to the instant six month review docket did not agree to modify this language in PAP section 16.3, Staff believes that certain language in the Commission’s AFOR orders requires an affirmative showing by Qwest before any of the non-Attachment 3 sub-measures may be eliminated.⁴ Because of this controversy, the Commission should clarify the status of the non-Attachment 3 measures and payments at this time.

9 If the Commission agrees with Qwest’s interpretation that the sub-measures and associated payments other than those listed in Attachment 3 to the PAP will automatically expire on December 23, 2008, and if any CLEC party wishes to advocate for those measures to be preserved, then the Commission should invite any such CLEC to come forward to make the case that phase-out of those measures is not appropriate at this time.

10 Staff has not undertaken any analysis to determine whether the non-Attachment 3 sub-measures are still needed. Several state commissions within the Qwest service area have recently initiated a collaborative review of the various state PAPs. Washington staff will observe but not directly participate in this review. However, the recommendations of the independent consultant currently assisting the various state commissions may be made available to this Commission should it elect to participate in the review at a later time.

Question 2: Should the Commission defer the commencement of a proceeding to take the place of a five and a half year review to the period six months prior to the expiration of Qwest’s AFOR in 2011?

11 Regardless of whether there is a need to conduct a proceeding about retaining the non-Attachment 3 sub-measures and payments, Staff believes it makes sense to defer any formal proceeding concerning phase-out of the PAP *as a whole* until 2011 (or at least until a party presents an alternative wholesale service quality plan that satisfies the requirement of

⁴ Please see Staff’s response to Question 3, below.

the AFOR statute, RCW 80.36.135(3)). As a condition of the AFOR, the Commission required a review to commence nine months before the AFOR's expiration date.⁵

Accordingly, it may make sense for PAP Sec. 16.3 review—if Qwest wishes to initiate such a review—to coincide with the commencement of that AFOR review.

Question 3: What changes will occur on or after December 23, 2008?

12 There does not appear to be any dispute that the PAP and at least those sub-measures and payments listed in Attachment 3 of the PAP (and detailed in the PIDs) will continue beyond the six year anniversary of the plan. In Staff's view, that is why the parties to the recent six-month review agreed to strike the sentence from section 16.3 of the PAP which stated: "The QPAP will expire six years from its effective date." The parties to current six-month review also agreed to insert language in PAP section 1.1 stating that "The PAP shall remain in effect for the full four-year term of the AFOR, unless modified by the Commission."⁶

13 There is an unresolved question, however, about what will happen to the measures and payments not listed in Attachment 3. The question is whether those sub-measures will automatically expire if no party comes forward to make a case for their preservation,⁷ or whether the Commission's AFOR orders put the burden on Qwest to show that eliminating those sub-measures would be consistent with RCW 80.36.135(3) (requiring a plan "for ensuring adequate carrier-to-carrier service quality, including service quality standards or performance measures for interconnection, and appropriate enforcement or remedial

⁵ UT-061625, Order 06, paragraph 115, (July 24, 2007).

⁶ See Qwest's compliance filing dated June 18, 2008, in docket UT-073034.

⁷ There is also a timing question: If the answer is that a party must make a case for preservation of the measures and payments not listed in Attachment 3, and a party comes forward to make that case, but the Commission does not render a decision by December 23, 2008, do the measures and payments expire on that date, with the possibility of being "revived" by a subsequent commission order?

provisions in the event the company fails to meet service quality standards or performance measures”).

Original Intent of Section 16.3

14 When the PAP was drafted, the expectation appears to have been that Qwest would come forward at five and a half years with a case for phasing-out the PAP in its entirety. The ensuing proceeding also would have addressed the disposition of the sub-measures and payments not listed in Attachment 3.⁸

15 In the proceeding in which the PAP was developed, the Commission ordered Qwest to include a six year expiration provision mirroring that of the Colorado PAP.⁹ The Commission was sympathetic to CLEC arguments that the Commission might need to adopt wholesale service quality rules if the PAP were to expire as a result of Qwest exiting the market for interLATA long distance.¹⁰ Thus, in explaining its preference for the Colorado language (which was effectively identical to what became Section 16.3 of the Washington PAP), the Commission explained that “Allowing time after the plan terminates for a review of payments to individual CLECs will allow the Commission time to investigate the need for wholesale service quality rules, if the Commission has not already adopted such rules.”¹¹

16 The Commission also stated its general agreement with the determination of the Colorado Hearing Examiner on the language that became Section 16.3 in the Washington PAP. The Colorado hearing examiner’s determination was as follows:

The [Colorado PAP or “CPAP”] is a temporary mechanism to ensure that Qwest’s performance does not backslide after it is allowed to enter long distance markets.

⁸ PAP Sec. 16.3 states “The review shall focus on ensuring that phase-out of the [Q]PAP is indeed appropriate at that time, and on identifying any submeasures *in addition* that should continue as part of the [Q]PAP.” [Emphasis added.]

⁹ UT-003022, 003040 (consolidated), 30th Supp. Order, paragraph 179 (April 5, 2002).

¹⁰ *Id.* at paragraph 180.

¹¹ UT-003022, 003040 (consolidated), 33rd Supp. Order, paragraph 60 (May 20, 2002).

After the plan has been in full-effect with payments made for six years, the market should have stabilized; there should be available alternatives to Qwest's resale and unbundled access products; and Qwest and CLECs will likely have adopted customized performance agreements. The Commission is optimistic that all of these factors will obviate the need for the CPAP. The six-year review (conducted at 5 ½ years after § 271 approval) will evaluate the appropriateness of complete phase out and set concrete dates and processes by which any remaining facets of the plan will then be eliminated.

Despite this six-year review, this entire plan, with the exception of Tier 1A payments, will sunset by its terms six years after the plan goes into effect. At that time, the Commission may revive this CPAP wholesale, may sunset the entire plan, including Tier 1A payments, or may allow more traditional contract and arbitration remedies to take the CPAP's place.¹²

When Qwest filed its final performance assurance plan in compliance with the Commission's requirements, the Company included as Attachment 3 a list of "Performance Measurements Subject to Continuation Beyond Six-year review." That list was essentially identical to what the Colorado PAP listed as "Tier 1A" payments. The Colorado PAP states that Tier 1A "includes the measures that are most critical and most likely to be relied on most heavily by smaller competitors."¹³

Effect of the AFOR

17 As stated above, the Commission's Orders in the AFOR docket (specifically Order 08) arguably shifted the burden of proof from those advocating retention of the non-Attachment 3 measures to those who would seek to eliminate them (likely Qwest). The Commission's Order 08 in the AFOR docket is perhaps ambiguous on this point and the

¹² Colorado P.U.C. Decision No. R01-997-I, Docket No. 01I-041T, pages 69-70 (Mailed Sept. 26, 2001), available at http://www.dora.state.co.us/PUC/DocketsDecisions/decisions/2001/R01-0997_01I-041T.pdf

¹³ Colorado P.U.C. Decision No. R01-997-I, Attachment A, Section 6.1 (Sept. 26, 2001), available at http://www.dora.state.co.us/puc/DocketsDecisions/decisions/2001/R01-0997A_01I-041T.pdf

parties' stipulation in the present six month review proceeding did not attempt to resolve that ambiguity.

18 When Qwest petitioned the Commission for an alternative form of regulation, the Commission noted that the AFOR statute—RCW 80.36.135(3)¹⁴—requires the company to present a carrier-to-carrier service quality plan as part of its petition. The Company (and Staff, which had reached a settlement with Qwest) believed that the QPAP served this purpose. The Commission disagreed, stating as follows:

The QPAP fails to ensure adequate service quality while the AFOR will be in effect because it expires earlier. The AFOR is approved for a four-year term. The QPAP is scheduled to expire on December 23, 2008. [Citing Qwest Washington SGAT Eighth Revision, Ninth Amended –Exhibit K – November 30, 2004, ¶¶ 13.1, 16.3] By its own terms and conditions, the QPAP cannot provide a carrier-to-carrier service quality plan for the full term of the AFOR. Second, 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 docket UT-073034.] The 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. Finally, the QPAP 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.

Accordingly, we conclude that the QPAP must be modified to fulfill the requirements of RCW 80.36.135(3). Subject to the following conditions, the current provisions of the QPAP, together with other existing measures, should constitute an adequate carrier-to-carrier service quality plan within the meaning of the statute. First, the QPAP must remain in place for the full four-year term of the AFOR, unless modified by the Commission. This condition recognizes the current provisions of the QPAP including the requirement to review the QPAP after five and one-half years to determine whether to modify or terminate the QPAP, remain in effect. [Citing P&P Sec.

¹⁴ An AFOR “. . . must also contain a proposal 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 the company fails to meet service quality standards or performance measures.”

16.3.1 Absent modification, the QPAP will provide carrier-to-carrier service quality standards for the full term of the AFOR.

Second, the QPAP must remain available to all wholesale carriers in its current form unless modified by the Commission. This condition does not preclude Qwest, or any other party, from seeking Commission approval of changes to the QPAP, such as those changes currently under consideration in a separate proceeding. Third, 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.¹⁵

[Emphasis added.] Qwest agreed to these conditions. The underlined language can be read as modifying the terms of the QPAP so that no change to the PAP—including the expiration of the non-Attachment 3 measures provided for Sec. 16.3—may occur without prior approval by the Commission after considering the standards of RCW 80.36.135(3). On the other hand, the order seems to provide that the five and a half year review provision should remain in effect. As noted above, that provision provides for expiration of all but the Attachment 3 sub-measures and payments at six years, albeit with the possibility of reinstating those sub-measures if appropriate.

19 In Staff's view, the better interpretation is that the Attachment 3 sub-measures should not expire unless Qwest can demonstrate that the sub-measures are not needed to meet the requirements of RCW 80.36.135(3). Moreover, when the PAP was drafted, the expectation was that retention of some or all of the non-Attachment 3 sub-measures would have been taken up as part of an overarching analysis of whether "phase-out of the [Q]PAP is indeed appropriate at that time, and on identifying any submeasures in addition that should continue as part of the [Q]PAP."¹⁶ Therefore, it arguably would be inconsistent not only with the Commission's AFOR orders, but also with the original intent of the PAP to

¹⁵ UT-061625, Order 08, paragraphs 21-23 (Sept. 6, 2007).

¹⁶ PAP Sec. 16.3.

allow the non-Attachment 3 sub-measures to expire without the benefit of a comprehensive review of the need to the PAP as a whole. Staff respectfully requests that the Commission clarify its intention on this issue.

20 If the Commission finds the unlisted sub-measures should automatically expire at the six year date, it should at least afford any CLECs to advocate for retention of those sub-measures, as noted above.

DATED this 12th day of November, 2008.

Respectfully submitted,

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