

**BEFORE THE WASHINGTON STATE
UTILITIES AND TRANSPORTATION COMMISSION**

In the Matter of the Petition of)	DOCKET UT-073034
)	
QWEST CORPORATION,)	ORDER 08
)	
For Commission Approval of Stipulation)	FINAL ORDER GRANTING
Regarding Certain Performance Indicator)	PETITION FOR
Definitions and Qwest Performance)	ADMINISTRATIVE REVIEW;
Assurance Plan Provisions.)	GRANTING IN PART AND
)	DENYING IN PART QWEST’S
)	REQUEST TO MODIFY PAP
.....)	

1 **SYNOPSIS:** *The Commission grants Qwest’s petition for administrative review, reversing the Initial Order’s decision to defer two disputed issues to a five and one-half year review proceeding. On the merits, the Commission grants Qwest’s request to modify the Qwest Performance Assurance Plan to provide for one allowable miss before Qwest makes Tier 1 payments on certain benchmarks or standards, and denies the request to modify the trigger for making Tier 2 payments under the Plan.*

SUMMARY

2 **Proceedings.** Qwest Corporation (Qwest or Company) initiated this proceeding by filing a petition to approve a stipulation between itself and three competitive local exchange carriers (CLECs) operating in Washington¹ to modify certain Performance Indicator Definitions (PIDs) as well as certain provisions of the Qwest Performance Assurance Plan (Plan or QPAP). Qwest filed similar petitions before thirteen other state commissions across its service territory.

3 **Appearances.** Lisa A. Anderl, Associate General Counsel, Seattle, Washington, represents Qwest. Ginny Zeller, Associate General Counsel, Minneapolis, Minnesota, represents Integra Telecom of Washington, Inc., (Integra), and Eschelon Telecom,

¹ Eschelon Telecom, Inc., DIECA Communications, Inc. d/b/a Covad Communications Company, and McLeodUSA Telecommunications Services, Inc., joined with Qwest in the stipulation.

Inc., (Eschelon). Gregory J. Kopta, Davis Wright Tremaine LLP, Seattle, Washington, represents Time Warner Telecom of Washington, LLC (Time Warner Telecom), and XO Communications Services, Inc., (XO). Jonathan Thompson, Assistant Attorney General, Olympia, Washington, represents the regulatory staff of the Washington Utilities and Transportation Commission (Commission Staff or Staff).²

4 **Background.** When the Commission approved Qwest’s Performance Assurance Plan in 2002, it explained that the Plan was not just a contract between Qwest and competing carriers, but a means to “assure this Commission, competing carriers, and the [Federal Communications Commission (FCC)] that Qwest will continue to adhere to the requirements of Section 271 after it obtains Section 271 authority.”³ Section 271 requires that Bell-operating companies (BOC) such as Qwest demonstrate, among other items, that their application is “consistent with the public interest, convenience, and necessity.”⁴ The FCC has interpreted this to mean that there is “sufficient assurance that markets will remain open after grant of the application,”⁵ and that, “a BOC would continue to satisfy the requirements of section 271 after entering the long distance market.”⁶ To ensure that Qwest’s performance does not “backslide,” the Plan includes a set of performance measures known as Performance Indicator Definitions (PIDs) and self-executing remedies, *i.e.*, automatic payments, that Qwest must make if it does not meet the performance measures.

5 The PIDs include performance standards for the service Qwest provides to its wholesale customers, including such activities as ordering and provisioning, maintenance and repair. They also include timeframes or intervals, such as

² In formal proceedings such as this, the Commission’s regulatory staff functions as an independent party with the same rights, privileges, and responsibilities as other parties to the proceeding. There is an “ex parte wall” separating the Commissioners, the presiding Administrative Law Judge, and the Commissioners’ policy and accounting advisors from all parties, including regulatory Staff. *RCW 34.05.455*.

³ 39th Supplemental Order, Dockets UT-003022 and UT-003040 (consolidated), ¶ 19 (July 1, 2002).

⁴ 47 U.S.C. §271(d)(3)(C).

⁵ *In the Matter of Application of Bell Atlantic New York for Authorization Under Section 271 of the Communications Act To Provide In-Region, InterLATA Service in the State of New York*, Memorandum Opinion and Order, CC Docket No. 99-295, FCC 99-404, ¶ 423 (rel. Dec. 22, 1999) (*Bell Atlantic New York Order*).

⁶ *Id.*, ¶ 429.

completion within a number of hours or days, benchmarks, *i.e.*, 95 percent complete within a certain time period, and parity measures, such that Qwest's performance in providing service to competitors must be the same as in providing its own retail services.

6 The Plan includes two types of automatic payments, known as Tier 1 and Tier 2 payments. Tier 1 payments are those made to individual CLECs when Qwest does not meet the performance standards for PIDs critical to a CLEC's ability to compete. Tier 2 payments are made to state commissions when Qwest does not meet standards that are evaluated on a regional basis or for services that are critical for competition, generally.

7 **Procedural History.** Qwest filed with the Commission on June 26, 2007, a petition to modify the PAP along with a proposed stipulation (2007 Stipulation). A prehearing conference was convened in Olympia, Washington, before Administrative Law Judge Ann E. Rendahl on August 21, 2007. Integra, Time Warner and XO were granted intervention at the conference. A procedural schedule for considering the petition was established in the prehearing conference order, Order 02.

8 On October 25, 2007, the presiding Administrative Law Judge, Adam E. Torem, granted Qwest's motion to convert the proceeding to a six-month review under the Plan and vacate the existing procedural schedule.

9 On November 19, 2007, Judge Torem issued Order 05 , setting deadlines for the parties to submit a disputed issues list, conduct settlement negotiations, and file two rounds of responsive comments on those issues.

10 On April 2, 2008, the parties filed a proposed Partial Settlement of Disputed Issues (2008 Partial Settlement) and narrative in support thereof, requesting Commission approval. Of the original list of 17 issues, two remained unresolved: (1) adding a "one allowable miss" provision to the PAP and (2) changing the monthly trigger for Tier 2 payments under the PAP.

11 Also on April 2, 2008, Qwest and Staff filed their initial comments on the two remaining disputed issues. The parties filed responsive comments on April 26, 2008.

- 12 Judge Torem entered an initial order, Order 06, on May 23, 2008, approving and adopting the Partial Settlement.⁷ On June 5, 2008, Judge Torem entered a second initial order, Order 07, denying Qwest's petition to modify the PAP, and recommending the two disputed issues be deferred to the five and one-half year review identified in the Plan.
- 13 Qwest filed a petition for administrative review of Order 07 on June 24, 2008. Staff answered Qwest's petition on July 7, 2008.
- 14 **Initial Order.** The Initial Order denied Qwest's request to modify the PAP, recommending that the Commission defer the two remaining disputed issues to a five and one-half year review proceeding. The Order found that the PAP does not envision that fundamental changes to the Plan would be made in a six-month review proceeding. Further, it found that before modifying the Plan, the Commission must consider recent orders in the Qwest Alternate Form of Regulation (AFOR) proceeding in Docket UT-061625, in which the Commission adopted the PAP as Qwest's wholesale carrier-to-carrier service quality plan.
- 15 **Commission Order.** In this Order, the Commission reverses the Initial Order's decision to defer consideration of the two disputed issues to a five and one-half year review proceeding, resolves the disputed issues, and finds it appropriate, after considering the standards under the AFOR statute, to grant Qwest's request to modify the PAP to add a "one allowable miss" provision. The Commission denies Qwest's request to alter the trigger for Qwest to make Tier 2 payments, finding the change inconsistent with the purpose of the Plan under Section 271 and the AFOR statute, which in part, is to ensure Qwest continues to provide quality service to its competitors. Meaningful and significant incentives to meet performance standards, remain necessary to assure Qwest's performance under the PAP.

MEMORANDUM

- 16 Qwest seeks review of the Initial Order, challenging its conclusions that the disputed issues are not appropriately considered in a six-month review proceeding and that the

⁷ No party sought administrative review of Order 06, and the order became final by operation of law on June 13, 2008. *See* Notice of Finality, Docket UT-073034, served June 13, 2008.

2008 Partial Stipulation and subsequent pleadings do not address adequately the impact of the proposed changes on AFOR requirements. Qwest requests that the Commission address the disputed issues on the merits, and grant its requests to modify the Plan.

17 Staff supports Qwest’s petition for review, and requests the Commission not defer a decision on the disputed issues to a five and one-half year review proceeding. While Staff agrees the Commission should decide the issues on the merits, Staff argues the Commission should deny Qwest’s requests to modify the Plan to include a “one allowable miss” provision and to change the trigger for Qwest to make Tier 2 payments.

A. The Initial Order Erred in Deferring Consideration of the Two Disputed Issues

18 We agree with Qwest and Staff that the Initial Order erred in deferring consideration of the two disputed issues to a five and one-half year review proceeding. As we discuss below, the Commission is not precluded from considering the merits of the disputed modifications in the PAP’s six-month review process. We also reject the Initial Order’s conclusions that the parties’ pleadings did not sufficiently address whether the proposed modifications met the standards for a carrier-to-carrier service quality plan under the AFOR statute.

1. The Scope of the PAP’s Six-Month Review Process is Not a Sufficient Basis for Deferring Consideration of the Proposed Changes to the Plan.

19 The PAP describes a number of ways to review or modify its provisions, including a review every six months, every two years, and five and one-half years after its effective date.⁸ Section 16.1 of the PAP describes the six-month review process:

Every six (6) months, beginning six months after the effective date of Section 271 approval by the FCC for the state of Washington, Qwest, CLECs, and the Commission shall participate in a review of the performance measurements to determine whether measurements should

⁸ See QPAP, § 16.

be added, deleted, or modified; whether the applicable benchmark standards should be modified or replaced by parity standards; and whether to move a classification of a measurement to High, Medium, or Low or Tier 1 to Tier 2. Criteria for review of performance measurements, other than for possible reclassification, shall be whether there exists an omission or failure to capture intended performance, and whether there is duplication of another measurement. . . . Parties 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.

- 20 The Initial Order determined that the six-month review process was intended to consider “fine tuning the performance metrics in the Plan,” but not “more important or consequential changes without some reasonable or compelling showing of urgency.”⁹ Finding no urgency existed, the Order concluded that the two disputed provisions did not fall within the limited scope of a six-month review process and that the Commission should defer a decision on the proposed changes to the five and one-half year review process envisioned in the Plan.¹⁰
- 21 Qwest and Staff argue that the parties chose the six-month review process as a vehicle to broaden the scope of possible modifications to the Plan beyond those in the original petition and stipulation.¹¹ Qwest asserts that no party objected to broadening the scope of the proceeding and the presiding officer granted Qwest’s motion to convert the proceeding to a six-month review without limiting the scope of the proceeding.¹² In addition, Qwest and Staff assert that the Commission considered and approved in this proceeding undisputed modifications in the 2008 Partial Settlement that also technically exceed the scope of Section 16.1 of the Plan.¹³
- 22 Staff claims that the Commission may modify the PAP at any time, citing Section 16.1.2: “[N]othing in this QPAP precludes the Commission from modifying the QPAP based upon its independent state law authority, subject to judicial challenge.”¹⁴

⁹ Initial Order, ¶ 11, citing 30th Supplemental Order, Dockets UT-003022 and UT-003040 (consolidated) ¶¶ 147, 318 (April 5, 2002).

¹⁰ Initial Order, ¶¶ 12-13, 17, 20-21.

¹¹ Qwest Petition, ¶¶ 5-7; Staff Answer, ¶ 6.

¹² Qwest Petition, ¶ 6.

¹³ Qwest Petition, ¶¶ 8-11; Staff Answer, ¶ 6.

¹⁴ Staff Answer, ¶ 4.

In addition, Staff asserts that the Commission may modify requirements in its orders under RCW 80.04.200.¹⁵

23 Staff also argues that no party would be prejudiced by a decision on the merits, as all CLECs operating in Washington state were notified of the proceeding, and had an opportunity submit comments on the proposed changes to the Plan.¹⁶ Lastly, Staff asserts that deferring a decision on the merits would frustrate judicial economy.¹⁷

24 **Decision.** We concur with Qwest and Staff that the Initial Order erred in deferring consideration of the disputed issues, even though the proceeding was converted to a six-month review proceeding under Section 16.1 of the Plan, and Section 16.1 limits the scope of such a proceeding. No party objected to the scope of the issues to be addressed, and the presiding officer granted Qwest’s motion to convert the proceeding, recognizing the expanded scope of the issues.¹⁸ We agree that deferring the decision does not promote judicial economy, and results in increased expense and delay for all parties and the Commission.

25 As Staff notes, the Commission has independent state law authority to address the performance issues addressed in the PAP. The Commission asserted this authority during the Section 271 proceedings giving rise to the Plan, stating it “has authority under state law and the Telecommunications Act to require Qwest to act if its performance results in service that is unfair, unreasonable or would stifle competition in the state.”¹⁹ The Commission recently applied its state law authority in the AFOR proceeding and approved the use of the PAP as Qwest’s carrier-to-carrier service quality plan. As we have the authority to designate the PAP as Qwest’s carrier-to-carrier service quality plan, we have the authority to modify it.

¹⁵ *Id.*

¹⁶ *Id.*, ¶ 8.

¹⁷ *Id.*, ¶ 9. We note that Staff did recommend in its initial comments that the disputed provisions should be deferred to a more comprehensive review proceeding, such as a five and one-half review proceeding, asserting that the changes do not meet the “highly exigent” standard of the six-month review process. Staff April 2, 2008, Comments, ¶ 16. Staff’s new position on the issue changed on July 7, 2008, when it filed its answer to Qwest’s petition for review.

¹⁸ See Order 05 in this docket, a prehearing conference order allowing an expanded scope of the proceeding in a six-month review proceeding (Nov. 19, 2007).

¹⁹ 30th Supplemental Order, Dockets UT-003022 and UT-003040 (consolidated) ¶ 37, citing RCW 80.04.110 and RCW 80.36.300.

26 It is clear that we may exercise our statutory authority under the AFOR statute as well as under RCW 80.04.110 and RCW 80.04.300 to address Qwest's performance under the PAP. Given that the presiding officer approved the scope of the issues to be considered in the proceeding and no party would be prejudiced by addressing the issues on the merits, we find it appropriate to address them here.

27 Finally, we address Staff's argument that the Commission may exercise its authority under RCW 80.04.200 to modify its prior orders concerning the PAP, and expand the scope of a six-month review of the Plan. Qwest disputes that it is necessary to amend the Commission's prior orders to consider the disputed issues in this proceeding. We agree. As the parties note, the Commission did not hold regular six-month reviews, and no party requested a biennial review under the Plan. The PAP envisions review and modification of the Plan as necessary to conform it with conditions existing in telecommunication's competitive and dynamic marketplace.

2. The Parties' Pleadings Sufficiently Address the Standards in the AFOR Statute.

28 In order for the Commission to approve a telecommunications company's plan for an alternative form of regulation, the company must include in its plan a "proposal for ensuring adequate carrier-to-carrier service quality."²⁰ The AFOR statute requires that plan to include "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."²¹ We recently approved Qwest's AFOR Plan, adopting the PAP as the statutorily required carrier-to-carrier service quality plan.²² The Initial Order found the Commission must consider the standards in the AFOR statute – RCW 80.36.135(3) – prior to considering the proposed modifications to the Plan²³ and deferred consideration of the

²⁰ RCW 80.36.135(3).

²¹ *Id.*

²² *In re Qwest Corporation's Petition for an Alternative Form of Regulation Pursuant to RCW 80.36.135*, Docket UT-061625, Order 09, Order Accepting, Subject to Conditions, AFOR Carrier-to-Carrier Service Quality Plan and Granting Motion to File Reply to Comments (September 6, 2007).

²³ Initial Order, ¶ 24.

two disputed issues, finding the parties' pleadings did not sufficiently address the impact of the changes on the AFOR requirements.²⁴

29 Qwest asserts that our AFOR orders did not preclude it from seeking changes to the Plan, and recognized that Qwest's request to modify the Plan was pending.²⁵ Staff argues that the AFOR statute imposes a high burden on Qwest to show that the proposed modifications are appropriate, but that is not a reason to defer a decision on the merits.²⁶ Further, Qwest and Staff claim that the parties carefully considered the proposed changes to the Plan in the context of the AFOR orders and statutory requirements.²⁷

30 **Decision.** We agree that the need to apply the standards in the AFOR statute is not, by itself, a sufficient reason to defer consideration of the disputed issues to a future proceeding.

31 Further, after reviewing the parties' pleadings, we find the parties addressed sufficiently the statutory standards for a carrier-to-carrier service quality plan to allow us to address the merits of the disputed issues in this proceeding. While not specifically addressing the AFOR standards in its initial comments, Qwest argued that the proposed changes would provide adequate performance measures, as well as remedial provisions in the event the Company did not meet them.²⁸ Staff specifically identified the AFOR standards, arguing that Qwest had not met them and that the Commission should not modify the Plan.²⁹ In response, Qwest disputed that the AFOR standards are more stringent than those identified in the Plan, but argued that the proposed revisions provide adequate performance measures and remedies.³⁰ The parties have fully briefed the issues, as well as the standards we must apply in resolving the issues.

²⁴ *Id.*, ¶ 25.

²⁵ Qwest Petition for Review, ¶ 13.

²⁶ Staff Answer, ¶ 9.

²⁷ Qwest Petition, ¶ 14; Staff Answer, ¶ 9.

²⁸ Qwest April 2, 2008, Comments, ¶¶ 5-25.

²⁹ Staff April 2, 2008, Comments, ¶¶ 17-25, 28-29.

³⁰ Qwest April 25, 2008 Comments, ¶¶ 5, 7-19.

32 Thus, we find the issues are ripe for decision and that the Initial Order erred in deferring consideration of the two disputed issues to a future review proceeding. We reverse the Initial Order and address the disputed issues on the merits.

B. The Disputed Proposals to Modify the PAP

33 The overarching issue presented by the two disputed proposals is whether they are consistent with the original goals of the Plan and the statutory requirements of the AFOR. The purpose of the PAP approved in 2002, was to ensure the maintenance and further development of a competitive environment within Qwest's service territory. To ensure that Qwest would not backslide in providing quality service to its competitors, we created significant financial incentives for Qwest to meet its performance standards. The requirements of RCW 80.36.135(3) are consistent with the goals set forth in the PAP.

34 Qwest and Staff both note that the majority of the changes contained in the 2007 Stipulation would reduce Qwest's potential liability for failing to meet the Plan's performance standards.³¹ The parties differ, however, in how they perceive the effect of the two disputed proposals on Qwest's potential liability.

35 Qwest argues that the proposals are balanced and reasonable, especially when considered in the context of other changes agreed to in the 2007 Stipulation. Qwest argues that Staff has selectively identified two of the stipulated provisions without considering the benefit of the agreement to all sides and the compromises made.³²

36 Staff objects to the two disputed issues, asserting that Qwest and the stipulating parties have not met their burden to show a compelling reason why the changes are consistent with prior orders and the AFOR statute.³³ Specifically, Staff claims that Qwest must demonstrate that the proposed changes will ensure "adequate carrier-to-carrier service quality ... and appropriate enforcement or remedial provisions in the event a company fails to meet ... performance measures."³⁴

³¹ Staff April 25, 2008, Comments, ¶ 6; Qwest April 2, 2008, Comments, ¶ 12.

³² Qwest April 25, 2008, Comments, ¶ 6.

³³ Staff April 2, 2008, Comments, ¶ 12.

³⁴ *Id.*, ¶ 25, quoting RCW 80.36.135(3).

37 Staff asserts that reducing Qwest’s potential liability reduces its incentive to provide good wholesale service quality, and claims that the two disputed provisions would result in the largest reductions in potential liability of all the proposals in the 2007 Stipulation.³⁵

38 While Qwest argues that it has paid significant amounts despite its high performance,³⁶ Staff counters that there is no way to objectively measure “high performance” under the Plan, as the Plan is designed to require Qwest to make payments when it fails to meet the established standards.³⁷

39 We consider the disputed provisions with these concerns in mind.

1. One Allowable Miss.

40 The disputed “one allowable miss” provision was included in the 2007 Stipulation. The settling parties proposed to modify the PAP to include the following language:

Where applicable elsewhere in the PAP, this provision modifies other provisions and operates as follows: For any Tier 1 or Tier 2 benchmark or non-interval parity performance sub-measure, Qwest shall apply one allowable miss to a sub-measure disaggregation that otherwise would require 100% performance before the performance is considered as non-conforming to standard (1) if at the CLEC-aggregate level, the performance standard is met or (2) where the CLEC-aggregate performance must be 100% to meet the standard, the CLEC-aggregate performance is conforming after applying one allowable miss at that level.³⁸

41 The proposal would not change the PIDs themselves, but modify how the PAP would determine whether Qwest has met certain benchmark and non-interval parity performance measures. The settling parties described the proposed change as one that would:

³⁵ *Id.*, ¶¶ 26, 28.

³⁶ Qwest April 2, 2008, Comments, ¶ 12.

³⁷ Staff April 25, 2008, Comments, ¶ 3.

³⁸ See ¶ 3.1.2 of Exhibit 2 to Petition for Commission Approval of Stipulation Regarding Certain Performance Indicator Definitions and Qwest Performance Assurance Plan Provisions (June 26, 2007).

[A]dd a one allowable miss provision for benchmark and non-interval parity measurements where 100% performance would otherwise be required to meet the standard in cases where the CLEC aggregate results have met the standard. The one allowable miss provision will also apply if the CLEC aggregate results have not met the standard, but would require 100% performance to meet the standard and with one allowable miss at the CLEC aggregate level would result in CLEC aggregate results meeting the standard.³⁹

- 42 Qwest asserts that the proposed provision will modify the PAP “to eliminate the unreasonable performance standard of ‘perfection’ as the only way to avoid a PAP payment.”⁴⁰ Qwest states that under the current Plan, if an individual CLEC’s monthly volume is low enough for a certain measure, it can only meet the performance standard through perfect performance for that month. Under the proposed change, Qwest must meet a performance standard at the aggregate level (evaluating performance for all CLECs) before applying the one allowable miss provision at the individual CLEC level.⁴¹ Qwest asserts that requiring its overall performance to meet the standard ensures there is still an incentive for good performance, but does not penalize Qwest for failing to perform perfectly on a CLEC-by-CLEC basis.⁴²
- 43 Qwest claims the proposal is a “balanced and reasonable modification” that corrects an unanticipated flaw in the existing PAP, but ensures adequate incentive for Qwest to continue its high level of performance.⁴³ Qwest asserts that nine other states, including Colorado and Minnesota, have approved or allowed this change to their state PAP.⁴⁴
- 44 Staff claims its analysis shows that the proposed provision would have reduced payments to 24 of 27 CLECs, and reduced Qwest’s payments by 19 percent over the last year.⁴⁵ Staff also claims that a provision of the existing Plan, Section 2.4, already addresses the issue of performance misses due to low volume of CLEC activity. Staff

³⁹ 2007 Stipulation, ¶¶ 24, 25.

⁴⁰ Qwest April 2, 2008, Comments, ¶ 5.

⁴¹ *Id.*, ¶ 6.

⁴² *Id.*

⁴³ *Id.*, ¶ 7, 13.

⁴⁴ *Id.*, ¶ 12.

argues that further modifying the PAP to address performance with low volumes “undermines the careful design of the PAP.”⁴⁶

45 In response, Qwest argues that Staff’s primary objection is that the proposal would reduce Qwest’s potential liability under the Plan and affect a large number of CLECs.⁴⁷ Qwest asserts that reducing payments is not a reason to reject the proposal, as the reduction in payments is based on Qwest’s continued good performance, and thus continues Qwest’s incentive to provide quality service.⁴⁸ Qwest asserts that it paid CLECs nearly \$30,000 for failing to meet certain standards 100 percent of the time between July 2006 and June 2007.⁴⁹ Had the provision been in place during that time, one third of possible CLEC monthly payments would have been affected – about 100 – with the average reduction less than \$300 per CLEC.⁵⁰ Qwest asserts the proposed provision promotes better performance by establishing a high, but attainable standard.⁵¹

46 Finally, Qwest argues that Section 2.4 of the existing Plan recognizes the problem of meeting performance standards with low volume activity, but distorts the problem by aggregating multiple months of performance.⁵² Qwest notes that the Commission has previously modified standards that require perfection, approving Qwest’s proposed change to the retail Service Quality Performance Plan.⁵³

47 Eschelon – one of the settling parties – disagrees with some of Qwest’s and Staff’s arguments, but supports including the “one allowable miss” provision as a part of the overall stipulation to modify the Plan. Eschelon disagrees with Qwest’s assertion that perfection is an unreasonable standard, arguing that perfection is a commonly accepted performance standard.⁵⁴ Eschelon acknowledges that the effect of the proposed provision is to reduce Qwest’s potential liability for non-performance, but

⁴⁵ Staff April 2, 2008, Comments, ¶ 30.

⁴⁶ *Id.*, ¶ 31.

⁴⁷ Qwest April 25, 2008, Comments, ¶ 7.

⁴⁸ *Id.*, ¶ 1.

⁴⁹ *Id.*, ¶¶ 8-9.

⁵⁰ *Id.*, ¶ 11.

⁵¹ *Id.*, ¶ 7.

⁵² *Id.*, ¶¶ 8-11.

⁵³ *Id.*, ¶ 12.

⁵⁴ Eschelon April 25, 2008, Comments, ¶ 5.

argues that a reduction in potential liability does not necessarily translate into a reduction in Qwest's performance.⁵⁵ Eschelon asserts that incentives should be aligned with performance.⁵⁶

48 **Decision.** We grant Qwest's request to modify the PAP to include the proposed "one allowable miss" provision. Qwest has met its burden to show that the proposed provision meets the standard under RCW 80.36.135(3) as "appropriate enforcement or remedial provisions." Although we recognize that the result of modifying the Plan to include this provision will be a reduction in Qwest's potential liability, we do not find that it will result in a significant impact on Qwest's incentive to perform. Qwest must still meet its performance standards on an aggregate level each month in order to take advantage of the "one allowable miss" provision. The parties most affected by this provision, the CLECs, do not oppose this provision, and the stipulating parties – including Eschelon – support it.

49 In addition, the existing Plan included a provision, Section 2.4, to address the issue of meeting performance measures when there are low volumes of activity. The proposed "one allowable miss" provision further addresses that issue in a way that is more appropriate. Performance data will be addressed on a monthly basis, rather than aggregating months of data and distorting the results of performance in a given month.

50 Although we recognize Staff's concern that reducing Qwest's potential liability under this provision might also reduce the company's incentive to perform, we find, on balance, that the "one allowable miss" provision is an acceptable way to address the issue of performance and low volume activity. We support the parties' informal efforts to resolve disputes and will approve settlements when doing so is lawful, consistent with the public interest and supported by the evidence.⁵⁷ We find the parties stipulation to include the "one allowable miss" provision meets this standard, and find no reason to disturb the stipulating parties' agreement on this provision.

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ WAC 480-07-700.

2. Trigger for Tier 2 Payments

51 The other disputed provision – the Tier 2 trigger proposal - would modify when Qwest must make certain Tier 2 payments. The existing Plan requires that Qwest make Tier 2 payments monthly if the Company fails to meet performance measures associated with Tier 2 payments. The proposal would adopt a provision to require that Tier 2 payments be made only after Qwest fails to meet those performance standards after three consecutive months.⁵⁸ Qwest still must pay monthly, however, for failing to meet standards that require only Tier 2 payments.⁵⁹

52 The parties propose to modify Section 7.3 of the PAP as follows:⁶⁰

Determination of the Amount of Payment: Except as provided in section 7.4, Tier 2 payments are calculated and paid monthly based on the number of performance measurements failing performance standards for a third consecutive month, if two out of three consecutive months in the 12 month period have been missed, the second consecutive month for Tier 2 measurements with Tier 1 counterparts and one month for Tiers [sic] 2 measurements that do not have Tier 1 counterparts. ~~exceeding the critical z-value, identified in section 7.2, in any single month.~~ Payment will be made on either a per occurrence or per measurement basis, whichever is applicable to the performance measurement, using the dollar amounts specified in Table 4 5 or Table 5 6 below. Except as provided in section 7.4, the dollar amounts vary depending upon whether the performance measurement is designated High, Medium, or Low.

53 Qwest explains that certain performance measures are subject to Tier 2 measures because the performance results are only available on a regional basis, or the measures are assigned Tier 2 payments because of their importance to all CLECs' ability to compete.⁶¹ Those performance measures that are important for CLEC competition are also subject to Tier 1 payments. Qwest notes that the two-tiered

⁵⁸ 2007 Stipulation, ¶¶ 31, 32. If Qwest has failed to meet performance standards in any three consecutive months in a 12 month period, Qwest must make Tier 2 payments after two consecutive months of misses for those measures that require both Tier 1 and Tier 2 payments.

⁵⁹ *Id.*

⁶⁰ The parties also propose to modify Section 9 of the Plan. The changes to this section delineate how the changes in Section 7.3 will be implemented for each type of Tier 2 payment.

⁶¹ Qwest April 2, 2008, Comments, ¶ 14.

payment system was designed to ensure adequate incentive for good performance while preventing a financial windfall to individual CLECs.⁶²

54 Qwest asserts that the proposed change would eliminate payments for isolated monthly misses and address ongoing performance issues by reducing the payment trigger whenever there are two misses in three months.⁶³ Qwest states that the proposed change would not apply to those measures subject only to Tier 2 payments, i.e., those measures available only on a regional basis.⁶⁴ Tier 2 payments for failure to meet such measures would still be made on a monthly basis. Qwest explains that almost all of the measures affected by the proposed change are subject to both Tier 1 and Tier 2 payments, with individual CLECs receiving monthly Tier 1 payments if Qwest does not meet the standard.⁶⁵ Qwest asserts that the proposed change continues to provide appropriate sanctions for individual monthly misses, and allows Qwest to focus on improving performance where there is a continuing problem, not an isolated miss.⁶⁶

55 Staff opposes the proposed change in the Tier 2 payment trigger. Staff does not believe the proposal is consistent with the original goals of the Plan or the standard in the AFOR statute, as it reduces Qwest's incentive to perform.⁶⁷ Staff asserts that the Commission rejected a similar multiple-month trigger in approving the original PAP, finding that "a plan that allows Qwest to miss significant performance measures one-third of the time without consequence does not fall within the FCC's zone of reasonableness, as the plan does not create a meaningful and significant incentive to comply. Nor would the plan adequately detect and sanction poor performance when

⁶² *Id.*

⁶³ *Id.*, ¶ 17.

⁶⁴ *Id.*, ¶ 16.

⁶⁵ *Id.* Qwest notes that certain measures are subject to the reinstatement/removal provision approved in the 2008 Partial Settlement. Under this provision, "[A]ll parties agreed that the relevant PIDs had generated very few payments in the past and, because they were not effectively impacting customers, should be removed from the PAP, subject to a reinstatement/removal process. In sum, Qwest's obligation to report its performance on those measures and track avoided payments will continue and, if Qwest falls below set performance standards for these PIDs, they will be reinstated with retroactive payments due for the most recent three months that triggered their reinstatement." See Order 06, Docket UT-073034, ¶ 16 (May 23, 2008).

⁶⁶ Qwest April 2, 2008, Comments, ¶ 25.

⁶⁷ Staff April 2, 2008, Comments, ¶ 39; Staff April 25, 2008, Comments, ¶ 18.

it occurs.”⁶⁸ Staff notes that the Commission reached its decision based on the analysis of an outside facilitator who relied on a full year of performance data provided by Qwest.⁶⁹

- 56 Staff claims that the proposed change will result in a significant reduction in Tier 2 payments - about 56 percent.⁷⁰ Staff reviewed the information supporting Qwest’s proposal, a spreadsheet aggregating all performance results by major category for 12 of the 14 states. Staff raises a concern that the aggregated data may mask serious problems, preferring a state-by-state analysis, and that the data does not include information from Colorado and Minnesota, states closest in size to Washington.⁷¹
- 57 In response, Qwest asserts that Staff opposes the proposal because of its financial impact and concern it will reduce Qwest’s incentive to perform, not because of the merits of the proposal.⁷² Qwest agrees that the FCC stated that the “liability at risk in the plan” was an important component in its approval of the PAP, but notes that the FCC was approving plans that both did and did not include a single month trigger. Qwest argues that “total liability at risk” applies to the whole plan, not just the trigger for Tier 2 payments.⁷³
- 58 Qwest asserts that the Commission’s original decision to reject a multiple-month trigger was made in isolation without a proven track record on which to rely. Qwest asserts that its performance record in Washington and five other states supports modifying the Tier 2 trigger.⁷⁴ Qwest argues that there is no “demonstrable difference” in performance between states with a single-month trigger and those with a multiple-month trigger.⁷⁵ Qwest also claims that performance results from the evaluation period show that 85 percent of misses were isolated, with no pattern of missed performance, resulting in payments of over \$72,000, in addition to Tier 1

⁶⁸ Staff April 2, 2008 Comments, ¶ 33, quoting 33rd Supplemental Order, Dockets UT-003022 and UT-003040 (consolidated), ¶ 102 (May 20, 2002).

⁶⁹ Staff April 25, 2008, Comments, ¶ 16.

⁷⁰ Staff April 2, 2008, Comments, ¶ 39; *see also* ¶ 35.

⁷¹ Staff April 2, 2008, Comments, ¶¶ 37-38; *see also* Staff April 25, 2008, Comments, ¶ 17.

⁷² Qwest April 2, 2008, Comments, ¶ 18; *see also* Qwest April 25, 2008, Comments, ¶ 14.

⁷³ Qwest April 25, 2008, Comments, ¶ 19.

⁷⁴ Qwest April 2, 2008, Comments, ¶ 19.

⁷⁵ *Id.*, ¶¶ 21-22.

payments.⁷⁶ Qwest asserts that such payments do not add incentive, but are merely punitive.⁷⁷

59 In response to Staff's argument that changes to the Tier 2 trigger should consider performance in Colorado and Minnesota, states similar to Washington, Qwest asserts that the comparison is not appropriate. Qwest states that none of the measures to which the proposed change applies is subject to Tier 2 payments in Colorado and Minnesota.⁷⁸ Qwest claims that its performance was better during the three 12 month periods the Plan has been in effect under the Arizona multiple-month Tier 2 trigger, which is less stringent than that proposed in this docket, than in Washington.⁷⁹

60 Qwest argues that measures subject only to Tier 2 payments would not be affected by the change and would continue to provide a means to detect and sanction poor performance.⁸⁰ Qwest states that 16 of the 18 measures impacted by the change would continue to be subject to Tier 1 payments based on monthly performance, creating a meaningful and significant incentive for Qwest to meet standards.⁸¹

61 **Decision.** We deny Qwest's request to modify the trigger for Tier 2 payments. Qwest bears the burden to show that any proposed change to the PAP is consistent with the overarching goals of the Plan and requirements of the AFOR statute. Under the FCC's zone of reasonableness test for Section 271 relief, Qwest must show that the proposal creates a significant financial incentive for Qwest to meet performance standards, aimed at ensuring that it will not backslide in providing quality service to its competitors, and will maintain a competitive environment. Additionally, under RCW 80.36.135(3), Qwest must show that its proposal will ensure adequate carrier-to-carrier service quality through service quality or performance measures and appropriate enforcement or remedial provisions in the event the Company fails to meet performance measures. Thus, over the past decade, both the FCC and the Washington Legislature have embraced and adopted requirements to maintain adequate wholesale service quality performance by Qwest.

⁷⁶ *Id.*, ¶¶ 23-24.

⁷⁷ *Id.*, ¶ 24.

⁷⁸ Qwest April 25, 2008, Comments, ¶ 16.

⁷⁹ *Id.*, ¶¶ 17-18.

⁸⁰ Qwest April 2, 2008, Comments, ¶ 20.

⁸¹ *Id.*, ¶¶ 20-21.

- 62 We find that Qwest has not met its burden to show that the proposed change will result in “appropriate enforcement or remedial provisions.” Both parties agree that there would be a significant reduction in potential payments as a result of the proposed change. Qwest argues that it will continue to have incentives to perform if we change the Tier 2 payment trigger, because it will continue to make Tier 1 payments on a monthly basis for these measures. However, we are concerned that if combined with our decision to grant Qwest’s proposal for “one allowable miss” applicable to Tier 1 payments, the net effect would unreasonably reduce Qwest’s incentive to perform, contrary to the intent of the PAP and the AFOR statute.
- 63 Although Qwest disputes that limiting its potential liability would reduce its incentive to perform, the only remedies under the Plan for failure to perform are the Tier 1 and 2 payments. The PAP exists to ensure Qwest continues to provide quality service to its competitors through self-executing payments, to which Qwest agreed in 2002 as a means to obtain approval from the FCC to provide long distance service. Qwest has now also agreed that the PAP will serve as its carrier-to carrier service quality plan as a means to implement an alternative form of regulation. Although we did not preclude Qwest from seeking to alter the PAP in our AFOR orders, we do not find this aspect of Qwest’s proposal appropriate at this time.
- 64 We note that a review of Qwest’s Tier 2 payments over the past few years shows that payments have declined gradually, apparently as result of improved service quality. This suggests strongly that the current Plan reasonably provides the proper incentive to maintain or improve wholesale service quality as intended by the PAP and the AFOR statute. We are reluctant to reduce significantly the financial incentive to maintain adequate wholesale service quality so early in the life of Qwest’s AFOR plan, particularly when there is evidence that current plan is working as originally intended.
- 65 Although several CLECs joined with Qwest in proposing the changes to the PAP these CLECs can only represent their individual interests in promoting changes to the Plan. Ultimately, only Staff and the Commission are responsible for looking after the interests of competition in the industry as a whole. The Tier 2 payments exist to provide an “added” or “back-stop” incentive for Qwest to meet performance goals that are important to all competitors or competition as a whole, not only those CLECs

opting to participate in a negotiated settlement submitted to address a range of wholesale service quality performance issues.

66 The aggregated data Qwest provides to support its proposal show that its performance is similar both with and without the multiple-month trigger. We understand that other states have adopted the multiple-month trigger, and that Colorado and Minnesota do not require such a provision. We do not know, however, if Qwest has agreed in other states to make the PAP a part of its service quality obligations or plan under an AFOR. That is the circumstance here and for the reasons previously stated we are not persuaded to change the PAP in this regard at a relatively early point under the AFOR.

67 We deny Qwest's request to modify the Tier 2 payment trigger, finding it has not met its burden to demonstrate the proposal is consistent with the public interest. We are concerned that the proposed change, in context with all of the other changes Qwest has proposed to the Plan, would reduce Qwest's incentive to perform. Qwest's continued good performance is necessary for competition in the state and to ensure the success of the AFOR.

FINDINGS OF FACT

68 Having discussed above in detail the evidence received in this proceeding concerning all material matters, and having stated findings and conclusions upon issues in dispute among the parties and the reasons therefore, the Commission now makes and enters the following summary of those facts, incorporating by reference pertinent portions of the preceding detailed findings:

69 (1) The Washington Utilities and Transportation Commission is an agency of the State of Washington, vested by statute with authority to regulate the rates, rules, regulations, practices, and accounts of public service companies, including telecommunications companies.

70 (2) Qwest Corporation (Qwest) is a "public service company" and a "telecommunications company," as those terms are defined in RCW 80.04.010 and as those terms otherwise are used in Title 80 RCW. Qwest is engaged in

Washington state in the business of supplying telecommunications service for hire, sale, or resale to the general public for compensation.

- 71 (3) The Commission approved Qwest's Performance Assurance Plan (PAP or Plan) in 2002 in a proceeding to consider whether the FCC should grant Qwest authority to provide long distance service under Section 271 of the federal Telecommunications Act of 1996.
- 72 (4) The Commission recently approved Qwest's plan for an alternative form of regulation (AFOR) under RCW 80.36.135(3), adopting the PAP as Qwest's statutorily required carrier-to-carrier service quality plan.
- 73 (5) Section 16.1 of the PAP limits a six-month review proceeding to whether performance measures should be added, deleted or modified, whether certain performance standards should be modified or whether measures should be reclassified for payment. More fundamental changes must be deferred to a biennial review unless they are highly exigent.
- 74 (6) The Commission has not held regular six-month reviews or a biennial review under the Plan.
- 75 (7) No party objected to converting this proceeding to a six-month review or the scope of the issues to be considered, and the presiding administrative law judge granted Qwest's motion to convert the proceeding, understanding the scope of the issues to be addressed.
- 76 (8) The Initial Order found the two disputed provisions were beyond the scope of a six-month proceeding under the Plan and deferred consideration of the issues to a future proceeding.
- 77 (9) The proposed "one allowable miss" provision would address the problem of measuring performance for low volume activity, allowing Qwest to miss meeting a performance measure once in a month for a particular CLEC without making a Tier 1 payment, thus reducing such payments.

- 78 (10) The proposed Tier 2 payment trigger provision applies only to those measures associated with both Tier 1 and Tier 2 payments, and would allow Qwest to make Tier 2 payments for certain measures if it fails to meet performance standards after three consecutive months instead of each month, thus reducing such payments.

CONCLUSIONS OF LAW

79 Having discussed above all matters material to this decision, and having stated detailed findings, conclusions, and the reasons therefore, the Commission now makes the following summary conclusions of law, incorporating by reference pertinent portions of the preceding detailed conclusions:

- 80 (1) The Washington Utilities and Transportation Commission has jurisdiction over the subject matter of, and parties to, this proceeding.
- 81 (2) Qwest's Washington Performance Assurance Plan provisions and Performance Indicator Definitions remain subject to Commission review.
- 82 (3) The parties waived any objection to the scope of the proceeding when it was converted to a six-month review by the presiding judge without objection and with an understanding of the proceeding's scope.
- 83 (4) The Commission has authority to address changes to the Plan and Qwest's performance and service quality under the AFOR statute, RCW 80.36.135(3), as well as RCW 80.04.110 and RCW 80.36.300.
- 84 (5) Where there is no prejudice to the parties and when judicial economy is served, proposed changes to the Plan may be considered by the Commission even if such proposals are beyond the scope of the review process described by the Plan.
- 85 (6) A telecommunications company must include in its plan for an alternative form of regulation a "proposal for ensuring adequate carrier-to-carrier service quality" that includes "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.” *RCW 80.36.135(3)*.

- 86 (7) Because the PAP has been adopted as Qwest’s AFOR carrier-to-carrier service quality plan, any changes to the PAP must continue to provide “appropriate enforcement or remedial provisions” under *RCW 80.36.135(3)*.
- 87 (8) The standards for a carrier-to-carrier service quality plan under *RCW 80.36.135(3)* do not require that the Commission defer consideration of the two disputed issues.
- 88 (9) The parties adequately addressed in their pleadings whether the proposed provisions meet the standards for a carrier-to-carrier service quality plan under *RCW 80.36.135(3)*.
- 89 (10) The proposed “one allowable miss” provision will reduce Qwest’s potential liability, but will not significantly affect its incentive to perform because it must still meet its performance standards on an aggregate level each month before applying the provision.
- 90 (11) The proposed “one allowable miss” provision is an appropriate way to address the issue of meeting performance measures when there is a low volume of activity, an issue recognized in the existing PAP.
- 91 (12) Qwest has not met its burden of proof to show that the proposed Tier 2 payment trigger will result in “appropriate enforcement or remedial provisions.”
- 92 (13) The combination of the “one allowable miss” and Tier 2 payment provisions would significantly reduce Qwest’s incentive to perform by reducing its potential liability for payment under measures subject to both Tier 1 and Tier 2 payments, thus diminishing the remedial provisions of the Plan.
- 93 (14) The Commission should retain jurisdiction over the subject matters and the parties to this proceeding to effectuate the terms of this Order. *RCW Title 80*.

ORDER

THE COMMISSION ORDERS:

- 94 (1) Qwest Corporation's Petition for Administrative Review of Order 07 is
granted.
- 95 (2) Qwest Corporation's request to modify the Qwest Performance Assurance
Plan to include a provision for "one allowable miss" is granted.
- 96 (3) Qwest Corporation's request to modify the trigger for making Tier 2 payments
under the Qwest Performance and Assurance Plan is denied.
- 97 (4) The Commission retains jurisdiction over the subject matter and the parties to
this proceeding to effectuate the terms of this Order.

DATED at Olympia, Washington and effective December 3, 2008.

WASHINGTON STATE UTILITIES AND TRANSPORTATION COMMISSION

MARK H. SIDRAN, Chairman

PATRICK J. OSHIE, Commissioner

PHILIP B. JONES, Commissioner

NOTICE TO PARTIES: This is a Commission Final Order. In addition to judicial review, administrative relief may be available through a petition for reconsideration, filed within 10 days of the service of this order pursuant to RCW 34.05.470 and WAC 480-07-850, or a petition for rehearing pursuant to RCW 80.04.200 and WAC 480-07-870.