

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

In the Matter of the Petition of)	DOCKET UT-073034
)	
QWEST CORPORATION,)	ORDER 09
)	
For Commission Approval of Stipulation)	
Regarding Certain Performance Indicator)	FINAL ORDER DEFERRING
Definitions and Qwest Performance)	FIVE AND ONE-HALF YEAR
Assurance Plan Provisions.)	REVIEW; CLARIFYING EFFECT
)	OF AFOR ORDERS ON QPAP
)	
.....)	

1 ***SYNOPSIS:*** *In this Order, the Commission defers the “five and one-half year” proceeding identified in Qwest Corporation’s Performance Assurance Plan (QPAP) until at least one year prior to the expiration of Qwest’s Alternative Form of Regulation (AFOR) Plan, consistent with the Commission’s order granting Qwest’s AFOR. This Order also clarifies that consistent with the AFOR orders, all measures, submeasures, Tier 1 and Tier 2 payments remain in effect past December 23, 2008, until the Commission approves a change to the QPAP.*

SUMMARY

2 **Procedural History.** Qwest Corporation (Qwest or Company) initiated this proceeding on June 26, 2007 by filing a petition to approve a stipulation (2007 Stipulation) between itself and three competitive local exchange carriers (CLECs)¹ operating in Washington 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 The parties and the Commission agreed to convert the proceeding to a six-month review proceeding and expand the issues for consideration. On April 2, 2008, the

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

parties filed a Partial Settlement of Disputed Issues (2008 Partial Settlement) and a narrative in support thereof, requesting Commission approval. Also on April 2, 2008, Qwest and Staff filed their initial comments on two remaining disputed issues. The parties filed responsive comments on April 26, 2008.

- 4 On May 23, 2008, Judge Torem entered an initial order, Order 06, approving and adopting the 2008 Partial Settlement.² Neither the Commission nor any party sought review of Order 06; thus, Order 06 became effective by operation of law on June 13, 2008. On June 5, 2008, Judge Torem entered a second initial order, Order 07, denying Qwest's petition to further modify the QPAP, and recommending the two remaining disputed issues be deferred to the five and one-half year review identified in the Plan.
- 5 Qwest filed a petition for administrative review of Order 07 on June 24, 2008. Staff answered Qwest's petition on July 7, 2008. The Commission entered a final order, Order 08, on December 3, 2008, granting Qwest's petition for review and granting in part and denying in part Qwest's petition to modify the QPAP.³ In QPAP Order 08, the Commission approved Qwest's request to modify a QPAP provision regarding Tier 1 payments; however, the Commission denied Qwest's request to modify the QPAP with regard to Tier 2 payments.
- 6 Prior to entering QPAP Order 08, the Commission issued a notice on October 20, 2008, requesting comments from the parties and interested persons concerning the need for a five and one-half year review under the QPAP, and what operational or effective changes, if any, to the QPAP will occur on or after December 23, 2008.⁴ Specifically, the Commission sought comments on "the interplay between the original terms and conditions of the QPAP, the revisions adopted in Order 06 in Docket UT-073034, and the Commission's AFOR Orders."

² 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.

³ Hereinafter referred to as QPAP Order 08.

⁴ October 20, 2008, Notice of Opportunity to File Comments, Docket UT-073034.

7 On November 12, 2008, Qwest, Staff, Integra and jointly XO and Time Warner
Telecom (Joint CLECs) filed comments in response to the Commission's notice. On
November 24, 2008, Staff and Qwest filed reply comments.

8 **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,
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).⁵

MEMORANDUM

9 This Order resolves a dispute concerning whether there will be any change to any
performance measure subject to QPAP on or after December 23, 2008.

I. Background Facts.

10 As we explained in QPAP Order 08, the Commission approved Qwest's Performance
Assurance Plan in 2002 as 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."⁶ To

⁵ 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*.

⁶ QPAP Order 08, ¶ 4, citing 39th Supplemental Order, Dockets UT-003022 and UT-003040 (consolidated), ¶ 19 (July 1, 2002). Section 271 requires that Bell-operating companies such as Qwest demonstrate, among other items, that their application is "consistent with the public interest, convenience, and necessity." 47 U.S.C. §271(d)(3)(C). The FCC has interpreted this to mean that there is "sufficient assurance that markets will remain open after grant of the application," and that, "a BOC would continue to satisfy the requirements of section 271 after entering the long distance market." *In the Matter of Application of Bell Atlantic New York for*

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.

- 11 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 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.
- 12 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.
- 13 As originally adopted in 2002, the QPAP was scheduled to expire after six years. Section 16.3 of the QPAP provided, in relevant part, that:

This QPAP will expire six years from its effective date. Only the submeasures identified in Attachment 3 and payments will continue beyond six years, and these submeasures and payments shall continue until the Commission orders otherwise. Five and one-half years after the QPAP's effective date, a review shall be conducted with the objective of phasing-out the QPAP entirely. This review shall focus on ensuring that phase-out of the QPAP is indeed appropriate at that time, and on identifying any submeasures in addition that should continue as part of the QPAP.

- 14 On October 20, 2006, Qwest filed with the Commission in Docket UT-061625 a request for an alternative form of regulation (AFOR) under RCW 80.36.135, which requires any AFOR plan filed with the Commission to include a “proposal for ensuring adequate carrier-to-carrier service quality.”⁷ The AFOR statute specifically states that such proposal must 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.”⁸
- 15 In Order 08 in the AFOR proceeding, we incorporated the QPAP as part of Qwest’s obligation to provide an adequate carrier-to-carrier service quality plan, subject to certain conditions. In that September 2007 Order, we found that:

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

⁷ RCW 80.36.135(3).

⁸ *Id.*

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 QPAP Sec. 16.3.] 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.⁹

16 Following our AFOR decision, the parties to this proceeding entered into a partial settlement of the disputed issues in this docket. The parties requested approval of the 2008 Partial Settlement asserting that the settlement “is consistent with the Federal Telecommunications Act of 1996 . . . , this Commission’s prior orders regarding the Qwest Performance Assurance Plan . . . , RCW 80.36.135(3), and the Commission’s orders in docket UT-061625 (granting, with conditions, Qwest’s petition for an alternative form of regulation).”¹⁰ The parties also agreed “that the resolution of issues in this docket will not preclude a party from taking a position on any issues in the upcoming review to be conducted under Section 16.3 of the QPAP with regard to the continuation of any measures.”¹¹

17 The Partial Settlement proposed the following amendments to Sections 1.1 and 16.3 of the QPAP:

1.1 As set forth in this Agreement, Qwest and CLEC voluntarily agree to the terms of the following Performance Assurance Plan

⁹ Docket UT-061625, Order 08, ¶¶ 21-23 (Sept. 6, 2007) (Emphasis added) [Hereinafter “AFOR Order 08”].

¹⁰ See Partial Settlement of Disputed Issues, ¶ 3 (filed Apr. 2, 2008).

¹¹ *Id.*, ¶ 6.

(“PAP”), initially prepared in conjunction with Qwest’s application for approval under Section 271 of the Telecommunications Act of 1996 (the “Act”) to offer in-region long distance service and subsequently modified in accordance with the Commission’s orders. [Footnote omitted] This PAP is also subject to the following provisions ordered by the Commission in Order No. 8, Par. 42, Docket UT-061625, *In the Matter of the Petition of Qwest Corporation for and Alternative Form of Regulation (“AFOR”) pursuant to RCW 80.36.135:*

- 1.1.1 The PAP shall remain in effect for the full four-year term of the AFOR, unless modified by the Commission.
- 1.1.2 The PAP must remain available to all wholesale carriers in its current form unless modified by the Commission.
- 1.1.3 The PAP terms must apply to all wholesale service provided by Qwest as a substitute for unbundled network elements (“UNE substitute services”) during the term of the AFOR, unless the affected parties agree otherwise. [Footnote omitted]

16.3 ~~This QPAP will expire six years from its effective date.~~ Only the submeasures identified in Attachment 3 and payments will continue beyond six years of the PAP effective date, and these submeasures and payments shall continue until the Commission orders otherwise. Five and one-half years after the QPAP’s effective date, a review shall be conducted with the objective of phasing-out the QPAP entirely. ~~This~~The review shall focus on ensuring that phase-out of the QPAP is indeed appropriate at that time, and on identifying any submeasures in addition that should continue as part of the QPAP.¹²

18 The presiding Administrative Law Judge approved the Partial Settlement and QPAP amendments in an initial order, Order 06 in this Docket, finding “approval and adoption of the 2008 Partial Settlement is in the public interest, ... supported by an appropriate record, and ... lawful.”¹³ Neither the Commission nor any party sought review of Order 06; thus, Order 06 became effective by operation of law on June 13, 2008. The Notice of Finality provides that: “In allowing this Order to become final,

¹² Qwest Corporation Washington SGAT Eighth Revision, Tenth Amended Exhibit K (Performance Assurance Plan), June 15, 2008.

¹³ Order 06, *Initial Order Approving And Adopting 2008 Partial Settlement Agreement; Requiring Compliance Filing*, ¶ 34 (May 23, 2008).

the Commission does not endorse the Order's reasoning and conclusions. If cited in the future, the Order must be identified as an Administrative Law Judge's order."¹⁴

19 In determining whether to initiate a five and one-half year proceeding under the QPAP, the Commission issued a notice requesting comments on October 20, 2008. The Commission requested comments about the need for a five and one-half year review proceeding, whether to defer such a proceeding until six months prior to the expiration of the AFOR in September 2011, and whether any changes to "any measure, submeasure, Tier 1 payment, or Tier 2 payment" will occur on or after December 23, 2008.

20 All commenting parties agree that there is no current need for a five and one-half year review proceeding, and that such a proceeding should occur prior to the expiration of the AFOR.¹⁵ The parties disagree, however, about whether any changes to measures, submeasures, or payments will occur on or after December 23, 2008. We address this dispute below.

II. Changes to the QPAP on December 23, 2008

21 Integra, XO, and Time Warner Telecom argue that no change to QPAP measures, submeasures or payments for those measures should occur on or after December 23, 2008.

22 Staff concurs, asserting that the QPAP and the submeasures and payments identified in Attachment 3 of the QPAP, and detailed in the PIDs, remain in effect after the six year anniversary of the QPAP.¹⁶ Staff explains this is why the parties agreed to modify the QPAP consistent with the Commission's AFOR orders, deleting the sentence in Section 1.1 that stated: "The QPAP will expire six years from its effective date."¹⁷ The parties also agreed to insert language in Section 1.1 to the effect that

¹⁴ Notice of Finality, Docket UT-073034 (June 13, 2008).

¹⁵ The parties differ about when the Commission should conduct its review, proposing such a review one year prior (Integra), nine months prior (Staff), and six months prior (Qwest) to the expiration of the AFOR. We do not see a present need to address this timing issue, and defer a decision on the appropriate review until at least one year prior to the expiration of the AFOR.

¹⁶ Staff Comments, November 12, 2008, ¶ 12.

¹⁷ *Id.*

“The PAP shall remain in effect for the full four-year term of the AFOR, unless modified by the Commission.”¹⁸

23 Staff asserts there is an unresolved question about what happens to the measures and payments not included in Attachment 3.¹⁹ Staff asserts we must determine whether the submeasures will automatically expire if no party makes a case to preserve them, or whether Qwest bears the burden under the AFOR orders to show that eliminating the sub-measures is consistent with the AFOR statute.²⁰

24 Staff argues that when the QPAP was originally drafted, there was an expectation that Qwest would come forward at five and one-half years to argue that the entire QPAP be phased out.²¹ The Commission ordered Qwest to include language from the Colorado PAP that would ensure certain wholesale service quality rules would continue if the QPAP were to expire.²² Staff asserts that this language became Section 16.3 of the Washington QPAP, and the wholesale service quality rules to be retained after the six-year QPAP term were included in the list of performance measures in Attachment 3 to the QPAP.²³ Staff asserts that the Colorado Commission identified a similar set of measures as those most critical and likely to be relied on most heavily by smaller competitors.

25 Staff further argues that the Commission’s orders in the AFOR proceeding, in particular AFOR Order 08, effectively shifted the burden of proof from those seeking to retain the non-Attachment 3 measures to those who would seek to eliminate them, i.e., Qwest.²⁴ Staff argues that AFOR Order 08 is ambiguous on this point, even though the Order finds that the current provisions of the QPAP must remain in place for the full term of the AFOR in order to ensure adequate service quality, and that the current provisions include a five and one-half year proceeding to determine whether to modify or terminate the QPAP.²⁵

¹⁸ *Id.*

¹⁹ *Id.*, ¶ 13.

²⁰ *Id.*

²¹ *Id.*, ¶ 14.

²² *Id.*, ¶ 15.

²³ *Id.*, ¶ 16.

²⁴ *Id.*

²⁵ *Id.*, ¶ 18, citing AFOR Order 08, ¶¶ 21-22.

- 26 Staff notes that the parties' stipulation in this docket was not intended to resolve the ambiguity.²⁶ Staff urges us to interpret our AFOR Order 08 as requiring that the non-Attachment 3 measures do not expire unless Qwest can affirmatively demonstrate the measures are no longer necessary to meet the requirements of the AFOR statute.²⁷ Staff argues that allowing the non-Attachment 3 measures to expire without a comprehensive proceeding to review the need for the QPAP as a whole is contrary to the intent of the QPAP and inconsistent with the AFOR orders.²⁸ Although Staff does not believe there is a need for a five and one-half year proceeding to consider a complete phase out of the QPAP, Staff argues that there may well be a need for a proceeding to determine whether to retain measures and submeasures other than those listed in Attachment 3 to the QPAP.²⁹ Staff requests the Commission clarify its intent on this issue. Staff also requests the Commission find that the non-Attachment 3 measures and submeasures do not expire unless or until Qwest demonstrates that the measures are not necessary to meet the requirements of a carrier-to-carrier service quality plan under the AFOR statute.³⁰ Alternatively, Staff asks that the Commission at least allow potentially affected CLECs to advocate for the retention of the submeasures.³¹
- 27 Integra does not "anticipate any changes," asserting that the Commission must consider the effect on the AFOR of any fundamental changes to the QPAP.³² XO and Time Warner Telecom argue that in light of the Commission's AFOR orders and recent modifications to QPAP Sections 1.1 and 16.3, no changes to any measure, submeasure or payment should occur on or after December 23, "unless and until the AFOR expires and /or the Commission determines otherwise."³³
- 28 Qwest disagrees with the positions of Staff, Integra, XO, and Time Warner, and requests the Commission adopt its interpretation of the AFOR orders and QPAP

²⁶ *Id.*, ¶ 17.

²⁷ *Id.*, ¶ 19.

²⁸ *Id.*, ¶ 20.

²⁹ *Id.*, ¶¶ 4, 7.

³⁰ *Id.*, ¶ 19.

³¹ *Id.*, ¶ 20.

³² Integra Comments, November 12, 2008.

³³ XO and Time Warner Telecom Comments, November 12, 2008.

provisions. Qwest claims that by the terms of Section 16.3 of the QPAP, “only the submeasures identified in Attachment 3 and payments will continue beyond December 23, 2008.”³⁴ Qwest argues that the QPAP continues to exist and operate in accordance with its terms, including the provision that only Attachment 3 measures continue in effect, as the provision and deadline were not changed in either the AFOR or in this docket.³⁵

29 Qwest asserts that Staff’s interpretation of AFOR Order 08 is flawed. Qwest asserts that Section 16.3 – a section in place since the inception of the QPAP – requires retaining only a subset of measures after six years. Qwest notes that the Commission explicitly required Section 16.3’s termination, continuation, and review/evaluation provisions to remain in effect for the duration of the QPAP, unless modified.³⁶

30 Qwest notes that the Commission could have explicitly modified this term in its AFOR orders, but did not do so, nor did the Commission identify the term as inconsistent with the AFOR or RCW 80.36.135(3).³⁷ Qwest argues, contrary to the other parties, that Section 16.3 is self-executing, operating automatically without further action by the Commission.³⁸ While Qwest recognizes that AFOR Order 08 requires that the Commission must approve any changes made to the QPAP under the AFOR statute’s standards,³⁹ it argues that the changes referred to in AFOR Order 08 mean only those proposed by a party, not those self-executing changes embedded in the QPAP.

31 Qwest interprets paragraphs 22 and 23 of AFOR Order 08 as recognizing that certain QPAP terms would be revised automatically after the six year mark, and that the QPAP would remain in effect its current form, including the provision that retains only measures in Attachment 3.⁴⁰

³⁴ Qwest Comments, November 12, 2008, ¶ 4.

³⁵ *Id.*; Qwest Comments, November 24, 2008, ¶ 10.

³⁶ Qwest Comments, November 24, 2008, ¶¶ 3-4.

³⁷ *Id.*, ¶ 5.

³⁸ *Id.*, ¶ 6.

³⁹ *Id.*, ¶¶ 7-8, citing AFOR Order 08, ¶ 21.

⁴⁰ *Id.*, ¶ 9.

32 **Decision.** The parties dispute the effect of AFOR Order 08 on the sentence in Section 16.3 that would allow certain measures to expire on December 23, 2008: “Only the submeasures identified in Attachment 3 and payments will continue beyond six years, and these submeasures and payments shall continue until the Commission orders otherwise.” The issue is whether this QPAP term is consistent with our decision in AFOR Order 08 to incorporate the QPAP into an acceptable carrier-to-carrier service quality plan for purposes of the AFOR. We find it is not.

33 As Staff notes, there is an ambiguity in AFOR Order 08 that we should clarify. We adopted the QPAP as the carrier-to-carrier service quality plan for Qwest’s AFOR, noting that the Commission could not approve Qwest’s AFOR without such a plan. We also stated that the QPAP must be modified to fulfill the requirements of the AFOR statute, specifically requiring that it remain in effect for the AFOR’s four-year term to ensure adequate carrier-to-carrier service quality.

34 AFOR Order 08 extended the QPAP’s life with the express expectation that all of its measurements, reporting requirements, and financial incentives would continue unaffected, unless or until we specifically agree to modify them. Accordingly, we reiterate our intention expressed in AFOR Order 08 to preclude the expiration or unilateral change to “any” measures, submeasures, and Tier 1 or 2 payments without Commission approval. We acknowledge the provision in the QPAP stating that only the measures included in Attachment 3 to the QPAP continue beyond the expiration date of the QPAP. However, given our decision in AFOR Order 08 to extend the life of the QPAP for the duration of the AFOR, and Qwest’s acceptance, we reject the Company’s interpretation of the continuing relevance and effect of the disputed sentence in Section 16.3. In essence, AFOR Order 08 reset the expiration date of the entire QPAP, including those measures that might have otherwise expired on December 23, 2008.

35 Furthermore, Order 08 recognizes our statutory authority under the AFOR statute as well as under RCW 80.04.110 and RCW 80.04.300 to address the terms of the QPAP as well as Qwest’s performance under it. In that order, we approved and extended use of the QPAP as the material component of Qwest’s carrier-to-carrier service quality plan under the AFOR. The power to designate the QPAP as the AFOR’s service

quality plan includes the power to modify it, as necessary. Neither Qwest nor any other party has demonstrated the QPAP requires further modification

- 36 The term in question was intended to work hand-in-hand with the provision to terminate the QPAP. When we required the QPAP to remain in effect, we intended *all* measures, submeasures and payments to remain in effect to ensure there were adequate “service quality standards or performance measures for interconnection, and appropriate enforcement or remedial provisions” should Qwest fail to meet its service quality obligations.⁴¹ AFOR Order 08 specifically refers to the five and one-half year review provision in Section 16.3 to allow flexibility in the QPAP, and to allow any party to propose the QPAP be modified or terminated. By referring to the section, we did not intend the anomalous result that a provision intended to preserve certain submeasures after the six-year expiration of the QPAP would cause other measures to expire even though the QPAP itself was extended for four more years. The parties proposed to strike the first sentence of the section in their 2008 Partial Settlement precisely because it is clear that AFOR Order 08 mooted the six-year expiration of the QPAP. We similarly intended to moot the six-year expiration of the measures Qwest argues for here.
- 37 Although no party provided specific information in their comments as to the effect on the CLECs and competition of allowing the non-Attachment 3 measures and payments to expire, it is clear that a large number of measures and payments may be affected. A comparison of the PIDs in Exhibit B filed in this proceeding on June 18, 2008, and the measures listed in Attachment 3 to the QPAP filed on the same day shows that many measures will no longer be effective under Qwest’s interpretation. These measures and submeasures include, but are not limited to: all billing measures (BI-1 through BI-4); all electronic gateway availability measures (GA-1 through GA-8); all but four of 13 pre-order and order (PO) measures and countless submeasures; two ordering and provisioning measures (OP-2 and OP-15); four maintenance and repair measures (MR 2, MR-4, MR-9, and MR-10), all database update measures (DB-1 and DB-2); the sole directory assistance measure (DA-1); and all collocation measures (CP-1 through CP-4).

⁴¹ See RCW 80.36.135(3).

- 38 Similar to our recent decision in QPAP Order 08, we do not find Qwest's interpretation of AFOR Order 08's effect on the QPAP appropriate at this early stage in the implementation of the AFOR. It is clear that allowing measures, submeasures and payments not included in Attachment 3 to simply expire without any meaningful review and approval seriously undermines the effectiveness of the QPAP as the AFOR's service quality plan, contrary to the intent of AFOR Order 08. Four of the measures that may expire (GA-1, PO-2b, BI-1 and BI-4) are subject to per occurrence Tier 2 payments.⁴² If changes to the QPAP of this nature are to occur, they must follow from the review process specifically recognized by AFOR Order 08.
- 39 Therefore, after reviewing the issue in dispute and the parties' arguments, we find it appropriate to modify the terms of Section 16.3 of the QPAP consistent with our AFOR Order 08 to expressly prohibit any measures or submeasures from expiring prior to six months before the expiration of the AFOR, absent demonstration from Qwest that the measures are no longer necessary to meet the requirements of the AFOR statute.
- 40 Qwest must modify the QPAP to strike the disputed sentence in Section 16.3: "Only the submeasures identified in Attachment 3 and payments will continue beyond six years of the PAP effective date, and these submeasures and payments shall continue until the Commission orders otherwise." At the time of the AFOR review, the question of which, if any, measures, submeasures or payments should continue can be addressed. If Qwest believes such a question should be addressed earlier, it can request that review at any time pursuant to our prior AFOR orders' provisions permitting Qwest to seek approval to alter the QPAP during the course of the AFOR.
- 41 Qwest argues that we have already approved the stipulation language in the QPAP which retains the disputed provision. Staff asserts that the parties could not resolve the ambiguity in the stipulated language. The fact that the language was approved in an administrative law judge's initial order is not determinative. The parties' 2008 Partial Settlement in this proceeding was approved in an initial order, which was not reviewed by the Commission and therefore has no precedential effect.⁴³

⁴² See Attachment 1 to the QPAP.

⁴³ See WAC 480-07-825(7)(c).

FINDINGS OF FACT

- 42 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:
- 43 (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.
- 44 (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.
- 45 (3) The Commission approved Qwest’s Performance Assurance Plan (QPAP) 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.
- 46 (4) The Commission recently approved Qwest’s plan for an alternative form of regulation (AFOR) under RCW 80.36.135(3), adopting the QPAP as Qwest’s statutorily required carrier-to-carrier service quality plan.
- 47 (5) The Commission’s Order 08 entered in the AFOR proceeding requires that “the QPAP must remain in place for the full four-year term of the AFOR, unless modified by the Commission.” *AFOR Order 08*, ¶ 22.

- 48 (6) The parties dispute the effect of AFOR Order 08 on a sentence in Section 16.3 of the QPAP that would allow certain measures to expire on December 23, 2008: “Only the submeasures identified in Attachment 3 and payments will continue beyond six years of the PAP effective date, and these submeasures and payments shall continue until the Commission orders otherwise.”
- 49 (7) If the disputed sentence were effective, many measures and submeasures identified in Qwest’s set of Performance Indicator Definitions would no longer be subject to Tier 1 or Tier 2 payments under the QPAP.
- 50 (8) Allowing measures, submeasures and payments not included in Attachment 3 to expire prior to the expiration of the AFOR may seriously undermine the effectiveness of the QPAP as the AFOR service quality plan.
- 51 (9) No review was sought of the administrative law judge’s initial order, Order 06, approving the parties’ 2008 Partial Settlement in this proceeding.

CONCLUSIONS OF LAW

- 52 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:
- 53 (1) The Washington Utilities and Transportation Commission has jurisdiction over the subject matter of, and parties to, this proceeding.
- 54 (2) Qwest’s Washington Performance Assurance Plan provisions, measures and submeasures in the Performance Indicator Definitions remain subject to Commission review.
- 55 (3) The Commission has authority to address changes to the QPAP 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.

- 56 (4) The five and one-half year review proceeding identified in Section 16.3 of the QPAP should be deferred until at least one year prior to the expiration of Qwest's AFOR, consistent with the comments filed in this proceeding.
- 57 (5) AFOR Order 08 requires Qwest to extend the QPAP for the duration of the AFOR plan, including all its measurements, reporting requirements, and financial incentives, unless otherwise approved by the Commission.
- 58 (6) The provision of Section 16.3 of the QPAP which provides: "Only the submeasures identified in Attachment 3 and payments will continue beyond six years, and these submeasures and payments shall continue until the Commission orders otherwise," is effectively modified by AFOR Order 08's extension of the QPAP for four years. All submeasures and payments, not just those identified in Attachment 3, continue until the expiration of the AFOR, unless otherwise approved by the Commission.
- 59 (7) Qwest should modify Section 16.3 of the QPAP to implement the decisions in this Order.
- 60 (8) 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:

- 61 (1) The five and one-half year review proceeding identified in Section 16.3 of Qwest Corporation's Performance Assurance Plan (QPAP) is deferred until at least one year prior to prior to the expiration of Qwest's Alternative Form of Regulation, approved in Docket UT-061625.
- 62 (2) Qwest Corporation must modify the QPAP to strike the following sentence in Section 16.3: "Only the submeasures identified in Attachment 3 and payments will continue beyond six years of the PAP effective date, and these

submeasures and payments shall continue until the Commission orders otherwise.”

- 63 (3) 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 January 5, 2009.

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.