

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

In the Matter of the Second Six-Month)	
Review of Qwest Corporation's)	DOCKET NO. UT-043007
Performance Assurance Plan)	
)	QWEST CORPORATION'S
)	OPENING BRIEF
)	
)	
)	
.....)	

Qwest Corporation ("Qwest") hereby submits its opening brief in the above proceeding. The single issue that is to be decided in this case is whether the new PID expanded PO-20 should be assigned a Tier 2 payment level in Qwest's Washington QPAP Exhibit K, Appendix 1.

Statement of Facts

1. Qwest, several CLECs and staffs of several state commissions in Qwest's region conducted a series of settlement negotiations during late 2003 and early 2004 on possible modifications to PIDs and PAPs to be filed with the state commissions under the auspices of the Long Term PID Administration ("LTPA") Collaborative. These negotiations produced agreements on some issues including the establishment of a replacement PID for PO-20, Manual Service Order Accuracy. The negotiations resulted in impasse on several other issues. The question of the tier

assignment for the replacement expanded PO-20 PID was not negotiated in the LTPA Collaborative.

2. This second six month review case was set pursuant to Section 16 of the QPAP to consider issues of implementation of LTPA agreements, including tier assignments of new PIDs, and resolution of LTPA Collaborative impasse issues and other issues. The parties to this case jointly prepared and submitted to the ALJ on June 25, 2004 a Final Issues List on which each party, if it so desired, stated its position on each issue. The question of the tier assignment for the expanded PO-20 was on the Final Issues List. The CLECs stated their position on that list that the tier assignments should be Tier 1 High and Tier 2 Medium to correspond with what the CLECs considered to be a “companion” measure, OP-5. Qwest’s position on the Final Issues List was that the expanded PO-20 should be assigned Tier 1 Low, and that there should be no Tier 2 assignment. Staff stated no position on this issue in the Final Issues List.
3. During the course of this second six month review case, the participating CLECs (MCI, Eschelon and Covad) negotiated an agreement with Qwest resolving all issues on the Final Issues List among the settling parties. The agreement was filed with the Commission on August 27, 2004 and the Commission issued its Order No. 10 approving this agreement September 17, 2004.¹ The agreement stated that the settling parties

¹ *In the Matter of the Second Six-Month Review of Qwest Corporation’s Performance Assurance Plan*, Docket No. UT-043007, Order No. 10, Order Approving and Adopting Settlement Agreement, September 17, 2004.

agreed that the tier assignment of the expanded PO-20 PID should be “Tier 1 Medium, ... and without a Tier 2 assignment.”²

4. Commission Staff was invited to the second six month review case settlement negotiations but declined to participate based on a prior commitment. The Settlement Agreement provided that Exhibit B-1 should be deleted from the SGAT and references to PO-20 as a Tier 2 per-measurement measure in Section 7 and Table 5 of Exhibit K should also be deleted.³ With the approval of Qwest’s compliance filing by Order No. 11, there are no longer any references in the Washington QPAP to PO-20 as a Tier 2 measure.
5. Commission Staff seeks the imposition of a Tier 2 Medium designation for the expanded PO-20 as a per-occurrence measure, in addition to the Tier 1 Medium designation that was negotiated by Qwest and the CLECs. Qwest opposes a Tier 2 designation for the expanded PO-20 measurement. The Commission held a hearing in this matter November 18, 2004.
6. No CLEC participated in the November 18, 2004 hearing. Commission Staff witness Mr. Spinks testified that the expanded PO-20 should “continue” as a Tier 2 measure because of the history of the prior PO-20 including Qwest’s own decision to request Tier 2 treatment for that PID and his conclusion that it met what he characterized as the subjective

² Order No. 10, *supra*, pp. 6-7

³ Order No. 10, *supra*, p. 7

standard the Commission had set for Tier 2 assignments.⁴ Mr. Spinks also testified that QPAP payments should be sufficient to create strong assurance that the local market will remain open and a sufficient incentive for Qwest to minimize errors and that Qwest would not be harmed if Staff's position were accepted by the Commission since Qwest had been meeting the expanded PO-20 standard for the three months since the measurement had been added to the SGAT.⁵ Under cross examination Mr. Spinks agreed that the prior PO-20 was a regional only measure and that the only way that measurement could have been included in the QPAP at the time of original adoption was as a Tier 2 per measurement measure.⁶ Mr. Spinks also admitted that he had presented no evidence that maintaining the existing Tier 1 Medium assignment for the expanded PO-20, without a Tier 2 assignment, would result in an insufficiently strong incentive for Qwest to minimize errors in manually handled CLEC orders.⁷

7. Qwest witness Mr. Reynolds testified that because of the differences between the original and expanded PO-20 measurements, and the agreement by all parties including Staff to remove the original PO-20 from the QPAP, the question of imposing a Tier 2 assignment on the expanded PO-20 is a question of first impression.⁸ Mr. Reynolds was not

⁴ Exh T-1 1:19 – 2:2 (Spinks); Exh. T-1 7:20 – 8:2 (Spinks); Exh. RT-9 4:17 – 4:18 (Spinks)

⁵ Exh. RT-9 3:4 – 3:8 (Spinks); Exh. T-1 8:17 – 9:5 (Spinks)

⁶ TR 170:7 – 170:18 (Spinks)

⁷ TR 182:23 – 183:4 (Spinks)

⁸ Exh. T-10 3:16 – 4:10 (Reynolds)

cross examined or rebutted on this testimony. Mr. Reynolds testified that by Qwest and CLECs both compromising their originally stated positions on the tier assignment for the expanded PO-20 PID, the settling parties had produced a result that was consistent with the Commission's stated objectives for the QPAP and that no Tier 2 assignment is necessary.⁹ Under cross examination Mr. Reynolds testified that if Qwest performed poorly in entering manual service orders, and such errors impacted CLECs' relationships with their customers, the errors by Qwest could affect CLECs' ability to compete.¹⁰ Mr. Reynolds pointed out, however, that a different PID, OP-5, measures manual service order errors that affect CLECs' end user customers, and the OP-5 PID is assigned a Tier 2 payment level.¹¹

Statement of Issues

1. Has Staff met its burden to justify imposing a Tier 2 payment requirement on Qwest for the expanded PO-20 PID?
2. What is the standard by which Staff requests to impose Tier 2 payment requirements for new PIDs should be judged?
3. Does the evidence Staff presented meet the proper standard to justify its position?

⁹ Exh. T-10 5:7 – 5:18 (Reynolds)

¹⁰ TR 202: 22 – 203:7 (Reynolds)

¹¹ TR 210:7 – 210:12 (Reynolds)

4. What is the significance for the issues in this case of the CLECs' agreement that there should be no Tier 2 assignment for the expanded PO-20 PID?

Summary of Argument

Staff has failed to show any reason why the expanded PO-20 should be assigned a Tier 2 payment requirement in the Washington QPAP. The evidence on which Staff relies does not prove that the expanded PO-20 meets the standard the Commission has already established for requiring Tier 2 payments. The standard for determining whether a PID should be assigned to Tier 2 is not subjective, as Staff claims; such a standard would not allow the Commission to comply with the law that requires its decisions to be based on evidence. The purpose of Tier 2 payments is not different from that of the QPAP as a whole, namely to prevent backsliding by Qwest.¹² By agreeing to payment arrangements for the expanded PO-20 that do not include Tier 2 the CLECs have demonstrated that a Tier 2 assignment for this PID is not inherently necessary to prevent backsliding by Qwest.

Argument

1. Staff has failed to meet its burden to justify imposition of a Tier 2 assignment for the expanded PO-20 PID.

Although Mr. Spinks styled the issue as being whether a Tier 2 assignment for PO-20 should "continue," it is clear that what the Commission must decide is whether a new

¹² *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, ¶429 (rel. Dec. 22, 1999) (*Bell Atlantic New York Order*)

Tier 2 assignment for a new expanded PO-20 should be established.¹³ While the original and expanded PO-20 PIDs carry the same name and PID number, they are quite different from one another. The original PID was a regional measure that could only be included in the QPAP as a Tier 2 per measurement measure.¹⁴ This is because at the time the original PID was developed Qwest did not have the capability to measure the PID directly on every order, but was required to use a sampling methodology.¹⁵ By contrast, the expanded PO-20 is measured directly for one hundred percent of manual service orders.¹⁶ The original PO-20 was removed from the QPAP with Staff's agreement and without objection from any party.¹⁷ Thus, the question is not one of a PO-20 measure "continuing" with a Tier 2 payment obligation, but is instead whether Staff has proven with appropriate evidence that existing conditions justify imposing a Tier 2 payment requirement for the expanded PO-20; in short, whether Staff has met its burden of proof.

Staff has not met its burden. Staff's case is explicitly based on Staff's own subjective opinion.¹⁸ Mr. Spinks admitted that with respect to this type of evidence, reasonable people can differ.¹⁹ Mr. Spinks admitted that he has no experience in operating a CLEC.²⁰ Thus, Mr. Spinks' subjective opinion on whether expanded PO-20 should be assigned a Tier 2 payment requirement based on its importance to CLECs' ability to compete fails to provide sufficient evidence on which to base a finding in Staff's favor. Common sense and a plain reading of the rules of this Commission do not allow Staff to

¹³ Exh. T-1 1:19 – 2:2 (Spinks)

¹⁴ Exh. T-10 3:9 – 3:15 (Reynolds); TR. 170:7 – 171:1 (Spinks)

¹⁵ (Id.)

¹⁶ Exh. T-10 3:9 – 3:15 (Reynolds)

¹⁷ Order No. 10, ¶16.

¹⁸ Exh. RT-9 4:17 – 4:18 (Spinks)

¹⁹ TR 185:3 – 185:7 (Spinks)

²⁰ TR 157:7 – 157:14 (Spinks)

establish a preponderance of the evidence solely through reliance on its subjective opinion especially when that opinion is based on neither experience nor fact.

2. The Commission-established standard used to consider what tier designation should be implemented for a measurement does not apply to the expanded PO-20.

In ¶80 of the *Thirtieth Supplemental Order* in Qwest's Section 271 proceeding, the Commission set forth the standard for determining whether a Tier 2 payment obligation should be required.²¹ At that reference, the Commission held:

Certain performance measures are subject to Tier 2 payments because the performance results are only available on a regional basis, such as Gateway Availability. CLECs receive no payment when Qwest fails to meet these performance standards. Other performance measures that are subject to individual CLEC payment are also subject to Tier 2 payments because of their importance to the CLECs' ability to compete. These measures are referred to as Tier 2 measures having Tier 1 counterparts.

In Order No. 5 in the first six month review case, the Commission amplified the standard for Tier 2 assignments:

Tier 2 payments are made to states when Qwest fails to meet performance standards that are *critical* to a CLEC's ability to compete with Qwest, and for measures that are reported on a regional basis. [Emphasis added.]²²

The Commission has prescribed a two part test. First, are the performance results for the PID only available on a regional basis? Based on the evidence, the answer is no to this question for expanded PO-20.²³ Second, is the performance measure critical to CLECs' ability to compete? This second prong of the test prescribes an empirical

²¹ *In the Matter of the Investigation into U S WEST COMMUNICATIONS, INC.'s Compliance with Section 21 of the Telecommunications Act of 1996*, Docket No. UT-003022, Thirtieth Supplemental Order, (hereinafter "Thirtieth Supplemental Order") April 5, 2002, ¶80.

²² *In the Matter of the Six-Month Review of Qwest's Performance Assurance Plan*, Order No. 5, Order on Issues Pending in First Six Month Review Period, January 16, 2004, ¶4, n. 1.

examination. Not all PIDs that are assigned to Tier 1 are also assigned to Tier 2, even though they are capable of being measured on a state or CLEC specific basis. The Commission's amplification that the factor involved must be critical to CLECs' ability to compete in order for the measurement to be assigned to Tier 2 connotes that the examination must show that the factor is in some way indispensable for that ability. Therefore some PIDs are critical to CLECs' ability to compete and some are not. The Staff as proponent of a Tier 2 assignment for expanded PO-20 that is not a regional measurement should be expected to introduce substantial evidence that the factors this PID measures are critical to CLECs' ability to compete.

At ¶86 of the *Thirtieth Supplemental Order*, the Commission described the purpose of Tier 2 payments:

The purpose of Tier 2 payments is to provide sufficient incentive for Qwest to continue meeting its performance obligations once it receives section 271 approval.²⁴

This statement by the Commission indicates that the inquiry into whether a PID should be assigned to Tier 2 in addition to Tier 1 is whether there is evidence that the lack of the Tier 2 assignment would render the incentives of the QPAP insufficient for Qwest to be likely to continue to meet its performance objectives once Qwest received section 271 approval. Since Qwest has already received section 271 approval for Washington, a reasonable restatement of this test under the circumstances is whether there is evidence that on an ongoing basis the lack of a Tier 2 assignment for the expanded PO-20 means that the

²³ Exh. T-10 3:9 – 3:15 (Reynolds); TR. 170:7 – 171:1 (Spinks)

²⁴ This is the same general purpose as the Commission has ascribed to the QPAP generally in the *Thirtieth Supplemental Order*. At ¶ 3 of that order, the Commission described the QPAP as follows:

incentives of the QPAP are insufficient for Qwest to be likely to continue to meet its performance objectives. Staff has failed to introduce evidence under either test.

3. Staff has failed to satisfy either prong of the Commission's two-part test with the limited evidence presented.

Staff's evidence consists of the testimony of Mr. Spinks, certain documentary exhibits and Mr. Spinks' subjective conclusion that the expanded PO-20 should be assigned to Tier 2. None of this evidence meets the appropriate tests as described above. Rather than objectively analyzing the specific factors that the expanded PO-20 measures and relating those factors with evidence that shows they are critical to CLECs' ability to compete, Staff's evidence largely treats the matter as essentially predetermined by the history of the development of the original PO-20 PID.²⁵

- a. Staff's testimony does not meet the Commission's tests.

Mr. Spinks' testimony from Ex. T-1 pp. 2 through 8 consists of Staff's summary and recapitulation of various documents that discuss the development of the original PO-20, and Staff's opinions: (1) that assignment of PIDs to Tier 2 is subjective; (2) Qwest would not be harmed by a Tier 2 assignment for expanded PO-20; and (3) the QPAP's incentives must be sufficient for Qwest to act to minimize errors. None of this testimony is substantial evidence that shows that the factors expanded PO-20 measures are critical to CLECs' ability to compete or that without a Tier 2 assignment for this PID, the QPAP's

"The QPAP is designed as a self-executing remedy plan to ensure Qwest's continued compliance with the requirements of section 271 should the FCC grant an application by Qwest to provide in-region, interLATA service in Washington state."

²⁵ The only portion of Staff's evidence that does not fall into this category is Exh. 8 showing Qwest's experience under the new PID for the most recent three months.

incentives will be insufficient to motivate Qwest to minimize errors or that the QPAP would not be strong enough to deter backsliding by Qwest.

- b. Observation 3086 from the section 271 OSS test does not meet the Commission's tests.

The first of Staff's documentary exhibits, Exh. 3, is Observation 3086 by KPMG, a vendor during the section 271 OSS evaluation, relating to certain detected problems with the training of Interconnect Service Center and Service Delivery Coordinator personnel. However, the vendor acknowledged in the same exhibit that all of its concerns had been sufficiently addressed by Qwest as of a date in early 2002.²⁶ No concerns relate to the expanded PO-20 and in fact no concerns articulated in that exhibit remain.

Further, nothing in Exh. 3 purports to show that the factors measured by expanded PO-20 are critical to CLECs' ability to compete pursuant to the *Thirtieth Supplemental Order* test as amplified by Order No. 5 in Qwest's first six month review case. Nothing in the exhibit purports to show that without a Tier 2 assignment for expanded PO-20, Qwest's incentives to meet its performance objectives under the QPAP will be insufficient. In fact, Mr. Spinks admitted during cross examination that Observation 3086 did not even focus on manual service order entry.²⁷ Mr. Spinks also admitted that none of the evidence he presented purported to show that Qwest's incentives to meet its performance objectives would be insufficient without a Tier 2 assignment for expanded PO-20.²⁸

In his testimony, Mr. Spinks quoted a portion of a sentence from Exh. 3. However, this quotation is offered out of context in a manner that is somewhat misleading. Mr. Spinks testified about the importance of manual service order errors to CLECs' ability to

²⁶ Exh. 3 18.

²⁷ TR 166:21 – 166:22 (Spinks)

compete. He stated that in Exh. 3, KPMG had characterized “the impact” as “negatively impacting a CLECs ability to conduct business.”²⁹ Reference to Exh. 3 itself indicates that what KPMG actually said was “The *inadequacy of Qwest’s ISC and SDC personnel training may impede a CLEC’s ability to obtain consistent and effective assistance, thereby negatively impacting its ability to conduct business operations.*”³⁰ [emphasis added] Mr. Spinks admitted under cross examination that this sentence was the statement he had paraphrased at Exh. T-1 7:12 – 7:14.³¹

Mr. Spinks omitted the qualifier “may” from his paraphrase of the conclusion, and he also omitted the mechanism by which the vendor concluded a CLEC’s ability to conduct business may be negatively impacted. That mechanism was the impeding of the CLEC’s ability to obtain consistent and effective assistance.

However, Mr. Spinks admitted that nothing in Exh. 3 indicates that manual service order errors have anything to do with the mechanism identified by KPMG in Exh. 3 as potentially impacting the CLECs’ ability to conduct business.³² The Observation discussed several topics related to then inadequate Qwest training in addition to a small section on manual order errors. One of the additional topics was the Help Desk.³³ Mr. Spinks admitted under cross examination that the Help Desk was the place CLECs would look for “consistent and effective assistance.”³⁴ Staff’s use of this out of context partial quotation does not provide substantial evidence to support a finding under this

²⁸ TR 182:23 – 183:4 (Spinks)

²⁹ Exh. T-7 7:12 – 7:14 (Spinks)

³⁰ Exh. 3 2

³¹ TR 172:6 – 173:6 (Spinks)

³² TR 166:13 – 166:22 (Spinks)

³³ Exh. 3 10; TR 163:10 – 163:13 (Spinks)

³⁴ TR 167:3 – 167:9 (Spinks)

Commission's *Thirtieth Supplemental Order* test as amplified by Order No. 5 in Qwest's first six-month review case for the expanded PO-20 to be assigned to Tier 2.

- c. The Steering Committee's February 12, 2002 response to the OSS test vendor does not meet the Commission's tests.

Staff's Exh. 4 consists of Steering Committee comments on the document that is Exh. 3, made at a time that Mr. Spinks testified was prior to Qwest's changes in training that the OSS test vendor later acknowledged sufficiently met all of the concerns in Exh. 3.³⁵ The Steering Committee comments say that there should be a plan to reduce the frequency of failures due to human error and the plan should include a system of financial incentives.³⁶ As in the case of Exh. 3, nothing about this document shows that the factors that expanded PO-20 measures are critical to CLECs' ability to compete, pursuant to the *Thirtieth Supplemental Order* and Order No. 5 in Docket No. UT-033020. In fact Mr. Reynolds testified that Qwest had satisfied the concerns identified by the Steering Committee in Exh. 4 before the OSS tests were concluded in 2002.³⁷ Mr. Reynolds was not cross examined or rebutted on this testimony. Staff's Exh. 4 is not substantial evidence that expanded PO-20 should be assigned to Tier 2 because it ignores material intervening changes that Qwest made in training and processes, it does not show that expanded PO-20 measures factors that are critical to CLECs' ability to compete and Qwest has already complied with the objectives in the exhibit.

- d. The OSS test vendor's recommendation for creation of a manual service order accuracy PID does not show that expanded PO-20 meets the Commission's Tier 2 tests.

³⁵ TR 167:18 – 167:25; Exh. 3 18

³⁶ Exh. 4 1

³⁷ Exh. T-10 6:17 – 7:4 (Reynolds)

The next Staff exhibit, Exh. 5, is a recommendation by the test vendor that the vendor expressly disavowed as not being statements of fact or findings entitled to the same weight as those in the final ROC test.³⁸ Even so limited, nothing in the exhibit purports to show that the factors that are measured by expanded PO-20 are critical to CLECs' ability to compete. The sole discussion of manual service order accuracy, besides the recommendation on this point, is in a single sentence at the bottom of page 5 of the exhibit. Nothing in the sentence addresses the impact on CLECs' ability to compete of the errors the sentence describes, let alone shows that such impact is critical. The sentence also does not show that without a Tier 2 assignment for expanded PO-20, Qwest's incentives to minimize errors would be insufficient. Exhibit 5 is not substantial evidence that expanded PO-20 should be assigned to Tier 2.

- e. Qwest's response to the OSS test vendor's recommendation does not show that expanded PO-20 meets the Commission's Tier 2 tests.

Qwest's response to Exh. 5 comprises Exh. 6. In Exh. 6, Qwest stated that "Existing PIDs, in the context of ongoing data reconciliation, audits, and payments, will capture performance problems and reporting errors, whether manual or otherwise, *and provide sufficient incentives* for Qwest to insure that its steps to minimize errors are effective." [emphasis added]³⁹ Despite this statement, Qwest agreed in the document to volunteer to report manual service order accuracy data to the commissions. Qwest pointed out that the existing OP-5 PID, New Service Installation Quality, which carries a Tier 2 assignment, already measures order processing errors, making it unnecessary to create a duplicate measurement for consistency of Service Orders with LSRs, the measurement that

³⁸ Exh. 5 2

³⁹ Exh. 6 3

ultimately became PO-20.⁴⁰ This evidence, which Staff introduced, actually weighs against a finding that the expanded PO-20 is critical for CLECs' ability to compete or that without a Tier 2 assignment for expanded PO-20, Qwest's incentives to minimize errors would be insufficient.

- f. Qwest's *ex parte* filing with the FCC addressed a regional PID; that filing does not establish that the expanded PO-20 should be assigned to Tier 2.

The next Staff exhibit, Exh. 7, is Qwest's *ex parte* filing with the FCC during its first section 271 application for Washington, WC Docket No. 02-148. In this filing, Qwest advised the FCC that it would file PO-20 with state commissions and it would request Tier 2 designation "consistent with the payment approach employed by the PAPs for *region-wide measurements*, GA-1, -2, -3, -4, and -6; PO-1; OP-2; and MR-2." [emphasis added]⁴¹ As discussed above, this filing does not relate to the prongs of the Commission's Tier 2 test from the *Thirtieth Supplemental Order* ¶80 under which Staff proceeds in this case. Those are whether expanded PO-20 measures factors that are critical for CLECs' ability to compete and without a Tier 2 assignment for PO-20 Qwest's incentive to minimize errors would be insufficient.

Yet Staff's testimony treats this *ex parte* filing as in effect an admission against interest by Qwest that the expanded PO-20 should be assigned to Tier 2.⁴² This claim by Staff is without merit. The expanded PO-20 PID is not a region-wide measurement.⁴³ Mr. Spinks admitted under cross examination that at the time of the *ex parte* filing, the only possible means to add a measurement of manual service order accuracy to the QPAP was

⁴⁰ Exh. 6 11

⁴¹ Exh. 7 2

⁴² Exh. T-1 7:20 – 8:2 (Spinks)

⁴³ Exh. T-10 10:4 – 10:17 (Reynolds); TR 170:7 – 171:1 (Spinks)

to use a Tier 2 per-measurement approach because Qwest could not measure manual service order errors directly.⁴⁴ Qwest's use in 2002 of the only means then existing to include a manual service order accuracy PID in the QPAP⁴⁵ when that measurement was region wide, should not foreclose a Qwest challenge to the reasonableness of including the new, expanded order-specific PO-20 in Tier 2.

- g. The Department of Justice's comments in Qwest's first section 271 application do not meet the Commission's tests for Tier 2.

Staff's testimony recites repetitively a quotation from the comments of the Department of Justice to Qwest's first section 271 application, WC Docket No. 02-148.⁴⁶ In those comments the Department expressed concerns about the then lack of regularly reported commercial data on manual service order accuracy and agreed with the test vendors' recommendation for monitoring with a new performance measure that turned out to be the original PO-20.⁴⁷ This evidence does not address the points in the *Thirtieth Supplemental Order* test this Commission adopted and on which Staff purports to rely, that the factors measured by expanded PO-20 must be shown to be critical to CLECs' ability to compete. By filing the original PO-20 and negotiating and filing the expanded PO-20, Qwest has satisfied the Department's concern and has provided "regularly reported commercial data" on manual service order accuracy.

In fact, Staff misconstrues the Department's statement and fails to recognize that reporting as desired by the Department is a necessary but not a sufficient condition for a

⁴⁴ TR 170:7 – 170:18 (Spinks)

⁴⁵ Tier 1 payments – i.e., payments to specific CLECs for actions occurring in specific states – are not available when data is tracked only on a region-wide basis. TR 170:11 – 170: (Spinks)

⁴⁶ Ex. T-1 5:3 – 5:25 (Spinks); Ex. T-1 7:16 – 7:20 (Spinks)

⁴⁷ WC Docket No. 02-148 was not the docket that resulted in Qwest being authorized to provide interLATA service in Washington. Qwest withdrew its application in that docket and submitted a second application in WC Docket No. 02-314. Ex. T-10 8:16 – 8:20 (Reynolds)

Tier 2 assignment for a PID in Washington. The Department indicated that manual service order accuracy was important enough to report so that performance could be monitored and adequate performance maintained as volumes increase.⁴⁸ Under this Commission's test from the *Thirtieth Supplemental Order*, more is required than simply that a factor is important enough to report for the measure to be assigned to Tier 2. Results for all PIDs are reported, but not all PIDs are assigned to Tier 2. Reporting allows for the monitoring the Department requested so that regulators and CLECs can take action if adequate performance is not maintained as volumes increase.

Staff also fails to acknowledge that the language it quoted from the Department's comments was not the Department's last word on the subject of the state of the record on Qwest's manual service order accuracy.⁴⁹ The Department commented that Qwest had improved the record on manual service order accuracy in its second application and the FCC held in its order in that application that Qwest was processing manual orders accurately.⁵⁰

Staff also relies on this Commission's *Forty-Third* and *Thirtieth Supplemental Orders* in this Commission's 271 proceeding as evidence supporting a Tier 2 assignment for expanded PO-20.⁵¹ Staff's claim is illogical. Neither of these orders addressed expanded PO-20. The language Staff quotes from the *Forty-Third Supplemental Order*, ¶8, does not apply the *Thirtieth Supplemental Order* test for PIDs to be included in Tier 2.

In ¶8 of the *Forty-Third Supplemental Order*, the Commission discussed what it considered to be Qwest's failure to address the issue of manual service order accuracy

⁴⁸ Exh. T-1 5:12 – 5:15 (Spinks)

⁴⁹ Exh. T-10 8:21 – 9:8 (Reynolds)

⁵⁰ Exh. T-10 9:1 – 10:2 (Reynolds)

during the OSS test, and the Commission's reaction to that situation of advising the FCC to put less weight on performance data for PID OP-4. The action the Commission had taken, of advising the FCC to reduce the weight given to reported new installation performance data, has nothing to do with whether or not the factors reported by expanded PO-20 are critical to CLECs' ability to compete.

In ¶8 of the *Forty-Third Supplemental Order*, the Commission cited ¶58 of the *Thirty-Ninth Supplemental Order*. In ¶58 of the *Thirty-Ninth Supplemental Order* the Commission indicated that it was following the FCC's guidelines on verification of data in recommending lesser weight be put on performance data for OP-4. This recommendation occurred in Qwest's first section 271 application that had been filed in the spring of 2002.⁵² The development of the original PO-20 was part of Qwest's response to the concerns expressed in this order, as is shown by Exh. 7, the August 9, 2002 *ex parte* filing at the FCC and the *Forty-Third Supplemental Order*, which recites in ¶2 that Qwest filed the original PO-20 on August 20, 2002 with this Commission.

As discussed above, during the summer and fall of 2002 Qwest was also making improvements in its training and manual order handling procedures with the effect that when Qwest filed its second application in WC Docket 02-314, the Department of Justice commented favorably on Qwest's improved manual service order process.⁵³ Apparently as an additional result, this Commission did not file any comments with the FCC in response to Qwest's second section 271 application.⁵⁴

⁵¹ Exh. T-1 8:2 – 8:6 (Spinks); Exh. RT-9 4:19 – 5:2 (Spinks)

⁵² TR 176:10 – 176:16 (Spinks)

⁵³ Exh. T-10 9:1 – 9:8 (Reynolds)

⁵⁴ TR 176:17 – 177:1 (Spinks)

Another result of Qwest's improvements in the area of manual service order accuracy during the latter part of 2002 was that the FCC found in its order in Qwest's second application that Qwest was processing manual orders accurately.⁵⁵ Staff's citation in its testimony of the *Forty-Third Supplemental Order* ignores the intervening changes and improvements in Qwest's manual service order handling that occurred between that order and the FCC's determination to grant section 271 relief to Qwest. Nothing in the *Forty-Third Supplemental Order* indicates that every PID having to do with manually handled service orders is *ipso facto* to be designated for Tier 2.

In its rebuttal testimony, Staff also cites ¶129 of the *Thirtieth Supplemental Order*.⁵⁶ There, the Commission assigned PO-2B to Tier 2. Staff offers no explanation as to how that determination requires or even supports a finding that the expanded PO-20 meets the test announced for Tier 2 in the same order at ¶80 as amplified by Order No. 5 in Docket No. UT-033020. The Commission relied at ¶129 of the *Thirtieth Supplemental Order* on the fact that PO-2B was already included in the CPAP, the Colorado equivalent of the QPAP. There is no evidence that any other state has sought to impose Tier 2 payment requirements on the expanded PO-20.⁵⁷

Expanded PO-20 and PO-2B do not measure the same thing. There is no objective evidence that the factors that are measured by expanded PO-20 are critical to CLECs' ability to compete. Poor manual service order performance by Qwest that impacts the CLEC's relationship with its end user customers may possibly affect the CLECs' ability to

⁵⁵ *In the Matter of the Application of Qwest Communications International, Inc. to Provide In Region, InterLATA Services in the States of Colorado, Idaho, Iowa, Montana, Nebraska, North Dakota, Utah, Washington and Wyoming*, WC Docket No. 02-314, FCC 02-332, Memorandum Opinion and Order ¶16.

⁵⁶ Exh. RT-9 4:19 – 5:2 (Spinks)

⁵⁷ TR 181:10 – 181:13 (Spinks)

compete, but another PID, OP-5, measures such errors.⁵⁸ Staff produced no evidence of how errors that are measured by the expanded PO-20 would affect CLECs' ability to compete. Staff's reliance on this Commission's *Forty-Third Supplemental Order* and *Thirtieth Supplemental Order* does not demonstrate that expanded PO-20 meets the tests the Commission has established for Tier 2.

- h. Staff's claim that FCC decisions show the importance of expanded PO-20 to competition is unsupported.

Staff also mentions in its testimony unidentified "actions" and "determinations" by the FCC during the 271 process that supposedly recognize the importance of manual service order accuracy to competition in the local service market.⁵⁹ The only evidence Staff introduced of any involvement by the FCC in this issue related to the FCC staff, not the FCC itself. The *ex parte* filing by Qwest that was introduced in evidence recited the existence of questions by FCC staff that had led to the filing.⁶⁰ Whatever those questions were, Qwest's response through the filing of the original PO-20 and other improvements to manual service order processing it made during 2002 were satisfactory, according to the action and determination of the FCC in its order granting Qwest's application for section 271 relief. In that order, the FCC held that Qwest was accurately processing manual orders.⁶¹

- i. Qwest's performance report for three months under the expanded PO-20 does not show that this PID meets the Commission's Tier 2 tests.

⁵⁸ TR 202:22 – 203:7 (Reynolds); TR 210:7 – 210:12 (Reynolds)

⁵⁹ Exh. T-1, 8:7 – 8:9 (Spinks); Ex. RT-9, 4:13 – 4:17 (Spinks)

⁶⁰ Exh. 7 1

⁶¹ *In the Matter of the Application of Qwest Communications International, Inc. to Provide In Region, InterLATA Services in the States of Colorado, Idaho, Iowa, Montana, Nebraska, North Dakota, Utah, Washington and Wyoming*, WC Docket No. 02-314, FCC 02-332, Memorandum Opinion and Order ¶16.

Staff introduced Qwest's performance report under expanded PO-20 for the most recent three months and argued that Qwest would not be burdened if Staff's recommendation were accepted because as long as Qwest continues to provide quality service it will pay no penalties under Tier 2.⁶² Staff argues that the purpose of the QPAP is to provide a strong incentive for Qwest to continue its good performance.⁶³ On their face, this testimony and evidence fail to address the tests established by the Commission for including PIDs in Tier 2. This evidence also demonstrates that there is no need for the assignment of the expanded PO-20 to Tier 2 in order to meet the objectives of the QPAP as identified by the Commission. Qwest has been meeting the performance objectives without the added "incentive" of a Tier 2 assignment, since the new PID was approved by the Commission.

Mr. Spinks admitted that the existence of Tier 1 payments to Qwest's competitors for failure to meet the expanded PO-20 performance objectives provides Qwest an incentive to minimize manual service order errors.⁶⁴ While Mr. Spinks claimed that the incentive from Tier 1 payments alone "may not be adequate," he admitted he had no evidence that the incentive was not strong enough for Qwest to minimize manual service order errors.⁶⁵

The Commission should find that Staff has failed to carry its burden of satisfying this Commission's test for determining whether any Tier 2 assignment for expanded PO-20 is required or reasonable. Staff submitted no evidence that supports its recommendation for a Tier 2 Medium assignment for expanded PO-20.

⁶² Exh. 8; Exh. T-1 8:15 – 9:5 (Spinks)

⁶³ Exh. T-1 9:2 – 9:5 (Spinks)

⁶⁴ TR 191:2 – 191:21 (Spinks)

4. The CLECs' agreement that expanded PO-20 should have no Tier 2 assignment supports a finding that a Tier 2 assignment is not required.

Mr. Reynolds testified that the fact that the CLECs had agreed in the Settlement Agreement that there should be no Tier 2 assignment for the expanded PO-20 meant that the assignment of this new PID to Tier 2 was not necessary under the tests the Commission has established.⁶⁶ Staff responded with Mr. Spinks' recitation of hearsay declarations by persons he did not name and a statement by counsel for one CLEC during the prehearing conference that considered the Settlement Agreement.⁶⁷ Staff argues that the CLECs' agreement on this issue should be disregarded because CLECs allegedly did not consider the issue "theirs" to negotiate.⁶⁸ The ALJ indicated she considered this issue a "red herring" and Qwest respects that determination.⁶⁹

Qwest submits, however, that there is merit in briefly considering the fact that the CLECs did identify the Tier 2 assignment of expanded PO-20 as an issue on which they wanted to be heard in the Final Issues List, and they stated a position on that list in favor of a Tier 2 assignment. Staff stated no position on the issue in the Final Issues List and declined to negotiate the issue with the other parties.⁷⁰ The actions of those competitors who came forward to be heard initially on whether a Tier 2 assignment is needed for the

⁶⁵ TR 191:16 – 192:8 (Spinks)

⁶⁶ Exh. T-10 5:7 – 5:18 (Reynolds)

⁶⁷ Exh. RT-9 2:3 – 2:11 (Spinks) Staff's interpretation of the statement of Eschelon's counsel during the prehearing conference as indicating that the issue of Tier 2 for expanded PO-20 was "open" as between Qwest and the CLECs, is counter to the Commission's determination in Order No. 10 in this proceeding. In that order, the Commission held at ¶11 that the Settlement Agreement resolved all the issues in the proceeding between the settling parties. The question of a Tier 2 assignment for expanded PO-20 was clearly an issue between the CLECs and Qwest on the Final Issues List, and therefore that issue according to Order No. 10 and the law of the case doctrine was settled between Qwest and the CLECs.

⁶⁸ Exh. RT-9 2:3 – 2:5 (Spinks)

⁶⁹ TR 196:7 – 196:9

expanded PO-20 in order to protect competition and who agreed that it is not, in light of the other terms of the Settlement Agreement, should be given some weight. While the Settlement Agreement did not purport to resolve the Tier 2 issue for expanded PO-20 between Qwest and Staff, it definitely resolved that issue between Qwest and the CLECs.

CONCLUSION

Qwest submits that based on the evidence, the Commission should find that a Tier 2 assignment remains unnecessary for expanded PO-20. Qwest and the interested CLECs, bargaining at arms' length, crafted a settlement of the issues in this second six month review proceeding that included a resolution of the tier assignment for the expanded PO-20 such that there should be no Tier 2 assignment. This is not a situation of the Settlement Agreement being silent on whether there should be a Tier 2 assignment.

Notwithstanding the CLECs' agreement to walk away from a Tier 2 designation for expanded PO-20 in all of Qwest's states that will consider the issue, Staff claims that the Settlement Agreement is insufficient to guard CLECs' ability to compete in Washington. Staff has produced no substantial evidence to support that position. The history of the development of the original PO-20 more than two years ago does not support a finding that expanded PO-20 meets the test of measuring factors that are critical to CLECs' ability to compete. At least one other PID, OP-5, measures manual service order errors that affect CLECs' end user customers and might be expected to affect CLECs' ability to compete. That PID already carries a Tier 2 assignment and in and of itself provides sufficient incentive for Qwest to avoid backsliding. Staff admits it has no evidence that the incentive

of Tier 1 payments for failures to meet the expanded PO-20 benchmarks is not sufficient to cause Qwest to minimize manual service order errors. No other state has sought to impose Tier 2 payments on expanded PO-20. The Commission should reject the Staff's position and uphold the Settlement Agreement on this issue.

Respectfully submitted this 7th day of December, 2004

QWEST CORPORATION

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CERTIFICATE OF SERVICE

I certify that I served the foregoing Opening Brief on all parties to this proceeding this 7th day of December, 2004 by placing the same in the United States mail, properly addressed and with postage prepaid.

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