

**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 REPLY
) BRIEF
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.....)

Qwest Corporation ("Qwest") hereby submits its reply brief in the above proceeding. Staff's initial brief has failed to demonstrate a reason why the expanded PO-20 should be assigned to Tier 2 in Qwest's Washington PAP in addition to the Tier 1 Medium assignment that was negotiated by the CLECs.

Summary of Argument

The three arguments in Staff's initial brief and the lack of supporting evidence in the record fail to satisfy Staff's burden of proof. No evidence contradicts Qwest's assertion that the existing Tier 1 Medium assignment for expanded PO-20 provides sufficient incentive to Qwest to minimize manual service order errors or that expanded PO-20 does not measure factors critical to CLECs' ability to compete. Without such evidence, Staff's initial brief does not support a finding that Staff has met its burden of proof. Therefore, no justification exists for the establishment of a Tier 2 assignment for this PID.

Argument

1. Staff's initial brief presents a straw man argument.

The first section of Staff’s initial brief attacks a straw man by attributing to Qwest an argument that Qwest did not make. At page 3 of Staff’s brief, Staff says that Qwest “appears” to argue that the settlement agreement it entered with CLECs decided the issue. Although Staff attributes this alleged position to Mr. Reynolds’ testimony, Staff does not provide a citation to the record to support its argument pursuant to WAC 480-07-395(c)(v) and no evidence in the record supports Staff’s claim.

Qwest has already pointed out that the issue of whether there should be a Tier 2 assignment for the expanded PO-20 in addition to a Tier 1 Medium assignment was in fact settled between Qwest and the CLECs, since the tier assignment only remained open as between Staff and Qwest.¹ What Mr. Reynolds said about the settlement between Qwest and CLECs on the Tier 2 issue was that the CLECs’ decision to obtain a higher Tier 1 payment designation for PO-20 in lieu of pursuing a Tier 2 payment designation satisfied the Commission’s criteria regarding the importance of PO-20 to the CLECs.² The distinction lies in the satisfaction of the objective standard set by the Commission versus whether the settlement agreement resolved the issue in this proceeding. Qwest submits that the agreement between Qwest and the CLECs provides probative value as to the need for additional payment requirements for the expanded PO-20 but does not in and of itself resolve the issue.

In its attack on this nonexistent argument, Staff claims that a Tier 2 assignment for expanded PO-20 is necessary, in addition to the Tier 1 Medium assignment, to ensure that the remedial measures in the QPAP are sufficient. The question of “sufficient for what” must be analyzed in deciding whether a Tier 1 Medium payment obligation alone for

¹ Qwest’s Opening Brief, p. 22 n. 67.

expanded PO-20 is insufficient. Mr. Spinks said sufficiency means providing a strong incentive to Qwest to “continue its good performance” in serving CLECs who want to compete.³

As the proponent of the proposition that a Tier 1 Medium assignment alone provides insufficient incentive, Staff should be expected to prove that proposition with evidence. But Staff witness Mr. Spinks admitted that he had not presented any evidence that Tier 1 medium is insufficiently strong to deter poor performance by Qwest with regard to the manual service order accuracy.⁴

Mr. Spinks also admitted that he had presented no evidence that the local market would not remain open for competition without Tier 2 payments for expanded PO-20 in addition to the Tier 1 Medium payments that had been negotiated by the CLECs.⁵ Staff’s own evidence is that this case does not involve the “paramount” state interest.⁶ Indeed, Staff agreed that the remedies in the QPAP should be no stronger than necessary; otherwise the state or CLECs or both would be improperly enriched at Qwest’s expense.⁷

Staff’s initial brief at page 4 continues the argument against a position Qwest never took by pointing out that the settlement agreement was entered into by only three of one hundred thirty-seven CLECs that operate in Washington, and arguing that Qwest cannot say that the settling CLECs have interests that are the same as all the others. This

² Exh. T-10 13:22 – 14:1

³ Exh. T-1 9:2 – 9:5

⁴ TR 183:23 – 184:4

⁵ TR 181:3 – 181:9

⁶ TR 191:16 – 191:18 At page 3 of its initial brief, Staff argues that it represents the “paramount” interest of the state in “ensuring that effective competition not be stifled by insufficient remedial measures in the QPAP.”

⁷ Exh. T-1 9:2 – 9:5

argument is puzzling because Staff did not introduce evidence of any non party CLEC with a different position than the settling CLECs regarding tier assignment for expanded PO-20.

Staff's argument invites the Commission to speculate that unnamed CLECs who were not concerned enough to comment or otherwise participate in the proceeding, might have a different view on the issue and that such a view, even though it is unknown, should be weighed. This Commission should not decide this case based on such speculation.

2. By describing the QPAP in its brief Staff does not meet its burden of proof.

The second section of Staff's initial brief simply describes the QPAP. The only response necessary for this section of Staff's initial brief relates to the significance of the facts that Tier 1 and Tier 2 payments are not mutually exclusive and the number of the PIDs that are subject to Tier 1 and Tier 2 payments. Qwest has never suggested that Tier 1 and Tier 2 assignments are exclusive or that a tier assignment should be based on the number of other PIDs with two tier designations. Since Staff agrees payments under the QPAP need to be sufficient but not excessive to produce a strong incentive for Qwest to minimize manual order errors, exclusivity and whether other PIDs are subject to more than one tier assignment simply should not be a consideration as they result in no impact on the sufficiency of the incentive.⁸

Staff's initial brief also argues at page 5 that sixteen of twenty-five existing PIDs that are subject to Tier 1 payments are also subject to Tier 2 payments.⁹ Plainly this argument does not establish that any specific *new* PID that is already subject to Tier 1 Medium payments should also be subject to Tier 2 payments.

⁸ Exh. T-1 9:2 – 9:5

⁹ Staff's initial brief cites Exh. K to the QPAP, Attachment 1 as the source of this evidence, which is not an exhibit or an order or a rule. See WAC 480-07-395(c)(v).

3. The review of the evidence in Staff's initial brief does not support a finding in Staff's favor.

The third section of Staff's initial brief reviews the evidence Staff presented.

Qwest has in its opening brief already responded to certain arguments Staff presented and refers the Commission to that brief at pages 12-13 for Qwest's response. This section of Staff's initial brief asserts in essence that manual service order entry is critical to a CLEC's ability to compete.

The argument appearing at page 7 of Staff's initial brief erroneously asserts that it was "because of the concerns raised" in Exh. 3 and Exh. 4 that Qwest committed to develop and present a proposal for PIDs for order accuracy, citing Exh. 6 at page 1. What that latter exhibit actually says is:

Qwest understands and appreciates *the desire of commission staffs* to be in a position *to monitor* the effectiveness of manual order handling. *Accordingly*, Qwest's response starts by agreeing to develop and present a proposal for new PIDs addressing order accuracy, and then builds from there by agreeing to gather and provide additional data to support further consideration of manual order entry concerns in the upcoming long term PID administration meetings."[emphasis added]

Contrary to the apparent implication contained within Staff's initial brief, nothing about or within Exh. 6 establishes that expanded PO-20 measures factors that are critical to CLECs' ability to compete, pursuant to Docket No. UT-033020, Order No. 5, ¶4, n. 1. Staff's initial brief at page 7 also recites a portion of the Department of Justice's comments to Qwest's initial 271 application, arguing that the Department had concerns about monitoring of manual order accuracy but failing to show that the Department considered manual service order accuracy to be critical to CLECs' ability to compete.

While the Department commented on manual service order entry and a CLEC's ability to compete in Qwest's first section 271 application, Staff's initial brief on page 7 took the Department's comments out of context and has without explanation ignored the Department's subsequent comment on this same subject in Qwest's second section 271 application. The Department's comment about the existence of a meaningful opportunity for CLECs to compete was in the course of a qualified finding that Qwest's processes in fact allowed such an opportunity. Given the nature of what is measured, the impact of errors included in PO-20 does not affect and has not been shown to be critical to, a CLEC's ability to compete.¹⁰

Staff also failed in its initial brief to discuss the evidence Qwest introduced relating to the Department's finding in Qwest's second section 271 application, that Qwest had improved the record on manual service order accuracy.¹¹ Qwest further pointed out in its opening brief that in granting Qwest's application for interLATA relief, the FCC held that Qwest was processing manual orders accurately.¹²

Staff's initial brief at page 7 also recites an unsupported argument relating to concerns expressed by the Commission's *Forty-Third Supplemental Order* in Docket UT-003022 ¶8. The Commission order described a concern in a prior order¹³ with the reliability of reported installation data due manual data errors, not the impact of all manual

¹⁰ The record does indicate that the impacts to the end user are captured by a different PID (not at issue here) which may affect a CLECs' ability to compete through an effect on the CLEC's relationship with its customer. Errors captured by PO-20 are not end user impacting because they are either resolved prior to provisioning or the end user customer did not experience a problem as a result of the service order error. The PID OP-5 measures something that went wrong on or after the due date and therefore has an impact on the end user customer. TR 202:22 – 203:7; TR 209:17 – 210:9

¹¹ Exh. 10-T 8:16 – 9:8

¹² Qwest's opening brief at pp. 20-21

¹³ In the Thirty-Ninth Supplemental Order ¶58, the Commission advised the FCC to reduce the weight given to performance data for OP-4 based on manual service order error measurement reliability.

service order errors on CLECs' ability to compete. Nothing in the quoted portion of the *Forty-Third Supplemental Order* indicates that the Commission intended that all PIDs having to do with manual service order accuracy must be assigned to Tier 2 in addition to Tier 1, or that any improvement of the original PO-20 must automatically be assigned to Tier 2 in addition to Tier 1.¹⁴

Conclusion

Qwest submits that the Staff's initial brief has failed to identify any facts or make any arguments to support a finding that expanded PO-20 meets the standard for a Tier 2 assignment in addition to the Tier 1 Medium assignment the Commission adopted by approving the agreement between Qwest and the CLECs. No record evidence has been cited by showing that any of the factors measured by expanded PO-20 are critical to CLECs' ability to compete. Based on the evidence, Qwest submits that the Commission should uphold the settlement agreement and retain the tier assignment of Tier 1 Medium, no Tier 2 for expanded PO-20.

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Respectfully submitted this 17th day of December, 2004

QWEST CORPORATION

¹⁴ The order merely reflected the Commission's concern that Qwest offered the original PO-20 without having collaborated with the CLEC community; Qwest responded by working within CLECs and state staffs in a collaborative forum.

LAW OFFICES OF DOUGLAS N. OWENS

Douglas N. Owens (WSBA 641)
Counsel for Qwest Corporation

Lisa A. Anderl (WSBA 13236)
Qwest Corporation
Associate General Counsel
1600 Seventh Ave., Room 3206
Seattle, WA 98191
(206) 345 1574

Adam L. Sherr (WSBA 25291)
Qwest Corporation
Senior Attorney
1600 Seventh Ave., Room 3206
Seattle, WA 98191
(206) 398 2507

CERTIFICATE OF SERVICE

I certify that I served the foregoing Reply Brief on all parties to this proceeding this 17th day of December, 2004 by placing the same in the United States mail, properly addressed and with postage prepaid.

Douglas N. Owens (WSBA 641)
Counsel for Qwest Corporation

December 17, 2004