

BEFORE THE WASHINGTON STATE
UTILITIES AND TRANSPORTATION COMMISSION

In the Matter of the Second Six-Month)	DOCKET NO. UT-043007
Review of)	
)	ORDER NO. 14
QWEST CORPORATION'S)	
)	
Performance Assurance Plan)	INITIAL ORDER REJECTING TIER
)	2 ASSIGNMENT FOR PID PO-20
.....)	

PROCEDURAL BACKGROUND

- 1 **Synopsis.** *This Initial Order proposes that Tier 2 payments to the state are not required if Qwest fails to meet the performance standards of PID PO-20, a recently revised performance measure addressing Qwest's accuracy in manually processing service orders.*

- 2 **Nature Of The Proceeding.** In Docket No. UT-043007, the Washington Utilities and Transportation Commission (Commission) conducts its second six-month review of Qwest Corporation's (Qwest) Performance Assurance Plan, or QPAP. The Commission conducts a review of performance measures and performance indicator definitions (PIDs) in the QPAP every six months following the December 23, 2002, approval by the Federal Communications Commission (FCC) of Qwest's Section 271 application for the state of Washington.

- 3 **Procedural History.** The Commission initiated this proceeding in January 2004 by notifying parties of a prehearing conference. Following several prehearing conferences and discussions among the parties, the parties submitted a joint issues list with the Commission on June 25, 2004. A more detailed summary of

the procedural history in this proceeding is presented in paragraphs 5 through 13 of Order No. 10 in this proceeding and will not be repeated in this Order.

- 4 On August 27, 2004, Qwest, WorldCom, Inc., d/b/a MCI, Inc. (MCI), Eschelon Telecom, Inc. (Eschelon), and Covad Communications Company (Covad) filed with the Commission a Settlement of Disputed Issues (Settlement Agreement) that resolved all issues in this proceeding between the settling parties. On the same day, Staff filed a statement of position on the settlement, indicating that it did not oppose the Settlement Agreement generally, but objected to one aspect of the settlement, *i.e.*, whether or not to require Tier 2 payments for the modified PID PO-20. The modified PID PO-20 is referred to as Expanded PID PO-20.
- 5 Following a September 8, 2004, prehearing conference, the Administrative Law Judge entered a prehearing conference order, Order No. 09, establishing a procedural schedule to address the remaining issue in the proceeding, *i.e.*, whether to include a Tier 2 payment assignment in the QPAP for Expanded PID PO-20, and scheduling a hearing for Thursday, November 18, 2004.
- 6 On September 17, 2004, in Order No. 10 in this proceeding, the Commission approved the proposed Settlement Agreement and petitions to modify SGAT Exhibits B¹ and K,² including Expanded PID PO-20.
- 7 On October 5, 2004, Commission Staff filed with the Commission the testimony and exhibits of Thomas L. Spinks. On October 26, 2004, Qwest filed with the Commission the Response Testimony Mark S. Reynolds, as well as Qwest's Objection to Staff Testimony and Motion to Strike.

¹ Exhibit B to the SGAT comprises Qwest's Service Performance Indicator Definitions, or PIDs.

² Exhibit K to the SGAT is Qwest's Performance Assurance Plan, or QPAP.

- 8 On November 4, 2004, Staff filed with the Commission its Response in Opposition to Qwest's Motion to Strike. On November 8, 2004, Staff filed with the Commission the Reply Testimony of Mr. Spinks.
- 9 On November 12, 2004, Qwest filed with the Commission its Reply to Staff Response in Opposition to Qwest's Motion to Strike.
- 10 On November 15, 2004, Administrative Law Judge Rendahl entered Order No. 12 in this proceeding, granting Qwest's Motion to Strike Testimony.
- 11 On November 18, 2004, the Commission convened an evidentiary hearing before Administrative Law Judge Rendahl, at which Mr. Spinks and Mr. Reynolds testified concerning the remaining issue in the proceeding.
- 12 Qwest and Staff filed simultaneous initial briefs with the Commission on December 7, 2004, and simultaneous responsive briefs on December 17, 2004.
- 13 **Initial Order.** The presiding administrative law judge proposes that Expanded PID PO-20, a recently revised performance measure addressing manual service order accuracy, not be designated as a Tier 2 measure in the QPAP.
- 14 **Appearances.** Douglas N. Owens, attorney, Seattle, Washington, represents Qwest. Gregory J. Trautman, Assistant Attorney General, Olympia, Washington, represents Commission Staff. Other parties to the proceeding did not participate in hearings or submit briefs on the Tier 2 assignment issue.

MEMORANDUM

- 15 **Staff's Position.** Through the testimony and exhibits of Mr. Spinks and in brief, Staff asserts that the Commission should continue to include a Tier 2 payment

opportunity in the QPAP for Expanded PID PO-20, which measures manual service order accuracy.³

- 16 Staff recommends the Commission follow the criteria established in the Thirtieth Supplemental Order in Docket Nos. UT-003022 and UT-003040 for determining whether performance measures should be subject to Tier 2 payments, *i.e.*, “1) when performance results [are] available only on a regional basis, and 2) because of their importance to CLECs’ ability to compete.”⁴ Staff recommends a Tier 2 assignment for Expanded PID PO-20 because of the importance of manual service order accuracy to a CLEC’s ability to compete.⁵
- 17 Staff describes the history of the original performance measure, PID PO-20, developed during the course of third party testing of Qwest’s Operational Support Systems (OSS) to assist state commissions and the FCC in reviewing Qwest’s compliance with Section 271 of the Telecommunications Act of 1996.⁶ Staff asserts that Exhibits 3 through 7 to Mr. Spinks’ testimony, as well as comments filed by the U.S. Department of Justice and the Commission’s orders in Docket No. UT-003022, demonstrate the significance of manual service order accuracy to local service competition in Washington.⁷
- 18 Staff asserts that third-party OSS tester KPMG, the Regional Oversight Committee (ROC) Steering Committee, and the U.S. Department of Justice all indicated that errors relating to Qwest’s manual handling of orders could affect a

³ See Exh. T-1 at 1-2.

⁴ *Id.*, 7, citing *In the Matter of the Investigation into U S West Communications, Inc.’s Compliance with Section 271 of the Telecommunications Act of 1996, In the Matter of into U S West Communications, Inc.’s Statement of Generally Available Terms Pursuant to Section 252(f) of the Telecommunications Act of 1996, Thirtieth Supplemental Order, Commission Order Addressing Qwest’s Performance Assurance Plan, Docket Nos. UT-003022 and UT-003040, ¶ 80 (April 5, 2002) [Hereinafter Thirtieth Supplemental Order].*

⁵ *Id.*, 7-9.

⁶ *Id.*, 2-6.

⁷ *Id.*, 2-6, 7-8; see also Staff Initial Brief, ¶¶ 9-11.

CLEC's meaningful opportunity to compete.⁸ Staff notes that the issue of manual service order accuracy caused the Commission to recommend the FCC give less weight to certain performance data in the FCC's review of Qwest's Section 271 application.⁹ Given this historical analysis, Staff recommends that the Commission apply Tier 2 payments to Expanded PID PO-20.¹⁰

19 Staff asserts that the criteria the Commission applied in the Thirtieth Supplemental Order for determining whether Tier 2 payments are required is a subjective test requiring the Commission to determine whether Tier 2 payments are necessary to ensure Qwest's compliance in the future.¹¹ Staff asserts that the issue is one of policy and requires a forward-looking inquiry, not evaluation of empirical evidence.¹² Staff asserts that the Commission's test does not create a burden of proof, as no party could determine what may happen in the future.¹³ Staff asserts that Tier 1 and Tier 2 payments are not mutually exclusive, noting that sixteen of twenty-five PIDs in the current QPAP are subject to Tier 1 *and* Tier 2 payments due to their importance to a CLEC's ability to compete.¹⁴

20 Staff notes that Qwest and other parties have worked together to refine the original PID and develop Expanded PID PO-20.¹⁵ Staff asserts that Qwest and the settling CLECs resolved all issues relating to Expanded PID PO-20 in the Settlement Agreement, except for the question of whether the measure should be designated as subject to Tier 2 payments.¹⁶ Staff asserts that only three of 137 CLECs operating in the state, Covad, Eschelon, and MCI, entered into the Settlement Agreement, and that the three cannot represent the interests of all

⁸ Staff Initial Brief, ¶¶ 9-10.

⁹ *Id.*, ¶ 11.

¹⁰ *Id.*, ¶ 12; Staff Responsive Brief, ¶ 3.

¹¹ Staff Responsive Brief, ¶¶ 1-2.

¹² *Id.*, ¶¶ 4-5.

¹³ *Id.*, ¶ 5.

¹⁴ Staff Initial Brief, ¶¶ 7-8.

¹⁵ Exh. T-1 at 6.

¹⁶ *Id.*

CLECs.¹⁷ Further, Staff asserts that the settling CLECs did not intend the Settlement Agreement to resolve the issue of Tier 2 payments for Expanded PID PO-20.¹⁸ Staff argues that the Commission did not resolve the issue of Tier 2 payments for Expanded PID PO-20 by approving the Settlement Agreement.¹⁹ Staff asserts that it did not participate in settlement discussions, and that only Staff represents the interests of the state in this proceeding.²⁰

21 Although Staff recognizes that Qwest has never made a Tier 2 payment under PID PO-20 and that Qwest has recently met the standards for the Expanded measure, Staff asserts that assigning a Tier 2 payment opportunity for the PID will create a strong incentive to Qwest to continue to meet the performance benchmarks.²¹

22 **Qwest's Position.** Through the testimony of Mr. Reynolds and in brief, Qwest asserts that a Tier 1 payment designation is sufficient incentive to meet the requirements of Expanded PID PO-20, and that no Tier 2 designation is necessary.

23 Qwest concurs with Staff that paragraph 80 of the Thirtieth Supplemental Order provides guidance for determining whether a measure should be subject to Tier 2 payments.²² Qwest argues that the Commission's two-part test in paragraph 80 of the Thirtieth Supplemental Order requires empirical evidence of whether a measure is important to a CLEC's ability to compete.²³ Qwest asserts that Staff must prove "with appropriate evidence that existing conditions justify imposing a Tier 2 payment requirement for the expanded PO-20."²⁴ Qwest argues that

¹⁷ Staff Initial Brief, ¶ 5; *see also* Exh. 9-RT at 2-3.

¹⁸ Staff Initial Brief, ¶ 6, *citing* TR 115.

¹⁹ *Id.*, ¶ 4.

²⁰ *Id.*

²¹ Exh. T-1 at 8-9.

²² Exh. 10-RT at 4-5.

²³ Qwest Initial Brief at 7-9.

²⁴ *Id.*, 7.

Staff's case is based on subjective opinion, not experience or fact.²⁵ Qwest asserts that Staff has failed to meet its burden to show that the Commission should assign a Tier 2 payment designation for PID PO-20.²⁶

- 24 While Qwest concurs with Staff concerning the history of the development of the original PO-20 performance measure, Qwest argues that this history should not determine whether to assign a Tier 2 designation for Expanded PID PO-20.²⁷ Qwest further asserts that Staff's exhibits do not provide support for a determination of the appropriate tier designation for Expanded PID PO-20.²⁸
- 25 Qwest asserts that Exhibit 3, KPMG's Observation 3086, identifies that Qwest had satisfied KPMG's concerns by early 2002.²⁹ Further, Qwest asserts that Mr. Spinks quoted a portion of KPMG's concerns out of context, and that the concerns expressed do not relate to manual service order accuracy.³⁰ Qwest asserts that Exhibit 4 represents comments by the ROC Steering Committee before Qwest had made changes to its training processes, and that Qwest satisfied the Steering Committee's concerns.³¹ Qwest expresses similar concerns with Exhibits 5 and 6.³² In response to Staff's Initial Brief, Qwest asserts that nothing in Exhibit 6, KPMG's Manual Order Entry PID Adequacy Study, demonstrates that Expanded PID PO-20 measures factors that are critical to a CLEC's ability to compete.³³
- 26 Qwest argues that Exhibit 7, Qwest's *ex parte* filing with the FCC concerning the original PID PO-20, is not an admission by Qwest that Tier 2 payments are

²⁵ *Id.*, 7-8.

²⁶ *Id.*, 6-8.

²⁷ Exh. 10-RT at 3; Qwest Initial Brief at 10.

²⁸ Exh. 10-RT at 6.

²⁹ Qwest Initial Brief at 11; *see also* Exh. 10-RT at 6-7.

³⁰ Qwest Initial Brief at 11-13.

³¹ *Id.*, 13; *see also* Exh. 10-RT at 6-7.

³² Qwest Initial Brief at 14-15.

³³ Qwest Responsive Brief at 5.

appropriate for Expanded PID PO-20.³⁴ Qwest also asserts that the Department of Justice's concerns on which Staff relies do not address whether the factors measured by expanded PID PO-20 are critical to a CLEC's ability to compete.³⁵ Qwest further notes that the Department later filed comments with the FCC indicating that Qwest had addressed the Department's concerns.³⁶

- 27 Qwest asserts that PID PO-20 was originally assigned a Tier 2 payment designation because it was a regional measurement that was not disaggregated on an individual CLEC basis.³⁷ Qwest asserts that when the Commission considered Qwest's proposal for the original PID PO-20, AT&T and MCI opposed the Tier 2 payment designation.³⁸ Qwest asserts that these CLECs argued for Tier 1 payments to CLECs, rather than payments to the states.³⁹ Qwest notes that the new Expanded PID PO-20, however, is measured on a CLEC-specific basis.⁴⁰
- 28 Qwest requests that the Commission uphold the Settlement Agreement by retaining the Tier 1 Medium assignment with no Tier 2 assignment for Expanded PID PO-20.⁴¹ Qwest asserts that only Staff seeks a Tier 2 payment designation for Expanded PID PO-20.⁴² Qwest asserts that the Settlement Agreement resolved the issue of a Tier 2 assignment for PID PO-20 between Qwest and the CLECs, and that the Commission should give weight to the fact that the settling CLECs agreed that no Tier 2 assignment is necessary.⁴³ Qwest asserts that the CLECs' agreement indicates "that the lack of a Tier 2 designation does not hamper a

³⁴ Qwest Initial Brief at 15.

³⁵ *Id.*, 16.

³⁶ *Id.*, 17; *see also* Exh. 10-RT at 6-10.

³⁷ Exh. 10-RT at 3.

³⁸ *Id.*, 10-11.

³⁹ *Id.*

⁴⁰ *Id.*, at 3-4.

⁴¹ Qwest Reply Brief at 7.

⁴² Exh. 10-RT at 4.

⁴³ Qwest Initial Brief at 22-23; *see also* Exh. 10-RT at 3-5.

CLEC's ability to compete" and satisfies the criteria in paragraph 80 of the Thirtieth Supplemental Order concerning the importance of the performance measure to CLECs.⁴⁴

29 Qwest asserts that a Tier 2 payment designation is not appropriate where Qwest has demonstrated superior performance for a performance measure.⁴⁵ Qwest asserts that it has met the performance objectives of the PID for the months of May through July 2004, the most recent months reported at the time testimony was filed, and that there is no need for further incentive to perform by imposing a Tier 2 assignment.⁴⁶ Qwest asserts that Mr. Spinks testified that Staff had no evidence to show that Tier 1 payments are not a sufficiently strong incentive for Qwest to meet its performance benchmarks for Expanded PID PO-20.⁴⁷ Qwest also asserts that Mr. Spinks testified that there is no evidence that the local market would not remain open without Tier 2 payments for the performance measure.⁴⁸ Qwest argues that there is no evidence to contradict Qwest's assertion that a Tier 1 assignment provides sufficient incentive for Qwest to perform.⁴⁹

30 Qwest also disputes Staff's assertion that the Commission's Thirtieth and 43rd Supplemental Orders in Docket Nos. UT-003022 and UT-003040 support a Tier 2 assignment for Expanded PID-PO-20.⁵⁰ Qwest asserts that the Commission's discussion in the 43rd Supplemental Order addressing its concerns over manual service order accuracy during the OSS test, and the Commission's determination of a Tier 2 assignment for PID PO-2B in the Thirtieth Supplemental Order, are

⁴⁴ Qwest Reply Brief at 2; see also Exh. 10-RT at 5, 13-14.

⁴⁵ Exh. 10-RT at 12-13.

⁴⁶ Qwest Initial Brief at 21.

⁴⁷ Qwest Initial Brief at 21, *citing* TR 191:2-192:8 (Spinks).

⁴⁸ Qwest Reply Brief at 3, *citing* TR 181:3-181:9 (Spinks).

⁴⁹ *Id.*, 1.

⁵⁰ Qwest Initial Brief at 17-18.

not relevant to a consideration of the factors in Expanded PID PO-20.⁵¹ Qwest asserts that the FCC has not made any determination concerning the importance of manual service order accuracy to competition in the local market.⁵²

- 31 **Discussion and Decision.** The only issue remaining in this proceeding is whether the Commission should assign a Tier 2 payment opportunity to Expanded PID PO-20. This is a question of policy and fact to be resolved by applying the Commission's previously established criteria for Tier 2 designation.
- 32 The Commission has established several criteria for determining whether Qwest should be required to make Tier 2 payments for a performance measure. The Commission determined that:

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.⁵³

The Commission further asserted that Tier 2 payments are intended "to provide sufficient incentive for Qwest to continue meeting its performance obligations once it receives section 271 approval."⁵⁴

⁵¹ *Id.*, 18-19, citing *Thirtieth Supplemental Order*, ¶ 129; *In the Matter of the Investigation into U S West Communications, Inc.'s Compliance with Section 271 of the Telecommunications Act of 1996*, *In the Matter of into U S West Communications, Inc.'s Statement of Generally Available Terms Pursuant to Section 252(f) of the Telecommunications Act of 1996*, 43rd Supplemental Order; Approving Qwest's Request for Acceptance of Performance Measure PO-20, with Conditions, Docket Nos. UT-003022 and UT-003040 (Sep. 26, 2002), ¶¶ 8-9 [Hereinafter 43rd Supplemental Order].

⁵² *Id.*, 20-21.

⁵³ *Thirtieth Supplemental Order*, ¶ 80.

⁵⁴ *Id.*, ¶ 86.

33 As Qwest notes, the Commission stated during the first six-month review proceeding that:

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.⁵⁵

34 A party asserting that Tier 2 payments are required for a non-regional performance measure bears the burden of persuasion that the performance standards of the PID are important or critical to a CLEC's ability to compete and that Tier 2 payments will provide sufficient incentive to perform. Whether or not a performance measure meets these criteria is a policy question as well as a determination of fact and prediction of a future event, *i.e.*, whether a CLEC's ability to compete will be compromised without the incentive to Qwest of avoiding Tier 2 payments. While the party must provide some factual evidence of Qwest's historical performance in meeting the standards of the PID and the impact of the failure on a CLEC's ability to compete, the Commission may decide the issue considering both policy concerns and the factual evidence presented.

35 Expanded PID PO-20 is not reported on a regional basis like the original measure, but is reported on an individual CLEC basis. Following the Commission's criteria, Expanded PID PO-20 would be subject to Tier 2 payments only if the performance standards of the PID are important or critical to a CLEC's ability to compete with Qwest and if Tier 2 payments would create sufficient incentive for Qwest.

36 As a policy matter, Qwest's accuracy in processing manual orders is critical to a CLEC's ability to compete: If Qwest processes orders with errors, these errors

⁵⁵ *In the Matter of the Six-Month Review of Qwest's Performance Assurance Plan*, Order No. 05, Order on Issues Pending in First Six-Month Review Period, Docket No. UT 033020 (Jan. 16, 2004) ¶ 4, n.1 (*emphasis added*).

could delay or prevent CLECs from placing orders, affecting a CLEC customer's decision to do business with the CLEC. In addition, if Qwest processed manual orders with errors for products with which Qwest and CLECs are in direct competition, CLECs are likely to be negatively affected. Qwest concurs that errors in processing manual orders could be customer affecting and could affect a CLEC's ability to compete.⁵⁶ The Commission's policy concerns, however, are not the end of the inquiry.

37 The exhibits presented by Staff, *i.e.*, Exhibits 3 through 7, demonstrate the history of the development of the original PID PO-20 and the concerns of KPMG and the Steering Committee with Qwest's processes for handling manual service orders during the ROC OSS testing process in 2002. The problems in the OSS testing process that led to concerns by KPMG, the Steering Committee, the Department of Justice and this Commission occurred over three years ago. Staff acknowledges that these concerns were met, in part, by Qwest's proposal for and implementation of the original performance measure, and in part by other actions Qwest took to improve employee training.⁵⁷ In addition, since the measure was first implemented in 2002, Qwest, a number of CLECs, and state commission staff have worked to refine the measure, consistent with the Commission's directions in the 43rd Supplemental Order.⁵⁸ Based on these considerations, Staff has not sufficiently demonstrated that the problem is continuing or that Qwest's historical performance in accurately handling manual service orders rises to the level of affecting a CLEC's ability to compete.

38 Qwest has also consistently met the standards in both the original and Expanded PID PO-20. Staff reported that Qwest has not made a Tier 2 payment to the Commission, *i.e.*, failed to meet performance standards, for the original PID since

⁵⁶ TR 202, line 25 – TR 203, line 7 (Reynolds).

⁵⁷ TR 161, line 22 – TR 164, line 8 (Spinks); *see also* TR 167, line 1 – TR 169, line 25 (Spinks).

⁵⁸ 43rd Supplemental Order, ¶ 9.

it became effective in the QPAP in 2002.⁵⁹ In addition, Qwest had met or exceeded the benchmark for the expanded PID PO-20 at the time Mr. Spinks filed testimony in June 2004.⁶⁰ Given this history of performance under the original and expanded version of the PID, it appears that Qwest has sufficient incentive to continue meeting performance standards for manual service order accuracy without the additional incentive of Tier 2 payments.

39 It is not appropriate to assign any weight to the CLECs' decisions made in settlement to a determination of whether to assign a Tier 2 designation to Expanded PID PO-20. While Covad, Eschelon, and MCI agreed in the Settlement Agreement to forego a Tier 2 assignment for Expanded PID PO-20, it is not appropriate to divine the CLECs's intent in agreeing to only Tier 1 payments for the PID. There is no clear statement from the CLECs as to their intent for such an agreement, only conjecture by Qwest as to the meaning of such an action.⁶¹ Even if there were a statement of intent from the CLECs, it would not likely be admissible, as other references to settlement discussions have been stricken in this proceeding.

40 Despite Qwest's assertions, neither the Settlement Agreement nor the Commission's Order approving the Settlement Agreement resolved the issue of whether to assign a Tier 2 designation to Expanded PID PO-20. The settling CLECs agreed that "The Settlement is intended to be a resolution of the issues that existed between the Stipulating Parties in this proceeding, with the

⁵⁹ Exh. 1-T, at 8-9.

⁶⁰ See Exh. 8; The most recent monthly performance report demonstrates that Qwest has continued to meet the performance benchmarks for PID PO-20 through September 2004. See Qwest Performance Results for Washington, December 2003 – November 2004, at 66. While this Order does not rely on this data as a basis for decision, the Commission does continue to monitor Qwest's performance for all PIDs included in Exhibit B to the SGAT. Should Qwest begin to consistently fail to meet the performance standards for Expanded PID PO-20, the Commission would have reason to re-examine the issue.

⁶¹ TR 207, lines 7-15 (Reynolds); Qwest Initial Brief at 23.

exception of the Tier 2 designation for PO-20.”⁶² In approving the Settlement Agreement, the Commission noted that the question of whether to assign a Tier 2 payment to PID PO-20 is not resolved by the Settlement Agreement.⁶³

41 After reviewing the testimony, exhibits, and arguments presented by the parties, this Initial Order finds that Staff has not met its burden of persuasion to show that Tier 2 payments are necessary for Expanded PID PO-20. While the measure appears critical, on a policy level, to a CLEC’s ability to compete, there is no showing that the concerns that led to development of the measure almost three years ago still remain. Additionally, given Qwest’s consistent performance under the original and Expanded PID PO-20, Tier 2 payments are not necessary—on top of Tier 1 medium payments—to provide incentive for Qwest to continue to perform under the measure.

FINDINGS OF FACT

42 Having discussed above in detail the documentary evidence received in this proceeding concerning all material matters, and having stated findings and conclusions upon issues at impasse among the parties and the reasons and bases for those findings and conclusions, the Commission now makes and enters the following summary of those facts. Those portions of the preceding detailed findings pertaining to the ultimate findings stated below are incorporated into the ultimate findings by reference.

⁶² CLEC Narrative (Settlement of Disputed Issues), filed on August 30, 2004, in Docket No. UT-043007, ¶ 4.

⁶³ *In the Matter of the Second Six-Month Review of Qwest’s Performance Assurance Plan*, Docket No. UT-043007, Order No. 10; Order Approving and Adopting Settlement Agreement; Approving Petition to Modify SGAT Exhibits B and B-1 and in part, Exhibit K, and Interconnection Agreements Containing Exhibits B, B-1, and K (Sep. 17, 2004) ¶ 27.

- 43 (1) Qwest Corporation is a Bell operating company within the definition of 47 U.S.C. § 153(4), and an incumbent Local Exchange Company, or ILEC, providing local exchange telecommunications service to the public for compensation within the state of Washington.
- 44 (2) The Washington Utilities and Transportation Commission is an agency of the State of Washington vested by statute with the authority to regulate the rates and conditions of service of telecommunications companies within the state, and to take actions, conduct proceedings, and enter orders as permitted or contemplated for a state commission under the Telecommunications Act of 1996.
- 45 (3) Qwest's Performance Assurance Plan, or QPAP, includes performance measures and performance indicator definitions (PIDs) designed to ensure Qwest's continued compliance with the requirements of Section 271 of the Telecommunications Act of 1996 after entry into the long-distance market.
- 46 (4) In its six-month review proceedings, the Commission conducts a review of performance measures and PIDs every six months following the FCC's approval of Qwest's Section 271 application for the state of Washington.
- 47 (5) Since PID PO-20 was first approved by the Commission and implemented in the QPAP in 2002, Qwest, a number of CLECs, and state commission staff have worked to further refine the measure as Expanded PID PO-20.
- 48 (6) In Order No. 10 in this six-month review proceeding, the Commission approved a Settlement Agreement between Qwest and three participating CLECs to modify a number of performance measures, including PID PO-20, and agreed to include the modified PID PO-20 in the QPAP as a Tier 1 medium measure, with no designation for Tier 2 payments.

- 49 (7) Expanded PID PO-20, which measures Qwest's accuracy in processing manual service orders, is reported on an individual CLEC basis, not on a regional basis.
- 50 (8) Commission Staff objected to the lack of a Tier 2 designation for Expanded PID PO-20 in the Settlement Agreement, but supported the remainder of the Settlement Agreement.
- 51 (9) Neither the Settlement Agreement nor Order No. 10 in this proceeding resolved the issue of whether to assign a Tier 2 payment designation to PID PO-20.
- 52 (10) If Qwest processes manual orders with errors that are customer affecting, the errors could affect a CLEC's ability to compete.
- 53 (11) Exhibits 3 through 7 demonstrate the history of the development of the original PID PO-20 and the concerns of KPMG and the Steering Committee with Qwest's processes for handling manual service orders during the ROC OSS testing process in 2002. The exhibits also demonstrate that many of the concerns have been addressed, but do not demonstrate a continuing concern for manual service order accuracy.
- 54 (12) Qwest consistently met the performance standards for the original PID PO-20, and did not make Tier 2 payments under the measure. Qwest has met the performance standards for Expanded PID PO-20 for the first three months of reporting.
- 55 (13) The three participating CLECs agreed in the Settlement Agreement to forego a Tier 2 assignment for Expanded PID PO-20, but did not state or identify their intent for such an agreement.

CONCLUSIONS OF LAW

56 Having discussed above in detail all matters material to this decision, and having
stated general findings and conclusions, the Commission now makes the
following summary conclusions of law. Those portions of the preceding detailed
discussion that state conclusions pertaining to the ultimate decisions of the
Commission are incorporated by this reference.

- 57 (1) The Commission has jurisdiction over the subject matter of this
proceeding and the parties to the proceeding.
- 58 (2) Whether to designate a performance measure as subject to Tier 2
payments under the QPAP is a question of policy and fact to be resolved
by applying criteria established in paragraphs 80 and 86 of the Thirtieth
Supplemental Order in Docket Nos. UT-003022 and UT-003040.
- 59 (3) The Commission will designate performance measures as subject to Tier 2
payments if performance results are only available on a regional basis or a
performance measure is important or critical to a CLEC's ability to
compete, and Tier 2 payments will provide sufficient incentive for Qwest
to continue to meet its performance obligations.
- 60 (4) A party requesting designation of a performance measure as subject to
Tier 2 payments bears the burden of persuasion, rather than the burden of
proof, that a performance measure meets the Commission's criteria for
such designation, as the Commission will consider both policy concerns
and factual evidence in making the determination.
- 61 (5) Exhibits 3 through 7 presented by Commission Staff do not sufficiently
demonstrate that Qwest's historical performance in accurately handling

manual service orders rises to the level of affecting a CLEC's ability to compete.

- 62 (6) Qwest has complied with the Commission's directions in paragraph 9 of the 43rd Supplemental Order by working collaboratively with CLECs and state commission staff to refine PID PO-20.
- 63 (7) Qwest's history of performance under the original measure and for the first three months under the Expanded PID PO-20 demonstrates that Qwest does not need the additional incentive of Tier 2 payments to continue to perform under the measure.
- 64 (8) Assigning weight to the settling CLECs' decision during settlement to forego Tier 2 payments for Expanded PID PO-20 would be inappropriate, either as speculation where there is no record of the CLECs' intent, or as inadmissible settlement discussions if there were a record of intent.
- 65 (9) Commission Staff has not met its burden of persuasion to show that Tier 2 payments are necessary for Expanded PID PO-20, even though as a matter of policy, the measure appears critical to a CLEC's ability to compete.

ORDER

THE COMMISSION ORDERS:

- 66 (1) Qwest Corporation is not required to assign a Tier 2 payment designation to Expanded PID PO-20 in Qwest Corporation's Performance Assurance Plan in Exhibit K to its Statement of Generally Available Terms and Conditions.

- 67 (2) The Commission retains jurisdiction to effectuate the provisions of this and prior Orders entered in this proceeding.

DATED at Olympia, Washington, and effective this 6th day of January, 2005.

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

ANN E. RENDAHL
Administrative Law Judge

NOTICE TO THE PARTIES

This is an Initial Order. The action proposed in this Initial Order is not effective until entry of a final order by the Utilities and Transportation Commission. If you disagree with this Initial Order and want the Commission to consider your comments, you must take specific action within the time limits outlined below.

WAC 480-07-825(2) provides that any party to this proceeding has twenty (20) days after the entry of this Initial Order to file a *Petition for Administrative Review*. What must be included in any Petition and other requirements for a Petition are stated in WAC 480-07-825(3). WAC 480-07-825(4) states that any party may file an *Answer* to a Petition for review within (10) days after service of the Petition.

WAC 480-07-830 provides that before entry of a Final Order any party may file a *Petition to Reopen* a contested proceeding to permit receipt of evidence essential to a decision, but unavailable and not reasonably discoverable at the time of hearing, or for other good and sufficient cause. No Answer to a Petition to Reopen will be accepted for filing absent express notice by the Commission calling for such answer.

One copy of any Petition or Answer filed must be served on each party of record, with proof of service as required by WAC 480-07-150(8) and (9). An Original and **seven** copies of any Petition or Answer must be filed by mail delivery to:

Attn: Carole J. Washburn, Executive Secretary
Washington Utilities and Transportation Commission
P.O. Box 47250
Olympia Washington 98504-7250.