

BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

In the Matter of the Application of

U S WEST, INC., and QWEST
COMMUNICATIONS
INTERNATIONAL, INC.

For an Order Disclaiming Jurisdiction, or
in the Alternative, Approving the U S
WEST, INC., - QWEST
COMMUNICATIONS INTERNATIONAL
INC. Merger

DOCKET NO. UT-991358

COMMENTS OF PUBLIC
COUNSEL IN RESPONSE TO
QWEST'S PETITION FOR
MODIFICATION OF NINTH
SUPPLEMENTAL ORDER AND
MITIGATION OF CREDIT
AMOUNT

I. INTRODUCTION

1. The US West – Qwest Merger Settlement Agreement, approved by the Commission on June 19, 2000, in its Ninth Supplemental Order in this Docket, includes several commitments designed to improve the Company's quality of service, through infrastructure investments and customer credits for inadequate service. One of the most significant commitments is a Service Quality Performance Program that establishes eight performance baselines designed to provide an incentive to Qwest to improve its service quality. If the Company fails to meet these eight baseline performance levels, financial liabilities accrue. These liabilities ultimately flow back to customers as a bill credit, to compensate them for Qwest's inadequate service quality. The program places a total of \$20 million at risk annually and is in effect for a minimum of three years, beginning January 1, 2001. The Service Quality Performance Program was a crucial element supporting our belief that the Merger Settlement Agreement was in the public interest.
2. The Settlement Agreement approved and adopted by the Commission in the Ninth Supplemental Order provides that the Company may petition for mitigation of customer credits within 30 days after the end of the calendar year. On January 31, 2002, Qwest petitioned the Commission to mitigate a portion of the credit due to customers under the Service Quality

Performance Program and to modify the standard entitled Repair Intervals for Out-of-Service Conditions. In response to the Commission's February 15, 2002, Notice of Prehearing Conference and Notice of Hearing, Public Counsel respectfully submits these comments in opposition to Qwest's petition. Public Counsel will participate in the hearing scheduled for March 6, 2002.¹

II. QWEST'S REQUEST FOR MITIGATION OF CREDIT AMOUNT DOES NOT MEET THE STANDARD ADOPTED IN THE NINTH SUPPLEMENTAL ORDER

3. Qwest is seeking mitigation of \$666,667 of the \$1 million credit obligation for performance benchmark 5 – Out-of-Service Conditions—Repair Intervals. The performance standard agreed to by the Parties and adopted in the Commission's Ninth Supplemental Order at Appendix A reads as follows:

Out-of-Service Conditions--Repair Intervals. All reported interruptions of telecommunications service shall be restored within two business days, excluding Sundays and holidays, except interruptions caused by emergency situations, unavoidable catastrophes, force majeure, work stoppage, or failure of inside wiring or customer premises equipment. These credits shall not apply to trouble reports relating to operation of customer premises equipment, nor shall it apply to extraordinary or abnormal conditions of operation, such as those resulting from emergency or catastrophe or disruptions of service caused by persons or entities other than the local exchange company.

4. A credit obligation in the amount of \$83,333 is payable for each month that Qwest fails to meet this standard, representing a total of \$1 million at risk annually. In 2001, Qwest failed to meet this standard in all twelve months. Qwest petition at p. 6. Qwest's performance on this standard has therefore resulted in a \$1 million credit obligation to customers.
5. **The Mitigation Standard.** The Commission's Ninth Supplemental Order outlines the standard with which the Commission should review a petition for mitigation. The standard of review is as follows:

¹ Mary Kimball, Analyst for Public Counsel, has verified these comments and will be available at the March 6, 2002 hearing.

Mitigation of Credit Amounts. The Company may petition the Commission for mitigation of the credit amounts that would otherwise be paid pursuant to Section II.B.4 above. The Company shall have the burden of demonstrating that mitigation of any service quality credit amount is in the public interest. *In considering whether mitigation is in the public interest, the commission shall consider whether the assessment of credit amounts is due to unusual or exceptional circumstances for which the Company's level of preparedness and response was reasonable.* Any such petition shall be filed no later than thirty (30) days after the end of the calendar year for which such credits are payable. Appendix A, Section II.B.5 (emphasis added).

6. Qwest seeks mitigation for eight months of credit obligation for the out-of-service repair interval standard on the basis that for those eight months the Company achieved performance of 99.5% or better. Qwest petition at p. 7. The petition states, “The mitigation requested by Qwest will serve the public interest by continuing Qwest’s incentive to sustain its high level of performance.” At p. 7.

7. In considering whether a mitigation petition is in the public interest, the standard of review adopted in the Ninth Supplemental Order requires Qwest, if it seeks mitigation, to show that the credit obligation is “due to unusual or exceptional circumstances for which the Company’s level of preparedness and response was reasonable.” Appendix A, Section II.B.5. In reviewing Qwest’s petition, the Commission should therefore consider the following:

1. Has Qwest identified “unusual or exceptional circumstances” that resulted in the \$666,667 credit obligation?

2. If the answer to the question above is “yes,” was the Company’s level of preparedness and response to those circumstances reasonable?

8. Notably, Qwest does not argue that there were unusual or exceptional circumstances or that it otherwise meets the stated standard. Qwest’s petition states that the Company conducted a review and analysis of the 1,435 out-of-service reports not closed within two business days and concluded the following:

- 54 reports could not be located. Qwest petition at p. 6.

- 211 reports were completed in two business days but were not closed for paperwork reasons. Qwest petition at p. 6.
- 243 reports were not closed due to customer reasons. Qwest petition at p. 8.
- 486 reports were delayed due to major cable outages. Qwest petition at p. 8.
- 368 reports were delayed due to Qwest process issues. Qwest petition at p. 8.
- 127 reports were delayed for a variety of other reasons. Qwest petition at p. 8.²

9. The circumstances outlined above do not constitute “unusual or exceptional” circumstances. Rather, these are circumstances that are encountered by local exchange companies on a regular basis and therefore, the Company could and should have reasonably anticipated these situations.

10. Qwest’s justification for mitigation seems to be that repairing 99.5% of all out-of-service conditions within two working days represents a more reasonable standard and therefore, the Commission should grant mitigation for those months where Qwest’s performance met or exceeded the 99.5% benchmark. Accepting this argument would result in retroactively modifying a performance benchmark for 2001 performance that was agreed to by the Parties and adopted by the Commission in the Ninth Supplemental Order.

11. In a recent Commission Order granting in part and denying in part a petition for mitigation of service quality penalties from Puget Sound Energy, the Commission clearly distinguished its granting of mitigation as a result of “exceptional circumstances occurring in the energy industry.” *In the Matter of the Petition of Puget Sound Energy Inc. For Mitigation of Penalties Incurred for Failing to Achieve Benchmark for its Service Quality Index*, UE-011603, Order Granting in Part and Denying in Part the Petition for Mitigation, at p. 2. Puget Sound Energy’s request to modify a performance standard, however, was denied by the Commission. The Company had requested to exclude certain monthly performance results, which would have

² Qwest’s petition states that the Company conducted a manual analysis of 1,381 reports (1,435 minus the 54 reports that could not be located = 1,381). Qwest petition at p. 6. However, we observe that the results of the manual analysis amount to 1,435 rather than 1,381.

allowed them to meet the benchmark during the performance period in question. The Commission's Order states: "We reject the Company's argument to exclude the May 2001 results, which would allow the Company to claim the achievement of the benchmark. The standard agreed to in the Stipulation was not reached and should not be modified." Id at p. 3.

12. The standard for review of mitigation petitions in the Puget Sound Energy service quality program is substantially the same—indeed the standard in the US West-Qwest Merger Stipulation was based on the PSE standard. The mitigation standard for the PSE Service Quality Program is as follows:

In its report to the Commission filed October 15 of each year, PSE shall include the calculation of a penalty, if any, as provided herein. The report may include a mitigation petition for relief from such penalty. *The standard to be applied for such petition is that the penalty is due to unusual or exceptional circumstances for which PSE's level of preparedness and response was reasonable.* PSE will not file a mitigation petition unless it believes, in good faith, that it meets this standard. *In the Matter of the Proposed Merger of Puget Sound Power & Light Company and Washington Natural Gas Company* in Docket Nos. UE-951270 and UE-960195, Fourteenth Supplemental Order, Appendix A, Section III.B.4 (emphasis added).

13. In summary, Public Counsel believes that Qwest's petition fails to identify any unusual or exceptional circumstances that resulted in credits for the out-of-service repair interval standard. Therefore, we recommend the Commission find that Qwest's petition for mitigation of credits in the amount of \$666,667 does not meet the standard agreed to by the Parties and adopted by the Commission, is not in the public interest, and therefore should be denied.

III. PUBLIC COUNSEL OPPOSES QWEST'S PETITION TO MODIFY THE OUT-OF-SERVICE REPAIR STANDARD

14. Qwest's petition included a request to modify the performance standard pertaining to repair intervals for out-of-service conditions in the following respects:

- Additional Exclusions. Qwest proposes to add two new exclusions to the standard—reports not repaired within two working days (1) where customer access is required and the customer is not available and (2) as a result of major cable outages.

- Lower the Standard. Qwest proposes to lower the standard from repair of “all” out-of-service conditions within two working days to a 99.5% standard.

15. Public Counsel opposes both modifications sought by Qwest. Modification of the performance standards was not contemplated in the merger settlement agreement or the Order, as approved and adopted by the Commission. A settlement agreement reached after extensive negotiations and efforts to balance a wide variety of considerations should not be subject to modification on the motion of one party alone. In addition, there are significant policy reasons for opposing Qwest’s modification petition.

16. In considering Qwest’s petition to modify the Ninth Supplemental Order, we encourage the Commission to consider that the Service Quality Performance Program was designed to bring the Company into compliance with existing rules regarding service quality. The eight performance standards in the Service Quality Performance Program were largely based upon the rules that existed at the time of the settlement. However, key modifications were made, such as the additional exclusions added to the repair interval standard for out-of-service conditions. These modifications suggest the Parties knew full well what performance was expected. The Company willingly and freely negotiated and signed the Merger Settlement Agreement, fully aware of its past performance and the standards it would have to meet.

A. Modification of the Standard to Lower the Performance Baseline to 99.5%

17. First and foremost, the current standard agreed to by all Parties and adopted by the Commission is the same as the existing Commission rule, WAC 480-120-520(8), with the exception that there are additional exclusions included in the performance standard. Qwest agreed to this standard. Modification would lower the standard below that in the existing rule. Qwest’s proposal is to lower the standard from repair of “all” out-of-service conditions within two working days to a 99.5% standard.

18. A second concern is that Qwest’s proposal to lower the performance benchmark fails to adequately address the incentive issue raised by Qwest in their petition. With respect to the out-

of-service repair interval standard, Qwest's petition states: "There is a monetary penalty of \$83,333 for this specific standard for each month in which the Company's performance is not in compliance, regardless of how well Qwest performed overall. In other words, as the standard now reads, Qwest is penalized \$83,333 per month regardless of whether its performance on this metric was 99.5% or 59.5%." Qwest Petition at p. 5. Lowering the standard from repair of "all" out-of-service conditions to 99.5% does not address the incentive issue raised by the Company. Once Qwest knows it will not meet the 99.5% standard, there is no longer an incentive to repair individual out-of-service conditions in the two day timeframe.

19. Public Counsel opposes Qwest's proposal to lower the standard to 99.5% and encourages the Commission to deny this modification petition.

B. Modification of the Standard to Incorporate Additional Exclusions

20. As mentioned above, the current performance standard for out-of-service conditions—repair intervals in Qwest's Service Quality Performance Program is based upon the existing rule WAC 480-120-520(8), provided below:

WAC 480-120-520 Major Outages and Service Interruptions

(8) All reported interruptions of telecommunications service shall be restored within two working days, excluding Sundays and holidays, except interruptions caused by emergency situations, unavoidable catastrophes, and force majeure.

21. The performance standard adopted in the Ninth Supplemental Order and agreed to by all Parties included several additional exclusions that are not found in the existing rule. The performance standard adopted in the Ninth Supplemental Order appears below, with the new exclusions that are not included in WAC 480-120-520(8) in italics.

Out-of-Service Conditions--Repair Intervals. All reported interruptions of telecommunications service shall be restored within two business days, excluding Sundays and holidays, except interruptions caused by emergency situations, unavoidable catastrophes, force majeure, *work stoppage, or failure of inside wiring or customer premises equipment. These credits shall not apply to trouble reports relating to operation of customer premises equipment, nor shall it apply to extraordinary or abnormal*

conditions of operation, such as those resulting from emergency or catastrophe or disruptions of service caused by persons or entities other than the local exchange company.

22. Qwest proposes to add two new exclusions to the current performance standard on a going-forward basis. Specifically, Qwest proposes to exclude the following out-of-service reports from the repair interval standard:

- where customer access is required and the customer is not available, and
- those resulting from major cable outages

23. Public Counsel believes the existing performance standard—agreed to by all Parties and approved by the Commission—is reasonable and should not be modified to include the additional exclusions Qwest requests. Qwest’s justification for this modification stems from the results of the Company’s analysis of the 1,435 out-of-service reports not closed within two business days. Subsequent to Qwest’s mitigation and modification petition filed January 31, 2002, Commission Staff sent data requests to the Company. Staff request No. 5 posed the following question to Qwest: “What has changed that would cause Qwest to agree to the exceptions as stated in 2000 but now causes the company to seek a change?” In response to that question, Qwest states that modification of the standard to include these additional exceptions “is sought due to the analysis of the tickets and the specific conditions that prevented restoration within two working days.” Qwest response to Staff request 5 (Qwest’s complete response is included as Attachment A).

24. A review of all out-of-service reports—not just the 1,435 reported as not closed within two business days but all 233,236 reports received in 2001—might identify any number of other criteria by which orders are not closed. Presumably, the Company had an understanding of what it believed important circumstances that would prevent restoration within two working days when it agreed to a performance standard that includes several exclusions not found in the

existing rule. The Company should not be able to add each year those things that cause it to miss the standard.

25. Public Counsel opposes this modification for additional policy reasons. We believe the Company's proposed exclusion regarding customer access would create a vague and highly subjective standard. Presumably the Company would determine whether a particular situation meets that exclusion. There is no mention of exactly what level of effort the Company is required to make before concluding that the customer is not available. For example, should the Company make a point of asking every customer that reports an out-of-service condition when they will be available over the next two days in case access to the customer premise is required? Or should the Company be expected to make that inquiry only after they discover that access to the premise is needed to repair the problem? Public Counsel's concern is that any exclusion along these lines will not provide sufficient incentive to ensure the Company makes every effort to repair each out-of-service condition.

26. In summary, Qwest has not provided sufficient evidence to demonstrate that modification of the standard to add these two new exclusions is in the public interest. We believe the current standard, which is more lenient than the existing rule (WAC 480-120-520(8)) inasmuch as additional exclusions have been added, is reasonable. Public Counsel opposes the request for the reasons discussed above and encourages the Commission to deny the modification petition.

IV. CONCLUSION

27. The Company's petition for mitigation of credit obligation in the amount of \$666,667 failed to identify unusual or exceptional circumstances for which Qwest's level of preparedness and response was reasonable. The Qwest petition for modification improperly seeks unilateral changes in the standards agreed to in the settlement, changes that are flawed on policy grounds. The Qwest petition should be denied.

DATED this 22nd day of February, 2002.

VERIFICATION

Mary Kimball, being first duly sworn, deposes and says that she is Policy Analyst with Public Counsel, one of the parties to this proceeding entitled above, that she has read the foregoing comments and knows the contents thereof, that the same are true of her own knowledge, except as to matters which are stated on information and belief, and as to those matters as she believes them to be true.

DATED this ____ day of February, 2002.

Mary M. Kimball
Policy Analyst

Simon J. ffitch
Assistant Attorney General