

BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION
COMMISSION

In Re Application of U S WEST, Inc.,)	
And QWEST COMMUNICATIONS)	DOCKET NO. UT-991358
INTERNATIONAL, INC.)	
)	TWELFTH SUPPLEMENTAL
For An Order Disclaiming Jurisdiction,)	ORDER: DENYING PETITION
or in the Alternative, Approving the)	FOR MODIFICATION OF
U S WEST, INC.--QWEST)	NINTH SUPPLEMENTAL
COMMUNICATIONS)	ORDER AND MITIGATION
INTERNATIONAL, INC., Merger)	OF CREDIT AMOUNT
.....)	

SYNOPSIS: The Commission denies Qwest Corporation's Petition to modify requirements under one of the eight measurements of performance established by the Service Quality Performance Program approved and adopted by the Commission's Ninth Supplemental Order in this proceeding. The Commission also denies Qwest Corporation's request that it be relieved from its obligation to pay \$666,667 of the \$1,000,000 credit due as a result of the Company's failure to meet the Service Quality Performance Program measure concerning Repair Intervals for Out-of-Service Conditions during calendar year 2001.

1 **PROCEEDINGS:** The Commission concluded the principal phase of this proceeding with the entry of its Ninth Supplemental Order Approving and Adopting Settlement Agreements and Granting Application on June 19, 2000. In the Ninth Supplemental Order ("Order"), the Commission held that it had jurisdiction over the proposed merger between U S WEST, Inc. and Qwest Communications International, Inc., and approved their merger transaction subject to the conditions stated in the body of the Order, including those conditions set forth in the Settlement Agreements that were made part of the Order. Among other things, the approved and adopted Settlement Agreements required Qwest, Inc.,¹ to meet certain Service Quality Performance Program standards.

¹ Under the terms of the merger agreement, Qwest, Inc. became the "Surviving Corporation" and the separate corporate existence of U S WEST, Inc., ended. The Petition is brought in the name Qwest Corporation. We refer to the various corporate identities collectively as "Qwest" or the "Company")

2 The Commission conducted prehearing and hearing proceedings on March 6 and 7,
2002, and heard evidence from Qwest, Public Counsel, and the Commission's
regulatory staff (Staff) in connection with the Company's Petition, described below.

3 **PETITION:** On January 31, 2002, Qwest petitioned the Commission to modify
certain requirements of the Ninth Supplemental Order in this proceeding.
Specifically, Qwest requested a change in the Service Quality Performance Program
standard entitled "Out-of-Service Conditions—Repair Intervals." Qwest also
petitioned for mitigation of the credit amounts due under this standard for eight of the
twelve months in 2001, when it failed to meet the standard.

4 **PARTIES:** In the current phase of these proceedings, the following parties entered
appearances and actively participated: Lisa A. Anderl, Senior Attorney, Qwest,
Seattle, Washington, represents the Company; Simon ffitch, Assistant Attorney
General, Seattle, Washington, represents the Public Counsel Section, Office of the
Attorney General; Sally G. Johnston, Assistant Attorney General, Olympia,
Washington, represents the Staff.

5 **COMMISSION:** We deny Qwest's request that the Ninth Supplemental Order in
this proceeding be modified by changing the Service Quality Performance Program
measure entitled "Out-of-Service Conditions—Repair Intervals" to provide that
Qwest must restore 99.5 percent instead of 100 percent of out-of-service conditions
within two business days, and by adding exceptions when service restoration is due to
major cable outages or customer access reasons. We also deny Qwest's request that
the Commission mitigate \$666,667 of the \$1,000,000 credit obligation under the
existing standards for calendar year 2001.

MEMORANDUM

I. Background and Procedural History.

6 On August 31, 1999, U S WEST, Inc., and Qwest Communications International,
Inc., jointly filed an application requesting that the Commission enter an order
disclaiming jurisdiction over their proposed merger transaction or, in the alternative,
approving the merger. The Commission conducted proceedings as necessary under
its governing statutes and rules to afford all parties due process of law.

- 7 On Friday, March 3, 2000, the Applicants, Staff, and Public Counsel filed a Settlement Agreement (Exhibit No. 320) by which they proposed to resolve certain issues referred to as the “retail issues.” The Parties identified the issues that were not covered by the first proposed partial settlement as the “competitive issues.” The Commission adopted the Parties’ nomenclature and refers to this first settlement agreement as the Retail Settlement Agreement.
- 8 The Commission conducted a final prehearing conference on March 13, 2000, and held evidentiary proceedings on March 14-17 and 21, 2000. These hearings included proceedings concerning the proposed Retail Settlement Agreement, and proceedings concerning the competitive issues that remained in dispute. The Commission also conducted proceedings on March 16, April 10, 12, and 20, 2000, in various locations in Washington State, to receive oral comments from the public. Written comments from the public also were received. Exh. Nos. 454 and 455.
- 9 On or about May 19, 2000, Joint Applicants and Commission Staff reported to the Presiding Administrative Law Judge that they had achieved a settlement in principle on the remaining issues in the proceeding (*i.e.*, the competitive issues). These Parties requested that the hearing proceedings scheduled for May 23, 2000, for purposes of hearing oral argument be used instead to present a witness panel to testify in support of the proposed settlement of these issues and to respond to questions from the Bench.
- 10 On May 23, 2000, the Commission received into evidence as Exhibit No. 465, the Competitive Settlement Agreement between the Applicants and Staff concerning the competitive issues. The Commission inquired of a witness panel concerning the proposed settlement terms.
- 11 The Commission considered the two Settlement Agreements and the full record, including prefiled direct and rebuttal testimony by more than 20 witnesses, more than 1,500 transcribed pages of cross-examination and other colloquy, and more than 125 exhibits. On the basis of its review and deliberations, the Commission determined that it should approve the settlement terms as a resolution of the previously contested issues, as discussed in the body of the Ninth Supplemental Order in this proceeding.
- 12 Section II of the Retail Settlement Agreement, entitled Service Quality Improvements, includes Customer-Specific Credits in subpart A and a Service

Quality Performance Program in subpart B. The detailed requirements for the Service Quality Performance Program are set out in Attachment A to the Retail Settlement Agreement. There are eight performance measures, including the Out-of-Service—Repair Intervals measure at issue in this proceeding. This performance measure provides that:

Baseline: All reported interruptions of telecommunications service shall be restored within two business days, excluding Sundays and holidays, except interruptions cause 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 of [sic] disruptions of service caused by persons or entities other than the local exchange company.

Calculation of Credit: The credit payable shall be \$83,333⁵ for each month in which the Company's performance is not in compliance with this standard.

Maximum Annual Credit: \$1.0 million.

⁵ Representing \$1.0 million divided by 12 months.

13 Section II.B. of the Retail Settlement Agreement provides in part as follows:

4. Payment of Credits. In its monthly report to the Commission for December each year, the Company shall include a calculation of any credits payable for that calendar year under the Service Quality Performance Program. Unless the amount is mitigated pursuant to Section II.B.5 below, the amount of credits payable for such year shall be paid to current customers of the Company as an equal bill credit on all Company local exchange access lines. Such credits shall be paid no later than ninety (90) days after the end of such calendar year.

5. 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.

14 Qwest acknowledges that the Company failed to meet the Out-of-Service Condition—Repair Intervals measure during all twelve months of calendar year 2001. Accordingly, absent mitigation, a \$1,000,000 credit is due to be paid to Qwest’s customers by March 30, 2002, under the terms of the Service Quality Performance Program.

II. Discussion.

15 Qwest seeks by its present Petition to modify the Out-of-Service Conditions—Repair Intervals measure under the Service Quality Performance Program. Qwest also requests the Commission to mitigate \$666,667 of the credit obligation due for its failure to meet the current standard during each month of calendar year 2001. We discuss the issues of modification and mitigation separately below.

A. Modification.

16 The Commission’s fundamental mandate to regulate in the public interest is stated in RCW 80.01.040, which says in relevant part that:

The utilities and transportation commission shall:

* * *

(3) Regulate in the public interest, as provided by the public service laws, the rates, services, facilities, and practices of all persons engaging within this state in the business of supplying any utility

service or commodity to the public for compensation, and related activities; including, but not limited to, electrical companies

The Commission carries out its statutory duty in various ways, including through the conduct of adjudicatory proceedings in appropriate circumstances, as defined by our governing statutes. When we enter a final order at the conclusion of an adjudicatory proceeding, we necessarily do so under the public interest standard. It is in this context that we must consider Qwest's Petition that asks us to modify our Ninth Supplemental Order in this proceeding.

17 RCW 80.04.210 provides as follows:

Commission may change orders. The commission may at any time, upon notice to the public service company affected, and after opportunity to be heard as provided in the case of complaints rescind, alter or amend any order or rule made, issued or promulgated by it, and any order or rule rescinding, altering or amending any prior order or rule shall, when served upon the public service company affected, have the same effect as herein provided for original orders and rules.

Thus, although we unquestionably have the power under RCW 80.04.210 to modify our prior orders in appropriate circumstances, we exercise that power only if to do so is in the public interest. *RCW 80.01.040.*

18 In our Ninth Supplemental Order in this proceeding, we ordered:

That the Joint Application of U S WEST, Inc., and QWEST COMMUNICATIONS INTERNATIONAL, Inc., for approval of their merger transaction is granted subject to the conditions stated in the body of this Order, including those conditions set forth in the Settlement Agreements that are attached to this Order as Appendices "A" and "B."

We ordered further:

That the Settlement Agreements, attached to this Order as Appendices “A” and “B,” are approved and adopted as part of this Order as if set forth fully in the body of this Order.

19 Our ordering paragraphs, quoted above, rest on our Findings of Fact and Conclusions of Law. Our eighth Finding of Fact states that:

The Commission finds that Exhibit Nos. 320 and 465,^[2] taken together with testimony and exhibits related specifically to the settlement terms, and considered in light of the full record, are sufficiently comprehensive to provide reasonable resolutions of the issues pending in this proceeding, including the ultimate issue of whether the proposed merger is “inconsistent with the public interest.” WAC 480-143-170.

Our second and third Conclusions of Law state, respectively, that:

The Settlement Agreements (Appendices “A” and “B” to this Order), considered together, fully and fairly resolve the issues pending in this proceeding, and are in the public interest.

The merger transaction, subject to the requirements stated in the Settlement Agreements, which are attached to this Order as Appendices “A” and “B,” respectively, and which are adopted by reference into the body of this Order, is not inconsistent with the public interest. WAC 480-143-170. There is, therefore, no legal basis upon which to deny the pending application for merger approval. U S WEST and Qwest’s application for merger approval should be granted subject to the conditions described in the Settlement Agreements.

20 Qwest essentially argues that it would be inequitable to maintain the current performance standard for Out-of-Service—Repair Intervals because Qwest now recognizes that it will be difficult, if not impossible, ever to meet the standard and avoid incurring liability for monthly customer credits of \$83,333, and because it

² Exhibit Nos. 320 and 465 are, respectively, the Retail Settlement Agreement and the Competitive Settlement Agreement.

cannot control some of the events that will cause it to fail to meet the standard.³ We must consider this request for equitable relief in the overall context of what we accomplished through our Ninth Supplemental Order, as indicated by the operative parts of that Order, quoted above.

- 21 Staff and Public Counsel argue that it would be inequitable to grant in isolation Qwest's requested modifications of only one standard in the Service Quality Performance Program, the standard addressing Repair Intervals for Out-of-Service Conditions. These parties argue that equity requires us to consider alternatives to the specific modifications Qwest suggests. They also argue that we should not modify one standard without also modifying other aspects of the Program at the same time. Dr. Blackmon testified that Staff did make efforts to discuss with Qwest a more comprehensive approach to modification of the Service Quality Performance Program, but that these efforts were fruitless.
- 22 Although the current 100 percent standard, the current set of exclusions provided, and the current "cliff" nature of the credit-due mechanism under the Out-of-Service—Repair Intervals measure may appear in retrospect to be imperfect, we must be mindful that this is the incentive approach used for four of the eight Service Quality Performance Program measurements. Significantly, the service quality performance measure of this type that Qwest seeks to change is one of two that appeared to work effectively during 2001. With a goal of 100 percent, Qwest reported to the Commission that it achieved a 99.38 percent success rate in meeting the Out-of-Service Conditions—Repair Intervals standard.⁴
- 23 On a second measurement of similar type (*i.e.*, high percentage of performance coupled with cliff credits), the Answer Time Performance—Repair Calls measure, Qwest exceeded the 80 percent criterion and reported a 90 percent success rate on an annual average basis for 2001. On two other measures of this type, however, Qwest failed by a significant margin to achieve the goals set under the Service Quality Performance Program. If we are going to consider changing a performance measure

³ Mr. Robert Jones's testimony on cross-examination is that he advised the Company against a 100 percent performance standard at the time the Company negotiated and agreed to the Retail Settlement Agreement.

⁴ Qwest's Petition restates the Company's performance, correcting for asserted reporting errors, which changes the success rate for calendar year 2001 to 99.68 percent. Staff, however, challenged this analysis for its failure to "scrub" the entire universe of trouble reports for offsetting reporting errors.

24 that appears to be working pretty well (in the sense that the Company came close to achieving it), we certainly would wish to consider simultaneously changing other performance standards that do not appear to be working as well. Yet, Qwest urges us to consider only the one performance measure in isolation from the rest, and to consider only its proposed change, as shown by its response to Staff's proposal for alternatives.

25 Dr. Blackmon offered through his testimony an alternative acceptable to Staff that would give Qwest additional exclusions under the performance measurement, would eliminate the cliff mechanism for calculating credits due, and would eliminate the 100 percent performance requirement. *Exhibit No. 507 at 8-11; Exhibit No. 509.* Dr. Blackmon's Exhibit No. 509 shows that Staff's alternative would have meant a lower level of credits due given Qwest's reported performance during 2001. Ms. Theresa Jensen testified for Qwest, however, that the Company would prefer to keep the existing standard rather than have the Commission consider and adopt Staff's alternative.

26 The Ninth Supplement Order adopted a Settlement Agreement negotiated by and agreed to by all parties. The Commission found in its Order that the Agreement, including the Service Quality Performance Program, is in the public interest. Absent a showing of, for example, changed circumstances or significant hardship, or other convincing reason, the argument that one of eight performance standards can be improved upon is not sufficient for the Commission now to rewrite that standard over the objections of other parties to the Settlement.⁵ We are persuaded that the equities and the public interest disfavor granting the relief Qwest has requested because it is imbalanced. Accordingly, Qwest's Petition for Modification should be, and is, denied. Any, or all parties are always free, of course to present to us a more balanced proposal to modify the Agreement.

B. Mitigation.

27 As with our analysis of Qwest's Petition for Modification, we consider the Company's request for mitigation in the context of the overall Service Quality Performance Program. Qwest has shown in support of its Petition for Mitigation that

⁵ See *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*, Docket No. UE-011603, Order Granting in Part and Denying in Part the Petition for Mitigation, at 2-3 (January 10, 2002).

it has achieved a relatively high degree of success on the Out-of-Service—Repair Intervals measure, but this is only one of eight measures of the Service Quality Performance Program. Had Qwest performed on all of these other measures at high levels, a different case for mitigation would be before us. However, as stated earlier, Qwest’s performance on another measure was substantially below the “cliff” thresholds.

28 Like its request for modification, Qwest’s request for mitigation is lopsided, in that it does not take into account Qwest’s overall performance. When we look at Qwest’s overall performance we find that mitigation is not in the public interest.⁶ Accordingly, Qwest’s Petition for Mitigation should be, and is, denied. That said, we applaud the Company’s considerable improvement on some measures, and look forward to seeing an overall improvement in 2002.

FINDINGS OF FACT

29 Having discussed above all matters material to our decision, and having stated general findings, the Commission now makes the following summary findings of fact. Those portions of the preceding discussion that include findings pertaining to the ultimate decisions of the Commission are incorporated by this reference.

30 (1) The Washington Utilities and Transportation Commission is an agency of the State of Washington, vested by statute with authority to regulate rates, rules, regulations, practices, and accounts of public service companies, including electric companies. *Chapter 80.01 RCW.*

31 (2) Qwest is engaged in the business of furnishing telecommunications services within Washington State as a public service company.

32 (3) The current record does not support granting either legal or equitable relief to Qwest from the terms and requirements of the Ninth Supplemental Order in this proceeding.

⁶ In view of our disposition of the request for mitigation on this Petition, we do not reach, in applying the public interest standard, the need to “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,” as provided in Section II.B.5 of the Retail Settlement Agreement.

CONCLUSIONS OF LAW

- 33 Having discussed above in detail all matters material to our 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.
- 34 (1) The Washington Utilities and Transportation Commission has jurisdiction over the subject matter of, and Parties to, this proceedings. *Title 80 RCW.*
- 35 (2) The Commission's Ninth Supplemental Order continues to be in the public interest in all respects and should not be modified at this time.
- 36 (3) The Commission should not mitigate the credits due in connection with Qwest's performance under the Service Quality Performance Program during calendar year 2001.
- 37 (4) The Commission should retain jurisdiction over the subject matter and the parties to effectuate and enforce the terms of this Order and its prior orders in this proceeding.

ORDER

- 38 (1) THE COMMISSION ORDERS That Qwest's Petition for Modification of Ninth Supplemental Order and Mitigation of Credit Amount is denied.
- 39 (2) THE COMMISSION ORDERS FURTHER That it retains jurisdiction over the subject matter of, and the parties to, this proceeding to effectuate and enforce the terms of this Order and its prior orders in this proceeding.

DATED at Olympia, Washington, and effective this 13th day of March 2002.

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

MARILYN SHOWALTER, Chairwoman

RICHARD HEMSTAD, Commissioner

PATRICK J. OSHIE, Commissioner

NOTICE TO PARTIES: This is a final order of the Commission. In addition to judicial review, administrative relief may be available through a petition for reconsideration, filed within 10 days of the service of this order pursuant to RCW 34.05.470 and WAC 480-09-810, or a petition for rehearing pursuant to RCW 80.04.200 or RCW 81.04.200 and WAC 480-09-820(1).