

BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

In the Matter of

QWEST CORPORATION

Petition for Commission Approval of
Stipulation Regarding Certain Performance
Indicator Definitions and Qwest
Performance Assurance Plan Provisions.

DOCKET NO. UT-073034

COMMISSION STAFF'S
OBJECTION TO QWEST'S
PETITION AND MEMORANDUM
REGARDING PROCEDURAL
ISSUES

1 In accordance with the Commission's August 6, 2007, Prehearing Conference Order, Commission Staff submits its objections to and substantive concerns with Qwest's Petition for Approval of Stipulation Regarding Certain Performance Indicator Definitions and Qwest Performance Assurance Plan Provisions. Staff also submits, in Part II below, its memorandum regarding the inapplicability of the language contained in 47 U.S.C. §252(f)(3) (requiring that a state commission take some action on an SGAT filing within 60 days) to Qwest's request to amend the performance assurance plan.

I. STAFF OBJECTIONS AND CONCERNS.

2 Qwest Corporation and four competitive local exchange carriers (CLECs) have filed with the Commission a stipulation regarding various proposed modifications to Qwest's Performance Assurance Plan (PAP) and Performance Indicator Definitions (PIDs). The PAP and PIDs are included as exhibits to Qwest's Statement of Generally Available Terms (SGAT) and to numerous interconnection agreements between Qwest and various CLECs.

One effect of the filing is to remove from the PIDs certain unbundled network elements that Qwest is no longer required to provide to CLECs under FCC rules. Much more significantly, however, the filing proposes a change in the way Tier 2 payments (for which Qwest is liable when it fails to meet performance standards) are triggered. Currently, if Qwest fails to meet a standard in a given month, it is liable for payments for that month. Under the proposal, Qwest would not be liable for payments unless it failed to meet a given standard for three consecutive months. Information that Qwest provided in response to Staff's informal data requests shows that the effect of the proposed changes, based on the last 12 months of performance data, would be that Qwest would enjoy as much as a 55 percent reduction in liability for failing to meet performance standards (even after adjusting for the removal of delisted UNEs). *See* exhibit attached to this pleading. Staff is concerned that these proposed changes could reduce Qwest's incentive to meet the performance standards set out in the PIDs.¹ In fact, in the docket in which the PAP was developed, the Commission specifically ordered Qwest to change a provision in its proposed PAP that would have required Tier 2 payments only after three consecutive months of non-performance, stating "We question whether sufficient Tier 2 incentives will exist if Qwest

¹ In the FCC's order approving Qwest's application to provide in-region, interLATA toll services in Washington and eight other states, the FCC stated:

We conclude that the nine application states' respective PAPs provide incentives to foster post-entry checklist compliance. As in prior section 271 orders, our conclusions are based on a review of several key elements in the performance remedy plan: *total liability at risk in the plan*; performance measurement and standards definitions; structure of the plan; self-executing nature of remedies in the plan; data validation and audit procedures in the plan; and accounting requirements. . . . The PAPs include provisions for continuing review of the PAP by the state commission. [Emphasis added.]

17 FCC Rcd 26303, ¶ 455 (Dec. 23, 2002).

can fail to meet the performance standards one-third of the time or more without consequence.²

4 Staff is also concerned that this request has come without any prior state staff or Qwest Regional Oversight Committee involvement.³ Although Qwest provided notice to state staffs that it would be negotiating changes to the QPAP with CLECs, the notice gave no indication that the level of payment for failing to meet standards would be a subject of negotiation.

5 Although the Commission has previously made changes to the QPAP without hearing (while simultaneously approving amendments to the SGAT and making reference to Section 252(f)(3)), all such requests came from other states, or the Regional Oversight Committee (ROC), and were non-controversial.⁴ That is not the case here. Staff recommends that the Commission set the matter for hearing and that Qwest be required to file testimony showing why it is in the public interest and consistent with purposes of the PAP for Qwest to reduce the financial consequences of failing to meet performance standards.

Recommendation:

6 As discussed in the procedural section below, it is appropriate to (1) set the proposed change to the PAP for hearing, and (2) disapprove, without prejudice, the amended SGAT. If the Commission ultimately approves the proposed changes to the PAP, Qwest should then be permitted to change the applicable portions of its SGAT accordingly.

² 30th Supp. Order, Dockets UT-003022 and UT-003044 (consolidated), ¶¶ 81, 86 (April 5, 2002).

³ See 47th Supp. Order (Order 01, Docket UT-033020) Dockets UT-003022 and UT-003040 (consolidated) (directing participation in multi-state collaborative for long-term PID administration including “payment structure” issues).

⁴ See fn.5, *infra*.

II. PROCEDURAL ISSUES (APPLICABILITY OF SEC. 252(f)).

7 Qwest, and the stipulating CLECs, seek to have the Commission “approve the 2007
stipulation describing proposed changes to the PAP and the PID, apply the agreed upon
changes to any interconnection agreements containing the PAP, and also allow the PID to go
into effect no later than 60 days after this submission in accordance with 47 U.S.C. §
252(f)(3).”⁵

8 This Commission has sometimes characterized its actions with regard to the PAP
(and the PIDs that contain the performance standards) as a matter of “approving” those
documents as exhibits to the SGAT.⁶ However, the PAP and PIDs aren’t merely voluntary
offerings by Qwest, nor are they just a contract between Qwest and the CLECs.⁷ Together,
they constitute a wholesale service quality requirement that, along with the PAPs of other
states in Qwest’s territory, “are administered by state commissions and derive from authority
the states have under state law. . . .”⁸ They serve as a complement to the FCC’s authority to
preserve checklist compliance after Qwest’s entry into the market for interLATA toll

⁵ Qwest Petition for Approval of PID/PAP Stipulation, ¶ 5.

⁶ However, approving the QPAP as Exhibits B and K of the SGAT has typically been handled a kind of compliance filing *after* Commission has already ordered or agreed to a change in some aspect of the QPAP. In its 30th Supp. Order in Docket UT-003022 and UT-003040 (consolidated), at ¶ 109, this Commission concluded that it has “independent authority to review Qwest’s overall service quality” and that it “will not relinquish its authority over service quality, nor is it required to do so in approving the QPAP.” *See fn. 10, infra*. *See also*, UT-033020 Order No. 08 (also UT-043010 Order no. 01) (approving Qwest’s petition to modify QPAP in response to Washington’s 6 month. review and compliance filing in response to Long Term PID Administration recommendation – multistate group); UT-043007 Order No. 07 (also UT-043068 Order No. 01) (approving Qwest’s petition to modify QPAP in response to Long Term PID Administration recommendation – multistate group); UT-043007 Order No. 10 (also UT-043088 Order No. 01) (approving Qwest’s petition to modify QPAP in response to settlement following litigation and hearing); UT-043007 Order No. 15 (also UT-043119 Order No. 01) (approving Qwest’s petition to modify QPAP in response to Arizona’s 6 month review).

⁷ “The QPAP is not just a contract between Qwest and CLECs. The QPAP is Qwest’s performance assurance plan through which it assures this Commission, competing carriers, and the FCC that Qwest will continue to adhere to the requirements of Section 271 after it obtains section 271 authority.” 39th Supplemental Order, Dockets UT-003022 and UT-003040 (consolidated), ¶ 19 (July 1, 2002).

⁸ *In the Matter of Application by Qwest Communications International, Inc. for Authorization to Provide In-Region, InterLATA Services in the States of Colorado, Idaho, Iowa, Montana, Nebraska, North Dakota, Utah, Washington, and Wyoming*, 17 FCC Rcd 26303, ¶ 459 (Dec. 23, 2002).

services.⁹ Many, if not most, of the key elements of the Washington plan were specified by Commission orders.¹⁰

9 Therefore, properly characterized, the stipulating parties are really asking the Commission to: (1) exercise its state authority to make changes to the requirements of previous Commission orders, (2) specify that those changes apply to carriers operating under existing interconnection agreements, and (3) *then* allow Qwest to reflect those changes in its schedule of generally available terms (SGAT) for any CLEC who might, in the future, choose to adopt the SGAT as its interconnection agreement with Qwest.

10 By asserting that the entirety of this request is driven by the timeline that the federal Act provides in Section 252(f)(3) for review of SGAT filings, Qwest puts the cart before the horse. An SGAT is merely a standard contract *offer* that the federal Act permits regional Bell operating companies to file with state commissions.¹¹ Qwest's theory appears to be that because its filing includes a change to the PAP that would need to be reflected in an amended SGAT, the Sec. 252(f)(3) schedule for review applies to all aspects of the filing. Therefore, in Qwest's theory, the Commission must review Qwest's request and approve or disapprove it, including any reconsideration thereof, within 60 days.¹² Although the Commission could continue its review after 60 days under Qwest's theory, the Commission

⁹ In its *Verizon New York Order*, 15 FCC Rcd 4164, n. 1316, the FCC stated with regard to performance assurance plans: "These mechanisms are generally administered by state commissions and derive from authority the states have under state law or under the federal Act. As such, these mechanisms can serve as critical complements to the [FCC's] authority to preserve checklist compliance pursuant to section 271(d)(6)."

¹⁰ See 30th Supp. Order (establishing QPAP); 33rd Supp. Order (responding to Qwest petition for reconsideration), 37th Supp. Order (addressing compliance with commission orders); 47th Supp. Order (Order 01, Docket UT-033020) (directing participation in multi-state collaborative), Dockets UT-003022 and UT-003040 (consolidated) (various dates).

¹¹ Under 47 U.S.C. § 252(f), a Bell operating company is allowed to file with a state commission a "schedule of generally available terms" that sets forth its standard contract offering for items required under section 251 of the Act. The SGAT, once approved, provides a comprehensive set of local interconnection terms that allows a CLEC without an existing interconnection agreement to opt into the SGAT.

¹² See 47 U.S.C. § (f)(3).

would have to permit the statement to take effect during that continuing review.¹³ Qwest also apparently believes it needn't provide any meaningful justification for the proposed changes in the SGAT or in the underlying PAP requirements that were imposed by Commission order.

Recommendation:

11 The Commission should recognize Qwest's petition as fundamentally a request to change a Commission regulatory requirement, imposed on Qwest under state authority by previous Commission orders.¹⁴ As such, the Commission should treat the matter under RCW 80.04.200 or RCW 80.04.210. Both of these statutes give the Commission authority to change its orders—at the initiative of the affected company under RCW 80.04.200, or at the Commission's own initiative under RCW 80.04.210. Under RCW 80.04.200, the company carries the burden of showing changed conditions or other good cause to alter the previous Commission order. Additionally, both statutes specify that the proceedings are to be conducted as provided for complaints—in other words, under the 10-month clock of RCW 80.04.110(3). This is why Staff recommends that the Commission set the matter for hearing and that Qwest and the stipulating CLECs be required to file testimony showing why it is in the public interest, and consistent with purposes of the PAP, to reduce the financial consequences of failing to meet performance standards.

12 To the extent that the petition also seeks an amendment to the SGAT (as opposed to a change in underlying commission requirements regarding Qwest's PAP and the PIDs that are part of that plan), the Commission should disapprove the proposed amendment as

¹³ See 47 U.S.C. § (f)(4).

¹⁴ See, e.g., 30th Supp. Order, Docket No. UT-003022 and UT-003040 (consolidated), ¶ 339 ("Qwest must modify section 7.3 of the QPAP to require Tier 2 payments in any month that Qwest fails to meet the Tier 2 performance standards").

inconsistent with the existing intrastate wholesale telecommunications service quality requirements (*i.e.*, the PAP). Section 252(f)(2) expressly reserves to a state commission the authority to enforce “other requirements of State law in its review of [a statement of generally available terms], including requiring compliance with intrastate telecommunications service quality standards or requirements.” It is impossible to apply a different PAP to Qwest’s relationship with different CLECs. The calculation of Qwest’s liability for Tier 1 and Tier 2 payments provides one example of why this is so: Qwest’s Tier 1 and Tier 2 liability is dealt with in the PAP on an aggregate basis. Qwest’s Tier 1 liability to CLECs for failing to meet standards is capped, and CLECs receive a proportionate share of the payments below the cap. Tier 2 payments to the Commission are calculated on a company-wide basis. There likely are also numerous operational reasons why it does not make sense to change the QPAP for some carriers but not others, or to change the QPAP as reflected in the SGAT, but not in existing interconnection agreements. Therefore, the Commission should disapprove the amended SGAT while it considers Qwest’s request to change the QPAP. As noted above, if the Commission ultimately approves the proposed changes to the PAP, Qwest should then be permitted to change the applicable portions of its SGAT accordingly.

DATED this 16th day of August, 2007.

Respectfully submitted,

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