

1 BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION
2 COMMISSION

3 In re Application of U S WEST,)
INC., and QWEST COMMUNICATIONS)
4 INTERNATIONAL, INC.,) Docket No. UT-991358
) Volume XXI
5 For an Order Disclaiming) Pages 2113 - 2179
Jurisdiction, or in the)
6 Alternative, Approving the)
U S WEST, INC. - QWEST)
7 COMMUNICATIONS INTERNATIONAL,)
INC., Merger.)
8 -----

9

10 An oral argument in the above matter
11 was held on June 25, 2004, at 1:30 p.m., at 1300 South
12 Evergreen Park Drive Southwest, Olympia, Washington,
13 before Administrative Law Judge C. ROBERT WALLIS,
14 Chairwoman MARILYN SHOWALTER, Commissioners RICHARD
15 HEMSTAD and PATRICK OSHIE.

16

17 The parties were present as follows:

18 QWEST CORPORATION, by LISA A. ANDERL and ADAM
SHERR, Attorneys at Law, 1600 Seventh Avenue, Suite
19 3206, Seattle, Washington 98191; telephone (206)
345-1574.

20

21 WASHINGTON UTILITIES AND TRANSPORTATION
COMMISSION, by CHRISTOPHER G. SWANSON, Assistant
Attorney General, 1400 South Evergreen Park Drive
22 Southwest, Post Office Box 40128, Olympia, Washington
98504; telephone, (360) 664-1220.

23

24 PUBLIC COUNSEL, by SIMON J. ffitich, Assistant
Attorney General, 900 Fourth Avenue, Suite 2000,
Seattle, Washington 98164; telephone, (206) 389-2055.

25

02114

1 CITIZENS' UTILITY ALLIANCE OF WASHINGTON, by
2 JOHN O'ROURKE, Attorney at Law, 212 West Second Avenue,
3 Suite 100, Spokane, Washington 99201; telephone, (509)
4 744-3370

5

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

Kathryn T. Wilson, CCR

25

Court Reporter

1 PROCEEDINGS

2 JUDGE WALLIS: Let's be on the record,
3 please. This is the June 25th session in the matter of
4 the Commission Docket No. UT-991358. The purpose for
5 this afternoon's session is to receive oral argument
6 from the parties on the issues that have been presented
7 in the reopening of this docket for purpose of
8 reviewing the service quality protection program and to
9 hear the proposal for termination or modification
10 presented by Qwest.

11 This afternoon's argument is before the
12 Commission, Chairwoman Marilyn Showalter, Commissioners
13 Richard Hemstad and Patrick Oshie. My name is Bob
14 Wallis. Before we begin this afternoon, I would like
15 to confirm the time that parties have. We were looking
16 at 45 minutes per side. Ms. Anderl, will that be
17 sufficient for you?

18 MS. ANDERL: Yes, Your Honor.

19 JUDGE WALLIS: Will that be a surplus issue?

20 MS. ANDERL: If I were to speak
21 uninterrupted, it would be, yes, but I'm anticipating
22 there may be questions from the Bench, so I would like
23 to assume we would use the whole time, and I would like
24 to reserve 15 or 20 minutes for rebuttal at this point.

25 JUDGE WALLIS: Which is it?

1 MS. ANDERL: Twenty.

2 JUDGE WALLIS: The other parties have a total
3 of 45 minutes to respond to the opening argument to be
4 divided as you wish. You have indicated you would
5 prefer to be heard as a panel; that is, each make short
6 presentations and then respond to questions. Is that
7 still your thought for this afternoon?

8 MR. SWANSON: That's true for Commission
9 staff.

10 MR. ffitch: And for Public Counsel, thank
11 you, Your Honor, if that's amenable to the Bench.

12 JUDGE WALLIS: It is. Do we know whether
13 Mr. O'Rourke is planning to attend today?

14 MR. ffitch: Your Honor, I understood he was
15 going to participate and had not conferred with him
16 whether he was going to be here in person or not.

17 JUDGE WALLIS: Mr. O'Rourke, we have unmuted
18 our bridge line. Are you on the line?

19 MS. KELLY: This is Jessica Kelly, legal
20 intern. Mr. O'Rourke is on the road currently. There
21 was supposed to be a message given to you that he had
22 his car break down so he will not be there.

23 JUDGE WALLIS: So Mr. O'Rourke has had car
24 trouble.

25 MS. KELLY: Yes. I spoke to him about 15

1 minutes ago.

2 JUDGE WALLIS: I would propose, given the
3 time constraints that we have, to begin, and if
4 Mr. O'Rourke appears, to allow him to offer comments if
5 he has any.

6 MS. KELLY: He will plan on being there.

7 JUDGE WALLIS: Thank you. We are going to
8 turn the mute back on.

9 So if we are ready to begin, I do want to say
10 that everyone is familiar with the record, has read the
11 briefs very carefully, and has that context in mind as
12 you make your arguments, so let's begin with
13 Ms. Anderl.

14 MS. ANDERL: Thank you, Your Honor,
15 Chairwoman Showalter, Commissioners Hemstad and Oshie,
16 Lisa Anderl representing Qwest. This matter is before
17 you today on oral argument on Qwest's petition to
18 terminate, or in the alternative, modify the SQPP, and
19 we ask that you grant the petition for termination in
20 the first instance, and if you find that full
21 termination is not warranted, we ask that you modify it
22 as set forth in Qwest's petition.

23 As you are aware, the SQPP, along with the
24 continuation of the customer service guarantee program,
25 was deemed necessary at the time of the merger to

1 insure good quality customer service and to protect
2 customers against any deterioration of service quality
3 that might result from the merger. Since then, Qwest's
4 service quality has improved dramatically. By any
5 measure, Qwest's service quality is excellent. As
6 discussed in the testimony and in the closing brief,
7 Qwest's service quality is good in absolute terms. It
8 is good in relative terms, and it is good and improving
9 on a subjective basis.

10 Staff, and when I say "staff," I mean to
11 include the other parties as well, public counsel and
12 the CUA, seem to be intent on having Qwest make
13 payments simply for the purpose of having Qwest make
14 payments. Even though Staff admits that certain of the
15 SQPP metrics are flawed, Staff does not want to modify
16 them in this proceeding. Even though Staff admits that
17 the SQPP Qwest makes payment for good service, Staff
18 does not want to remedy that result of the SQPP.

19 Staff continues to take the position that any
20 reduction in credits to customers is a harm to
21 customers. Qwest submits to you that a reduction or
22 elimination of credits when service quality is good is
23 not a harm to customers, and Qwest's proposal really
24 implements that concept.

25 What I would like to do, and there are some

1 things in the opposing parties' closing briefs that I
2 would like to address specifically, but I would like to
3 discuss with you another way to think about this
4 application, and as I was thinking about it, it
5 occurred to me in many ways that Qwest's application to
6 terminate the SQPP is like an application to get into
7 college, and I think we are all kind of familiar with
8 what that entails for ourselves or for children.

9 There are pretty much four things. They look
10 at the SAT scores. They look at your grades. They
11 look at your essay, and they consider your personal
12 interview, and Qwest has really presented four things
13 in support of its application to have the SQPP
14 terminated that are roughly analogous to those four
15 factors. We've presented our historic performance
16 level since 2003, maybe something like your grades.
17 We've presented the fact of the existence of the
18 customer service guarantee program, which continues to
19 provide incentives and remedies into the future, much
20 like the SAT might be predictive of a future
21 performance. We have presented to you the competitive
22 environment, which I'm going to analogize to the
23 personal interview, and we've presented to you the
24 existence of the Commission's newly adopted and revised
25 and improved service quality rules, which are something

1 like the essay.

2 Staff and Public Counsel have set themselves
3 out in this analogy as advisors to the Commission's
4 committee, which I would submit are Your Honors, and
5 have said that Qwest fails to gain admission, but
6 Qwest's SAT score isn't good enough, and we've said,
7 What would be good enough? Well, we don't know, but we
8 know that Qwest isn't good enough. Well, all right,
9 then what about the grades? Well, we think our grades
10 are really high. We've got something like a 3.8. No,
11 Staff and the other parties say, your past performance
12 is good, your grades are good, but it's not good
13 enough. Well, what would it have taken? Well, we
14 don't know, but we know you aren't there yet.

15 What about the interview? I thought I did
16 well on the interview. Taken by itself, it's okay.
17 There are some competition. You did okay, but there is
18 some things lacking, just maybe residential
19 competition, just weren't quite personable enough to
20 ace the interview. Okay, maybe.

21 What about the Commission's new rules? The
22 Commission's rules coupled with the customer service
23 guarantee program, there are metrics for every single
24 one of the metrics in the service quality program that
25 we are asking to terminate. I would say to you that's

1 kind of like the essay. Gee, we had a lot of help on
2 that essay. We worked with Commission staff. We
3 worked with the Commission to write the rules. We got
4 a lot of input. We thought it was a pretty good essay.
5 Well, yeah, but it's just not good enough. Well, what
6 would it have taken to be good enough to pass the test
7 to get in? Well, we don't know, but we know we aren't
8 there yet.

9 So then to kind of mix metaphors here, I
10 would said, well, okay, if you consider each of these
11 factors by themselves and look at them as each of them
12 being a string to hold up this application, maybe each
13 one of them by itself isn't strong enough to do that,
14 but we have never suggested that any one of these
15 factors on a stand-alone basis is strong enough. What
16 we would suggest to you is you take these four factors,
17 these four ropes, and you braid them together, and when
18 you do that, you get something that's a lot stronger
19 than any one thing standing by itself, and under those
20 circumstances, can you tell us why we have not met the
21 standard to terminate the SQPP, and the answer again
22 is, Well, we can't really tell you what the standard
23 is, but we know you aren't there yet.

24 Qwest respectfully submits that that's just
25 wrong. Qwest's performance, the other metrics that are

1 in place to continue to provide assurance of good
2 service quality, the changing competitive landscape,
3 Qwest's need to provide excellent service quality in
4 the spirit of service that is the company's way of life
5 at this point, all those things independently drive
6 good service quality, and the SQPP, a plan that we've
7 done through our testimony and evidence, really does
8 have Qwest pay credits for good performance and really
9 does have flawed metrics in it, has outlived its
10 usefulness.

11 Under those circumstances, we think there is
12 more than enough reason to terminate it. How can I say
13 to you that Staff won't tell us or the opposing parties
14 won't tell us what the standard is to terminate or how
15 we'll know when we get there? I would submit to Your
16 Honors that in the hearing, and I'm sure you have read
17 the transcript, both Dr. Blackmon and Ms. Kimball,
18 witnesses for Staff and Public Counsel, were asked by
19 the administrative law judge, how will we know when it
20 is time to end the SQPP? How will we know when it's
21 outlived its usefulness, and in response to those
22 questions, the parties each said, We are not really
23 sure, but we will know it when we see it, and we know
24 we aren't there yet.

25 That is not a standard that any company can

1 ever really meet, and we think that the better
2 standards are the ones that we have presented to you,
3 which is that changes in the competitive landscape
4 constitute changed circumstances. The changes in the
5 Commission's rule constitute changed circumstances.
6 The continuation of the customer service guarantee
7 program constitutes sufficient protection for
8 customers, and Qwest's historic performance is
9 evidence, not necessarily that the SQPP is working,
10 because for some metrics it doesn't work at all, but is
11 evidence that Qwest has independent desire and need to
12 maintain high service quality and will do so, even if
13 the SQPP is terminated or modified as we've requested.

14 CHAIRWOMAN SHOWALTER: On the question of if
15 the SQPP is terminated, then what is the effect of the
16 combination of the new rules and the customer guarantee
17 program? Is it that there are metrics in place for
18 measurement because of the rules that are individual
19 payments under the customer guarantee program, and what
20 does that leave missing as part of the picture?
21 Obviously, the metrics will have changed, but then also
22 some of the payments, but in the form of penalty,
23 automatic payments will not be there. Am I first of
24 all accurate in that characterization?

25 MS. ANDERL: Yes, that's exactly right.

1 Individual customer credits to affected customers under
2 the tariffed program will continue the customer service
3 guarantee program. And we think that's really an
4 important factor because we've heard in this case that
5 customers should be remedied or receive remedies when
6 service quality is bad, and we think that's what the
7 customer service guarantee program does. It targets a
8 remedy to a specifically injured, or customer, a
9 customer who has had a commitment missed, a customer
10 who has not had their out-of-service repair within two
11 days, and those targeted payments, we think, are the
12 ones that are appropriate both from an incentive
13 standpoint for the company and also from those customer
14 remedy standpoint.

15 Under the SQPP that we are seeking to
16 terminate, all of the customers in the state get
17 somewhere in the neighborhood of 81 cents on their bill
18 once a year whether they were ever injured or not, and
19 it doesn't seem to be a meaningful tie in there to
20 service quality.

21 CHAIRWOMAN SHOWALTER: Thank you.

22 COMMISSIONER HEMSTAD: What is the company's
23 view in this context of the competitive landscape for
24 landline services for residential customers?

25 MS. ANDERL: We believe that competition is

1 present and getting stronger for residential landline
2 customers. There is no question that Comcast competes
3 in a big way for residential customers. There is no
4 question that wireless competes in a big way for
5 residential customers. There is no question that VOIP
6 is going to be a very disruptive technology and
7 potentially competitive for residential customers.

8 Unless we have service quality along with
9 products, of course, to attract and retain customers,
10 we are not going to be viable, and that's not something
11 we target to only business customers because we receive
12 a competitive classification for business services, so
13 therefore, those are the only ones that might be
14 competed away and those are the only ones we have to
15 provide good service too, that's simply not the mindset
16 in the company. That's not the way you can run the
17 business.

18 As we explained in some of our testimony,
19 many of the things that are measured by the metrics at
20 issue are ones where there is no distinction between
21 residential and business customers. We don't
22 distinguish when we try to improve out-of-service
23 repair conditions between residential and business
24 customers, so there are no preferences there, and so
25 service quality, to the extent it's driven higher by

1 competition in one market, will be driven higher for
2 all customers.

3 COMMISSIONER HEMSTAD: Do I take it from that
4 that you see the competition from alternative
5 technologies but not significantly competition for
6 landline, and my question is really informed by the
7 recent decision of the court of appeals.

8 MS. ANDERL: Your Honor, I don't know the
9 extent to which competing companies saw UNE-P as a
10 viable platform for competition for residential
11 customers given the pricing for UNE-P in this state.
12 On the other hand, we do know that MCI was making
13 significant inroads with its neighborhood program,
14 which is targeted to residential customers, and as
15 you've read in the press reports, MCI has recently
16 reached a commercial agreement to enable them to
17 continue to purchase the UNE platform.

18 So I think that the court of appeals'
19 decision for that particular purpose is really not
20 going to impact competition on the UNE platform or
21 should it because the companies can reach commercial
22 agreements that, as far as we and MCI are concerned, is
23 viable for both of us. MCI wouldn't have entered into
24 that agreement if it didn't think it enabled them to
25 compete, and we wouldn't have entered into it unless we

1 thought it made financial sense for us, and I'm sorry I
2 forgot to mention them when I listed off Comcast and
3 wireless and VOIP, but they are definitely a component
4 in the mix.

5 CHAIRWOMAN SHOWALTER: I have a question
6 about the timing of our adoption of the rules,
7 vis-a-vis timing of our approval of the merger
8 conditions. My recollection, but please correct me if
9 I'm wrong, is that at the time of the approval of the
10 merger, we had a rule-making underway on many of these
11 metrics were under discussion, and some of the drafts
12 had provisions that looked something like the merger
13 conditions, but in any event, the rules that we did
14 later adopt cover those areas but sometimes in a
15 different way. Is that sequence approximately correct?

16 MS. ANDERL: At the time of the merger, June
17 30th, 2000, the Commission service quality rules were
18 similar to what they are today, but they were lacking
19 in several respects. There were several metrics in the
20 SQPP as to which rules do not exist, and in the
21 Commission's rule-making that then promulgated the
22 rules that were effective last July 3rd, July of 2003,
23 the rules that we are under now filled those gaps.

24 In fact, I think it was very important, and
25 one of the reasons why we are suggesting that the

1 Commission's new rules are an adequate standard, an
2 adequate customer protection, whereas the Commission's
3 old rules were not and necessitated the SQPP, there was
4 no rule on out-of-service repair within two days or 48
5 hours. That's a huge metrics. It's one that's very
6 important for us and customers. At the time the SQPP
7 was approved or the merger was approved, there was no
8 Commission rule that had the out-of-service standard in
9 it. Now do you have an out-of-service rule.

10 CHAIRWOMAN SHOWALTER: Is it correct to say
11 that the old rules had some gaps. The merger
12 conditions filled in the gaps. The rules filled the
13 gaps in in a different way but that in addition, the
14 merger conditions contained automatic payments that the
15 rules don't.

16 MS. ANDERL: That's right, and there is
17 really only one rule that is just completely different
18 from the SQPP metric, and that's the business office
19 response time and repair response time, and in your
20 rule it says it has to be a 60-second average wait
21 time, no more than 60-second average wait time.

22 In the SQPP, it is the 80 percent of the
23 calls within 30 seconds, and I'm going to talk a little
24 more about that as I move into discussions of some of
25 the metrics. With regard to the installation

1 intervals, five-day and 90-day intervals, there is the
2 old rule and the new rule and the SQPP metrics are all
3 the same.

4 CHAIRWOMAN SHOWALTER: I'm sorry. It's
5 really hard for me to listen to what Ms. Anderl is
6 saying when there is a side conversation going on. If
7 you need a few minutes before you start, that's fine.
8 I didn't really hear what you were saying in the last
9 couple of minutes.

10 MS. ANDERL: In the installation intervals,
11 90 percent of all orders within five days and 99
12 percent in 90 days, there was no change in the old
13 rule, the new rule, and the SQPP. That's the same
14 metric there. For the out of service, there is no
15 rule, and now the Commission rule says 100 percent of
16 those out-of-service conditions must be repaired in 48
17 hours. The SQPP says 100 percent of the out-of-service
18 conditions must be repaired in two business days. The
19 difference is that if you violate the rule, you don't
20 automatically pay anything unless somebody brings a
21 complaint against you.

22 CHAIRWOMAN SHOWALTER: But there is no
23 subject, is there, in the SQPP, that is not also in the
24 new rules?

25 MS. ANDERL: That's right. That's exactly

1 right, and the essence of our request for modification
2 is if you don't want to terminate the SQPP, move all
3 the metrics to metrics in the rule. We think you did a
4 good job in the rule-making. We think you had a lot of
5 industry input. We think that everyone's judgment has
6 been informed by the instance of the SQPP and the rules
7 over the last three years. In an evolutionary sense,
8 the rules are superior to the SQPP.

9 Your Honor, may I ask have how much time I
10 have left?

11 JUDGE WALLIS: We've added a couple of
12 minutes to compensate for the diversion, and you have
13 nine minutes.

14 MS. ANDERL: I would like to talk a little
15 bit about, because I'm sure Staff will mention this,
16 and this is something that's specific to Staff and not
17 to the other parties, but because of our frustration as
18 to what the standard might be in terms of how we could
19 possibly terminate the SQPP and what will it take to
20 let us out of this, we asked Staff in discovery what
21 will it take to let us out of this, and Staff did
22 respond to us by setting forth four factors that Staff
23 believed to be sufficient justification to terminate
24 the SQPP. We think three of those factors are simply
25 meaningless or unattainable and that the fourth factor

1 is one that's present here but that Staff doesn't wish
2 to recognize.

3 The four factors, the first of which was, and
4 I don't know if I'm going in order, but the first one I
5 would like to talk about is Staff said you could
6 terminate the SQPP if it were acting in such a way as
7 to harm customers, that it created worse incentives to
8 the company, and the implementation and operation of it
9 actually harmed customers, but then Staff indicated
10 during hearing that they did not believe that such an
11 accusation could ever be fairly leveled at any of the
12 metrics in the SQPP. Thus, it is a set of
13 circumstances that could never exist.

14 With regard to the second proposal, a factor
15 as to when termination would be appropriate would be if
16 Qwest's service quality performance so far exceeded the
17 metrics that there was no chance we would make any
18 payments under the plan. For at least two metrics, the
19 standard is 100 percent, and we asked Staff, how can
20 you exceed the standard so far there would be no
21 possibility of payment. How can you exceed a standard
22 of 100 percent by any measure at all, and Staff agreed
23 as to how that factor would not then be applicable as a
24 basis for terminating at least some of the metrics in
25 the SQPP.

1 With regard to the third factor, the basis
2 for termination, Staff indicated that if Qwest went
3 under an AFOR, an alternative form of regulation, it
4 might be reasonable to terminate the SQPP. However,
5 when asked why would that be, the response would be,
6 Well, we would expect that when a set of superior or
7 equivalent measures were put into place under the AFOR,
8 therefore rendering the SQPP superfluous, to that I
9 would respond that that simply makes that factor
10 meaningless. You can't replace a set of metrics with a
11 new set of metrics and terminate the SQPP is simply a
12 meaningless act, but it's got a different name.

13 The fourth factor is the factor that is
14 present here, and that is the introduction of another
15 mechanism with similar or superior objectives and
16 incentive effects, and as Qwest's evidence amply shows,
17 we believe the Commission's new rules constitute
18 another mechanism with similar objective. I don't
19 think anyone would be able to say that the Commission's
20 rules don't have the objective of insuring good service
21 quality and incenting companies to perform.

22 So we think the new rules, and candidly
23 admit, coupled with the other factors we've presented
24 to you, but that Staff's standard here for termination
25 is met, but for reasons that remain unclear to us,

1 Staff does not agree with that.

2 I wanted to point out in response to some
3 allegations that Qwest's proposal is not balanced that
4 we believe the proposal is really very balanced. We
5 did take a look at all of the metrics. On three of the
6 metrics, we are subjecting ourselves to a more onerous
7 standard than is present in the SQPP, and that is the
8 out-of-service repair.

9 In the SQPP, we have two business days to
10 repair out-of-service conditions. In the rule you have
11 48 hours. There is quite a bit of difference. 48
12 hours is a shorter period than two business days, and
13 we understand the risks that we will have to work very
14 hard to meet that metric and maintain the 99.2 or 99.4
15 or 99.6 percent that we aspire to, but we didn't try to
16 avoid this. We didn't try to say, leave us with the
17 SQPP methods that are lenient and let us only the rule
18 metrics that make life easier for us. We feel as
19 though we include all of the rule metrics. It's a very
20 rational, balanced, and fair proposal.

21 With regard to the payment triggers, taking
22 the two payment triggers down from 100 percent to 99.5
23 percent, we think sets a realistic but stretched goal
24 for us. Honestly in 2003, we performed at 99.5 percent
25 on our out-of-service repair only six months out of the

1 12, and now under the current metric, we paid every
2 month, and so we really didn't operate as an incentive
3 one way or the other. Once you miss 100 percent you
4 miss 100 percent.

5 We know we could still pay under the new
6 proposal, but we think it's a very strong incentive if
7 we know the difference between 99.5 and 99.49 is
8 \$83,000 a month. There is a lot we can do to make that
9 99.51 percent. There is not a lot we can do to avoid
10 the one or two or 11 misses every month that makes the
11 distinction between 99.999 and 100 percent, and we
12 think our evidence from Mr. Pappas and the network
13 operational side of that amply demonstrates there is
14 just always something and think that wouldn't
15 necessarily constitute excusable delay or even a basis
16 for mitigation.

17 In connection with that, I would like to
18 discuss Staff's recommendation in its closing brief
19 that perhaps the Commission could adopt the \$500
20 permits standard that Staff suggested in proceeding two
21 or three years ago. We were very opposed to that. We
22 believe it has problems from a due-process standpoint,
23 and we think it has substantive problems as well.

24 Procedurally, it's impossible for Staff to
25 make that recommendation in its closing brief because

1 in comments, Staff specifically said it was not making
2 a modification proposal to the SQPP. For Qwest to see
3 what looks very much like a modification proposal in
4 closing brief with no opportunity to cross-examine and
5 no opportunity to do discovery or present response
6 testimony we think makes the recommendation
7 procedurally improper.

8 But maybe even more importantly, it's
9 substantively improper because what it does is it
10 penalizes Qwest for good performance. It would have
11 Qwest pay on every miss, regardless of whether it was
12 an excellent month or not, and if Qwest misses 100
13 orders in a month, it still is going to pay \$50,000.
14 If it misses 200, it would still pay \$100,000. That's
15 a lot of money. That may not be a lot of missed
16 orders.

17 JUDGE WALLIS: Your time is up. Do you want
18 to continue.

19 MS. ANDERL: Yes, Your Honor. I will take
20 time out of my rebuttal.

21 So that's the flaw. It penalizes good
22 performance. So that's one reason why it shouldn't be
23 adopted as a metric. Staff said in their reply
24 comments that one of the problems with the metric is
25 that the 100 percent standard is akin to falling off a

1 cliff and said that what Qwest has done is put a ledge
2 in halfway down. We submit we put a ledge in five feet
3 down so we can catch ourselves, but if we don't, then
4 we do fall off the cliff, and we think that's fair and
5 reasonable. Would we rather have the metric and the
6 payments go away all together? Yes; that's what we are
7 asking for as our first line of relief, but to the
8 extent the Commission finds it appropriate to retain
9 some level of SQPP credit payments, we think that
10 that's the right way to go.

11 I've talked to you a lot or a little bit
12 about how Qwest's service is excellent, and you may be
13 saying if you've looked over the evidence in this case,
14 Well, what about business office access? We don't
15 think your service of quality was so hot on that
16 metric. You missed it nine months of the last 12 in
17 2003. How can you claim you've got excellent service
18 quality when you've missed that metric nine months out
19 of 12, and what we would submit to you, Your Honors, is
20 anytime you are looking at service provided under a
21 particular metric, you need to look at how good is the
22 metric at measuring what's important, and if the metric
23 is good at measuring what's important and then you
24 fail, then that's important, though you need to work on
25 remedying your conduct.

1 If the metric is bad and doesn't measure
2 something that's important or doesn't provide an
3 understanding of what the true performance is, then if
4 you fail that metric, you have to look at maybe we
5 should fix the metric.

6 CHAIRWOMAN SHOWALTER: What's the new rules
7 metric on that same subject?

8 MS. ANDERL: The new rule metric is the
9 60-second average wait time, and that is what we are
10 asking to move to. In fact, the Staff has a current
11 docket open to do a telecom tune-up rule-making, and on
12 June 9th of this year, just two days after the hearing
13 on this matter where Staff did not want to see Qwest's
14 SQPP metric modified in any way, Staff published a new
15 draft of the rules and indeed has suggested making the
16 existing rule even more lenient than it is.

17 In Staff's latest draft, the company subject
18 to the rule would be provided a 90-second average wait
19 time. We think that's more than generous. We will
20 take the 60 seconds, and it's unclear, of course,
21 whether the 60-second average wait time will be adopted
22 by this commission in the form of rule-making, but I
23 think it's an interesting contrast in terms of Staff's
24 positions.

25 It's also an interesting contrast when you

1 realize that this particular metric, business office
2 access and repair office access, is a metric under
3 which companies are required to report if requested by
4 the Commission, and this is one metric that Staff has
5 not requested the other companies to provide service
6 quality results for evaluation. No one knows what the
7 other companies, what the other Class A companies are
8 doing with regard to business access, and yet, under
9 Staff's position, the metric is important enough that
10 not only can it not be modified for Qwest but that
11 Qwest should pay service quality credits amounting to
12 almost three quarters of a million dollars. We don't
13 think that's right. We understand Staff's position
14 that parity arguments aren't very persuasive because
15 Qwest is different, but in this case, the difference
16 just doesn't seem to make any sense in terms of how we
17 would be treated because of the other Class A
18 companies.

19 In brief response to Public Counsel, Public
20 Counsel's brief takes much the same concluding position
21 as Staff's does. There is some specific aspects of it
22 that I would like to respond to, and one thing that
23 Public Counsel does is Public Counsel criticizes
24 Qwest's implementation of the customer service
25 guarantee program suggesting that Qwest is somehow

1 hiding its service quality results and that we should
2 therefore not be allowed to rely on the existence of
3 the customer service guarantee plan as a reasonable
4 substitute for adequate safety net if the SQPP goes
5 away.

6 I find this allegation just astonishing
7 because Qwest reports to the Commission its service
8 quality results and customer service guarantee program
9 based on an informal agreement that the parties made
10 prompted by a request from Public Counsel for that
11 reporting. Public Counsel knows full well that these
12 reports are not required by rule or an order. They are
13 not required by the merger settlement agreement. So to
14 the extent there are allegations contained in Public
15 Counsel's brief that we are somehow not being fully up
16 front with the Commission in terms of what the service
17 quality reporting is under the service guarantee
18 program, nothing could be further from the truth.

19 Public Counsel also discusses investment
20 levels and staffing levels and indicates that those
21 should be cause for concern to the Commission. We
22 would submit to you that our evidence shows that the
23 staffing levels are appropriate. Investment levels are
24 appropriate, and not just the evidence that Qwest's
25 witnesses who testified on that issue but the service

1 quality results.

2 Public Counsel in their closing brief
3 indicates in confidential numbers the decline in the
4 number of network employees in 2000 to 2003. During
5 that time, you have seen historically good and improved
6 service quality. I don't know what every single
7 network person did who is no longer with us, but I
8 would submit to you that we have become more efficient
9 with the network organization, and the jobs that were
10 eliminated were not service impacting. They couldn't
11 have been, or we would see service-impacting results,
12 and you don't.

13 Under the circumstances, Your Honors, we
14 believe that we have shown more than adequately why
15 Qwest should be granted and we would therefore ask you
16 to do so. I will reserve the balance of my time for
17 rebuttal.

18 JUDGE WALLIS: 13 minutes.

19 COMMISSIONER HEMSTAD: I have one question.
20 I think your comment on Public Counsel's brief answer,
21 which I was going to pursue, I just want to make clear,
22 were you responding to the information on Pages 4 and 5
23 of this brief with regard to Exhibit 35-C, and I wasn't
24 really able to decipher what Public Counsel states that
25 only a tiny fraction has been reported to the

1 Commission. I take it your statement was responding to
2 that.

3 MS. ANDERL: That's exactly what I was
4 responding to, Your Honor, and those reports are not
5 required by any rule, order, or agreement other than
6 the informal agreement we have with Staff and Public
7 Counsel to report on those particular metrics.

8 COMMISSIONER HEMSTAD: On the following page,
9 and I realize this is in their brief and with no chance
10 to respond in writing to it, on the following page with
11 regard to the Qwest Web site, and I'm quoting here at
12 the top of the page, the customer who visits the Qwest
13 Web site pages with a service question regarding
14 residential service or Washington customer service will
15 find no reference to the Customer Bill of Rights or the
16 guarantee program on pages to locate the CBR, and
17 thereby, the guarantee program, the customer must know
18 to click on legal notices in very small print at the
19 bottom of the page, hardly an obvious or intuitive
20 choice. Any reaction to that?

21 MS. ANDERL: Your Honor, my reaction is it is
22 true that it's on the legal notices section. I'm not
23 sure that we have any obligation, again, under, any
24 rule, order, or agreement to post it on the Web site at
25 all. It is in our published tariff, and I think it is

1 appropriately classified under legal notices. That's
2 simply where we put it.

3 I don't necessarily think that customers go
4 on the Web site looking for that type of information.
5 They go on the Web site to get information on how they
6 can call a number to retrieve their voice mail or order
7 a new service, more likely than not, and those really
8 are the types of things we try to put up front and
9 center.

10 COMMISSIONER HEMSTAD: That's all I have.

11 Thank you.

12 JUDGE WALLIS: Ten minutes.

13 COMMISSIONER HEMSTAD: I thought our
14 questions didn't detract from their time.

15 (Discussion off the record.)

16 MR. SWANSON: Staff would request a brief
17 recess with your permission.

18 (Recess.)

19 JUDGE WALLIS: Ms. Anderl?

20 MS. ANDERL: I just wanted to add on to the
21 question about the location of the Customer Bill of
22 Rights on the Web site, and nothing to say really in
23 addition about the Web site, but I did want to point
24 out to the commissioners that we do mail a copy of
25 that, of course, with all of our year's prior service

1 results to the customers, and so they do get a hard
2 copy of the Customer Bill of Rights once a year. So
3 it's not as though they either need to know the secret
4 of the Web site or the secret of the tariff books. We
5 do provide them all a copy of it.

6 JUDGE WALLIS: Mr. Swanson, Mr. ffitch, are
7 you prepared?

8 MR. SWANSON: Thank you. Chris Swanson,
9 assistant attorney general for Commission staff.
10 Commissioners, opposing counsel, Qwest has set up a
11 straw-man standard for us and then knocked it down.
12 The question is not whether the mechanism of the
13 service quality performance program is perfect. It may
14 not be, but that's the result of it being borne from a
15 settlement of all the parties for the merger.

16 Settlement by its very nature is imperfect.
17 It's imperfect for all the parties to it if it's a good
18 compromise. Qwest seems to be arguing that apparent
19 improved service is a right to terminate or that's what
20 was intended. Staff believes that's too simplistic an
21 approach in terms of analyzing whether termination is
22 appropriate and whether Qwest has met its burden for
23 termination. Qwest also criticizes Staff and argues
24 that Staff in a sense puts it between two bad choices.
25 Whether it has good service or bad service, it can't

1 terminate the service quality performance program, but
2 as Staff has mentioned in its brief and statement, it
3 doesn't put Qwest in this choice.

4 Staff believes it's inappropriate for the
5 Commission to terminate solely on the criteria of
6 improved service. On the one hand, one could argue
7 that Staff has shown improved service; therefore, the
8 program should be terminated. On the other hand, it
9 could be argued that because service is improved, the
10 program is working as it was intended.

11 CHAIRWOMAN SHOWALTER: Counsel, I don't think
12 Qwest is saying solely on improved service. They've
13 cited four reasons, so you should address yourself to
14 the collection of the four reasons, not that any single
15 one has been put forth as justification for
16 termination.

17 MR. SWANSON: Staff agrees with that;
18 however, also believes that Qwest is emphasizing its
19 argument and also emphasized by using the analogy of
20 getting into college, in a sense, that in a sense it's
21 been punished for its past actions and now it needs to
22 make the grade. That's the analogy that Qwest seemed
23 to employ in its argument, and certainly, it has
24 provided a number of other factors why it thinks it's
25 made the grade.

1 However, that doesn't change the fact that
2 the way that Qwest is characterizing this termination
3 proceeding doesn't recognize the fact that this
4 mechanism was borne of a settlement, and that's perhaps
5 why there were imperfections in the mechanism, not
6 necessarily because -- on the other hand, if the case
7 was litigated, perhaps something else would have come
8 out.

9 COMMISSIONER HEMSTAD: If it were borne of a
10 settlement, which it was, then how do you address the
11 right of the company to petition to terminate after
12 three years?

13 MR. SWANSON: Certainly. As the record
14 demonstrates, there is various interpretations of what
15 it is that stands for, and as you mentioned, since it
16 was borne of a settlement, it's difficult to know, and
17 really, it's impossible to know what the intent behind
18 that was. However, Staff doesn't believe, as Qwest
19 seems to assert, that Staff is arguing that that term
20 has no meaning. Certainly, if it could be shown,
21 Dr. Blackmon provided a number of different situations
22 where termination might be appropriate.

23 In addition, there might be, as Dr. Blackmon
24 said, a number of other ones that Staff can't
25 contemplate at this point. Certainly if the mechanism

1 was so unfair as to not balance the parties' interests
2 and the interest of consumers and the company under the
3 criteria that Staff has suggested, perhaps termination
4 would be appropriate.

5 COMMISSIONER HEMSTAD: Well, is it fair to
6 summarize the Staff position by saying that your view
7 that termination after three years would be appropriate
8 if the machinery isn't working?

9 MR. SWANSON: I think that's a fair summary
10 of Staff's position.

11 CHAIRWOMAN SHOWALTER: Why wouldn't that be a
12 basis for modifying? If it wasn't working, then
13 wouldn't you want to do something else?

14 MR. SWANSON: Yes, that's correct.

15 CHAIRWOMAN SHOWALTER: Doesn't terminating
16 imply somehow either success or some other adequate
17 mechanism to take the place of the SQPP?

18 MR. SWANSON: Yes, I think it can. I believe
19 that also though there is other situations that could
20 result, that modification might not be appropriate, but
21 termination would in the sense that if it was
22 unanticipated that Qwest would be paying out the kind
23 of numbers or the way the mechanism was working was not
24 as intended, then if it was so unbalanced in terms of
25 consumer versus the company, there might be a good

1 reason to terminate, and I would guess that Ms. Anderl
2 would say that that situation is the one that exists
3 today. Staff does not believe that's the case.

4 Staff believes that the mechanism as it was
5 put together is operating exactly as the parties
6 intended. In fact, the situations that Qwest posits as
7 the reasons why we need the change in the competitive
8 market, the customer service guarantee program and the
9 new rules, Staff doesn't believe those really are
10 things that were unanticipated or unusual events or
11 that the penalties are severely harsh as described in
12 Staff's brief.

13 CHAIRWOMAN SHOWALTER: The biggest question
14 in my mind, and I think Mr. ffitch may want to chime in
15 as he was here during the merger and when we adopted
16 the rules, but as you point out, the settlement was a
17 settlement of the parties and the Commission approved
18 it. On the other hand, the later adopted rules on the
19 same subject were adopted by this commission as
20 appropriate metrics and standards for the subjects they
21 cover, which are the same as the merger condition, the
22 SQPP, and so why shouldn't those later adopted rules be
23 considered the Commission's latest and most thorough
24 assessment of what the appropriate standards are?

25 MR. SWANSON: Certainly, I would be happy to,

1 if the commissioners are open to it, agree to letting
2 Mr. ffitch informally reply, but in terms of what Staff
3 would say, the settlement settled a number of issues,
4 and Staff's position would be that a settlement that
5 contains agreement to allow a merger to occur that has
6 a number of terms, including at least two service
7 quality programs put in place, that the settlement is
8 more complex than just one company's purpose or one
9 individual party's purpose for putting a mechanism in
10 place. That would be Staff's position anyway.

11 CHAIRWOMAN SHOWALTER: Mr. ffitch?

12 MR. ffitch: I think there is a couple of
13 things to think about to answer that question. First
14 of all, we would suggest that the existence of service
15 quality rules that have been adopted by the Commission
16 is not inconsistent with having a separate and
17 customized performance program for a company.

18 In fact, when this program was initially
19 adopted in 2000, it was not adopted because there were
20 no Commission service quality rules. It was adopted
21 instead specifically to create a special incentive
22 program for Qwest. It was well known to the parties
23 and to the Commission at that time that sitting over
24 here was a pretty complete set of Commission service
25 quality metrics. Secondly, I would --

1 CHAIRWOMAN SHOWALTER: "Sitting over here,"
2 you mean the old rules?

3 MR. ffitch: The old rules.

4 CHAIRWOMAN SHOWALTER: But I think that's the
5 very point is that the new rules were being deliberated
6 at the time that the Qwest conditions were adopted, and
7 they are very similar in subject, and some of the
8 earlier drafts of the new rules looked more like the
9 Qwest conditions, I believe, than the ones that were
10 ultimately adopted, and had the merger conditions
11 occurred after adoption of new rules, then I think your
12 point would be very well taken. The recently adopted
13 new rules were then altered in some way by the
14 settlement, but in this case, it's the opposite. The
15 settlement preceded the adoption of the rules.

16 MR. ffitch: We would look at it a bit
17 differently. Our view would be that sequence of events
18 actually supports our view. In other words, to the
19 extent that the parties were aware that there was some
20 discussion going on regarding the revisions to the
21 Commission's rules, they could have said, once these
22 new rules are adopted in the settlement agreement, they
23 could have said, we could have said, that will become a
24 basis for termination or modification of the settlement
25 agreement. We specifically did not do that.

1 CHAIRWOMAN SHOWALTER: Right, but at that
2 time, of course, you didn't know what the new rules
3 would say, but there is the provision that after three
4 years, Qwest can petition to be relieved, and they have
5 cited the new rules as one of the bases.

6 MR. ffitch: Certainly they have the right to
7 argue that, and what I'm saying is there was absolutely
8 no agreement among the parties at the time of the
9 agreement that the mere revision in the Commission's
10 service quality metrics would automatically be grounds
11 for termination or supersede this program.

12 CHAIRWOMAN SHOWALTER: No one suggested that.
13 That is, it's not in the agreement and Qwest gets to
14 petition us for it, so we are not talking about
15 automatic. Isn't the substantive issue in front of us,
16 one of them, is whether the new rules are an adequate
17 or superior or more generalized substitute for the
18 metrics in the SQPP, either if the SQPP is terminated
19 or under the alternate, to substitute the new rules as
20 metrics but maintain some kind of payment provisions
21 pursuant to them.

22 MR. ffitch: Your Honor, I would just simply
23 state that the service quality protection program was
24 never intended to be in parallel with the service
25 quality metrics rules. It was never intended to be a

1 substitute for the rules. During the rule-making
2 around the new rules, there was never any suggestion,
3 there was never any discussion that we are going to
4 adopt these rules in place of Qwest's existing service
5 quality program, and there is another difference, which
6 is that the service quality performance program is a
7 self-executing incentive program with payments in place
8 as penalties for -- to use the shorthand term that
9 everyone has been using, even the company -- the rules
10 don't have that. For whatever reason, Qwest has agreed
11 to a set of metrics which didn't match the old rules
12 and they don't match the new rules now, and they agreed
13 to that as sort of a custom design of incentives.

14 CHAIRWOMAN SHOWALTER: I understand what
15 everybody agreed to or what the intent was or wasn't,
16 but if we get to today, what is your opinion on the
17 merits, not on whether something was intended or not,
18 but on the merits from going forward from today of
19 using the metrix of the new rules with automatic
20 payments as suggested in the alternate proposal by
21 Qwest?

22 MR. ffitch: We are strongly opposed to that,
23 Your Honor.

24 CHAIRWOMAN SHOWALTER: Could you address that
25 question? Why are those metrics with automatic

1 payments less fair overall in the public interest than
2 the original settlement agreement?

3 MR. ffitch: If I'm understanding the
4 question correctly, essentially, why this is directly
5 to the Qwest petition for modification, what's our
6 opposition to that.

7 CHAIRWOMAN SHOWALTER: Yes. In particular,
8 their suggestion that if we do not terminate,
9 substitute the metrics of the new rules with a sliding
10 scale automatic payment system -- for simple terms,
11 let's call it an automatic payment system that's not as
12 onerous as the original automatic payment system.

13 MR. ffitch: Let me give you three reasons,
14 Your Honor. First of all, let me direct you to Page 20
15 of our memorandum, the initial filing in this case, and
16 on Page 20, you will find a table which displays the
17 monetary outcome of the change. This is in our
18 confidential version, and you will see that the
19 practical outcome of Qwest's recommendation is a 75
20 percent reduction in the incentive payments that are
21 owed by the company.

22 This is in part a result, and this comes to
23 Reason No. 2, which is that several, three or four of
24 the metrics that Qwest suggests now be adopted under
25 the modification proposal are actually weaker than the

1 standards in the current service quality performance
2 program, and that's kind of intuitive. If they are
3 weaker, the penalty payments go down.

4 The third reason we would strongly object to
5 that, Your Honor, is that's essentially a forest/tree
6 negotiation of the service quality performance program,
7 and if the Commission is going to entertain
8 modification, we would ask, and I believe other parties
9 would also ask, for an opportunity to present our
10 proposals for ways in which this program could be
11 changed to the benefit of consumers, not just to the
12 benefit of Qwest.

13 CHAIRWOMAN SHOWALTER: And I saw that point
14 in your brief and I wondered, wasn't the proceeding
15 that was just had the opportunity to suggest
16 modifications? That is, actually this is the second
17 such proceeding, but why wouldn't the parties have come
18 forward with other ideas, or if they didn't, wasn't
19 this the opportunity to do so?

20 MR. ffitich: I'm sorry. Which proceeding are
21 you referring to, Your Honor?

22 CHAIRWOMAN SHOWALTER: I understand your
23 comment just now as well as in your brief to say to the
24 Commission, don't modify this program without giving
25 us, Public Counsel, an opportunity to propose other

1 modifications, and I wondered why that opportunity
2 wasn't the hearing process in the proceeding that was
3 just had.

4 MR. ffitch: Your Honor, in our view, the
5 settlement agreement narrowly provides Qwest the
6 opportunity to petition for termination. There is no
7 reference to a request for modification. I understand
8 Qwest's position to be that sort of lesser included
9 crimes you can also petition for modification short of
10 termination.

11 We felt and it's our position that
12 modification is entirely inappropriate, and we don't
13 believe that it's appropriate for us to come forward as
14 a single party and try to throw open 18 months before
15 this program is over this carefully worked out
16 agreement for a complete revision and rewrite. Our
17 basic position is that's a bad idea. It wasn't
18 contemplated by the parties. Qwest's proposal is
19 one-sided. Let's not even go there.

20 We are forced to say that if the Commission
21 feels we need to go out 18 months before the end of the
22 program and do a comprehensive rewrite, then let's hear
23 from everybody and let us put together a comprehensive
24 proposal. We did not feel that that was the focus of
25 this proceeding.

1 COMMISSIONER HEMSTAD: Do you consider the
2 current service quality rules an effort to balance the
3 interests of the companies collectively and the
4 customers?

5 MR. ffitch: Your Honor, in general,
6 certainly, we were active in that rule-making, and
7 there are some things we recommended come out
8 differently. For example, the 60-second average wait
9 time, we did not agree with. But in general, I think
10 it's an effort to take a general industry-wide
11 approach. It's not aimed at any one particular
12 company, and we do appreciate the fact it's looking
13 forward to having more players in the competitive
14 marketplace who all have to live by these rules, but
15 it's certainly not designed for one company.

16 CHAIRWOMAN SHOWALTER: As between Qwest's
17 request for termination and it's alternate of request
18 for modification, i.e., the rules plus automatic
19 payments, if the Commission were to do one of those two
20 things in this round, are you saying that termination
21 is appropriate, but modification without more process
22 is inappropriate, and our choice is really keep it in
23 place or terminate, and that's it for us today?

24 MR. ffitch: I can't say that as a matter of
25 law, Your Honor, in part because the Commission did

1 entertain modification in the 2002 proceeding, so I
2 couldn't with a straight face say there absolutely is
3 no discretion to consider modification. I'm suggesting
4 that as a matter of policy, the Commission should put
5 great weight upon the negotiated settlement in
6 maintaining it unless the company carries its burden of
7 proof to show it's in the public interest to terminate.

8 CHAIRWOMAN SHOWALTER: But what is your
9 preference, I'll ask you that. If we were inclined to
10 either terminate or to modify in the way requested, do
11 you have a preference as between those two?

12 MR. ffitch: Termination, certainly. I mean,
13 denial of termination, but you are asking --

14 CHAIRWOMAN SHOWALTER: There are four total
15 options. One is deny termination. One is to
16 terminate. The third is to modify in the way Qwest has
17 requested, and the fourth would be yours to entertain
18 further process for modification, and I'm asking you
19 between numbers two and three; that is, terminate or
20 modify in the way Qwest has requested, what is your
21 preference?

22 MR. ffitch: We would not support either one,
23 Your Honor, and I'm not going to say on the record we
24 believe this modification proposal is warranted in any
25 way. I think it would be extremely unfortunate to

1 similarly accept one party's unilateral unbalanced
2 modification proposal over the objections of other
3 parties to the settlement, and we are not willing to
4 support either one of those options.

5 CHAIRWOMAN SHOWALTER: Thank you.

6 COMMISSIONER OSHIE: I have a question for
7 both Public Counsel and Staff. I look at this as
8 really the situation boiling down to whether there has
9 been adequate performance under the settlement
10 agreement, whether it's been a demonstration of
11 performance over a period of time, and so let's just
12 maybe put this theoretically, because my understanding
13 of the facts, there are certain areas where Qwest has
14 done well and other areas where they are still making
15 payments under the settlement agreement.

16 So if theoretically Qwest was paying no
17 payments under the settlement plan or under the
18 settlement and had not for 2001 and 2002 and 2003,
19 would it still be the position of Public Counsel and
20 Staff that the program should not be terminated? I'm
21 looking for a boundary here, because Qwest's position,
22 as I understand it, is we just don't know when we have
23 adequately performed the settlement agreement or when
24 conditions have been met in which the program could be
25 terminated prior to 2005, and I would like to explore

1 that a bit with the two of you.

2 MR. ffitich: I'll give my time back to
3 Mr. Swanson because I've been talking for awhile, but I
4 would be happy to answer that too.

5 MR. SWANSON: You know, the criteria you are
6 using certainly makes Staff's position a little more
7 difficult in a sense that you're setting it out as
8 simply if Qwest can show performance whether the
9 program should be terminated or not or when we would
10 know that fact. Again, I will answer your question,
11 but certainly, Staff's position is it's more complex
12 than that.

13 However, I think Staff believes that again,
14 there is a number of factors that go into performance,
15 and it's not an easy question to answer, and that's
16 probably why we are all struggling with it to a certain
17 degree. Specifically your question, I think, was if
18 Qwest made no payments, could they terminate? It's
19 difficult to answer, but I think that it would depend
20 on, again, what the factors and situation was in that
21 circumstance. Is it because the program is not
22 working? Is it because Qwest's performance is so
23 exemplary that there really is no need to have it in
24 place at that point?

25 Depending on what the circumstances are, I do

1 believe that Staff at some point could see a boundary
2 line in terms of when termination is appropriate, but
3 in terms of the hypothetical, it's really difficult
4 because it's difficult to know what the elements of
5 your hypothetical are. I'll either defer to
6 Mr. ffitch, or if I haven't answered your question,
7 please follow-up with me.

8 COMMISSIONER OSHIE: I think you have,
9 Mr. Swanson, because really, it seems as if Staff is
10 saying, if there has been performance, assuming that
11 the program was well designed and the program performed
12 and the company performed under the program, then Staff
13 would at least consider that perhaps maybe that would
14 have a great influence for its position to support or
15 not support the termination of the program, and
16 Mr. ffitch?

17 MR. ffitch: Thank you, Your Honor. I guess
18 I would like to take a slightly different tact and say
19 in some ways, it's actually not as difficult as Qwest
20 would have us think. This discussion that we are
21 having right now only really needs to occur if we
22 accept Qwest's premise and argument in this case that
23 the burden of proof is shifted to opponents of the
24 termination to present some set of standards that Qwest
25 has to meet, and I will submit that the burden of proof

1 is fully upon Qwest to show that termination is in the
2 public interest, and let's just take -- so we don't
3 have to have --

4 CHAIRWOMAN SHOWALTER: I would like to
5 challenge you on that. I think it's a given that Qwest
6 has the burden of proof. I think the question was,
7 what kind of standard or burden would you have them
8 meet? What burden would you have them meet in order to
9 terminate the program, and so that's not putting the
10 burden on you to prove anything. It is asking you as a
11 conceptual matter how you think or under what
12 circumstances this provision, which is in the
13 settlement agreement, allowing Qwest to petition for
14 termination, so you did agree on that, so the next
15 question is, conceptually, what does that mean,
16 assuming Qwest is going to have to meet it?

17 MR. ffitch: Well, first of all, it's our
18 view that there is a presumption that this program is
19 in place for five years. Then let's take a look at
20 Qwest's evidence -- what I'm trying to say is Qwest
21 would like to have us all sit here and have these
22 wonderful theoretical discussions about what kind of
23 possible alternative scenario of facts we might
24 encounter which would possibly allow termination to be
25 proper.

1 Our approach to this case is to say, what's
2 happening in the real world right now? Let's look at
3 the fact that Qwest has paid every year penalties to
4 customers. Let's look at the fact that in every year
5 of the program, they have failed five out of eight of
6 the measures. Let's look at the fact that investment
7 is going down every year during the program. Let's
8 look at the fact that the employees employed by Qwest
9 local networks are going down significantly, much more
10 than the loss of access lines. Let's look at the
11 arguments which they propose in opposition of its
12 support of termination, all of which are arguments
13 which were available to them at the time of adoption of
14 the merger.

15 There was a customer service guarantee
16 program in effect at that time. There were Commission
17 service quality metric rules in effect at that time.
18 That was four years after the Telecom Act was passed,
19 and so competition was not imaginary at that time
20 either. Qwest has really not brought forward anything
21 new in the way of changed circumstances. They have
22 simply in effect backed away from the positions that
23 they took in this very hearing room four years ago when
24 this program was approved.

25 We heard Qwest witnesses on that witness

1 stand right over there saying to this commission, we
2 support these metrics. These are stiff -- if I could
3 look at my notes for a minute. "We are stepping up to
4 some very stiff requirements," said Ms. Jensen, and
5 Mr. Davis -- I believe that's the right name, from
6 Qwest; is that correct? That's correct. Thank you --
7 said that, "Qwest stands behind this document and
8 pledges its compliance."

9 So a lot of what we are hearing now is simply
10 a kind of change of mind, a sense that we don't want to
11 live with these conditions anymore when the conditions
12 themselves haven't really changed, and so I would
13 submit that if this commission does not have to figure
14 out what some sort of hypothetical pattern of behavior
15 would entitle Qwest to termination, the standard is
16 public interest. Look at the facts in the record and
17 decide if the public interest is furthered by
18 termination. That's not as hard as trying to think of
19 the perfect set of facts for termination.

20 Finally, to answer your question,
21 Commissioner Oshie, if they were meeting all those
22 standards and not triggering and paying penalties and
23 meeting a lot more than five out of eight and their
24 investments weren't going down in the state, we would
25 probably have quite a different view of this, but I

1 can't sit here and say, here's exactly what they would
2 need to do, and it's not my burden of proof, and I
3 don't apologize for that.

4 COMMISSIONER OSHIE: As I understand the
5 position of both Staff and Public Counsel, you would
6 oppose picking and choosing, if you will, among the
7 metrics. In other words, if Qwest shows success in,
8 let's just say three of the five or three of the eight,
9 then you would oppose terminating those metrics in
10 which there has been success because the metrics are to
11 be taken as a whole. At least that's how I understood
12 both of your pleadings or your briefs and memorandum.

13 MR. ffitch: Yes, Your Honor.

14 MR. SWANSON: That's correct.

15 COMMISSIONER HEMSTAD: I want to pursue a bit
16 further the issue of modification. As I understand it,
17 both Staff and Public Counsel agree that at least two
18 of the metrics are awkward, if not flawed, with the
19 requirements of 100 percent compliance, and not met,
20 then very burdensome sanction, and you are shaking your
21 head no, and apparently, you disagree with that.

22 MR. ffitch: We don't agree that the 100
23 percent standard is flawed. We differ slightly from
24 Staff on that point.

25 COMMISSIONER HEMSTAD: But if there is

1 validity to the position that there is at least some
2 awkwardness with those standards, and when we
3 considered this a couple of years ago, we concluded it
4 would not be inappropriate to change that in isolation,
5 calling our order at the time the avocation of the
6 company but that we would have to look at collectively
7 at the general impacts.

8 If we were here to conclude that some kind of
9 modification would be appropriate, my question to you
10 is then quite specifically, what kind of process would
11 you want us then to pursue?

12 MR. ffitch: Your Honor, I think from our
13 perspective, perhaps providing the parties an
14 opportunity to get together, and if the Commission is
15 going to direct the parties it's willing to consider
16 modification, then we should be given an opportunity to
17 work with the company and the other parties to see if
18 there is some consensual approach that can be taken.
19 If not, give us a deadline to submit proposed
20 alternatives.

21 I have to say, Your Honor, we are 18 months
22 from the end of this program. This program was the
23 result of very extended and careful negotiations. Its
24 implementation required very significant investments of
25 resources from my staff, Commission staff, and the

1 company in order to get it right, to get the reporting
2 right, to get the measurements right. It's no easy
3 matter to simply craft new measurements and put them
4 into place.

5 CHAIRWOMAN SHOWALTER: What if the
6 measurements are the new rules? The company is already
7 being measured on those metrics.

8 MR. FFITCH: I believe that our experience
9 with the reporting of performance under the metrics is
10 just very difficult to put in place in a short period
11 of time. Even though those are on the books right now,
12 I'm not sure the reporting would be the same. It might
13 be more complex if we are doing self-executing program
14 with payments automatically triggered.

15 CHAIRWOMAN SHOWALTER: Can you remind me,
16 when did Qwest file this particular petition? Maybe
17 when it gets to it.

18 MS. ANDERL: January 30th of 2004, Your
19 Honor.

20 MR. SWANSON: One thing, if I may, I would
21 like to comment a little bit, which I think relates to
22 Commissioner Hemstad's question and also relates to
23 some of the questions or issues that Ms. Anderl raised
24 in terms of Staff's reference to its alternate
25 proposal.

1 One of the reasons why Staff didn't come up
2 with a list of alternative proposals in this case was
3 it was fully expecting Qwest, consistent with the prior
4 decision regarding its prior petition, that Qwest would
5 come up with a balanced proposal, and I believe that
6 was the language of that order, and in reviewing the
7 proposals that were put forward by Qwest, Staff didn't
8 believe that any of those were balanced. However,
9 Staff did in its statement reference those prior
10 proposals, or I guess counter-proposals, that Staff
11 made in the previous routine we went through the last
12 time.

13 And the other thing I think that it's
14 important again to remember, and I know Mr. ffitich
15 pointed this out, but Staff's position or Staff
16 believes, at least in terms of the proposals for
17 modification, that Qwest has an obligation to show they
18 are in the public interest and has an obligation to
19 show they are, in fact, balanced and take into account
20 the fact that this agreement was born of a settlement,
21 and Staff doesn't believe that Qwest has met that
22 standard as an initial matter. In terms of the
23 process --

24 CHAIRWOMAN SHOWALTER: Counsel, I don't
25 disagree with your characterization of a standard just

1 now, but your brief has a very different standard of
2 the public interest. It suggests we need to find
3 everybody is better off in order for any change to be
4 in the public interest, and I wondered about that.
5 Isn't the right standard something more akin to what
6 you just mentioned, which is the new proposal is
7 unbalanced, a better balance of interests than the old
8 one, taking into account that there is also a change in
9 the settlement disagreement which we don't take
10 lightly?

11 MR. SWANSON: I guess my answer would be if
12 my brief appeared, or I guess if Staff's brief appeared
13 to suggest that the factor of everybody benefitting was
14 decisive in terms of whether or not a proposal should
15 go forward, I don't believe that that's what our
16 position is. I believe Staff's position is it is a
17 factor, that one of the factors of the three factors
18 Staff suggested that the Commission could look at in
19 terms of deciding the public interest was the fact that
20 this agreement was borne of a settlement and that there
21 were a number of parties involved, and their interests
22 came together to pull this all together.

23 So I guess I agree with you in the sense it
24 doesn't have to be decisive. It doesn't have to be
25 decisive in terms of a necessarily -- the proposal has

1 to benefit all parties, but another part of that is
2 that certainly, the Commission could, if the situation
3 were different, look back and say, for example, this
4 proposal for whatever reason, because of the
5 circumstances we were in, was unbalanced from the
6 start, but we didn't know that up front, and that's why
7 at this point it's appropriate to terminate, but Staff
8 doesn't believe that's the situation we face here.
9 Staff believes that the mechanism is working, and when
10 it's reviewed, the proposals for termination and/or
11 modification are not in the public interest.

12 MR. ffitch: Your Honor, may I make one other
13 comment on modification? I think it's important to
14 understand the company proposal, and this ties in with
15 the discussion of the 100 percent standard. The
16 Commission actually has a so-called 100 percent
17 standard in its new rules, and we point that out in our
18 brief in aid of saying, these things aren't
19 unreasonable. The Commission just adopted one.

20 And interestingly, if you look at the
21 company's petition for modification, they are not
22 proposing to live by that rule. In the instance of
23 that rule, they want a weaker standard in their
24 petition for modification. I think that's an important
25 nuance to remember here in evaluating that request.

1 CHAIRWOMAN SHOWALTER: Is it a weaker
2 standard, or is it just when a payment is to be made?
3 My understanding is under our new rules, there is no
4 automatic payment of any kind. It's discretionary with
5 Staff and the Commission to proceed forward to collect
6 a penalty, so really, the automatic part is zero and
7 the discretionary part is discretionary.

8 So in the case, say, of 100 percent standard
9 where some company met at 99 percent, there would be
10 the opportunity to collect a penalty, but practice
11 would suggest that would be unlikely. Am I
12 characterizing that right? I don't want to
13 mischaracterize the rule if that's not what you mean to
14 refer to.

15 MR. ffitch: That may be technically correct,
16 Madam Chairwoman. I guess I'm responding to the nature
17 of the discussion that we've been having with the Bench
18 along the lines of if we are going to do a
19 modification, what's so wrong with having a
20 self-executing program that simply triggers -- you are
21 characterizing Qwest's proposal as if it's adopting the
22 new rules and tying payments to them, and I'm pointing
23 out that in this instance, it actually doesn't adopt
24 the new rules and tie payments to them. It sort of
25 creates for itself a special lower standard in the

1 instance of the 100 percent rule.

2 CHAIRWOMAN SHOWALTER: What rule are we
3 talking about in this?

4 MR. ffitch: I was afraid you were going to
5 ask me that.

6 COMMISSIONER OSHIE: I think you are
7 referring to the out-of-service rule --

8 MR. ffitch: I am.

9 COMMISSIONER OSHIE: -- in which the rule
10 requires there be all -- shall be restored within two
11 business days, and Qwest is requesting 100 percent
12 compliance within 48 hours.

13 MR. ffitch: But in addition, as I understand
14 it, and I have become confused with some of these
15 matters, I understand that they are proposing that
16 penalties not be assessed unless -- they are looking at
17 more of a 99 percent and sliding scale standard. The
18 rule itself, I have cited in my brief at --

19 JUDGE WALLIS: Three minutes remain.

20 MR. ffitch: It's 480-120-440. I guess I did
21 want to just address one or two other things, perhaps
22 just take a minute, and if Mr. Swanson has anything
23 else. I wanted to respond to the suggestion that --
24 well, to go back to the customer service guarantee
25 reporting, we did get into that area because we

1 believed it was important to point out some of the
2 flaws with the customer service guarantee program in
3 actual practice, one of which is the lack of reporting.

4 Ms. Anderl has suggested that we agreed to
5 this limited level of reporting. I can't say whether
6 that's correct or not. I have to say that I harbor
7 very serious doubts about what the nature of those
8 discussions were. Our lead staff person who has been
9 working this issue for a number of years now is not
10 here to help advise me on that, so I just have
11 questions about whether that's a correct interpretation
12 of the discussions.

13 The fundamental point is that this program is
14 difficult for customers to find out about, and it's
15 interpreted very narrowly by the company, and the
16 reporting to the Commission to date, no matter whether
17 it's agreed to or not, is basically concealing from the
18 Commission the vast, vast, vast majority of payments
19 that the company is making under that program, and that
20 would need to be changed.

21 On the witness stand, the witness for the
22 company declined to explain why that reporting was
23 limited in that way or whether they would be willing to
24 broaden the reporting, and it is true that right now,
25 there is no requirement, particularly under the

1 customer service reporting program.

2 CHAIRWOMAN SHOWALTER: I appreciate the
3 comment on the service reporting, but am I correct that
4 that issue is not in front of us in this hearing, this
5 proceeding?

6 MR. ffitch: You are correct, only in the
7 sense that Qwest has put that forward in conjunction
8 with the rules as a substitute for the service quality
9 performance program, which does have full reporting and
10 public reporting to the public as well as to the
11 Commission.

12 CHAIRWOMAN SHOWALTER: Right, so it is
13 context, but if we wanted to make some other
14 requirement there, would or would not be appropriate in
15 this proceeding?

16 MR. ffitch: We would live to say it's
17 appropriate, Your Honor, but I think it would have to
18 be taken up separately.

19 MR. SWANSON: Your Honor, I realize our time
20 is expired. May I have 45 seconds or a minute? Thank
21 you.

22 I guess one last thing, and we've been
23 talking a lot about the difference between the rules
24 and this agreement, and I think that there should be a
25 realization that rules go through the APA process, and

1 it's in a sense a democratic process and that
2 stakeholders are involved, and there very well may be,
3 and I believe the parties here today and Staff believes
4 there is a distinction between the rest of the industry
5 and Qwest, that I think that's really the hinge point,
6 whether or not the parties should be treated in parity,
7 and whether or not based on this merger and this
8 agreement, they are exactly the same.

9 I guess one other part to point out is that
10 the rules are -- I guess Staff is going through a
11 telecom tune-up right now, and the proposals that Staff
12 proposes in terms of that tune-up aren't necessarily
13 Staff's proposals. It is an APA process. The
14 stakeholders are involved, and my understanding is that
15 many times what's initially circulated is a proposal of
16 a stakeholder, and it's important to recognize that.
17 It's important to recognize that those are two
18 completely different processes, and whether or not
19 Staff necessarily agrees with the proposal as
20 circulated or is simply doing the democratic process
21 and taking the stakeholder proposal and putting it out
22 there for comments, that doesn't necessarily mean that
23 Staff thinks it's a good idea. For all these reasons,
24 Staff requests that Qwest's petition be denied.

25 JUDGE WALLIS: Ms. Anderl?

1 MS. ANDERL: Thank you, Your Honor, a few
2 brief points in response to the issues raised by Staff
3 and Public Counsel. I have heard coming from Staff
4 some suggestions, although not explicit, that there
5 should be a higher standard applied to whether you
6 grant modification or termination here because it is
7 somehow violating a settlement agreement as opposed to
8 doing exactly what was contemplated by the settlement
9 agreement, and what we have here is the latter.

10 We are not asking you to modify or somehow
11 void any aspect of a settlement agreement, which I
12 intend to agree might be subject to stricter scrutiny.
13 We are simply asking you to implement as part of the
14 settlement agreement that the parties agreed to. So I
15 don't think that there ought to be any greater sanctity
16 accorded to the metrics in this SQPP simply because
17 it -- when in fact the same settlement agreed to by all
18 the parties did decide that termination could be sought
19 after 2003.

20 Staff has also said the changes that Qwest
21 has offered up as a basis for modification or
22 termination were not unanticipated. We are not aware
23 that's the standard. There was no agreement that the
24 SQPP could only be terminated based on unanticipated
25 changed circumstances or based on factors that the

1 parties did not at that time contemplate, so we don't
2 think that's the right standard either.

3 In response to some of the issues that Public
4 Counsel raised -- oh, I'm sorry. I'm trying to keep
5 straight in my head and respond to all of Staff's
6 statements at once. The final thing that Staff said
7 when Mr. Swanson was talking about the public interest
8 standard, he said Qwest had an obligation to show that
9 modification is balanced and in the public interest and
10 Qwest has not met that standard. That's absolutely
11 baffling to me since the modification proposed is to
12 adopt exactly the Commission's rules, and I do not
13 understand what it is about the Commission's rules that
14 is not balanced or in the public interest. I think
15 that they are, and the proposal to substitute those
16 metrics into the SQPP, if that's the alternative the
17 Commission selects, is indeed balanced and fair, the
18 result of a process that had industry and other
19 stakeholder input. I think it's a very good way to go.

20 Which leads me to the question, Chairwoman
21 Showalter, that you had of Mr. Ffitch, and that is, are
22 we really proposing to live by the standards in the new
23 rules or are we proposing to do something different?
24 Mr. Ffitch was saying we were really trying to adopt
25 the rules but not live under the rules, and I think you

1 had it exactly right.

2 We are proposing that there be 100 percent
3 metrics to extent those 100 percent metrics are
4 contained in the Commission's rules. We are proposing
5 a lower threshold to trigger customer credits though to
6 the extent that any company subject to the rules is
7 subject to penalties for even one violation, statutory
8 penalties or even one violation. Qwest would remain
9 vulnerable to that as well. It is simply the SQPP
10 credit payments that would only be triggered at the
11 99.5 percent. So we think it's absolutely correct and
12 right to say Qwest is proposing to live under the new
13 rules and new standards, because the new rules don't
14 have payments for anybody automatically, and the
15 overlay on those new rule standards, SQPP payment at
16 somewhat modified trigger points.

17 Public Counsel also suggested that we are
18 weakening the standards when we did this and pointed to
19 the chart on Tip 20 in its opening comments to say
20 look, Qwest paid a million nine in 2003, and under the
21 new metrics, we would only be paying half a million
22 dollars. This goes back to one of the things I said in
23 my very opening statement, which is it seems as though
24 the interest expressed by Public Counsel there is
25 simply to extract money from Qwest rather than to worry

1 about whether the metrics are good, whether they
2 measure important things or incent good service.

3 I don't think that the difference in that
4 payment schedule for 2003 proves that the metrix are
5 weaker at all. It proves we would pay less money, and
6 that's it. We explained in the hearing how having an
7 attainable metric can drive further service quality
8 because we have an incentive to meet it. An
9 unattainable metric doesn't incent you to meet it.

10 CHAIRWOMAN SHOWALTER: Could I ask you a
11 question on the mechanics and how difficult it is or
12 isn't to switch over to the new rules? I would have
13 assumed you are under the new rules anyway.

14 MS. ANDERL: That's exactly right; we are.
15 We have to track our service quality under the SQPP
16 methods and the rule methods to insure compliance with
17 both standards.

18 CHAIRWOMAN SHOWALTER: On a related aspect,
19 you asked for application or termination as of December
20 31st of last year.

21 MS. ANDERL: That's right.

22 CHAIRWOMAN SHOWALTER: If we were to grant
23 your petition in some form but as of, let's say, July
24 1st instead of January 1st, for example, does that pose
25 any mechanical or administrative difficulties?

1 MS. ANDERL: Not really. Nothing that would
2 be insurmountable. We track the service performance on
3 a monthly basis. All of the metrics save, I think,
4 two, that I can think of, are on a monthly basis.
5 Well, there is the installation within 90 days, but
6 nothing changes there.

7 I'm thinking there is one metric that relates
8 to trouble reports and how many consecutive months you
9 have greater than four out of 100 lines with trouble
10 reports in a particular wire center, and the SQPP
11 standard is you pay a penalty for more than three
12 consecutive months, and the rule standard is that you
13 pay to have two consecutive months, and so to the
14 extent that the three or the two could be in overlap
15 where you would grant relief, that could be something
16 we would have to look at from an administrative
17 standpoint, but I don't think it's anything that's
18 insurmountable, and we do track and monitor our
19 performance so that if you were to grant effective
20 December 31st, we have performance results under the
21 new metrics, proposed metrics, beginning January 1,
22 2004, that would be able to be shown to establish the
23 new appropriate payment amounts. That concludes my
24 remarks.

25 JUDGE WALLIS: I will acknowledge the arrival

1 of Mr. O'Rourke. Is there anything further? It
2 appears there is not. We want to thank you all for
3 arriving today, for being with us, and the argument is
4 adjourned and this matter is concluded.

5 (Oral argument adjourned at 3:15 p.m.)

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25