BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

In the Matter of the Petition of QWEST CORPORATION To be Regulated Under an Alternative Form of Regulation Pursuant to RCW 80.36.135.	DOCKET NO. UT-061625

REPLY BRIEF OF PUBLIC COUNSEL

MAY 1, 2007

I. INTRODUCTION

A. The Qwest/Staff AFOR Is Not A Balanced Plan

1. The Qwest and Staff approach to the alternative form of regulation (AFOR) is disappointing. Rather than offering a plan, like those in place elsewhere, that provides substantial benefits, not just for the Company, but also for its customers, Qwest presents a one-sided plan nearly devoid of customer benefits. The Company, with Staff's support, then vigorously opposes every single customer benefit proposed to improve the plan. Qwest and Staff oppose a true rate cap, stand-alone DSL, à la carte features, notice to customers, a service quality program, and meaningful DSL deployment, just to name some of the proposals they attack. There is no way in fairness to describe the Qwest/Staff AFOR[1] as a balanced plan that serves the public interest, or that is superior to current regulation, as the AFOR statute intends.[2]

2. The opening briefs of Staff and Qwest are generally more focused on rhetoric than on the record. Qwest accuses Public Counsel of recommending a plan that "overreaches in the extreme" and "utterly fails to comprehend" the competitive market place.[3] Contrary to these hyperbolic descriptions, Public Counsel has taken a moderate position in this case. We support allowing Qwest move to an alternative form of regulation in Washington. The difference is that Public Counsel's proposal is better tailored to the fact that Qwest retains dominance and exerts market power for residential service for hundreds of thousands of households in many parts of the state. For these customers regulatory protections are still appropriate. Public Counsel simply proposes that Qwest agree to a plan in Washington that makes the same commitments

[1] Qwest's Modified Proposal for an AFOR, Exh. No. 4 (Qwest/Staff AFOR).
[2] RCW 80.36.135(1)(a).
[3] Qwest's Post-Hearing Brief (Qwest Brief), ¶ 45.

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that it does to its customers in other states. This is hardly extreme.

B. Only Qwest and Staff Support the Full Settlement AFOR Plan

3. While there should be no real confusion about this point, both Qwest and Staff nevertheless attempt to create the impression that the proposed AFOR has broad substantive support from all parties.[4] Because this is not accurate, the record needs to be corrected. Only Qwest and Staff have agreed that Qwest's modified proposal for an AFOR as a whole is in the public interest and should be approved by the Commission. The other intervenors state clearly and separately in the next sentence of the agreement only that they do not oppose.[5] The letter narrative filed on behalf of the Joint CLECs, WeBTEC, and the Department of Defense states:

> The Selected Intervenors, however, have not joined in the Settlement Narrative filed in support of that Agreement because *they do not take a position on the alternative form of regulation (AFOR) proposed by Qwest Corporation (Qwest) or on the resolution of issues other than the issue which the Selected Intervenors raise.* The Selected Intervenors, therefore, provide this separate narrative statement supporting only the aspect of the Settlement Agreement that is specific to that issue.[6]

The separate statement of the Northwest Public Communications Council (NPCC) similarly expressly clarifies that "NPCC has not joined in the settlement narrative filed by Qwest… because NPCC does not take a position on the alternative form of regulation ("AFOR") proposed by Qwest except to the extent that it relates to … payphone services."[7]

II. COMPETITION

4. Qwest's discussion of alternative regulation in other states is internally contradictory.

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[4] Qwest Brief, ¶ 2; n. 1; ¶¶ 6, 33. Initial Brief of Commission Staff (Staff Brief), Introduction, p. 1, Conclusion, p. 21.

[5] Exh. No. 4, Stipulation and Settlement Agreement, p. 2 (Section III.B).

[6] Exh. No. 7, p.1 (emphasis added).

[7] Exh. No. 8, p.1.

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Qwest says it "does not believe other states necessarily provide significant guidance in terms of the specific terms of an appropriate AFOR."[8] Nevertheless, Qwest cites New York and California as examples of states that have reduced regulation and provides a chart which attempts to show they are similar to Washington.[9] On the other hand, Qwest is nearly silent about its own AFOR experience in other states. The Company makes no specific reference or citation to the extensive information in the response to Bench Request No. 2 or other material in the record about other Qwest-state AFORs, beyond the vague statement that "[o]ther states, … in Qwest's historic service region… have recognized increased competition in the market by granting incumbent carriers regulatory freedom."[10]

5. Public Counsel submits that it is most relevant to look at other Qwest states because they offer the best comparison to Washington, both in terms of the profile of the states, and because the same incumbent company is involved. Qwest's own witness identified Arizona and Colorado as the most comparable to Washington.[11] New York and California are obviously very different than Washington and other Qwest states in terms of population, levels of urbanization, size of major urban areas, and economic activity. Nevertheless Qwest's brief does not ask the Commission to draw any conclusion from these states other than that recognition of increased competition has led to grants of regulatory freedom. The question in this case, however, is the *specific details* of the plan for alternative regulation. Simply arguing that regulatory flexibility is warranted because there is much competition does not contribute to resolving the issue.

[8] Qwest Brief, ¶ 13.
[9] Qwest Brief, ¶ 1.2
[10] *Id.*.
[11] Williams, Tr. 438:25-439:4.

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6. The FCC decision in the AT&T/Bell South merger cited by Qwest is also of limited relevance, since it primarily involves the former SBC and Bell South regions. The reference to small enterprise competition has little bearing on this case, which is about the residential market. The discussion of the merger does highlight the notable lack of discussion about counter-competitive trends in telecommunications including consolidation, such as the AT&T/Bell South merger, acquisition by ILECs of competitors (SBC/AT&T, Verizon/MCI), or the potential development of duopolistic markets where the broadband/bundles market is essentially split between the ILEC and the cable company.

7. The Qwest brief repeats its misleading focus on the broadband and bundles market, arguing that for a "significant fraction" of households "the relevant price comparison is between the *incremental* price of telephone service (cable telephony or stand-alone VoIP)."[12] This argument was already addressed in Public Counsel's Opening Brief. Hundreds of thousands of Washington households do not fit this profile.

8. Qwest challenges Public Counsel's identification of the residential stand-alone service as a separate market that is not competitive.[13] Public Counsel has already addressed this in the opening brief.[14] Qwest and Staff do not seem to fully agree on this issue. Staff witness Tom Wilson testified on direct that "some of Qwest's services retain vestiges of market power *like standalone residential*, WTAP, and others listed as exceptions under the plan …. Therefore,

[12] Qwest Brief, ¶ 17.

[13] The $1.00 increase also applies to local measured service. The parties have devoted little attention in this case to this service.

[14] Public Counsel Brief, ¶¶ 13-23.

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stand-alone residential service…and others are protected by remaining available à la carte under tariff in the AFOR [.]"[15]

III. BROADBAND DEPLOYMENT

A. The Settlement Proposal Is Too Limited To Satisfy The Statutory Requirement

9. Qwest's brief describes as "a major component of the AFOR," its commitment to deploy DSL to seven wire centers. Staff's brief describes the DSL portion of the settlement as a "significant commitment" which is "important and beneficial" to Washington customers.[16] These are, to put it mildly, overstatements. No string of adjectives can change the fact that Qwest's only real commitment affects a small number of customers, and even when implemented, only makes the service available to half the customers in the subject wire centers.[17]

10. Qwest complains that Public Counsel has not provided information about the cost of its deployment recommendation. This is an unfair assertion since Qwest was able to provide no cost information to Public Counsel in discovery regarding DSL deployment. [18] Qwest does not mention cost concerns when describing the benefits of the settlement. Staff's brief also touts the 83 percent goal as if it is a firm commitment, making no mention of cost issues.[19] The fact that Qwest has to file a report at the end of the four years adds little to the weight of the commitments made. There are no requirements for the content of the report, no stated consequences for not

[15] Exh. No. 142C, p. 20:10-16 (emphasis added)(Wilson); see also, *Id.*, p. 49:3-16. Staff's statements acknowledging that vestiges of market power exist is at odds with its assertion that competition is sufficient to ensure that service quality remains at acceptable levels throughout Qwest's service territory.

[16] Qwest Brief, ¶ 19; Staff Brief, p.3:5-12, p. 4.

[17] Public Counsel Brief, ¶¶ 82-86.

[18] Exh. Nos. 75, 76, 77.

[19] Staff Brief, p. 4 ("a goal whereby Qwest *will actually make DSL available* to a definite percentage of households")(emphasis added).

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filing it, and none for not reaching the goal of either the seven wire center or the 83 percent deployment.

11. Qwest devotes significant space to criticizing Public Counsel's optional proposal for broadband lifeline which would have allowed six months time to develop a workable and consensual multiparty proposal to address underserved populations. At the same time, Qwest virtually ignores the community technology center alternative, which addresses the problem of lack of access and affordability of hardware. Qwest seems to miss the point here, asking Dr. Loube to agree on the stand that the cost of computer could be a barrier to use of broadband service.[20] That is precisely Public Counsel's purpose in recommending the community technology center option. Qwest's brief offers only critique, while the Qwest/Staff AFOR does nothing to address underserved customer groups as called for in the AFOR statute.[21]

B. Public Counsel's Proposal Is Not Unlawful

12. Qwest and Staff both raise questions about the Commission's jurisdiction to include Public Counsel's broadband deployment proposals in an AFOR.[22] This argument is not well-taken for several reasons. First, this criticism could be applied equally to the Qwest/Staff AFOR DSL provisions. Neither Qwest nor Staff explains how their own proposal does not run afoul of this supposed prohibition. Qwest acknowledges, as it must, that both the AFOR statute and the

[20] Qwest Brief, ¶ 52.

[21] Qwest's brief does not mention that among several conditions imposed by the FCC on the AT&T/Bellsouth merger were several conditions regarding its broadband service, including provision of broadband services to 100 percent of their territory by the end of 2007, offering stand-alone DSL for $19.95 per month, and offering new retail consumers its basic broadband service for $10 per month as well as a free modem to current dial-up customers. *In the Matter of AT&T Inc. and BellSouth Corporation Application for Transfer of Control,* WC Docket No. 06-74, FCC 06-189, Memorandum Opinion and Order (March 26, 2007), Concurring Statement of Commissioner Michael J. Copps, , pp. 171-172.

[22] Qwest Brief, ¶ 50; Staff Brief, p. 4.

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state telecommunications policy goals direct the Commission to support the goal of deployment of advanced services. Second, Commission jurisdiction is not at issue because the mechanism of the AFOR statute is essentially consensual. The Company can decline to accept the terms of the AFOR before it takes effect[23] and thus can agree to anything it wishes. Third, other Qwest state AFOR plans have DSL deployment provisions.[24] Public Counsel is not aware that Qwest has objected to these provisions on jurisdictional grounds after their adoption.

13. Finally, the Commission has authority to order "betterments" to the telephone network and to ensure that the appliances, instrumentalities, and service provided are "modern, adequate, sufficient, and efficient."[25] Qwest in its own brief describes well the relationship between the network and the provision of DSL:

> A key component of the investment required to provide DSL is the condition of the network. For example, if the outside plant between central offices and customer premises is *modern, robust, and has ample capacity to provide additional services*, significantly less investment will be required to deploy DSL than in a situation where the network is aged or at capacity.[26]

Because Qwest's network can be and is used for a variety of services, the Commission can use its statutory authority to ensure that the network meets standards adequate for those services.

IV. RATES

A. Rate Levels In Other States Do Not Establish A Fair, Just, and Reasonable Rate Level For Washington

14. Qwest and Staff both argue that the Commission should determine what is fair, just, and reasonable by comparison with other companies and other states.[27] This is a departure from

[23] RCW 80.36.135(4).
[24] Public Counsel Brief, Appendix B (Investment)
[25] RCW 80.36.260; RCW 80.36.080.
[26] Qwest Brief, ¶ 23. (emphasis added).
[27] Qwest Brief; ¶ 41; Staff Brief, p. 17.

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fundamental ratemaking principles. A customer's rates are set based on the establishment of a revenue requirement based on the state-specific costs and revenues of the company providing service to that customer, not on the basis of what another company somewhere else charges its customers, based on the unique costs and revenues in a different service territory. Customers should be confident that the rates that they are paying are based on Qwest's Washington state costs and revenues. Carried to the extreme, Staff and Qwest arguments mean there has never been a need for rate cases in Washington, nor for Commission review of Qwest financial information. Fifteen minutes spent researching other company rates and calculating the average would suffice to set Washington rates.

15. When asked on cross-examination about rates in other Qwest states, consistent with the points made above, Dr. Loube explained at the hearing that the lower level of Qwest's current rates in Washington reflects the fact that, by two different measures, Qwest's Washington service territory has among the lowest costs in its region.[28] Qwest provides corroboration that its costs are lower when it points in its initial brief to its "lower relative level of capital expense" in Washington as compared with its other states.[29]

16. While it is true that in the last Verizon rate case, Dr. Loube referred to other company rates, Qwest unfairly misrepresents Dr. Loube's testimony. In the Verizon case, Dr. Loube, as Public Counsel's rate design witness, was actually responding to and *opposing* Verizon's use of rate comparisons to justify an increase.[30] Dr. Loube was not advocating use of rate comparisons per se, but instead pointing out that "*if* the Commission wishes to use a rate comparison as a

[28] Loube, Tr. 511:11-513:11.
[29] Qwest Brief, ¶ 24.
[30] Exh. No. 108, pp. 3:22-4:5, pp. 50-51.

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guide to designing residential rates," a different comparison was available that undercut the Verizon argument and showed that no increase was necessary.[31] As Public Counsel pointed out in its opening brief, the Verizon case was a fully litigated general rate case in which all parties had reviewed extensive financial data for Verizon, and had arrived at a settlement. Unlike this case, there was a strong independent basis for the reasonableness of the rate being proposed based on Verizon's Washington financial information.

B. Qwest's Rate of Return Has Not Been Updated

17. Again, on brief, both Qwest and Staff justify the reasonableness of the $1.00 increase by reference to the authorized rate of return set in the U S West 1995 rate case. Public Counsel has already addressed the weakness of this argument in detail in its opening brief.[32] This out-of-date rate of return cannot lawfully act as a basis for setting a new fair, just, and reasonable rate. Staff's estimates of earnings and return are also unreliable because they do not take into account potential revenue increases that could occur from increased prices either for features or for bundles.[33] Given Qwest's insistence that the AFOR must provide it with unlimited upward pricing flexibility for features and bundles, this would seem an important calculation to make.

C. Raising Rates Is Inconsistent With The Presence of Competition

18. Qwest also argues that even for stand-alone 1FR, there is price-constraining competition. Even if that is the case, which Public Counsel disputes, why then would Qwest seek the ability to raise the rate of the service? There is no logic in this position. The Company makes the interesting statement in its brief that "it is open to reasonable debate as to whether any sort of

[31] *Id.*, pp. 52:21-53:2 (emphasis added).
[32] Public Counsel Brief, ¶¶ 62-65, 68.
[33] Saunders, Tr. 242:7-14.

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rate cap is even necessary, much less one as modest as $1.00 over four years."[34] Qwest is saying that rates may well stay at current levels in any event, due to competitive conditions. If that is true, then a rate cap has no practical negative impact on the Company, while at the same time it protects consumers if Qwest is wrong and it is not subject to price constraining competition.

V. SERVICE QUALITY

A. Service Quality Is A Legitimate Concern In Adopting An AFOR

19. Both Qwest and Staff argue that Public Counsel has identified no changes in management or operation under the AFOR that would warrant concern about service quality, as if to suggest that Public Counsel is foolish to raise any concern about service quality.[35] This is a straw man argument. Public Counsel has never asserted that a change in management or operation is a justification for its service quality recommendation. The fact that service quality is a legitimate issue in reflected in the AFOR statute, by this Commission's own observations,[36] by the experience under the first AFOR, and by the number of other Qwest states addressing the issue in their alternative regulatory schemes.[37]

20. There also can be no reasonable dispute that the change to an AFOR is significant. The adoption of an AFOR introduces uncertainty because no company has operated under an AFOR in Washington for over a decade.[38] This is another issue where, when it is convenient, the Company argues that the AFOR is "no big deal," while elsewhere in the brief the AFOR is of

[34] Qwest Brief, ¶ 42. In fact Qwest's brief points out that for 1FR, "as service offerings expand, prices come down." That is what Washington customers are hoping to see as a benefit of competition.

[35] The Qwest Brief refers to a so-called candid admission by Public Counsel witness Mary Kimball that nothing about Qwest's service quality warrants additional measures. Qwest Brief, ¶ 27.

[36] Public Counsel Brief, ¶ 96.

[37] See discussion, Public Counsel Brief, ¶¶ 113-119 and Appendix B.

[38] Kimball, Tr. 621:9-18, 628:1-19.

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critical importance for Qwest to compete effectively.

21. Qwest's brief asserts that Public Counsel "candidly" admits that nothing about Qwest's service quality warrants imposition of additional measures.[39] This is a simplistic mischaracterization. Public Counsel's reasons for supporting a service quality incentive plan are thoroughly set forth in Section IV of the Opening Brief. The SQIP is designed to encourage investment. It is a forward looking anti-backsliding measure, not a response to particular recent performance. A self-executing plan is a more effective incentive than intermittent penalty enforcement actions under the WAC. A SQIP serves a different function than and is not interchangeable with a customer remedy program such as the CSGP.

B. The SQIP Does Not Impose Additional Regulatory Burdens

22. Qwest argues that since wireless and VoIP providers are not regulated by the Commission for price or service quality that Qwest should not therefore be subject to new service quality requirements.[40] This argument ignores the fact that the SQIP will in no way hinder Qwest's ability to flexibly price its services.

23. In an argument made for the first time at hearing, Qwest witness Williams argued that Public Counsel proposals are unreasonable in part because Washington already has the most robust service quality rules in Qwest territory. It is hard to see what point is being made here. The comparative "robustness" of Washington rules is not at issue in this case. Certainly no record has been made that would allow the Commission to make accurate comparisons. There is no proposal to change the existing rules. The issue is whether, merely by being on the books, the

[39] Qwest Brief, ¶ 27.
[40] Qwest Brief, ¶ 59.

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rules are sufficient without more to preserve and enhance service quality during an AFOR, and to ensure that Qwest continues to invest in its network in Washington.[41]

24. Public Counsel's SQIP will not require Qwest to engage in any additional efforts related to service quality performance tracking. The SQIP standards are based upon the Commission's rules, and the Company has agreed in the Qwest/Staff AFOR to continue to be bound to all of the Commission's service quality rules. All of the reporting currently provided by the Company in their monthly service quality reports is sufficient to allow the Commission and Public Counsel to track performance under the SQIP, with one minor exception.[42]

C. Is The SQIP A Penalty or An Incentive Program?

25. Qwest engages in a semantic debate about whether the SQIP is a penalty or an incentive program, as if to suggest that Public Counsel is somehow concealing the nature of the program. Of course, self-executing programs like the SQIP and the SQPP have both incentive and penalty aspects, and have been described as incentives by the Company itself.[43] Public Counsel would strongly prefer an outcome where no payments are ever made under the SQIP because Qwest investment and operations yielded service quality that consistently met Commission standards This is the ideal result and it is within the Company's control to achieve.

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[41] Public Counsel Brief, ¶ 99 (citing evidence of trends in Qwest investment levels in Washington). Qwest acknowledges "lower relative capital expense" in Washington for DSL deployment and cites the "relatively good condition of its Washington network." Qwest Brief, ¶ 23. Public Counsel would argue that the current condition of Qwest's network in Washington is in large measure directly attributable to the investment requirements and the SQPP that have been in place in recent years, providing further evidence of their value.

[42] The Commission's rules require companies to meet telephone answer time standards (WAC 480-120-133). While Qwest, like other companies, is required to track their performance against these standards, they are only required to report telephone answer time data when requested. (WAC 480-120-439(10). This is a one-page report, as shown in the record in this case. *See* Exh. No. , p. 58C, p. 5. Public Counsel's opening brief, at ¶ 127, stated that companies are not required to file telephone answer time reports if they meet the Commission's standard. To clarify, companies are only required to file these reports on request. WAC 480-120-439(10).

[43] Exh. No. 47, pp. 6-8 (Williams)(self-executing plans in other states described as incentive plans); Exh. No. 118C, p. 15 (former Qwest employee Ms. Theresa Jensen describing the incentive function of the SQPP).

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26. It appears that Staff shares the view that performance programs provide an incentive. As Staff witness Kristin Russell stated in testimony, "Staff is of the belief, based on previous performance programs, that there appears to be a correlation between financial consequences and service quality improvements."[44] The SQIP is a preventive approach, and one that other Qwest states have found desirable.[45] In Washington, Qwest and Staff want the Commission and customers to settle for reactive enforcement after problems have already occurred.

D. Staff's Initial Service Quality Proposals

1. Major outages

27. Public Counsel's AFOR proposal adopts Staff's original provision related to major outages. It provides that in the event of a major outage in a given area "with a cause that is within Qwest's control, that affects the availability of advanced telecommunications services, the company must build in either more redundancy to serve that area or a technological improvement that removes the vulnerability that caused the outage." [46]

28. This provision has been dropped by Staff and is not included in the Qwest/Staff AFOR. Staff's brief explained that in Staff's view, the re-institution of the merger settlement's 25 cent trouble report credit replaces Staff's original provision regarding major outages and network redundancy.[47] This makes no sense, as trouble reports are quite different from major outages. [48]

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[44] Exh. No. 134, p. 19 (K. Russell).

[45] Staff and Qwest do not explain why it makes sense to look at other states to copy a state-specific rate figure, while at the same time it is inappropriate to pursue service quality measures based on broadly applicable economic and policy concerns.

[46] Exh. No. 144, p. 2, Provision 5.

[47] Staff Brief, p. 13.

[48] WAC 480-120-021 defines major outages and trouble reports as follows:
"Major outages" means a service failure lasting for thirty or more minutes that causes the disruption of local exchange or toll services to more than one thousand customers; total loss of service to a public safety answering point or emergency response agency; intercompany trunks or toll trunks not meeting service requirements for four hours or more and affecting service; or an

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Trouble reports are isolated incidents of impaired access lines that come in two forms – out-of-service trouble conditions (i.e. no dial tone), and other types of trouble (e.g. static on the line) – as set forth in WAC 480-120-440. Major outages, in contrast, are outages affecting significant numbers of customers, and are addressed by different Commission rules. WAC 480-120-412 establishes priorities for repair of major outages, and includes provisions for notice to the Commission and public safety answering points (PSAPs) and information to customers.

29. The value of the 25 cent trouble report credit provision in the Qwest/Staff AFOR is trivial compared with the major outage provision of the original Staff proposal. For example, in 2005 when the 25 cent trouble report credit program was previously in effect, Qwest failed the standard in one exchange, resulting in *de minimis* amounts of customer credits to a small number customers.[49] It makes no sense to view a customer remedy program of this type, as a realistic replacement for a major outage provision intended to provide "network robustness." The 25 cent remedy program will do absolutely nothing to address any potential "vulnerability" that causes outages that are under Qwest's control.[50]

30. Clearly, there are much more direct means of addressing network robustness and redundancy, as evidenced by the current New Mexico example. In a recent settlement concerning Qwest's investment failures during its initial AFOR, the Company is required to

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intermodal link blockage (no dial tone) in excess of five percent for more than one hour in any switch or remote switch.

"Trouble report" means a report of service affecting network problems reported by customers, and does not include problems on the customer's side of the SNI.

[49] Exh. No. 74C, p. 16. The top portion of the chart shows the confidential number of "actual working numbers paid" the trouble report bill credit in September 2005. The dollar amount can be calculated by multiplying by 25 cents.

[50] Staff witness Deborah Reynolds' Exhibit 153C shows Qwest's 2006 outages. Qwest reported 14 outages (not all major) in 2006. Exh. No. 152C, p. 28.

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upgrade all of its wire centers throughout its New Mexico territory so that each wire center is connected to Qwest's network by both redundant and diverse routes.[51] Under the terms of the settlement, redundancy and route diversity in all instances are required to comply with generally accepted telecommunications industry outside plant engineering standards. Achievement of the described interoffice route diversity and redundancy is a priority project and must be obtained even if the actual costs exceed the estimates provided by Qwest.[52] The Settlement Agreement states that the company estimates the total cost of these upgrades at $23,100,000.[53] But the agreement also specifies additional costs for various wire centers roughly estimated at another $10,600,000.[54]

2. Staff initially proposed to use rate increases as a service quality incentive.

31. While Staff now contends that there is no need for Public Counsel's service quality incentive plan, describing it as punitive, Staff's original testimony recognized that a relationship exists between financial consequences and service quality improvements.[55] Furthermore, Staff's initial AFOR proposal position would have allowed an initial increase of only fifty cents to the monthly 1FR service during the first year of the AFOR ($12.50 to $13.00). Any subsequent increases were conditioned upon a demonstrated five percent reduction in service quality complaints to the Commission. Staff's original plan, therefore, required that the Company demonstrate improved performance in service quality before being allowed any revenue increase.

[51] Exh. No. 2, Supplement to Bench Request No. 2, Attachment F, p. 8.
[52] *Id.*, p. 10.
[53] *Id.*, p. 8.
[54] *Id.*, p. 9.
[55] Exh. No. 134, p. 19 (K. Russell).

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While Public Counsel sees problems with the specifics of this proposal,[56] it is worth noting that Staff itself was willing to tie service quality to financial incentives, although it now advocates against any such linkage.

E. The SQIP is Not Punitive

32. Qwest and Staff both refer to the SQIP as punitive.[57] They refer to the "backcast" that shows Qwest would have paid over $1 million had the SQIP been in place.[58] They suggests this is an unfair result because their service quality is actually good by comparison with other companies and that other companies would not have paid anything similar performance.[59] The facts show, however, that the vast majority of these payments would have come from three areas where Qwest's performance is actually worsening: restoring out of service conditions and telephone answer time at repair centers, or appears to be, as in the case of trunk blocking [60] The bottom line is that Qwest failed to perform at levels required by the Commission's rules, not an arbitrary construct of Public Counsel. Moreover, the standards and payment calculations in the SQIP are the same as those which Qwest itself recommended in 2004 in the merger proceeding. Qwest's argument seems to amount to saying, "we are doing no worse than some other companies, so that should be good enough." Certainly, if an enforcement action were brought

[56] Complaint volume is an extremely indirect and imprecise measure of specific service quality performance on individual metrics and is also subject to manipulation.

[57] Qwest Brief, ¶ 59; Staff Brief, p. 11.

[58] Rather than being punitive, the impact of Public Counsel's plan simply parallels the experience in other Qwest states. The record shows that Qwest has made automatic payments, for failing to meet out-of-service metrics in Arizona, Colorado, and New Mexico under their alternative regulation plans. Exh. No. 53C, p. 9.

[59] Public Counsel witness Mary Kimball explained at the hearing that accurate comparisons between companies can be difficult because of different tracking and reporting. Tr. 622:24-623:18. In addition, saying that other companies would not have paid anything for similar performance overlooks company potential liability for statutory penalties for violating service quality rules.

[60] Public Counsel Brief, ¶¶ 102-105. Qwest trunk blocking data has been difficult to assess due to inaccurate reporting.

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for statutory penalties, Qwest could not successfully defend on that basis.

VI. EFFICIENT REGULATION

33. As all the parties' briefs note, this is an area where there is substantial agreement. A few observations are in order however. Despite Qwest's protestations about regulatory burden, it is fascinating to see that in response to Bench Request No. 7, the financial benefit to Qwest of the reduced regulation is a mere $25,000 to$50,000. It seems unlikely that Qwest requested the AFOR out of any serious concern with this burden.

34. Staff defends the adoption of a five percent threshold for requesting approval of property transfers, by arguing that the Qwest/Staff AFOR "ensures that major transactions will continue to be filed with the Commission."[61] Staff's original, "improved" AFOR had a much lower threshold of one percent for waiving the transfer of property filing requirements. Staff witness Deborah Reynolds explained that Staff's original one percent threshold is appropriate, "in order to keep the larger transactions within Qwest's filing requirement."[62] Her testimony includes an example of a $20 million transfer of property filing, related to the sale of a building. Under the terms of the Qwest/Staff AFOR, Qwest would not have to file a transfer of property for her example, and thus any potential gain on sale due ratepayers would not be captured.

35. Staff and Qwest are applying a double standard when they characterize a sum of under $78 million as not a "major transaction" that requires Commission oversight. If spending approximately $1 million for DSL deployment is described as a "major" commitment then certainly a multi-million dollar transfer of property seventy times as large is sufficiently "major"

[61] Staff Brief, p. 7.
[62] Exh. No. 152C, p. 12 (D. Reynolds).

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to warrant Commission oversight.

VII. PUBLIC COUNSEL PROPOSAL

36. Many of the criticisms of Public Counsel's proposed AFOR were anticipated and addressed in the opening brief. Others have been addressed above. Public Counsel responds to some additional issues below.

A. À La Carte Offerings Should Still Be Required

37. This is an area where there are substantial differences between the Public Counsel and the settlement AFOR proposals. Under the Qwest/Staff AFOR:

- There is no cap whatever on the prices of residential features or of bundled services.
- There would be no requirement that residential features be offered on an à la carte basis.
- Bundles could be priced at *more* than the sum of regulated and competitively classified services.
- There would be no requirement that customers be told that 1FR is available on a stand-alone basis.

This framework creates the potential for a number of serious negative developments in this area of service. First, if there is no requirement that customers be aware that stand-alone 1FR is available, deceptive advertising, incomplete information, customer confusion, or a combination of the above, could lead consumers to purchase bundles or packages in the belief they need to do so to get 1FR service. It will not be in Qwest's economic interest to make sure customers know stand-alone is available. It will be in the Company's interest to sell bundles.

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38. If Qwest no longer offers features à la carte, customers will lose the freedom to choose only the features they require and that fit into their budget. Instead, customers could be forced to purchase services they do not want, paying more than they would under an à la carte framework.

39. Furthermore, with no à la carte requirement, no notice or information requirements, and no "bundle maximum," Qwest would be free to steer customers to bundles of features that might have been less expensive than the identical services purchased à la carte.

40. Since Qwest asserts that it has no plans to stop offering à la carte services, or price bundles above à la carte levels,[63] it is a cause for concern that Qwest is opposing so assiduously any requirements in this area. From a consumer perspective, this provides little comfort or assurance that current practices will continue.[64]

B. The Economic And Policy Rationale for The Residential Price Cap

41. Qwest objects to the cap on residential features as having no economic rationale. Both Public Counsel and Qwest witness Mr. Teitzel have explained that a significant portion of the market consists of customers who only buy 1FR and one or a limited number of features. This is not an effectively competitive part of the market. From an economic perspective, therefore, the price cap prevents the exercise of market power in this segment of the market. Qwest again makes the illogical argument that price caps will not allow it to respond to the competitive market. It does not explain why it would increase price in an effectively competitive market. The Company also ignores the flexibility that exists currently to lower prices without serious regulatory hindrance.

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[63] Qwest Brief, ¶ 71

[64] It is also important to recognize that recently-approved HB 2103 incorporates the Public Counsel recommendations for stand-alone availability for non-competitive services at fair, just, and reasonable, prices. The

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42. There is also a policy rationale for maintaining price protections. As other Qwest states have recognized, some features can be viewed as "public interest" features. Because of their widespread use, importance for customers, and close connection to the local service market, these features should share in the price protections afforded to basic service. Other Qwest states have placed a hard cap these features. Public Counsel's moderate proposal employs only a flexible cap that permits the price to float tied to the Consumer Price Index.

C. The Feature Cap Does Not Defeat Pricing Flexibility For Bundles

43. Qwest has also expressed objections about the interplay of the features cap with its flexibility to price bundles.[65] The proposed indexed cap on vertical features, however, constrains the price of the bundle only if the bundle is limited to local exchange services. Any bundle that contains either long distance service, data or video services will not be affected by the cap because Qwest would retain the ability to discount or increase the rate for the entire bundle by altering the amount it recovers for long distance, data and video services. Moreover, because bundles that contain data and video are more likely to be affected by competition than other bundles, the proposed indexed cap would not restrict Qwest's ability to meet competition with either a downward or upward adjustment.

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provisions of the Qwest/Staff AFOR are not consistent with this new law. Substitute House Bill 2103, Laws of 2007, ch. 26, Approved April 10, 2007, effective July 22, 2007.

[65] Qwest Brief, ¶ 57.

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D. Forbearance Proposal

44. Public Counsel's AFOR proposal adopted Staff's original recommendation regarding wholesale obligations under the Telecommunications Act of 1996.[66] Under the provision Qwest would have agreed not to seek to avoid any of its wholesale obligations in Washington by means of a "forbearance" request. Public Counsel continues to believe this is a desirable provision for the reasons stated in Tom Wilson's testimony.[67] As with other provisions, Qwest must accept the provision if the AFOR is to go into effect, so the issue Qwest identifies with Commission authority is not well taken. However, given that Staff and the wholesale customers have withdrawn their support for this provision, Public Counsel does not see it as an essential element of an AFOR for Qwest.

E. Public Counsel's Proposal Does Not Significantly Add To Regulation

45. Qwest portrays the Public Counsel proposal as significantly adding to Qwest's regulatory burden. This does not stand up to examination. The proposed DSL deployment is responsive to the statutory requirements. The Public Counsel plan does not appear substantially different in scale or operational impact from the aspirational 83 percent "goal" in the Qwest/Staff AFOR, which also includes the seven wire center commitment. The additional reporting for discounts would seem to impose the minimal obligation to file an extra report. The 1FR hard cap, the cap on features, and the maximum price for bundles are all elements that Qwest has agreed to or complies with in other states. The added burden of the SQIP is incremental only, since under the

[66] Exh. No. 144, p. 2. Public Counsel would observe that it is debatable whether a plan that states it does not address wholesale service quality meets the requirement of RCW 80.36.135(3) that the AFOR "must contain" a proposal with standards and enforcement or remedial provisions.

[67] Exh. No. 142C, pp. 53-:4-54:4 (Wilson).

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Qwest/Staff AFOR the company will be tracking and reporting performance under the Commission rules in any event.

46. The deaveraging limitation is only incrementally different from the commitment in the Qwest/Staff AFOR, primarily limiting Qwest from doing something it says it is not doing anyway – contracting with residential customers. Public Counsel's chief concern on this issue is to close the "contracting" loophole that would appear to allow Qwest to begin deaveraging for residential packages and features. Qwest should also not be permitted to deaverage prices for any service not competitively classified by statute, even if pricing flexibility is allowed under an AFOR. It is not the intent of Public Counsel's proposal to restrict the Company's options with respect to services already competitively classified.[68]

F. Qwest Misstates the Commission's Options

47. Qwest's brief spells out its view of the options before the Commission.

> Qwest believes that the most important thing to consider is that the AFOR statute allows the Commission to consider either Qwest's plan for an AFOR, or to consider an AFOR on its own motion.
>
> The statute does *not* contemplate the consideration or approval of a plan submitted by another party, such as Public Counsel, and the statute directs the Commission to order implementation of the company's proposed plan unless the plan fails to meet the considerations of RCW 80.36.135(2).[69]

This is an erroneous statement of the choices available. The statute expressly authorizes the Commission to "issue an order accepting, modifying, or rejecting the plan[.]"[70] Clearly nothing in the statute precludes modifications based on recommendations of Qwest, other parties, or the

[68] The reference in Exh. No. 103, Sec. B.1.e to "its services" is unclear, and confusion also arose during Dr. Loube's cross-examination. This provision is not intended to change any permitted flexibility regarding deaveraging for services that have already received competitive classification.

[69] Qwest Brief, ¶ 76 (emphasis in original).

[70] RCW 80.36.135(3).

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Commission itself. Even in this case, the Commission is being asked to consider modifications to Qwest's own plan presented "by another party," i.e., the Commission Staff, albeit jointly as part of a settlement, as well as those of Public Counsel. If the Commission adopts a modified AFOR and the company does not find it acceptable, it can elect not to proceed, as already noted.[71] If the Commission accepts Qwest's characterization of the two options as an all or nothing choice, then the Qwest/Staff AFOR should certainly be rejected because it "fails to meet the considerations of RCW 80.36.135(2)."[72]

VIII. CONCLUSION

48. An AFOR should not be approved for Qwest in form proposed by the Company and Staff. Staff has described the Qwest/Staff AFOR as "precise" and "carefully crafted."[73] Spending just a few minutes reviewing the responses to Bench Request No.2 dispels any such impression. The Qwest/Staff AFOR does not stand up well by comparison to the intensive work, comprehensiveness, and attention to detail reflected in the other state plans. It would be more accurate to describe the proposal as "not ready for prime time."

49. As a number of answers at the hearing showed, there are many areas where the Qwest/Staff AFOR is unclear, where the parties have not given thought to issues, or where there is confusion about the applicability of other provisions of law.[74] This is simply not a sound blueprint for a four-year long alternative regulation plan for the state's largest telecommunications carrier. Public Counsel has attempted to offer a better alternative. As it

[71] RCW 80.36.135(4).
[72] Qwest Brief, ¶ 76.
[73] Staff Brief, Introduction, p.1, Conclusion, p. 21.
[74] Staff's brief again highlights this concern with its references to the AFOR treating Qwest as a "competitively classified company." *See* Staff Brief, p. 18 ("Under the modified AFOR proposal Qwest will otherwise be treated as if it were a competitively classified company pursuant to RCW 80.36.320). As Public Counsel argued in its opening brief, Qwest has not here sought competitive classification, and actually disclaimed such status at the hearing. Public Counsel Brief, ¶ 95.

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stands, the AFOR proposal agreed to by Qwest and Staff does not meet the requirements of the AFOR statute and is not in the public interest. Washington can do better.

RESPECTFULLY SUBMITTED this 1st day of May, 2007.

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