Alex M. Duarte
Corporate Counsel
QWEST
421 SW Oak Street, Room 810
Portland, OR 97204
(503) 242-5623
(503) 242-8589 (facsimile)
Alex.Duarte@qwest.com

Attorney for Qwest Corporation

BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH

In the Matter of Qwest Corporation's Request for Approval of a Stipulation Regarding Certain Performance Indicator Definitions and Qwest Performance Assurance Plan Provisions	Docket No. 07-049-31 **QWEST'S PETITION FOR REVIEW, RECONSIDERATION OR REHEARING OF COMMISSION'S JUNE 30, 2008 ORDER**

Qwest Corporation ("Qwest"), pursuant to Utah Code Ann. §§ 54-7-15 and 63G-4-301 and Utah Admin. Code R746-100-11.F, respectfully seeks review, reconsideration or rehearing of the Commission's Report and Order issued in this docket on June 30, 2008 ("Order"). Specifically, Qwest seeks review, rehearing or reconsideration of that part of the Commission's order that held that the approved changes to the Qwest Performance Assurance Plan ("PAP" or "QPAP") and the Performance Indicator Definitions ("PIDs") will be effective on a going-forward basis only and that the Commission will not retroactively impose such changes upon "unwilling parties who do not wish to modify agreements entered into prior to this order." Order, p. 4.

PERTINENT BACKGROUND AND PROCEDURAL HISTORY

A. Qwest's PAP agreements and PIDs

By way of introduction, Qwest's PAP agreements were negotiated with the Competitive Local Exchange Carrier ("CLEC") community throughout Qwest's 14-state ILEC region as part of Qwest's efforts to reenter the interLATA toll market under Section 271 of the Telecommunications Act of 1996 ("Act"). The purpose of the PAP was to provide CLECs and state commissions with additional assurance (by way of potential monetary consequences) of continued appropriate interconnection and network access between Qwest and other telecommunications providers. Further, Qwest and CLECs, with the approval of state commissions, agreed to incorporate or reference PAPs and PIDs in individual interconnection agreements between Qwest and such providers.

B. Qwest's and the stipulating parties' filing of stipulation

On June 27, 2007, Qwest filed, on behalf of itself and a number of major CLECs in its region, a stipulation regarding certain PIDs and PAP provisions, and requested that the Commission approve the Stipulation, accept the agreed-upon changes to the PAP and to interconnection agreements containing the PAP, and also allow the PIDs to take effect. Qwest explained that its submission resulted from collaborative work sessions among Qwest and certain CLECs which chose to participate in such work sessions. Qwest noted that the participants in these work sessions worked for a year on these issues before agreeing upon a number of modifications to the PIDs and various state-specific PAPs that would provide a fair resolution and be in the public interest.

As Qwest explained, all of these changes were discussed by the participants in one or more of the sessions, and just as importantly, Qwest provided notice to all CLECs certified in

each of its 14 states of the opportunity to participate in the process, as well as of the nature of the issues to be presented for discussion in the collaborative forum. Ultimately, 19 CLECs in the region elected to be notified of updates and meetings, while six CLECs regularly participated.

Accordingly, Qwest recommended that the Commission approve the stipulation. Qwest also requested that the changes be implemented for all CLECs that participate in the PAP; namely, that the Commission issue an Order *applying the changes to all Utah interconnection agreements containing the PAP*. This uniform application of the changes is necessary given that the PAP is, and has always been, structured as a single, statewide plan for all CLECs opting into the PAP.

C. XO's comments

On August 28, 2007, the Commission issued a Notice of Request for Comments. The only comments filed were from XO Communications Services, Inc. ("XO") on September 17, 2007. XO raised a couple of concerns. First, XO objected to Qwest's request that the Commission complete its consideration of Qwest's petition within 60 days. Second, XO recommended that the Commission issue bench requests (like the Washington Commission had done) to Qwest for additional information in support of the stipulation. Third, XO argued that the Commission should not approve the Stipulation, "at least with respect to XO and other CLECs who are not party to that stipulation, *until* Qwest has demonstrated that the revisions to the QPAP are in the public interest." XO Comments, p. 3. (Emphasis added.)[1] XO never advocated that any changes ultimately approved by the Commission should not apply uniformly

[1] In support of its concerns about the Commission not approving the stipulation as to XO and other non-stipulating CLECs until Qwest had shown that the stipulated revisions were in the public interest, XO said that "[m]ore specifically, the Commission should require Qwest to demonstrate that the reduced payment levels that would result from the 2007 Stipulation are sufficient to ensure that Qwest will provide CLECs with adequate service quality." XO Comments, p. 3.

to all CLECs opting into the PAP or that such approved changes should not modify existing interconnection agreements.[2]

D. The Division's Recommendations

On May 8, 2008, the Division issued its recommendation that the Commission *approve* the stipulation submitted by Qwest. The Division noted that it had worked with Qwest to determine the impact of the stipulation to the Tier 1 payments (to individual CLECs in the event of Qwest's failure to meet benchmarks) and Tier 2 payments (to the State in the event Qwest's failure to meet benchmarks). The Division also noted that only one CLEC (XO) had filed comments and that "it appears that they [XO] were concerned about the Commission using a 60 day clock to evaluate the stipulation." Division Recommendation, p. 1. The Division further mentioned that "[i]n phone conversations with representatives from XO, the Division also learned that another concern was ensuring that a process of evaluation and proper analysis occurred." *Id.* The Division, however, dealt with this concern by stating its belief that "there has been sufficient time to evaluate the Stipulation and gain an understanding of the impacts of the proposed changes" and therefore "the Commission should move forward and approve the stipulation." *Id.*

E. The Commission's Order

On June 30, 2008, the Commission issued its order. After summarizing the background and analyzing the issues, the Commission recognized that developments within the telecommunications industry and changes in FCC implementation and administration of the Act provide a basis for changes in the PAP and PIDs. The Commission then concluded that the suggested changes to the PAP and PIDs proposed in the Stipulation are reasonable and may be

[2] XO's recommendation for a thorough review has been fulfilled through the details provided in Qwest's filing, the support communicated by the participating CLECs, and the Division's consideration and discussions with XO, culminating in the Division filing a recommendation that the stipulated changes were appropriate.

approved for use in interconnection agreements of Qwest and other telecommunications providers with Utah operations. Order, pp. 3-4.

However, regarding XO's original comments, the Commission stated as follows:

> However, we agree with the comment originally made by XO. The changes to the PAP and PIDs will only be effective on a going forward basis. Our approval herein is not intended to alter PAP terms and conditions or PIDs in any interconnection agreement existing or entered into prior to this order. Obviously, parties to an existing agreement may voluntarily modify their contracts to adopt the new PAP and PIDs, *but we will not retroactively impose changes upon unwilling parties who do not wish to modify agreements entered into prior to this order*. Order, p. 4. (Emphasis added.)

Accordingly, the Commission approved the Stipulation and the new PAP and PIDs to be used for an interconnection agreement negotiated and effective after June 27, 2008. However, the Commission denied Qwest's request that the changes to the PAP and the PIDs be applied to any interconnection agreement existing and effective prior to the date of the Order, absent a mutual voluntary modification by agreement parties. Order, p. 4. It is this determination that Qwest requests that the Commission reconsider.

DISCUSSION

For the reasons set forth below, Qwest respectfully requests that the Commission review and reconsider that aspect of the Order that denied Qwest's request that the changes to the PAP and the PIDs be automatically incorporated into any interconnection agreement existing and effective prior to the to the date of the Order, absent a mutual voluntary modification by agreement parties.

First, the Commission's decision was issued without Qwest having an opportunity to respond to XO's comments. Second, and more importantly from a substantive standpoint, failing to automatically amend existing interconnection agreements to include the stipulated changes will result in an unworkable process for both Qwest and CLECs, and further, will result in bad

public policy and be discriminatory. Indeed, this Order has inadvertently modified the long-standing cornerstone of the PAP - namely, the fact that the PAP is a single, statewide system of performance measurements and credits which CLECs may either opt into or decline. Failing to incorporate the approved changes into all interconnection agreements which contain the PAP is akin to failing to incorporate new approved rates into interconnection agreements following a cost docket.

I. Qwest had no opportunity to respond to XO or to address the "opt-in" concept adopted by the Commission

Preliminarily, and procedurally, the Commission issued its Order without the benefit of receiving Qwest's response to XO's comments. In this instance, there was no process by which Qwest was permitted to respond or rebut XO's comments. This resulted in a decision-making process that only considered XO's comments, without the benefit of Qwest's response to the issues XO raised. On that basis alone, Qwest believes that reconsideration is appropriate.

II. PAPs and PIDs need to be applied consistently, as a whole, to all CLECs

The QPAP provisions were designed to apply, and have always applied, as a whole and across the board, to all CLECs that elect to include a PAP in their interconnection agreements. Section 13.6 of the Utah PAP sets out this framework:

> This PAP contains a comprehensive set of performance measurements, statistical methodologies, and payment mechanisms that are designed to function together, and only together, as an integrated whole. To elect the PAP, the CLEC must adopt the PAP in its entirety in its interconnection agreement with Qwest in lieu of other alternative standards or relief for the same wholesale services governed by the PAP.

Similarly, in Section 16.1, which deals with reviews, the PAP specifies that "[a]ny changes made at the six-month review pursuant to this section shall apply to and modify this agreement between Qwest and the CLEC." This concept of a single statewide PAP is

appropriate and consistent with the fact that the PAP was created to enable Qwest to assure performance in a uniform and non-discriminatory manner.

More importantly, from a practical standpoint, the nature and structure of the QPAP is such that it must be administered in a uniform manner to all CLECs that have opted in. For example, Tier 2 payments are *aggregate* in nature, and thus are based on standards that must necessarily apply statewide.[3] Specifically, this aggregation consists of combining the numerators, denominators, and results for all CLECs in a given measurement into one regional result and applying it against the standard. Since a number of the changes proposed by Qwest and approved by the Commission significantly change the standard or the way that the measurement is applied against the standard, applying the changes only to some CLECs and not others would result in multiple standards or methods for the same measurement, which would make the Tier 2 aggregation impossible. In short, Tier 2 payments cannot be properly calculated in Utah unless all participating CLECs' data are handled according to the same version of the PAP and PIDs.[4] For this reason, Qwest respectfully submits that the Commission's Order is unworkable.

---

[3] Section 2.1.1 of the Utah QPAP, for example, states:

> As specified in section 7.0, if Qwest fails to meet parity and benchmark standards on an aggregate CLEC basis, Qwest shall make Tier 2 payments to a Fund established by the state regulatory commission or, if required by existing law, to the state general fund.

Changes that by their nature must apply to all CLECs due to the aggregate nature of Tier 2 include the modifications to Sections 7.3 and 9 of the PAP. There is simply no way to measure Qwest's performance on an aggregate CLEC basis if some CLECs have different standards.

[4] By way of further examples, Sections 4.0 and 5.0 establish statistical methods and parameters, doing so in a manner that treats all CLECs the same. Sections 7.0 and 9.0 define Tier 2 payments and implement the concepts previously described for Section 2.1.1, stating not only the application of aggregate CLEC results, but also determining "non-conformity" on an aggregate basis. This requires applicability of the same rules and the same standards for all CLECs using the PAP in the state. Further still, Section 10.0 addresses "low volume, developing markets" and establishes another PAP feature that is based on aggregate CLEC results – in this case, aggregate volumes. Again, while applying to all CLECs uniformly, this section aggregates CLEC volumes in a manner that can only fairly be applied where the same standards apply to those CLECs. Finally, Section 14.2 requires Qwest to provide to the Commission "a monthly report of aggregate CLEC performance results pursuant to the PAP …," again invoking aggregation that is only possible if PID standards apply uniformly to all CLECs in the same manner.

Finally, the PIDs upon which QPAP payments are based have calculation requirements and standards for each measurement that apply in the same manner for *each CLEC* in a state. There is no mechanism designed into the PIDs for this to be otherwise, and it has ever been so. To attempt to alter this fundamental aspect of the PIDs/PAP by applying the stipulated changes only to some CLECs would make it very difficult for Qwest to apply the PAP. Moreover, since the current request does not ask for such a fundamental change, this outcome is not permissible under the PAP, because it would require its own notice and hearing, consistent with due process, as stated in Section 16.1.[5] Indeed, had Qwest and the CLECs known that different versions of the PAP were a possible outcome of their stipulation, they might have taken different positions in negotiating the changes. Accordingly, the proposed PID changes must apply to all participating CLECs in the state.

III. The Commission regularly orders implementation affecting all CLECs

These PAP and PID changes are really no different from other regulatory orders that apply to all CLECs without the necessity of having to individually amend interconnection agreements. For example, the Commission has regularly ordered the implementation of certain rates from a cost docket to apply unilaterally to all affected interconnection agreements, regardless of any formal amendment of such agreements. This situation is no different.

Further, XO appeared to rely on a California decision from the Ninth Circuit for its argument that a state commission cannot make a "generic ruling" that "alters existing contractual arrangements." See XO Comments, p. 2, citing *Pac Bell v. Pac-West Telecomm, Inc.*, 325 F.3d 1114, 1127 (9th Circuit 2003). However, XO exaggerates the point, and, of course, that decision is not binding or precedent in Utah. Moreover, *Pac-West* is distinguishable here in any event.

[5] Section 16.1 states, in pertinent part: "The Commission retains any independent authority under law to initiate a proceeding to review the PAP at any time and to order changes to any provision of the PAP, after notice and hearing and consistent with due process and other rights of all parties."

For example, in *Pac-West*, the California Commission had issued a generic ruling regarding the jurisdictional status of and billing treatment for *interstate* Internet Service Provider (ISP)-bound traffic (namely, that reciprocal compensation provisions of interconnection agreements apply to ISP-bound traffic, which the FCC had determined is *interstate* for jurisdictional purposes, in California). The Ninth Circuit later ruled that the Commission had exceeded its statutory authority over interconnection agreements because any jurisdiction it has over interstate traffic was only in the context of an interconnection agreement arbitration under Section 252 of the Act. Thus, under these schemes established under Section 252, the California Commission lacked authority under the Act to promulgate general (or "generic") regulations over ISP (interstate) traffic.

Obviously, this case does not deal with interstate traffic. Nor did the Ninth Circuit *Pac-West* case deal with a *voluntary* PAP agreement over which the state commission clearly has jurisdiction, and in which all CLECs who choose (but are not required) to participate in a PAP are entitled to financial remuneration in the event that Qwest fails to meet certain *standard* interconnection and network access benchmarks that the *Commission* has set. Nor did *Pac-West* involve an industry-wide effort in which Qwest and all CLECs who wish to participate have an opportunity to have their input and opinions taken into consideration.

Rather, the present situation is more akin to a cost docket in which the Commission's new standard wholesale rates are implemented in every CLEC's interconnection agreement, regardless whether the parties have amended their individual agreements. There is no question that the Commission would have the jurisdiction and authority to have such new approved cost docket rates apply to all interconnection agreements with that particular ILEC, and the

Commission has done so in the past. In short, the non-binding Ninth Circuit *Pac-West* decision is not persuasive authority here.

IV. The Commission's Order would be bad public policy and would be discriminatory

Finally, apart from the practical impossibilities of having two (or possibly more) different PAPs in a state, the Commission's ruling, if not reconsidered, would be discriminatory and would run afoul of the public interest. For example, even if Qwest could manage two (or more) different PAPs in a state, such a scenario could give CLECs an incentive to refuse to negotiate in good faith regarding necessary changes in the hopes of leveraging such lack of cooperation into some type of concession or accommodation on other issues. Not only would such gamesmanship neither be in the public interest, nor promote fair competition, but it would have a *discriminatory* effect on other CLECs, especially since different CLECs would have different PAP provisions and PIDs, and thus different monetary payments.

CONCLUSION

Accordingly, for the reasons above, Qwest respectfully submits it has shown good cause for review, reconsideration or rehearing of that part of the Commission's Order that ruled that the approved changes to the QPAP and the PIDs will be effective on a going-forward basis only, and that the Commission will not retroactively impose such changes upon unwilling parties who do not modify agreements entered into prior to the order.

WHEREFORE, Qwest respectfully requests that the Utah Public Service Commission **review** or **reconsider** that part of the Commission's Order which ruled that the approved changes to the QPAP and the PIDs will be effective on a going-forward basis only, absent a mutual voluntary modification by agreement parties.

Dated: July 28, 2008

Respectfully submitted,

QWEST CORPORATION

By_____

Alex M. Duarte
QWEST
421 SW Oak Street, Room 810
Portland, OR 97204
(503) 242-5623
(503) 242-8589 (facsimile)
Alex.Duarte@qwest.com

Attorney for Qwest Corporation