BEFORE THE WASHINGTON STATE
UTILITIES AND TRANSPORTATION COMMISSION

In the Matter of the Second Six-Month Review of Qwest Corporation's Performance Assurance Plan	)	DOCKET NO. UT-043007
	)	QWEST CORPORATION'S OBJECTION TO STAFF TESTIMONY AND MOTION TO STRIKE

COMES NOW Qwest Corporation ("Qwest") and objects to a portion of the initial prefiled testimony of Thomas L. Spinks, specifically the sentence that begins on page 7, line14, and moves to strike the same on the grounds that it constitutes the impermissible introduction of evidence of statements in settlement negotiations as evidence, and unfair surprise. This motion is based on the following showing.

In the 47th Supplemental Order in Docket No. 003022 et al, (*"47th Supplemental Order")* the Commission determined in paragraphs 14-16 to participate in what it called the LTPA Collaborative, which it described in paragraph 14 as "an ongoing process that will result in both 'agreed upon' changes to the PIDs as well as documentation of unresolved disputes to be resolved during the six-month review process that states will commence pursuant to Section 16 of the QPAP." The Commission's rules of procedure, chapter 480-07 WAC, in subpart D, entitled "Alternative Dispute Resolution," include a provision on collaboratives, WAC 480-07-720. The definition of a collaborative in subsection 1 of this

Law Offices of
Douglas N. Owens
P.O. Box 25416
Seattle, WA 98165-2316
Tel: (206) 748-0367

rule is "a commission-sanctioned negotiation in which interested persons work with each other and representatives of commission staff to achieve consensus on one or more issues, within the commission's jurisdiction, assigned to or identified by the collaborative participants."

According to the description in the *47th Supplemental Order, supra,* the LTPA Collaborative was "a collaborative" as defined in WAC 480-07-720(1). As such, the LTPA Collaborative was subject to the WAC 480-07-700(4) ADR guidelines, which state: "In *any negotiation,* the following apply unless *all participants* agree otherwise: …(b) *No statement, admission, or offer of settlement* made during negotiations is admissible in evidence in *any formal hearing* before the commission without the consent of the participants or unless necessary to address the process of the negotiations;" [emphasis added]

The testimony of Mr. Spinks to which Qwest objects consists of his recitation of a statement made by a CLEC participant in the LTPA Collaborative, during the negotiations. Qwest which was a participant in the negotiations, does not consent to the Staff's introduction of the statement in evidence in this proceeding. The Staff seeks to introduce that statement as evidence in this formal hearing.

The purpose of the introduction of this statement by Staff is not to address the process of the negotiations. The Staff's purpose is to use that statement as evidence supporting the Staff's position on the merits of the dispute in this hearing. That is clearly a violation of WAC 480-07-700(4). The Commission's rule is consistent in this regard with ER 408, which provides that evidence of conduct in settlement negotiations is inadmissible.

Law Offices of
Douglas N. Owens
P.O. Box 25416
Seattle, WA 98165-2316
Tel: (206) 748-0367

The purpose of the Commission's own ADR guidelines, and ER 408, is to encourage full and open settlement negotiations and thereby create conditions likely to produce settlements. The action of the Staff in seeking to introduce evidence of settlement discussions in this hearing against a party to those discussions, without that party's consent will inevitably chill any future ADR efforts to resolve issues of PID administration outside of a formal hearing. Even if the Commission should find that the LTPA Collaborative was for some reason not a WAC 480-07-720(1) collaborative, the policy behind the Commission's own ADR guidelines and ER 408 should still result in the exclusion of the evidence of settlement negotiation statements.

The Staff's violation of the Commission's own guidelines for ADR is particularly egregious from an unfair surprise standpoint as well as the standpoint of preserving conditions that lead to settlements. Because Staff did not disclose its position on the tier assignment of the expanded PO-20 in the Issues List, Qwest did know Staff's position and could not conduct discovery of the basis of that position before discovery was closed. Qwest is therefore without evidence which can only be obtained from the CLEC participant in the settlement negotiations that made the statement involved, to confront the hearsay, settlement discussion evidence on which Mr. Spinks relies.

For the foregoing reasons, Qwest respectfully moves that the evidence described above be stricken and not received in the record. If this motion is granted, Qwest withdraws the portion of Mr. Reynolds' prefiled testimony that responds to the above described Staff testimony.

Respectfully submitted this 26th day of October, 2004

Law Offices of
Douglas N. Owens
P.O. Box 25416
Seattle, WA 98165-2316
Tel: (206) 748-0367

QWEST CORPORATION

LAW OFFICES OF DOUGLAS N. OWENS

_____
Douglas N. Owens (WSBA 641)
Counsel for Qwest Corporation

Lisa A. Anderl (WSBA 13236)
Qwest Corporation
Associate General Counsel
1600 Seventh Ave., Room 3206
Seattle, WA 98191
(206) 345 1574

Adam L. Sherr (WSBA 25291)
Qwest Corporation
Senior Attorney
1600 Seventh Ave., Room 3206
Seattle, WA 98191
(206) 398 2507

Law Offices of
Douglas N. Owens
P.O. Box 25416
Seattle, WA 98165-2316
Tel: (206) 748-0367

CERTIFICATE OF SERVICE

I certify that I served the foregoing Objection and Motion to Strike on all parties to this proceeding this 26th day of October, 2004 by placing the same in the United States mail, properly addressed and with postage prepaid.

_____
Douglas N. Owens (WSBA 641)
Counsel for Qwest Corporation

October 26, 2004

Law Offices of
Douglas N. Owens
P.O. Box 25416
Seattle, WA 98165-2316
Tel: (206) 748-0367