

**BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION**

In the Matter of a Rulemaking to Consider Possible Corrections and Changes in Rules in Chapter 480-07 WAC, Relating to Procedural Rules.

Docket No. A-050802

**QWEST CORPORATION'S  
SECOND SET OF COMMENTS**

**I. INTRODUCTION**

*I* Qwest Corporation (“Qwest”) submits the following comments in response to the Commission's Notice of Opportunity to Submit Comments in this Docket dated December 9, 2005. In Section II, below, Qwest responds to the numbered questions set forth in the December 9, 2005 Notice.

**II. COMMENTS IN RESPONSE TO COMMISSION QUESTIONS**

- 1. Please comment whether the commission should consider adopting the amendments to WAC 480-07-730 and WAC 480-07-740 proposed by Public Counsel and others.**
- 2 The Commission should not adopt the proposed amendments to the existing settlement rules. The proposed changes would chill settlement negotiations, and unnecessarily complicate and potentially protract proceedings, without any real benefit to the parties or the Commission.

3 Commission proceedings are very frequently multi-party proceedings, with many intervenors  
in large cases. The Commission has liberally interpreted the intervention standard to allow  
parties to intervene in cases without restrictions on the areas in which they may participate.  
Commission proceedings often involve a number of different parties with very different and  
sometimes narrow interests in the proceedings.

4 Although the proposed new WAC 480-07-730 would not restrict a company from meeting  
one-on-one with a particular party to undertake settlement negotiations, it would prevent the  
company from working with Commission Staff on resolution of such issues without bringing  
all other parties into the discussions. Qwest submits that this is unnecessary and would create  
incentives, and the ability, for a party to hold the negotiations hostage for a favorable  
resolution of a particular issue.

5 Moreover, the dynamics of multi-party settlement negotiations are such that it is often more  
productive for the company to have individual negotiations with the various parties, including  
Commission Staff, than to gather all parties together in a room to negotiate the case.

6 The proposed amendments to WAC 480-07-730 that would prevent the company and  
Commission Staff from engaging in one-on-one negotiations would also prevent the orderly  
resolution of the many minor disputes that arise in an adjudicative proceeding. The exception  
in the proposed new rule for information gathering is insufficient because after information is  
gathered about a topic, there may be a dispute between Staff and a company that needs to be  
resolved. Staff and the company should be free to discuss the issues, and resolve them. This  
is especially true in an enforcement or other proceeding where the Commission is the  
complainant – though there may be intervening parties, the complainant ought to be able to  
discuss and resolve issues relating to the matters alleged in the complaint.

7 The Commission should also reject the proposed amendments to WAC 480-07-740. These

changes would inappropriately restrict the presiding officer and Commissioners with respect to determining the amount of additional process that should be provided with respect to a partial or multi-party settlement in any particular case. In addition, the presiding officer and Commissioners should be in a position to assess whether there are concerns that an objecting party is seeking to leverage opposition to a settlement into concessions that would result in benefits to a narrow class of interests at the expense of others or the public interest. The proposed revisions would give such parties disproportionate power over Commission proceeding.

8 Finally, Qwest notes that the Commission has demonstrated that it can and will provide non-settling parties with ample opportunity to object to settlements under the rules as they currently exist. The settlement in Docket No. UT-033011 is a good example of such a case, where the Commission duly considered objections by Time Warner to both the settlement and the process, and ensured that Time Warner had an opportunity to be heard and to represent its interests.

**4. Please state whether the amendment to WAC 480-07-730 proposed by Public Counsel and others, if adopted, should apply only to commission staff or to all parties.**

9 If the Commission were to adopt the proposed amendment to WAC 480-07-730 requiring advance notice of settlement negotiations that are to take place between a regulated company and Commission Staff, the restriction should be extended as to negotiations between all parties to the case (not just the regulated company) and Commission Staff. It would be fundamentally unfair to restrict the regulated company from having one-on-one negotiations with Commission Staff while permitting other parties to do so.

10 However, if adopted, the Commission should not extend the advance notice requirement as to negotiations between any of the parties to an adjudicative proceeding other than Commission

Staff. Such extension would only increase the harm to the settlement process that would be caused by adopting the proposed restriction as to negotiations with Commission Staff, for the reasons described above.

**5. Please describe how the nature of the commission's proceedings differs materially from other civil litigation insofar as settlements and the settlement process is concerned, and how any differences should be reflected in the settlement rules or practice.**

11 As described above, Commission proceedings can be very different from civil litigation because of the number of participants in Commission proceedings with very different, and often narrow, interests. In addition, unlike civil litigation, some parties in Commission proceedings may perceive very little litigation risk in going forward, thereby decreasing their incentive to engage in settlement negotiations, and increasing the possibility that those parties may disrupt negotiations between other parties. Thus, the Commission's rules should reflect that difference by enabling each party to engage in settlement negotiations with other parties without requiring all parties to be invited or present at the negotiations.

**6. Would it be improper under the proposed amendment to WAC 480-07-730 for a settlement judge to caucus with one or more, but not all, parties to resolve issues between two or more parties? Should rules restrict parties' ability to caucus with one or more other parties, but not all, during a scheduled settlement conference?**

12 Any revisions to the proposed settlement rules should specifically permit settlement judges to caucus with one or more, but not all, parties to a proceeding.

**7. Concerning the proposed amendments to WAC 480-07-740, do the requirements in RCW 34.05.461(3) meet the concerns of the proponents for an order addressing all material issues of fact or law? If not, please discuss why the statute does not address the concerns.**

13 The requirements of RCW 34.05.461(3) should be adequate to meet the concerns of non-settling parties without any need to revise WAC 480-07-740. The statute requires "a statement of findings and conclusions, and the reasons and basis therefor, on all the *material* issues of

fact, law, or discretion presented on the record...." (Emphasis added). This requirement is supplemented by legal requirements including that Commission orders be based on substantial evidence, that they be neither arbitrary nor capricious, and that they not violate the constitution or any statutes. *See, e.g.* RCW 34.05.570(3).

14 The Commission should reject the proposal to require the Commission, under its own rules, to address "all *disputed* issues of fact, law or discretion" in its final orders. Just because something is disputed does not make it material, and the Commission should retain the ability to address in each case and for each settlement the issues that are material to the outcome of the case.

15 The current version of WAC 480-07-740 already provides sufficient opportunity for non-settling parties to create the record they need to challenge a settlement to which they object. It provides: "The right to cross-examine witnesses supporting the proposal; the right to present evidence opposing the proposal; the right to present argument in opposition to the proposal; and the right to present evidence or, in the commission's discretion, an offer of proof, in support of the opposing party's preferred result." WAC 480-07-740(2)(c). In addition, "The presiding officer may allow discovery on the proposed settlement in the presiding officer's discretion." *Id.*

**8. Is discovery under the proposed amendment to WAC 480-07-740 intended to be an absolute right? Would an absolute right allow abuse of the process and irrelevant discovery? Why should parties opposing a settlement have discovery rights greater than those afforded under the discovery rules during other stages of a proceeding (*i.e.*, why should the commission's discretion to control discovery, considering the needs of the case be constrained, when a settlement is filed)?**

16 There is nothing in the proposed new language that should limit the presiding officer's discretion to control discovery. The general discovery rules contain numerous provisions limiting the scope of discovery. *See, e.g.* WAC 480-07-400(4)-(5), WAC 480-07-420.

However, there is a concern that the language of the proposed revision to WAC 480-07-740 would be interpreted in the future as providing an absolute right to discovery because it would add to the list of "Rights of opponents of a proposed settlement" the "right to conduct discovery" and because it would eliminate the current reference in the rule to the presiding officer's discretion.

17 To the extent that there is any suggestion that non-settling parties should have a right to conduct discovery on communications that gave rise to the settlement, such discovery should not be permitted because it would chill the candid discussions that can be required to reach a settlement. The value of protecting such communications is recognized in Evidence Rule 408, which requires exclusion of evidence of offers to compromise or conduct or statements made in settlement negotiations.

18 Qwest believes the current formulation of potential discovery in WAC 480-07-740 should remain as is. At a minimum, the rule should clearly and explicitly state that the presiding officer retains the authority to limit the scope of any discovery.

**9. Should the commission change the description of the "highly confidential" designation in WAC 480-07-423(1)(b)? If so, please explain how and why.**

19 The current definition should not be changed. The use of the term "for example" in the first sentence makes the definition flexible enough to be applied across a variety of materials or cases and over time. At the same time, the example that is provided, when read in comparison with the definition of the "confidential" designation, conveys the point that the risks and concerns at issue must be significant to rise to the level of obtaining the "highly confidential" designation and any requested enhanced protections.

**10. Please identify circumstances that justify use restrictions for persons given access to documents designated confidential or highly confidential.**

20 "Use restrictions" are justified in all cases involving confidential and highly confidential materials. Persons who obtain access to such materials are able to do so only because of their participation in a Commission proceeding where such materials are filed or produced in response to data requests. Their use of such materials should be limited to that proceeding.

**11. Please identify circumstances that justify employment restrictions for persons given access to documents designated confidential or highly confidential.**

21 Qwest concurs in the Comments of Puget Sound Energy ("PSE") on this question.

**12. Please provide proposed language for WAC 480-07-160 and WAC 480-07-423 describing how confidential or highly confidential information should be marked or identified in a document.**

**13. Please provide proposed language for WAC 480-07-160 and WAC 480-07-423 describing how confidential or highly confidential documents should be filed with the commission.**

22 Qwest has reviewed the Comments PSE on these questions and concurs in those comments.

**14. Please comment on Public Counsel's August 26, 2005, proposal to amend WAC 480-07-310(b), concerning ex parte communication.**

23 The ex parte rule should not be amended as proposed. Public Counsel's comments recognize that "the Commission has an exemplary record of dealing with matters of ex parte communications and commends the Commission's sensitivity to matters that might create an impression of impropriety as well as impropriety in fact."

24 Public Counsel states that it is concerned that representatives of regulated companies meet with Commissioners and discuss issues and policies "when the company intends to make a related filing in fairly short order with the Commission." This suggests that Public Counsel is concerned about meetings that happen immediately before a filing. However, Public Counsel's proposed revision to the ex parte rule is far more extensive. It states:

When a regulated company has communicated directly with one or more commissioners regarding *an issue which was later set for adjudication* by the Commission, the nature and content of the communication shall be disclosed by the company in a filing in the docket established by the commission.

(Emphasis added). This is an ambiguous standard that is not limited in scope or in time. It is difficult to see how regulated companies or Commissioners are to interpret and implement such a standard.

25 Public Counsel's proposal is particularly concerning to Qwest because Qwest believes it is critical that Commissioners and their advisors be kept informed on an ongoing basis about a wide variety of issues related to the companies they regulate. Such issues include the investment and business climate relevant to regulated companies, company initiatives or efforts within the service area or industry, and federal legislative or regulatory developments that may have some bearing on the company or this Commission's jurisdiction or authority. Regulatory filings that may be made at some later point in time by a company may involve such issues. But it would deter companies and the Commissioners from discussing such issues if they need to track in detail each such communication for some undefined period of time for later filing in an adjudicative docket.

26 It is important to remember in this regard that a great deal of the Commission's work is legislative in nature. It is perfectly appropriate for the entities that are impacted by legislative decisions to make their views known to the persons who make such decisions. Public Counsel and other interested persons are free to meet with the Commissioners as well on topics of concern to them.

27 The current ex parte rule appropriately balances the Commissioners' legislative and judicial roles by setting a bright-line standard as to which ex parte communications must cease with Commissioners and when. It should not be revised as proposed by Public Counsel.



**15. Please state your observations or concerns about any of the commission’s procedural rules, and propose specific language changes to address your concerns.**

**A. Part II: Rule-Making Proceedings**

28 Qwest shares the concerns raised by other parties in this proceeding that potential changes to existing rules, including revisions to discussion drafts of proposed new or revised rules, should be more clearly identified. In particular, it would be helpful if: (i) proposed revisions were prepared in a “track changes” format to show all proposed changes to current rules, and (ii) a brief explanation were provided of the reason(s) for each proposed change.

29 When a rulemaking goes through one or more rounds of informal comment, it would also be helpful if Staff would provide some explanation of the reasons it is accepting, rejecting or modifying proposals set forth in the various comments. Among other things, this would likely streamline future rounds of comments, alert interested persons to the existence of any misunderstandings regarding a proposal that has been rejected, and assist all parties in addressing fundamental interests that may be at issue in a rulemaking.

**B. Part III: Adjudicative Proceedings**

30 Qwest proposes an amendment to WAC 480-07-650, the Commission’s rule regarding enforcement of interconnection agreements, to require that companies who send a 10-day notice of intent to file a petition for enforcement as set forth in WAC 480-07-650(1)(c), file the petition within 30 days after serving the 10-day notice. As the rule currently reads, a carrier may serve Qwest with a 10-day notice, and then not file a petition for enforcement for many months. The 10-day notice is in the rule in order (among other things) to allow the responding company time to marshal the facts associated with the petition somewhat in advance of the filing of the petition, and respond within the required five (5) business days when the petition is ultimately filed. As the rule currently reads however, the petitioner can wait months before

filing its petition, thereby creating a situation where the fact gathering is (perhaps) somewhat stale, the dispute is not “on the radar,” and the responding company is just as surprised by the petition as if no 10-day notice had ever been filed. Qwest suggests that a 30-day cut off is reasonable, and that the petitioner merely be required to serve another 10-day notice if it intends to file a petition for enforcement after that time. Proposed rule language is set forth below:

(c) ***Prefiling notice of petition.*** The petitioner must give at least ten days' written notice to the respondent that the petitioner intends to file a petition for enforcement. The notice must identify the contract provision the petitioner alleges was violated, and the exact behavior or failure to act that petitioner alleges violates the agreement. The written notice must be served as provided in (b) of this subsection. The petitioner must include a copy of this notice with its petition for enforcement. The written notice shall be valid for 30 days from the date of service. Thereafter, if the petitioner wishes to file a petition for enforcement, petitioner must serve another notice as set forth herein.

Respectfully submitted this \_\_\_\_\_ day of January, 2006.

QWEST CORPORATION

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