

BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

In the Matter of the Second Six-Month
Review of

QWEST CORPORATION'S

Performance Assurance Plan

DOCKET NO. UT-043007

STAFF'S RESPONSE IN
OPPOSITION TO QWEST'S
MOTION TO STRIKE

1 Qwest has brought a motion to strike one sentence in Staff witness Thomas L. Spinks' initial testimony, filed on October 5, 2004. The sentence in question refers to a statement made by one of the CLECs participating in the Long Term PID Administration (LTPA) collaborative, on an issue relevant to this case. The statement is contained in LTPA minutes that: (1) were kept by the express agreement of all parties to the LTPA, including Qwest; (2) are available on publicly available websites; and (3) were provided to the Commission for use in this proceeding pursuant to a Bench Request of the Administrative Law Judge. Nevertheless, Qwest objects that reliance upon this statement as evidence in this proceeding, by either Staff or the Commission, somehow violates the Commission's prior orders and rules, and constitutes "unfair surprise" inflicted upon Qwest. These objections are clearly without merit, and Qwest's motion to strike should be denied.

2

Last year, the Commission directed Staff to participate in the multi-state LTPA collaborative, to “address issues relating to the six-month review of performance measures required by Section 16 of the QPQP.” Docket UT-003022, et al., 47th Supplemental Order, ¶ 39 (August 21, 2003). This process was to be documented and recorded, pursuant to the agreement of all the participating parties, as the Commission noted:

On May 14, 2003, state commission staff *and representatives from Qwest* and various CLECs finalized a plan document for the LTPA collaborative. The ad hoc collaborative group then developed a Request for Proposal for a facilitator who will *develop a record of the collaborative proceedings, memorialize agreements between parties and manage impasse issues.*

Id. at ¶ 10. (Emphasis added.)

3

The Commission further explained:

The collaborative is 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.

Id. at ¶ 14. (Emphasis added.)

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Contrary to Qwest’s suggestion, the Commission has never determined that the multi-state LTPA collaborative is the type of “negotiation” that is subject to the Alternative Dispute Resolution restrictions set forth in WAC 480-07-700(4). Those rules clearly are intended to apply to negotiations between parties to a case pending

before the Commission, where the parties' discussions are not documented, recorded, or preserved in any way, and where any statement, admission, or offer of settlement made by a party is thus inadmissible in evidence in the pending case without the consent of the participants to the negotiation. Here, by contrast, all of the parties including Qwest agreed that "a record of the collaborative proceedings" would be made, and the obvious purpose of such a record was to assist the Commission in its six-month review proceedings, should the parties be at impasse on any particular issues.

5 Thus, the ALJ in this case issued Bench Request No. 1 to Qwest Corporation:

Please provide copies of *all publicly available documents* produced during or generated as a result of the Long Term PID Administration (LTPA) collaborative process since June 2003, *including* issues matrices, *weekly minutes of LTPA meetings*, statements of agreed-upon impasse issues, recommendations of the facilitator, *and parties' statements*, whether available on Qwest's website, from the LTPA facilitator, or from Qwest employees participating in the LTPA process.

(Emphasis added.) Qwest provided a large box of documents to the Commission in response to the bench request, including the excerpt from the LTPA minutes at issue here, without objection or qualification. The Commission believed this material to be relevant to the present proceeding, for as the ALJ noted at the May 19, 2004, prehearing conference, "I do agree with Qwest in this situation that we

can't use the LTPA process as an appeal, per se, but that doesn't mean we ignore what occurred there." Docket UT-034007, Transcript, Volume II, at 58.

6 Mr. Spinks' testimony does no more than rely upon material that is contained in Qwest's response to that bench request—material that is relevant to the PO-20 issue in this proceeding, that is part of an agreed-upon documented record, and that is available to the Commission for use in this proceeding. Qwest's allegation that Staff has engaged in "unfair surprise" by citing to material provided in a response to a bench request has no merit whatsoever. Nor is there any merit to Qwest's contention that Staff—and by clear extension, the Commission—is precluded from relying on the meticulous record that was maintained precisely for the purpose of assisting state commissions in the six-month PID review process. Neither the Commission's prior orders or rules require that record to be pushed aside, unread and unused by anyone.

7 Qwest's motion to strike should be denied.

DATED this 4th day of November, 2004.

CHRISTINE O. GREGOIRE
Attorney General

GREGORY J. TRAUTMAN
Assistant Attorney General
Washington Utilities and
Transportation Commission
(360) 664-1187