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

COMES NOW Qwest Corporation ("Qwest") and replies to Staff's Response in Opposition to Qwest's Motion to Strike. Qwest also in this Reply expands its original objection and motion to include material in Staff's Rebuttal Testimony of Thomas Spinks filed November 8, 2004 consisting of the sentence at page 5, beginning on line 2, which reiterates and expands the statement to which Qwest objected in Staff's opening testimony. The grounds of Qwest's objection to this new testimony are the same as those stated in the original motion and in this Reply.

Staff's Response fails to address the central issue that Qwest's motion presented and it therefore fails to establish any ground why Qwest's motion should be denied. The central issue that Qwest's motion presented is that the discussions in the LTPA Collaborative were settlement negotiations and therefore Staff's introduction in evidence of statements in those negotiations against a party to the negotiations without that party's consent violates not only the Commission's ADR rules and ER 408 but the policy of the law to encourage full and open

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settlement negotiations and hence to increase the likelihood of settlements. Staff's failure to respond to the substance of this issue, other than its unsupported claim that the ADR rule does not apply, should be deemed a concession by Staff that Qwest's argument is well taken.[1]

In its Response, Staff points to the facts that the LTPA minutes were kept by agreement of the parties, are available on public websites and were provided to the Commission pursuant to a Bench Request.[2] None of these facts has anything to do with the issue raised by Qwest's motion. Qwest objects to the unfairness of the use by one party of another party's statements in settlement negotiations as evidence against a third party in a later formal proceeding to address issues as to which settlement was not achieved. The fact that the statements were recorded by agreement of the LTPA Collaborative parties has nothing to do with this, nor does the fact that the statements are publicly available. The fact that the statements were provided in response to a Bench Request has nothing to do with Qwest's motion because such responses are not evidence until and unless they are received on the record. WAC 480-07-405(9)

Staff's Response argues that the Commission has not determined that the LTPA Collaborative is the type of negotiation that is subject to the Commission's ADR rules. Staff then argues that the Commission's ADR rules are only intended to apply to negotiations in a case pending before the Commission that are not documented or recorded. The Staff Response does not quote the Commission's ADR rule, or any prior Commission decisions on

[1] Staff claims that the LTPA Collaborative negotiations were not *the type* of negotiation that the Commission's ADR rules were intended to cover, but Staff acknowledges that the discussions of the LTPA Collaborative were negotiations. The policy to safeguard and encourage negotiations applies, regardless of the label Staff attaches to them.

[2] Staff Response, at p. 1.

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the issue or attempt to show how its argument is supported by the language of the rule. There is no support in the language of the rule for Staff's argument, as shown below.

In fact Staff's argument that the Commission's ADR rules only apply to proceedings then pending before the Commission is contrary to the express language of the ADR rule. WAC 480-07-700(2) provides:

> Parties to *a dispute that is within the commission's jurisdiction* may agree to negotiate with any other parties *at any time* without commission oversight. [Emphasis added.]

Disputes that are within the Commission's jurisdiction include disputes that are not yet formally pending before the Commission. Staff's argument is thus demonstrably incorrect.

Staff's unsupported interpretation will greatly discourage parties to disputes that are within the Commission's jurisdiction, but that are not actually pending in formal proceedings, from doing that which WAC 480-07-700 specifically states that the Commission supports, namely negotiating to avoid contested hearings. This is because under Staff's interpretation the Commission's ADR guidelines in their entirety and the bar in those guidelines against admission of settlement statements in evidence, would not apply to such negotiations. This is exactly the situation with disputes over proposed PID changes that all parties know may be litigated periodically in six month review cases but that the parties and the Commission have some interest in resolving without contested hearings if possible. Those PID changes may be disputed but the disputes are not formally pending before the Commission until a six month review case begins that includes those issues.

Nothing in the Commission's rule limits the ADR guidelines' applicability only to negotiations that are not recorded, as Staff claims. WAC 480-07-700 provides in part: "Alternative dispute resolution (ADR) includes *any mechanism* to resolve disagreements, in

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whole or in part, *without contested hearings*." [Emphasis added.] "Any mechanism" includes the LTPA Collaborative settlement negotiations in which the negotiations were recorded.

Staff argues that the agreement of the parties that the LTPA Collaborative negotiations would be recorded is fatal to Qwest's motion because "the obvious purpose" of such recording was to "assist the Commission" in the six month review proceedings should the parties be at impasse on particular issues. This argument is both illogical and unhelpful to Staff's position in this case. In this case the parties were not at impasse during the LTPA Collaborative settlement negotiations on the issue of whether or not there should be a Tier II assignment for the expanded PO-20 PID. The so-called one "obvious purpose" of recording the negotiations does not assist Staff.

Staff also has adduced no evidence to support its claim about the only "obvious purpose" of recording the negotiations, and Staff's conclusion on this point is illogical. Staff contends that the only "obvious purpose" of the parties' agreement to record the LTPA Collaborative negotiations is so that statements in settlement negotiations could be introduced in evidence by one party against another in later formal proceedings on issues as to which settlement was not reached. It is far more reasonable to conclude that the LTPA Collaborative parties agreed to record the settlement negotiations as a means to manage the process of negotiating multiple complex issues between multiple parties over a period of several months, rather than to conclude that the parties intended thereby silently to waive the protection of the ADR rule against introduction of settlement negotiations in evidence in later formal hearings. Under WAC 480-07-700(4)(b) there are two explicit purposes for the recording of the LTPA Collaborative negotiations, but neither is that which Staff claims is the only "obvious"

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purpose. Theoretically under this rule the recordings could have been useful and introduced in evidence in later formal proceedings (1) by consent of all parties or (2) to address the process of the negotiations. Neither of these purposes now applies on the facts of this case, but *ab initio* they were possibilities under the rule.

Staff's Response makes much of the issue that the Commission believed the LTPA Collaborative settlement negotiation minutes to be relevant because it ordered their production in a Bench Request and Qwest did not object to the request.[3] Qwest did not object to the Bench Request because that request did not make settlement statements evidence, and the relevance of the information is not the issue that Qwest's motion to strike presents.

Aside from a one sentence conclusion that Qwest's argument in its motion that Staff has unfairly surprised Qwest by introducing this evidence is without merit, the Response does not address Qwest's argument on this point.[4] It is fundamental that parties that are brought into contest with the government in an administrative hearing are entitled to reasonable notice of the claims of their opponents and an opportunity to meet those claims with evidence. *Morgan v. United States,* 304 U.S. 1, 82 L.Ed. 1129, 58 S.Ct. 773 (1938) Qwest has been brought into contest with Staff in this case over the issue of whether there should be a Tier II assignment for the expanded PO-20 PID. Staff did not disclose its position on this issue or the basis of that position in the Issues List. The party that made the hearsay settlement statement on which Staff relies in its testimony has settled with Qwest and the discovery period closed before Staff divulged its position. Qwest has not been provided the notice and reasonable

[3] Staff Response at p. 3.
[4] Id. at p. 4.

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opportunity to respond to the alleged facts in Staff's testimony to which it is legally entitled. For this reason the evidence should be excluded.

CONCLUSION

Based on the foregoing argument, Qwest's motion to strike as expanded in this Reply should be granted.

Respectfully submitted this 12th day of November, 2004

QWEST CORPORATION

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CERTIFICATE OF SERVICE

I certify that I served the foregoing Reply to Opposition to Motion to Strike on all parties to this proceeding this 12th day of November, 2004 by placing the same in the United States mail, properly addressed and with postage prepaid.

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