

**BEFORE THE WASHINGTON STATE
UTILITIES AND TRANSPORTATION COMMISSION**

In the Matter of the Second Six-Month)	DOCKET NO. UT-043007
Review of)	
)	ORDER NO. 12
QWEST CORPORATION'S)	
)	ORDER GRANTING MOTION TO
Performance Assurance Plan)	STRIKE TESTIMONY; REQUIRING
)	NOVEMBER 18, 2004, HEARING.
.....)	

1 **SYNOPSIS.** *This Order grants Qwest's motion to strike portions of the testimony of Mr. Spinks, and finds that the November 18, 2004, hearing should go forward as planned.*

BACKGROUND

2 **Nature Of The Proceeding.** In Docket No. UT-043007, the Washington Utilities and Transportation Commission (Commission) conducts its second six-month review of Qwest Corporation's (Qwest) Performance Assurance Plan, or QPAP. The Commission conducts a review of performance measures and performance indicator definitions (PIDs) in the QPAP every six months following the December 23, 2002, approval by the Federal Communications Commission (FCC) of Qwest's Section 271 application for the state of Washington.

3 **Appearances.** Douglas N. Owens, attorney, Seattle, Washington, represents Qwest. Karen Shoresman Frame, Senior Counsel, Denver, Colorado, represents Covad Communications Company (Covad). Karen Clauson, attorney, Minneapolis, Minnesota represents Eschelon Telecom, Inc. (Eschelon). Michel Singer Nelson, Senior Regulatory Attorney, Denver, Colorado, represents WorldCom, Inc., d/b/a MCI, Inc. (MCI). Gregory J. Trautman, Assistant Attorney General, Olympia, Washington, represents Commission Staff.

- 4 **Procedural History.** The Commission initiated the second six-month review proceeding through a January 27, 2004, notice of prehearing conference. The Commission held a prehearing conference before Administrative Law Judge Ann E. Rendahl on February 11, 2004, in Olympia, Washington, to take appearances of the parties, identify and narrow the issues, establish and modify the schedule for the proceeding, and address other administrative matters. A summary of the procedural history in this proceeding is presented in paragraphs 5 through 13 of Order No. 10 in this proceeding and will not be repeated in this Order.
- 5 On August 27, 2004, Qwest, MCI, Eschelon, and Covad filed with the Commission a Settlement of Disputed Issues (Settlement Agreement) that resolves all issues in this proceeding between the settling parties. On the same day, Staff filed a statement of position on the settlement, indicating that it did not oppose the Settlement Agreement generally, but objected to one aspect of the settlement, *i.e.*, whether or not to include a Tier 2 payment assignment to expanded PID PO-20.
- 6 On September 8, 2004, the Commission convened prehearing conference in this docket at Olympia, Washington, before Administrative Law Judge Rendahl. On September 14, 2004, the Administrative Law Judge entered Order No. 09, a prehearing conference order in this proceeding, establishing a procedural schedule to address the remaining issue in the proceeding, and scheduling a hearing for Thursday, November 18, 2004. During the conference, the Administrative Law Judge determined that the need for a hearing would be based upon a review of the testimony filed by the parties. *See Tr. 130, lines 9-14.*
- 7 On October 5, 2004, Commission Staff filed with the Commission the testimony and exhibits of Thomas L. Spinks.

- 8 On October 26, 2004, Qwest filed with the Commission the Response Testimony Mark S. Reynolds, as well as Qwest's Objection to Staff Testimony and Motion to Strike.
- 9 By notice issued on November 1, 2004, the Commission requested responses and replies relating to Qwest's motion to strike be filed by November 4, and November 12, respectively.
- 10 On November 4, 2004, Staff filed with the Commission its Response in Opposition to Qwest's Motion to Strike. On November 8, 2004, Staff filed with the Commission the Reply Testimony of Thomas L. Spinks.
- 11 On November 12, 2004, Qwest filed with the Commission its Reply to Staff Response in Opposition to Qwest's Motion to Strike.

MEMORANDUM

- 12 **A. Qwest's Motion.** Qwest objects to and moves to strike a portion of Mr. Spinks' testimony that describes a statement made by a CLEC during discussions in the Long Term PID Administration (LTPA) collaborative. Qwest moves to strike the following sentence beginning on page 7, line 14, of Mr. Spinks' testimony: "During the LTPA discussions, one of the participating CLECs discussed its internal quality control processes finding 15% of its UNE-P order has errors. (See LTPA_021204 minutes)." *Qwest Motion at 1, 2.* Qwest also moves to strike a sentence in Mr. Spinks' reply testimony, filed after Qwest's motion. *Qwest Reply at 1.* The sentence begins on page 5, line 2, of that testimony, and addresses the same LTPA discussions to which Qwest objects in its motion. *Id.*

- 13 Qwest asserts that the statements in Mr. Spinks' direct and reply testimony are impermissible as they seek to introduce into evidence statements made in settlement negotiations and as unfair surprise. *Qwest Motion at 1; Qwest Reply at 1-2.*
- 14 Qwest argues that the Commission's 47th Supplemental Order in Docket No. UT-003022 refers to the LTPA process as the LTPA Collaborative, and describes the process as one to resolve issues and document disputes. *Qwest Motion at 1.* Qwest further argues that the Commission's procedural rules include collaboratives, and define them as "commission-sanctioned negotiation." *Id. at 1-2.* Qwest argues that collaboratives are subject to the Commission's rules concerning alternative dispute resolution (ADR), which prohibit admission into evidence of any statements, admissions or offers of settlement made during negotiation, without the agreement of all participants. *Id. at 2, citing WAC 480-07-700(4).* Qwest asserts that the rule is consistent with ER 408, which provides that evidence of conduct in settlement negotiations is inadmissible. *Id. at 3.*
- 15 Qwest argues that Staff seeks to introduce the statement to address the merits of the dispute, not to address the process of negotiations. *Id. at 2.* Qwest argues that Staff's action in seeking to introduce evidence of settlement discussions would have a chilling effect on any future efforts to resolve issues of PID administrative outside of a formal hearing. *Id. at 3.*
- 16 Finally, Qwest asserts that Staff's introduction of statements made during LTPA discussions is an unfair surprise in that Staff did not disclose its position on the tier assignment of expanded PID PO-20 in the Issues List. *Id.* Qwest asserts that it did not know of Staff's position and was denied the opportunity to conduct discovery of Staff's position. *Id.*

- 17 Staff responds that the sentence in question is contained in minutes of LTPA collaborative meetings “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.” *Staff Response at 1*. Staff argues that there is no merit to Qwest’s argument that the statement referred to in Mr. Spinks’ testimony violates Commission order and rules or constitutes unfair surprise. *Id.*
- 18 Staff argues that the Commission’s 47th Supplemental Order in Docket No. UT-003022 does not provide that the multi-state LTPA collaborative is subject to the ADR restrictions in WAC 480-07-700(4). *Id. at 2*. Staff asserts that the Commission, in paragraphs 10 and 14 of the 47th Supplemental Order, provide that state commission staff, Qwest, and various CLECs agreed to a plan whereby a facilitator will develop a record of the collaborative proceedings, and that the unresolved issues will be documented to assist in the resolution of disputes in state six-month review processes. *Id. at 2-3*.
- 19 Staff asserts that the statement to which Qwest objects was included in the materials Qwest provided in response to Bench Request No. 01 in this proceeding. *Id. at 3*. Staff asserts that the Administrative Law Judge required production of the information in the proceeding, not as the basis for appealing the decision in the LTPA process, but to inform the proceeding. *Id. at 3-4, citing Tr. at 58*.
- 20 In reply, Qwest asserts that Staff’s response does not address the issue presented in Qwest’s motion, *i.e.*, that Staff’s introduction in evidence of statements in negotiations violates the Commission’s ADR rules as well as ER 408. *Qwest Reply at 1-2*. Qwest asserts that the fact that the LTPA minutes were kept by agreement of the parties, are publicly available, and were provided pursuant to a Bench Request are not relevant to the question of whether a statement made in those

minutes may be admitted as evidence in this proceeding. *Id. at 2.* In response to Staff's claims that the minutes of the LTPA Collaborative negotiations are relevant to the proceeding, Qwest asserts that it objects to the admission of the minutes rather than their relevance. *Id. at 5.*

21 Qwest contests Staff's representation that the Commission's ADR rules only apply to "negotiations in a case pending before the Commission that are not documented or recorded." *Id. at 2-3.* Qwest argues that the express language of the Commission's ADR rule is contrary to Staff's argument. *Id. at 3.* Qwest is concerned that adopting Staff's interpretation of the Commission's ADR rules would discourage parties to disputes within the Commission's jurisdiction, but not formally pending before the Commission, from negotiating to avoid a contested hearing. *Id. at 3.* Qwest is specifically concerned that in disputes concerning PID changes, the disputes are not formally pending before the Commission until the Commission initiates a six-month review proceeding. *Id.*

22 Qwest contests Staff's argument that the purpose of the parties' agreement to record the LTPA Collaborative negotiations was to assist with state six-month review proceedings. *Id. at 4.* Qwest asserts the parties did not waive the protection of the ADR rules by agreeing to record the negotiations, but that a more reasonable purpose of recording the negotiations was to "manage the process of negotiating multiple complex issues between multiple parties over a period of several months." *Id. at 4-5.* Qwest asserts that evidence of settlement negotiations may only be introduced if all parties consent to admission or to address the process of negotiations. *Id. at 5.* Qwest asserts that it has not given its consent to the use of the information for admission in a contested hearing and that Staff does not offer the statements for the purpose of identifying the process of the negotiations. *Id.*

23 Qwest asserts that the remaining issue in this proceeding, whether or not there should be a Tier 2 assignment for the expanded PID PO-20, was not an impasse issue during the LTPA collaborative settlement negotiations. *Id. at 4.* Qwest further argues that it is unfair surprise for Staff to raise an issue that it did not disclose earlier in the proceeding, *i.e.*, through the issues list filed in the proceeding. *Id. at 5.* Qwest asserts that it has not been provided with notice and a reasonable opportunity to respond to the alleged facts in Staff’s testimony. *Id. at 6.*

24 **Discussion and Decision.** At issue in Qwest’s motion to strike is whether statements made during the LTPA collaborative negotiations and recorded in minutes are subject to the Commission’s rules governing alternative dispute resolution and whether the statements may be submitted as evidence in this proceeding.

25 The Commission’s procedural rules specifically support the informal efforts of parties to resolve disputes without formal hearings, and refer to ADR as “any mechanism to resolve disagreements, in whole or in part, without contested hearings.” *WAC 480-07-700.* The Commission’s general ADR rule provides:

“In *any* negotiation, the following apply, unless the 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.”

WAC 480-07-700(4) (Emphasis added).

- 26 The Commission’s rules define a collaborative as “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.” *WAC 480-07-720(1)*. The rule governing collaboratives provides that “[p]articipants must develop procedural guidelines for their negotiations when beginning a collaborative and should refer to any commission policy statement(s) that relate to ADR for guidance.” *WAC 480-07-720(2)*.
- 27 In the 47th Supplemental Order in Docket No. UT-003022, the Commission described the LTPA collaborative as a process to build upon the efforts of the ROC¹-sponsored third-party testing of Qwest’s Operations Support Systems and multi-state proceedings concerning the QPAP, “by continuing regional collaborative efforts to refine and develop performance measures, or PIDs, used to assess Qwest’s performance in opening the local market to competition.” *47th Supplemental Order*, ¶ 15.
- 28 The Commission ordered Commission Staff to participate in the multi-state LTPA collaborative process, finding that “[a]ddressing the common issues first in a regional collaborative process will provide to all parties and the Commission the benefits of greater efficiency and time savings in the six-month review proceeding.” *Id.*, ¶ 17. The Commission noted that “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.*, ¶ 14.

¹ ROC stands for the Regional Oversight Committee, an ad hoc group composed of representatives of the regulatory commissions in the 14 states in which Qwest provides local exchange telephone service.

- 29 The Commission officially approved of, and ordered Staff to participate in, the LTPA process. The Commission recognized that the LTPA process was a “collaborative,” involving negotiation and the use of a facilitator who would document the disputes for resolution in state six-month review proceedings. *Id.*, ¶ 14. The Commission did not refer, however, to the Commission’s rules governing collaboratives or address whether ADR rules applied to the LTPA collaborative process.² While it appears that the Commission envisioned the LTPA collaborative process as similar to the OSS testing process in the Section 271 proceedings, in which all documents prepared during the process were available for use during the proceedings, the Commission did not specify that the documentation of unresolved issues would be used during the six-month review process. *See Id.*, ¶¶ 14, 15.
- 30 The dispute between Qwest and Staff highlights the importance of establishing procedural guidelines and expectations prior to engaging in any ADR negotiations. It does not appear that the parties established procedural rules at the outset of the collaborative as required by WAC 480-07-720(3) governing the use of information and documents generated during the LTPA collaborative process.³ The lack of these guidelines and the agreement to record discussions in the LTPA collaborative process creates an ambiguity as to the purpose of documenting discussions. Although Staff asserts that the documents are publicly available and that the purpose was to assist in state commission six-month review processes, Qwest’s argument that LTPA discussions were recorded for the purpose of managing discussions in the collaborative is equally reasonable.

² At the time the 47th Supplemental Order was entered, the procedural rules in chapter 480-09 WAC were still in effect. The former procedural rules addressing ADR and collaboratives, WAC 480-09-465 and WAC 480-09-467, respectively, are substantially the same as the rules in WAC 480-07-700 and WAC 480-07-720.

³ No party has identified or submitted in this proceeding any procedural guidelines established for the LTPA collaborative.

31 Without a more specific statement from the Commission that its ADR rules did *not* apply to the LTPA collaborative, and without established guidelines by the parties concerning the use of information developed in the LTPA collaborative, it is reasonable and appropriate to apply the Commission’s ADR rules to statements made during the LTPA collaborative. The Administrative Law Judge’s issuance of a bench request requiring submission of LTPA documents is part of the discovery process. Documents provided through discovery, including bench request responses, are not evidence unless a party moves for admission. *See WAC 480-07-400(1)(c)(v), WAC 480-07-405(9)*. As Qwest asserts in its motion and reply, allowing the use of such statements in evidence without a party’s consent creates a chilling effect on the informal settlement of disputes and may discourage parties from engaging in such negotiations.

32 Staff’s argument that ADR rules apply only in “negotiations between parties to a case pending before the Commission, where the parties’ discussions are not documented, recorded, or preserved in any way,” is not persuasive. *Staff Response at 2-3*. The Commission’s rules appear to apply to the negotiation of any “dispute that is within the commission’s jurisdiction,” not just those ADR efforts sanctioned or approved by the Commission. *See WAC 480-07-700(2)*.

33 Based on the discussion above, Qwest’s motion to strike portions of the testimony of Mr. Spinks is granted.⁴ Specifically, this Order grants Qwest’s motion to strike the sentence in Mr. Spink’s initial testimony beginning at page 7, line 14, and the following portion of the sentence in Mr. Spink’s reply testimony beginning at page 5, line 4: “and the LTPA discussion by CLECs regarding their perception of the impact of manual service order errors on their ability to conduct business.”

⁴ Having resolved Qwest’s motion to strike on the basis of the Commission’s ADR rules, there is no need to reach Qwest’s argument that Staff did not disclose its position on the issue in time to allow Qwest to conduct discovery.

- 34 **B. Need for an Evidentiary Hearing.** During the September 8, 2004, prehearing conference, Qwest requested an evidentiary hearing in this matter. *Tr. 128-29.* The Administrative Law Judge scheduled a half-day of hearing starting at 9:30 a.m. on Thursday, November 18, 2004, but stated that the need for a hearing would be evaluated after the parties filed testimony. *Tr. 130.*
- 35 Mr. Spinks has submitted testimony on behalf of Staff and Mr. Reynolds has submitted testimony on behalf of Qwest. The majority of the testimony is based upon the witnesses' opinions of whether a Tier 2 assignment for expanded PID PO-20 is appropriate policy based upon prior Commission orders and statements by third parties that are generally publicly available. Qwest asserts that it has not had an opportunity to explore Staff's position through discovery.
- 36 While there appear to be no factual disputes that require exploration or examination in an evidentiary hearing, it would be helpful to hold a hearing in order to develop a clear record of the issues, including issues of policy. As Qwest noted in the September 8, 2004, prehearing conference, "policy is hard to separate from the facts." *Tr. 129.* The Commission frequently evaluates questions of policy through the testimony of expert witnesses. Mr. Spinks and Mr. Reynolds both demonstrate extensive knowledge, experience, and expertise concerning the development of performance indicator definitions and tier assignments for the QPAP. The hearing scheduled for Thursday, November 18, 2004, will go forward as planned to hear the testimony of Mr. Spinks and Mr. Reynolds.

FINDINGS OF FACT

- 37 Having discussed above in detail the documentary evidence received in this proceeding concerning all material matters, and having stated findings and conclusions upon issues at impasse among the parties and the reasons and bases for those findings and conclusions, the Commission now makes and enters the

following summary of those facts. Those portions of the preceding detailed findings pertaining to the ultimate findings stated below are incorporated into the ultimate findings by reference.

- 38 (1) Qwest Corporation is a Bell operating company within the definition of 47 U.S.C. § 153(4), and incumbent Local Exchange Company, or ILEC, providing local exchange telecommunications service to the public for compensation within the state of Washington.
- 39 (2) The Washington Utilities and Transportation Commission is an agency of the State of Washington vested by statute with the authority to regulate the rates and conditions of service of telecommunications companies within the state, and to take actions, conduct proceedings, and enter orders as permitted or contemplated for a state commission under the Telecommunications Act of 1996.
- 40 (3) During the September 8, 2004, prehearing conference, the Administrative Law Judge scheduled a hearing in this proceeding for November 18, 2004, but stated that the need for a hearing would be evaluated after the parties filed testimony.
- 41 (4) Thomas L. Spinks filed initial and rebuttal testimony in this proceeding on behalf of Commission Staff, and Mark S. Reynolds filed responsive testimony in this proceeding on behalf of Qwest Corporation.
- 42 (5) The October 5, 2004, prefiled testimony and November 8, 2004, reply testimony of Mr. Spinks include references to a statement made by a CLEC during the LTPA collaborative discussions.

- 43 (6) The CLEC statements referred to in Mr. Spinks' testimony are documented in minutes of LTPA discussions that are publicly available and posted on the internet.
- 44 (7) The Commission's 47th Supplemental Order in Docket No. UT-003022 does not specify whether or how documentation of matters discussed in the LTPA collaborative would be used in subsequent state commission six-month review proceedings.
- 45 (8) There is no statement or guideline prepared by participants of the LTPA collaborative concerning use of documents prepared during the LTPA collaborative in subsequent state commission six-month review proceedings.

CONCLUSIONS OF LAW

- 46 Having discussed above in detail all matters material to this decision, and having stated general findings and conclusions, the Commission now makes the following summary conclusions of law. Those portions of the preceding detailed discussion that state conclusions pertaining to the ultimate decisions of the Commission are incorporated by this reference.
- 47 (1) The Commission has jurisdiction over the subject matter of this proceeding and the parties to the proceeding.
- 48 (2) Commission rules prohibit the use of statements, admissions, or offers of settlement made during negotiations in alternative dispute resolution processes as evidence in any formal hearing before the commission, unless the parties consent to the use or it is necessary to address the process of negotiations. *See WAC 480-07-700(4)*.

- 49 (3) The Commission approved or sanctioned the LTPA collaborative in the
47th Supplemental Order in Docket No. UT-003022 as an alternative
dispute resolution process by directing Commission Staff to participate in
the collaborative process.
- 50 (4) By not establishing specific procedural guidelines concerning the use of
information developed during the LTPA collaborative, the participants are
subject to the Commission’s alternative dispute resolution rules.
- 51 (5) Allowing the use of statements made in negotiation in evidence without a
party’s consent creates a chilling effect on the informal settlement of
disputes and may discourage parties from engaging in such negotiations.
- 52 (6) The Commission’s rules governing alternative dispute resolution applies
to the negotiation of any “dispute that is within the commission’s
jurisdiction,” not just those efforts sanctioned or approved by the
Commission. *See WAC 480-07-700(2)*.
- 53 (8) The Commission may hear testimony from expert witnesses concerning
matters of policy even where there are no factual disputes that require
exploration or examination in an evidentiary hearing.

ORDER

THE COMMISSION ORDERS:

- 54 (1) Qwest Corporation’s Motion to Strike Testimony of Thomas L. Spinks is
granted by striking the sentence in Mr. Spinks’ initial testimony beginning
at page 7, line 14, and striking the following portion of the sentence in Mr.
Spinks’ reply testimony beginning at page 5, line 4: “and the LTPA

discussion by CLECs regarding their perception of the impact of manual service order errors on their ability to conduct business.”

55 (2) The hearing scheduled for November 18, 2004, will proceed to allow the Commission to examine the testimony of Thomas L. Spinks and Mark S. Reynolds.

56 (3) The Commission retains jurisdiction over the subject matter and Qwest Corporation to effectuate the provisions of this Order.

57 **NOTICE TO PARTIES: This is an Interlocutory Order of the Commission. Administrative review may be available through a petition for review, filed within 10 days of the service of this Order pursuant to WAC 480-07-810.**

DATED at Olympia, Washington, and effective this 15th day of November, 2004.

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

ANN E. RENDAHL
Administrative Law Judge