

BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

In the Matter of the Petition of  
VERIZON NORTHWEST, INC.  
For waiver of WAC 480-120-071(2)(a).

Docket No. UT-011439  
QWEST CORPORATION'S  
MOTION TO STRIKE PORTIONS  
OF STAFF'S RESPONSE BRIEF

COMES NOW QWEST CORPORATION ("Qwest") and moves to strike paragraphs 35, 36, 38 and 39 on pages 19 through 22 of Staff's Response Brief. The basis of the motion is that the matter on which Staff bases its argument is outside the record in this case and it would therefore be improper for the Commission to consider it.

This is an adjudicative proceeding under the Administrative Procedure Act.<sup>1</sup> The agency record in an adjudicative proceeding is prescribed by RCW 34.05.476(2), which provides: The agency record shall include:

- (a) Notices of all proceedings;
- (b) Any prehearing order;
- (c) Any motions, pleadings, briefs, petitions, requests, and intermediate rulings;
- (d) Evidence received or considered;
- (e) A statement of matters officially noticed;
- (f) Proffers of proof and objections and rulings thereon;
- (g) Proposed findings, requested orders, and exceptions;

<sup>1</sup> Notice of Prehearing Conference, ¶2.

- (h) The recording prepared for the presiding officer at the hearing, together with any transcript of all or part of the hearing considered before final disposition of the proceeding;
- (i) Any final order, initial order, or order on reconsideration;
- (j) Staff memoranda or data submitted to the presiding officer, unless prepared and submitted by personal assistants and not inconsistent with RCW34.05.455; and
- (k) Matters placed on the record after an ex parte communication.

Staff's brief contains, at paragraphs 35, 36, 38 and 39, argument based on documents which have not been admitted in evidence in this proceeding and which are not included in any of the permitted categories of the administrative record in RCW 34.05.476(2). Staff's brief uses these documents to attack Qwest's argument in its opening brief at page 39, which is based on the record in this proceeding as to the benefits perceived by existing customers of having service migrated from the existing air-core cable served by CM8 analog carrier systems to a gel core cable, but still being served by the CM8 analog carrier system and on the impacts on maintenance expense of replacing air-core cable with gel-filled cable.<sup>2</sup> These documents consist of an alleged notice from the Idaho Public Utilities Commission which Staff represents is the same as a prehearing conference order and was issued on the last day of the hearing in this case, an order of that commission which was issued one month after the end of the hearing in this case, and two alleged letters to that commission from Qwest managers.<sup>3</sup> Staff's brief does not identify any of these documents by exhibit number in the

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<sup>2</sup> Qwest's opening brief at page 39 relied on Staff's own testimony from Mr. Williamson that the customer-perceived benefit of moving customers from the air core cable to the gel filled cable but still using the analog carrier system would be "slight," if any. (Hearing Tr. p. 512). Mr. Williamson also testified that CM8 was an analog system that operates as an analog T1 technology system. (Hearing Tr. p. 501) Staff's response brief contradicts this testimony at p. 20, n. 11 without citing any evidence.

<sup>3</sup> Qwest understands that it is the Commission's practice to allow citation of and argument based on orders of other commissions as authority, but Staff's response brief here does not use the Idaho Commission's order in that way. Instead Staff purports to quote from findings of fact in that order as in effect a prior inconsistent statement by Qwest, which is not a permissible use of an order of another commission. Even in this improper effort Staff has mischaracterized the findings of the Idaho Commission and has failed to show that the facts

instant case, and Qwest's review of the record indicates that the documents were not admitted in evidence.

None of the documents referred to above was the subject of a request by Staff for official notice, and no opportunity was afforded Qwest to respond to any of this information.<sup>4</sup> Staff has not given Qwest timely notice of its claims so that Qwest could respond to those claims with evidence. Staff did not seek to cross examine Qwest's witness Mr. Hubbard on the alleged letters from Qwest managers, or inform Qwest of its intent to rely on the letters in time for Qwest to adduce testimony on them from Mr. Hubbard.

The agency record is the exclusive basis for decision in this case, according to RCW 34.05.476(3). Staff's brief relies on matters which are not included in the agency record as a basis for a requested finding that Qwest's arguments about the lack of benefit of migration of customers who are served by the existing air-core cable to a gel-filled cable but using the existing analog carrier system, and that Qwest would not replace the existing air-core cable, are without merit. Staff apparently in turn asks that for reasons which do not appear in Staff's briefs, such a finding be the basis of a decision to alter Qwest's boundary. Staff's brief

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which led to Qwest's Idaho proposal are the same as those in the instant case. Staff by inserting the bracketed phrase "air-core cable" in the quote from the Idaho order, erroneously implied that all such cable would be replaced. This implication is contradicted by the actual Idaho Commission finding that Qwest's proposal in Case No. QWE-T-03-4 was to replace or rehabilitate only discrete sections of air-core cable, typically between 300 feet and 1,000 feet long, (along with other types of improvements) in *selected* wire centers, based on evidence of specific localized service problems. (Order No. 29197 at pp. 1-3) That is clearly not the same thing as an overbuild of twenty-seven miles of existing cable which Staff advocates in the instant case, where the record in this proceeding shows that there is no evidence that the air-core cable causes service problems for the existing customers. (Hearing Tr. p. 510)

<sup>4</sup> Even if Staff had requested official notice, the Commission's rule on official notice would not have permitted notice of the portions of these documents which Staff's brief has quoted which apparently consist of findings of fact of the Idaho Public Utilities Commission, or of the alleged letters. WAC 480-09-750(2)(a)(i)(A). If these documents had been proper for official notice and such notice had been requested, RCW 34.05.452(5) would

therefore invites reversal on appeal if the Commission follows Staff's recommendation.

RCW 34.05.558 provides "Judicial review of disputed issues of fact shall be conducted by the court without a jury and must be confined to the agency record for judicial review as defined by this chapter, supplemented by additional evidence taken pursuant to this chapter."

Qwest submits that it would be improper for the Commission to consider Staff's arguments which are based on matters outside the agency record. Qwest submits that the appropriate remedy is for the Commission to issue its order striking paragraphs 35, 36, 38 and 39 of Staff's response brief.

#### Conclusion

Based on the foregoing argument the Commission should grant Qwest's motion to strike portions of Staff's Response Brief.

Respectfully submitted this 3rd day of April, 2003.

QWEST CORPORATION

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also have required timely provision of copies of the documents during the hearing so that parties could respond, rather than a URL listing in Staff's response brief.

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CERTIFICATE OF SERVICE

I certify that I have this day served a copy of the foregoing document on all parties to this proceeding by depositing copies of the said petition in the United States mail, properly addressed and with postage prepaid.

Dated April 3, 2003.

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