

BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

WASHINGTON UTILITIES AND  
TRANSPORTATION COMMISSION,

Petitioners,

v.

ADVANCED TELECOM GROUP, INC.,  
et al,

Respondents.

DOCKET NO. UT-033011

COMMISSION STAFF'S  
RESPONSE TO QWEST'S  
MOTION TO COMPEL

**I. INTRODUCTION**

1 Staff of the Washington Utilities and Transportation Commission (Staff) responds to Qwest Corporation's Motion to Compel Response to Data Requests to Staff (Motion). In summary, Qwest's data requests (DRs) seek legal analysis rather than data pursuant to WAC 480-07-400. Staff believes that Qwest's actions in delaying its motion and manufacturing an emergency situation with regard to the deposition of Tim Wilson are merely an attempt to distract Staff from preparation for the deposition. Qwest may feel such tactics are productive for its position.

However, Qwest's Motion has no merit and Qwest's actions should not be rewarded. Therefore, the Motion should be denied.

## II. BACKGROUND

2           On June 21, 2004, Qwest served its second set of data requests (DRs) to Staff in this docket "weighing in" at over 120 pages and containing approximately 120 DRs. A few days after receiving the DRs Staff contacted Qwest by phone to inquire about an extension of time for response to the DRs due to the size of the request. Qwest indicated a willingness to grant an extension. On June 28, 2004, Staff followed up with an email to Qwest formally requesting an extension. Qwest responded on that same day that "Qwest will agree to a one week extension on the condition that, on or before July 6, Staff (a) identifies any requests it will object to without substantively answering, and (b) provides its full objections to those particular requests." See Exhibit A.

3           Qwest also asserted on the same June 28, 2004 email that this information was needed because "*we want sufficient time to pursue a motion to compel* [emphasis added]".<sup>1</sup> *Id.* A few days later, Staff called Qwest and indicated that the DRs, in large part, asked for legal conclusions and that Qwest should be on notice that objections to the improper questions were coming. Staff also conferred with Qwest about the issue and Qwest indicated that the "new rules" were broader than the old

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<sup>1</sup> Apparently "sufficient time" was ten days after receiving notice of the objections and two business days prior to the deposition.

rules and that *Qwest would be testing their boundaries.*<sup>2</sup> On July 6, 2004, *ten days before Qwest's Motion was filed*, Staff sent its objections to the DRs to Qwest. *See Exhibit B.*

4 On July 12, 2004, Staff sent its full answers to the DRs to Qwest. On July 14, eight days after receiving Staff's objections, Qwest contacted Staff and indicated it would be filing a motion to compel and that it would "try to file" on Thursday, July 15, 2004. Staff again emphasized to Qwest its opinion that the information contained in the DRs sought legal analysis. Qwest did not raise any issues related to specific DRs. On July 15, 2004, Staff again called Qwest and indicated that the precedent of allowing parties to seek extensive legal analysis in DRs was dangerous and that the new rules did not appear to go as far as Qwest contended.

5 Qwest again indicated it would be filing its motion and it wanted to put Staff on notice of that fact. Staff, pursuant to WAC 480-07-425, inquired about the substance of the motion. Qwest indicated that it related to Staff's position regarding hypothetical questions and legal analysis. Staff responded that it was of the opinion that much more communication between the parties was required in order to comply with the Commission rules. Qwest reluctantly provided a brief summary of its motion, but did not raise issues regarding specific DRs. In response on July 15, 2004, Staff emailed its thoughts about Qwest's position in an attempt to resolve the conflict prior to a motion to compel. *See Exhibit C.* Qwest did not respond. Staff

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<sup>2</sup> Although Qwest conferred with Staff about this issue, relying on it in large part as an excuse for the DRs seeking legal conclusions, it did not mention it in its Motion.

sent an email to Qwest at 4:18 p.m. on that same day asking when the motion would be arriving. *See* Exhibit D. Staff received Qwest’s motion at 4:52 p.m.<sup>3</sup> *See* Exhibit E.

### III. LEGAL ISSUES

#### A. General Analysis

6 Qwest’s DRs fall into four categories. Some of the categories overlap, but in general, the discussion below will address each of the four categories. The categories are: requests for admission, plain interrogatories, interrogatories referencing requests for admission/containing requests for admission, and interrogatories containing hypothetical questions.

7 WAC 480-07-400 provides in pertinent part(c)(iii):

*Data request.* A party’s written request that calls for another party to produce data in connection with an adjudicative proceeding is a “data request.” Generally, data requests seek documents, an analysis, compilation or summary of documents into a requested format, a narrative response explaining a policy, position, or a document, *or the admission of a fact asserted by the requesting party* [emphasis added]. If a party relies on a cost study, it is expected that the party will, on request, rerun the study based on different assumptions, subject to the standards in subsection (5) of this section. The commission will not order a party to respond to a data request that seeks production of a new cost study unless there is a compelling need for such production.

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<sup>3</sup> Staff finds it necessary to document the communications between Staff and Qwest in detail due to Qwest’s misstatement of the facts regarding conferring of the parties pursuant to WAC 480-07-425. Despite Qwest’s statements in its motion that Qwest conferred with Staff about what it perceived to be the specific shortcomings in Staff’s responses, it did not. *See* Qwest’s Motion, p. 6, ¶ 13. Staff also did not state, as Qwest contends, that “it would be easier to address Qwest’s concerns after seeing this motion”. *Id.* Qwest certainly did not file the motion *immediately* after being notified of Staff’s position, as stated in its Motion. *Id.* In fact, Qwest filed the motion ten days after being formally notified of Staff’s position and two business days prior to the deposition.

The formerly in effect WAC 480-09-480 provided in pertinent part:

Generally, data requests seek extant documents, an analysis, compilation or summary of extant documents into a requested format, or a narrative explaining a policy, position or document. If a party relies on a cost study, it is expected that the party will, upon request, rerun the study based on different assumptions, subject to the standards in subsection 6(a)(vi) of this section. Parties will not be ordered to respond to a data request which seeks a new cost study unless the commission so orders, based upon a compelling need for such production.

### 1. Admissions

8 Civil Rule (CR) 36 provides in pertinent part “a party may serve upon any other party a written request for admission, for purposes of the pending action only, of the truth of any matters within the scope of rule 26(b) set forth in the request that relate to statements or opinions of fact or of the application of law to fact, including the genuineness of any documents described in the request.”

9 The new Commission rules permit data requests related to “the admission of a fact asserted by the requesting party”. This language was not contained in the previous rules. The distinction between the language in the new commission rule and CR 36 is important. CR 36 permits requests for admission that relate to “statements or opinions of fact or of *the application of law to fact* [emphasis added]”. On the other hand, WAC 480-07-400 permits *only* “the admission of a fact asserted by the requesting party”.

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The rules of statutory construction apply to interpretation of administrative rules. *Multicare Medical Center v. State*, 114 Wn.2d 572, 591, 790 P.2d 124 (1990). The inclusion of one in a statute, is the exclusion of another – *expressio unius est exclusio alterius*. See *Queets Band of Indian v. State*, 102 Wn.2d 1, 5 (1984). (“[w]here a statute specifically designates the things upon which it operates, there is an inference that the Legislature intended all omissions”).

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The Commission was clearly aware the scope of CR 36 when the new rules were drafted because the new rules appear to be a modified version of it. The Commission specifically chose to limit admissions in the new rules to an admission of fact only and not an admission related to opinions of fact or *the application of law to fact*.<sup>4</sup> Therefore, to the extent Qwest’s data requests seek application of law to fact and legal admissions<sup>5</sup>, they are objectionable.<sup>6</sup> See tables 1 and 2.

Table 1. Admissions permitted under CR 36 and new and old DR rules

Admission	WAC 480-09-480	WAC 480-07-400	CR 36
Admission of fact only.	Not permitted (NP).	Admission of a fact asserted by the requesting party.	Statements of fact.
Admission of a factual opinion	NP	NP	Opinions of fact.
Admission related to application of law to fact	NP	NP	Application of law to fact.
Legal Opinion/theory	NP	NP	NP

<sup>4</sup> The Commission did not limit the commission equivalent of interrogatories in *exactly* the same way.

<sup>5</sup> *Brust v. Newton*, 70 Wn.App. 286, 295 - 296 (1993) (a request for admission that calls for a legal conclusion is not allowed).

<sup>6</sup> Qwest was notified of this issue prior to filing its Motion, but did not respond. See Exhibit C.

Table 2. Application of old and new DR rules and CR 26

Admission type	Example	Old	New	CR 36
Admission of fact only.	Please admit that Company X filed agreement Y on date Z.	NP	Permitted	Permitted
Admission of factual opinion	Please admit that agreement Y was publicly available.	NP	NP	Permitted
Admission related to application of law to fact	Please admit that Company X had no duty to file agreement Y on date Z.	NP	NP	Possibly Permitted <sup>7</sup>
Legal Opinion/theory	If your answer is anything other than an unqualified admission, please provide all relevant federal and state authorities supporting your position.	NP	NP	NP

## 2. Plain Interrogatories

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CR 33(b) provides “An interrogatory otherwise proper is not necessarily objectionable because an answer to the interrogatory involves an opinion or contention that relates to fact or application of law to fact, but the court may order that such an interrogatory need not be answered until after designated discovery has been completed or until a pretrial conference or other later time.” As with requests for admission, the Commission certainly could have specifically permitted parties to issue DRs related to the “application of law to fact”. It did not. Instead the Commission permits “a narrative response explaining a policy, position, or a document”. The rule necessarily requires that the requested party have previously

<sup>7</sup> See *Brust*, 70 Wn.App. at 295 - 296 (a request for admission that called for an application of law to facts central to whether defendant’s negligence was proximate cause of plaintiff’s injuries was not allowed), *Santos v. Dean*, 96 Wn.App. 849, 860 - 861 (1999) (a party is not required to admit major factual issues central to the dispute or legal conclusions).

indicated a policy or position that requires explaining. It is not appropriate for Qwest to use an improper request for admission to expand the interrogatory rules. The Commission rule specifically permits a response relating to a “policy”, but does not allow such a response explaining a *law or applying a fact to a law*. See tables 3 and 4. Therefore, DRs seeking an opinion applying law to fact or a legal conclusion are not permissible. See *O’Brien v. International Brotherhood of Electrical Workers*, 443 F.Supp. 1182, 1187-88, (N.D. Georgia, 1977), Table 3 and 4.

Table 3. Interrogatories permitted under old and new WACs and CR 26, 33(b)

Interrogatory	WAC 480-09-480 and 480-07-400	CR 26, 33(b)
Opinion explaining a fact.	Yes.	Yes.
Opinion explaining a policy or position.	Yes.	Yes.
Opinion seeking the application of law to fact.	No.	Possibly.
Opinion seeking a legal conclusion.	No.	No.

Table 4. Application of old and new DR rules and CR 26, 33(b).

Interrogatory	Example	Old and New Rule	CR 26
Opinion explaining a fact.	Please explain why Staff believes that agreement Y covered the State of Washington as well as Minnesota.	Permitted	Permitted
Opinion explaining a policy or position.	Please explain why Staff asserts that Qwest’s actions with regard to agreement Y are more harmful than its actions with regard to agreement Z (assuming Staff made the assertion).	Permitted	Permitted



Opinion seeking the application of law to fact.	Please explain whether Staff views agreement X, an exhibit B agreement, as an interconnection agreement.	NP	Possibly permitted
Legal Opinion	Please identify any statutes, rules, or other authority which require settlement agreements to be filed with the Commission.	NP	NP

**3. Interrogatories referencing requests for admission/containing requests for admission or are contained within requests for admission.**

13 A number Qwest’s interrogatories relate to requests for admission. Since a number of these interrogatories reference improper requests for admission, it is impossible for Staff to answer them. In addition, a number of these DRs are requests for admission because they do not seek “a narrative” pursuant to the rule, but instead seek a yes or no answer. These DRs should properly be evaluated under the request for admission portion of the Commission rules.

**4. Hypothetical Questions.**

14 The old and new DR rules specifically provide for one type of hypothetical. The new rules provide and the old rules parrot the provision “[i]f a party relies on a cost study, it is expected that the party will, on request rerun the study based on different assumptions . . . [t]he commission will not order a party to respond to a data request that seeks production of a new cost study unless there is a compelling need for such production.” It can hardly be said that Qwest’s hypothetical questions

in this case are analogous to the running of different assumptions under a cost study. Qwest has indicated that Staff issued hypothetical DRs and therefore Staff should not be complaining.<sup>8</sup> However, Staff's hypothetical DRs were not of the type issued by Qwest: Staff's DR's did not ask for legal conclusions. Even if, hypothetically, they were similar, Qwest had every opportunity to object to their content, but chose not to.

**5. Other issues**

**a. Clarification.**

15 A question that asks for Staff to explain a position Staff has not taken is not appropriate. As a result of this issue and other questions which were not clear on their face, Staff objected to a number of DRs as vague and based on insufficient facts. To the extent Qwest argues that such a question requires a request for clarification from the questioning party, Staff believes it gave Qwest ample opportunity to explain the DRs. Qwest was generally uncooperative following its initial willingness to allow Staff an extended deadline to provide responses.

16 Staff made several attempts to contact Qwest prior to providing its objections to the company, but to no avail. See ¶¶ 2-5 "II. Background" above. Staff viewed service of the objections, prior to the new deadline as notice of Staff's confusion regarding a number of DRs. Staff made several attempts to contact Qwest following

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<sup>8</sup> Staff objects to inclusion of these DRs in Qwest's Motion below.

service of the objections, again to no avail. Qwest did not provide any clarification during the phone calls. Nor did Qwest contact Staff to explain its intentions with regard to the DRs in question. Staff believes that, under the circumstances, it fully complied with WAC 480-07-405(b)(5).

**b. Precedent**

17 Many of Qwest's DRs are a modification of the following pattern of question:

Please admit that defendant does not have to file agreements. If your answer is anything other than an unqualified yes, please identify all legal authorities in support of that position.

Qwest's contention that Staff must answer this type of question is nonsensical. If Qwest was correct, in all cases, parties could simply rattle off the elements of the cause of action (or any other cause of action they think responses might come in handy for at a later date or in other litigation) and ask for all authorities supporting the opposing party's position. There would be little need for briefs. If parties were to raise an issue in brief that was not provided as part the discovery process, it could be objected to.<sup>9</sup> Furthermore, Qwest's plea for this type of information is not necessary.

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<sup>9</sup> It should be noted that Staff has prepared similar DRs asking for "all legal authority" supporting the party's position for Qwest in the unlikely event that Staff loses this motion. Staff will prepare similar DRs for the other parties. Staff does feel, however, that permitting such DRs in this and all other actions in front of the Commission creates a dangerous precedent even though in most cases this type of DR would be more useful to Staff than the company.

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Qwest has notice of Staff's legal theories. Staff provided them in its amended complaint and its testimony. If Qwest doesn't feel that they are strong legal theories, it may attack them by testimony and/or brief. This is really the gist of the issue. Qwest must do its own legal research and not rely on discovery for its legal theories. Qwest has already been notified of Staff's cause of action and factual application to that cause of action through its amended complaint and testimony.

**c. Staff DRs**

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As an initial matter, Staff objects to Qwest's referencing of Staff's DRs in this motion. These DRs are not the subject of a motion to compel. This action is explicitly in conflict, not only with WAC 480-07-405(3), but also with this presiding officer's email directive in this docket. *See* Exhibit G.

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Despite Qwest's contentions, Staff's DRs that Qwest referenced in its Motion are of a different character than Qwest's. *See* Motion, p. 3 and 4. Staff asks for Qwest's factual reasons why a particular agreement is not an interconnection agreement. WUTC 2-012. Staff asks for Qwest's factual response to a Commission action. WUTC 2-013. Staff asks whether other CLEC's have requested similar arrangements to Qwest offerings, a factual issue. WUTC 2-016. Staff asks for a response regarding relevancy of a particular fact asserted by Qwest. WUTC 2-030(a). Staff asks for a factual matter, citations to authority showing agreements

were approved. WUTC 2-030(g). In summary, Staff requests factual information, while Qwest requests relate to legal authority/opinions/conclusions.

## B. Specific Analysis

Staff will attempt to address Qwest’s DRs one by one. See table 5.

DR #	Discussion
5-12, 15-18, 24-26	Qwest argues that because Staff chose to answer some DRs requesting a legal conclusion, it should be required to answer all. To the contrary, Staff responded to DRs related to definition of interconnection agreement and application of RCW 80.36.170, .180 and .186 because such discussion was already contained in its testimony. As discussed above to the extent the questions are requests for admission or interrogatories seeking legal conclusions, they are improper. Qwest should be required to do its own legal work and rely on the traditional notions of receiving a party’s legal case through a complaint, testimony and briefing. Qwest states that the central theme in these DRs is how Qwest should have handled the process of settling disputes, etc. Motion, paragraph 21. This is a major problem with Qwest’s argument because it is not Staff’s role to provide an advisory opinion on how Qwest should conduct its business. Staff must prove its case. If Qwest does not feel that Staff has done so, it may make its best argument.
19-22, 49-53	Staff asks the presiding officer to read DR 19 and conclude that its not vague and confusing. A number of questions are raised by this DR. How do we know they would not have been approved by the Commission? How do we know if there is harm when we don’t know what the term is? How do we know what the other CLECs response would be? How do we know which agreements other CLECs would or would not seek to opt into? DR 21 asks Staff to draw the legal conclusion that if a party is not willing or able to satisfy all reasonably related terms, they can’t be harmed because they can’t opt in. If this is Qwest’s position, than make it in testimony and argument. DR 22 asks for all legal authorities. DR 50 – 53 ask for a legal conclusions related to “undue or unreasonable prejudice or disadvantage”.
27-47	Qwest was asking for a legal opinion with regard to these DRs. It says as much in its motion. Motion, paragraph 27.
54-57	Again, Qwest asks for legal opinions and legal authorities supporting a position that Staff has not taken in briefing or in its amended complaint.
23, 25	Staff’s objections were proper. <i>See In re M &amp; L Business Mach. Co., Inc.</i> , 184 B.R. 366, 386 (D. Colo. 1995) (requests stating half-facts or half-truths are objectionable). Qwest suggests Staff’s view on a matter which is not the complete truth. In DR 25 Staff does its best to articulate its position with regard to the issue.

58-96, 97-122	Staff properly objected to 58(c) and (d) as they requested a legal opinion and speculation about whether the commission would have approved the agreement and the legal authorities the Commission would have used to support that approval. Staff properly objected to 97(a), (b), (c), and (d). Staff has not taken the position that Qwest suggests that it has. Furthermore, these requests call for legal conclusions: authority requiring Qwest to make agreements available, an opinion that there is a certain date by which Qwest should have made an agreement available, an opinion about whether the Commission approval would be necessary, what a timely filing would be, and the legal authorities supporting Staff's position. Furthermore, Staff has not made allegations relating to filing related to exhibit B agreements in its amended complaint or testimony.
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#### IV. CONCLUSION

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Taken as a whole Qwest's DRs do little more than ask Staff to do Qwest's legal research for it. If Qwest wants to argue that when a particular statute is applied to facts only one conclusion can result, it certainly may argue that point. Likewise if Qwest wants to make the assertion that no state or federal statute requires Qwest to file certain types of agreements, it may make that argument as well. However, Staff should not have to supply answers to questions that Qwest can supply for itself. Nor should Staff be required to answer questions that seek legal conclusions. This is not a case involving difficult and complex factual issues. Perhaps Qwest is befuddled by the simplicity of the case and therefore is seeking to go a step farther by seeking legal analysis or perhaps Qwest is simply attempting, as other parties have done in the past, to distract Staff from preparation of its case in an attempt to gain a strategic advantage. Either way, Qwest should be limited to seeking information contemplated by the DR rules. For all of the above reasons,

Staff requests that Qwest's Motion be denied. If, however, the presiding officer determines that Staff should answer one or more DRs, the parties should be ordered to confer about the content of the DR and response.

DATED this 19<sup>th</sup> day of July, 2004.

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