

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

COMMISSION STAFF'S
ANSWER IN OPPOSITION TO
QWEST'S MOTION TO STRIKE
PORTIONS OF STAFF'S
RESPONSE BRIEF

1 Qwest, contending that it is somehow improper for this Commission to consider a relevant recent order issued by the Idaho Public Utility Commission, a Notice of Proposal issued by that commission, as well as letters written *by Qwest* to the Idaho Commission in support of the very relief that Qwest sought and received from that commission— relief that is inconsistent with the arguments that Qwest has made before this Commission concerning the same matter — has filed a motion to strike certain paragraphs of Staff's response brief. This motion is clearly without merit and should be

denied.¹

WAC 480-09-750 provides, in relevant part:

- (2) Official notice.
 - (a) The commission may take official notice of:
 - (i) Any judicially cognizable fact. Examples of such facts include, but are not limited to:
 - (A) Rules, regulations, administrative rulings and orders, exclusive of findings of fact, of the commission and other governmental agencies . . .[.]

2

The Idaho Commission issued two orders in Case No. QWE-T-03-04, to which Staff refers in paragraphs 35, 36, and 38, and 39 of its response brief. These consisted of a Notice of Proposal (issued January 24, 2003) and a subsequent Order (issued February 24, 2003), in which the Idaho Commission granted Qwest's proposal to use a portion of \$4 million in "revenue sharing" funds, plus an additional \$4 million in matching dollars from Qwest for, among other projects, the "[r]eplacement or rehabilitation of air core cabling in the local exchange network in selected wire centers[.]"² These orders, and the relief granted in Idaho upon the request of Qwest, are directly relevant to Qwest's arguments in this docket that moving customers from older air-core cable to newer generation gel-filled cable would provide only "imperceptible benefits" to customers,

¹ Copies of the Idaho Commission Orders and Qwest letters (including its proposal) to the Idaho Commission are attached to this answer. They are also available on the Idaho PUC website, as was noted in Staff's response brief, at <http://www.puc.state.id.us/fileroom/telecom/telecom.htm>.

² *Notice of Proposal*, In the Matter of Qwest's Proposal to Use Revenue Sharing Funds to Make Network Improvements in Its Southern Idaho Service Area, Case No. QWE-T-03-04 (January 24, 2003); *Order No. 29197*, In the Matter of Qwest's Proposal to Use Revenue Sharing Funds to Make Network Improvements in Its Southern Idaho Service Area, Case No. QWE-T-03-04 (February 24, 2003), at 1.

and would result in little or no reduction in maintenance cost. In Staff's view, they are plainly inconsistent with Qwest's position taken in this docket. WAC 480-09-750(2)(a)(i)(A) permits the Commission to take official notice of these administrative rulings and orders of other state commissions.

3 The Commission may read these orders for itself and determine what they do or do not say. Contrary to Qwest's argument made in a footnote to its motion, Staff is not asking the Commission to confirm any "findings of fact" of the Idaho Commission, for the simple reason that the Idaho Commission made no such "findings of fact." The Idaho Commission did render a decision, based largely on the representations of Qwest, in which the commission stated:

The record supports the finding that the use of the remaining revenue sharing funds proposed by Qwest is consistent with the public interest and the goals of the Commission. Qwest proposes to remove and replace old and deteriorating facilities, which will improve the quality of service to customers. . . . Facility improvements to the basic telephone service network will benefit not only the customers in the improved areas, but also those who call them and Qwest competitors that may use the facilities.

Order No. 29197, supra, at 3. Qwest itself set forth in its proposal to the Idaho Commission (submitted December 31, 2002), at p. 4, the widespread benefits that would arise from the replacement of air-core cable with newer generation cable:

In Qwest's network in southern Idaho lead sheathed or air core

cables are connected to digital central offices that provide an array of modern services. Customers who are served by these cabling facilities generally experience a higher level of repair activity than those served by later generation cabling facilities. These improvements come from new materials, and in many underground applications, through the use of gel-filled cables, which are highly resistant to water intrusion. The proposed Tech III program will impact thousands of Qwest customers who, as a result of the program, will be connected by current-generation cabling to their serving digital central office.

4 Staff is simply asking the Commission to look at what Qwest has said here, and what Qwest said before the Idaho Commission, as set forth in official orders promulgated by that commission, in considering Qwest's arguments in this case. In the face of this impeachment of Qwest and admission by Qwest that the replacement of air core cabling would create widespread benefits, there is no basis to accept Qwest's invitation to simply ignore these significant and relevant orders.

5 Staff's response brief also refers to two letters that Qwest submitted to the Idaho Commission in support of the relief that the commission granted in its February 24, 2003 order. These letters (submitted by Qwest on December 31, 2002, and January 17, 2003) consisted of Qwest's proposal to the Idaho Commission, and Qwest's supplemental comments on its proposal. Both of these letters are directly referenced in the Idaho Commission's order, and were considered by that commission in granting Qwest the relief it sought. WAC 480-09-750(2)(a)(i) permits their consideration as a

judicially cognizable fact.

6 Staff finds it curious that Qwest attempts to dismiss the Idaho Commission's Notice of Proposal as an "alleged notice," and the letters that Qwest itself filed with that Commission as "alleged letters," as if they never existed or were never written. The items to which Staff refers, as Qwest well knows, are real orders, notices, and letters that Qwest simply wants the Commission to ignore.

7 Staff also takes great issue with Qwest's suggestion that Staff is somehow at fault for not bringing these items to the attention of the Commission at the hearing in this case, held on January 22-24, 2003, and for not permitting Qwest's witness Mr. Hubbard to respond to the "alleged letters." It is *Qwest* that has not apprised the Commission of these items, though it undoubtedly had much more reason to know of them than did Staff. The Notice of Proposal was not issued by the Idaho Commission until January 24, 2003 (the last day of hearings), and the Idaho Commission Order approving Qwest's request to use funding for the replacement and rehabilitation of air-core cable was not issued until one month later, on February 24, 2003. Staff had no reason to know of the letters Qwest had earlier sent to the Idaho Commission.

8 In any event, Qwest will suffer no prejudice from the Commission taking official notice of these items. WAC 480-09-750(c) provides that the presiding officer "must

afford parties an opportunity to contest facts and material so noted.” Here, there is nothing to contest, since it is clear that the Idaho Commission orders were issued, and the letters authored by Qwest were submitted to that Commission. They say what they say, and they should be considered by this Commission. Qwest’s motion to strike paragraphs 35, 36, 38, and 39 should be denied.

9 Paragraph 36 clearly should not be stricken for another reason. In footnote 11 to that paragraph, Staff noted Qwest’s erroneous contention that the FCC has determined that “analog carrier systems are a known disturber” of DSL technology. Nowhere has the FCC stated this. In fact, the FCC has stated that the only technology found to cause interference with sufficient persistence to rise to the level of a “known disturber” is analog T1. *In the Matter of Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Dockets Nos. 98-147 et al., FCC 99-355, Third Report and Order et al., December 9, 1999 at ¶ 214. Qwest has provided no basis for striking paragraph 36 or the accompanying footnote. Analog T1 is not the same as an “analog carrier system,” notwithstanding the appearance of the word “analog” in both system names; the two are in fact, completely different.

For the reasons set forth above, Qwest's motion to strike portions of Staff's response brief should be denied.

DATED this 9th day of April, 2003.

CHRISTINE O. GREGOIRE
Attorney General

GREGORY J. TRAUTMAN
Assistant Attorney General