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

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| 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 OPPOSITION TO MOTION FOR HEARING AND DISCOVERY |

COMES NOW Qwest Corporation ("Qwest") and replies to the opposition by Joint CLECs to Qwest's motion for an evidentiary hearing and invoking the Commission's discovery rule, and to Commission Staff's opposition to Qwest's motion for an evidentiary hearing.

1. Qwest has the right to an evidentiary hearing.

The Joint CLECs oppose Qwest's motion for an evidentiary hearing, and take the position that Qwest must show good cause for this request. On the contrary, Qwest had previously shared the hope that matters would be resolved at the LTPA in such a way that an evidentiary hearing would not be necessary in this six month review, but Qwest did not waive its right to a hearing to which it is entitled. In *In the Matter of the Investigation Into U S WEST COMMUNICATIONS, INC.'s Compliance With Section 271 of the*



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*Telecommunications Act of 1996,* Docket No. UT-033020, 30th Supplemental Order at para. 143, n. 33, Qwest had challenged the Commission's legal authority to require Qwest to make changes in the QPAP as a result of the six month review process. The Commission upheld its authority to require Qwest to file changes to the QPAP in the six month review, including the requirement to make payments for new or revised PIDs, as a result of changes resulting from a multistate process, on the basis of its general ratemaking and regulatory power under RCW 80.36.140. This statute empowers the Commission to act "..after a hearing had upon its own motion or upon complaint…" In Docket No. UT-033020, hearings were held and evidence was received subject to cross examination before the Commission entered the 30th Supplemental Order. Order No. 1 in this proceeding clearly provided at para. 9 that the procedure for a paper record was a matter of agreement and that parties were free to request a hearing in this six month review, should matters develop in such a way during the LTPA process that a party believed such a hearing was necessary. It is contrary to this determination to argue that Qwest has the right to agree to a paper process but must show good cause to disagree with that process.[1]

Commission Staff argues that it is premature to decide on an evidentiary hearing before the facilitator has had an opportunity to resolve the impasse issues, and Staff disagrees

[1] The Joint CLECs select a single impasse issue and argue that because it supposedly is a "policy" issue the entire proceeding does not require evidence. On its face, this argument fails to address the point that Order No. 1 acknowledges that the paper process is a matter of agreement. In the second place, the argument makes no sense. Policy issues are not decided in a vacuum, and the evidentiary process with live witness testimony and cross examination has been used by this Commission for many decades to decide policy issues. Indeed many of the policy issues that were decided in the 30th Supplemental Order in Docket UT-033020 and that are embodied in the current QPAP were decided on the basis of the testimony that was adduced at the hearings in that case.



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that the impasse issues are very significant. Commission Staff also believes that the issues will be fairly resolved by the facilitator and confirmed by state staffs by the end of April.

It is important to note that the LTPA process is not an adjudicative process in which the facilitator and state commission staffs wield the final decisionmaking authority of the state commissions. Instead it is a form of mediation. Qwest notes that the parties and the facilitator have been working on these issues for a number of months but agrees that it is theoretically possible that the issues that are now classified as impasse issues will nonetheless be resolved by the end of April through agreement of the parties.[2] Qwest is willing that the decision on whether or not to hold an evidentiary hearing abide the outcome of the LTPA impasse comment and response process, but it wished to alert the ALJ and the parties at an early time that it viewed an evidentiary hearing as something it seeks, based on the nature of the issues that are currently at impasse.

2. This proceeding qualifies for the discovery rule.

The Joint CLECs object to Qwest's motion to invoke the discovery rule. The Joint CLECs argue that this proceeding does not qualify for discovery under WAC 480-07-400(2)(b). The argument of the Joint CLECs is erroneous. In Order No. 2 in Docket No. UT-

[2] Commission Staff also argues that Qwest's motion threatens the utility of the multistate collaborative process. Qwest has no intent of threatening this process, but sought merely to alert the ALJ and parties that given the issues that are now at impasse, it seeks an evidentiary hearing at such time as the impasse statement and response period is concluded, unless those issues are resolved by agreement. This is based on the assumption that the impasse issues would be part of the issues list for this proceeding. This is not a matter of Qwest seeking to fully litigate based on its dissatisfaction with the outcome of the multi-state forum, as Staff argues. It simply recognizes that for issues that remain at impasse in the multistate forum, there will not be an outcome. There have not been evidentiary hearings in the LTPA process as there were in the Multistate process that preceded the 30th Supplemental Order in Docket No. UT-033020, and on the record of which this Commission could rely in its decisionmaking. Thus Qwest has not asked that any efficiencies of gathering evidence in the multistate forum be sacrificed.



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033020 at para. 10, the Administrative Law Judge found that the previous six month review proceeding qualified for discovery under the predecessor discovery rule, WAC 480-09-480. The ALJ determined that since no party had requested the rule's invocation, the rule would not apply until and unless a party made such a request in its comments. There is no material difference between WAC 480-07-400(2)(b) and the predecessor rule for this purpose, and there is no difference in the type or quality of the proceeding between the current six month review and the previous six month review, for purposes of invoking discovery.

For the foregoing reasons, Qwest respectfully requests that its motion be granted, if any of the current impasse issues remains unresolved at the conclusion of the LTPA process.

Respectfully submitted this 14th day of April, 2004.

QWEST CORPORATION

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