

[Service Date February 26, 2007]

February 26, 2007

**NOTICE DENYING, WITHOUT PREJUDICE,
REQUEST FOR MEDIATOR AND GRANTING MOTION
TO ACCEPT LATE-FILED DOCUMENTS**

RE: *In the Matter of the Petition of QWEST CORPORATION to be Regulated
Under an Alternative Form of Regulation Pursuant to RCW 80.36.135.*
Docket UT-061625

TO ALL PARTIES OF RECORD:

Request for Mediator: On February 16, 2007, Public Counsel filed a request for mediator. Public Counsel requested a mediator to aid the progress of settlement discussions regarding some of the more difficult issues encountered. Public Counsel asserted that it polled the parties for their position regarding this request. Qwest Corporation opposes the request for mediator. Washington Electronic Business and Telecommunications Coalition, XO Communications Services, Inc., Time Warner Telecom of Washington, LLC, Integra Telecom of Washington, Inc., Covad Communications Company, Northwest Public Communications Council, and the United States Department of Defense and all other Federal Executive Agencies have no objection to the request. The Commission's regulatory staff did not state a position on the request.

As a single party's request for Commission action, the request for mediator should be construed as a motion. According to WAC 480-07-375(4), a party who opposes a written motion may file a response within five business days after the motion is served. Public Counsel's request was served on February 16, 2007. Therefore, the deadline for filing a response was February 21, 2007. No party filed a response by the deadline.

According to WAC 480-07-710(2), the parties to a negotiation may ask the Commission to mediate any differences. For purposes of this discussion, the operative word is "parties" and herein lies the fatal flaw in Public Counsel's request. In most regulations, a single party may request Commission action. In this regulation,

the parties, implying the consensus of all parties, may request mediation. Public Counsel is the sole party who supports the use of a mediator.

Mediation is a form of nonbinding dispute resolution that is designed to aid the parties in reaching a mutually agreeable solution. As such, mediation differs from other forms of alternative dispute resolution that may be supported by the use of a Commission appointed settlement judge¹ or arbitrator.² Using the latter procedures, the settlement judge or arbitrator may render a decision that is subject to Commission approval. In contrast, a mediator cannot impose a settlement.³ Only the parties may reach a mutually agreeable resolution. Therefore, unanimity in willingness to participate in the mediation process is critical. In this instance, only one party supports the use of mediation and the remaining parties either oppose, do not object to, or do not state a position on the use of this process. Given these circumstances, Public Counsel's request does not comply with the regulation. The regulation allows all parties, rather than a single party, to request use of this process.

In addition, an effort to impose the mediation process on unwilling parties is contrary to the underlying purpose of the process. If parties are not willing to engage in the use of the mediation process, it is unlikely that they will be able to reach a mutually agreeable solution.

Moreover, while the Commission supports alternative dispute resolution provided it is lawful, consistent with the public interest, and subject to approval by Commission order,⁴ assigning a mediator does not appear to be a cost-effective and efficient use of either the parties' or the Commission's resources under the facts presented. As a practical matter, there is insufficient time remaining before the evidentiary hearing to appoint a mediator at this juncture. The evidentiary hearing is scheduled to commence March 12, 2007. The parties filed a significant amount of prefiled testimony and exhibits in this proceeding. In order to meaningfully participate in the mediation process, a mediator would have to review the documents filed to date. There is simply insufficient time to review these documents and schedule and conduct mediation prior to the evidentiary hearing.

Accordingly, the request to assign mediator should be denied, without prejudice. The Commission encourages the parties to continue their efforts to informally resolve disputed issues.

Motion for Approval of Late Filing: On February 16, 2007, the Washington Utilities and Transportation Commission (Commission) received a motion from the Public Counsel Section of the Washington Office of the Attorney General (Public Counsel)

¹ WAC 480-07-700(2).

² *Id.*

³ WAC 480-07-710(4)(a).

⁴ WAC 480-07-700.

for approval of late filing of specified documents. Public Counsel stated that the Commission required Public Counsel to refile by February 15, 2007, certain exhibits of Dr. Robert Loube with working formulae. Public Counsel asserted that it was unable to meet the February 15, 2007, deadline due to unexpected difficulties in delivery of the CD containing the required information.

The motion for approval of late filing is essentially a motion for continuance. According to WAC 480-07-385(2), the Commission will grant a continuance if the requesting party demonstrates good cause for the continuance and the continuance will not prejudice any party or the Commission. Public Counsel stated good cause for the continuance. Due to unanticipated delays in delivery of the document to be filed, Public Counsel was unable to file the CD in a timely manner. The required CD was filed one day late. The *de minimis* delay in filing should not prejudice any party or the Commission. Accordingly, the request should be granted.

NOTICE IS HEREBY GIVEN That:

- (1) The request for mediator filed by Public Counsel is denied, without prejudice.**
- (2) The motion for approval of late filing of working copies of certain documents, with formulae, filed by Public Counsel is granted.**

Sincerely,

PATRICIA CLARK
Administrative Law Judge