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5 BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION
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7 In the Matter of the Application of
8 QWEST CORPORATION
9 Regarding the Sale and Transfer of Qwest
10 Dex to Dex Holdings, LLC, a non-
11 affiliate.
12

Docket No. UT-021120

RESPONSE OF PUBLIC COUNSEL
TO MOTION OF COMMISSION
STAFF TO APPLY THE PER-LINE
BILL CREDIT MANDATED IN THE
QWEST DEX SETTLEMENT
AGREEMENT TO QWEST'S
RETAIL AND RESALE ACCESS
LINES
13

14 **I. Motion and Request for Relief**

15 The Washington Utilities and Transportation Commission Staff ("Commission Staff")
16 filed on October 16, 2003 a *Motion of Commission Staff to Apply the Per-Line Bill Credit*
17 *Mandated in the Qwest Dex Settlement Agreement to Qwest's Retail and Resale Access Lines*
18 ("Staff Motion"). They have moved the Washington Utilities and Transportation Commission
19 ("Commission") for an order directing Qwest to include resale companies as recipients of the
20 bill credit to be issued pursuant to the Stipulation and Settlement Agreement ("Settlement")
21 adopted by the Commission in the *Tenth Supplemental Order: Approving and Adopting*
22 *Settlement Agreement; Granting Application and Accepting Notice, Subject to Conditions,*
23 entered on August 1, 2003 ("10th Order"). The Public Counsel Section, Office of Attorney
24 General ("Public Counsel") contests the assertion of Commission Staff. Public Counsel
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1 believes that the Settlement is clear upon its face and that the intent of the parties, as reflected
2 in the Settlement, was to provide a bill credit to Qwest's retail customers and not to the resale
3 companies who provide service to their customers by reselling Qwest service.

4 The Staff Motion should be denied.

7 II. Memorandum

8 A. Standard of Review.

9 The matter now before the Commission is one of contractual interpretation of the
10 Settlement approved by the Commission on August 1, 2003. Public Counsel asserts that the
11 Commission may, as a matter of law, interpret the Settlement and rule on the Commission
12 Staff's motion pursuant to the standard for summary judgment under Civil Rule 56. Public
13 Counsel contends that there are no contested issues of material fact and the Court may rule as a
14 matter of law.
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16 Summary judgment is appropriate if evidence, viewed in a light most favorable to the
17 non-moving party shows there is no dispute of material fact and that the moving party is
18 entitled to judgment as matter of law. *Fancher Cattle Co. v. Cascade Packing, Inc.*, 26 Wn.
19 App. 407, 408, 613 P.2d 178 (1980).
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21 A motion to enforce or clarify a settlement agreement is similar to a summary judgment
22 motion and is governed by general principles of contract law. *Lavigne v. Green*, 106 Wn. App.
23 12, 16, 23 P.3d 515, 518 (2001); *In re Estate of Harford, v. Birchfield*, 86 Wn. App. 259, 262,
24 936 P.2d 48, 50 (1997).
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26 B. Statement of Facts.

1 The Washington Utilities & Transportation Commission is an independent state
2 regulatory agency authorized by the Washington legislature to regulate certain investor owned
3 utilities in the public interest. Title 80 RCW. Public Counsel represents the citizens of
4 Washington in utility matters such as rates, services and practices before the Commission, state
5 and federal courts, the Federal Communications Commission, and the Federal Energy
6 Regulatory Commission. RCW 80.01.100. Qwest is a regulated telecommunications company
7 serving customers in Washington and subject to the Commission's jurisdiction.
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9 A statement of the background of this case can be found at pages 3 through 9 of the 10th
10 Order and need not be repeated here.
11

12 Since the entry of the Commission's 10th Order approving the Settlement, Qwest has
13 worked on implementation of the Court's order. The first notice Public Counsel had of
14 Commission Staff's new interpretation of the Settlement was during a conference call on
15 October 8th, 2003 when Dr. Glenn Blackmon raised the question of the status of resale
16 companies' entitlement to a credit for the first time.
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19 **C. Statement of Issues.**

20 Did the parties to the Settlement Stipulation intend that companies which resell Qwest
21 service would receive a credit based upon the number of customers they serve?

22 **No.**

23 Public Counsel believes that the Settlement Stipulation is clear upon its face, and
24 contains no ambiguities which would support the reading given to it by the Commission Staff.
25 The Staff Motion is not only unsupported by the plain language of the Settlement, it is
26

1 untimely as well. In the event the Commission believes there is some ambiguity in the
2 Settlement Public Counsel would request the opportunity to provide extrinsic evidence in the
3 form of declarations to further discuss the intent of the settling parties. Commission Staff was
4 not a settling party.

5 As Appendix 1 makes clear, the settling parties intended to benefit the retail customers
6 of Qwest, both business and residential. The Settling parties did not intend to benefit
7 companies that resell Qwest service.
8

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10 **D. Evidence Relied Upon.**

11 Public Counsel relies upon the Settlement filed with the Commission on May 16, 2003
12 and the other documents previously admitted into evidence in this docket. To the extent the
13 Commission finds some ambiguity in the Settlement, Public Counsel requests the opportunity
14 to file declarations addressing the intent of the parties.
15

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17 **E. Legal Authority.**

18 As stated above, settlement agreements such as this one are interpreted as contracts.
19 Washington follows the objective theory of contracts. Public Counsel believes the Settlement
20 is unambiguous and can be interpreted by this Commission as a matter of law. If an agreement
21 is clear on its face, the duty of the Commission is to declare the meaning of what is written.
22 *Meyer v. Consumers Choice, Inc.*, 89 Wn. App. 876, 880, 950 P.2d 540 (1998). There is a
23 strong presumption that the parties to a contract intend for each part of the contract to have
24 some meaning. Thus, the Commission should give effect to each part of the contract rather
25 than render some of the language meaningless or ineffective. *Erick v. Pemco Ins. Co.*, 108
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1 Wn..2d 338, 340, 738 P.2d 251 (1987). Courts will not read ambiguity into a contract where it
2 can be reasonably avoided by reading the contract as a whole. *Victoria Tower Partnership v.*
3 *Lorig*, 40 Wn. App. 785, 788, 700 P.2d 768 (1985) (court resolved purported ambiguity in
4 partnership agreement by reading contract as a whole).

5 Interpretation of contracts in Washington is governed by the context rule, not the plain
6 text rule.¹ *Berg v. Hudesman*, 115 Wn.2d 657, 669, 801 P.2d 222 (1990). As a result, the
7 courts are asked to interpret or construe a written agreement by considering not only the
8 writing itself, but the context in which it was executed. *Id.* *Berg* extended this rule to both
9 contracts that have an ambiguity and those that do not. When looking at the original meaning
10 of a contract term, extrinsic evidence is admissible even if the terms appear unambiguous.
11 Courts must enforce the contract as written, and cannot disregard or suppress any of its terms
12 nor read anything into the instrument. *Bernard v. Triangle Music Co.*, 1 Wn.2d 41, 48, 95 P.2d
13 43 (1939). The agreement must be interpreted by the court so as to reflect the intent of the
14 parties at the time the agreement was drafted. *Max L. Wells Trust by Horning. v. Grand Cent.*
15 *Sauna & Hot Tub Co.*, 62 Wn. App. 593, 601, 815 P.2d 284, 289 (1991).

16 In *Tjart v. Smith Barney*, 107 Wn. App. 885, 895, 28 P.3d 823, 828 (2001), Division
17 One of the Court of Appeals reaffirmed that under Washington law, all contracts are
18 interpreted under the context rule enunciated in *Berg v. Hudesman*. The court then stated:

19 The “context rule” is the framework for interpreting written contract
20 language which involves determining the intent of the contracting parties by
21 viewing the contract as a whole, including the subject matter and objective of

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24 ¹ The “context rule” is the framework for interpreting written contract language which involves
25 determining the intent of the contracting parties by viewing the contract as a whole, including (1) subject matter
26 and objective of the contract, (2) all circumstances surrounding its formation, (3) the subsequent acts and conduct
of the parties, (4) the reasonableness of the respective interpretations advocated by the parties, (5) statements
made by the parties in preliminary negotiations, and (6) usage of trade and course of dealings. *Berg* at 667.

1 the contract, all circumstances surrounding its formation, the subsequent acts
2 and conduct of the parties, statements made by the parties in preliminary
3 negotiations, and usage of trade and course of dealings. The application of the
4 context rule leads the courts to discover the intent of the parties based on their
5 real meeting of the minds, as opposed to insufficient written expression of their
6 intent. Context may not be used, however, to contradict, modify or add to the
7 written terms of an agreement. Nor may context be used for the purpose of
8 importing into writing an intention not expressed therein. *Id.*

9 Again, if the Commission desires to consider the Commission Staff Motion more fully
10 Public Counsel requests the opportunity to provide declarations which will satisfy the context
11 rule and provide evidence as to the circumstances surrounding the execution of the Settlement
12 and the parties' contemporaneous intent.

13 **F. Argument.**

- 14 1. Commission Staff has erroneously interpreted the Settlement, in a manner that
15 is inconsistent with the language of the instrument taken as a whole and
16 contrary to the parties' intentions at the time the agreement was entered.

17 The Settlement between Qwest and the other settling parties for the disposition of the
18 proceeds of the Dex transaction is unambiguous. As in *Meyer*, when the language of an
19 agreement is clear it is the duty of this Commission to declare the meaning of the agreement.
20 The agreement is plain on its face: the only recipients of the Bill Credit provided for in section
21 III.C.1. are those retail customers of Qwest identified in Appendix 1 to the Settlement.

22 The Settlement makes no mention of resale customers or companies which resell Qwest
23 retail services. The discussion on page 3 of the Settlement clearly contemplates Qwest's
24 billing cycle and not the billing cycle of resale companies whose customers Qwest has no
25 relationship with at this time. The discussion on page four of the Settlement of the application
26 and effect of the bill credit on "all qualifying customers" clearly contemplates the customers of

1 Qwest and not resale companies. Since Qwest has no business relationship with reseller's
2 customers it is axiomatic that it would have no means of carrying forward a bill credit beyond
3 the month of issuance or of applying a bill credit to the possible delinquencies of a resale
4 customer. There is nothing in the language of the Settlement or Appendix 1 upon which
5 Commission Staff can reasonably rely to support the contention that the Settlement, on its face,
6 provides bill credits to companies who resell Qwest's services.
7

8 It is similarly clear from the plain language of the Settlement that the bill credit benefits
9 the retail residential and business customers of Qwest. *Settlement*, Section III.C.1. and
10 Appendix 1. There is no language to be found that can reasonably be interpreted to benefit
11 resale companies.

12 2. Commission Staff's Motion would benefit resale companies not their customers.
13

14 Were the Commission to grant the Commission Staff's motion, it would be benefiting
15 not the resale customers, but the resale companies. The companies which resell Qwest's retail
16 services are not parties to this docket and arguably would be free to do with such a windfall
17 what they will. It is quite dubious that they would choose to pass along the credit to their
18 customers voluntarily, and the Commission Staff's Motion is noticeably silent on this vital
19 question.
20

21 The Commission Staff's focus on "access lines" to reach their tortured interpretation of
22 the Settlement is unsupported by the language of the Settlement itself. *Staff Motion* at pp. 1-2.
23 *Berg* at 667. The discussion of "access lines" is deceptive, and should be ignored by the
24 Commission. The settling parties clearly and unambiguously intended to benefit Qwest's rate
25 paying customers. The net result of Commission Staff's motion, if granted, would be to
26 selectively benefit resale companies and not their customers. It is also incorrect to assert that

1 the Settlement makes no distinction between retail and resale lines. *Staff Motion*, at pp. 1-2.
2 Appendix 1 sets forth the exclusive list of customer groups entitled to the bill credit, all of
3 whom are retail customers of Qwest.

4 Commission Staff's emphasis on "parity" is similarly misplaced. *Id.*, pp. 2-4. These
5 bill credits are a substantial remedy that provides immediate relief to Qwest's ratepayers, as the
6 Commission itself recognized. *10th Order* at ¶ 47. The bill credits are one element of an
7 extraordinary remedy that resolves over 20 years of litigation and contention surrounding the
8 imputation of directory revenues. This Settlement, and the bill credits that are a part of it,
9 clearly represent an exceptional circumstance.

10 Commission Staff also mistakenly asserts "as a matter of fundamental fairness, the
11 resellers are equally entitled to a share of the \$67 million credit amount." *Staff Motion* at p. 4.
12 There is nothing "fair" about providing to resale companies a bill credit intended to
13 compensate Qwest's ratepayers. When the Settlement is read as a whole, it is clear that the
14 Settlement's bill credits are intended to benefit the retail customers of Qwest and not resale
15 companies. *Victoria Tower Partnership* at 788.

16 3. The purpose of the Settlement is to compensate Qwest's ratepayers.

17 It is critical to remember that the purpose of the bill credit is to provide an immediate,
18 up-front benefit to Qwest's ratepayers, as a means of having Qwest's ratepayers share in the
19 proceeds of the sale. This accompanies the long term benefits that accrue from the revenue
20 credit and the medium term benefits that accrue from the other provisions of the Settlement.
21 The Settlement provides a package of benefits to Qwest's ratepayers that compensate them for
22 their interest in the Dex directory business, provide Qwest and Dex Holdings LLC certainty
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1 regarding the risk of litigating the parties' respective positions, and is a significant element in
2 averting the possible bankruptcy of Qwest Corporation.

3 The Commission Staff's attempt to extend the bill credit to the resale companies
4 purchasing services from Qwest is unsupported by the language of the Settlement. Indeed, no
5 party to the Settlement agrees with their interpretation. Public Counsel did not enter into the
6 Settlement intending for the scope of the bill credit to include resale companies.
7

8 The Commission Staff have also incorrectly assumed that the selection of customers
9 reflected in Appendix 1 is Qwest's decision which the other settling parties are simply
10 acceding to. *Staff Motion* at p. 3. Nothing could be further from the truth. Appendix 1 to the
11 Settlement reflects the careful consideration of the settling parties who represent Qwest's
12 customers, reached in cooperation with Qwest. Qwest's obligation under the Settlement is to
13 provide \$67 million in bill credits. *Settlement* at §III.C.1. Who those credits then go to was of
14 significantly greater concern to Public Counsel, WeBTEC, AARP and DOD/FEA than it was
15 to either Qwest or Dex Holdings, LLC. As Appendix 1 sets forth, bill credits go to the retail
16 residential and business customers of Qwest (including government accounts such as DOD).
17 For example, the inclusion of activated channels was a carefully considered inclusion so that
18 those customers receiving voice services on an activated channel basis were not left out.
19

20 If necessary, Public Counsel is prepared to provide extrinsic evidence regarding the
21 settling parties' intent if so requested by the Commission. Such evidence will document that
22 no settling party intended the result the Commission Staff now seek at the "11th hour."
23

24 4. Commission Staff's Motion is untimely.

25 The Staff Motion is not only unsupported by the plain language of the Settlement, it is
26 untimely as well. The Commission Staff, who opposed the settlement filed with the

1 Commission, had a full and complete opportunity to contest the terms of the Settlement, and
2 explore the settling parties' intent during the hearings the Commission held. In fact, the
3 Commission provided its Staff with extra time, and breaks in the hearings in order to file
4 additional testimony and prepare cross-examination on the settlement. The Commission Staff
5 remained silent on this question of resale and asked no questions of the witnesses that were
6 made available by all the settling parties to testify in support of the Settlement. The
7 Commission Staff similarly could have addressed the question of resale companies' alleged
8 entitlement on brief when all parties would have been able to respond. And finally, there is
9 nothing that would have prevented the Commission Staff from filing this Motion after the
10 issuance of the 10th Order as a Request for Clarification which the Commission, and the
11 settling parties, could have addressed at that time. The Commission Staff chose not to avail
12 themselves of these opportunities for reasons left unexplained by their motion. The
13 Commission should not now, on the literal dawn of the issuance of the bill credits, entertain
14 this motion.
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18 **III. Conclusion**

19 The Commission should not permit its Staff to unilaterally reinterpret the Settlement of
20 this docket which the Commission adopted in its 10th Order. The Settlement is clear on its
21 face, as was the intent of the parties at the time it was executed. Resale companies are not
22 entitled to one cent of the bill credit.
23
24

25 **IV. Relief Requested**

1 Public Counsel respectfully requests an order of the Commission denying the motion
2 filed by the Commission Staff seeking to unilaterally extend the bill credit to resale companies.

3 DATED this 16th day of October, 2003.

4 CHRISTINE O. GREGOIRE
5 Attorney General

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9 _____
10 Robert W. Cromwell, Jr., WSBA# 24142
11 Assistant Attorney General
12 Public Counsel
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