

proceeding. By electronic mail transmission on March 17, 2005, Qwest submitted its Motion and proposed Reply. That submission is both procedurally and substantively improper.

3. Other than a right to reply to new challenges to an initial order that were raised in a party's answer, "A party otherwise has no right to reply to an answer, but may petition for leave to reply, *citing new matters raised in the answer and stating why those matters were not reasonably anticipated* and why a reply is necessary." WAC 480-07-825(5)(b) (emphasis added). Qwest's Motion does not cite to any new matters raised in AT&T and TWTC's answer, much less state why any such matters were not reasonably anticipated. Indeed, Qwest does not even rely on the applicable rule, citing instead to WAC 480-07-370(1)(d), which governs replies to answers to a formal complaint or petition. On these procedural grounds alone, the Commission should deny Qwest's Motion.

4. Even if the Commission were to disregard Qwest's failure to comply with the Commission's procedural rules – which the Commission should not – Qwest has failed to justify its proposed Reply. Qwest does not identify any new matters raised in AT&T and TWTC's answer because there were none. AT&T and TWTC addressed only the matters raised in Qwest's Petition, specifically the issue of when the unfiled agreements at issue in this proceeding were publicly available in Washington. AT&T and TWTC argued, as the Initial Order found, that the agreements were not publicly available until Commission Staff included them as nonconfidential exhibits to its direct testimony in Docket No. UT-033011. Nothing in Qwest's Motion or proposed Reply even purports to characterize these arguments as "new," much less that Qwest could not have reasonably anticipated that AT&T and TWTC would make these arguments.

5. The sole purported justification Qwest offers in its Motion for proposing its Reply is that “a reply is necessary to correct inaccuracies in the AT&T/TWTC Response.” That explanation, even if accurate, does not satisfy the requirements in WAC 480-07-825(5)(b). But Qwest’s representation is not accurate. At most, Qwest identifies statements in AT&T and TWTC’s answer with which Qwest disagrees. More inappropriately, however, Qwest departs from even this insufficient justification to mischaracterize statements in the answer that Qwest does not dispute – or with which Qwest agrees – as alleged “admissions” supporting Qwest’s position, thus demonstrating that Qwest’s true objective is simply to have the last (inaccurate) word.
6. Qwest first characterizes as “inaccurate” (Reply paragraph 2) AT&T and TWTC’s argument that nothing that Qwest has provided in this docket to date contradicts the Initial Order’s finding that the unfiled agreements at issue were confidential until June 8, 2004. AT&T and TWTC continue to stand by that statement. Qwest disagrees, claiming that it provided an exhibit to its pleadings in this case to demonstrate that it filed the agreements as nonconfidential documents in March 2002. Qwest, of course, fails to explain why the Commission treated these documents as confidential if that were the case. More to the point, however, Qwest disagrees with AT&T’s and TWTC’s characterization of the record in this proceeding, but that disagreement is not an “inaccuracy” that merits “correction” through an otherwise unauthorized reply.
7. Qwest then identifies as “inaccurate” (Reply paragraph 3) AT&T and TWTC’s statements that Qwest cannot reasonably contend that the agreements were publicly available in 2002 and that Qwest represented that the agreements were specific to Minnesota. Qwest argues that it *does* make that contention, but Qwest’s argument does

not render the statement “inaccurate.” AT&T and TWTC continue to maintain that the contention is not reasonable, which means once again that the parties disagree on the *characterization* of each other’s positions, not on what those positions are. Similarly, whether Qwest represented that the agreements were specific to Minnesota – even viewed in the light most favorable to Qwest – is not an objective fact that may be considered “inaccurate” and subject to any need for “correction.”

8. Qwest abandons entirely the pretext of correcting “inaccuracies” in the remainder of its proposed Reply. In paragraph 4, Qwest points to the statement in AT&T and TWTC’s answer that “Had Complainants requested copies, Staff presumably would not have provided them except under the restrictions of the Protective Order issued on September 11, 2003, not as public documents as Qwest maintains.” Qwest’s reply to this statement is not a correction but a mischaracterization of the statement as an admission that the agreements were available to AT&T and TWTC as of September 2003. It is no such thing. It is a speculative hypothetical. Staff may not have provided the agreements at all, and without sufficient knowledge of the contents of those documents, AT&T and TWTC had no reason to request them. The bottom line, however, is that Qwest is not “correcting” any “inaccuracy” with this statement but is attempting to use the statement as part of further argument in support of Qwest’s position. No reply is even arguably warranted in such circumstances.

9. Similarly in paragraph 5 of the proposed Reply, Qwest points to the statement in AT&T and TWTC’s answer that “even if they had requested and received the confidential agreements through discovery in Docket No. UT-033011, AT&T and TWTC could have used them only for purposes of the proceedings in that docket.” Qwest does

not even take issue with this statement. Rather, Qwest claims, “This is entirely beside the point.” The Commission has not authorized replies to enable a party to observe that an opposing party’s arguments are beside the point. This is pure argument that lies well beyond the scope of even Qwest’s purported justification for filing a reply.

10. Finally, in paragraph 6 of its proposed Reply Qwest latches on to the statement in AT&T and TWTC’s answer that because the Commission had initiated its own complaint, “AT&T and TWTC reasonably believed that their issues with the agreements would be addressed in that proceeding.” Far from disputing the accuracy of this statement, Qwest trumpets, “At last, Complainants *admit* that they had sufficient knowledge, at the outset of the proceeding in Docket No. UT-033011, to know that they had issues with the agreements that they wanted addressed.” (Emphasis in original.) It is no such admission. The statement reflects nothing more than that AT&T and TWTC reasonably believed that *whatever* issues they had with the agreements would be addressed in the Commission complaint proceeding, not that AT&T and TWTC already had sufficient publicly available knowledge of the agreements to file their own complaint. Once again, however, Qwest uses the fiction of correcting “inaccuracies” in AT&T and TWTC’s answer to mischaracterize a statement with which Qwest actually agrees. Nothing in the Commission’s rules or procedures authorizes such a reply.

11. Qwest’s proposed Reply, moreover, highlights the factual nature of the parties’ dispute on this issue. Qwest contends that the “confidential” stamp on the unfiled agreements at issue in this proceeding was meaningless beginning in March 2002. AT&T and TWTC, as well as the Initial Order, observe that they and the Commission treated the documents as they were marked until June 8, 2004. The Commission cannot

accept Qwest's factual claims based solely on the pleadings. At a minimum, any factual issues should be resolved in favor of AT&T and TWTC until the Commission can conduct an evidentiary hearing to resolve factual disputes on complete record.

CONCLUSION

12. Qwest has not even attempted to justify its proposed Reply under the applicable Commission rule. Instead, Qwest fabricates a need to correct "inaccuracies" as a thinly veiled excuse to reargue its position by repeating its characterization of the record and mischaracterizing statements that AT&T and TWTC made in their answer. Such a reply does not comply with Commission rules, provides no benefit to the Commission's deliberative process, and unduly prejudices AT&T and TWTC. The Commission, therefore, should deny Qwest's Motion and refuse to accept the proposed Reply.

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