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BEFORE THE ARIZONA CORPORATION COMMISSION

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Arizona Corporation Commission

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IN THE MATTER OF QWEST
CORPORATION'S FILING AMENDED
RENEWED PRICE REGULATION PLAN.

DOCKET NO. T-01051B-03-0454

IN THE MATTER OF THE
INVESTIGATION OF THE COST OF
TELECOMMUNICATIONS ACCESS.

DOCKET NO. T-00000D-00-0672

**QWEST'S RESPONSE TO STAFF'S
MOTION TO STRIKE AFFIDAVIT OF
HARRY M. SHOOSHAN, III**

I. INTRODUCTION.

Qwest Corporation ("Qwest") respectfully submits the following Response to Staff's Motion to Strike the Affidavit of Harry M. Shooshan, III. Staff's motion has absolutely no basis in Arizona law or the facts of this case, and should be denied.

II. BACKGROUND.

Mr. Shooshan's affidavit was submitted with Qwest's February 25, 2004 Application for Rehearing in the above-captioned matter. Mr. Shooshan is a widely respected, independent expert in the field of telecommunications economics and regulatory policy. He has worked for and testified on behalf of both utility companies and state commissions. Staff employed Mr. Shooshan to testify in the previous rate proceedings during 2000 and 2001.¹ His work with the Commission ended in

¹ The factual background is further elaborated in the supplementary Affidavit of Harry M.

1 approximately April 2001. Staff has not hired or otherwise consulted with Mr. Shooshan
2 regarding the current proceedings.

3 Since that time, Qwest has retained Mr. Shooshan as an expert in numerous
4 dockets in Arizona and elsewhere, including in Arizona's TRO and Cost of Access
5 proceedings, as well as the Unfiled Agreements proceeding against Qwest.² Qwest has
6 offered Mr. Shooshan's affidavit in this matter, however, solely as a fact witness to
7 describe the previous proceedings in which he participated and his understanding of the
8 Price Cap Plan he initially drafted. Mr. Shooshan's affidavit is fully supported by
9 citations to the public record. Staff has now moved to strike Mr. Shooshan's affidavit,
10 but has not pointed out a single reference in the affidavit that could reasonably be
11 interpreted as being based on confidential information.

12 **III. ARGUMENT.**

13 Staff's assertion that Mr. Shooshan should be disqualified from testifying in this
14 litigation based on a conflict of interest is incorrect. Although Staff recites the basic test
15 to determine whether certain types of expert witnesses should be disqualified based on
16 past employment by an opposing party, Staff misapplies its own cited authorities and fails
17 to demonstrate any reason whatsoever why Mr. Shooshan should be disqualified in this
18 case. In any event, Staff's motion does not support an order disqualifying Mr. Shooshan

19 _____
20 Shooshan III attached as Exhibit A.

21 ² Mr. Shooshan filed Direct Testimony on behalf of Qwest in the Cost of Access docket on July
22 1, 2003, long before that docket was consolidated with the docket addressing renewal or
23 modification of the Price Cap Plan. *See In the Matter of the Investigation of the Cost of*
24 *Telecommunications Access*, Docket No. T-00000D-00-0672. Mr. Shooshan has also filed
25 Direct Testimony on behalf of Qwest in the Unfiled Agreements docket on March 7, 2003, and
26 in the TRO docket on January 9, 2004. *See In the Matter of Qwest Corporation's Compliance*
with Section 252(e) of the Telecommunications Act of 1996, Etc., Docket Nos.
RT-00000F-02-0271 and T-00000A-97_0238; *In the Matter of ILEC Unbundling Obligations as*
a Result of the Federal Triennial Review Order, Docket No. T-00000A-03-0369. It is important
to note that at no time did Staff object to Mr. Shooshan filing testimony on behalf of Qwest in
these dockets until its recent motion.

1 from appearing as a witness in these proceedings on matters unrelated to his prior work
2 with Staff.

3 **A. Staff has failed to identify any potentially confidential or privileged**
4 **information that has been (or even could be) revealed by Mr.**
5 **Shooshan.**

6 A claim of privilege generally must be made expressly, and supported by a
7 description of the matters over which the privilege is claimed “sufficient to enable other
8 parties to contest the claim.” Ariz. R. Civ. P. 26.1(f); *see also* Ariz. R. Civ. P. 45(d)(2).
9 Here, Staff has only vaguely asserted that Mr. Shooshan was present at “confidential”
10 meetings, and that attorneys were present at “almost all” of these meetings. Staff’s
11 Motion at 2. Thus, on its face Staff’s description of the allegedly privileged
12 communications appears to include at least some meetings at which no lawyers were
13 present. Moreover, Staff’s description does not identify any specific type of information
14 that was discussed at these meetings, other than to invoke the vague concept of
15 “strategy.” Under these circumstances, Qwest cannot fairly evaluate and contest the
16 alleged purpose and confidential treatment of specific communications.

17 By the same token, Staff has not pointed out (and cannot point out) any specific
18 confidential or privileged information actually contained in Mr. Shooshan’s affidavit. A
19 brief review of Mr. Shooshan’s affidavit shows that he has cited publicly available
20 sources for virtually all of his information. He did not make any statement that could
21 remotely be construed as revealing Staff’s “strategy” in the 2000 rate proceedings. He
22 has not testified in his affidavit as to any discussions he had with Staff or counsel for
23 Staff. Moreover, he has not attempted to bolster his interpretation of the Agreement and
24 Plan by suggesting that his knowledge is generally based on access to confidential
25 information.
26

1 Rather, Mr. Shooshan's affidavit focuses on his understanding of the Price Cap
2 Plan as a drafter and as a participant in public proceedings leading to the adoption of the
3 Plan. Statements made by Mr. Shooshan at Commission Open Meetings are not
4 confidential communications subject to either the attorney-client or work-product
5 privilege. Similarly, Mr. Shooshan's understanding of the Price Cap Plan, which he
6 drafted and explained to the Commission again in public Open Meetings, is not subject to
7 these same privileges. Under these circumstances, it is clear that Staff is not seeking to
8 protect specific privileged communications, but rather is trying to suppress Mr.
9 Shooshan's testimony because Staff does not agree with his independent recollections.

10 **B. Staff has failed to show any basis for believing that either the attorney**
11 **client privilege or the work-product privilege applies.**

12 The attorney client privilege only applies to communications between the attorney
13 and the client, not to the underlying facts at issue. A.R.S. § 12-2234(C) *Samaritan*
14 *Foundation v. Goodfarb*, 176 Ariz. 497, 501, 862 P.2d 870, 874 (1993). In order to be
15 treated as privileged, "the communication must be made to or by the lawyer for the
16 purpose of securing or giving legal advice, must be made in confidence, and must be
17 treated as confidential." *Id.*; A.R.S. § 12-2234(B). Staff's claim of privilege concerning
18 any information Mr. Shooshan might possess necessarily fails each element of this test.

19 Staff's accusations fail to meet the burden of proof required under their own case
20 law, and are posed in non-specific, hypothetical language (e.g., "Mr. Shooshan is,
21 however, using information against the Staff that he *likely* derived in large part"
22 Staff's Motion at 1 (emphasis added). Mr. Shooshan filed extensive testimony about the
23 Price Cap Plan and made numerous public statements at the Open Meeting on the Price
24 Cap Plan. Mr. Shooshan was, in fact, subject to vigorous cross-examination during the
25 proceedings conducted on the adoption of the Price Cap Plan. Consequently, it defies
26 logic to suggest that his affidavit constitutes an unfair breach of what amounts to illusory

1 “confidences” three years after the original proceedings concluded.

2 **C. Staff has failed to show a disqualifying conflict of interest.**

3 Mr. Shooshan was not acting as an attorney in this case, and is therefore not
4 subject to attorney disqualification rules, as the cases cited by Staff clearly recognize.
5 “The expert disqualification standard must be distinguished from the attorney-client
6 relationship because experts perform very different functions in litigation than attorneys.
7 Experts are not advocates in the litigation but sources of information and opinions.”
8 *English Feedlot, Inc. v. Norden Laboratories, Inc.*, 833 F.Supp. 1498, 150 (D. Colo.
9 1993) (citations omitted); *see also Mitchell v. Wilmore*, 981 P.2d 172, 175-76 (Colo.
10 1999).

11 Qwest agrees with Staff that the party seeking to disqualify an expert bears the
12 burden of showing that (1) it was objectively reasonable for the first party who retained
13 the expert to believe that a confidential relationship existed; and (2) that the first party
14 actually disclosed confidential information to the expert. *English Feedlot*, 833 F.Supp. at
15 1502. Again, as noted above, Staff has not identified any specific information that was
16 shared with Mr. Shooshan.³ Moreover, Staff has failed to specify why it believes the
17 information in Mr. Shooshan’s affidavit is being used “against the Staff.” Staff’s Motion
18 at 2 & 3. Mr. Shooshan has simply testified as to his understanding of the prevailing
19 interpretation of the Settlement Agreement and the Plan at the time they were adopted.
20 There is certainly no rule providing that a witness who has accepted compensation from
21 one party can only offer testimony in agreement with that party’s subsequent statements.
22 Qwest and Staff disagree about the proper interpretation of the Agreement and Plan, but

23 _____
24 ³ It should also be noted that Staff has known for many months that Mr. Shooshan is working
25 with Qwest on Arizona regulatory matters. If Staff did have any basis for disqualifying Mr.
26 Shooshan from working with Qwest, which it does not, Staff should have put its concerns
forward much sooner. Under the circumstances, Staff should be deemed to have waived the
superficial appearance of conflict that it belatedly seeks to raise.

1 Qwest has so far operated on the belief that all parties are trying in good faith to
2 determine the legitimate and fair meaning of the terms set forth in the Agreement and
3 Plan. Mr. Shooshan's testimony furthers that goal, and does not operate "against" the
4 ultimate interest of any party.

5 **III. CONCLUSION.**

6 For the reasons stated above, Staff's motion to strike Mr. Shooshan's affidavit
7 must be denied.

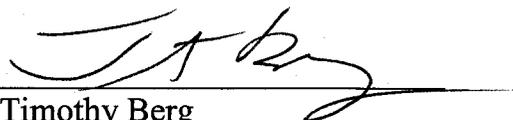
8 RESPECTFULLY SUBMITTED this 24th day of April, 2004.

9

FENNEMORE CRAIG

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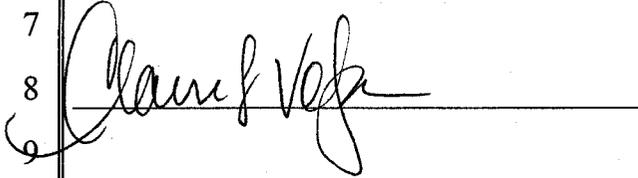
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- 18 Opex Communications, Inc.
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- 21 Stockton, CA 95207
- 22 The Phone Company/Network Services of New Hope
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- 24 Rio Virgin Telephone Co.
Rio Virgin Telephone and Cablevision
- 25 PO Box 189
- 26 Estacada, OR 97023-000

- 1 Rhythm Links, Inc.
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- 3 San Carlos Apache Telecommunications Utility, Inc.
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- 5 South Central Utah Telephone Association, Inc.
6 PO Box 226
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- 7 Southwestern Telephone Co., Inc.
8 PO Box 5158
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12 6860 W. 115th, MS:KSOPKD0105
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- 13 Touch America
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16 600 N. Second Avenue
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18 1875 Lawrence Street, Room 1575
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EXHIBIT

A

4. It is my understanding that Qwest will oppose the Motion to Strike as lacking sufficient legal grounds. In this affidavit, I address the allegations by Staff that I have somehow abused my confidential relationship with the Staff. Nothing could be further from the truth. It is telling to me that the Staff Motion makes sweeping claims about my affidavit but provides no specific references to any particular statement made therein as a breach of confidence. There is a simple explanation for this omission in the Staff Motion—my affidavit does not, in fact, rely on any confidential information, internal work-product, discussion of strategies or other information that could appropriately be considered covered by attorney-client privilege or the work-product doctrine. For example, I did not participate in any of the settlement discussions between the Staff and Qwest. I was briefed by both parties once a settlement was reached and, along with Staff and Qwest, met with other parties in the case to brief them and solicit their participation in the settlement. Thus, I was not privy to the internal settlement discussions between the Staff and Qwest on which Staff suggests I am somehow relying. Rather, my affidavit is grounded on what I recall from my active participation in this case as a testifying witness whose primary responsibilities were to assist in the preparation of the Price Cap Plan, help explain it to other parties and defend it before the Commission. I expressed many of the views contained in my affidavit on the public record at the time. What Staff's motion boils down to, in my opinion, is that we have different recollections of the meaning and intent of certain key elements of the Price Cap Plan. I cannot explain why the Staff now recalls certain things differently than I do or now chooses to construe the Price Cap Plan in the way they do, especially where their position is unsupported by either the structure of the Plan itself or by the record leading up to its adoption. These differences will be up to the Commission—or perhaps ultimately, the courts—to resolve.

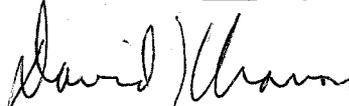
5. Finally, I take issue with the suggestion that Qwest has employed me simply to “bolster its Petition for Rehearing and Stay in this case.” While it is certainly true that I am appearing in this case because of my previous involvement as a consultant to the Commission in developing an alternative regulation plan for Qwest and not in the role of an expert, the Staff is well aware of the fact that SPR has been engaged for some time by Qwest to work on a variety of state regulatory matters throughout its region. In fact, I have appeared twice previously before the Commission as an expert on behalf of Qwest. I also filed testimony for Qwest in the now-suspended proceeding to implement the TRO. It is quite natural—and not at all inappropriate—given this consulting arrangement—for Qwest to ask me to provide an affidavit based on my recollection of events and my understanding of various provisions relating to the existing Price Cap Plan.

DATED this 23rd day of April, 2004.



Harry M. Shooshan II

SUBSCRIBED AND SWORN TO before me this 23 day of April, 2004



Notary Public

My Commission Expires:

DAVID J. CHARRON, Notary Public
My Commission Expires May 7, 2008
