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BEFORE THE RECEIVED ARIZONA CORPORATION COMMISSION

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2005 APR 28 P 4: 26
AZ CORP COMMISSION
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Arizona Corporation Commission
DOCKETED
APR 28 2005

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IN THE MATTER OF QWEST
CORPORATION'S PERFORMANCE
ASSURANCE PLAN

DOCKET NO. T-01051B-03-0859

**QWEST CORPORATION'S OPENING
BRIEF**

Qwest Corporation ("Qwest") hereby submits its opening brief on the single remaining issue in the initial Six Month Review of the Qwest Performance Assurance Plan ("QPAP"). The issue involves the appropriate mechanism for discussing changes to the Performance Indicator Definitions ("PIDs") and the QPAP. Specifically, the issue is whether a voluntary collaboration, known as Long Term PID Administration or LTPA, should be revived and Qwest ordered to participate in it, or whether existing mechanisms continue to provide sufficient safeguards.

Statement of Facts

1. Based on activities underway prior to the grant of Arizona's 271 authority in December, 2003, Qwest, some CLECs and the Arizona Corporation Commission Staff ("Staff") participated in a series of negotiations to resolve issues arising around the PID and additionally addressed the QPAP in workshops. The PID and QPAP are contained in Exhibits B and K, respectively, of the Statement of Generally Available Terms and Conditions

1 (“SGAT”). Separately, Qwest, some CLECs and staffs of several state
2 commissions in Qwest’s local service region negotiated the PID and PAPs.
3 Subsequently, the PID for Arizona and the PID for the other states were
4 merged.

5 2. During late 2003 and early 2004, CLECs in the industry, Qwest and some state
6 staff members continued to participate in negotiations on possible
7 modifications to PIDs. These negotiations, referred to as LTPA, produced
8 agreements on some issues and resulted in impasse on several other issues.
9 Agreements were filed with the state telephone regulatory commissions that
10 were to be incorporated into the various state specific QPAPs by operation of
11 their QPAP structures or provisions.

12 3. LTPA participants typically met once a week to discuss issues; twenty-one (21)
13 LTPA meetings were held, five (5) of which were special meetings to discuss
14 one particular measurement not currently included in the PID or the QPAP.

15 4. Commission Staff was present for two¹ of the 18 meetings held after December
16 1, 2003, and the Arizona Corporation Commission (“Commission”) chose not
17 to participate in funding the LTPA facilitator.

18 5. The Arizona QPAP allows modifications to occur through the six month review
19 process.²

20
21 ¹ Direct Testimony of Mr. Dean Buhler, filed January 21, 2005.

22 ² Section 16 of the Arizona QPAP reads: 16.0 Reviews 16.1 Every six (6) months, Qwest, CLECs, and the
23 Commission shall review the performance measurements to determine whether measurements should be added,
24 deleted, or modified; whether the applicable benchmark standards should be modified or replaced by parity
25 standards; and whether to move a classification of a measure to High, Medium, or Low or Tier-1 to Tier-2. Criteria
26 for review of performance measurements, other than for possible reclassification, shall be whether there exists an
omission or failure to capture intended performance, and whether there is duplication of another measurement. The
first six-month period will begin upon the FCC’s approval of Qwest’s 271 application for the state of Arizona. Staff
shall seek the mutual consent of the parties to any proposed changes. Notwithstanding the limitations set forth
above, Qwest acknowledges that the Commission reserves the right to modify the PAP including, but not limited to
performance measurements, penalty amounts, escalation factors, audit procedures and reevaluation of confidence
levels, at any time as it sees fit and deems necessary upon Commission Order after notice and hearing.

- 1 6. The language of the Arizona QPAP acknowledges the present authority of the
- 2 Commission to modify the QPAP, after notice and hearing, outside the six
- 3 month review.
- 4 7. LTPA reached an end in May, 2004, when the facilitator completed his impasse
- 5 recommendations and CLECs and Qwest submitted statements regarding their
- 6 experiences and recommendations.
- 7 8. The Arizona QPAP does not address the existence of the LTPA, and contains
- 8 no language allowing agreements to be incorporated without the approval of the
- 9 ACC.
- 10 9. When Qwest's 271 application was pending approval, even though several
- 11 issues had been referred to the collaborative, Staff agreed that there was no
- 12 legal requirement or justification for withholding that approval pending
- 13 establishment of LTPA.³
- 14 10. Per Section 16 of the QPAP, a review was to begin upon approval by the
- 15 Federal Communications Commission ("FCC") of Qwest's 271 application in
- 16 Arizona. Coincidentally, this First Six Month review was opened about the time
- 17 that the Second Six Month review case was concluding in the state of
- 18 Washington. Many of the issues initially raised in this Arizona review were
- 19 resolved in the same manner as agreed upon in the Washington proceeding and
- 20 filed with each of the other 13 states in the Qwest local region for
- 21 implementation.
- 22 11. The participating CLECs (AT&T, MCI, Eschelon and Covad) and Qwest
- 23 successfully negotiated and closed issues as a result of both the Six Month
- 24
- 25

26 ³ *In the Matter of U S West Communications Inc's Compliance with Section 271 of the Communications Act of 1996, Notice of Filing, Staff's Proposed Order on Checklist Items 1 and 2, paragraph 21, filed August 22, 2003.*

1 reviews in Arizona and Washington. The Stipulation incorporating the
2 agreements reached was filed with the ACC on November 1, 2004.

3 12. During this six month review, the Commission issued a decision approving the
4 agreed upon QPAP changes.⁴

5 13. While the Stipulation stated that Qwest and the CLECs agreed "to support the
6 Stipulation and bring no additional issues forward during this First 6 Month
7 Review"⁵, the Staff elected to pursue one issue.

8 14. Nothing in the testimony or documents indicates that CLECs' ability to
9 compete is adversely affected by the status quo, including absence of the LTPA
10 forum.

11
12 Statement of Issues

- 13
14 1. Has Staff met the burden of the Stipulation to pursue the issue and justify the
15 imposition of something not presently included in the QPAP?
16 2. What is the standard by which the Commission may newly require Qwest to
17 participate in a voluntary forum that refines and seeks implementation of
18 service quality measurements?
19 3. What is the significance for the issue in this case that CLECs and Qwest agreed
20 to withdraw the issue unless Staff chose to pursue it?
21 4. What evidence promotes the need to formally reestablish an industry
22 collaborative process or otherwise demonstrates that the status quo, without
23 LTPA, fails to prevent backsliding?
24

25 ⁴ Arizona Corporation Commission Order, Docket No.T-01051B-03-0859, Decision No. 67575, effective February
26 15, 2005.

⁵ *Stipulation of the Parties*, Docket No.T-01051B-03-0859, filed 11/01/2004, page 2.

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Summary of Argument

The QPAP was implemented in Arizona and approved by the Commission as a mechanism to prevent Qwest from backsliding in performance provided to CLECs with regard to Qwest's Section 271 obligations. Neither Staff, which requested this proceeding and then failed to file testimony in it, nor the single CLEC that filed testimony has shown any reason why the current language allowing QPAP modifications during the six month review provides insufficient protection for CLECs to compete effectively. Nor have they shown that there is a deficiency with the existing QPAP language or the PID management process that Qwest currently follows. The Commission has finished the substantive part of the first Six Month QPAP Review for Arizona, and significant changes to the QPAP were ordered and adopted as a result of that review.⁶ The smooth operation of the initial Six Month QPAP Review amply demonstrates the sufficiency of the existing terms of the QPAP. No additional processes are required.

Not only are no additional processes needed—it is important for the Commission to consider the negative consequences of any decision to order a revival of LTPA. If LTPA is a voluntary forum, ordering the companies to participate would be an empty act. Further, the Commission lacks the authority to manage the business affairs of the companies it regulates in such a manner.

On the other hand, if LTPA is to be operated as a compulsory and integral part of the QPAP review process, the record is utterly devoid of what that role may be. To the extent that the Commission orders LTPA, the Commission would necessarily have to amend the QPAP review process, and to specify the scope and role of LTPA. In doing so, the Commission runs in peril of unconstitutionally delegating its regulatory authority to another body.

⁶ *Supra* note 4.

1 If the Commission is not being asked to make LTPA a part of the QPAP review, then the
2 notion of reviving LTPA has no rightful place in this proceeding, which is limited to the required
3 six month review of the QPAP.

4 During LTPA, there was little chance for meaningful mediation, because the
5 circumstances caused the meetings to focus on advocacy and positioning of issues for regulatory
6 litigation rather than carrier-to-carrier resolution of issues in a business setting. Qwest's current
7 PID Management Process affords that business opportunity. Additionally, the state commission
8 Six-Month Reviews continue to be available for regulatory litigation.

9 The Commission should take no further action and should close this Six Month Review.

10

11

Argument

12

13 1. Staff and Covad have failed to meet their burden to justify imposition of an
14 additional process for QPAP modifications.

15

16 Although Covad has styled the issue as a question of whether Qwest's process should be
17 rejected, before reaching that question, the Commission must decide whether an additional
18 process such as LTPA should be required. No Commission order, controlling document, or law
19 currently requires Qwest to manage PID or QPAP modifications through participation in a
20 regional collaborative. Requiring such participation would be a new obligation unsupported by
21 any factual evidence demonstrating that a new obligation or process is warranted.

22

23 Pursuant to Procedural Orders issued on November 16, 2004 and December 21, 2004,
24 Staff and CLECs were to file their recommended process by December 10, 2004 and testimony
25 on March 25, 2005. The CLEC's existing testimony and filings have failed to show why an
26 additional process requirement for modifying the PIDs and QPAP should be established. As
noted, Section 16 of the QPAP does not require participation in a collaborative of any sort, or

1 even mention it. The QPAP language does allow for modifications⁷ through the six month
2 review process and need not be supplemented. The CLEC-described deficiencies in Qwest's
3 process fail to support a requirement that another process be utilized. Staff, for their part, did not
4 file a recommended process or file testimony. Covad's testimony has not met the burden of
5 proof necessary to amend the QPAP process. Assuming that Staff supports Covad's testimony,
6 Staff's case is apparently based on Staff's subjective opinion that what is provided in the QPAP
7 is somehow now insufficient to provide an appropriate mechanism for modifying the QPAP in
8 Arizona. That is inadequate justification and should be rejected. An objective standard requires
9 a review of the law, and marshalling of facts supporting a change from the status quo and
10 Commission authority.

11 While Covad correctly asserts that certain agreements were reached in LTPA, many of
12 those discussions started well before LTPA itself was established, and the agreements resulted
13 more from the 271 process than from LTPA. And though Covad argued that agreements were
14 the result of the LTPA forum, the reality is that the agreements were the result of discussions
15 between the parties regardless of LTPA.

16 Many solutions as to measurements and standards were reached during forums
17 established at the state level with state staff oversight through the six month reviews in
18 Washington and Arizona. But, should CLECs elect to pursue changes outside of those forums,
19 the PID Management Process exists as a business place for proposals, discussions, and
20 negotiations. The PID Management Process Qwest operates under currently, which is posted on
21 its wholesale website, and widely publicized to CLECs by Qwest, and which was filed by Qwest
22 in this docket on December 10, 2004, provides a process by which one or more CLECs, singly or
23 in groups, may bring PID or PAP issues forward in a business-to-business setting. Open to all
24 CLECs, it simply informs and clarifies how CLECs can contact Qwest about performance
25 questions and issues, and efficiently pursue resolution; it is not in conflict or inconsistent with

26 _____
⁷ *Supra* note 2.

1 any agreements or rules, and does not require CLECs to agree to or do anything. This process,
2 which Qwest submits is more efficient than a vague voluntary or quasi-regulatory forum, is
3 better equipped to deal with time sensitive items should those arise, as well.

4 Finally, those seeking to reinstitute LTPA must show a need. They have utterly failed to
5 do so. The facts do not point to a need that is not met; rather, there is clear proof to the contrary:
6 *In the nearly one full year since LTPA concluded, not a single carrier has approached state*
7 *commissions outside of a formal Six Month Review or pursued changes through the Qwest*
8 *process.* Thus, the question is not one of “continuing” with LTPA as it was, but is instead
9 whether Staff and Covad have proven with appropriate evidence that existing conditions justify
10 imposing a new required process in addition to what was contemplated by the QPAP.

11
12 2. Common sense militates against regulatory attempts to compel participation in a
13 voluntary forum, and an attempt to compel such participation would unlawfully
14 interfere with the management function of public service corporations.

15
16 The Commission is being asked to require Qwest’s participation in a forum that refines
17 and seeks implementation of service quality measurements already established and approved
18 through another proceeding. The nature and extent of that participation, exactly what power the
19 forum will have, and how it is organized, are not addressed by the CLECs. While the LTPA was
20 in existence, Qwest’s participation was strictly voluntary. Qwest respectfully asks the
21 Commission to consider the illogical nature of compelling Qwest to participate in a voluntary
22 endeavor. Beyond that, however, it simply is beyond the Commission’s power to take over the
23 management functions of the companies it regulates. Demanding that Qwest participate in a
24 reconstituted LTPA crosses that line.

25 The Commission may interfere with the management functions of a public service
26 corporation such as Qwest only to the extent that such authority has been specifically granted by

1 the Arizona Constitution or through implementing statutes. The Commission's powers do not
2 and can not exceed those derived from a strict construction of the Arizona Constitution and
3 implementing statutes.⁸ The Arizona Supreme Court has held that, absent specific authority
4 from those two sources, the Commission cannot interfere with the internal management affairs of
5 a public service corporation it regulates.⁹

6 In *Southern Pac. Co.*, the Arizona Supreme Court recognized that the Commission may
7 not cloak itself with the general power of management incident to ownership.¹⁰ Its order
8 requiring specific services was set aside in part because the Commission failed to offer any
9 legitimate constitutional or statutory authority requiring railroads to obtain Commission approval
10 prior to changing service schedules.¹¹

11 The Commission also argued that the legislature had granted it the authority to issue any
12 General Order that would allow it to "supervise and regulate every public service corporation in
13 the state and do all things, whether specifically designated in this title or in addition hereto,
14 necessary and convenient in the exercise of such power and jurisdiction."¹² The Arizona
15 Supreme Court disagreed, and held that the language of the statute was merely a confirmation of
16 the constitutional power already possessed by the Commission. The right to supervision and
17 regulation did not in and of itself grant additional powers to the Commission, and in *Southern*
18 *Pacific's* case, "the legislature has not given the Commission the right to rearrange petitioner's
19 train service without a judicial determination that the service so provided is inadequate."¹³

21 _____
22 ⁸ *Williams v. Pipe Trades Industry Program of Ariz.*, 100 Ariz. 14, 409 P.2d 720 (1966); *Tonto Creek Estates*
Homeowners Ass'n v. Arizona Corp. Com'n, 177 Ariz. 49, 864 P.2d 1081 (Ariz.App 1993).

23 ⁹ *Southern Pac. Co. v. Arizona Corp. Commission*, 98 Ariz. 339, 343, 404 P.2d 692, 694 (1965).

24 ¹⁰ *Id.* at 341, 693. In 1964, Southern Pacific Railroad Co. ("Southern Pacific") chose to eliminate two passenger
25 services. After issuing an Order to Show cause, the Commission issued Decision No. 35247 and ordered Southern
26 Pacific to restore the eastbound and westbound services. In its holding, the Court distinguished the Commission's
authority to regulate railroad service schedules as legislative in nature, and concluded that Decision No. 35247 was
not supported by Article XV, § 3 of the Arizona Constitution. *Id.* at 345-46, 404 P.2d at 696

¹¹ Decision No. 35247 was also vacated on procedural grounds for violation of due process.

¹² A.R.S. § 40-202(A).

¹³ *Id.* at 348, 698.

1 In *Phelps Dodge Corp. v. Arizona Elec. Power Co-op, Inc.*¹⁴, the Arizona Court of
2 Appeals recently followed *Southern Pacific Co.* by applying the same strict statutory
3 interpretation of A.R.S. § 40-202(A) as the Arizona Supreme Court had utilized. The Court
4 concluded that because the statute does not contain “any specific provision granting” the
5 Commission the specific authority to interfere with a utility’s management decision on how to
6 open access to distribution and transmission facilities, the Court of Appeals could not “discern
7 one.”¹⁵ The statute does not grant the Commission authority to interfere with the management
8 decisions of the utility, which is “beyond the clear letter of the statute.”¹⁶ This case supports a
9 broad reading of the “management discretion” limitation on the Commission’s authority. For the
10 Commission to not only mandate that Qwest meet service quality standards but to mandate that
11 Qwest participate in a voluntary forum as a way to refine and implement those standards
12 unlawfully infringes on Qwest’s management authority.

13
14 3. If the CLECs are asking that the LTPA be a made compulsory and integral part of
15 the Arizona QPAP Six Month Review process, the Commission would necessarily
16 have to amend the QPAP review process, and to specify the scope and role of the
17 LTPA. In doing so, the Commission runs in peril of unconstitutionally delegating
18 its regulatory authority to another body.

19
20 As has been noted by Qwest, LTPA as it was last incarnated was a voluntary forum. It
21 did not have the authority to make findings of fact or to adjudicate any issues. It had no official
22 status of any kind. LTPA was an adversarial and politically sensitive process; it neither
23 supported nor complemented the post-271 carrier-to-carrier competitive environment in Arizona.
24 No criteria were necessary to define issues before presenting them to the forum participants, no

25 ¹⁴ 207 Ariz. 95, 112, 83 P.3d 573, 590 (Ariz.App 2004).

26 ¹⁵ *Phelps Dodge Corp.* at 113, 591.

¹⁶ *Id.*

1 proof of a problem was required, many resources were regularly required but not efficiently
2 utilized and supported more adversarial relationships over working partnerships – LTPA was so
3 broken, it was not worth fixing. But, nothing in the way the six month review or other QPAP
4 related items function supports a finding that the QPAP is broken. The six month review process
5 is designed to address problems with the QPAP and has effectively done so; it is not broken and
6 does not call for an external process fix. After all, even Staff thought it unnecessary to require
7 it.¹⁷ Further, the Commission is not authorized to delegate its authority to an external process or
8 entity. The Commission can not delegate its public powers or duties to private persons over
9 which it has no control. The Commission’s powers do not exceed those to be derived from a
10 strict construction of the Arizona Constitution and implementing statutes.¹⁸ Therefore, because
11 no applicable constitutional provision or implementing statute confers upon the Commission the
12 authority to delegate its power in any instance, any delegation by the Commission to another
13 entity would be impermissible as unauthorized.¹⁹

14
15 4. The CLECs’ agreement to withdraw the issue supports a finding that the existing QPAP
16 language sufficiently prevents backsliding and should not be altered or supplemented
17 through an additional requirement.
18
19
20

21 ¹⁷ ACC Staff Proposed Order on issues arising from the July 2002 Supplemental Work Shop relating to Checklist
22 Items 1 and 2, Docket No. T-00000A-97-0238, filed August 19, 2003, page 7, lines 17-19.

23 ¹⁸ *Williams v. Pipe Trades Industry Program of Ariz.*, 100 Ariz. 14, 409 P.2d 720 (1966); *Tonto Creek Estates*
24 *Homeowners Ass’n v. Arizona Corp. Com’n*, 177 Ariz. 49, 864 P.2d 1081 (Ariz.App 1993).

25 ¹⁹ There is considerable case law confirming the prohibition against the delegation of constitutionally derived
26 powers by the state legislature. *State v. Marana Plantations, Inc.*, 75 Ariz. 111, 114, 252 P.2d 87, 89 (1953). It is
well settled in Arizona that the legislature may not delegate its authority to private persons over which it has no
supervision or control. *Industrial Com’n v. C&D Pipeline*, 125 Ariz. 64, 66, 607 P.2d 383, 385 (App. 1980).
Furthermore, with respect to boards or commissions, the power granted to a governing body cannot be subdelegated,
or transferred from the heads of agencies to their subordinates, unless specifically authorized by legislation. *Peck v.*
Board of Educ. of Yuma Union High Sch., 126 Ariz. 113, 115, 612 P.2d 1076, 1078 (App. 1980).

1 Mr. Buhler's testimony and the Stipulation indicate the fact that the CLECs had agreed to
2 withdraw the LTPA issue and that it would not be raised unless Staff chose to pursue it. In the
3 nearly five months since that filing was made, Staff has not filed any support for their proposal to
4 pursue LTPA other than to state in a procedural conference that the issue is important to the
5 CLECs. The Arizona QPAP has no clear or implied obligation requiring anyone, including
6 Qwest, to participate in a regional collaborative. Implementing such a requirement or some
7 similar process represents a change for which no party has provided sufficient evidence to
8 support. Nonetheless, Staff has indicated it is "pursuing" the issue and that the CLECs' written
9 agreement should be disregarded because Staff has somehow concluded that the CLECs really
10 didn't want to choose to compromise.

11 Qwest submits, however, that even if CLECs wanted to pursue the issue rather than
12 compromise, the testimony presented does not point to any backsliding that resulted from the
13 absence of LTPA. Only one competitor has found reason to submit testimony on the topic in this
14 review since the Stipulation was filed. The absence of industry participation and the content of
15 the Stipulation should be given considerable weight.

16 At a minimum, the Commission should take the signed Stipulation into account in
17 weighing the evidence. If the CLECs were content to let the LTPA issue drop, a reasonable
18 inference is that the LTPA issue is not very critical.

19

20 5. No evidence promotes the need to reestablish a collaborative or otherwise indicates
21 that the PID Management Process fails to prevent backsliding.

22

23 As explained by Mr. Buhler, the PID Management Process offers a comprehensive
24 alternative for CLECs to utilize to pursue and protect their interests should they find the six
25 month review process provided in the QPAP insufficient. The process affords parties an initial
26 opportunity to reach agreement, allows freedom to address issues as they arise, and has no fixed

1 timeframe. Communications may flow freely among the parties as they each remain effectively
2 in control of their own destinies throughout the discussions. The process provides flexibility
3 with final approval ultimately received through state commission filings. The PID Management
4 Process and the six month reviews allow efficiency in the administration of performance
5 measurements and modifications to the QPAP; however, the only required mechanism to modify
6 the QPAP is and should remain within the four walls of the document itself – the six month
7 review process.

8
9 6. LTPA was a flawed process.

10
11 Even if the Commission should find that another requirement is warranted, the LTPA list
12 of inadequacies do not merit fixing. LTPA is an irreparably flawed and an inappropriate process.
13 As explained in Mr. Buhler's testimony, the LTPA impasse governance document and impasse
14 process were not binding on the parties. While the facilitator provided input, no state
15 commission(s) were required to adopt that input. The documentation only contemplated that in
16 the event *agreements* were reached they be presented to the Commissions for adoption. Disputes
17 did not require resolution in that forum and still required Commission resolution rather than just
18 approval. Impasse documents submitted by the parties and the recommendation of the facilitator
19 were merely advisory and without binding weight or authority. LTPA outlived its usefulness and
20 should not be revived for any reason.

21
22 7. No other state has compelled mandatory participation in LTPA.

23
24 No state has ordered Qwest or CLECs to participate in a mandatory regional collaborative
25 to address possible changes to PIDs and the QPAP. In fact, the question has been raised by
26 CLECs in only one state, which removed it from the issues for resolution in the six month

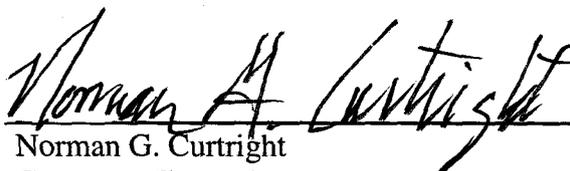
1 review. The LTPA issue arose before the Washington Utilities and Transportation Commission.
2 There, the ALJ Washington ruled that LTPA was not properly before her in a QPAP six month
3 review.²⁰
4

5 CONCLUSION

6 Qwest submits that based on the evidence, the Commission should find that no
7 modification to the QPAP is necessary, that voluntary processes should remain strictly voluntary,
8 and the QPAP six-month review process remain unchanged.
9

10 RESPECTFULLY SUBMITTED April 28, 2005.

11 QWEST CORPORATION

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26 ²⁰ Washington Second Six Month Review Pre-Hearing Transcript, page 97, lines 10-22 (June 28, 2004)

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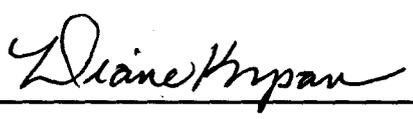
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