

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLORADO**

Civil Action No. 04-cv-2042-LTB-OES

**NELSON B. PHELPS,**

Plaintiff,

v.

**QWEST EMPLOYEES BENEFIT  
COMMITTEE**

Defendant.

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**DEFENDANT'S RESPONSE TO PLAINTIFF'S MOTION TO COMPEL  
DISCOVERY AND FOR IMPOSITION OF PENALTY**

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Defendant Qwest Employees Benefit Committee ("Defendant" or "Qwest"), by and through undersigned counsel, hereby responds to Plaintiff's Motion to Compel Discovery Responses and for Imposition of ERISA 502(c)(1)(B) Penalty ("Plaintiff's Motion"):

**I. INTRODUCTION**

This case involves the novel question of whether portfolio specific investment guidelines must be provided to plan participants, such as Plaintiff, pursuant to § 1024(b)(4) of the Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1001 *et seq.* ("ERISA"). Plaintiff, Nelson Phelps ("Phelps") made a request to the plan administrator of the Qwest Pension Plan, the Employees Benefit Committee ("EBC") on January 9, 2004<sup>1</sup> for documents including the "investment policy guidelines or blueprint

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<sup>1</sup> Plaintiff made a prior related request on August 15, 2003 seeking explanations for a number of investment decisions, including a decision to invest in a put option in October 2001. (See Pl.'s Compl. ¶

used in the design and implementation of the Qwest Pension Plan investment program in effect during year 2001.” See Pl.’s Compl. ¶ 17.<sup>2</sup> Thereafter, in April 2004, Plaintiff’s counsel submitted another request, this time for a copy of the U S WEST Trust Investment Proxy Voting Policy, and any successor policies. Qwest responded to both of these requests by indicating that the investment policy guidelines and proxy voting policies are not among the very limited category of documents ERISA § 1024(b)(4) requires a plan to produce to its participants and beneficiaries. See Pl.’s Compl. ¶¶ 18, 22.

Ten months after submitting his request for the trust investment guidelines, in October 2004, Plaintiff filed this action seeking investment policy guidelines and proxy voting policies. After Plaintiff rejected Qwest’s proposal in February 2005 to follow an expedited method that would have afforded early resolution of whether the portfolio guidelines and proxy voting policy were subject to production,<sup>3</sup> Qwest promptly filed a motion for summary judgment at the conclusion of the six month discovery period requested by Plaintiffs.<sup>4</sup> On December 2, 2005, Judge Babcock ruled on Qwest’s Motion for Summary Judgment holding that the proxy voting guidelines did not have to be

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14). Plaintiff also requested copies of a number of documents relating to the Plan: financial statements, Form 5500 exhibits, 2002 annual report, Plan Trust Document and amendments, and governing Plan documents and amendments. (See Pl.’s Compl. ¶ 14). Qwest provided a lengthy response answering Plaintiff’s questions about specific investments, including the put option. Specifically, Qwest explained that the put option was purchased in October 2001 to protect against possible large declines in the equity markets in which the Plan was invested immediately after the terrorist attacks of September 11, 2001. Qwest also agreed to provide the requested documentation. (See Pl.’s Compl. ¶ 15)

<sup>2</sup> Plaintiff’s asserted reason for requesting the investment policy guidelines was to determine the investment policy criteria against which the propriety of the put options investment was determined and approved. See Pl.’s Compl. ¶¶ 17.

<sup>3</sup> See Scheduling Order, section 9 at p. 13.

<sup>4</sup> During this period, Plaintiff issued one set of discovery requests, a portion of which are at issue here, requesting that Qwest produce the documents that were in dispute and conducted no further discovery.

produced, but that the portfolio specific guidelines and the Qwest Derivatives Policy did. December 2, 2005 Order on Summary Judgment at 8-9. (“Order”).<sup>5</sup>

On December 15, 2005, acknowledging the Court’s Order, Defendant provided Plaintiff with the 2001 and presently effective Derivatives Policy, the policy that governs the put option investment about which Plaintiff has expressed concern. See December 15, 2005 letter from Elizabeth I. Kiovsy to Curtis Kennedy, attached as Exhibit A. Then on December 27, 2005, after compiling and reviewing the portfolio specific guidelines and notifying investment managers that documents would be produced, Defendant provided Plaintiff with the portfolio specific guidelines in effect during 2001 and presently in effect, eliminating the names of the specific portfolio manager, but providing those names on a separate list.

Within less than thirty days following entry of the Court’s Order, Defendant has complied fully with both the letter and the spirit of that Order by providing Plaintiff with these documents in a timely manner. Plaintiff’s Motion, which is an attempt to enforce the Court’s Order through the discovery process, is therefore unnecessary and should be denied and no penalties should be assessed against Defendant.

## **II. PLAINTIFF’S MOTION TO COMPEL DISCOVERY SHOULD BE DENIED AS MOOT**

Because Qwest has provided Plaintiff with all documents to which he is entitled, Plaintiff’s Motion should be denied as moot. Plaintiffs’ Motion seeks to compel

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<sup>5</sup> The Order, in fact, simply denied Qwest’s motion for summary judgment as to the Derivatives Policy and the portfolio specific guidelines, rather than affirmatively ordering documents to be produced. The Court, in addition, assumed without deciding that the obligation to produce documents under which the pension plan is operated is limited to documents presently in effect, not prior versions of such documents. Order at 8. The Court simply noted that Qwest had not produced the recent version and left open the specific issue of the obligation to produce prior versions of the Derivatives Policy and portfolio guidelines. The documents Qwest has provided to Plaintiff therefore go beyond those the Court held were subject to disclosure under ERISA section 1024(b)(4).

responses to Plaintiff's First Set of Interrogatories and First Request for Production of Documents ("Plaintiff's Discovery Requests"), Interrogatory No. 3 and Document Request No. 2, served on January 21, 2005. Plaintiff's Interrogatory No. 3 and Qwest's Response are as follows:

**INTERROGATORY NO. 3.** Identify the authors of each version of the Plan's Investment Policy and Investment Guidelines drafted, created and used during the period 1999 to the present, stated [sic] the date the document was drafted and the date is [sic] was adopted or approved for the PLAN. This request for documents includes the documents that are the subject matter of Plaintiff's First Claim for Relief in the Complaint.

**QWEST'S RESPONSE:** Defendant objects to Interrogatory No. 3 on the grounds that it is overly broad by time frame, is vague and ambiguous and seeks information that is not relevant and not reasonably calculated to lead to the discovery of admissible evidence. Without waiving said objections, and specifically reserving same, Defendant responds as follows:

Plaintiff's First Claim for Relief asks as, as does this interrogatory, for the Plan's "Investment Policy and Investment Guidelines." The Qwest Pension Plan does not have a Statement of Investment Policy or other comparable "Investment Policy Guidelines" and therefore, there are no authors or drafting or adoption dates to identify.

Plaintiff's Document request No. 2 sought production of the Plan's Investment Policy Guidelines as follows:

**DOCUMENT REQUEST NO. 2:** A copy of each version of the PLAN's Investment Policy Guidelines drafted, created and used by PLAN fiduciaries during the period 1999 to the present. This request for documents includes the documents that are the subject matter of Plaintiff's First Claim for Relief in the Complaint.

**QWEST'S RESPONSE:** Defendant objects to Request for Production No. 2 on the ground that it is overly broad by time frame, is vague and ambiguous and seeks information that is not relevant and not reasonably calculated to lead to the discovery of admissible evidence. Without waiving said objections and specifically reserving same, Defendant states that the Qwest Pension Plan does not have a Statement of Investment Policy or a comparable "Investment Policy Guideline."

Qwest served its Response to Plaintiff's Discovery Requests on March 28, 2005. Plaintiff took no action to compel discovery, or to even discuss Defendant's responses

until December 5, 2005, when Plaintiff demanded production by December 12, and without further discussion filed the present Motion to Compel. Plaintiff is obviously using this Motion to Compel as an alternative to moving to enforce the Court's Order.

Pursuant to the Court's Order, Plaintiff is entitled to the present version of the Derivatives Policy and the presently in effect portfolio specific guidelines. Order at 8-9. Qwest has produced the Derivatives Policy in effect in 2001, the present version of that policy and an exception to the 2001 policy. Exhibit A. Similarly, Qwest has produced both the portfolio specific guidelines in effect during 2001 and in effect at present.<sup>6</sup> The Derivatives Policies and the portfolio specific guidelines as produced by Qwest are more comprehensive than the documents the Court held were required to be produced under ERISA. To the extent that Plaintiff's Discovery Requests seek information beyond that which Qwest has produced, such information (for example, guidelines in effect prior to 2001 and the name of the person who drafted the guidelines) is legitimately subject to the objections asserted by Qwest in March 2005 and no additional production should be required.

Plaintiff's Motion moreover accuses Qwest of being "somewhat dishonest" in responding to discovery, claiming that only during summary judgment briefing did Qwest reveal the existence of several portfolio specific guidelines rather than one overarching Statement of Investment Policy. Motion to Compel at 2-3. Plaintiff is simply wrong. As early as February 2005, more than a month before responding to Plaintiff's Discovery Requests, Qwest volunteered in its Initial Rule 26(a) Disclosure Statement the existence of "portfolio specific investment guidelines (these are multiple separate documents)." Defendant's Initial Disclosure Statement at 3 (attached hereto as Exhibit B). In addition, Qwest proposed in the Scheduling Order a process by which it would specifically identify

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<sup>6</sup> Qwest redacted the name of the portfolio manager from the guidelines and provided all portfolio managers' names on a separate list for confidentiality reasons.

all documents potentially responsive to Plaintiff's demand, would submit the documents to the Court for in camera inspection, and within 30 days Plaintiff could file a motion on whether the identified documents should be produced pursuant to ERISA § 1024(b)(4). Plaintiff refused to agree to this proposal, Scheduling Order, section 9 at 13-14, and discovery ensued.

**III. GIVEN THE NOVEL LEGAL ISSUES INVOLVED IN THIS CASE  
AND QWEST'S EFFORTS TO EXPEDITE RESOLUTION,  
NO PENALTY SHOULD BE IMPOSED.**

Although Plaintiff now claims that Qwest should be subject to penalties in the amount of \$74,030.00, Plaintiff not only waited 10 months to bring this action, but then refused to engage in a simple process proposed by Defendant to efficiently resolve the dispute, which delayed resolution of this matter for at least an additional six months. Qwest was not simply being obstructive in refusing to produce portfolio specific investment guidelines. As Plaintiff's Counsel recently explained in an open letter posted on the Association of U S West Retirees ("AUSWR") website,

This update concern the *Phelps v. Qwest Employees Benefit Committee* case pending in Denver Federal Court (the ERISA Disclosure case) .... Chief Judge Babcock ruled that Qwest does *not* have to disclose the requested proxy voting guidelines, as those matter are handled by outside investment managers and Qwest does not dictate the terms of those polices. However, with respect to the more important issue, Chief Judge Babcock ruled Qwest *must turn over* the several investment policies/guidelines that are portfolio specific for the pension plan. **This is an important ruling. No other retiree group has made such a legal challenge. Certainly, there has been no other case like this one filed anywhere within the federal courts making up the 10th Circuit Court of Appeals (i.e., Colorado, Kansas, New Mexico, Oklahoma, Utah and Wyoming)....**

(emphasis in bold supplied; Attached hereto as Exhibit C).

Given the admitted novelty of the legal issues regarding the interpretation of section 1024(b)(4), this Court should not impose penalties pursuant to ERISA. The imposition of

a penalty here would only serve to cow plan administrators in the future into producing documents, regardless of whether they are subject to production under section 1024(b)(4), in order to avoid protracted litigation and ultimately significant penalties such as Plaintiff seeks here.

Penalties are subject to ERISA §1132(c)(1), which provides as follows:

Any administrator . . . who fails or refuses to comply with a request for any information which such administrator is required by this subchapter to furnish to a participant or beneficiary (unless such failure or refusal results from matters reasonably beyond the control of the administrator) . . . within 30 days after such request *may in the court's discretion* be personally liable to such participant or beneficiary in the amount of up to \$110 a day from the date of such failure or refusal, and the court may in its discretion order such other relief as it deems proper.

29 U.S. §1132(c)(1) (emphasis supplied).

The Court has wide discretion in deciding whether to impose a statutory penalty. The Tenth Circuit in Deboard v. Sunshine Min. & Refining Co., 208 F.3d 1228, 1244 (10th Cir. 2000), held that in exercising discretion whether to award penalties under section 1132 for violation of section 1024(b)(4), a court may consider a variety of factors including defendants good faith and lack of prejudice to plaintiff. Following Deboard, Judge Kane in Cytrymbaum v. The Employee Retirement Plan of Amoco Corp., 338 F. Supp. 2d 1187, 1193-94 (D.Colo. 2004), awarded no penalty for the plan administrator's clear violation of section 1024(b)(4) in failing to produce retirement plan documents for 150 days. The Court declined to award the statutory penalty because of a lack of bad faith by defendant and a lack of prejudice to plaintiff evidenced by plaintiff's failure to promptly file a claim for benefits and a subsequent law suit. See also, e.g., Sullivan v. Raytheon Co., 262 F.3d 41, 52 (1<sup>st</sup> Cir. 2001) (affirming district court's decision not to impose penalties for violation of ERISA disclosure obligations); Demery v. Extebank

Deferred Compensation Plan, 216 F.3d 283, 290 (2d Cir. 2000) (“we find no abuse of discretion in the district court’s decision not to impose the penalties permitted by 29 U.S.C. §1132(c)”); Ames v. American Nat’l Can Co., 170 F.3d 751, 760 (7<sup>th</sup> Cir. 1999) (affirming district court’s decision not to impose any financial penalty: “Fines under §1132(c)(1) are not mandatory, even if there has been a violation of §1024(b)(4).”).

The Court also has wide discretion in setting the amount of such penalty. For example, courts have imposed a penalty of *ten cents* per day. Patterson v. Ret. & Pension Plan for Officers & Employees, 2001 U.S. Dist. LEXIS 15949, \*22 (S.D.N.Y. Oct. 5, 2001). Other courts have imposed a penalty of between ten and thirty dollars per day. See, e.g., Estate of Fields v. Provident Life & Accident Ins., 2001 U.S. Dist. LEXIS 10157, \*18 (E.D. Pa. Jul. 10, 2001) (imposing a penalty of \$10 per day); Sedlack v. Braswell Servs. Group, Inc., 134 F. 3d 219, 226 (4<sup>th</sup> Cir. 1998) (affirming penalty of \$20 per day); Proujansky v. Blau, 2001 U.S. Dist. LEXIS 12694, \*41 (S.D.N.Y. Aug 2, 2001) (imposing statutory penalty of \$20 per day “where the furnishing of required information was delayed for years”); Kascewicz v. Citibank N.A., 837 F.Supp. at 1312, 1323-24 (S.D.N.Y. 1993) (imposing penalty of \$25 per day where plan administrator failed to create required SPD and “displayed complete indifference” to plaintiff’s document requests); Moothart v. Bell, 21 F. 3d 1499, 1506 (10<sup>th</sup> Cir. 1994) (affirming a penalty of \$30 per day where “defendants acted in bad faith” and adamantly fought plaintiff’s efforts to obtain documents).

Importantly, this is not a case in which an ERISA plan administrator has completely ignored its ERISA obligations to produce documents upon request. To the contrary, the record demonstrates that Qwest undertook substantial efforts to respond to



Plaintiff's requests. Specifically, Qwest copied and produced the bulk of what Plaintiff requested and provided explanations to each of Plaintiff's questions. (See, e.g., Pl.'s Compl. ¶ 15: Qwest's initial response to Plaintiff's inquiry). In fact, over the past few years, Qwest has produced literally thousands of pages of documents to Mr. Phelps, Mr. Kennedy and the Qwest retiree community. The only documents Qwest did not produce here were the requested "investment guidelines" and "proxy voting policy." Documents that might fall into these categories were held back based on the good faith legal belief that they are not required to be produced under § 1024(b)(4) and its progeny of cases. It turns out that Qwest was right about the proxy voting policy and wrong about the investment guidelines. In addition, Plaintiff's delay in filing this case, and his refusal to engage in the expedited procedure allowed this case to languish until the discovery period closed six months later and Defendant immediately filed its Motion for Summary Judgment.

Under these circumstances, Qwest's good faith warrants waiver of any penalty, or at least a substantial reduction in any penalty imposed. See, e.g., Cytrynbaum, 338 F.Supp. 2d at 1193-94; Abraham v. Exxon Corp., 85 F.3d 1126, 1132 ( 5<sup>th</sup> Cir. 1996) ("district court could conclude that the administrator acted in good faith when he refused to provide information and could decline to award penalties); Paris v. Korbel & Bros., Inc., 751 F.Supp. 834, 840 (D. Cal. 1990) (defendant's good faith was mitigating factor in determining \$10 per day penalty amount). Also included within the Court's discretion would be the number of days to include in any penalty calculation. The Court could decide, for example, not to include the nine month period when Plaintiff failed to file this action following denial of his request and the six month period in which Plaintiff could

have moved this case forward, but to which case management structure Plaintiff needlessly objected.

### III. CONCLUSION

Qwest has throughout this case acted on the good faith belief that certain documents are not required to be produced under section 1024(b)(4). However, less than a month following entry of the Court's Order on Summary Judgment, Qwest has more than complied with both the letter and the spirit of that Order by providing Plaintiff with 2001 and presently effective derivatives policies and portfolio specific investment guidelines. Plaintiff has not, and cannot, show prejudice by the delay in production, in that the delay was caused in large part by Plaintiff's refusal to agree to promptly move this case to resolution. For these reasons, Plaintiff's Motion should be denied and no penalties should be assessed against Qwest.

Dated this 27th day of December, 2005.

*s/ Beth Doherty Quinn*  
Beth Doherty Quinn  
Baird & Kiovsky, LLC  
2036 East 17<sup>th</sup> Avenue  
Denver, CO 80206  
(303) 813-4500  
(303) 813-4501 (fax)  
[bdq@bairdkiovsky.com](mailto:bdq@bairdkiovsky.com)

Attorneys for Defendant Qwest  
Employees Benefit Committee

**CERTIFICATE OF SERVICE (CM/ECF)**

I hereby certify that on December 27, 2005, I electronically filed the foregoing **Response to Motion to Compel** with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following e-mail address:

Curtis Kennedy, Esq. at CurtisLKennedy@aol.com

and, I also certify that I have mailed or served the document via electronic mail to the following non-CM/ECF participants:

Cynthia Delaney, Esq  
Qwest Communications, Corp.  
1801 California Street, Suite 900  
Denver, CO 80202  
Cynthia.Delaney@qwest.com

s/ Carla A. Chiles, Paralegal  
of Baird & Kiofsky, LLC

# BAIRD & KIOVSKY, LLC

ATTORNEYS AND COUNSELORS AT LAW

*THE BUSHONG MANSION*  
2036 E. 17<sup>th</sup> AVENUE  
Denver, Colorado 80206  
Tel: 303.813.4500 Fax: 303.813.4501

*ELIZABETH KIOVSKY*  
DIRECT DIAL NO.  
303.320.8301  
beth@bairdkiovisky.com

December 15, 2005

## VIA EMAIL

Mr. Curtis L. Kennedy  
8405 E. Princeton Avenue  
Denver, CO 80237-1741

**Re:** Re: Phelps v. Qwest Employees Benefit Committee  
Civil Action No. 04-B-2042 (OES)

Dear Curtis:

This letter is in response to your email to Beth Doherty Quinn of December 5, 2005 and Plaintiff's Motion to Compel Discovery Responses and For Imposition of ERISA Section 502(c)(1)(B) Penalty. It is worth noting that the Court's Order of December 2, 2005 simply denied the Committee's motion for summary judgment regarding the portfolio specific investment guidelines and granted its motion for summary judgment regarding the proxy voting policy. The Judge has not entered judgment against the Committee nor has he ordered the Committee to turn over any documents. However, in an attempt to work toward a reasonable resolution of this case, I have enclosed the Qwest Asset Management Company Derivatives Policy for Qwest Trusts ("Derivatives Policy") effective in October 2001 and the present version of the Derivatives Policy. In addition, I have enclosed an exception to the Derivatives Policy dated October 19, 2001.

The Committee continues to review its options regarding the investment guidelines included in QAM's agreements with individual investment managers. There is significant concern that wide dissemination of these guidelines could have a significant negative impact on QAM's ability to effectively invest trust assets going forward. It would assist the Committee in determining the appropriate manner in which to proceed if Mr. Phelps would agree to enter into a protective order limiting disclosure of the portfolio specific guidelines to you and Mr. Phelps. Please let me know if your client is willing to enter into such an order at your earliest convenience.

**EXHIBIT A**

Very truly yours,

A handwritten signature in black ink, appearing to read "Elizabeth I. Kiovsky", with a horizontal line extending to the right.

Elizabeth I. Kiovsky

cc: Cynthia Delaney, Esq.

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLORADO**

Civil Action No. 04-B-2042 (OES)

**NELSON B. PHELPS,**

Plaintiff,

v.

**QWEST EMPLOYEES BENEFIT  
COMMITTEE**

Defendant.

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**DEFENDANT'S INITIAL DISCLOSURE STATEMENT**

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Defendant Qwest Employees Benefit Committee ("Qwest"), by and through undersigned counsel, hereby serves upon Plaintiff the following initial disclosure statement. These disclosures are based upon information reasonably available at this time and represent a good faith effort to meet required disclosure obligations.

Defendant's disclosures are made without waiving: (1) the right to object on the grounds of competency, privilege, relevancy and materiality, hearsay or any other proper ground, to the use of any information, for any purpose, in whole or in part, in any subsequent proceeding in this action or any other action; and (2) the right to object on any and all grounds, at any time, to any other discovery request or proceeding involving or relating to the subject matter of these disclosures.

**EXHIBIT B**

1. Individuals likely to have discoverable information Qwest may use to support its claims or defenses:

Defendant is disclosing the addresses and telephone numbers for employees of Defendant or other Qwest entities. Any attempted communications with these employees would constitute a prohibited communication with a party represented by counsel.

Notwithstanding the provision of the addresses and telephone numbers below,

Defendant objects to, and will vigorously oppose, any attempted communications with the following persons outside the presence of Defendant's counsel.

- a. Kimberly G. Walker, CFA  
President  
Qwest Asset Management Company  
1005 17<sup>th</sup> Street, Suite 250  
Denver, CO 80202  
(303) 382-6002
- b. Karen Frame  
Director - Compliance  
Qwest Asset Management Company  
1005 17<sup>th</sup> Street, Suite 250  
Denver, CO 80202  
(303) 382-6035

2. Documents Qwest may use to support its claims or defenses:

Qwest has consistently maintained that there are no documents which have been wrongfully withheld from Plaintiff pursuant to ERISA § 1024(b)(4). In the interests of resolving this matter, however, Qwest has agreed to produce the following document "log" that identifies documents in place at the time, or recently after, Plaintiff made his request and which are related to Plaintiff's general areas of inquiry (i.e., a particular plan investment). While these documents may be related to Plaintiff's general areas of inquiry, that does not mean the documents fall within the ambit of the § 1024(b)(4) disclosure obligation. In fact, Qwest specifically asserts that the following documents are

not required to be produced pursuant to § 1024(b)(4). The titles and descriptions of these documents are provided solely to demonstrate that no documents have been wrongfully withheld and the mere fact they have been disclosed is not an admission or evidence of any kind that such documents should be produced under § 1024(b)(4).

#### DOCUMENT LOG

Date	Title	Adopted By	Description
8.20.04	Proxy Voting Policy	Proxy Policy Committee of Mellon Financial Corporation, the parent corporation of the Mellon Trust of New England, NA, Trustee of the Qwest Pension Fund <sup>1</sup> ; adopted by investment advisory subsidiaries of Mellon Financial Corporation and used to vote proxies for all clients	Outlines some general philosophies regarding corporate governance, discusses record keeping and disclosure obligations, and sets forth the general process by which written proxy voting guidelines are adopted and utilized.
3.05.02	Qwest Asset Management Committee Derivatives Policy for Qwest Trusts	Investment Committee of Qwest Communications International, Inc.	Addresses the use of one type of financial instrument, derivative instruments, within all Qwest employee benefit trusts.
Varying dates	Generic title: portfolio specific investment guidelines (these are multiple, separate documents)	Qwest Asset Management Company and each individual Investment Manager	Each individual Investment Manager managing a portfolio or account that is part of the Qwest Pension Trust is subject to investment guidelines that relate solely to that specific Investment Manager and a specific portfolio.

<sup>1</sup> It is the policy of Qwest Asset Management not to vote proxies and, instead, to delegate that responsibility to external managers and, for internally managed assets, to the Trustee. The policy listed here is that of the Trustee. In addition to Mellon Financial Corporation's policy, independent investment managers hired by Qwest Asset Management to manage U.S. and International Equities held by the Qwest Pension Fund would have similar policies and/or written guidelines. As with the Mellon Financial Corporation policy and guidelines, these are not policies or guidelines that are authored, adopted or utilized by any Qwest entity.



3. Computation of Damages:

Defendant is not seeking damages in this action except to the extent that attorney's fees might be available to it as a prevailing party.

4. Insurance Agreements:

The Company is investigating whether any applicable agreements exist:

DATED THIS 10<sup>th</sup> DAY OF FEBRUARY, 2005:

Respectfully submitted,

BAIRD & KIOVSKY, I.L.C.

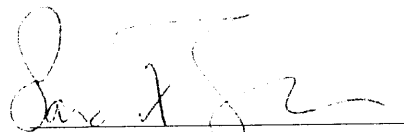


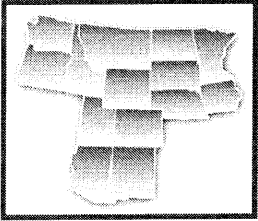
BY: Elizabeth I. Kiofsky, Esq.  
Beth Doherty Quinn, Esq.  
*Attorneys for Defendants*  
2036 E. 17<sup>th</sup> Avenue  
Denver, CO 80206  
Telephone No.: 303-813-4500

**CERTIFICATE OF MAILING**

I hereby certify that on the <sup>15<sup>th</sup></sup> 15 day of February, 2005, I placed a true and accurate copy of the foregoing *Defendant's Initial Disclosures* in the United States Mail, postage prepaid, and addressed to the following:

Curtis L. Kennedy, Esq.  
8405 E. Princeton Ave.  
Denver, Colorado 80237  
303-770-0440  
Attorney for Plaintiff

  
\_\_\_\_\_  
Of Baird & Kiovsky, LLC



# AUSWR

THE ASSOCIATION OF U S WEST RETIREES

## Please Redistribute

December 6, 2005

Mimi Hull, President  
ASSOCIATION OF U S WEST RETIREES (AUSWR)  
AUSWR Board Members and General Members

This update concern the *Phelps v. Qwest Employees Benefit Committee* case pending in Denver Federal Court (the ERISA Disclosure case). The last update was sent on September 21, 2005. As you know, AUSWR Executive Director Nelson Phelps formally demanded Qwest make disclosure of the "investment policy guidelines" and "proxy voting guidelines" in order to help him and the retiree association police the goings on with the Qwest Pension Plan. Mr. Phelps was particularly concerned about a complete loss of a \$67 million "put option" investment made with pension fund monies in late 2001.

On December 2, 2005, Chief Judge Babcock entered a ruling deciding the central dispute between the parties, i.e., whether Qwest is required to provide certain documents to Mr. Phelps pursuant to § 104(b)(4) of the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1024(b)(4). In short, Chief Judge Babcock ruled that Qwest does *not* have to disclose the requested proxy voting guidelines, as those matter are handled by outside investment managers and Qwest does not dictate the terms of those polices. However, with respect to the more important issue, Chief Judge Babcock ruled Qwest *must turn over* the several investment policies/guidelines that are portfolio specific for the pension plan.

This is an important ruling. No other retiree group has made such a legal challenge. Certainly, there has been no other case like this one filed anywhere within the federal courts making up the 10th Circuit Court of Appeals (i.e., Colorado, Kansas, New Mexico, Oklahoma, Utah and Wyoming). This legal issues resolved in the *Phelps* case is significant not only for AUSWR, but for other retiree groups and individual retirees who, too, want to police their pension plan and, therefore make written requests for information concerning pension plan operations. Retirees should not have to pursue a federal lawsuit simply to find out more about how the pension plan is being managed or mismanaged. You can read Chief Judge Babcock's December 2, 2005 Order at this URL:

<http://www.uswestretiree.org/Order120205Phelps.pdf>

EXHIBIT C

The next step in this case is for Qwest to produce the requested investment policies/guidelines and answer some questions we asked back in January 2005. We will pursue our request that Chief Judge Babcock impose a daily fine on the company and order payment of costs and attorney's fees, so as to deter this type of obstinate behavior in the future when we make requests for other disclosures and information about the Qwest Pension Plan.

Meanwhile, to learn more, you should visit the "Legal Developments" page at the AUSWR website <http://www.uswestretiree.org/legal2.htm> and under the heading "*ERISA Disclosure - Phelps v. Qwest*" view all of the updates, the Complaint and other legal papers that have been posted.

Curtis  
[CurtisLKennedy@aol.com](mailto:CurtisLKennedy@aol.com)  
303-770-0440