

BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

WASHINGTON UTILITIES AND
TRANSPORTATION COMMISSION,

Complainant,

v.

ADVANCED TELECOM GROUP, INC.;
ALLEGIANCE TELECOM, INC.; AT&T
CORP; COVAD COMMUNICATIONS
COMPANY; ELECTRIC LIGHTWAVE,
INC.; ESCHELON TELECOM, INC. f/k/a
ADVANCED TELECOMMUNICATIONS,
INC.; FAIRPOINT COMMUNICATIONS
SOLUTIONS, INC.; GLOBAL CROSSING
LOCAL SERVICES, INC.; INTEGRA
TELECOM, INC.; MCI WORLDCOM, INC.;
McLEODUSA, INC.; SBC TELECOM, INC.;
QWEST CORPORATION; XO
COMMUNICATIONS, INC. f/k/a NEXTLINK
COMMUNICATIONS, INC.,

Respondents

Docket No. UT-033011

**QWEST CORPORATION'S MOTION
TO COMPEL RESPONSES TO DATA
REQUESTS TO STAFF**

I. INTRODUCTION

I Respondent Qwest Corporation (“Qwest”) respectfully requests that the Commission compel Staff to respond immediately to one hundred and eight data requests it has failed to answer: Nos. 5-12, 15-23, 25, 27-47, 54-57, 58-96 and 97-122. To a one, these data requests ask Staff to explain its allegations and positions in this docket, particularly those relating to the

agreements listed in Exhibit B to Commission Order No. 05. In some instances, Staff has answered only with an objection; in others, Staff's answer is far too general or otherwise nonresponsive.

2 At its core, this case asks the Commission to interpret and apply nondiscrimination laws, both state and federal, in new and unique contexts. Staff necessarily understands how it interprets and applies these statutes to the agreements at issue, but Qwest does not, and these data requests sought to narrow this gap in understanding. Staff's refusal to respond to these data requests, which are very similar in structure and purpose to data requests Staff served on Qwest and that Qwest answered, seriously prejudices Qwest's ability to understand and defend against Staff's allegations of discrimination and harm to the market at large and individual CLECs. In the more immediate term, Qwest also needs guidance in order to prepare and focus its questioning at the deposition of Mr. Wilson, Staff's witness in this docket, which is scheduled for July 21-22. Qwest also requires proper responses in order to prepare its responsive testimony, which is due August 9, 2004. Staff's responses may also prompt follow-up responses, and Qwest may also need those follow-up responses in order to prepare its testimony.

3 Staff has not complained that Qwest's data requests are overly burdensome or otherwise inappropriate (and, indeed, Qwest agreed to Staff's request for an extension of time to respond). Qwest respectfully requests that the Commission issue an order prior to July 21, 2004 compelling Staff to serve proper answers to Qwest's Data Requests within five business days.

II. BACKGROUND

4 Staff initiated this docket on August 13, 2003 by filing a six-count complaint against Qwest and thirteen competitive local exchange carriers ("CLECs"), which it amended on August

15, 2003. Various parties, including Qwest, responded to the complaint by filing motions to dismiss on a variety of grounds. Staff opposed these motions and, on February 12, 2004, the Commission granted the motions in part, denied them in part, and narrowed the issues remaining to be tried. *See* Commission Order No. 05.

5 Among other things, Order No. 05 divides the agreements between Qwest and the various CLEC defendants remaining at issue into two categories. The first category, listed by the Commission in Exhibit A to Order No. 05, includes documents that, in Staff's view, constitute "interconnection agreements" that Qwest was required to file with the Commission for approval and, if approved, for CLECs to opt into, but that Qwest failed to file in a timely fashion or, in some instances, at all. *See* 47 U.S.C. § 252. The second category, listed by the Commission in Exhibit B to Order No. 05, consists of settlements Qwest entered into with various CLECs that, according to Staff, discriminated in some fashion against other CLECs in violation of Washington law. By Staff's admission, Qwest was not required by the Telecommunications Act or any other authority to file these settlement agreements, but Staff nonetheless accuses Qwest of wrongfully keeping these settlements "secret" and, in the process, discriminating against CLECs that were not parties to or otherwise aware of their terms. *See, e.g.*, Direct Testimony of Thomas L. Wilson, Jr., June 8, 2004, at 80 ("Similarly, secret agreements in Exhibit B give preferences that were withheld from other carriers.").

6 In advance of filing Mr. Wilson's testimony, Staff served more than forty data requests on Qwest. Among its data requests to Qwest, Staff included a significant number of requests that required Qwest to articulate and explain its positions in this case and cite supporting authority:

WUTC 02-012: “Please explain for each agreement listed in Order No. 05, Exhibit A, why Qwest does not believe the document is an interconnection agreement.”

WUTC 02-013: “For each agreement listed in Order No. 05, Exhibit A, please explain how Qwest proposes to handle the terms, rights, duties, and services under the agreement if it is not approved by the WUTC (e.g., does Qwest plan to refund money to the CLEC that paid for the provision of a service that should not have been provided to them at the outset)?”

WUTC 02-016: “For any of the UNE-E or UNE-M or other similar arrangement offerings by Qwest to any CLEC, have any other providers requested similar offerings from Qwest? If yes, please identify each provider that has requested such an offer, which offer was requested, and all documentation supporting Qwest’s decision to honor or deny the request, including citation to any WUTC authority approving such documents.”

WUTC 02-030(a): “[Qwest’s] response to [an earlier data request] seems to contradict itself, if the reciprocal compensations in Par. 7 were super[s]eded, and if the agreement is really just for Minnesota, then why is it relevant to Washington that it was super[s]eded?”

WUTC 02-030(g): “Provide citations of authority approving the arrangements governing bill and keep with the subject CLEC before 7/31/01.”

7 Staff also posed a hypothetical set of facts and asked Qwest how it would respond to different permutations of those facts:

WUTC 02-024: “Please assume that a CLEC with an existing interconnection agreement with Qwest in Washington requests from Qwest: a. a copy from Qwest of the original agreement and any subsequent amendments; and b. a citation with date, docket number and order number from the WUTC for each agreement or amendment; and c. a copy of the WUTC order approving the agreement or amendment. What would be Qwest’s response?”

WUTC 02-025: “Please assume that CLEC 1 makes the same request described in WUTC Staff Data Request No. [24], except CLEC 1 asks for those documents pertaining to CLEC 2, what would be Qwest’s response?”

8 Qwest responded fully, and on time, to all of Staff’s data requests and Staff has not contended otherwise.

9 Mr. Wilson’s testimony, despite weighing in at 127 pages of text and 75 exhibits, makes Staff’s case in only a broad and non-specific fashion. As Qwest began preparing its testimony, it became clear that Staff had not identified any actual harm that CLECs suffered from Qwest’s alleged failure to file agreements, nor had Staff explained anywhere how or why Qwest could have discriminated against other CLECs by entering into settlements not subject to the Section 252(i) filing requirements. Accordingly, Qwest served a set of 121 data requests.¹ Qwest’s requests asked Staff, first, to explain its positions and identify the authority on which it relied, as the Commission’s procedural rules specifically contemplate. *See* WAC 480-07-400(c)(iii) (“Generally, data requests seek documents, an analysis, compilation or summary of documents into a requested format, a narrative response explaining a policy, position, or a document, or the admission of a fact asserted by the requesting party.”) (emphasis added). Qwest requests further asked Staff to provide specific information about the allegations relating to each of the agreements listed in Exhibits A and B to Order No. 05. Qwest utilized structures and forms of requests similar to those served on it by Staff.

10 Shortly after receiving Qwest’s requests, Staff asked for and Qwest agreed to an extension of Staff’s time to respond. Consistent with the parties’ agreement, Staff served a set of objections to certain requests on July 6. Its responses to all 121 requests followed on July

¹ A copy of the data requests at issue in this motion, including Staff’s responses to those requests, is attached as Exhibit 1.

12, and Qwest met and conferred with Staff about the shortcomings in its responses. Staff responded that it would be easier to address Qwest's concerns after seeing this motion, and Qwest filed it immediately thereafter.

11 Qwest responded fully, and on time, to all of Staff's data requests and Staff has not contended otherwise.

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III. DISCUSSION

A. Qwest's Requests Are Reasonable and Appropriate

14 Because this case is a "complaint proceeding involving claims of discriminatory or anticompetitive conduct," the parties are entitled to serve data requests (and to utilize other discovery methods as well). *See* WAC 480-07-400(2)(b)(iii). Data requests generally "seek documents, an analysis, compilation or summary of documents into a requested format, a narrative response explaining a policy, position or a document, or the admission of a fact asserted by the requesting party." WAC 480-07-400(1)(c)(iii) (emphasis added). Data requests are "inappropriate when the party seeking discovery has had ample opportunity to obtain the information sought or the discovery is unduly burdensome or expensive, taking into account the needs of the adjudicative proceeding, limitations on the parties' resources, scope of the responding party's interest in the proceeding, and the importance of the issues at stake in the adjudicative proceeding." *Id.*, (c)(4).

15 Every single one of Qwest's data requests seeks information directly relevant to the issues in the case, and Staff has not argued otherwise – nor have it complained that the requests are unduly burdensome. *See* WAC 480-07-405(6)(a) ("A party that wishes to object to a data request must present the objection to the requesting party in writing by the time the response is due, or at such other time as may be ordered."). Instead, despite the fact that Staff and Qwest are two of the core parties to this proceeding, the similarity in form and structure between Qwest's requests and Staff's own data requests, and the absolute centrality of the issues raised in these data requests, Staff simply has refused to respond.

B. Staff Has Failed To Answer A Great Many Of Qwest's Requests

16 Staff's stated reasons for refusing to answer Qwest's data requests fall generally into four categories – none of which supports or justifies Staff's outright or effective refusal to answer Qwest's data requests.

1. Staff Failed To Answer Fifteen Requests On The Ground That The Request Sought A Legal Conclusion (Nos. 5-12, 15-18 and 24-26).

17 A significant number of Qwest's data requests asked Staff to articulate its position and identify the authorities on which it relies. Staff answered some questions of this type without complaint, including (among others) Nos. 2, 3 and 48.³ Others, however, Staff has refused altogether to answer on the ground that "the question calls for a legal conclusion," *see, e.g.*, Ex. 1, No. 5, or "[c]alls for a legal conclusion rather than an admission of fact." *See, e.g., id.* No. 15. These include:

No. 5: Please identify any Washington statutes, regulations or other authorities that create any obligation by telecommunications carriers to file with the Washington State Utilities and Transportation Commission ("Commission") a broader range of agreements than the definition of "interconnection agreement" contained in the FCC Order.

No. 6: Please identify any Washington statutes, regulations or other authorities that create any obligation by telecommunications carriers to file inter-carrier settlement agreements with the Commission.

³ "Please state the definition of "interconnection agreement" on which Staff bases its claims in this action, and on which Mr. Wilson bases his testimony, and cite the authorities on which Staff relies for that definition." Ex. 1, No. 2.

"Please explain how Staff's definition of the term "interconnection agreement" differs from the definition articulated by the FCC in *In the Matter of Qwest Communications International, Inc. Petition for Declaratory Ruling on the Scope of the Duty to File and Obtain Prior Approval of Negotiated Contractual Agreements under Section 252(a)(1)*, WC Docket No. 02-89, Memorandum Opinion and Order, FCC 02-276, 17 FCC Rcd. 19,337 (Oct. 4, 2002) (the "FCC Order")." Ex. 1, No. 3.

"Please explain why, in Staff's view, RCW 80.36.170, .180 and .186 apply to settlements between two or more carriers." Ex. 1, No. 48.

No. 7: Please identify any federal statutes, regulations or other authorities that create any obligation by telecommunications carriers to file inter-carrier settlement agreements with the Commission.

No. 8: Please identify any Washington statutes, regulations or other authorities that create any obligation by telecommunications carriers to publish or otherwise make inter-carrier settlement agreements available for public inspection, review, comment, approval or opt-in.

No. 9: Please identify any federal statutes, regulations or other authorities that create any obligation by telecommunications carriers to publish or otherwise make inter-carrier settlement agreements available for public inspection, review, comment, approval or opt-in.

No. 10: Please admit that Qwest was not required by any statute, regulation or other authority to file the agreements listed in Exhibit B to Commission Order No. 05 with the Commission for approval. If your response is anything other than an unqualified admission, please identify each statute, regulation or other authority supporting your answer.

No. 15: Please admit that CLECs that wish to opt into approved interconnection agreement provisions pursuant to 47 U.S.C. § 251(i) must satisfy all reasonably related terms and conditions of the agreement or provision they wish to opt into. If your response is anything other than an unqualified admission, please identify each statute, regulation or other authority supporting your answer.

No. 16: Please admit that a CLEC that is unwilling or unable to satisfy all reasonably related terms and conditions of an agreement or provision it wishes to opt into may not then opt into that agreement or provision.

No. 17: If your response to Qwest Data Request No. 16 is anything other than an unqualified admission, please explain why Staff does not agree with that statement and identify all authorities on which Staff relies in support of its position.

No. 18: Please admit that CLECs may not opt into interconnection agreement provisions pursuant to 47 U.S.C.

§ 251(i) unless those provisions have been approved by the Commission.

- 18 Staff's refusal to answer these questions is misplaced, and the Commission should compel a comprehensive response. Qwest has not asked Staff to provide to disclose its internal deliberations or thought processes or to disclose any attorney-client communications or work product. Qwest has asked only for Staff to state or admit its position and state the reasons and authorities supporting it – information Qwest is entitled to have in any event, and needs in order to defend itself against Staff's claims in this case.
- 19 In other instances, Staff provided a response that fails to answer the question or to provide the information Qwest fairly requested:

No. 11: Please admit that Qwest is not required to file settlement agreements containing only "backward looking" terms with the Commission for approval.

RESPONSE: Objection. The question calls for a legal conclusion rather than an admission of fact.

Without waiving objection, Staff contends that if the agreement contains ongoing obligations pertaining to §251(b) or (c), including directly or indirectly, or by any special rate, rebate, drawback or other device or method an ongoing rate effect pertaining to §251(b) or (c), then it should be filed with the Commission under §252(e).

No. 12: If your response to Qwest Data Request No. 11 is anything other than an unqualified admission, please explain why and under what circumstances Qwest is required to file settlement agreements containing only "backward looking" terms with the Commission for approval and identify all authorities on which Staff relies for that position.

RESPONSE: Objection. Please see response to Qwest Data Request No. 11.

Without waiving objection, Staff contends that if the agreement contains ongoing obligations pertaining to §251(b) or (c), including directly or indirectly, or by any special rate, rebate, drawback or other device or method an ongoing rate effect pertaining to §251(b) or (c), then it should be filed with the Commission under §252(e).

20 These requests asked Staff to articulate its position regarding Qwest’s obligation to file settlement agreements that undeniably fall outside of the definition of “interconnection agreement” Staff utilized in Mr. Wilson’s testimony. *See* Ex. 1, Response to No. 3 (“Staff’s definition of the term [‘interconnection agreement’] does not differ [from the definition articulated by the FCC in the FCC Order].”). Staff’s responses to these requests – aside from the objection – relate entirely to agreements that would fall within the definition of “interconnection agreement” articulated in the FCC Order. The Commission should compel Staff to directly answer the question Qwest posed. In the alternative, the Commission should deem that Staff has admitted that backward-looking settlement agreements are not required to be filed with the Commission.

21 A central theme, if not the central theme, of these data requests was to ascertain Staff’s position regarding when an agreement provides an unlawful preference to a carrier and how, in Staff’s view, Qwest should have handled the process of settling disputes (particularly backward-looking disputes) in order to avoid any such preference(s):

No. 24: Please explain the procedures that Staff contends Qwest should have followed after entering into the agreements listed in Exhibit B to Commission Order No. 05.

RESPONSE: Staff contends that Qwest should make sure various anti-discrimination statutes are not violated as a result of the way in which the agreements are entered into.

No. 25: Please explain how, in Staff’s view, carriers who were not parties to the agreements listed in Exhibit B to Commission Order No. 05 would have or should have become

aware of those agreements and their terms under the procedures that Staff believes Qwest should have followed.

RESPONSE: Objection, the question mischaracterizes Staff's view.

Without waiving the objection, Staff contends that Qwest should make sure the way in which its agreements are entered into does not violate various anti-discrimination statutes as discussed in detail in Staff's testimony concerning the fifth, sixth and seventh causes of action in the Complaint. Staff believes that its Qwest's decision to determine whether it will make particular terms available to all carriers and provide the carriers the opportunity to adopt those terms or not enter into agreements with those terms because do so requires Qwest to make the terms available to all carriers.

No. 26: Please explain, with citations to any relevant authorities, the procedures under which, in Staff's view, carriers who were not parties to the agreements listed in Exhibit B to Commission Order No. 05 would opt into or otherwise adopt the terms of settlement agreements between Qwest and another carrier once those agreements were made public.

RESPONSE: Objection. Calls for legal conclusion and mischaracterizes Staff's view.

Without waiving the objection, Staff contends that Qwest should provide the carriers "reasonable" notice and opportunity to opt into or otherwise adopt the terms.

- 22 These data requests asked plainly for Staff to identify the procedures – formal or otherwise – Staff contends that Qwest should have utilized in order to avoid the alleged “secrecy” of its settlement agreements under circumstances (such as with all of the Exhibit B agreements) in which the settlements do not fall within the Telecommunications Act’s filing requirement. Staff’s responses evade the core issue of these data requests and shed no light whatsoever on how a settlement between Qwest and a CLEC that does not qualify as an “interconnection agreement” work any sort of discrimination against another CLEC. Nor does Staff state the

basis – whether grounded in federal or state law – for its contention that Qwest should provide to other carriers “reasonable” notice of settlement agreements and the opportunity to opt into or otherwise adopt those terms. This information is critical because Staff is seeking substantial penalties for Qwest’s alleged violations of federal and state law *when federal law does not require that such agreements be filed and made available for opt in*. The Commission should order Staff to provide meaningful, comprehensive answers to these requests.

2. Staff Failed to Answer Thirty-Three Requests on the Ground That They Needed More Information or Could not Understand the Question (Nos. 19-22, 27-47, 49-53 and 54-57)

23 Although Staff propounded data requests utilizing hypotheticals (*e.g.* WUTC 02-024, quoted *supra* at 4), Staff nevertheless refused to answer Qwest’s hypotheticals – not by objecting to the use of hypotheticals, but rather by claiming that the hypothetical facts are vague or insufficiently detailed. Aside from the fact that the hypotheticals Qwest served were neither vague nor lacking, as demonstrated below, Staff waived this objection by failing to seek clarification. *See* WAC 480-07-405(b)(5) (“Lack of clarity is not a basis for objection to a data request unless the responding party has made a good faith effort to obtain clarification.”). For that reason alone, the Commission should compel Staff to provide good faith answers to Qwest’s data requests.

24 That procedural requirement notwithstanding, Staff’s claims of vagueness and insufficiency are not well taken on their merits. Qwest served three sets of requests grounded directly or arguably in hypothetical sets of facts:

a) Requests 19-22 and 49-53

25 These two sets of requests sought to understand the contours of Staff’s position regarding the harm it claims that CLECs suffer from Qwest’s failure to file interconnection agreements:

No. 19: Please admit that CLECs suffer no harm from the inability to opt into interconnection agreement provisions that would not have been approved by the Commission had they been filed in a timely manner.

RESPONSE: Objection. The question is vague, ambiguous, and confusing and assumes facts not in evidence about a hypothetical situation where Staff is being asked to determine that there has not been any harm. Staff has no way to know if harm is suffered or not under the hypothetical scenario vaguely described.

No. 20: If your response to Qwest Data Request No. 19 is anything other than an unqualified admission, please explain why Staff does not agree with that statement and identify all authorities on which Staff relies in support of its position.

RESPONSE: Objection. Calls for a legal conclusion. See also response to Qwest Data Request to Staff No. 19.

No. 21: Please admit that CLECs suffer no harm from the inability to opt into interconnection agreement provisions for which they would have been unable or unwilling to satisfy all reasonably related terms.

RESPONSE: See response to Qwest Data Requests to Staff No. 19.

No. 22: If your response to Qwest Data Request No. 21 is anything other than an unqualified admission, please explain why Staff does not agree with that statement and identify all authorities on which Staff relies in support of its position.

RESPONSE: Objection. Calls for legal conclusion. See also response to Qwest Data Request to Staff No. 21.

No. 49: Please state whether, in Staff's view, actual prejudice or disadvantage is necessary before the failure to file an interconnection agreement constitutes "undue or unreasonable prejudice or disadvantage" for purposes of RCW 80.36.170, .180 and .186.

RESPONSE: Objection. Speculative, insufficient information provided to answer the question and calls for legal conclusion.

No. 50: Please state whether, in Staff’s view, any hypothetical prejudice or disadvantage that could occur from a failure to file an interconnection agreement constitutes “undue or unreasonable prejudice or disadvantage” for purposes of RCW 80.36.170, .180 and .186, even if such prejudice or disadvantage has not yet occurred.

RESPONSE: Objection. Speculative, insufficient information provided to answer the question, calls for legal conclusion, and improperly phrased question: question answers itself.

No. 51: Please state whether it is Staff’s position that any actual prejudice or disadvantage relating to a failure to file an interconnection agreement constitutes “undue or unreasonable prejudice or disadvantage” for purposes of RCW 80.36.170, .180 and .186.

RESPONSE: Objection. Speculative, insufficient information provided to answer the question and calls for legal conclusion.

No. 52: If your answer to Qwest Data Request No. 51 is anything other than an unqualified “yes,” please explain the standard that Staff would apply in analyzing whether actual prejudice or disadvantage relating to a failure to file an interconnection agreement constitutes “undue or unreasonable prejudice or disadvantage” for purposes of RCW 80.36.170, 180 and .186, and identify all authorities on which Staff relies to support that position.

RESPONSE: See answer to DR 51.

No. 53: If your answer to Qwest Data Request No. 51 is anything other than an unqualified “yes,” please explain the standard that the Commission would apply in analyzing whether actual prejudice or disadvantage relating to a failure to file an interconnection agreement constitutes “undue or unreasonable prejudice or disadvantage” for purposes of RCW

80.36.170, .180 and .186, and identify all authorities on which Staff relies to support that position.

RESPONSE: See answer to DR 51.

26 There is nothing vague about No. 19: it asks Staff, flat-out, to admit that a CLEC is not harmed by its inability to opt into an agreement that the Commission would never have approved if Qwest had filed it. Similarly, No. 49 asks straightforwardly for a statement of position: is actual prejudice necessary before a failure to file inflicts harm on other CLECs. Staff does not need, nor has it identified, any further clarifying information. Staff need only state its position, and, in the absence of a relevance objection, it cannot refuse.

b) Requests 27-47.

27 Qwest based Requests Nos. 27-47 on the following hypothetical facts:

In responding to Qwest Data Requests Nos. 27-47, please assume the following hypothetical facts:

a. Qwest and CLEC A have entered into an approved interconnection agreement that entitles Qwest to bill CLEC A for minutes of usage by CLEC A's retail customers.

b. Qwest's records and CLEC A's records disagree about the number of minutes used by CLEC A's retail customers over a three-month period – Qwest's records show 200,000 minutes of usage and CLEC A's records show 100,000 minutes of usage.

c. The rate Qwest is entitled to charge is set forth in an approved tariff and there is no dispute between Qwest and CLEC A as to which rate applies.

Prior to the commencement of any formal dispute resolution docket (*e.g.*, arbitration or complaint proceeding), Qwest and CLEC A decide to resolve their dispute by agreeing that CLEC A will pay for 150,000 minutes of usage at the tariffed rate. Qwest and CLEC A memorialize this resolution a written agreement that they execute on July 1, 2004. The agreement contains only these provisions:

- i. Generic recital clauses stating that the parties had a dispute that they now seek to resolve;
- ii. A paragraph stating that CLEC A agrees to pay Qwest, in cash, an amount equal to 150,000 minutes of usage at the approved rate;
- iii. Mutual releases; and
- iv. Standard, non-substantive, boilerplate language relating to the mechanics of the agreement, its execution and its performance.

28 Concerned that Qwest might receive only general responses to more open-ended questions, Qwest formulated the questions flowing from this hypothetical settlement to address Qwest's very real confusion about Staff's position regarding Qwest's obligations to file, publicize, and/or allow other CLECs to adopt the terms of settlements Qwest is not required to file for approval. Despite this detail, and without seeking clarification, Staff answered each request with the objection "[s]peculative, insufficient information provided to answer the question and calls for legal conclusion." See Ex. 1, Nos. 27-47. In some instances, see Ex. 1, Nos. 28-32, Staff also offered an additional response "without waiving the objection," but these responses contained sweeping generalities that fail to answer the question, let alone to apply Staff's position to the posited facts. Qwest is entitled to direct answers to these questions, though.

c) Requests 54-57

29 Similarly, Requests 54-57 posed a second hypothetical set of facts designed specifically to determine Staff's position regarding how a common everyday phenomenon in Qwest's dealings with retail customers might, or might not, violate the legal theory Staff is advancing in this case:

In responding to Qwest Data Requests Nos. 54-57, please assume the following hypothetical facts:

A Qwest retail customer – both for local and long distance service – receives a bill containing charges for three calls the customer disputes having made.

The calls were in fact made from the customer's phone (by her visiting brother-in-law, who never asked permission), and Qwest's records could prove it conclusively.

The customer calls Qwest's customer care center and demands that Qwest remove the three disputed calls from her bill. Qwest decides, as a matter of customer relations, to remove the calls even though Qwest is undeniably entitled to bill for them.

30 Qwest's questions again asked simply for Staff's position:

No. 54: Please state whether Staff considers Qwest's decision to remove these calls from the customer's bill to be discrimination by that carrier against other retail customers and, if so, please identify the authorities on which Staff relies in support of its position.

No. 55: If your response to Qwest Data Request No. 54 is anything other than an unqualified "no," please explain the circumstances under which, in Staff's view, billing adjustments by carriers to retail customers constitute discrimination by that carrier against other retail customers, and identify the authorities on which Staff relies in support of its position.

No. 56: If your response to Qwest Data Request No. 54 is an unqualified "no," please explain whether, in Staff's view, billing adjustments by carriers to wholesale customers constitute discrimination by that carrier against other wholesale customers, and identify the authorities on which Staff relies in support of its position.

No. 57: If your responses to Qwest Data Request Nos. 54 and 56 reflect any difference in Staff's position regarding billing adjustments for retail versus wholesale customers, please

explain the bases for any such differences and identify the authorities on which Staff relies to justify those differences.

31 As to each question, however, Staff responded only by saying “[s]peculative, insufficient information provided to answer the question, question vague as to which authority Qwest is referring to and calls for legal conclusion.” *See, e.g.*, Ex. 1, Response to No. 54. Having failed to seek clarification, Staff cannot refuse to answer these requests on the ground that they cannot understand the hypothetical. Nor can Qwest’s requests for Staff’s position fairly be called a demand for a legal conclusion. To the contrary, these requests fall squarely within the range of issues Qwest is entitled to probe via data requests, and Staff should be compelled to fulfill its discovery obligations, just as Qwest did.

3. Staff Wrongly Refused to Answer Two Requests on the Ground that Qwest “Mischaracterized Staff’s View” (Nos. 23 and 25)

32 Staff refused to respond to two other requests, Nos. 23 and 25, simply because the requests “mischaracterize[e] Staff’s view,” without saying why or how:

No. 23: Please explain why settlements of backward-looking disputes between two carriers must, in Staff’s view, be made available for public inspection, review, comment, approval or opt-in.

RESPONSE: Objection. Mischaracterizes Staff’s view.

No. 25: Please explain how, in Staff’s view, carriers who were not parties to the agreements listed in Exhibit B to Commission Order No. 05 would have or should have become aware of those agreements and their terms under the procedures that Staff believes Qwest should have followed.

RESPONSE: Objection, the question mischaracterizes Staff’s view.

Without waiving the objection, Staff contends that Qwest should make sure the way in which its agreements are entered

into does not violate various anti-discrimination statutes as discussed in detail in Staff's testimony concerning the fifth, sixth and seventh causes of action in the Complaint. Staff believes that its Qwest's decision to determine whether it will make particular terms available to all carriers and provide the carriers the opportunity to adopt those terms or not enter into agreements with those terms because do so requires Qwest to make the terms available to all carriers.

33 Qwest's purpose in lodging these requests was to attempt to understand Staff's theory vis-à-vis the Exhibit B settlements, specifically how and why Qwest should have filed or otherwise made other CLECs aware of the Exhibit B settlements. This is an important point: although all parties agree that Qwest was not required to file the Exhibit B settlements, Staff contends that Qwest discriminated against other CLECs by keeping them "secret." Qwest is unsure what, under that analysis, it should have done. Staff has not answered these questions, objected to them on relevance grounds, or sought clarification, and they should be made to answer them.

4. Staff Failed to Answer the Data Requests Specific to Each Agreement (Nos. 58-97 and 98-122)

34 Finally, Qwest posed two identical sets of requests, one set seeking specific information about each of the Exhibit A agreements and one set seeking information about each of the Exhibit B agreements. Rather than answering them on an agreement-by-agreement basis, as Qwest requested, Staff answered the first in each set, then referred back to that first answer for all of the others that followed:

No. 58: Please provide the following information with respect to the agreement attached as Exhibit A, Agreement No. 1 to Commission Order No. 05:

a. Please state the basis for Staff's belief that this agreement constitutes an "interconnection agreement" under the definition set forth in the FCC Order.

b. Please state the date by which Staff contends that Qwest should have filed this agreement with the Commission.

c. Please state whether Staff contends that the Commission would have approved this agreement had Qwest filed it in what Staff would consider a timely manner.

d. If your response to subpart c above is anything other than an unqualified “yes,” please state the reasons why Staff contends that the Commission would not have approved this agreement and the authorities supporting that position.

e. Please explain the bases for Mr. Wilson’s calculation, in Exhibit TW-72 to his testimony, of the number of days Staff deems Qwest to have been in violation of 47 U.S.C. § 252(e), 47 U.S.C. § 252(i), RCW 80.36.170, RCW 80.36.180, and RCW 80.36.186.

f. Please identify all Washington-certificated CLECs that Staff knows or believes would have sought to opt into any provision of this agreement had it been filed in what Staff would consider a timely manner.

g. For each CLEC identified in your response to subpart f above, please identify all bases for Staff’s knowledge or belief that the CLEC would have sought to opt into any provision of this agreement had it been filed in what Staff would consider a timely manner.

h. For each CLEC identified in your response to subpart f above, please identify the provision(s) that Staff knows or believes that CLEC would have sought to opt into had the agreement been filed in what Staff would consider a timely manner.

i. For each CLEC identified in your response to subpart f above, please identify all facts and produce all documents in Staff’s possession, custody or control demonstrating that the CLEC could have satisfied all terms legitimately related to those Staff knows or believes the CLEC would have sought to opt into.

j. For each CLEC identified in your response to subpart f above, please identify all facts and produce copies of all

documents in Staff's possession, custody or control as of the date of these Requests identifying, defining or quantifying or attempting to identify, define or quantify any harm the CLEC suffered or may have suffered as a result of Qwest's alleged failure to file this agreement in what Staff would consider a timely manner.

k. For each CLEC identified in your response to subpart f above, please identify all facts and produce copies of all documents in Staff's possession, custody or control as of the date of these Requests that in any way suggest that the CLEC could have or would have changed its business model or modified its business behavior in any way had Qwest filed this agreement in what Staff would consider a timely manner.

RESPONSE: a. Please see Exhibit No. ___(TLW-70) and Mr. Wilson's analysis of the secret interconnection agreements under the Second Cause of Action beginning in his testimony on page 16 of Exhibit No. ___(TLW-T-1), wherein Mr. Wilson provides his analysis of whether each agreement constitutes an interconnection agreement.

b. Please see Exhibit No. ___(TLW-71), Column E, which provides the due date by which each secret interconnection agreement should have been filed with the Commission. Also please see Mr. Wilson's discussion and analysis of the Timeliness issue in Exhibit No. ___(TLW-T-1) beginning at page 55.

c. Objection, speculative, insufficient information provided to answer the question and calls for legal conclusion.

d. Objection, speculative, insufficient information provided to answer the question and calls for legal conclusion.

e. Please see Exhibit No. ___(TLW_T-1), page 56, lines 8-17 for an explanation of how Mr. Wilson calculated the number of days Staff deems Qwest to have been in violation of 47 U.S.C. § 252(e), 47 U.S.C. § 252(i). Regarding secret interconnection agreements in Exhibit A, the calculation of the number of days Staff deems Qwest to have been in violation of RCW 80.36.170, RCW 80.36.180, and RCW 80.36.186 is the same as for violations of 47 U.S.C. § 252(e), 47 U.S.C.

§ 252(i). Regarding secret agreements in Exhibit B, the calculation of the number of days Staff deems Qwest to have been in violation of RCW 80.36.170, RCW 80.36.180, and RCW 80.36.186 is simply the number of days since the agreement was signed until June 1, 2004.

f. Please see opening argument at page 3 of Time Warner's September 8, 2003 petition to intervene:

“In this proceeding, the Amended Complaint alleges that Qwest has entered into a number of agreements that make available interconnection, services, or network elements to certain CLECs that were not filed or not timely filed. TWTC may wish to take advantage of the terms of those agreements. The Amended Complaint also alleges that Qwest has entered into a number of agreements with certain CLECs that contain terms and conditions that create an undue or unreasonable prejudice or disadvantage or undue discrimination. TWTC has an interest in ensuring that it is able to take advantage of contract terms and conditions that are the same or substantially the same as those offered by Qwest to similarly situated telecommunications companies, and that it is not subjected to undue or unreasonable prejudice or disadvantage or undue discrimination in gaining access to or pricing of interconnection, services, or unbundled network elements.”
(Emphasis Added)

Also, because all of the secret interconnection agreements were kept a secret until they were filed as Exhibits attached to Mr. Wilson's testimony in this docket on June 8, 2004, other CLECs did not have access to any of the secret interconnection agreements until they were either untimely filed for approval or filed by Mr. Wilson in this case. It is Mr. Wilson's belief that because the secret interconnection agreements at issue were secret, there are no other documents that refer to or relate to communications from any other CLECs regarding such carrier's inability to obtain any service, rates, term or condition contained in any of the secret interconnection agreements at issue in this docket.

Please see Exhibit No. ____ (TLW-76) at page 12 (response to 1-2). It is speculative to consider the effects on other CLECs who did not have access to the secret interconnection agreements because other CLECs were not afforded the

opportunity to review the secret interconnection agreements to determine whether to opt-in, and therefore they also did not have grounds to try to adopt or opt-in.

Please see Exhibit No. ____ (TLW-79), at page 3 (response to 1-3) wherein Worldcom indicates that any secret interconnection agreement providing better pricing of any services, including UNE-P, through discounts or take-or-pay provisions, for example, or shorter intervals for provisioning of services or more attention to the provisioning of service should have been available for adoption. The response continues with the statement that pricing and provisioning are critical to entry into the local market and any improvement in prices and provisioning would have made entry easier for CLECs.

Please also see Exhibit No. ____ (TLW-80) at page 6, response to 1-2: “agreements which provide for discounts, accelerated complaint resolution, special attention, “take or pay” arrangements, “consulting,” or other incentives or privileges, or advantages, all would have made entry into the local market [easier] . . .” The secret interconnection agreements with Eschelon include provisions for discounts, accelerated complaint resolution, special attention, consulting and other incentives, privileges and advantages, therefore Staff concludes that CLECs such as AT&T might have possibly attempted to seek to have the agreements made available for adoption. Because they were secret, however, it is speculative to say anything other than apparently AT&T and other CLECs were not able to enjoy the opportunity that the request seems to imagine or presume may have occurred.

On this basis, Staff reasonably assumes that, had the secret interconnection agreements been filed and made available for adoption, it is entirely possible other CLECs would have reviewed and possibly adopted various elements in the hopes of improving pricing and provisioning.

Please see the agreement, which speaks for itself, and is filed as an exhibit attached to Mr. Wilson’s pre-filed direct testimony.

Please see response to f.

- h. Please see response to f.
- i. Please see response to f.
- j. Other than the information provided in its direct pre-filed testimony and exhibits, Staff does not have any documents in its possession which identify, define or quantify or attempt to identify, define or quantify any harm a CLEC suffered or may have suffered as a result of Qwest's alleged failure to file this agreement in what Staff would consider a timely manner.
- k. Other than the information already provided in direct pre-filed testimony and exhibits, Staff does not have any documents that suggest that the CLEC could have or would have changed its business model or modified its business behavior in any way had Qwest filed this agreement in what Staff would consider a timely manner.

35 Staff's inappropriate objections to this request mirror its inappropriate objections to other requests. Subsections (c) and (d) specifically request a statement of Staff's position, not a legal conclusion, and Qwest is entitled to know the answer – particularly since the likelihood, or not, or approval of a particular agreement affects the likelihood that a CLEC was or could have been harmed by Qwest's failure to file a particular agreement.

36 Staff's refusal to respond as to the Exhibit B agreements was similarly unwarranted, if not more so:

No. 97: Please provide the following information with respect to the agreement attached as Exhibit B, Agreement No. 1 to Commission Order No. 05:

- a. Please state the basis for Staff's belief that Qwest was required to publish this agreement or otherwise make this agreement available for inspection, review, approval or opt-in.
- b. Please state the date by which Staff contends that Qwest should have published this agreement or otherwise

made this agreement available for inspection, review, approval or opt-in.

c. Please state whether Staff contends that Commission approval would have been necessary for this agreement to take effect and, if so, if the Commission would have approved this agreement had Qwest filed it in what Staff would consider a timely manner.

d. If your response to subpart c above is anything other than an unqualified “yes,” please state the reasons why Staff contends that the Commission would not have approved this agreement and the authorities supporting that position.

e. Please explain the bases for Mr. Wilson’s calculation, in Exhibit TW-72 to his testimony, of the number of days Staff deems Qwest to have been in violation of RCW 80.36.170, RCW 80.36.180, and RCW 80.36.186.

f. Please identify all Washington-certificated CLECs that Staff knows or believes would have sought to adopt or opt into any provision of this agreement had it been filed in what Staff would consider a timely manner.

g. For each CLEC identified in your response to subpart f above, please identify all bases for Staff’s knowledge or belief that the CLEC would have sought to adopt or opt into any provision of this agreement had it been filed in what Staff would consider a timely manner.

h. For each CLEC identified in your response to subpart f above, please identify the provision(s) that Staff knows or believes that CLEC would have sought adopt or to opt into had the agreement been filed in what Staff would consider a timely manner.

i. For each CLEC identified in your response to subpart f above, please identify all facts and produce copies of all documents in Staff’s possession, custody or control identifying, defining or quantifying or attempting to identify, define or quantify any harm the CLEC suffered or may have suffered as a result of Qwest’s alleged failure to file this agreement in what Staff would consider a timely manner.

j. For each CLEC identified in your response to subpart f above, please identify all facts and produce copies of all documents in Staff's possession, custody or control that in any way suggest that the CLEC could have or would have changed its business model or modified its business behavior in any way had Qwest filed this agreement in what Staff would consider a timely manner.

RESPONSE: a. Objection, mischaracterizes Staff's position and calls for legal conclusion.

b. Objection, mischaracterizes Staff's position and calls for legal conclusion.

c. Objection, speculative, insufficient information provided to answer the question and calls for legal conclusion.

d. Objection, speculative, insufficient information provided to answer the question and calls for legal conclusion.

e. Regarding secret interconnection agreements in Exhibit A, the calculation of the number of days Staff deems Qwest to have been in violation of RCW 80.36.170, RCW 80.36.180, and RCW 80.36.186 is the same as for violations of 47 U.S.C. § 252(e), 47 U.S.C. § 252(i). Please see Exhibit No. ___(TLW_T-1), page 56, lines 8-17 for an explanation of how Mr. Wilson calculated the number of days Staff deems Qwest to have been in violation of 47 U.S.C. § 252(e), 47 U.S.C. § 252(i). Regarding secret agreements in Exhibit B, the calculation of the number of days Staff deems Qwest to have been in violation of RCW 80.36.170, RCW 80.36.180, and RCW 80.36.186 is simply the number of days since the agreement was signed until June 1, 2004.

f. Staff does not claim in its complaint or testimony that Exhibit B agreements should have been filed in a timely manner or that they are subject to §252(e) or §252(i). Staff is unaware of any Washington-certificated CLECs that would have sought to adopt or opt into any provision of this agreement.

g. Staff did not identify any CLECs in question f, because Staff does not claim in its complaint and testimony that

Exhibit B agreements should have been filed in a timely manner or that they are subject to §252(e) or §252(i). Staff has no bases for a belief that any Washington-certificated CLECs that would have sought to adopt or opt into any provision of this agreement.

h. Staff did not identify any CLECs in question f, because Staff does not claim in its complaint or testimony that Exhibit B agreements should have been filed in a timely manner or that they are subject to §252(e) or §252(i). Staff is unaware of any Washington-certificated CLECs that would have sought to adopt or opt into any provision of this agreement and therefore cannot identify specific provisions as requested.

i. Staff did not identify any CLECs in question f, and so Staff does not have the requested documents.

j. Staff did not identify any CLECs in question f, and so Staff does not have the requested documents.

37 This response suffers from two problems. First, subsections (a) and (b) do not seek legal conclusions: they ask Staff to state its position. And second, for the same reasons as the response regarding the Exhibit A agreements, subsections (c) and (d) also request a statement of position that Qwest is entitled to have. *See* WAC 480-07-400(1)(c)(iii).

38 Staff did not object to these requests on the grounds of burden or that the requests were not reasonably calculated to lead to the discovery of admissible evidence. Nor did not seek clarification. Staff's refusal to answer these requests is just as misplaced as for Qwest's more general requests (see Sections 1 and 2, *supra*), and the Commission should hold Staff to the same discovery obligations that Qwest and the other parties to this case have fulfilled.

IV. CONCLUSION

39 For the foregoing reasons, the Commission should compel Staff forthwith to provide appropriate responses to the data requests identified on page 1 of this motion.

40 The scheduling order in this docket requires Qwest to file its testimony with the Commission on or before August 9, 2004, and Qwest needs fulsome responses to these requests in order to prepare that testimony. Even more urgently, however, the parties are scheduled to take the deposition of Staff's witness, Mr. Wilson, on July 21-22, 2004. Accordingly, Qwest respectfully requests that the Commission consider and rule on this motion prior to July 21, if possible.

DATED this ____ day of _____, 2004.

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