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Ms. Carole J. Washburn
Dennis J. Moss,
Administrative Law Judge
Washington Utilities & Transportation Commission
1300 S. Evergreen Park Drive SW
P.O. Box 47250
Olympia WA 98504-7250

Re: U S WEST/Qwest Merger, Docket No. UT-991358

Dear Judge Moss:

Pursuant to the Commission's May 11, 2000, Notice of Additional Process in the above-referenced docket, Advanced TelCom Group, Inc. ("ATG") and NEXTLINK Washington, Inc. ("NEXTLINK") provide the following comments on whether, and the extent to which, agreements designated as confidential are entitled to confidential treatment under the Protective Order, or otherwise. Although neither ATG nor NEXTLINK have entered into a confidential agreement as identified in Bench Request No. 2, both ATG and NEXTLINK nevertheless strongly urge the Commission to recognize and maintain the confidentiality of business-to-business settlement agreements.

ATG and NEXTLINK previously informed the Commission that they each were in negotiations with U S WEST Communications, Inc. ("U S WEST"). NEXTLINK has subsequently entered into a nonconfidential agreement that requires NEXTLINK's withdrawal from the merger proceeding, and NEXTLINK has provided notice of its withdrawal in compliance with the terms of that agreement.

ATG and NEXTLINK are not parties to any of the confidential agreements currently at issue in this proceeding, but ATG and NEXTLINK cannot over-emphasize the importance of parties' ability to negotiate and execute confidential agreements that resolve intercompany business disputes without fear that those agreements will be made public. The Commission, like state and federal courts, has long encouraged parties to resolve their disputes through settlement. Courts consistently recognize that in order to do so, parties may enter into agreements, the terms and conditions of which are confidential. Confidentiality, in such circumstances, permits the parties to compromise their public positions to resolve a specific dispute without altering those positions or undermining their ability to maintain those positions in future disputes.

Confidentiality is no less important to settlement agreements between competing telecommunications companies. In the wake of the passage of the Telecommunications Act of 1996, companies have taken strong public positions on a variety of issues. These often absolute positions may be subject to some compromise under certain carrier-specific circumstances and if the parties are not required to defend such compromise in public. In addition, disputes frequently arise over specific company or customer accounts or involve customer proprietary network information ("CPNI"). Companies thus must be able to execute confidential agreements to protect not only their own competitively sensitive business information but also their customers' data.

Commission Staff's indiscriminate challenge to *all* of the "Confidential" or "Highly Confidential" designations of the settlement agreements in this proceeding casts a pall over companies' willingness to settle their disputes. Carriers will litigate their intercompany business disputes, rather than resolve them privately, if voluntary settlements are subject to public Commission scrutiny. The result will be a substantial increase in time and resources devoted by the parties and the Commission alike to resolve disputes that otherwise could and should be resolved through negotiation.

ATG and NEXTLINK, however, do not urge unqualified acceptance of every claim of confidentiality. Confidentiality should not be used as a shield for discrimination. ATG and NEXTLINK, for example, agree that an incumbent local exchange company ("ILEC") should not be permitted to use confidentiality to avoid compliance with the requirement that it "make available any interconnection, service, or network element provided under an agreement approved [by the Commission] to which it is a party to any other requesting telecommunications carrier upon the same terms and conditions as those provided in the agreement." 47 U.S.C. section 252(i). If an agreement substantively alters the terms and conditions of a Commission-approved interconnection agreement, the parties should amend the interconnection agreement accordingly. The agreement requiring that amendment, however, is nevertheless entitled to confidentiality, just as the parties' negotiations leading up to execution of an interconnection agreement are entitled to confidentiality.

Accordingly, ATG and NEXTLINK recommend that the Commission deny Staff's challenges to the "Confidential" or "Highly Confidential" designation asserted by the parties to the agreements provided in response to Bench Request No. 2. ATG and NEXTLINK further recommend that the Commission issue a strong statement in support of encouraging legitimately private resolution of disputes by maintaining the confidentiality of settlement agreements between competing telecommunications companies in the absence of substantial evidence that the parties are abusing that confidentiality in order to evade compliance with, or in violation of, applicable law.

Very truly yours,

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