

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
WORLD COM, 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
RESPONSE TO SETTLEMENT
AGREEMENT BETWEEN STAFF
AND ESCHELON

I Qwest Corporation, by and through its undersigned counsel, hereby comments on and opposes certain aspects of the August 12, 2004 Settlement Agreement between Staff and Eschelon Telecom ("Eschelon"). Specifically, Qwest objects to and opposes the provisions set forth in paragraphs 2 and 14, in so far as they call for Eschelon to file

what may amount to be direct testimony adverse to Qwest and supportive of Staff's complaint in the responsive round of testimony.¹ Any testimony filed by Eschelon on August 30 should be strictly limited to responding to Staff's direct testimony.

2 As the complainant, Staff bears the burden of proof in this proceeding. Pursuant to Order No. 6, as modified, all direct testimony was due to be filed on June 8, 2004. Staff initiated this proceeding in August 14, 2003, twelve months ago. Its deadline for making its case in direct testimony was June 8, 2004. The Eschelon settlement agreement potentially eviscerates that deadline by permitting Staff (in essence) two rounds of direct testimony and by throwing the entire procedural schedule and order of presentation out of balance.

3 Paragraph 14 of the Eschelon settlement agreement requires Eschelon to file prefiled "responsive" testimony of Richard Smith. The settlement agreement even specifies the topics on which he must testify, which are as follows:

- (1) An account of the circumstances in which ESCHELON entered into each of the Agreements and agreed to the confidential treatment of the Agreements, including any statements, positions, or requirements by Qwest that are not reflected in the written terms of the Agreements.
- (2) The reasons for ESCHELON's decision to enter into the Agreements with Qwest, including any problems or concerns with Qwest's performance of its obligations as an incumbent local exchange company;
- (3) The nature of the business relationships among ESCHELON, Qwest, McLeodUSA, and other respondents during the time the agreements were negotiated and entered into;
- (4) The effect on ESCHELON and its success as a competitive local exchange company of the practices of Qwest, McLeodUSA, and other respondents with regard to entering into interconnection agreements that were not filed and made available to ESCHELON pursuant to 47 USC 252(i);

¹ Qwest also questions the portion of paragraph 2, which seeks to preserve Eschelon's party status, so that it can provide testimony on August 30. The Commission's procedural rules, specifically WAC 480-07-340, do not appear to recognize a party status based solely on the entity's desire or compulsion to provide information when that party does not also have an interest in the proceeding, either as a claimant or as a respondent to claims against it.

(5) ESCHELON will provide exhibits in support of Mr. Smith's testimony, consisting of business records of the company documenting the facts and opinions presented in testimony.

4 While the settlement agreement characterizes Mr. Smith's testimony as "reply" and "responsive" in nature, the prescribed subject matter does not appear to be responsive to Mr. Wilson's June 8, 2004 direct testimony. Instead, the settlement agreement implies that the Eschelon testimony will be in the nature of affirmative, direct testimony supportive of Staff's complaint.

5 Qwest is, thus, placed in a very difficult position. Having not yet received Mr. Smith's "response" testimony, Qwest cannot yet move to strike it. However, if Qwest waits to act until the testimony is filed, it will potentially prove impossible to "unring the bell" assuming that Mr. Smith's testimony proves to be as procedurally objectionable as the settlement agreement indicates it will be.

6 The bottom line is that Staff had the burden to come forward with its entire affirmative case in the first round of testimony. Qwest had every right to see all testimony adverse to it, and supportive of Staff's complaint, in the first round of testimony, in order that Qwest could respond to all such adverse testimony at one time. If the Eschelon settlement agreement is approved and Staff and Eschelon are able to orchestrate a second round of direct testimony, Qwest will be prejudiced. Staff's failure to use the nine months it had after it filed the complaint in this proceeding to gather information it deemed sufficient to support its broad complaint is not a basis for giving Staff a second bite at the apple, to the detriment of Qwest. Qwest therefore requests that the Commission reject paragraphs 2 and 14 of the Eschelon settlement agreement and explicitly direct Eschelon to limit any prefiled testimony on August 30 to responding to the allegations set forth in Staff's direct testimony.

RESPECTFULLY SUBMITTED this _____ day of August, 2004.

QWEST

Lisa Anderl, WSBA # 13236
Adam Sherr, WSBA # 25291
1600 7th Avenue, Room 3206
Seattle, WA 98191
Phone: (206) 398-2500
Attorneys for Qwest