

**Qwest**

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***Via E-mail and  
Overnight Mail***

Ms. Carole J. Washburn, Executive Secretary  
Washington Utilities & Transportation Commission  
1300 S. Evergreen Park Drive SW  
P.O. Box 47250  
Olympia, WA 98504-7250

Re: Docket No. UT-033011 - Unfiled Agreements  
Supplemental Comments re Request to Modify Hearing Date

Dear Ms. Washburn:

This letter is submitted in response to the August 17 Notice of Opportunity to File Responses to Proposals to Reschedule Hearing Dates and Staff's August 16 letter wherein Staff requests that the hearing be moved from November 1-4 to November 8-10, 22 and 23. Qwest reiterates its request that the hearing dates be shifted to the week of January 10.

Staff rests its request on the vague notion that "the public interest is better served by holding the hearing in November rather than January." Staff fails to explain why this is so, and in fact, such a result would be neither equitable, nor in the public interest. Indeed, the result would be to severely compress the procedural schedule following Staff's filing of reply testimony and to limit Qwest's opportunity to conduct all necessary discovery. This unwarranted impact would also result if Staff's request for a November 15 discovery cutoff is granted.

With regard to its proposed discovery cutoff, Staff states that the parties "have already had the opportunity to engage in significant discovery" and that a discovery cutoff of November 15 is necessary to prevent any party (obviously, Qwest) from engaging in unnecessarily protracted discovery. There are at least two serious analytical flaws with this assertion.

First, Qwest has clearly had no opportunity to engage in any discovery regarding testimony that has not been filed yet, namely Staff's reply testimony now due October 25, 2004.<sup>1</sup> Qwest is not and should not be limited to conducting discovery on Staff's direct testimony. Second, Staff presupposes that any discovery will be "unnecessarily protracted." That simply isn't so. If Staff feels aggrieved by discovery propounded by any party, it has every right to seek relief from the ALJ. Predetermining that any discovery will be improper is simply unfair.

Furthermore, Staff's implication that Qwest is attempting to draw out this case is belied by the fact that it was Staff, not Qwest, that introduced a last-minute request to delay the filing of response testimony from August 16 to August 30. Staff had nine months to develop its direct evidence, but waited until August 12 to announce its intention to have Eschelon file what appears on the face of the settlement agreement to be additional direct evidence on Staff's behalf. It waited until August 20 to announce its intention to have McLeod to file what appears to be similar testimony as well. It is Staff that has injected delay into this proceeding. Qwest is simply seeking the opportunity to fairly defend itself.

Staff also offers no response to the fact that at least one Qwest witness and the attorney for Public Counsel have already indicated that they are unavailable on November 22 and 23, the week of Thanksgiving. Qwest finds it ironic that Staff partly bases its need for a November 15 discovery cutoff on the desire to prevent holiday scheduling conflicts. Staff appears unsympathetic about those conflicts as they pertain to conducting an evidentiary hearing the week of Thanksgiving.

Qwest also disagrees with Staff's claim that this case has been significantly simplified. Qwest believes five days will still likely be necessary given the sheer volume of agreements Staff has brought into this case. The fact that several parties have been dismissed will likely be offset by the added complexity that will arise from Eschelon's and McLeod's planned "response" testimony, if that testimony is permitted by the Commission.

Finally, Staff also fails to explain, and Qwest frankly fails to understand, how tightly compressing the procedural schedule will "encourage the timely settlement" of this case. Instead, it will likely make settlement discussions leading up to the hearing impossible because the parties will be devoting all of their energies to hearing preparation.

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<sup>1</sup> Please note that Qwest will be submitting a written request to once again reschedule the filing of response and reply testimony. By virtue of the Staff-Eschelon and Staff-McLeod settlement agreements (neither of which has been approved), Staff is attempting to orchestrate the filing by Eschelon and McLeod of what appears to be additional direct testimony supportive of Staff's complaint and adverse to Qwest. Qwest has filed a response objecting to that aspect of the Staff-Eschelon settlement agreement. Qwest believes it would be wholly inappropriate for Eschelon – and now McLeod – to file additional direct testimony prior to the Commission ruling on Qwest's objection.

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Qwest appreciates the opportunity to comment again, and asks the Commission to keep in mind the level of penalties Staff's direct testimony, if read literally, suggests the Commission impose against Qwest. In a case where millions of dollars are potentially at stake (Staff has alleged over 188,000 days of violations and a per day fining authority of \$1000 per day), stripping Qwest of the right to develop the facts and to test Staff's testimony in discovery raises serious due process issues and would be incredibly unfair to Qwest.

Sincerely,

Adam L. Sherr

ALS/llw

cc: Service List (*via e-mail and U.S. Mail*)  
ALJ Rendahl