August 26, 2004

Carole J. Washburn, Secretary
Washington Utilities and Transportation Commission
1300 S. Evergreen Park Dr. SW
P. O. Box 47250
Olympia, Washington 98504-7250

Re: *WUTC v. AdvancedTelecom Group, Inc., et al.*
Docket No. UT-033011

Dear Ms. Washburn:

Qwest has failed to provide an actionable basis to modify the response testimony filing dates. Qwest argues "it is critical" that the Commission have an opportunity rule on Qwest's objection to the Staff-Eschelon Settlement and the Staff-McLeod Settlement prior to the testimony filing date. In fact, there is nothing critical about it. The issues Qwest raises in its letter are really issues of procedure faced by the Commission on a regular basis and, in fact, addressed and cured by the Commission's procedural rules and the Administrative Procedure Act, Chapter 34.05 RCW. It's true that the procedural posture of the filings in this case may be a bit unusual, but that does not mean that the Commission's rules are inadequate. Furthermore, Qwest's request, when viewed in terms of the relief Qwest is seeking, makes no sense. Thus, it cannot possibly constitute "good cause" for a continuance under WAC 480-07-385. For those reasons, Qwest's request should be denied.

An overarching reason Qwest's request should fail is that it is premature. Qwest asserts that it believes the testimony of Eschelon and McLeod *will be* objectionable. This is pure speculation on the part of Qwest.[1] In fact, it is impossible to know the nature of the testimony until it is filed. To the extent that Qwest comes to the opinion that it is objectionable (once it is filed), Qwest has a procedural remedy available to it.

The Commission procedural rules specifically provide that objections shall be made "*at the time the evidence is offered* [emphasis added]" and provide standards for the admissibility of evidence. WAC 480-07-495(1). Although Eschelon and McLeod, presumably, will be filing

[1] In fact, Qwest's objection to the Eschelon Settlement says that Eschelon should be "responding to the allegations set forth in Staff's direct testimony." *See* Qwest Corporation's Response to Settlement Agreement Between Staff and Eschelon (Response to Settlement), paragraph 6. The list of topics that Eschelon and McLeod will be testifying to objectively appear to contemplate the companies doing just that. *See* Eschelon Settlement, paragraph 14.

their testimony consistent with Commission set deadlines, the evidence will not be offered into the record until the day of the hearing. *See* WAC 480-07-460(2). At that time, or before it, Qwest may state "the grounds for [its] objection". WAC 480-07-495(1). Certainly, Qwest should not be permitted to object to evidence not yet filed, let alone offered into the record.

Despite the substance of the Commission rules, Qwest states its concern that it will prove potentially impossible to "unring the bell". Response to Settlement, paragraph 5. It is hard to know what Qwest intends with this legal cliché, but it surely cannot mean that the Commission will be forced to admit the testimony into the record if it is filed on August 30. As discussed above, the bell would ring in that sense only when the evidence is offered at hearing and the motion to strike is overruled.

Rather, it would appear that Qwest is suggesting that the pre-filing of purportedly objectionable evidence will taint the commissioners and administrative law judge. In other words, if Qwest ultimately were to prevail on a motion to strike the Eschelon and McLeod evidence, the presiding officers would still factor the stricken evidence into their ultimate decision on the merits. That is not the case. The Commission routinely rules on the admissibility of evidence with that evidence before it. Indeed, the Commission's procedural rules specifically provide for it. *See* WAC 480-07-495(1). The presiding officer and Commissioners are practiced professionals and will do as they have done in countless other cases: rule on evidentiary issues and base their decision on the evidence admitted into the record. As the Commission and presiding officer are well aware "[f]indings of fact shall be based exclusively on the evidence of record in the adjudicative proceeding and on matters officially noticed in that proceeding." RCW 34.05.461(4).

A final reason Qwest's request should be denied is that *it is absurd* in that the remedy Qwest seeks doesn't cure the purported problem. Qwest seeks an extension of "the *deadlines* [emphasis added] for all parties to file response and reply testimony in this docket". Qwest August 24, 2004 letter, first sentence. An extension of a "deadline" does not prevent any party from filing testimony prior to the deadline. In fact, AT&T decided to file its "response" testimony on June 8, 2004. Even if the deadline for filing testimony was moved consistent with Qwest's request, Eschelon, McLeod, or any other party, could file testimony whenever that party saw fit to do so.

In other words, without Qwest requesting the draconian measure of an order from the presiding officer prohibiting Eschelon and McLeod from filing their testimony (which Qwest did not request), Qwest's letter of August 24, 2004, doesn't make any sense. Since Qwest has failed to make an actionable argument justifying the extension, Qwest's request for extension should be denied.

For all of the above reasons, Qwest, Eschelon, McLeod, and all other parties seeking to file testimony should be required to meet the August 30, 2004, deadline.

Very truly yours,

CHRISTOPHER SWANSON
Assistant Attorney General

CS:kll
Enclosures
cc: Parties