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August 30, 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:

Enclosed for filing is the original Commission Staff Reply to Qwest Response to Eschelon Settlement Agreement. This document was incorrectly titled Staff's Response to Eschelon Regarding Settlement Agreement when filed with you previously this date. Please replace the incorrectly titled document with this document. I apologize for any inconvenience this may have caused.

Very truly yours,

CHRISTOPHER SWANSON
Assistant Attorney General

CS:kll
Enclosures
cc: Parties

BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION, Petitioners, v. ADVANCED TELECOM GROUP, INC., et al, Respondents.	DOCKET NO. UT-033011 COMMISSION STAFF REPLY QWEST RESPONSE TO ESCHELON SETTLEMENT AGREEMENT

1 WAC 480-07-740 states in pertinent part "[t]he commission must determine whether a proposed settlement meets all pertinent legal and policy standards." As was discussed in the narratives supporting the Eschelon Settlement Agreement and McLeodUSA Settlement Agreement (Settlement Agreements) the Settlement Agreements are in the public interest. Qwest has not argued and has therefore waived any argument that the settlements are not in the public interest. Qwest's objections to the Settlement Agreements essentially relate to due process principles as applied to it, a legal standard. Therefore, if Qwest's arguments fail, it should not be allowed to raise additional objections to the Settlement Agreements. As will be

discussed below Qwest's objections are without merit because any potential prejudice is easily cured under the procedural schedule already in place. Therefore, the Settlement Agreements, following consideration by the Commission, should be approved.

2 There is no doubt that Qwest deserves the right to respond to the testimony of Eschelon and McLeodUSA in way that is consistent with due process principles. The constitutional guaranty of due process of law essentially requires notice and an opportunity to be heard. *Soundgarden v. Eikenberry*, 129 Wn.2d 750, 768 (1994). Qwest has already received notice of the allegations against it in the form of the Complaint and Amended Complaint in this docket. Qwest will have the opportunity to exercise its right respond in the second and third rounds of testimony.

3 Qwest will receive notice of all evidence offered against it either through Staff's direct testimony and the response testimony of Eschelon, McLeodUSA and, potentially, Public Counsel and Time Warner. Qwest will have the opportunity to respond to such testimony either at the time for filing response testimony (for Staff's direct testimony) or at the time for filing reply testimony (for Eschelon, McLeodUSA, and, potentially, Public Counsel's and Time Warner's testimony). Staff might be able to understand Qwest's concern if Eschelon and McLeodUSA

were sprung on the company as part of a reply case. In that situation the appropriate remedy might be to give Qwest an additional opportunity to respond. However, Staff fails to understand how Qwest is prejudiced, for purposes of due process, by the testimony offered by McLeodUSA and Eschelon in a reply context and pursuant to the Settlement Agreements.

4 The Settlement Agreements essentially call for Eschelon and McLeodUSA to truthfully explain the circumstances surrounding the formation of the agreements that are the subject of this complaint in exchange for settlement.[1] In a different forum this is called "turning state's evidence". Staff recognizes that Eschelon's and McLeod's actions in agreeing to testify are not the same as turning "state's evidence" because this is a civil administrative case, and as the narratives explaining the Settlement Agreements indicate, there were good reasons why Eschelon and McLeodUSA settled this case for the particular terms contained in the Settlement Agreements. That being said, the theory is the same for both situations: a co-defendant (or co-respondent in this case) agrees to testify truthfully about allegations in exchange for a settlement.

[1] The companies will testify about five separate issues each of them directly relevant to the Complaint and Amended Complaint in this case. *See* Eschelon Settlement Agreement, paragraph 14, McLeodUSA Settlement Agreement, paragraph 15.

5 This theory and practice has long been accepted by the courts as consistent with due process principles.[2] Courts have recognized that "[t]hat a co-defendant might turn State's evidence is not unforeseeable." *See State v. Ramos*, 83 Wn.App. 622, 636 (1996). In fact, "[p]romising an accomplice immunity is a time-honored practice and one sustained by the weight of authority." *State v. Johnson*, 77 Wn.2d 423, 439 citing 1 R. Anderson, Wharton's Criminal Law and Procedure s 16 (1957); United States v. Ford, 99 U.S. 594 (1879); United States v. Levy 153 F.3d 995 (3d Cir. 1946); 22 C.J.S. Criminal Law § 46 (1961); 21 Am. Jur. 2d *Criminal Law* § 147 (1965). In this jurisdiction, as in nearly all others, an accomplice may testify on behalf of the prosecution. *Id.* Therefore, it cannot be said that the practice, in and of itself, is a violation of due process principles.

6 Qwest is correct when it says that the testimony of Eschelon and McLeodUSA should *respond to the allegations in Staff's direct testimony*. Qwest Response to Settlement Agreement Between Staff and Eschelon (Qwest Response), paragraph 6. However, Staff and Qwest presumably differ on what it means to

[2] It should be recognized that the due process interests involved where only money are at stake, like this case, are not of the same character for purposes of due process as the interests at issue in criminal or criminal-like administrative cases. *See* Nguyen v. Dept. of Health, 144 Wn.2d 516, 527-528 (2001) ("a civil proceeding which can result only in a money judgment" involves a "relatively negligible interest").

"respond".[3] What Qwest is really saying is that it "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". Qwest Response, paragraph 6. This statement is an exaggeration of the Commission's procedural rules and practices and of due process principles.

7 In general it is true that in most Commission cases the parties whose interests are similar act in procedural alignment. *See* Docket No. UT-991358, Thirteenth Supplemental Order, paragraph 13 ("Covad, if it desires, may participate in argument with the party or parties with whom its interests ally).[4] However, it certainly cannot be said that two parties' whose interests are generally in alignment have interests that are *always* in alignment or that a party has an entitlement to testimony by another party in its favor. In fact, frequently parties share interests on some issues and differ on others. A review of the recent pleadings and briefs filed in the Verizon interim rate case, Docket UT-040788, makes that fact clear.[5]

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[3] For example, evidence of other unfiled agreements not noticed in the complaint would not be relevant to this case for purposes of finding a violation with regard to those particular agreements, but might be relevant to show the context in which all the agreements were entered into or Qwest's motivation to enter into agreements, etc.

[4] No such guiding statement as to when parties (other than Staff) were required to file was provided by the Commission in this docket. In fact, AT&T decided to file testimony at the same time as Staff: June 8, 2004. Presumably, Public Counsel and/or Time Warner may file testimony adverse to Qwest before the deadline set for "response testimony".

[5] In that Case WeB-TEC joined the Staff in its Motion for Summary Determination against Verizon, but opposed Staff and supported Verizon on the issue of rate design. This is typical of Commission cases.

8 Furthermore, a complaint case brought by the Commission is unique.[6] Under the Commission's procedural rules, "[w]hen the commission commences an adjudicative proceeding on its own complaint seeking to impose a penalty or other sanction based upon alleged acts or omissions of the respondent, the commission is the 'complainant'". WAC 480-07-340. Eschelon, Covad and Qwest are *respondents* because they are "[p]ersons against whom any formal complaint, petition, or motion is filed." *Id.* Thus, under the Commission's rules, it is not entirely clear that it would be appropriate for parties with interests aligned to the Commission Staff to file testimony at the same time as Commission Staff. It is a reasonable to assume that such parties, including Public Counsel and Time Warner, could file "response testimony" to describe their unique perspective related to the allegations and direct testimony.

9 The reality is that there is nothing in the Commission rules nor has Qwest cited any other authority for the proposition that respondents in a complaint case must file testimony supportive of each other or that a party must receive all non-

[6] In fact this case is exceptionally unique. It is reasonably foreseeable that in a multiple respondent complaint case involving agreements between the co-respondents Staff would attempt to play the parties interests against each other as a method to force out the truth. Staff's tactics are not unusual. They are simply a derivation of the old "prisoner's dilemma" wherein "co-respondents" gain the most advantage by maintaining consistent stories, but there is always the risk that one or the other will seek to settle with the charging party to benefit itself resulting in a loss in advantage to the non-settling "co-respondent".

favorable testimony at one time.[7] In fact, one might presume that had Eschelon and McLeod failed to settle with Staff, they would be attempting to shift the bulk of liability for failing to file agreements to Qwest as the incumbent. In turn, presumably Qwest would file reply testimony replying to that response testimony. Certainly, Eschelon and McLeodUSA's blame-shifting testimony in that instance would be characterized as adverse to Qwest and could be considered by the Commission in determining liability or issuing penalties, yet it certainly would not be received up front.

10 Finally, Qwest's argument that Commission's rules "do not appear to recognize a party status based solely on the entity's desire or compulsion to provide information when the party does not also have an interest in the proceeding, either as a claimant or respondent to the claims against it" holds no water. Qwest Response, footnote 1. Perhaps Eschelon and McLeodUSA's "interest" in the proceeding is that they agreed to testify truthfully in the proceeding as part of a

[7] Of course, there is an analogous objection to "friendly cross" at hearing which, although not contained in the Commission rules, seems to have reached general acceptance as a proper objection. The key to this objection, however, is not whether a party is a respondent, petitioner, or intervenor, rather it is where the party's interests ally. Here, Eschelon and McLeodUSA's interests appear to have changed. That too happens in Commission cases especially in the case of settlement. Also, interests may change based on Commission action. For example, prior to Order No. 05, presumably the CLECs sought to pin the responsibility for filing agreements solely upon Qwest (a position adverse to Qwest), but following the Commission order indicating that the responsibility for filing was joint, the CLECs' position changed so that they now sought to argue that the agreements were not actually interconnection agreements (a position friendly to Qwest).

settlement. In other words, they do have an interest in supporting their Settlement Agreements. They are appropriately labeled respondents because that is what they are under WAC 480-07-340. If Qwest prefers to play semantics, perhaps the Commission could re-label them as "intervenors" instead, as long as the parties to the settlement would not consider such a change as inconsistent with the terms of the Settlement Agreements.

11 The terms of the Settlement Agreements ensure that Eschelon and McLeodUSA (and Qwest for that matter) will be forthcoming and truthful with their testimony (by allowing Eschelon and McLeodUSA a measure of security that their testimony will not later be used against them), but also ensure that appropriate measures are taken to ensure future compliance relating to filing unfiled agreements. Staff is confident that admission of the testimony called for in the Settlement Agreements will inform the public interest. Qwest's objections to the Settlement Agreements are easily cured by the procedural schedule already in place.

12 Finally, Staff feels it necessary to respond to Qwest's request for an order from the Commission limiting Eschelon and McLeodUSA to filing only certain testimony. Such an order is unprecedented and potentially *is a violation of due*

process.[8] Furthermore, a motion to strike is a much less invasive measure. Additionally, as discussed in Staff's letter responding to Qwest's request to modify the response filing dates, it should be noted that even if the Settlement Agreements are approved, but the testimony of Eschelon or McLeodUSA contain objectionable testimony, Qwest has procedural remedies to cure the problem. Essentially, Qwest could move to strike.

13 For all of the above reasons, Commission Staff requests the Commission to accept the Settlement Agreements and deny Qwest's objections.

DATED this 30th day of August, 2004.

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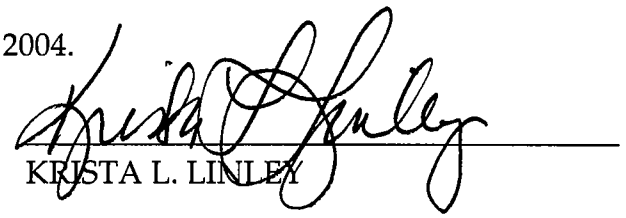
[8] Additionally, the Settlement Agreements provide that anything other than acceptance of the full agreement could result in one or the other party's withdrawal. Eschelon Settlement, paragraph 17, McLeodUSA Settlement, paragraph 18. Therefore, such an order would have the likely effect of eviscerating the parties' settlements and the need for any order would be mooted.

CERTIFICATE OF SERVICE
Docket No. UT-033011

I hereby certify that I have this day served a copy of the Response to Eschelon Regarding Settlement Agreement upon the persons and entities listed on this Service List as indicated below.

DATED this 30th day of August, 2004.



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