Exhibit HMS-1RT

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

RESPONSE TESTIMONY OF

HARRY M. SHOOSHAN

ON BEHALF OF
QWEST CORPORATION

September 13, 2004

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1. INTRODUCTION, PURPOSE AND SUMMARY OF RESPONSE TESTIMONY

Q. WHAT IS YOUR FULL NAME AND BY WHOM ARE YOU EMPLOYED?

A. My name is Harry M. Shooshan III. I am a principal in, and co-founder of, Strategic Policy Research, Inc. ("SPR"), a public policy and economics consulting firm located at 7979 Old Georgetown Road, Suite 700, Bethesda, Maryland, 20814.

Q. PLEASE STATE YOUR QUALIFICATIONS.

A. Before co-founding SPR, I served for eleven years on Capitol Hill. I was chief counsel and staff director of what is now the Subcommittee on Telecommunications and the Internet of the U.S. House of Representatives. As a consultant, I have specialized in communications public policy analysis, regulatory reform and the impact of new technology and competition.

I have testified before several Congressional committees, before the Federal Communications Commission ("FCC"), before the Canadian Radio-television and Telecommunications Commission and over two dozen state commissions. My testimony before state commissions has been on topics related to price regulation, the introduction of competition and the reclassification of services. I also served as an advisor to the Iowa Utilities Board and to the staff of the Arizona Corporation Commission where my work included the development of alternative regulation/price regulation plans and implementation of the Telecommunications Act of 1996.

I received a B.A. from Harvard University in Government and a J.D. from Georgetown University Law Center. From 1978 to 1991, I was an adjunct professor of law at Georgetown University Law Center, teaching regulation and communications law.

A copy of my curriculum vitae is appended to this testimony as Exhibit HMS-2.

Q. HAVE YOU TESTIFIED PREVIOUSLY BEFORE THIS COMMISSION?

A. Yes. I testified before this Commission on behalf of Qwest in WUTC Docket No. UT-030614 with regard to the competitive classification of Qwest's analog business services in Washington[1] and in WUTC Docket No. UT-033044, implementation of the FCC's Triennial Review Order.[2]

Q. WHAT IS THE PURPOSE OF YOUR RESPONSE TESTIMONY?

A. The purpose of my testimony on behalf of Qwest is to respond to the testimony of Thomas L. Wilson, Jr., on behalf of Staff in this proceeding. My testimony responds to Staff's position on—and deals with its lack of analysis of—the so-called "unfiled agreements" generally and also on the private commercial settlement agreements contained in Exhibit B.

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[1] Testimony on behalf of Qwest Corporation. Before the Washington Utilities and Transportation Commission. *Request for Competitive Classification of Basic Business Exchange Telecommunications Services.* Docket No. UT-030614. Direct: July 1, 2003. Rebuttal: August 29, 2003.

[2] Testimony on behalf of Qwest Corporation. Before the Washington Utilities and Transportation Commission. *In the Matter of the Petition of Qwest Corporation to Initiate a Mass-Market Switching and Dedicated Transport Case Pursuant to the Triennial Review Order.* Docket No. UT-033044. Direct: December 22, 2003. Response: February 2, 2004. Rebuttal: February 20, 2004.

Q. WILL YOU PLEASE SUMMARIZE WHAT YOU BELIEVE TO BE STAFF'S THEORY OF THE CASE?

A. Yes. As I read his Direct Testimony and the responses to questions from the parties in his deposition, I believe that Staff's theory of the case can be summarized as follows:

1) With regard to the "unfiled agreements" contained in Exhibit A, Mr. Wilson believes that—based on his own judgment—any agreement between Qwest and another carrier that "affects the bottom line economically and functionally" of the other carrier should be considered an "interconnection agreement"[3] and should be filed with the Commission. He then assumes without offering any evidence or performing any factual analysis that individual competitors and competition generally suffered harm as a result of the parties' failure to file.

2) With regard to the settlement agreements contained in Exhibit B, Staff concedes that they are not subject to Section 252 of the Telecommunications Act, and thus there was no obligation to file them or mechanism by which they were to be publicized or made available for inspection or opt-in. Nevertheless, Staff assumes, without any evidence that any other similarly-situated CLEC existed or had the same or a similar dispute with Qwest, that Qwest's settlement with one CLEC denied the same settlement to other CLECs, thereby causing differential treatment

[3] Deposition of Thomas L. Wilson ("Wilson Deposition"), vol. 2, at 44. Excerpts from volume 1 of Mr. Wilson's deposition are attached as Exhibit HMS-3, excerpts from volume 2 as Exhibit HMS-4, and excerpts from volume 3 as Exhibit HMS-5.

among CLECs that constitutes "undue discrimination" or "undue preference" prohibited by Washington statute.

3) While Staff does not "recommend" penalties, it considers each day that each Exhibit A agreement was not filed, as well as each day each Exhibit B agreement remained "unavailable" to other CLECs, to be a separate violation of each of the statutes remaining at issue. Staff's counting process yields more than 188,000 separate violations—each of which, it believes, reflexively merits the maximum allowable penalty, without regard to the specific circumstances of the agreement. Taken to its logical extreme, and applying Staff's view that the Commission has the authority to impose penalties of $1,000 for each per-day violation of each cause of action alleged, Staff's approach would point to an enormous and thoroughly unwarranted penalty.

Q. WILL YOU PLEASE SUMMARIZE YOUR TESTIMONY?

A. In my opinion**,** Staff fails to analyze the unfiled agreements (those listed in Exhibit A to Commission Order No. 05) properly and arrives at its conclusions based on speculation and surmise. Staff's theory regarding the discrimination supposedly resulting from the Exhibit B settlement agreements is at odds with the prevailing national policy favoring private dispute resolution by telecommunications providers and strains a fair interpretation of Washington state law barring *undue* discrimination or preferences, as is Mr. Wilson's deposition testimony to the effect that Qwest must offer to treat its wholesale customers and connecting carriers in *precisely* the same manner and cannot finally settle any commercial dispute with one carrier without first offering the same settlement to any other carrier that might benefit from it. Staff's position, were the

Commission to adopt it, would effectively make private settlements of commercial disputes between telecommunications providers in the State undesirable and, as a practical matter, impossible to undertake without creating vulnerability to new "violations." Although Staff stops short of formally recommending penalties, Mr. Wilson's view, articulated in his Deposition, that all failures to file are equally culpable and harmful and should be penalized identically fails to account for a variety of important mitigating circumstances.

Q. WILL YOU SUMMARIZE WHAT YOU CONCLUDE ABOUT STAFF'S POSITION?

A. Yes. Staff has not met its burden in this case. Even if the Commission were to assume that Qwest failed to file some number of agreements it was required under Section 252 to file, Staff has neither cited nor sought any evidence that even a single carrier was harmed by the parties' failure to file any of those agreements. Staff has done no analysis of the impact on competition generally of any of the agreements in either Exhibit A or Exhibit B. Staff has simply chosen to assert, without backing up its generalized theory, that the results of Qwest's actions were "bad"[4] and that maximum penalties are justified. Although Qwest's failure to file certain agreements may justify a modest penalty, Staff has not made a case that justifies the steep, cumulative sanctions Staff's approach would compel.

[4] "I think anyone will agree that analyzing their total impact is very, very difficult if not impossible, but we do know that it's bad." Wilson Deposition vol. 3, Ex. HMS-5, at 37.

2. UNFILED AGREEMENTS GENERALLY

Q. HAS STAFF FOLLOWED THE CORRECT "DECISION PATH" FOR ANALYZING THE UNFILED AGREEMENTS GENERALLY?

A. No, Staff has not. In general, Staff seems to rely on assumptions, assertions and surmise rather than on analysis of the facts and adherence to statute. I disagree with Staff's apparent view that maximum penalties should be assessed for Qwest's failure to file the Exhibit A agreements based solely on undefined (and, in Staff's view, undefinable) harm to competition, without regard to whether any CLEC could have opted into particular unfiled agreement and whether or not the failure to file actually caused any CLEC any harm. Notwithstanding a failure to file some agreements with this Commission, the existence and terms of these agreements related to interconnection were well-known to other parties. The agreements in question are national or regional in scope and had been filed or otherwise made available in proceedings like this one in other jurisdictions, including before the FCC. Moreover, since these agreements have become known, no other party sought to opt into any of them. Thus, it is difficult to understand how competition was harmed. Furthermore, in my opinion, the concept of "harm to competition" is so amorphous that it would be impossible to quantify such harm. Therefore, any penalties (aside from modest penalties for failure to file) based explicitly or implicitly on that theory if not supported by proof of actual harm would be entirely arbitrary. Finally, as Mr. Brotherson suggests,[5] the Commission lacks the authority to levy penalties on that basis.

[5] Response Testimony of Larry Brotherson ("Brotherson Test.") at 132-41.

Q. WHAT STEPS SHOULD THIS COMMISSION TAKE TO ANALYZE THE AGREEMENTS IN QUESTION?

A. The Commission should determine (1) if an agreement is an "interconnection agreement" covered by Sections 251 and 252 of the Telecommunications Act of 1996 ("the 1996 Act"); (2) whether a carrier not a party to the agreement would have qualified to opt in had the interconnection agreement been filed in a timely fashion; and (3) whether, and to what extent, based on reasoned analysis, that carrier was actually harmed by the lost opportunity.

If the Commission is to penalize a carrier for failing to file an interconnection agreement based, either explicitly or implicitly on some theory of harm, it must first clearly articulate that theory and then find actual proof that such harm occurred.

Q. WHAT FACTORS SHOULD THE COMMISSION CONSIDER IN DETERMINING WHETHER AN AGREEMENT IS AN "INTERCONNECTION AGREEMENT" AS CONTEMPLATED BY SECTIONS 251 AND 252 OF THE 1996 ACT?

A. In the first place, the Commission should consider the fact that the 1996 Act was designed to change the fundamental nature of the relationship among local telecommunications carriers. It was intended to change the local telecommunications market from one constrained by extensive regulation where relationships were governed by tariffs to one determined more by marketplace forces where parties can negotiate arrangements that make sense for their particular business models.[6]

[6] For example, Eschelon and McLeod both chose to compete for medium and small businesses by reselling Qwest's Centrex services. Some CLECs target residence customers; some focus on voice; some combine voice with Internet access. Other carriers purchase unbundled loops and provide their own switches to serve local markets. Still others use wireless technology and rely on Qwest only for interconnection to complete voice calls.

Staff agrees with this fundamental proposition:

(footnote continued)

Congress anticipated that, as local competition intensified, carriers would be best able to structure their business relationships through negotiation, rather than regulation.[7] Different carriers may be interested, by virtue of their circumstances and business plans, in altogether different arrangements and may, by virtue of their positions in the market, be able to negotiate different terms for what is essentially the same product or service than other carriers. This is no different than the outcome one observes in the economy generally.[8]

Nor is it unusual—or anticompetitive—for customer-specific terms to be embodied in individual contracts between buyers and sellers whenever circumstances warrant the transaction costs of negotiating such a contract. In wholesale markets (such as those in

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> Q And the way in which that market is supposed to function is designed again within a world that previously had been regulated to try to mimic a free market type environment, recognizing of course that you have a historical incumbent, for example, that owns all the poles and wires and so it would be—it might not be reasonable to expect that competitors can come about by building all new poles and wires on their own. But the ultimate goal is to try to create an environment that mimics as best you can under the circumstances a free market environment, right?
>
> A Yes, to realize those benefits to society of effective competition.
>
> Wilson Deposition vol. 2, Ex. HMS-4, at 54.

[7] The Telecommunications Act of 1996, Section 252(a)(1) indicates that terms for interconnection are envisioned to be derived from "voluntary negotiations" between parties in the first instance, rather than through generally available tariffed terms and conditions. That Act provided for binding arbitration if negotiations fail. *See* 47 U.S.C. § 252(a)(2).

[8] Such price discrimination is not unusual in the general economy. When customers purchase different quantities or qualities of goods, producers will often charge different prices. Price distributions can often be explained by different costs associated with different goods or different customers. *See*, *e.g.*, Jean Tirole, *The Theory of Industrial Organization* (MIT Press, Cambridge: 1997), at 133-134 (hereinafter *Tirole*). In fact, even in the case of a monopoly market structure, implementing a certain amount of price discrimination is considered an improvement in efficiency over the average cost pricing that had prevailed for many years. Further, price differences can enhance competitive entry in such a market. F.M. Scherer and David Ross, *Industrial Market Structure and Economic Performance* (Houghton Mifflin, Boston: 1990), at 496-502 (hereinafter *Scherer Ross*). I believe the FCC understood these benefits early on when it began to approve various calling plans and other pricing freedom for AT&T in the 1980s and early 1990s while it was still considered to be a "dominant carrier." *See*, *e.g.*, Bridger M. Mitchell and Ingo Vogelsang, *Telecommunications Pricing: Theory and Practice* (Cambridge University Press, Cambridge: 1991), at 188-200.

issue in this proceeding), transactions are generally large enough to justify negotiating individual contracts. These contracts would typically differ among customers.[9]

The fact that a seller (in this case an ILEC) might sell the identical product to different buyers on different terms cannot, as a matter of economics or public policy, be presumed to reflect an abuse of market power on the part of the seller or serve as evidence that the seller possesses extensive market power in the first place. Quite to the contrary, a seller that negotiates different transactions for different customers based on their circumstances and needs is actually *responding* to market forces—including its customers' bargaining leverage—and behaving precisely as it should in a competitive environment.[10] Such a pricing approach reflects the reality of markets in which customers' needs are diverse.

This contrasts with a regulated monopoly environment in which a single provider sells its products subject to complex and binding tariffs and in which customers—both wholesale and retail—must purchase what the single provider chooses to offer rather than negotiate offerings that truly match their individual needs. It is precisely this rigid model of business relationships, where it is presumed that "one size fits all," that Staff seems intent on perpetuating through its theory of the case.

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[9] In addition to approving optional calling plans for AT&T from which customers could select the pricing plan that met their needs, *see* n.7 above, the FCC later established resale conditions for AT&T's contract packages. The FCC determined that AT&T could offer different contract terms and volumes to different customers, whether they were retail or wholesale buyers of AT&T's services. Customers that seek to purchase different terms and volume conditions would not be considered to be purchasing "like" services. Therefore, such contracts would not constitute undue discrimination. *In the Matter of AT&T Communications Revisions to Tariff FCC No. 12*, CC Docket No. 87-568 (rel. November 22, 1991). The FCC followed the court's view of contract offerings in other industries that required customers to be "similarly situated" in order to obtain the same contract terms and conditions. *Id.* at ¶ 66. The availability of generally available tariffed rates provided additional protection against undue discrimination by regulated firms in the same way that the Statement of Generally Available Terms and Conditions ("SGAT") does for interconnection services.

[10] *See, e.g., Tirole* referenced in n.7 above. Much of the product variation in the general economy is considered "a natural and healthy response to consumer demands." Extensive product variation "is generally accepted by consumers and scholars." *Scherer Ross* at 571.

In enforcing the Act, this Commission should consider what it means to have "a level playing field" in the context of an industry in which the participants, particularly at the CLEC/retail level, are attempting to execute vastly different business models. Some CLECs have decided to build their own facilities, including wireless platforms. Others have chosen to resell ILEC offerings or lease portions of the ILEC network. Some have concentrated their footprints, while others have chosen to offer service more widely. It is wrong, and contrary to the deregulatory goals of the Act, to require Qwest and other ILECs to deal with each CLEC in a rigidly identical fashion.

In the new environment created by the 1996 Act, carriers are expected to work out their own business relationships (including the resolution of disputes).[11] It is for that reason that only agreements which are truly interconnection agreements need be filed.[12] But Staff wrongly extends its definition of "interconnection agreement" to encompass agreements (or portions of agreements, or even letters between parties in the course of carrying out a wholesale relationship, *see* Agreements 17A, 18A, 19A and 20A) that relate to other "terms of trade" among carriers, that affect CLECs' "bottom lines," or that amend (or propose to amend) aspects of the ILEC/CLEC business relationship beyond Section 251(b) or (c) services.

[11] In addition to implementing the provisions Section 252(a), the FCC developed its accelerated docket and alternative dispute resolution programs following the passage of the 1996 Act. *See* the FCC's Market Dispute Resolution Division website, http://www.fcc.gov/eb/mdrd/.

[12] *Memorandum Opinion and Order*, In the Matter of Qwest Communications International Inc. Petition for Declaratory Ruling on the Scope of the Duty to File and Obtain Prior Approval of Negotiated Contractual Arrangements under Section 252(a)(1), WC Docket No. 02-89 (October 4, 2002) ("Declaratory Ruling").

Q. WHAT WAS THE SCOPE OF THE FILING REQUIREMENT UNDER THE ACT AT THE TIME THE EXHIBIT A AGREEMENTS WERE EXECUTED?

A. At the time the Exhibit A agreements were executed, the scope of the filing requirement was a matter of some ambiguity, to say the least. It was not until the FCC issued its *Order* of October 4, 2002[13] in response to a petition from Qwest that there began to be some clarity on the subject. Before that time, different players in the market were taking very different positions on what constituted an "interconnection agreement."[14] State commissions had differed as well in their interpretations of the scope of the Act's filing requirements.[15] It was not at all evident in 1999, 2000 and 2001 that the term "interconnection agreement" would be held to encompass all or substantially all of the agreements comprising an ILEC/CLEC business relationship. And although the FCC ultimately interpreted the term more broadly than Qwest had, its ruling recognized fundamental limits, particularly that the filing requirement applied only to agreements relating to the interconnection services listed in § 251(b) and (c) and that it covered only terms that related to forward-looking obligations and not to backward-looking consideration (e.g., credits to resolve billing disputes).[16]

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[13] *Id*.

[14] *See id*. at ¶ 8 and n.26 (specifically disagreeing with parties advocating the filing of all ILEC/CLEC agreements and finding "that only those agreements that contain an ongoing obligation relating to section 251(b) or (c) must be filed under 252(a)(1)").

[15] *See, e.g., In re: AT&T Corporation v. Qwest Corporation*, Order Making Tentative Findings, Giving Notice For Purposes of Civil Penalties, and Granting Opportunity to Request Hearing, Docket No. FCU-02-2 (Iowa Utilities Board, May 29, 2002) ("Thus, for present purposes the Board will define an interconnection agreement that must be filed with the Board pursuant to § 252(a)(1) as a negotiated or arbitrated contractual arrangement between an ILEC and a CLEC that is binding; relates to interconnection, services, or network elements, pursuant to § 251, or defines or affects the prospective interconnection relationship between two LECs. This definition includes any agreement modifying or amending any part of an existing interconnection agreement."). A copy of this order is attached as Exhibit HMS-6.

[16] Mr. Wilson's view is markedly different. For example, he suggests that if the agreement results in an ongoing *relationship*, it should be considered an interconnection agreement, even if it resolves a past dispute. Wilson Deposition vol. 1, Ex. HMS-3, at 50-51. An agreement would also constitute an interconnection agreement, according to Wilson, if he saw in it any element he had seen in an SGAT. *Id*. at 60.

Q. IN YOUR OPINION, WHAT BALANCE DOES THE ACT ATTEMPT TO STRIKE IN DETERMINING THE SCOPE OF THE FILING REQUIREMENT?

A. The filing requirement and the opt-in opportunity provided by the Act were not designed by Congress to mimic the pre-Act regulatory regime. Instead, they were designed for the more limited—although very important—purpose of providing notice of the terms on which ILECs and CLECs are interconnecting so that carriers might elect to interconnect on *equivalent* terms, keeping in mind that interconnection means purchasing the services delineated in § 251(b) and (c).

Q. WHAT DO YOU MEAN WHEN YOU SAY THAT A CARRIER MIGHT ELECT TO INTERCONNECT ON "EQUIVALENT TERMS"?

A. The FCC made it clear that a CLEC could not avail itself of the prices negotiated in an interconnection agreement unless it could assume and satisfy related terms and conditions (for example, volume and term commitments).[17] Otherwise, CLECs could "cherry-pick" terms without regard for whether they would qualify for such terms in a fully unregulated market. The objective of the Act was to encourage carriers to negotiate interconnection agreements while making the market more transparent, so that regulators could be sure that ILECs were treating "likes alike." It was not to undermine negotiations by allowing CLECs to sit on the sidelines and simply "cherry pick" the terms they liked from agreements worked out by others.[18]

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[17] "For instance, where an incumbent LEC and a new entrant have agreed upon a rate contained in a five-year agreement, section 252(i) does not necessarily entitle a third party to receive the same rate for a three-year commitment. Similarly, that one carrier has negotiated a volume discount on loops does not automatically entitle a third party to obtain the same rate for a smaller amount of loops." *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, First Report and Order, 11 FCC Rcd 15499, 16139 ¶ 1315 (1996).

[18] Staff agrees with this proposition as well:

(footnote continued)

Q. HOW DO YOU DISTINGUISH THE TERM "CHERRY PICKING" FROM THE TERM "PICK AND CHOOSE" WHICH THE FCC USED TO DESCRIBE ITS POLICY?

A. In the first place, it is important to note that the FCC recently eliminated its "pick and choose" rule in favor of an "all or nothing" rule that requires carriers to opt in to an entire agreement, not simply the terms related to price for example.[19] Second, the term "pick and choose" was in itself somewhat misleading in what it connoted about a CLEC's rights and obligations. Nevertheless, § 252(i) says that competing carriers can opt in to agreements on the same terms and conditions. The FCC's First Report and Order determined that "incumbent LECs must permit third parties to obtain access under section 252(i) to any individual interconnection, service, or network element arrangement on the same terms and conditions as those contained in any agreement approved under section 252."[20] The effect of this interpretation was that requesting carriers could "pick and

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> Q So it is not correct to say that a CLEC can just cherry pick individual terms out of agreements without considering what related terms and conditions may go along with those terms, right?
>
> A I will go along with that generally speaking. You know, I mean, we have to be careful, but like you just said there might be a dispute about what is related, but generally speaking I would agree with you.

Wilson Deposition vol. 1, Ex HMS-3, at 194-95.

[19] *Second Report and Order*, In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, CC Docket No. 01-0338 (July 8, 2004) (hereinafter, *All or Nothing Order*).

[20] *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers*, CC Docket Nos. 96-98, 95-185, *First Report and Order*, 11 FCC Rcd 15499, 16139, ¶ 1314 (1996) (*Local Competition Order*), *modified on recon.*, 11 FCC Rcd 13042 (1996), *aff'd in part, vacated in part, Competitive Telecommunications Ass'n v. FCC*, 117 F.3d 1068 (8th Cir. 1997) and *Iowa Utils. Bd. v. FCC*, 120 F.3d 753 (8th Cir. 1997) (*Iowa Utils. Bd. v. FCC*), *aff'd in part, rev'd in part, AT&T v. Iowa Utils. Bd.*, 525 U.S. 366 (1999) (*AT&T v. Iowa Utils. Bd.*), *decision on remand, Iowa Utils. Bd. v. FCC*, 219 F.3d 744 (8th Cir. 2000), *aff'd in part, rev'd in part, Verizon Communications Inc. v. FCC*, 535 U.S. 467 (2002). It is worth noting that, in adopting this interpretation, the Commission limited a CLEC's rights by, among other things, requiring that the provision being opted in to is "legitimately related" to other provisions such that it cannot be adopted by itself. *See Local Competition Order*, 11 FCC Rcd at 16139-40, ¶¶ 1315, 1317, 1319. Mr. Wilson doesn't appear to incorporate this nuance in his analysis of the various agreements in this proceeding.

choose" among the individual provisions of state-approved interconnection agreements without being required to accept the terms and conditions of the entire agreement. It was most assuredly *not* to permit CLECs to, for example, "cherry pick" a rate from an agreement without accepting the related terms and conditions.

Q. WHAT IS YOUR UNDERSTANDING ABOUT WHY THE FCC COMPLETELY ELIMINATED ITS "PICK-AND-CHOOSE RULE"?

A. The FCC found that its "pick and choose" rule was actually hampering the very private negotiations among parties that the Act intended to promote. The FCC concluded that the pick-and-choose rule had impeded negotiations by making it impossible for favorable interconnection-service or network-element terms to be traded off against unrelated provisions. In the FCC's words: "The result has been the adoption of largely standardized agreements with little creative bargaining to meet the needs of both the incumbent LEC and the requesting carrier."[21] I would note that the failure of the rule to encourage the tradeoffs the Act and the FCC seek to encourage stems from the broad, "I-know-one-when-I-see-one" interpretation of what constitutes an interconnection agreement being advanced by Mr. Wilson in this proceeding.

Q. YOU HAVE STATED THAT THE COMMISSION MUST DETERMINE IF A CARRIER HAS ACTUALLY BEEN HARMED BY THE FACT THAT AN AGREEMENT WAS NOT PROPERLY FILED. WILL YOU ELABORATE?

A. Yes. Harms to particular carriers must be demonstrated, not simply asserted or assumed before the Commission imposes penalties based explicitly or implicitly on such harm. This is one of the major weaknesses of Staff's testimony. The Staff offers no proof of

[21] *All or Nothing Order*, ¶12.

harm to support its conjecture. Mr. Wilson simply presumes that the failure to file by Qwest and the other carriers in and of itself caused harm to competition and to other CLECs. To the contrary, one has to look at the specific circumstances of the other CLECs, the provisions they say they wanted to opt into, and analyze specifically whether these CLECs could have opted in had they even wanted to do so. Staff has offered no proof that any CLEC could have or would have opted into any of the Exhibit A agreements.[22]

Q. HOW DO YOU SUGGEST THAT THE COMMISSION CONDUCT THIS "AFTER THE FACT" REVIEW?

A. The Commission must start by reviewing each agreement and determining, as best it can, what it would have done had the agreement been timely filed. If the Commission determines that it would have approved the agreement and permitted carriers to exercise their right to opt in, the next step is to determine if there were any carriers that were in a position to opt into that agreement at that time. And in considering whether other carriers could have opted in, the Commission must consider not only the provision(s) themselves, but any related terms that Section 252(i) would require an opting-in CLEC to adopt as well.

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[22] In fact, Mr. Wilson conceded in his deposition that Staff had not attempted to analyze whether or to what extent any CLECs had been harmed by Qwest's failure to file any of the Exhibit A agreements:

> Q. Have you undertaken any sort of analysis of which CLECs could have opted in to any of these unfiled agreements in terms of the related terms and conditions, and whether the CLECs could have satisfied those?
>
> A. I have not taken a formal analysis, but I did consider that issue.
>
> Q. In what way did you consider it?
>
> A. I have studied the market presence of various CLECs for a long time, and I just applied a general feel based on my knowledge. . . .

Wilson Deposition vol. 3, Ex. HMS-5, at 39.

Q. WHY IS IT IMPORTANT FOR THE COMMISSION TO MAKE THIS DETERMINATION?

A. This determination has a direct bearing on the appropriate remedy. Leaving aside the fact that the filing requirement was ambiguous at the time, it would be inappropriate to base penalties on an assumption that specific carriers—or competition generally for that matter—had been harmed by the failure of Qwest and the other carriers to file these agreements in a timely fashion with this Commission without first determining if any other carrier could have opted in to begin with.

Q. HOW DO RESPOND TO MR. WILSON'S POSITION THAT THIS IS VIRTUALLY IMPOSSIBLE TO DO AFTER THE FACT?

A. The fact that it may be difficult does not excuse Mr. Wilson's failure to attempt such an analysis. The Staff's responses to Eschelon's data requests literally say that they cannot determine harm and then go on to speak in purely hypothetical terms about what "must have happened."[23] Short of "turning back the clock," there are a number of surrogate means available to Staff to make an informed judgment. For example, no carrier has sought to opt into any of the agreements in question subsequent to their being filed. Staff acknowledges this fact.[24] Furthermore, as Qwest has shown, no carrier has sought to

[23] *See*, *e.g.*, WUTC Staff Responses to Eschelon Data Request No. 3 (where Mr. Wilson admits he did not conduct any comparisons of the Eschelon agreements in question and terms that other carriers are receiving), No. 4 (where Mr. Wilson speculates that "had the secret interconnection agreements with Eschelon been filed and made available for adoption, it is entirely possible other CLECs would have reviewed and possibly adopted various elements…"), No. 7 (where Mr. Wilson speculates that the harm "may well have continued after the termination dates," referring to response No. 4), and Nos. 13 and 18, (where Mr. Wilson again refers to response No. 4 in response to questions about any calculations of damages he may have conducted). Copies of these responses are attached as Exhibit HMS-7.

[24] Staff Response to Qwest Data Request Nos. 58 to 122, part (f). Copies of Staff's responses to Qwest Data Request No. 58, which Staff adopted for requests 58-97 (which asked the identical question for each Exhibit A agreement), and Staff's response to Qwest Data Request No. 97, which Staff adopted for requests 97-122 (which asked the identical question for each Exhibit B agreement), are attached as Exhibit HMS-8.

opt into any of the agreements once they were posted on Qwest's website or filed with the Commission. These *facts* suggest that there are no carriers that are—or were—in position to opt in.

To base penalties on a surmise without any real substantive analysis or actual evidence is both arbitrary and capricious, especially when the evidence that is available supports a contrary conclusion.

Q. WHO HAS THE BURDEN OF PROVING THAT CLECS HAVE BEEN HARMED BY THE FAILURE TO FILE THESE AGREEMENTS?

A. Staff has the burden of proof in this case. To meet that burden, Staff must do more than simply assert that CLECs lost opportunities and suffered harm. Staff should show that one or more CLECs would have qualified to opt into each interconnection agreement and that those CLECs were actually harmed by their inability to do so. Harm is a factual question that cannot be assumed. The Commission should examine the facts to determine if the carriers that were party to the agreements uniquely benefited as a result of the agreement and to what extent. For example, Staff could have carefully compared the relevant terms of the various agreements to terms that were generally available at the time in order to determine if other carriers were truly disadvantaged.

If an agreement that should have been filed, was not, and a now-aggrieved CLEC could have opted into it, there is at least a basis to frame and analyze the harm; that is, the lost opportunity. That can be quantified and redressed. But unless Staff can demonstrate that a CLEC or CLECs could have opted into an agreement or provision (including related terms and conditions), any finding of harm is arbitrary and capricious.

In Qwest's case, since it was agreeing to do things for CLECs to help them do business in the local market, it is difficult to argue that its actions were anticompetitive.[25] One of the ironies in the Staff complaint is that Qwest is being faulted for trying to accommodate the needs of particular CLECs -- which is exactly what the Act meant to encourage.

Q. IF THE COMMISSION FINDS THAT AN AGREEMENT CONSTITUTES AN "INTERCONNECTION AGREEMENT" CONSISTENT WITH THE ACT AND FCC RULES, AND WAS NOT FILED IN A TIMELY FASHION, WHAT ARE THE NEXT STEPS IT SHOULD TAKE?

A. The Commission must then determine the appropriate penalty under state law. Mr. Brotherson discusses this in his Response Testimony.[26]

Q. WHAT CRITERIA SHOULD THE COMMISSION APPLY WHEN ANALYZING THE APPROPRIATE PENALTY?

A. Because I understand there is no Washington statute specifically defining the criteria bearing on the penalty the Commission should impose within its range of authority in a particular case, Qwest has researched and analyzed prior Commission orders to determine what criteria the Commission has used in the past. In the context of a settlement the

[25] One theory advanced by Staff is that Qwest was discriminating in favor of "weaker" competitors by giving them deals that it would not extend to "stronger" competitors. The objective was to strengthen weaker competitors so that they could take market share from the stronger competitors. Mr. Wilson's colorful analogy was to "sharks," "minnows" and "barracudas." Wilson Deposition vol. 2. Ex. HMS-4, at 60. There are a number of problems with the application of this theory to the evidence in this case. First, Qwest entered into agreements with a wide range of competitors, including firms that Mr. Wilson characterized as "barracudas" (*e.g.*, AT&T and MCI), as well as "minnows" such as Integra and Covad. Second, and more telling, is that Mr. Wilson's testimony demonstrates that Staff has made no effort whatsoever to test his theory with any real analysis; that is, of the effects of these agreements on competitors, prices or the market in general. Staff has not made any effort to show that any of the agreements would have other than a marginal effect on the well-being of either the "minnows" or the "barracudas." Finally, in my opinion, Staff's theory can only really apply to the long-term effects of these arrangements (in the short run, all competitors have to respond to the market in setting their prices) and none of these agreements were in effect long enough to be analyzed in that context.

[26] *See* Brotherson Test. at 132-41.

Commission approved between Staff and Puget Sound Energy ("PSE"),[27] Chairwoman Showalter had occasion to lay out what she believed to be the four principles that the Commission should apply in enforcing its rules.[28]

Q. WHAT WERE THOSE FOUR PRINCIPLES?

A. Chairwoman Showalter identified four principles for "determining an appropriate enforcement response to a violation": (1) specific deterrence; (2) rehabilitation; (3) general deterrence; and (4) justice.[29]

Q. DO YOU AGREE THAT THESE ARE THE APPROPRIATE PRINCIPLES FOR THE COMMISSION TO APPLY IN THIS CASE?

A. Yes. Consistent with those broad principles, I believe that the punishment should fit the infraction. That is, the penalty should take into consideration the actual harm created by the failure to file and the ambiguities in the law that existed at the time. It should also take into account other mitigating factors such as steps already taken by Qwest and discussed in Mr. Brotherson's testimony to prevent a reoccurrence.[30] These are key components of a just result. Overall, I believe the penalty should suffice, *in conjunction with other enforcement measures*, to deter future infractions.

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[27] *See Washington Utilities and Transportation Commission v. Puget Sound Energy, Inc*., Docket No. UG 001116, 2002 Wash. UTC LEXIS 235 (July 25, 2002) ("PSE Order").

[28] *See* Dissent by Chairwoman Showalter in PSE Order at 4-5. While the Commission was divided as to the appropriateness of the actual settlement entered into between the Staff and PSE, both the majority opinion and the dissent reflect comparable criteria for determining an appropriate penalty.

[29] *Id*.

[30] *See* Brotherson Test. at 123-32.

Q. HOW SHOULD THESE GENERAL PRINCIPLES APPLY TO DETERMINE THE APPROPRIATE PENALTY FOR QWEST IN THIS CASE?

A. With respect both to specific and general deterrence, the Commission should take into consideration the fact that the law was ambiguous at the time these agreements were entered into (and currently, in the case of the application of state anti-discrimination statutes). The Commission also should take into account the fact that the terms of the agreements at issue in this proceeding were widely known as a result of other state proceedings, and the fact that many of the terms at issue have been available to CLECs for years via Qwest's SGAT and wholesale website. As such, while the failure to file the agreements set out in Exhibit A to Order No. 05 at the time of their execution may have, in retrospect, technically violated the 1996 Act (and should be punished accordingly),[31] that failure cannot fairly be said to have deprived other carriers of notice that these agreements existed or the opportunity to enter into an agreement with Qwest on those same terms.

With respect to rehabilitation, the Commission should consider the fact that, in the case of Qwest, the carrier has adopted and is implementing internal checks to make sure that all interconnection agreements are filed in a timely manner. Mr. Brotherson discusses these steps fully in his testimony.[32]

[31] My use of the phrase "may have violated" is not meant to hedge Qwest's recognition of the scope and importance of the filing requirement or to suggest that Qwest takes the position that none of the Exhibit A agreements fell within that requirement. I use that phraseology only to avoid any suggestion that Qwest concedes that *all* of the Exhibit A agreement should have been filed. I refer the Commission to Mr. Brotherson's testimony, and specifically to pages 17-89, for an agreement-by-agreement discussion of why Qwest believes certain agreements identified in Exhibit A to Order No. 05 fall outside the proper articulation of the filing requirement.

[32] *See* Brotherson Test. at 123-32.

With respect to justice, the Commission should take into account the fact that Qwest has been fined by other agencies, including the FCC, for failing to file many of these same agreements. These penalties certainly can be expected to have a deterrent effect on Qwest's repeating these mistakes in the future. The Commission also can, and should, consider the terms on which the identical failure-to-file allegations against other carriers have been settled and the proportionality of those resolutions compared to the potential penalties suggested by Staff's per-day, per-agreement, per-cause-of-action approach. A failure to take such factors into account amounts to "regulatory piling-on" by this Commission. Further, the commission's consideration of justice should include a consideration of what harm, if any, has actually been demonstrably suffered.

Finally, in his deposition, Mr. Wilson expresses the view that all violations are equal and that they should be punished equally.[33] Under this theory, justice also requires that it be applied consistently to all parties to these agreements. Mr. Brotherson's testimony demonstrates that, on the basis of Staff's settlements with a number of the CLECs in this case, Qwest's penalties should be far less than the penalty that would flow from Staff's mechanical approach of imposing maximum per-day penalties for each agreement and for each separate cause of action.[34]

[33] His approach is simply to count the number of agreements and days of violations. Since he offers no real analysis of the agreements themselves, he really leaves the Commission no alternative.

[34] *See* Brotherson Test. at 132-41.

3. EXHIBIT B SETTLEMENT AGREEMENTS

Q. HOW SHOULD THE COMMISSION TREAT THE SETTLEMENT AGREEMENTS CONTAINED IN EXHIBIT B ("EXHIBIT B SETTLEMENTS")?

A. Staff concedes that Qwest was not required to file the Exhibit B agreements pursuant to § 252 of the 1996 Act.[35] The Commission also has rejected Staff's contention that these agreements were subject to the filing requirements of RCW 80.36.150.[36] This means that the only question before the Commission is whether there is anything inherent in these settlement agreements that constitutes a violation of state law prohibiting price discrimination and the granting of undue or unreasonable preferences.[37]

Q. WHAT POSITION DOES MR. WILSON TAKE ON BEHALF OF STAFF?

A. Based on a careful reading of his direct and deposition testimony, Mr. Wilson's position can be fairly characterized as follows: (1) Qwest must deal with every competitor in precisely the same manner; (2) settlements of commercial disputes between Qwest and another carrier that result in that carrier receiving any consideration that is not made generally available constitutes an undue preference, notwithstanding the lack of any requirement to file or publish the settlements; and (3) settlements of commercial disputes that are not made public (notwithstanding the lack of a filing requirement), therefore, may be considered inherently discriminatory without any proof that any carrier was unduly or unreasonably discriminated against.[38]

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[35] Wilson Deposition vol. 3, Ex. HMS-5, at 92.

[36] *See* Order No. 05, ¶¶ 71-73.

[37] These issues are addressed by Staff in the Fifth, Sixth and Seventh Causes of Action in its Complaint in this proceeding.. *See* Amended Complaint and Notice of Prehearing Conference, ¶¶ 17, 32-49.

[38] *See* Wilson Deposition, vol. 3, Ex. HMS-5, at 92-126.

Q. IN YOUR OPINION, WHAT WOULD THE RESULT BE IF THE COMMISSION WERE TO ADOPT STAFF'S POSITION?

A. The result would be to preclude settlements of private commercial disputes between Qwest (as well as presumably other incumbent LECs such as Verizon) and competing carriers who do business in the State of Washington. In my opinion, this outcome is directly at odds with one of the main goals of the 1996 Act which is to promote reliance on marketplace forces whenever possible, rather than on pervasive regulation.

Q. HOW DO YOU RESPOND TO STAFF'S POSITION?

A. Staff has not presented any real analysis to demonstrate that any of the Exhibit B settlements are discriminatory or afford undue preferences. Rather, the theory seems to be that because the settlements were "secret," and because Qwest did not affirmatively identify other similarly-situated CLECs (in business plan, size, volume and technology platform) that might have substantially similar disputes and settle those actual or putative disputes on identical terms, the Exhibit B agreements are *per se* discriminatory. In his Direct Testimony, Mr. Wilson states that "...Qwest has given *secret and therefore undue preference* in every Agreement listed in Exhibit A and Exhibit B."[39]

In his Deposition, Mr. Wilson seemed to change position. He said that he was not arguing that the settlements should have been filed (which would have put him at odds with the Commission).[40] Thus, he could no longer logically be arguing that the

[39] *See* Direct Testimony of Thomas L. Wilson at 111 (emphasis added).

[40] *See* Wilson Deposition vol. 3, Ex. HMS-5, at 92; *see also id*. at 118-19 ("Q. . . . Your view is that Agreement 1B, your Exhibit 44, now requires Qwest to, I guess to do two things. First of all, to settle all substantially similar disputes at the same proportion? A Yes. Q And it affirmatively obliges Qwest to go out and find all other CLECs with whom it has a substantially similar dispute and make that settlement happen, right? A Yes.").

settlements discriminated because they were "secret."[41] His position now seems to be that they discriminated *per se* based on his assumption (he has no evidence to support it) that a settlement necessarily results in Qwest treating certain carriers differently than others.

This interpretation seems to write the word "undue" out of the statute. "Undue" is defined by the *Encarta English Dictionary* to mean "excessive or very inappropriate." Common synonyms include: "unwarranted," unjustified" and "gratuitous." Mr. Wilson presents no evidence or real analysis that supports this extreme position. He offers no evidence that the terms of the agreements in Exhibit B conferred an unwarranted or unjustified advantage on any similarly situated carrier or, indeed, that there are any such carriers. Staff has not met its burden of proof that private settlements arising out of specific disagreements about certain aspects of commercial relationships between two carriers discriminate, in violation of state statute, against carriers that are not parties. Apparently, Mr. Wilson sees a world of commercial relationships that is very different from not only the unregulated world, but also the world that Washington legislature had in mind for regulated carriers.

The logical extension of Staff's theory precludes private settlements of commercial disputes. It is inconceivable that parties—and perhaps especially CLECs—would settle a commercial dispute if they know that the contents of that settlement would be made publicly available *and* precisely the same terms would have to be offered to all carriers.

[41] Mr. Wilson conceded this point in his deposition: " . . .we are not alleging that keeping them secret was in and of itself a violation. What we are saying is that keeping them secret was a device that enabled Qwest to keep other carriers from finding out about it and seeking the same deal, but we are not saying that secrecy itself was a violation or not filing Exhibit Bs was a violation." Wilson Deposition vol. 3, Ex. HMS-5, at 94.

Qwest, in particular, would have little or no incentive to settle with one carrier if it knew it had an affirmative obligation to seek out other carriers to determine if they wanted the same deal. Qwest would face potentially severe regulatory sanctions should it fail to guess correctly (a) which carriers were similarly situated, (b) which disputes were similar enough to the one being settled, and (c) how, exactly, to bring about an identical settlement.

By removing the incentive to settle commercial disputes, parties would be left to litigate every disagreement before the Commission and/or in the courts. Mr. Brotherson discusses how this position appears to conflict with Washington's strong public policy encouraging settlements. [42] As a matter of public policy, it also conflicts with a general public policy favoring settlements and with the specific approach taken by the FCC whose policy of actively encouraging private settlements of disputes actually resulted in many of the settlements in Exhibit B that Mr. Wilson would have the Commission effectively overturn.

Q. WOULD YOU ELABORATE ON THE POLICY OF ENCOURAGING PRIVATE SETTLEMENTS OF DISPUTES BETWEEN CARRIERS?

A. Yes. As a general matter, it is my experience that settlements are favored in regulatory/administrative contexts as well as in judicial proceedings. In telecommunications, the FCC strongly encourages settlements. It does so because it believes that parties are better suited to resolve their differences than regulators. This is especially true in today's competitive environment where competing carriers have different business plans and operate on different technology platforms. It is increasingly

[42] *See* Brotherson Test. at 98-102.

difficult, counter-productive and inefficient for regulators to attempt to impose a "one size fits all" approach to commercial relationships, yet that is precisely what Mr. Wilson seems to be recommending in this case. The FCC also encourages parties to work out their differences privately as a means of conserving scarce regulatory resources. To facilitate private resolution of disputes, the FCC encourages settlements prior to filing complaints. *See* 47 CFR §1.721(a)(8).[43] In my opinion, it would be unfair for this Commission to penalize Qwest (or any other carrier) for doing what the FCC encourages—that is, to resolve commercial disputes privately—based on the tenuous theory advanced by Staff that private settlements are *per se* discriminatory under Washington law.

Q. WHAT OTHER PROBLEMS DO YOU SEE IN STAFF'S POSITION?

A. Fundamentally, Staff does not provide a satisfactory answer to the question of how Qwest can settle any dispute with a CLEC without creating for itself a serious, perhaps insurmountable, risk of "unlawfully" discriminating against some another CLEC. Mr. Wilson's written testimony says nothing about precisely what he would have had Qwest or the other parties do after reaching each of the settlements in Exhibit B. But according to his deposition testimony, a decision by Qwest to settle a dispute with one CLEC

[43] The FCC's preference for settlements extends to matters in litigation. If a settlement is reached while a complaint is pending before the agency, parties inform the FCC that a settlement has been reached and that the parties mutually seek to have the complaint dismissed. The FCC has found this procedure to be in the public interest: "We are satisfied that granting this motion to dismiss with prejudice will serve the public interest by promoting the private resolution of disputes and by eliminating the need for further litigation and the expenditure of further time and resources of the parties and the Commission." *In the Matter of Arch Paging, Inc. v. U S West Communications,* File No. E-99-05, June 20, 2000. It should be emphasized that the FCC does not require the parties to file and make public their settlements. Where the settlement resolves a pending complaint, the parties need only notify the FCC of a settlement and file a motion to dismiss the case. Only if the parties agree that they want the settlement on file would it be filed. The FCC is satisfied if parties are satisfied. I recognize that the Commission does require filing and approval if a settlement is reached to a matter in litigation; however, it has not done so (to my knowledge) in a non-litigation context.

triggers a new obligation to identify other similarly situated CLECs, determine which of them has or might have the same dispute with Qwest, and offer them the identical settlement—and if Qwest fails to accomplish this, it will, in Staff's view, have "unlawfully" discriminated.[44] In what circumstances would Staff's "rule" apply? How and where is the line to be drawn? Would it apply to mundane billing adjustments that are today handled in the normal course of business? If, for example, a CLEC seeks a $200 adjustment on a bill relating to toll services because it thought it had ordered toll blocking, must Qwest identify and seek out every other CLEC that might have a similar problem? How exactly is Qwest supposed to determine which CLECs are "similarly situated" to a settling carrier? What does it mean to offer and enter into an "identical" settlement if a carrier's business plan or volumes deviate in any way from the carrier that settled? It may be that these questions can be answered in certain situations, but what should Qwest do when the answers are not obvious?

Must Qwest file settlements with the Commission for some sort of informational review? Or should Qwest be required to submit settlements to Staff for review and guidance regarding the scope of parties and disputes that the agreement would require? What authority would guide the answers to these questions? Where there are, in Mr. Wilson's words, "thirty-one flavors of CLECs"[45] and many different aspects of commercial relationships, it is irrational, unfair and contrary to public policy to attach such a weighty set of obligations to a carrier's decision to settle, rather than litigate, a business

[44] *See* Wilson Deposition vol. 3, Ex. HMS-5, at 92-126.

[45] *See* Wilson Deposition vol. 1, Ex. HMS-3, at 191 ("Particularly because my understanding of the CLEC industry is that there is more than 31 flavors of CLECs, and it's been made clear to me many times that, you know, one CLEC has a different business plan from another, and so CLEC "X" might find collocation to be incredibly important, and CLEC "Y" might think that features are where it's at for them.").

dispute. And I am not aware of any law, from Washington or elsewhere, that compels or even countenances such a result.

Q. WOULD THERE BE ANY OTHER EFFECTS FROM STAFF'S PROPOSED APPROACH THAT WOULD INHIBIT SETTLEMENT?

A. Requiring Qwest to disclose publicly the terms of its settlements with CLECs—indeed, to advertise them—would make it far less likely, if not impossible, for parties to settle any sort of dispute. There are several reasons to expect this result. First, public disclosure would reveal more about the nature of their businesses than they might want to their competitors. This would be especially true for the CLECs. Second, Mr. Wilson's theory allows other CLECs to use the terms of another CLEC's settlement, along with the knowledge that Qwest is obliged to offer affirmatively to settle with them on identical terms, to demand similar agreements or concessions or to threaten litigation. Staff is apparently untroubled by this prospect; indeed, as I noted previously, his testimony suggests that Qwest should treat all CLECs in precisely the same fashion in their commercial relationships.[46]

[46] *See* Wilson Deposition vol. 1, Ex. HMS-3, at 126-27 ("Q Do you believe that settlement is a good thing in disputes between telecommunications carriers? Do you think settlement should be encouraged? A I don't know that I have an opinion on that. Q Are you aware of any policies articulated by this Commission or the courts in the state of Washington in that regard? A Yes, I am. Q What are those policies? A To encourage settlement. Q Do you think it encourages settlement to require that one of the parties to each settlement agreement be required to go out and identify possible other disputes, and then settle them on the identical terms under pain of penalty of the discrimination laws? A The way you describe it it probably doesn't….").

Q. YOU MENTIONED THAT REVEALING THE TERMS OF ALL SETTLEMENT AGREEMENTS MIGHT ACTUALLY DISADVANTAGE CLECS. WILL YOU ELABORATE?

A. In addition to forcing all CLECs to disclose aspect of their business plans to their competitors, requiring Qwest to reveal the terms of private settlement agreements, or any other policy discouraging settlement, can be expected to hurt small CLECs that have fewer resources to litigate than larger CLECs. To the extent, then, that the overarching goal of the 1996 Act is to promote competition, the Staff's position that the state anti-discrimination statutes prohibit private settlements can be said to thwart it in an effort simply to preserve the Commission's prerogatives.

Q. DO YOU DISAGREE WITH MR. WILSON THAT THE EXHIBIT B SETTLEMENT AGREEMENTS HARM COMPETITORS?

A. Yes. It is not clear how competitors can be said to have been harmed by these settlements. Each settlement is *sui generis*. It arises under its own set of facts and circumstances. For example, some settlements resolve disputes over billing matters that arise out of particular transactions between Qwest and another carrier. No other carrier could rationally be expected to seek precisely the same resolution. Indeed, in response to Qwest's Data Request 97(f) relating to Agreement 1B, Mr. Wilson states: "Staff is unaware of any Washington-certificated CLECs that would have sought to adopt or opt into any provision of this agreement." He refers to this answer for the rest of the Appendix B Settlements. As I noted earlier, Staff's interpretation of the state anti-discrimination statutes seems to be that Qwest (and presumably other ILECs) must treat every competitor in precisely the same manner no matter how differently they may be situated. Staff reaches this position by reading the word "undue" out of the statute. The

result would be directly contrary to the FCC's objectives in eliminating its "pick and choose" rule, which the FCC found had inhibited ILECs and CLECs from reaching unique agreements specific to needs of an individual CLEC.

Mr. Brotherson responds to this extreme view.[47] As a matter of public policy, it seems to me that the result of the Commission adopting Staff's view would be, on balance, to harm competition by eliminating private commercial settlements and forcing carriers to seek regulatory intervention and pursue litigation. The fact that a number of carriers have sought to resolve their differences privately should not be seen as a failure of competition, but as a triumph. I pointed out earlier that CLECs always have the right to seek regulatory redress. However, they should have the opportunity to resolve disputes by other means and not have to make the terms of the settlements public.

Q. DESPITE YOUR CRITICISMS OF ITS APPROACH, IF THE COMMISSION WERE TO AGREE WITH STAFF AND FIND THAT QWEST VIOLATED WASHINGTON LAW IN CONNECTION WITH THE EXHIBIT B SETTLEMENT AGREEMENTS, IS STAFF CORRECT ABOUT THE PENALTIES THAT SHOULD BE ASSESSED?

A. No, it is not. There is no way that Qwest or any other party knew, or could have known, what its obligations were. To penalize any of the parties to these settlements now would be the functional equivalent of passing an *ex post facto* law, for it is only as a result of this docket that the parties are to know what their obligations are.

[47] *See* Brotherson Test. at 98-102.

Q. DOES THIS CONCLUDE YOUR RESPONSE TESTIMONY?

A. Yes, it does.