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 WORLDCOM, 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 MOTION TO STRIKE TESTIMONY OF STEPHEN C. GRAY AND RICHARD A. SMITH

1 Qwest Corporation ("Qwest"), by and through its undersigned counsel, respectfully requests that the Commission strike the testimony filed in this proceeding by Stephen C. Gray, President of McLeod USA Telecommunications Services, Inc. ("McLeod"), and Richard A.

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Smith, President and Chief Executive Officer of Eschelon Telecom, Inc. ("Eschelon"), on August 31, 2004. Qwest objects to this testimony, and asks the Commission to strike it, on an expedited basis, for the three reasons discussed immediately below.

2 First, the timing and circumstances of the Smith and Gray testimony violate the terms and spirit of the Commission's procedural order governing this case to Qwest's prejudice and detriment. In Order No. 06, the Commission established a schedule and order of testimony that, consistent with this Commission's practices, required Staff to file direct testimony that set forth Staff's entire direct case in early June 2004. Staff could readily have learned, pled and offered direct testimony relating to the ranging anti-Qwest allegations contained in the testimony filed by Messrs. Smith and Gray, all of which had been aired in Minnesota and elsewhere beginning in 2002. But Staff chose to plead and try a different case and, after receiving, reviewing and scrutinizing (through deposition) the direct testimony filed by Commission Staff witness Tom Wilson, Qwest prepared accordingly.

3 Notwithstanding the claims of Messrs. Gray and Smith to the contrary, the new testimony cannot rationally be said to respond to Mr. Wilson's testimony as Order No. 06 and Commission practice require. Instead, as Qwest demonstrates below, Mr. Gray and Mr. Smith add new issues that do not respond to Staff's direct testimony or any other issue raised in Staff's Amended Complaint. This "state's evidence" testimony, as Staff describes it, is more properly viewed as direct testimony that should have been filed on June 8, 2004, when direct testimony was due. Permitting Staff to orchestrate testimony in this fashion, and at this late date, allows Staff to end-run the Commission's procedural Order and avoid its obligation to put its evidence before Qwest and the Commission in direct testimony. Put another way, allowing this testimony into the case at this time sends the message that parties may freely ignore Commission procedural orders and file direct testimony whenever they feel that a tactical advantage can best be achieved.

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4 Second, the new testimony significantly expands the range of issues that will need to be tried at the hearing and almost certainly lengthens the hearing. But the prejudice comes not simply from the fact that the new testimony requires Qwest to shift gears late in the case, which is bad enough. The real prejudice, which cannot be cured except by striking this testimony, comes from the fact that none of the new accusations adds anything to the claims legitimately at issue in this case. Even if, for example, Mr. Smith is right about Qwest's alleged failings in wholesale service quality and general litigiousness – and he most assuredly is not – his complaints have no probative value on the questions of whether agreements should have been filed or whether Eschelon or any other CLEC suffered discrimination when they were not. In fact, as Qwest demonstrates below, both witnesses affirmatively eschew any ability to testify regarding harm and discrimination. The only apparent purpose of their testimony is to add superfluous and irrelevant issues to the case and to force Qwest to defend against a host of allegations having nothing to do with the case Staff chose to plead and pursue.

5 Third, Mr. Gray's testimony is independently objectionable and should be stricken because he unfairly and inappropriately attaches and relies upon the affidavits (from a different proceeding) of McLeod employees that McLeod and Staff have apparently chosen not to produce as witnesses. This only compounds the hardship to Qwest by depriving Qwest of any opportunity to confront and cross-examine the witnesses themselves, and similarly deprives the Commission of the opportunity to observe them and assess their credibility. It may be, given McLeod's promise in its settlement with Staff to provide "expert" testimony from Mr. Gray, that McLeod and/or Staff intend to circumvent the normal rules of evidence by casting Mr. Gray as an expert witness rather than a fact witness. But the Commission should see right through this tactic: Mr. Gray's testimony makes no effort to qualify him as an expert, to identify relevant areas of expertise, or to explain how his expertise in any area

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could aid the Commission's resolution of the issues before it here (even as expanded).

I. THE GRAY AND SMITH TESTIMONY ARE PROCEDURALLY INAPPROPRIATE

A. Staff Had Over Two Years to Investigate this Case and Prepare Its Testimony

6 Commission Staff obtained copies from Qwest of the agreements that underlie this case on March 8, 2002 in conjunction with Qwest's response to Bench Request 46 in Qwest's 271 proceeding, Docket Nos. UT-003022 and UT-003040. Staff waited eighteen months to file its Complaint on August 14, 2003.

7 After the Commission resolved various parties' motions to dismiss in Order No. 05, it convened a prehearing conference on March 30, 2004 at which all parties, including Staff, discussed the procedural schedule for this case. That schedule, which had the support of all parties including Staff, was set out in Attachment B to Order No. 06. Among other things, the schedule provided that Staff's prefiled direct testimony was due on June 1, 2004. On May 21, 2004, at Staff's request, Staff's direct testimony deadline was extended to June 8, 2004. Thus, Staff had (dating back to its original receipt of the agreements at issue in this case) twenty-seven months to investigate this matter through discovery and otherwise, develop its direct case and prepare direct testimony.

B. Staff Filed What it Claimed Was Its Entire Direct Case on June 8, 2004

8 The direct testimony Staff filed, that of Mr. Wilson, contained 127 pages of text and eighty exhibits that, in Staff's view, embodied the evidence supporting Staff's claims against Qwest and the other respondents. At no time prior to August 12, 2004 – the date Staff filed its motion for approval of its settlement with Eschelon – was there any suggestion that Staff would rely on the testimony of any other witnesses to support its claims. Indeed, during his three-day deposition, Mr. Wilson testified that there was no need for Staff even to attempt to

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quantify the benefits Qwest and the other parties to the unfiled agreements supposedly enjoyed by not filing them – in his view, the case merits a separate statutory maximum penalty for each agreement and each cause of action based solely on the information contained in his testimony, and evidence of harm would simply be icing on the cake:

> Q But the part I'm driving at is the part about that we discussed at the end of the day yesterday, about how your opinion is that what the Staff views as the maximum allowable legal penalty should be imposed for each and every day of each and every agreement. And if that's your opinion, why is it -- what is the purpose of attempting to define the benefits that was derived by anybody from any of these agreements, if you have already decided to penalize the max?
>
> A Just to build a stronger case. It's strong, and we wanted to make it stronger. We attempted to find out information about harm from the parties and we couldn't get anything from them; very little information came out. And so we didn't go and place the burden on all of the competitors who have already been disadvantaged to participate with trade secret information and so on, and we decided that that was the case right there. We felt we had a strong case and that would just be additional strengthening and we would have liked to do that, but we don't think that it is a fatal flaw in our case whatsoever.
>
> Q It wouldn't have changed your view then about what the appropriate penalty should be to obtain that information, would it?
>
> A No, absolutely not.[1]

9 Mr. Wilson espoused the same view regarding the appropriate penalties for Eschelon's failure to file its agreements with Qwest – a maximum statutory penalty (which he claimed was $1,000) for each day that each agreement remained unfiled:

> Q So if I were Commissioner Showalter sitting in a hearing and I turn to you and say, "Mr. Wilson, what do you think we should do to penalize the parties who failed to file interconnection agreements?" What would you say to her?
>
> A I would say to her that I would recommend that she count the number of violations for each party and apply a thousand dollars per violation.
>
> Q For each agreement? It doesn't matter whether it's a letter or a full-blown settlement agreement?

[1] Deposition of Thomas L. Wilson, Jr. ("Wilson Depo."), vol. 2 at 34:12-35:12.

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A For every one of the agreements the Staff has complained about in this case, yes, each one.[2]

C. Eschelon and McLeod Settle for $25,000 Each and a Promise to File Testimony

10 Based on Mr. Wilson's deposition testimony quoted above and his calculation of violations (set forth in Exhibit TLW-71), Staff believed that Eschelon should have been fined $5,444,000 (5,444 days) and McLeod $4,017,000 (4,017 days) for the violations alleged in the Amended Complaint as to the nine Eschelon agreements and four McLeod agreements Staff continues to believe are interconnection agreements.

11 On August 12, 2004 – just two days before Qwest's response testimony was due – Staff announced that it had reached a settlement with Eschelon. A settlement with McLeod followed on August 23. Both settlements provided, among other things, that each company would pay a total of $25,000 and that specific, named representatives from each company would submit "testimony related to the remaining disputed issues involving other respondents" on topics specified in the agreements.[3] Interestingly, McLeod's agreement characterizes Mr. Gray's promised testimony as "expert testimony,"[4] whereas Eschelon's characterizes Mr. Smith's simply as "reply testimony."[5]

12 Qwest opposed the aspect of these settlements calling for Eschelon and McLeod to file "reply" or "expert" testimony. Qwest accurately predicted that the testimony, in fact, would be supplemental direct testimony supporting Staff's prosecution of this case – testimony that should have been filed when direct testimony was due. Qwest will not repeat here the arguments contained in its August 23, 2004 filing – Qwest incorporates them here by

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2 *Id*., vol. 1 at 23:24-25:9.

3 *See* Eschelon Settlement Agreement, ¶ 14; McLeod Settlement Agreement ¶ 15.

4 *See* McLeod Settlement Agreement, ¶ 9.

5 *See* Eschelon Settlement Agreement, ¶ 9.

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reference – but it will suffice for present purposes to note that Qwest anticipated the prejudice that would result from Staff's tactic, and the testimony that has in fact been filed proves the point in black-and-white.

13 In replying to Qwest's response to the Eschelon settlement, Staff essentially conceded that the testimony filed by Messrs. Gray and Smith is, in fact, thinly disguised supplemental direct testimony. Staff even likened the settlement-induced testimony directly to a criminal defendant "'turning state's evidence,'" noting that "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."[6] But at least in the "state's evidence" context, both the state and the witness acknowledge that the witness is testifying in support of the state. Here, in an effort to get around the long-past deadline for filing supportive direct testimony, Staff's settlements with Eschelon and McLeod contain provisions keeping them in the case as parties, despite the resolution of all pending claims against them, so that they can transparently "sponsor" the testimony themselves.

14 Staff also acknowledged in its Reply that its Amended Complaint locks in the scope of the allegations it can pursue in this case (which logically, of course, limits the scope of the admissible evidence). Staff itself recognizes, "[f]or example, that 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 . . . ."[7]

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[6] *See* Commission Staff Reply to Qwest Response to Eschelon Settlement Agreement, ¶ 4.

[7] *Id*. at ¶ 6 n.3. The sentence goes on to argue that evidence of other unfiled agreements "might be relevant to show the context in which all the agreements were entered into or Qwest's motivation in entering into agreements, etc." *Id*. But according to Mr. Wilson's testimony, none of that matters: the mere failure to file, in his view, warrants a maximum penalty, regardless of possible mitigating circumstances. *See, e.g.*, Wilson Depo. Vol 3, 36:9-17 ("Q And I believe you also testified last week that it was your view that all failures to file were equally bad and deserved equal punishment, penalty in the eyes of the Staff; is that right? A Well, I said that we don't have a lot of experience with analyzing penalties of this nature, and we do consider the violations, all of them, to be very serious and believe that weighting the violations is something that we can't do, that the commissioners should.").

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15 Staff further argued in its Reply that "[t]he 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 McLeod USA a measure of security that their testimony will not later be used against them) . . ." and that it "is confident that admission of the testimony called for in the Settlement Agreements will inform the public interest."[8] While Qwest does not contend that "state's evidence" testimony is *per se* inadmissible, it objects to the curious timing and the substantive scope of the testimony. Staff had every opportunity to investigate the facts in the seventeen months before it filed its Complaint and to do so via discovery to Eschelon and McLeod in the ten months between the filing of the Complaint and the deadline for filing its direct case. Staff's failure to do so during that twenty-seven month period is neither cause, nor good cause, to justify its orchestration of additional direct testimony in blatant disregard of Order No. 6.

II. THE SMITH AND GRAY TESTIMONY ARE SUBSTANTIVELY INAPPROPRIATE AND MORE PROPERLY CHARACTERIZED AS DIRECT TESTIMONY SUPPORTING STAFF'S PROSECUTION OF QWEST

16 Like the criminal defendant who turns "state's evidence" – Staff's analogy, not Qwest's – Messrs. Smith and Gray delivered the testimony the settlements required. And as Qwest suspected even before reading the testimony, neither remotely qualifies as response testimony.

A. Mr. Smith's Testimony does not Respond to Staff's Direct Testimony About Eschelon

17 The relevant portions of Staff's direct testimony focus entirely on demonstrating (a) why each of the agreements listed in Exhibit A to Order No. 05 is an interconnection agreement that should have been filed, (b) when each agreement should have been filed and why, if it was filed at all, the filing was untimely and (c) how the failure to file agreements on a timely

[8] Staff Reply, ¶ 11.

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basis deprived other CLECs of the opportunity to seek to opt in. Mr. Wilson's testimony performs this analysis on an agreement-by-agreement basis, summarizing Mr. Wilson's opinion as to why each agreement qualified as an interconnection agreement when entered. In addition, Mr. Wilson offered testimony specifically seeking to explain "the details concerning timeliness . . . concerning Eschelon."[9] This testimony focused specifically on proving that Eschelon knew of its obligation to file agreements and failed to fulfill that obligation on a timely basis.

18 Mr. Smith begins his testimony by acknowledging that "[t]he purpose of [his] testimony is to provide truthful evidence and testimony about the Eschelon agreements ("Agreements") in this case and related issues in accordance with the settlement agreement with Commission Staff dated August 12, 2004 ("Settlement")."[10] He claims that he would have filed the same testimony in the absence of a settlement.[11] He then goes on to list the subjects his testimony will cover, many of which have nothing to do with the allegations in the Amended Complaint and Staff's direct testimony, *i.e*., that Qwest and Eschelon failed to file specified agreements and that Qwest discriminated in connection with certain specified settlements. For example:

- "Eschelon's concerns with Qwest's non-performance of its wholesale obligations under the Eschelon Interconnection Agreement ("ICA") at the time were key factors underlying Eschelon's decisions to enter into the Agreements"[12] have no bearing on whether Qwest or Eschelon was obliged to file those agreements, whether the failure to file those agreements discriminated against any other CLEC, whether any other CLEC could have or would have opted into those agreements, or whether any CLEC

[9] Direct Testimony of Thomas L. Wilson, Jr. at 61:4-67:2

[10] Testimony of Richard A. Smith ("Smith Test.") at 3:9-11.

[11] *Id*. at 3:12-15.

[12] *Id*. at 3:21-24.

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(including Eschelon) was harmed by the failure to file.

- Staff does not allege, either in the Amended Complaint or Mr. Wilson's direct testimony, that Qwest committed any wrong in connection with "Eschelon's role in Commission Section 271 proceedings."[13]

- There is no conceivable relevance in this case to "[t]he effectiveness of these agreements and their impact on Eschelon,"[14] whatever that means.

19 Mr. Smith then "sponsors as exhibits" six groups of documents not attached to Mr. Wilson's testimony. By the descriptions in Mr. Smith's testimony, none of these has any relevance to the allegations in the Amended Complaint or Staff's direct testimony. Exhibit RAS-2, for example, purports to relate to "Eschelon's request to convert Eschelon's resold lines to UNE-P Pricing" and to "describ[e] the failure of Qwest to make UNE-P conversions."[15] Similarly, Exhibit RAS-5 "describes Qwest's attempts to squelch Eschelon participation in Section 271, CMP and other regulatory proceedings and retaliation against Eschelon for such participation."

20 Beginning at the bottom of page 4 and continuing through the middle of page 9, Mr. Smith's testimony airs Eschelon's wide-ranging historical grievances with Qwest, including complaints about UNE-P pricing, service quality, availability of UNE-P and Qwest's alleged refusal to "voluntarily comply with the ICA," among other things. After describing why Eschelon entered into some of the agreements at issue here, Mr. Smith goes on to complain about Qwest's compliance with those agreements.[16] Mr. Smith seizes every conceivable opportunity to bash Qwest's performance, question Qwest's motives, and raise new

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13 *Id*. at 3:26.

14 *Id*. at 4:1.

15 *Id*. at 4:5-7.

16 *See, e.g., id*. at 14:22-25.

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categories of complaints about Qwest having nothing to do with this case.

21 A re-reading of the Amended Complaint and Mr. Wilson's direct testimony reveals that Mr. Smith's testimony adds nothing to the case Staff actually pled and committed itself to pursue. Nothing Mr. Smith says in his testimony bears on whether Qwest or Eschelon should have filed the Exhibit A agreements – beyond alleging that Eschelon viewed the filing obligation as Qwest's and that Qwest insisted on maintaining agreements in confidence[17] – or whether Eschelon or any other CLEC suffered discrimination as a result of any lost opportunity to opt into agreements, or whether competition or the market at large was harmed by the "unfiled agreements." Indeed, to the extent he turns at all to the issues of harm and discrimination, it is only to eschew any ability to testify about them – even as to Eschelon.[18]

22 Mr. Smith's testimony significantly alters the scope, length, complexity and tenor of the forthcoming hearing – and not for the better. Unless his testimony is stricken, as it should be, Qwest will have no choice but to pursue discovery aimed at understanding the origins and drafting history of his testimony, as well as the role the settlement discussions played in shaping it. Qwest also will be forced to bring additional witnesses to the hearing to counter Mr. Smith's many and serious misstatements of fact, and he will face a long, detailed cross-examination. In light of the circumstances under which his testimony surfaced, the outright violation of Order No. 6 and the minimal probative value it has to the issues actually before the Commission, the Commission should strike Mr. Smith's testimony.

23 Staff may respond to this point, and to the similar prejudice occasioned by Mr. Gray's testimony, by claiming "no harm, no foul: Qwest gets a chance to reply." But this argument

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[17] *See id*. at 10:8-22, 11:16-20.

[18] *See id*. at 19:16-20:13.

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has the burden of persuasion exactly backward. It was Staff's obligation to affirmatively seek (based on good cause) modification to the procedural schedule to permit additional direct testimony. In a similar context, the Commission's procedural rules require a party seeking to deviate from a procedural rule to seek an exemption on the basis that such would be consistent with the public interest, the purposes underlying regulation and applicable statutes.[19] In this case, it was Staff, not Qwest, who decided how to investigate and what claims to bring. It was Staff, not Qwest, who filed a Complaint, Amended Complaint and direct testimony. It is Staff, not Qwest, who orchestrated the filing of this "state's evidence" testimony literally on the eve of the response testimony deadline as a condition of settlements that appear extremely favorable to Eschelon and McLeod in comparison to the level of penalties Staff was earlier seeking. And so Staff, not Qwest, should bear the burden of justifying its tactics, a burden that requires more than reflexive platitudes about the "public interest." Staff, not Qwest, bears the burden of proving that Qwest is <u>not</u> prejudiced and that this case can and should be expanded and derailed.

24 Staff also bears the burden of proving good cause for its clear violation of Order No. 6. Had it pursued this issue properly, Staff would have sought leave to have Eschelon and McLeod file supplemental direct testimony *before* such testimony was filed. Staff opted not to do that and curiously the Eschelon and McLeod testimony was filed two weeks before it was due, obviously in an attempt to put Mr. Smith's and Mr. Gray's irrelevant accusations before the Commission and to force Qwest to file this motion – all of which highlights the testimony in the Commission's mind as it rules on whether the testimony was appropriate in the first instance.

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[19] *See* WAC 480-07-110.

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B. Mr. Gray's Testimony does not Respond to Staff's Direct Testimony About McLeod

25 As with Eschelon, Mr. Wilson's testimony relating to McLeod focused on the individual agreements between McLeod and Qwest listed on Exhibit A to Order No. 05. Mr. Wilson offered testimony specifically seeking to explain "the timeliness of filings involving McLeod. . . ."[20] And again, as with Eschelon, this portion of Mr. Wilson's testimony focused on proving that McLeod knew of its obligation to file agreements and failed to fulfill that obligation on a timely basis.

26 Mr. Gray's testimony is even more egregiously non-responsive than Mr. Smith's. Mr. Gray – who is required by McLeod's Settlement Agreement to offer "expert" testimony – began by tacitly admitting his lack of personal knowledge on the subjects addressed in his testimony.[21] Nevertheless, he purports to testify as to the accuracy of Mr. Wilson's testimony as to each of the McLeod agreements at issue in this case and purports to bolster or augment Mr. Wilson's characterization in each instance.[22] Like Mr. Smith, he goes on at length about irrelevant historical disputes McLeod had with Qwest (and gratuitous comparisons to other ILECs), wholesale service quality issues and account team responsiveness.

27 Unlike Mr. Smith, however, Mr. Gray does not stop there: he testifies that McLeod "had an

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[20] Direct Testimony of Thomas L. Wilson, Jr. at 67:4-68:13.

[21] *See* Responsive Testimony of Stephen C. Gray ("Gray Test.") at 4:9-11 ("Q. Are you familiar with the Complaint filed in this Docket, UT-033011? A. Yes, I am familiar with this case through discussions with our legal counsel and review of some of the documents related to this case."); *id*. at 4:18-5:8 (stating that he "was generally familiar with" the agreements at issue, although others were actually responsible for them); *id*. at 5:12-16 (stating that he reviewed portions of seven of the 127 pages of Staff's direct testimony). *See also id*. at 9:17-10:2 ("I have not, however, reviewed any of those agreements [between Qwest and other CLECs relating to the Qwest/USWest merger]. Consequently, I am unable to opine on what, if any, impact those other confidential agreements had on McLeodUSA other than to say that we may have benefited from the opportunity to opt into the performance measures in the agreement between Covad and Qwest that is labeled Agreement 7A in this proceeding."); 14:3-20 (opining on Agreements 3A and 7A despite admitting that "I have not reviewed these agreements").

[22] *See id*. at 6:4-18 (opining on Wilson's characterization of Agreement 8A); *i*d. at 10:14-20 (opinion that Wilson's description of Agreement 9A is "accurate"); 15:1-16:11 (opining on the accuracy of Wilson's testimony regarding Agreements 44A and 45A).

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oral agreement with Qwest that we believed entitled McLeodUSA to a volume discount of between 6.5% and 10% on the products we purchased from Qwest."[23] As such, Mr. Gray's testimony sandbags Qwest with testimony regarding an entirely new agreement to this case (testimony that, incidentally, was prepared in June 2002 by the Minnesota Department of Commerce and, therefore, available to Staff to consider when it prepared its Complaint and testimony in this case). There is simply no way that Staff or McLeod can rationally consider this testimony "responsive," and even by the Staff's view of the Commission's rules, this agreement is out of bounds altogether.[24] Weighing further in support of Qwest's motion to strike is Staff's admission that this "oral agreement" is not at issue in this case and cannot be the basis of penalties in this case. Thus, even Staff cannot dispute that this testimony strays far beyond the four corners of this docket.

28 The prejudice to Qwest from Mr. Gray's testimony is obvious, and the probative value is zero. Like Mr. Smith, nothing Mr. Gray says in his testimony bears on whether Qwest or McLeod should have filed the Exhibit A agreements, whether McLeod or any other CLEC suffered discrimination as a result of any lost opportunity to opt into agreements, or whether competition or the market at large was harmed by the "unfiled agreements." He too changes the scope, complexity and tone of these proceedings, forces Qwest and possibly other parties to undertake additional discovery, and lengthens and complicates the hearing.

29 Mr. Gray is as unable as Mr. Smith to offer any testimony regarding harm that McLeod or any other CLEC suffered, any agreements McLeod or any other CLEC might have opted into, or whether the failure to file any agreement harmed competition in Washington or the telecommunications market in general.[25]

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[23] *Id*. at 16:18-17:1.

[24] *See* fn. 7 above (citing Staff's Reply to Qwest's response regarding the Eschelon settlement).

[25] *See, e.g., id*. at 23:6-8 ("Q. Was McLeodUSA harmed by any of the unfiled agreements Qwest entered into with other CLECs? A. I really have no way of knowing.").

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C. Mr. Gray's Testimony also Should be Stricken Because of His Reliance on Hearsay Affidavits from other McLeod Employees

30 Most disturbingly of all, however, Mr. Gray levies his most serious and least relevant allegations through the affidavits of others neither McLeod nor Staff has made available for Qwest to confront. Instead of describing his involvement in negotiating and implementing the alleged "oral discount" agreement, testimony Qwest could effectively cross-examine in a deposition or at the hearing, Mr. Gray attaches and relies entirely upon the hearsay affidavits of two former McLeod employees, Blake Fisher and Lori Deutmeyer, who are outside the Commission's subpoena power.[26] Above and beyond the violation of Order No. 6, which by itself justifies striking the testimony, Mr. Gray's attachment of these affidavits actively deprives Qwest of any ability to confront the witnesses providing the testimony on which he (and Staff) rely. McLeod's obligation in its Settlement Agreement to bring Mr. Gray to a hearing is an empty promise. When confronted with the very real holes in the "oral discount" theory, he will assuredly shrug his shoulders and say "I wasn't there – you'll have to ask Mr. Fisher." And neither Qwest nor the Commission will be able to do anything about it. Such an outcome, in addition to being wantonly inconsistent with Order No. 6, would clearly deprive Qwest of due process.

31 McLeod agreed, in paragraph 9 of its settlement agreement with Staff, to submit "expert" testimony from Mr. Gray in this case. Whatever that promise means, Mr. Gray offers no basis in his testimony on which this Commission can or should consider him an expert. He offers no statement of his qualifications to serve as an expert, no delineation of his areas of expertise, and no explanation as to how his testimony would assist the Commission in resolving the issues before it in this case. Moreover, his testimony is more in the nature of fact testimony – albeit fact testimony as to which the witness, by his own reckoning, has

[26] Gray Test. at 17:1-18:5 and Exs. C and D.

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little to no personal knowledge – not opinion testimony, expert or otherwise. Any plans Staff and/or McLeod might have to seek to introduce the hearsay affidavits from Mr. Fisher and Ms. Deutmeyer would be directly at odds with the Washington Rules of Evidence and settled law.[27]

III. CONCLUSION AND REQUEST FOR EXPEDITED CONSIDERATION

32 At one level, these allegations – and, indeed some of this testimony – do not really surprise Qwest. The Fisher and Deutmeyer affidavits were part of the record in the Minnesota Commission's unfiled agreements proceeding back in 2002, as were the documents Mr. Smith purports to "sponsor" in his testimony. These materials, as well as the Minnesota Commission's decisions flowing from them, were readily available to Staff to review, consider, and crib when deciding how to cast and plead this case. The fact is, however, that Staff opted not to follow the Minnesota model, as other states did. Staff affirmatively chose not to gather and review the decisions from other states,[28] but rather to plead and pursue a

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[27] *Compare* Washington Rules of Evidence, ER 701 (lay opinion testimony must have personal knowledge) *with* ER 702 (expert opinion requires some specialized scientific, technical, or other specialized knowledge); *see also State v. Ortiz*, 119 Wash.2d 294, 308, 831 P.2d 1060 (1992).

[28] Mr. Wilson confirmed as much in his deposition:

> Q In the course of considering which agreements to include in the complaint, did you consider at all the agreements that had been the subject of dockets in other states?
>
> A I think so, yes.
>
> Q Which other state's complaints did you consider?
>
> A I think we are not quite communicating about this. Within the bundle of agreements that Qwest provided in response to Bench Request 46, there are agreements that are also applicable not just in Washington but in other states.
>
> Q I understand.
>
> A And in reviewing Staff reports, decisions, or settlement agreements that I obtained off the websites at those states, and comparing them and the descriptions of the contracts that were at issue where there are names of parties given, dates listed, identifying various agreements, I was able sometimes to determine that we had before us the very same agreements. But other than myself looking at materials I downloaded off of websites, I didn't do anything else like ask, would you send me the agreements you guys are looking at or anything like that. Olympia is the center of the universe.
>
> Q . . . And I understand you testified earlier that you hadn't reached out to other states' Commission staffs to obtain information –
>
> A That's right.

Wilson Depo. vol. 1 at 180:9-181:12.

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different set of theories based on Staff's unique view of the law. Staff also declined to seek leave to modify the procedural schedule, which would require it to justify this significant change to the scope and tone of this case rather than putting Qwest in the awkward and unfair position of having to unring these two noisy bells. Whether well-founded or ill-considered, Staff must be held to the decisions it made about the claims to pursue in this case and should not be allowed to change course at the eleventh hour, particularly in a manner that flouts the Commission's procedural order in this case.

33 Moreover, the testimony Staff seeks to sponsor here is overwhelmingly irrelevant, non-probative and incendiary. It is designed to poison the well with stories of irrelevant historical CLEC complaints about Qwest (allegations Staff affirmatively chose not to pursue here) rather than advancing the proof of Staff's actual claims. Nobody can dispute that someone accused of wrongdoing is prejudiced, unfairly and irreparably, if his accuser is allowed to color her case with last-minute "state's evidence" testimony from a co-defendant about "crimes" not charged. But this is exactly the sort of testimony Staff has orchestrated here, and its actions are no more fair, and no less prejudicial, simply because this is an administrative proceeding and the defendant is a large company. Permitting Staff's tactic would be an open invitation to parties in Commission proceedings to ignore Commission procedural orders and decide for themselves when it would be most strategically advantageous to lay testimony on other parties and the Commission. This cannot be a result the Commission seeks to facilitate.

34 For the foregoing reasons, Qwest respectfully requests that the Commission strike the testimony filed by Mr. Smith and Mr. Gray, and that it do so forthwith in order to forestall the need for written discovery, depositions and significant reply testimony not previously contemplated. Qwest is prepared to waive its right to reply to any opposition to this motion in order to bring these issues before the Commission as quickly as possible and will make

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itself available for hearing, by telephone or in person, at the Commission's convenience.

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RESPECTFULLY SUBMITTED this ____ day of _____, 2004.

QWEST

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