BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION, Petitioners, v. ADVANCED TELECOM GROUP, INC., et al, Respondents.	DOCKET NO. UT-033011 COMMISSION STAFF RESPONSE TO MOTION TO STRIKE

1 Qwest Corporation's Motion to Strike Testimony of Stephen C. Gray and Richard A. Smith (Motion to Strike) is, in large part, a recasting of the same arguments Qwest made in its filing objecting to the settlements. Since Staff already responded to that filing, Staff asks the presiding officer to consider this response in tandem with its prior filing on these issues.[1] Because the testimony of Eschelon and

[1] Staff showed the following in its Reply to Qwest's response to the Eschelon settlement: (1) due process requires notice and opportunity to be heard, (2) Qwest received notice of the allegations against it and will have the opportunity to respond to those allegations without modifying the current procedural schedule, (3) Qwest's arguments represent an exaggeration of due process principles, as well as Commission rules and practices, (4) had Staff and the CLECs failed to settle, Qwest would receive similarly adverse testimony because the CLECs, acting in their own interest, would likely attempt to show that Qwest was more blameworthy than they were, (5) Respondents in this case may express their unique perspectives in testimony whether or not such testimony is

McLeodUSA is lawful, in the public interest, and does not prejudice Qwest, Staff requests that Qwest's Motion to Strike be denied.

A. The Commission has already approved the process contemplated by the settlements.

2 Qwest, for the second time, attacks the process contemplated by the settlements and attempts to color the testimony of Eschelon and McLeodUSA as unfair by labeling it "an orchestration" and arguing that it is a second round of direct testimony.[2] Whatever one calls the Eschelon and McLeodUSA testimony, the fact remains that the process contemplated by the settlements has been accepted by the Commission as "not unlawful or contrary to the public interest." Order No. 12, paragraphs 31, 34, 44. It is also clear that the process is consistent with due process principles. *See* Staff's Reply to Qwest Response to Eschelon Settlement Agreement. The issue of the process contemplated by the settlements has already been addressed by the parties and disposed of by the Commission.

3 In making its argument that the Smith and Gray testimony is "procedurally inappropriate," Qwest misstates the process that led to the filing of the Complaint. Qwest would have the Commission believe that Staff waited two years to file its

---

supportive or adverse to Qwest, and (6) the process contemplated by the settlements is consistent with due process principles.

[2] Staff objects to Qwest raising the same arguments here that it raised in its previous filing objecting to the settlement. Staff also objects to Qwest's reliance on the schedule set out in Order No. 06 as the "final word", so to speak. The schedule set out in that order has been modified several times at the request of various parties.

direct case. While Staff will not dispute that two years passed, Qwest mischaracterizes the process. The Commission – not Staff – received the unfiled agreements in March 2002. It received them during the Commission's review of Qwest's Sec. 271 application. The documents did not, as Qwest suggests, sit untouched for eighteen months. The unfiled agreements were a significant topic within the Sec. 271 proceeding, and the Commission ultimately determined that the allegations of impropriety by Qwest should be addressed in a separate investigation (a decision that Qwest welcomed at the time).[3] The Commission – not Staff – then determined if and when a formal complaint would be issued, and it issued its Complaint on August 14, 2003. The interval between the issuance of the Complaint and the filing of Staff's direct case was largely occupied by Qwest's ultimately unsuccessful efforts to dismiss the case.

B. The substance of the testimony is a result of the process agreed to by the parties in the settlements and approved by the Commission.

4 The heart of Qwest's argument is that the Smith and Gray testimony is Staff's testimony. It is, Qwest argues, part of the direct case of Staff and therefore should have been part of Staff's filing in June. Qwest's argument fails because it fundamentally misrepresents the nature of this testimony. The settlement agreements did not call for Staff to approve the substance of the testimony, and

[3] 39th Supplemental Order, Dockets UT-003022 and UT-003040, July 1, 2002, paras. 295 and 381.

Staff in fact did not review of approve of the testimony before it was filed.[4] Staff and the settling parties agreed to a mechanism whereby Staff had the opportunity to judge the sufficiency of the testimony against specific criteria contained in the settlement agreements prior to final approval of the settlements, but not prior to the time the testimony was publicly available. This provided Staff with a mechanism to ensure that Eschelon and McLeodUSA complied with the terms of settlement agreements without interference with the substance of the testimony itself. Therefore, the testimony is, literally, independent of Staff's control and cannot be characterized simply as additional direct testimony (although there would be nothing prejudicial about it even if it were additional direct testimony).

5 The result of this independence was that Eschelon and McLeodUSA were free to draft their testimony in the way they saw fit. Thus, precisely because Staff did not direct the testimony of Eschelon and McLeodUSA, their respective testimony emphasizes their unique perspectives. Qwest complains because Staff could have raised certain issues discussed in the Eschelon and McLeodUSA testimony in its direct case. In fact, Staff did raise all the issues discussed in the Eschelon and McLeodUSA testimony albeit in a slightly different way: from its

[4] Consistent with Staff's responses to Qwest's data requests relating to the formation and substance of discussions leading to the settlements with Eschelon and McLeodUSA, Staff objects (on a continuing basis) to such inquiries consistent with WAC 480-07-400(4) and WAC 480-07-700(4)(b).

own perspective. The presiding officer should not accept Qwest's narrow view of "response" testimony.

6 Furthermore, the testimony of Eschelon and McLeodUSA is unique and important to the Commission because it comes, not from an outside observer like Staff, but from two competitive local exchange carriers (CLECs) who were actually participating in the interconnection agreement process when the violations occurred. In fact, Eschelon and McLeodUSA are in the best position to explain the context in which the violations actually occurred.[5]

C. The testimony is relevant.

7 The testimony of Eschelon and McLeodUSA is relevant for a number of reasons. For example, the testimony shows the context in which the agreements were entered into, the motivation of the parties, the damage to the marketplace that was occurring, and the overall relationship between Qwest and the CLECs. More importantly, however, the testimony is relevant for the Commission to assess the appropriate penalties against Qwest should a violation be found.

8 This is an issue Staff has long been concerned with.[6] In paragraph 6 of Commission Staff's Reply to Covad's Petition for Review, Staff said "Qwest and

[5] As well as approving the procedure contemplated by the settlements, the Commission specifically approved the substantive criteria contained in the settlement agreements to which the testimony is addressed as "not unlawful or contrary to the public interest." Order No. 12, paragraph 31.

[6] Contrary to Qwest's argument, there is nothing improper (nor inconsistent) about Mr. Wilson opining that the penalties should be levied at the maximum amount for all parties, and Staff

CLEC violators should be held accountable in that each should be found to have violated the Act. The amount of penalties for each violation, however, may vary depending on the culpability of each carrier taking into account such factors of timing of filing, intent, motivation, damage to the market, damage to other carriers, bargaining position, etc." This statement is consistent with the statement of Tom Wilson in his deposition transcript in which he said "[we] believe *that weighting the violations is something that we can't do, that the commission should* [emphasis added]." Motion to Strike, footnote 7, quoting from Mr. Wilson's deposition.

9 The Eschelon and McLeodUSA testimony do not advocate that the Commission impose an appropriate amount of penalties against Qwest. The effect of the testimony is to provide information to the Commissioners so that they may weigh the appropriate factors and make up their own minds on the appropriate amount of penalties, if any. In fact, the Commission has expressly recognized that issues of culpability and other issues should be considered when determining the appropriate enforcement response. One need only compare *MCIMetro Acess Transmission Services, Inc. v. US West Communications, Inc.*, Commission Decision and Final Order Denying Petition to Reopen, Modifying Initial Order, in Part, and Affirming in Part, Docket No. UT-971063, paragraph 158, where the Commission articulated eight factors that might assist in a decision whether to impose penalties

---

pointing out in brief (as it has already done) that the Commission may determine penalties by considering various factors.

with the dissent in *WUTC v. Puget Sound Energy, Inc*., Commission Order Accepting Settlement, Docket No. UG-001116, paragraph 32 – 38, where the Chairwoman articulated factors that should be considered to determine the Commission response to violations of law governing pipeline safety, to conclude the evidence in the Eschelon and McLeodUSA testimony is relevant to this proceeding.

10 The tone of Qwest's actions is also relevant in this regard. Qwest's Motion to Strike threatens to pursue unprecedented (and irrelevant) avenues of discovery, bring additional witnesses to extend the length of the hearing, and subject the witness(es) to a long and detailed cross-examination unless "the testimony is stricken." Motion to Strike, paragraph 22. This litigate or die mentality is apparently nothing new to Qwest. Qwest complains that Mr. Smith's testimony about Qwest's "general litigiousness" is irrelevant and states that "he most assuredly is not right about" it. Motion to Strike, paragraph 4. However, Qwest's actions in filing this motion, protesting the testimony so vigorously, its pattern of filing motion after motion, and the tenor of its discovery over the course of this proceeding, reveals the truth. Qwest has been, and apparently continues to be, extremely litigious. This fact, as well as other historical information contained in the testimony, is very relevant to the extent to which Qwest was attempting to intimidate smaller and less powerful CLECs into entering into agreements under its

terms, and is ultimately relevant to the extent of damage to the market caused by Qwest and *intended to be caused* by Qwest through manipulation and control.

11 In summary, the Eschelon and McLeodUSA testimony provide important information for the Commission to consider on a number of issues relevant to this proceeding. The depth of Qwest's protest only speaks to the importance of this evidence in considering the damage to the marketplace, the context in which the agreements were entered into, and the culpability of Qwest.

D. The testimony of Mr. Gray is admissible.[7]

12 Qwest objects to the testimony of Mr. Gray based on hearsay and other evidentiary grounds. As Qwest is well aware, "evidentiary standards in administrative proceedings are less rigorous than those in courtrooms, and 'administrative agencies are not restricted to rigid rules of evidence.'" *Qwest Corporation v. Koppendrayer*, 2004 WL 2065686 (D.Minn.) citing *Whaley v. Gardner*, 374 F.2d 9, 11 (8th Cir. 1967). Thus, reliance on traditional evidence rules is not necessarily appropriate.

13 The Commission rules, 480-07 WAC, "are authorized by and supplement the Administrative Procedure Act, Chapter 34.05 RCW." WAC 480-07-010. The Administrative Procedure Act explicitly permits the admission of hearsay evidence.

[7] Staff and McLeodUSA inadvertently labeled Mr. Gray's testimony as "expert testimony". This drafter's error was caught in the Eschelon settlement, but not the McLeodUSA settlement. The context of Mr. Gray's testimony makes it clear that he is a fact witness and should be considered as such.

In fact, RCW 34.05.452(1) states "[e]vidence, *including hearsay evidence* [emphasis added], is admissible if in the judgment of the presiding officer it is the kind of evidence on which reasonably prudent persons are accustomed to rely in the conduct of their affairs." The presiding officer may refer to the Washington rules of evidence for guidance, but *only if* "not inconsistent with (1) of this section." RCW 34.05.452(2). The APA also requires the following:

> Findings [of fact] shall be based on the kind of evidence on which reasonably prudent persons are accustomed to rely in the conduct of their affairs. Findings may be based on such evidence even if it would be inadmissible at civil trial. However, the presiding officer shall not base a finding exclusively on such inadmissible evidence unless the presiding officer determines that doing so would not unduly abridge the parties' opportunity to confront witnesses and rebut evidence. The basis for this determination shall appear in the order.
>
> RCW 34.05.455.

14 Thus, the standard for admission of the testimony is whether a reasonably prudent person would rely on this evidence. The affidavits of Mr. Fisher and Ms. Deutmeyer to which Qwest objects based on hearsay and other grounds were part of the overall context of Mr. Gray's testimony. They are but a small part of a much larger picture indicating the existence of agreements and the context under which the agreements are entered into. Staff is not asking the Commission to rely solely on hearsay testimony to make a finding of fact (although, in light of the facts described in the next paragraph (under RCW 34.05.455 and the Washington Rules of Evidence), it could). Instead, Staff is simply asking the Commission to consider

this testimony in light of all the testimony filed. In fact, it is entirely appropriate for the Commission to do so under any evidentiary standard.

15 Qwest's argument that it will not have the opportunity to confront these individuals is patently false. Qwest has seen and conducted discovery on this evidence, including examination of these witnesses, before. As Qwest admits "the Fisher and Deutmeyer affidavits were part of the record in Minnesota Commission's unfiled agreements proceeding back in 2002."[8] Motion to Strike, paragraph 32. In fact, Qwest deposed both of them. *See* Exhibit A and Exhibit B. When faced with similar arguments by Qwest, the Minnesota Public Utilities Commission specifically found that Qwest was not denied due process by the failure of Mr. Fisher to appear at the hearing and admitted his deposition instead. *See* Exhibit B. Staff is currently in the process of obtaining copies of the depositions (no doubt Qwest already has copies of them, but apparently failed to disclose this fact when making its argument on this issue). Staff will move for admission of these documents as soon as they are obtained. Consideration of the affidavits in the context of Qwest's opportunity to cross-examine these individuals should assure

[8] Qwest states "Blake Fisher and Lori Deutmeyer . . . are outside the Commission's subpoena power." Motion to Strike, paragraph 30. Evidence Rule 804 (b)(1) permits (where the witness is unavailable) admission of hearsay "[t]estimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered . . . had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination."

that the entire package of evidence is the kind of evidence a reasonably prudent person would rely on and is consistent with traditional evidentiary principles.

E. Qwest is not prejudiced.

16 As noted in Staff's prior filing on this issue, Qwest will have every opportunity to respond to the evidence offered against it in the reply round of testimony.[9] Therefore, Staff has already shown a lack of prejudice to Qwest. As Qwest is well aware, there is a difference in being prejudiced procedurally or for due process purposes and being prejudiced because testimony is not flattering to one's case. The former requires an appropriate remedy, typically a continuance. The latter is part of the litigation process and is something faced by all parties. Shakespeare's famous words "the lady doth protest too much, methinks" ring true here. The depth of Qwest's protest in this motion, at times resorting to what could be construed as intimidation, *e.g.* "[Mr Smith] will face a long, detailed cross-examination," illustrate the degree to which it is concerned about the second kind of prejudice. Motion to Strike, paragraph 22. For all of the above reasons, Qwest's Motion to Strike should be denied.

[9] In fact, Qwest was given an additional advantage due to the structure of the settlement in this case because it received the substance of the response testimony two weeks prior to the time it had to file its response case. When Qwest moved for an extension of the deadline to file response testimony and it was granted, Staff and the other parties to the settlement were faced with either scrapping their settlement agreement or filing prior to Qwest's filing date. The ultimate result was that the parties chose to preserve their agreement, but Qwest received an advantage by being permitted to review the settlement response testimony prior to filing its own.

DATED this 24th day of September, 2004.

CHRISTINE O. GREGOIRE
Attorney General

_____

CHRISTOPHER G. SWANSON
Assistant Attorney General
Washington Utilities and
Transportation Commission
(360) 664-1220