

BEFORE THE  
WASHINGTON UTILITIES AND  
TRANSPORTATION COMMISSION

WASHINGTON UTILITIES AND  
TRANSPORTATION COMMISSION,

Complainant,

v.

ADVANCED TELCOM, INC., d/b/a  
ADVANCED TELCOM GROUP; AT&T  
COMMUNICATIONS OF THE PACIFIC  
NORTHWEST and TCG SEATTLE; COVAD  
COMMUNICATIONS COMPANY;  
ELECTRIC LIGHTWAVE, LLC.;  
ESCHELON TELECOM OF  
WASHINGTON, INC.; FAIRPOINT  
CARRIER SERVICES, INC. f/k/a  
FAIRPOINT COMMUNICATIONS  
SOLUTIONS CORP.; GLOBAL CROSSING  
LOCAL SERVICES, INC.; INTEGRA  
TELECOM OF WASHINGTON, INC.;  
McLEODUSA, TELECOMMUNICATIONS  
SERVICES, INC.; SBC TELECOM, INC.;  
QWEST CORPORATION; WORLDCOM,  
INC.; and XO WASHINGTON, INC., f/k/a  
NEXTLINK COMMUNICATIONS, INC.,

Respondents.

Docket No. UT-033011

**TWTC'S ANSWER TO QWEST'S  
MOTION TO STRIKE TESTIMONY**

**I. INTRODUCTION**

1. Intervenor Time Warner Telecom of Washington, Inc. ("TWTC"), by and through its attorneys of record, Ater Wynne LLP, hereby submits its Answer to Qwest's Motion to Strike

Testimony of Stephen C. Gray and Richard A. Smith. TWTC opposes the motion and requests that the Commission deny it.

## II. ARGUMENT

### A. The Gray And Smith Testimonies Are Not Procedurally Inappropriate

2. The Gray and Smith testimonies are not procedurally inappropriate. As the Staff argues in its Response to Motion to Strike, the Commission has already approved the settlements and the process of submitting testimony from Messrs. Gray and Smith as “not unlawful or contrary to the public interest.” Order No. 12, para. 31, 34, 44. The Gray and Smith testimonies constitute the testimonies of their respective companies, McLeod USA Telecommunications Services, Inc. (“McLeod”) and Eschelon Telecom, Inc. (“Eschelon”), respectively, not that of Staff. Since they were submitted in response to agreements reached in Settlement Agreements, which were not executed until well after Staff filed its opening testimony in this case, it is illogical to argue that they should have been submitted as part of Staff’s direct testimony.

3. Further, in contrast to Qwest’s argument, Qwest’s due process rights are not compromised by the filing of the Gray and Smith testimonies. Under the procedural schedule adopted in this case, Qwest has ample opportunity to conduct discovery and respond to the Gray and Smith testimonies.

### B. The Gray And Smith Testimonies Are Relevant

4. The Gray and Smith testimonies are directly relevant to the issues in this case. Critically, from TWTC’s perspective, they describe clearly the full extent and scope of the secret agreements between each of the two CLECs and Qwest, as well as the context in which the agreements were entered into, including the motivation of the parties and the damage to the marketplace that was occurring.

5. Qwest specifically attacks Mr. Gray’s testimony that McLeod “had an oral agreement with Qwest that we believed entitled McLeod USA to a volume discount of between

6.5% and 10% on the products we purchased from Qwest” (Gray Testimony at 16, line 18 – 17, line 1), claiming that this “oral agreement” is not at issue in this case and cannot be the basis of penalties in this case. TWTC submits that the testimony is directly relevant and appropriate for two reasons. First, the testimony is relevant to the question of whether the “oral agreement” was in fact part of a larger interconnection agreement between McLeod and Qwest that should have been filed. Second, the testimony is relevant to the question of Qwest’s culpability, including a pattern of conduct designed to cause damage to the marketplace.

**C. Mr. Gray’s Testimony Should Not Be Striken Because It Relies In Part On Hearsay.**

6. Qwest’s argument that Mr. Gray’s testimony about the “oral agreement” for Qwest to provide a secret discount to McLeod should be striken because it relies on affidavits of two former employees, Blake Fisher and Lori Deutmeyer, is not well taken. First, the Washington Administrative Procedures Act, Chapter 34.05 RCW specifically permits agencies such as the Commission to admit and rely on hearsay evidence 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.” RCW 34.05.452(1). The hearsay evidence at issue is two sworn affidavits that were submitted in a Minnesota unfiled agreements case, certainly the kind of evidence reasonably prudent persons would rely upon. Courts also rely on sworn affidavits all the time.

7. Qwest’s complaint really is that, because Mr. Fisher and Ms. Deutmeyer are former employees outside the control of McLeod, who reside beyond the subpoena power the Commission, it cannot compel their attendance at the hearing. However, as Qwest itself acknowledges, both affiants were deposed in the Minnesota proceeding by Qwest. Pursuant to

Civil Rule 32(a)(3)<sup>1</sup> their depositions can be introduced in this proceeding. Indeed, Staff in its Response to Qwest's motion states that it intends to do so. Thus, any hypothetical prejudice to Qwest will be cleared. There is no due process violation here.

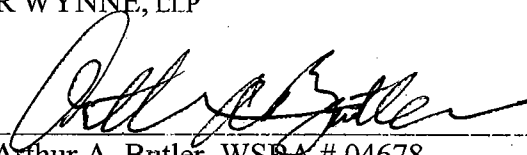
### III. CONCLUSION

8. For the reasons discussed above, TWTC requests that the Commission deny Qwest's Motion to Strike Testimony.

RESPECTFULLY SUBMITTED this 24th day of September, 2004.

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By



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<sup>1</sup> CR 32(a)(3) provides in pertinent part: "The deposition of a witness, whether or not a party, may be used by any party for any purpose if the court finds: . . .(D) that the party offering the deposition has been unable to procure the attendance of the witness by subpoena . . ."

## CERTIFICATE OF SERVICE

I hereby certify that I have this 24th day of September, 2004, served the true and correct original, along with the correct number of copies, of the foregoing document upon the WUTC, via the method(s) noted below, properly addressed as follows:

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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 24th day of September, 2004, at Seattle, Washington.

  
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