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 TIMOTHY J. GATES

1 Qwest Corporation ("Qwest"), by and through its undersigned counsel, respectfully requests that the Commission strike the testimony filed in this proceeding by Timothy J. Gates, a consultant retained to sponsor testimony on behalf of intervenor Time Warner Telecom of Washington, LLC ("Time Warner"). Qwest objects to this testimony, and asks the Commission to strike it, on an expedited basis, for the three reasons discussed immediately below.

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2 First, Time Warner's "request for additional reparations" impermissibly seeks to expand the scope of this case – after Time Warner affirmatively represented that it would not do so. Staff seeks penalties, not "reparations" or any other form of payments to CLECs. In the time since it intervened in this case, Time Warner has not filed a complaint, cross-claim or other appropriate pleading articulating factual and legal bases for relief beyond that sought in Staff's complaint. Time Warner's effort to expand the scope of this case *via* a response to Qwest's motion for summary determination is no substitute for a proper complaint, and Time Warner offers no reason or authority justifying its total failure to proceed according to the Commission's rules.

3 Second, Time Warner's claims for "reparations" are barred as a matter of law. They are barred by limitations. The operative limitations period is six months (or at most two years). This period began running no later than March 2002. To this date, Time Warner's claims remain unasserted in any case. Time Warner's claims also fail because the Commission lacks authority under state law to award the requested "reparations" even if Time Warner had sought them properly.

4 Third, Mr. Gates's testimony is impermissibly late and should be stricken for that reason as well.

I. TIME WARNER'S CLAIMS FOR "REPARATIONS" FALL OUTSIDE THE SCOPE OF THIS CASE

A. The Case Staff Actually Pled Seeks Penalties For Qwest's And Other Carriers' Failure To File Agreements, And Not Payments To CLECs

5 The Commission's procedural rules require adjudicative proceedings before this Commission to begin with an "appropriate form of pleading."[1] The rules define carefully

[1] WAC 480-07-305(2) ("A person involved in an actual case or controversy subject to the commission's jurisdiction may apply to the commission for an adjudicative proceeding by filing the appropriate form of pleading.").

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the range of "appropriate pleadings," which include "[f]ormal complaints,"[2] "[p]etitions,"[3] "[f]ilings for general rate increases,"[4] "[a]pplications for authority that are not protested,"[5] and "[p]rotests to applications for authority."[6] But merely filing the pleading is not enough. The Commission must then decide either to initiate the adjudicative proceeding and serve the parties with notice of a hearing, or to decline to conduct the proceeding at all.[7]

6 <u>This</u> adjudicative proceeding began with a complaint filed by Commission Staff on August 14, 2003. The Complaint (which Staff amended shortly thereafter) alleged seven causes of action against Qwest and thirteen competitive local exchange carriers ("CLECs"), not including Time Warner. The Commission's prayer for relief stated only that it sought the assessment of monetary penalties against Qwest and the other CLECs, and not a word about "reparations," CLEC credits or anything of the sort:

> THEREFORE, the Commission enters into a full and complete investigation into the matters alleged and will commence an adjudicative proceeding pursuant to chapter 34.05 RCW and chapter 480-09 WAC for the following purposes:
>
> (1) To determine whether the respondents or each of them have violated the statutes set forth in the allegations above;
>
> (2) <u>To determine whether the Commission should impose monetary penalties against the respondents or each of them in an amount to be proved at hearing</u>; and
>
> (3) To make such other determinations and enter such orders as may be just and reasonable.[8]

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[2] *See* WAC 480-07-305(3)(a).

[3] *See* WAC 480-07-305(3)(b), (c) and (f).

[4] *See* WAC 480-07-305(3)(d).

[5] *See* WAC 480-07-305(3)(e).

[6] *See* WAC 480-07-305(3)(g).

[7] *See* WAC 480-07-305(5).

[8] Complaint, ¶¶ 46-49 (emphasis added). These paragraphs remain unchanged in the Amended

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B. **Rather Than Filing An ''Appropriate Pleading'' Of Its Own, Time Warner Intervened, Representing To The Commission That It Would Not Expand The Scope Of Issues In This Case**

7 Because it was not named as a respondent in Staff's complaint, Time Warner intervened in this case. Again, the procedural rules contain straightforward standards on the subject. Putative intervenors must file a petition disclosing, among other things, their "interest in the proceeding," their "position(s) with respect to the matters in controversy," and, most importantly, "[w]hether the petitioner proposes to broaden the issues in the proceeding and, if so, a statement of the proposed issues or an affidavit or declaration that clearly and concisely sets forth the facts supporting the petitioner's interest in broadening the proceedings."[9]

8 Time Warner's petition to intervene, filed on September 8, 2003, represented its interest in this case as stemming from its status as a CLEC that may wish to take advantage of opt-in opportunities. Time Warner also represented affirmatively that it would not seek to broaden the issues in the case:

> As a competitor and a party to an interconnection agreement with Qwest, TWTC has a substantial interest in the issues to be addressed in this proceeding. . . . In this proceeding, the Amended Complaint alleges that Qwest has entered into a number of agreements that make available interconnection, services, or network elements to certain CLECs that were not filed or not timely filed. <u>TWTC may wish to take advantage of the terms of those agreements</u>. The Amended Complaint also alleges that Qwest has entered into a number of agreements with certain CLECs that contain terms and conditions that create an undue or unreasonable preference or advantage in the access or pricing of interconnection, services, or network elements while subjecting companies that were not offered such provisions. <u>TWTC has an</u>

Complaint.

[9] WAC 480-07-355(1)(c).

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interest in ensuring that it is able to take advantage of contract terms and conditions that are the same or substantially the same as those offered by Qwest to similarly situated telecommunications companies, and that it is not subjected to undue or unreasonable prejudice or disadvantage or undue discrimination in gaining access to or pricing of interconnection, services, or unbundled network elements. The Commission's review of these agreements, therefore, will directly and materially affect TWTC and its ability to provide telecommunications services in the State of Washington on a fair basis.

> As a competing local exchange company with a direct and particular interest in the outcome of this proceeding, TWTC's participation will be of material value to the Commission. TWTC's intervention will not broaden the issues to be addressed or delay this proceeding, and TWTC will coordinate with other parties with similar interests to minimize any duplication or overlap in presentation of positions.[10]

9 Time Warner reinforced this misrepresentation at the prehearing conference held on September 8, 2003. In the course of that hearing, counsel for Time Warner again represented that it would not seek to expand the issues in the case and again said nothing about seeking "reparations" or anything like them:

> MR. BUTLER: Time Warner Telecom of Washington requests leave to intervene. We've set forth the reasons for that in a written petition, copies of which have been filed and handed to the parties that are present in the room today and served on all the parties that had filed notices of appearance before.

> Time Warner Telecom is a facilities-based telecommunications company that's registered to do business in the state of Washington. It has an interconnection agreement with Qwest and obtains interconnection, unbundled network elements, collocation, network facilities and services from Qwest under the terms of that interconnection agreement and competes with Qwest and with the other competitive local exchange companies that are named in the complaint in this proceeding.

> Time Warner Telecom has an interest in ensuring that it is able to

[10] Time Warner Telecom of Washington LLC's Petition to Intervene, at 2-3 (Sept. 8, 2003) (emphasis added).

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> take advantage of the contract terms and conditions that are the same or substantially the same as those offered by Qwest as similarly situated telecommunications companies in Washington and that it is not subjected to any undue or unreasonable prejudice or disadvantage or undue discrimination in gaining access to or pricing of interconnection services or unbundled network elements.
>
> As a competitive local exchange company with a direct particular interest in the outcome of this proceeding, Time Warner Telecom's participation will be of value to the Commission and will not broaden the issues to be addressed or delay the proceeding. And Time Warner Telecom commits to coordinate with other parties with similar interests to minimize any duplication or overlap in the presentation or positions. And on that basis, I would request petition to intervene.[11]

Based on Time Warner's representations, none of the parties objected to its petition, which was granted in Order No. 01.[12]

10 Time Warner's stated interest in this case and its proffered basis for intervening lay entirely in "ensuring that it is able to take advantage of the contract terms and conditions that are the same or substantially the same as those offered by Qwest as similarly situated telecommunications companies in Washington."[13] Before a CLEC can take advantage of contract terms, the agreement first must be an "interconnection agreement." The question of whether fifty-two agreements between Qwest and CLECs are "interconnection agreements" that should have been filed and made available to other CLECs lies at the center of the Exhibit A portion of this case. It makes perfect sense, then, that Time Warner would want to participate in litigating whether certain agreements should have been filed, and whether and on what terms they should be made available to other CLECs. And that level of participation would not "broaden the issues to be addressed or delay the proceeding."

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[11] Transcript of Prehearing Conference, Sept. 8, 2003, at 14:22-16:8 (emphasis added).

[12] *See* Order No. 01, ¶ 4.

[13] Transcript of Prehearing Conference, Sept. 8, 2003, at 15:14-23.

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11 Disclosing the desire to litigate possible opt-in opportunities falls far short of disclosing any intention to seek money damages. Even if one reads Time Warner's representations liberally, neither its Petition to Intervene nor its prehearing conference argument revealed the vaguest intention to seek "reparations," damages, credits, or any other form of relief for itself or the other unspecified CLECs for whom its witness purports to speak.[14]

12 After the prehearing conference, Qwest and other respondents filed motions to dismiss and/or for summary determination. On December 12, 2003, Time Warner filed a brief – purportedly in response to Qwest's motion to dismiss and for summary determination – asking this Commission in essence to give collateral estoppel effect to a then-recent recommended opinion and order of an Arizona Administrative Law Judge and, explicitly, to "find that Qwest was required to file the Eschelon and McLeod agreements giving those carriers a 10 percent discount on all purchases of Qwest's services, including interstate and intrastate switched and special access, Section 251(b) and (c) services, and private line services."[15] Time Warner's brief contains no recognition of its promise not to expand the issues in the case or any justification for its new request for relief. Beyond quoting (for more than four pages) from the Arizona recommendation, Time Warner's brief cites no authority, either to support its attempt to expand the case or the relief it wanted the Commission to consider.

13 Qwest argued in its reply that Time Warner's request for damages expanded the scope of the case in direct violation of its representations to the Commission, and that its request for damages was misplaced (or at best premature):

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[14] In his testimony, Mr. Gates recommends "that the Commission order Qwest to pay TWTC, *and the other CLECs that did not benefit from the unfiled agreements,* a lump sum equal to the difference between what each CLEC did pay and what it would have paid Qwest under the terms of the unfiled agreements, plus interest." Response Testimony of Timothy J. Gates on Behalf of Time Warner Telecom of Washington LLC ("Gates Test."), at 15:339-342 (emphasis added).

[15] Time Warner Telecom's Response to Qwest's Motion to Dismiss and for Summary Determination (Dec. 12, 2003), at 7.

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> Intervenor Time Warner Telecom responded to Qwest's Motion to Dismiss and for Summary Determination with a nearly four-page excerpt from the proposed order in an Arizona proceeding. Time Warner's protracted quote is not a substitute for legal arguments and cannot serve as a basis for denying Qwest's Motion. In addition, Time Warner's suggestions for the ultimate findings of fact and remedies in this case should be rejected as premature and not relevant at this stage.
>
> The Amended Complaint opened an adjudicative proceeding expressly for the purpose of addressing whether Qwest and a number of CLECs violated federal and state statutes by not filing certain agreements and, if so, whether monetary penalties should be imposed as a result. Despite Time Warner's protestation that its intervention would not "broaden the issues to be addressed or delay this proceeding," (Time Warner Telecom of Washington LLC's Petition to Intervene at 3), it now alleges "facts" and requests remedies that are outside the scope of the Amended Complaint. If Time Warner, as its Response suggests, desires an adjudication regarding any harm it claims to have suffered and seeks to recover damages as a result, it should file a complaint against the offending parties – and not attempt to expand the scope of this proceeding to focus on issues particular to Time Warner.[16]

14 In the course of resolving the various motions to dismiss and for summary determination, the Commission agreed with Qwest that "Time Warner's Response to Qwest's Motion to Dismiss and for Summary Determination does not address the arguments Qwest raises in its motion."[17] The Commission went on to conclude that "[a]s Qwest suggests, Time Warner's request is premature, as the issue before the Commission at this stage of the proceeding is the determination of dispositive motions, not a review of evidence or the fashioning of a remedy."[18] The Commission then stated, and Time Warner no doubt will seize upon this language, that it would "defer Time Warner's request to the fact-finding portion of the proceeding, when Time Warner will have an opportunity to present any relevant evidence on the issue before the Commission."[19] But the key word is "relevant,"

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16 Reply of Qwest Corporation to Responses to Motions to Dismiss, at 9-10 (Jan. 6, 2004).

17 Order No. 05, ¶ 127 (Feb. 12, 2004).

18 *Id.* ¶ 129.

19 *Id.*

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a concept that necessarily flows from the scope of the issues properly before the Commission in this case.[20] Time Warner is, as an intervenor, of course entitled to present testimony relevant to the claims pled in Staff's Amended Complaint and/or responsive to testimony filed by other parties. The Commission has not, however, been asked properly, by Time Warner or anyone, to expand the inquiry in this case beyond what was pled by Staff, and it surely cannot have meant in Order No. 05 to give Time Warner *carte blanche* to raise new claims and issues in a manner reflecting complete disregard for the Commission's procedural rules and basic principles of adjudicative due process.

15 Nevertheless, Time Warner apparently viewed Order No. 05 as an invitation to pursue its ill-conceived expansion of the case and filed Mr. Gates's "response" testimony on September 14, 2004. That testimony is improper and should be stricken.

C. Time Warner's Demand For ''Reparations'' Raises New And Altogether Different Questions, Ones Staff Considered And Chose Not To Pursue

16 Time Warner's demand for "reparations" marks a fundamental shift from the theory Staff pled and the relief Staff is pursuing. The Commission should strike Mr. Gates's testimony – which, by his own admission, is filed "to support TWTC's request for additional reparations associated with the unfiled agreements at issue in this proceeding"[21] – because it relates only to claims that are not part of this case and are not before this Commission.

17 Claims for CLEC damages raise different questions than those raised in Staff's complaint

[20] Even Staff – the plaintiff here, as it were – acknowledges that the Amended Complaint locks in the scope of the allegations it can pursue in this case and concedes "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 . . . ." Commission Staff Reply to Qwest Response to Eschelon Settlement Agreement, at ¶ 6 and n.3 (Aug. 30, 2004).

[21] Gates Test., at 2:45-46.

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as to the Exhibit A agreements, *i.e*., whether the failure to file agreements, either at all or on time, violated the Telecommunications Act of 1996 or counterpart Washington law.[22] CLECs are harmed by an unfiled agreement only if the CLEC could have opted into the unfiled agreement in the first instance.[23] As even Staff agrees, CLECs could not opt into agreements (at least at the time these agreements were entered[24]) without also agreeing to satisfy related terms.[25] A CLEC cannot, therefore, be damaged unless it first can prove that it lost (by virtue of a failure to file) an actual opportunity to opt in to an agreement or portion of an agreement. And Staff never undertook any formal or quantitative analysis of CLEC harms.[26]

18 CLEC damage claims would put the Commission to an entirely different inquiry – a

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[22] Time Warner has not alleged any damages, nor is it seeking "reparations," purporting to result from "discrimination" from not knowing about or being offered the settlement terms embodied in the agreements listed in Exhibit B to Order No. 05, and Mr. Gates says nothing about the Exhibit B agreements in his testimony.

[23] *See generally* Response Testimony of Harry M. Shooshan at 18; *see also, e.g*., *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, First Report and Order, 11 FCC Rcd 15499, 16139 ¶ 1315 (1996) ("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.").

[24] In the meantime, the FCC eliminated the "pick and choose" rule in favor of an "all or nothing" rule requiring CLECs to opt into agreements in their entirety. *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).

[25] Deposition of Thomas L. Wilson ("Wilson Depo."), vol. 1 at 194:6-11 ("Q So prior to [the FCC's adoption of the "all or nothing rule"] a week and a half ago, your understanding was that if a CLEC wanted to opt in to something that had been made available, the CLEC would have to agree to accept the terms related to the provision that they wanted to opt in to right? A Yes.").

[26] 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 Depo., vol. 3 at 39.

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painstaking CLEC-by-CLEC and agreement-by-agreement inquiry into each CLEC's ability to enter into the desired agreements or provisions "upon the same terms and conditions as those provided in the agreement."[27] And because Staff found it impossible to discern harm to individual CLECs,[28] it opted to plead and pursue the simpler theory that Qwest (and the other CLEC respondents) should be penalized for violating the filing requirement and that all failures to file are equally severe and require equal punishment for Qwest and CLEC alike.

19 Changing the scope and nature of the case at this late date severely prejudices Qwest, not least by requiring it to expand and reconfigure its defense accordingly. Adding Time Warner's reparations claims significantly expands discovery and lengthens the hearing – exponentially now that AT&T is apparently preparing to jump on the bandwagon.[29] In order to defend itself against these new claims, Qwest would need (and be entitled) to conduct discovery <u>at least</u> with respect to (a) the Exhibit A agreements or terms into

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[27] 47 U.S.C. § 252(i).

[28] *See* Wilson Depo., vol. 1 at 190:25-192:11:

> Q So when you thought through whether you could weight the relative harm that came about from the failure to file –
>
> A Okay.
>
> Q – your conclusion was that you couldn't really discern a way to distinguish among these agreements in terms of the type or extent of harm the failure to file caused?
>
> A No, I really couldn't. And that's because, first of all, taking Exhibit 70 where I list all the SGAT taxonomy and different services that are available, and you look down that list and ask yourself, okay, is collocation more important to a CLEC than direct end office trunking, or is it more important to them than favorable reciprocal compensation, et cetera. And it's just impossible for me to say that one is more important than the other. 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. So that's something that was not possible for a staffer to determine. And really that's something that should have been determined by the CLECs themselves, collecting the opportunity to opt in or out of things. They know best what their business is.

[29] See Order No. 14, ¶ 10 (Sept. 22, 2004) ("During the conference, counsel for AT&T inquired whether the issue of remediation should be addressed in reply testimony or will be addressed in post-hearing briefs. The Administrative Law Judge determined that all issues, including the appropriate remedy for violations alleged in the Amended Complaint, should be addressed in pre-filed testimony, but that parties may address in briefs the remedies proposed in prefiled testimony.")

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which Time Warner claims it would have opted, (b) for each such agreement or term, data regarding Time Warner's business at the time (such as customers, product mixes, and purchase volumes), (c) the extent of harm it suffered, customers it lost, and reparations it seeks, and (d) its awareness of the availability of the agreement(s) or term(s) in the time since the agreement(s) were entered. The same discovery would be necessary for each CLEC and each agreement supposedly giving rise to reparations. And the hearing then would grow to include one or more "damages" witnesses from each CLEC and countering testimony from Qwest. There is no way that a case of that magnitude could be tried in anything approaching five hearing days.

20 The case Time Warner wants to bring is not the case Staff actually brought or the case this Commission authorized. The rules afforded Time Warner the same opportunity to pursue its reparations claims[30] as Staff had to pursue its penalty claims, and Time Warner decided not to do so. Time Warner has not offered a single reason, let alone authority, justifying a special exemption for it or for these claims from the procedures set forth in state law. The Commission should, therefore, strike Mr. Gates's testimony in its entirety and decline Time Warner's back-door invitation to consider and award "reparations" in this proceeding.

II. CLAIMS FOR "REPARATIONS" ARE BARRED AS A MATTER OF LAW

21 The foregoing reasons for striking this testimony are strong enough on their own, but the injustice of allowing Time Warner to proceed in this fashion is compounded by two fundamental legal defects with Time Warner's "claim."

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30 *See* WAC 480-07-305; *see also* ¶¶ 5-6 *supra*.

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A. Claims for ''Reparations'' Are Barred By Limitations

22 The Commission's authority to order reparations is limited to cases in which a carrier is found to have "charged an excessive or exorbitant amount for [a] service"[31] or to have charged a customer more than the approved rate.[32] As Qwest demonstrates in the next section, neither section properly applies here. But putting aside for the moment whether reparations authority exists at all, reparations claims (and claims for overcharges) are subject to at longest a strict two-tier limitations period:

> All complaints concerning overcharges resulting from collecting unreasonable rates and charges or from collecting amounts in excess of lawful rates shall be filed with the commission within six months in cases involving the collection of unreasonable rates and two years in cases involving the collection of more than lawful rates from the time the cause of action accrues . . . .[33]

23 Time Warner's hypothetical cause of action for reparations accrued when it discovered (or should by exercise of reasonable diligence have discovered) its right to apply for relief.[34] The Qwest/Eschelon agreement containing the only "discount" alleged in this case was entered into on November 15, 2000.[35] Because that agreement was not filed

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[31] RCW 80.04.220. The Commission also can order refunds in the case of an overcharge, but that is not what Time Warner has alleged.

[32] *See* RCW 80.04.230 ("When complaint has been made to the commission that any public service company has charged an amount for any service rendered in excess of the lawful rate in force at the time such charge was made, and the same has been investigated and the commission has determined that the overcharge allegation is true, the commission may order that the public service company pay to the complainant the amount of the overcharge so found, whether such overcharge was made before or after the filing of said complaint, with interest from the date of collection of such overcharge.").

[33] RCW 80.04.240 (emphasis added).

[34] *See, e.g., City of Snohomish v. Seattle-Snohomish Mill Co., Inc.*, 2003 WL 22073066, *4 (Wash. App. Div. 1 Sept. 8, 2003) (citing and quoting *U.S. Oil & Refining Co. v. State Dep't of Ecology*, 96 Wn.2d 85, 91, 633 P.2d 1329 (1981) and *Janicki Logging & Constr. Co. v. Schwabe, Williamson & Wyatt, P.C.*, 109 Wn. App. 655, 659, 37 P.3d 309 (2001)).

[35] *See* Agreement 4A. Staff, through McLeodUSA, Inc. president Stephen C. Gray, has attempted to inject hearsay testimony regarding an alleged oral "discount" agreement between Qwest and McLeod into this case. Qwest has moved separately to strike this testimony, and the Commission should not even consider these allegations. Qwest respectfully disputes that this agreement existed at all, but it would not change the limitations analysis if it did: according to McLeod, it was entered into at the same time as two written purchase agreements, Agreements 44A and 45A, which were executed on October 26, 2000. Qwest's arguments relating to the non-applicability of RCW 80.04.220 and .230 apply to the McLeod "discount" in the same way as to the Eschelon "discount."

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with this Commission contemporaneously, Time Warner no doubt will argue that its cause of action did not accrue at signing. But the same allegations regarding a discount by Qwest to Eschelon was raised in the Minnesota Commission's "unfiled agreements" proceeding and Time Warner knew – or should have been aware with the exercise of minimal diligence – of those allegations no later than March 12, 2002, the date on which the Minnesota Commission published public notice of its decision to proceed with the unfiled agreements case.[36]

24 Time Warner's claims fails as a matter of law for three reasons. First, regardless of whether the Commission applies the six-month or two-year limitations period, Time Warner has not <u>to this day</u> initiated an adjudicative proceeding or properly asserted a claim. Without reiterating the arguments set forth above, the Commission's procedural rules provide specific mechanisms for raising and pursuing claims such as Time Warner's "reparations" claims,[37] rules Time Warner has chosen not to follow. As such, it still has not properly initiated its claims for reparations flowing from these alleged agreements, and that fact ends the analysis.

25 As between the two limitations periods, this is more akin to a "reparations" claim than an "overcharge" claim, and thus the six-month period for "cases involving the collection of unreasonable rates" represents a better fit.[38] Time Warner's complains of the unfairness to it (and other CLECs) of Qwest's alleged favoritism toward Eschelon. It is not

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[36] *See* Notice and Order for Hearing, *In the Matter of the Complaint of the Minnesota Department of Commerce Against Qwest Corporation Regarding Unfiled Agreements*, Docket No. P-421/C-02-197 (Minnesota Public Utilities Commission), March 12, 2002 (copy attached as Ex. 1 to this motion). Even if it claims ignorance of the case from public filings, Time Warner joined the service list for the Minnesota unfiled agreements case on June 27, 2002. *See* e-mail from R. Liethen to Minnesota docket service list, June 27, 2002 (copy attached as Ex.2 to this motion). Time Warner may also have been on the service list for other proceedings in Minnesota, specifically the Section 271 public interest docket, in which these same allegations were levied earlier.

[37] *See* WAC 480-07-305.

[38] *See* RCW 80.04.240.

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asserting simply that it was billed more than an approved rate. And as such, Time Warner's "claim" fails as a matter of law – it filed nothing, in this proceeding or in any other proceeding before this Commission, alleging a right to reparations from any unfiled agreement within six months of March 12, 2002.[39]

26 But even if these claims were considered a "cas[e] involving the collection of more than lawful rates" subject to the two-year limitations period,[40] Time Warner's claim is still time barred. The only filings by Time Warner relating to these claims within two years of March 12, 2002 were (a) its Petition to Intervene, which said nothing whatever about reparations, and (b) its response to Qwest's motion to dismiss – neither of which remotely contains the "[f]acts that constitute the basis of the formal complaint, including relevant dates" or "[c]itations to relevant statutes or commission rules" required both for formal complaints[41] and petitions.[42] It is telling that Time Warner did not support its alleged claim by filing direct testimony, as a party properly asserting a claim is required to do. So Time Warner's claims survive only if the Commission permits two wholesale exemptions from its procedural rules.

27 If Time Warner tries to claim that it is a victim of procedural confusion, the Commission should ask Time Warner why, in the more than twelve months since it intervened in the case, it has failed or refused to take the straightforward and well-defined steps necessary to protect its interests. Whatever Time Warner's excuse, the Commission's response should be the same: Time Warner's claims are barred by operation of the statute of limitations. And as a result, the Commission should strike Mr. Gates's testimony and not

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[39] As a point of reference, Staff filed its initial complaint in this case on August 14, 2003.

[40] *See* RCW 80.04.240.

[41] WAC 480-07-370(a)(ii)(B) and (C).

[42] WAC 480-07-370 (b)(ii)(B) and (C).

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require Qwest to respond to it.

B. The Commission Does Not Have The Authority to Order Reparations In Connection With The ''Unfiled Agreements'' Allegations

28 Second, and even more fundamentally, this Commission lacks authority in the first place to award equitable remedies for violations of federal and state law arising from Qwest's failure to file interconnection agreements pursuant to 47 U.S.C. § 252. The Exhibit A segment of this case[43] is about whether Qwest (and the other CLEC respondents, their settlements notwithstanding) violated federal and Washington law by failing to file interconnection agreements it should have filed. That failure, or the failure to do so in a timely fashion, is arguably punishable by fines.[44] But the legislature has not granted this Commission the authority to impose restitution-style remedies on behalf of CLECs for damages arising from a failure to file – even if, as is not the case here, the claims were properly and timely presented.

29 As noted in the previous section, Washington statutory law permits the Commission to award reparations for charging customers "excessive or exorbitant" rates[45] or refunds for charging customers more than lawful rates.[46]

30 Time Warner's "reparations" claim, to the extent it is alleged at all, is not grounded in the claim that the rate it paid was unreasonable, or that Qwest charged more than a lower approved rate. Instead, Time Warner's reparations tracks Staff's allegation that Qwest failed to file, and make available for opt-in, certain agreements that were subject to the

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[43] Time Warner has not alleged that it is entitled to any reparations for discrimination flowing from any of the settlement agreements listed in Exhibit B to Order No. 05.

[44] Qwest does not dispute here (or in general) that the Commission has authority to impose penalties, although Qwest and Staff disagree about the extent of that authority and the application of that authority to the particular violations and agreements at issue in this case.

[45] RCW 80.04.220.

[46] RCW 80.04.230.

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Section 252 filing requirement. This distinction matters:

- If this were a true reparations case, Time Warner would have to allege that Qwest charged it "an excessive or exorbitant amount" for the Section 251(b) or (c) services it purchased from Qwest.[47] Time Warner does not make that claim here, and cannot: the rates Time Warner paid were approved by the Commission, even if Eschelon's were lower.

- If this were a true overcharge case, Time Warner would have to allege that Qwest had charged it more than the approved rate for the Section 251(b) or (c) services it purchased from Qwest. Again, Time Warner does not make that claim and cannot. The question of whether Time Warner should have been charged the same amount as Eschelon requires the Commission first to consider and approve the Eschelon "rate" (the "discount" along with related terms and conditions), then to determine whether Time Warner could opt into that rate. After all, the Telecommunications Act contemplates that different customers may, in fact, pay different prices for identical services because of other, related terms and conditions in their broader business relationship.[48]

31 As the Commission may know, the Minnesota Public Utilities Commission initiated its own "unfiled agreements" docket in 2002. Although Qwest argued that the Minnesota Commission lacked the authority to award money or bill credits to CLECs, the Commission overruled Qwest's objections and imposed two main categories of "sanctions" on Qwest: (i) a fine and (ii) an order requiring Qwest to pay "restitutional relief" tracking exactly the "reparations" Time Warner seeks here.[49] And, on August 25,

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[47] *See* RCW 80.04.220.

[48] *See* Shooshan Test. at 7:12-10:17 and authorities cited therein.

[49] This is hardly surprising, since Time Warner participated in the Minnesota case. *See supra* n.38.

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2004, the United States District Court for the District of Minnesota vacated the Minnesota Commission's "restitutional relief" order, finding (as Qwest had argued) that the Minnesota Commission lacked the authority under Minnesota state law to impose equitable "penalties" on Qwest.[50]

32 This ruling is important not simply because the court vacated the "reparations," but more because of the court's refusal to imply authority for the Minnesota Commission to award equitable relief in the absence of express authority. The Minnesota statutes defining that Commission's authority appear on the surface to permit a fair amount of flexibility. The Minnesota Commission has authority to "make an order respecting [an unreasonable, insufficient, or unjustly discriminatory] . . . act, omission, practice, or service that is just and reasonable," and to "establish just and reasonable rates and prices."[51] But catch-all language is not enough. Like its counterpart in Minnesota,[52] an administrative agency in Washington "must be strictly limited in its operations to those powers granted by the legislature."[53] And given the Commission's existing but narrower authority to order

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[50] Memorandum Opinion and Order, *Qwest Corporation v. Minnesota Public Utilities Commission*, Civil No. 03-3476 ADM/JSM, 2004 WL 1920970, **2-3 (D. Minn. Aug. 25, 2004) (copy attached as Exhibit 3 to this motion).

[51] The MPUC argues that Minn. Stat. §§ 237.081, 237.461 and 237.462 authorize imposition of restitutional relief. Section 237.461 is a competitive enforcement statute which permits the MPUC to seek criminal prosecution, recover civil penalties, compel performance, or take "other appropriate action." See Minn. Stat. § 237.461 subd. 1. Section 237.462, also a competitive enforcement statute, emphasizes that "[t]he payment of a penalty does not preclude the use of other enforcement provisions . . . ." Minn. Stat. § 237.462, subd. 9. § 237.081, a complaint statute, authorizes the MPUC to "make an order respecting [an unreasonable, insufficient, or unjustly discriminatory] . . . act, omission, practice, or service that is just and reasonable," and to "establish just and reasonable rates and prices." Minn. Stat. § 237.081, subd. 4.

Id. at *3.

[52] *Id*. (The Commission, "'"being a creature of statute, has only those powers given to it by the legislature.'") (quoting *Peoples Natural Gas Co. v. Minn. Pub. Utils. Comm'n*, 369 N.W.2d 530, 534 (Minn. 1985)); *see also id*. ("'any enlargement of express powers by implication must be fairly drawn and fairly evident from the agency objective and powers expressly given by the legislature.'") (quoting *Peoples Natural Gas Co. v. Minn. Pub. Utils. Comm'n*, 369 N.W.2d 530, 534 (Minn. 1985)).

[53] *Cole v. Washington Utilities and Transportation Comm'n*, 79 Wn.2d 302, 306, 485 P.2d 71, 74 (1971) (citing *State ex rel. Pub. Util. Dist. No. 1 of Douglas County v. Department of Public Service*, 21 Wn.2d 201, 150 P.2d 709 (1944)); *see also In re Electric Lightwave, Inc*., 123 Wn.2d 530, 536-37, 869 P.2d 1045, 1049 (1994) ("An agency possesses only those powers granted by statute.").

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reparations and overcharge payments – which authority does not extend to the relief Time Warner seeks for the reasons discussed above -- the Washington Commission should be even more reluctant than Minnesota to interpolate authority to order the "reparations" Time Warner requests now.

III. MR. GATES'S TESTIMONY IS IMPERMISSIBLY LATE

33 Above and beyond Time Warner's inappropriate expansion of the case, Mr. Gates's testimony is impermissibly late and should be stricken.

34 Time Warner inexplicably and inexcusably filed Mr. Gates's testimony more than three months late. Prefiled direct testimony in this case was due no later than June 8, 2004.[54] Mr. Gates admits that his testimony is designed to "support TWTC's request for additional reparations associated with the unfiled agreements at issue in this proceeding,"[55] and, as discussed below, it makes no pretense of responding to Staff's direct testimony. As demonstrated above, Time Warner intervened in this case in its procedural infancy – its petition was granted at the initial procedural conference on September 8, 2003[56] – and cannot credibly claim it was unaware of the deadlines. But Time Warner never sought an extension of time to file direct testimony, leave to file its direct testimony out of order or sought any other form of relief from the schedule. There simply is no reason why Mr. Gates's testimony qualifies as response testimony, and no excuse for it being filed three months late without leave.

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[54] *See* Order No. 06 (establishing June 1 deadline for direct testimony) and Notice, May 21, 2004 (extending deadline to June 8). The first version of the Gates testimony Time Warner served (on September 13, 2004) characterized it as "direct testimony." The next day, Time Warner served a "corrected" version that amended the label on the cover page to say "response testimony."

[55] *Id*. at 2:45-46.

[56] *See supra* ¶¶ 8-9.

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IV. CONCLUSION AND REQUEST FOR EXPEDITED CONSIDERATION

35 For the foregoing reasons, Qwest respectfully requests that the Commission strike the testimony filed by Mr. Gates forthwith in order to forestall the need for written discovery, depositions and significant reply testimony not previously contemplated. Qwest is prepared to forego the opportunity to reply in writing to any opposition to this motion in order to bring these issues before the Commission as quickly as possible and will make itself available for hearing, by telephone or in person, at the Commission's convenience.

RESPECTFULLY SUBMITTED this 1st day of October, 2004.

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