

October 7, 2004

**VIA MESSENGER AND EMAIL**

Ms. Carol J. Washburn  
Executive Secretary  
Washington Utilities and  
Transportation Commission  
1300 S. Evergreen Park Drive S.W.  
Olympia, WA 98504-7250

Re: WUTC v. Advanced Telecom Group, Inc., et al.  
Docket No. UT-033011  
Time Warner Telecom of Washington, LLC's Response to Qwest's  
Motion to Strike Testimony of Timothy J. Gates

Dear Ms. Washburn:

Enclosed please find the original and 12 copies of Time Warner Telecom of Washington, LLC's Response to Qwest's Motion to Strike Testimony of Timothy J. Gates. A copy of this document has also been sent to all parties on the Certificate of Service attached to the Answer via the method(s) indicated.

If you have any questions, please feel free to contact our office.

Sincerely,

ATER WYNNE LLP



Aaron Hottell  
Assistant to Arthur A. Butler

cc: Ann E. Rendahl, ALJ (via E-Mail)  
Parties of Record (via E-Mail and U.S. Mail)

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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.; MCLEOD USA, INC.;  
SBC TELECOM, INC.; QWEST  
CORPORATION; and XO  
COMMUNICATIONS, INC. f/k/a NEXTLINK  
COMMUNICATIONS, INC.,

Respondents.

Docket No. UT-033011

**TIME WARNER TELECOM OF  
WASHINGTON LLC'S RESPONSE  
TO QWEST CORPORATION'S  
MOTION TO STRIKE  
TESTIMONY OF TIMOTHY J.  
GATES**

**I. INTRODUCTION**

Qwest Corporation's motion to strike the testimony filed by Timothy J. Gates on behalf of  
Time Warner Telecom of Washington, LLC ("TWTC") lacks merit and should be denied as a

TWTC's RESPONSE TO QWEST CORPORATION'S MOTION TO STRIKE  
TESTIMONY OF TIMOTHY J. GATES - Page 1

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1 matter of law. Qwest asserts three distinct arguments in support of its motion to strike, each of  
2 which fails for the reasons discussed immediately below.

3 First, the testimony of Timothy J. Gates urging the Commission to impose a reparations or  
4 other remedy on Qwest in this docket does not “impermissibly seek to expand the scope of this  
5 case,” as asserted by Qwest. To the contrary, the Gates testimony filed on behalf of TWTC is  
6 well within the Commission’s stated scope of the issues in this proceeding.  
7

8 Second, the Commission does have authority to order reparations or other remedies in  
9 connection with the “unfiled agreements” matter, and TWTC’s claims for reparations or other  
10 remedies are in no way time-barred. The statutory time limitations on filing such claims would  
11 not start to run until the Commission determines that the secret Eschelon and McLeod agreements  
12 are interconnection agreements that should have been filed and made available for other CLECs  
13 to opt into. Moreover, TWTC has understood that the Commission would consider remedies  
14 other than penalties in the course of this proceeding in which it is an intervening party.  
15 Accordingly, TWTC has never brought or needed to bring the type of statutory “reparations” or  
16 “overcharge” claims that Qwest alleges would be time-barred. Qwest’s arguments to this effect  
17 miss the mark.  
18

19 Third, Mr. Gates’s testimony was timely filed. Qwest’s position that TWTC should have  
20 filed Mr. Gates’s testimony as prefiled direct testimony due June 8, 2004 is incorrect. This  
21 proceeding was initiated by Commission Staff, and Commission Staff properly filed direct  
22 testimony in support of its complaint. As an intervenor, TWTC’s testimony is in response to the  
23  
24

1 Commission Staff's direct testimony. TWTC timely filed its response testimony of Timothy  
2 Gates on September 13, 2004.

3  
4 **I. ARGUMENT**

5 **A. Time Warner's claims for reparations or other remedies to cure the harm caused to**  
6 **it by Qwest's unfiled agreements are well within the scope of this case.**

7 First, the testimony of Timothy J. Gates urging the Commission to impose a reparations or  
8 other remedy on Qwest in this docket does not "impermissibly seek to expand the scope of this  
9 case," as asserted by Qwest. To the contrary, the Gates testimony filed on behalf of TWTC is  
10 well within the Commission's stated scope of the issues in this proceeding. The Commission  
11 Staff's Amended Complaint initiated this proceeding and defined the matters in controversy. That  
12 Amended Complaint provides as follows:

13  
14 THEREFORE, the Commission enters into a full and complete investigation into  
15 the matters alleged and will commence an adjudicative proceeding pursuant to chapter  
16 34.05 RCW and chapter 480-09 WAC *for the following purposes:*

- 17 (1) To determine whether the respondents or each of them have violated the  
18 statutes set forth in the allegations above;  
19 (2) To determine whether the Commission should impose monetary penalties  
20 against the respondents or each of them in an amount to be proved at hearing; and  
21 (3) *To make such other determinations and enter such orders as may be just and*  
22 *reasonable.*

23 Complaint, ¶¶ 46-49 (emphasis added). The broad language italicized above clearly indicates  
24 that, in addition to determining whether Qwest and the other respondents had violated federal and  
state law by failing to file certain agreements and whether the Commission should impose  
monetary penalties against the respondents for any such violations, the Commission expressly  
intended to consider other orders, including other remedies, "that may be just and reasonable."

1 Accordingly, the Gates testimony urging the Commission to adopt a remedy in addition to  
2 imposition of penalties is well within the scope of the case as defined by the complaint's broad  
3 announcement that the Commission will "make such other determinations and enter such orders  
4 as may be just and reasonable." Qwest's assertion that TWTC's claims for reparations fall  
5 outside the scope of this case fails.  
6

7 Qwest's position that TWTC's filing of the Gates testimony somehow contradicts its  
8 representation that it would not seek to broaden the issues in this case is similarly misguided. As  
9 explained above, the Amended Complaint's statement of the Commission's purposes in opening  
10 this proceeding expressly includes "to make such other determinations and enter such orders that  
11 may be just and reasonable." Given that the Complaint separately identified issues of whether  
12 there was a violation and whether the Commission should require penalties, this third broad issue  
13 logically includes the fashioning of other appropriate remedies that may be just and reasonable in  
14 the Commission's discretion. Accordingly, TWTC's request that the Commission consider CLEC  
15 reparations or other remedies does not in any way contradict its representation that it would not  
16 seek to broaden the issues in this case. Moreover, TWTC's request for reparations or other  
17 remedies is wholly consistent with its stated interest in this case and proffered basis for  
18 intervening. As Qwest acknowledges, it makes perfect sense that TWTC, a CLEC that was not  
19 privy to the special rates Qwest offered to the respondents, "would want to participate in litigating  
20 whether certain agreements should have been filed, and whether and on what terms they should be  
21 made available to other CLECs." It also makes perfect sense that TWTC would ask the  
22 Commission to exercise its expressly stated authority to "make such other determinations and  
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1 enter such orders as may be just and reasonable” by ruling that reparations to injured CLECs are  
2 appropriate. Indeed, while forcing Qwest to pay penalties may serve as a deterrent to similar  
3 unfiled agreements in the future, assuming they are high enough, penalties paid to the  
4 Commission do nothing to repair the harm caused to CLECs like TWTC by these unlawful  
5 agreements.  
6

7         Indeed, in the course of this proceeding the Commission itself has indicated more than  
8 once that it intends to hear relevant evidence from TWTC regarding appropriate remedies other  
9 than penalties. In an order resolving issues as to the scope of the motions to dismiss and for  
10 summary determinations earlier in this proceeding, the Commission stated that “Time Warner’s  
11 request [for consideration of remedies other than penalties] is premature, as the issue before the  
12 Commission at this stage of the proceeding is the determination of dispositive motions, not a  
13 review of evidence or the fashioning of a remedy.” Notably, the Commission did *not* state that  
14 TWTC’s request was “beyond the scope” of the proceeding. Rather, it went on to state that it  
15 would “defer Time Warner’s request to the fact-finding portion of the proceeding, when Time  
16 Warner will have an opportunity to present any relevant evidence on the issue before the  
17 Commission.” Thus, the Commission clearly anticipated hearing evidence relating to appropriate  
18 remedies in this case other than imposition of penalties. TWTC, as an intervenor, is entitled to  
19 present the testimony of Timothy J. Gates as it is relevant to the claims in the Amended  
20 Complaint.  
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23         In any case, Mr. Gates’s testimony is clearly relevant to the issue of what remedies,  
24 including penalties, should be imposed. He discusses the harmful impact on the market in general

1 and on TWTC in particular, the benefit Qwest received from hiding the Eschelon and McLeod  
2 agreements from other CLECs, and the harm to consumers from Qwest's impeding fair  
3 competition. This testimony is relevant to the issue of what penalties to impose. It also is  
4 relevant to the issue of what findings the Commission should make in the case. For example,  
5 even if the Commission were to conclude that it lacks the authority to order reparations or  
6 refunds, it should still make findings that the failure to file the Eschelon and McLeod agreements  
7 violated the Act and harmed CLECs. The Commission also should make findings about the real  
8 scope of the secret agreements. As Stephen A. Gray states in his prefiled testimony, Qwest had  
9 an oral agreement with McLeod that entitled McLeod to a volume discount of between 6.5 and 10  
10 percent on the services it purchased from Qwest. Gray Testimony at 16, lines 18-20. Also,  
11 Agreements 44A and 45A, which were volume-based take-or-pay agreements were simply part of  
12 the overall oral agreement, essentially the mechanisms by which the oral agreement was  
13 implemented. They had the net effect of modifying the rates McLeod paid under its existing  
14 interconnection agreement. Gray Testimony at 10, lines 11-12; 15, lines 6-9; 16, lines 18-20; 17,  
15 lines 4-13. To address the harm caused by this secret agreement, the Commission must make  
16 findings about the true scope of the agreement without the window-dressing that simply enabled  
17 the implementation of the scheme. Mr. Gates testimony is relevant to that, and on this ground  
18 alone should not be stricken.

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22 Qwest is also wrong in asserting that Mr. Gates's testimony is inconsistent with TWTC's  
23 petition to intervene. In that petition TWTC stated that its interest in the case was in "ensuring  
24 that it is able to take advantage of the contract terms and conditions" that were offered by Qwest

1 to other CLECs in Washington. That is exactly what Mr. Gates addresses in his testimony.  
2 Specifically, he identifies the ten percent discounts offered to Eschelon and McLeodUSA on all  
3 purchases of Qwest's services, including interstate and intrastate switched and special access,  
4 Section 251(b) and (c) services, and private line services. The remedies he discusses are what he  
5 believes are best suited for correcting the harm caused by Qwest keeping the Eschelon and  
6 McLeodUSA agreements secret and not filing them in a timely manner.<sup>1</sup> Mr. Gates's testimony  
7 and TWTC's request for remedies beyond the mere imposition of fines do not impermissibly seek  
8 to expand the scope of this case.  
9

10 Qwest also asserts incorrectly that TWTC's requested remedies "would put the  
11 Commission to an entirely different inquiry – a painstaking CLEC-by-CLEC and agreement-by-  
12 agreement inquiry into each CLEC's ability to enter into the desired agreements or provisions. .  
13 .", and data about each CLEC's business at the time and extent of harm it suffered. That is not  
14 correct. Under Mr. Gates's proposal, all that would be required in this case is that the  
15 Commission would determine what the criteria would be for qualifying for the discounts,  
16 including identification of necessarily related terms, and order Qwest to refund to qualifying  
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20 <sup>1</sup> As Mr. Gates testifies, and Qwest itself points out in its Motion to Strike, the FCC has eliminated the "pick and  
21 choose" rule in favor of an "all or nothing" rule requiring CLECs to opt into agreements in their entirety. *Second*  
22 *Report and Order*, In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local  
23 Exchange Carriers, CC Docket No. 01-0338 (July 8, 2004). Prior to that time, and at the time the Eschelon and  
24 McLeodUSA agreements should have been filed, CLECs were entitled to "pick and choose" the portions of other  
CLEC interconnection agreements they wanted to opt into. Thus, simply ordering Qwest to file the Eschelon and  
McLeodUSA agreement and make them available for opt-in today could be inadequate to remedy the harm caused  
by Qwest's keeping these agreements secret and not filing them.



1 CLECs--CLECs that were not parties to the secret discount agreements and indicated that they  
2 would have opted into the discounts--10% of the amounts they paid for services that would have  
3 qualified for discounts under the Eschelon or McLeodUSA agreements. Qwest would then go  
4 back into its records and issue a bill credit or check on what was paid. This is no different in  
5 principle that the way refunds were paid in the US West general rate case, UT-950200, or would  
6 be paid in the case of any interim rate increase that is later found to be unjustified. No exhaustive  
7 discovery would be necessary in this proceeding.  
8

9 In sum, Mr. Gates's testimony is well within the scope of the issues in this proceeding, is  
10 relevant, and should be admitted. Qwest's assertions to the contrary must fail.  
11

12 **B. TWTC's Request that the Commission rule that Qwest must pay reparations or**  
13 **overcharges is not barred by any statute of limitation.**

14 Qwest asserts that "Time Warner's hypothetical cause of action for reparations accrued  
15 when it discovered (or should by exercise of reasonable diligence have discovered) its right to  
16 apply for relief," arguing that TWTC had such knowledge of its claims no later than March 12,  
17 2002, the date on which the Minnesota Commission published public notice of its decision to  
18 proceed with the unfiled agreements case. Pointing to the six month limitation period for claims  
19 involving the collection unreasonable rates and two year period for claims involving collection of  
20 more than lawful rates, Qwest asserts that TWTC's request is time-barred because TWTC has  
21 never properly initiated either type of claim.  
22

23 TWTC's response is two-fold. First, Qwest's argument that the Minnesota Commission's  
24 opening of an unfiled agreements docket in Minnesota gave TWTC notice of its right to apply for

1 reparations in Washington is not logical. As Qwest itself argues, "Before a CLEC can take  
2 advantage of contract terms, the agreement first must be an 'interconnection agreement.' The  
3 question of whether fifty-two agreements between Qwest and CLECs are 'interconnection  
4 agreements' that should have been filed and made available to other CLECs lies at the center of  
5 the Exhibit A portion of this case." Qwest's Motion to Strike at 6. Similarly, at page 10 of its  
6 Motion, Qwest argues: "CLEC are harmed by an unfiled agreement only if the CLEC could have  
7 opted into the unfiled agreement in the first instance." Thus, any cause of action for a refund  
8 would not accrue until the Commission determines that the 10% discount terms offered to  
9 Eschelon and McLeodUSA are interconnection agreements that should have been filed. Since the  
10 Commission has not made such a determination yet, TWTC's request for refund or reparations is  
11 not untimely. In light of the fact that the Commission's complaint indicated that the Commission  
12 could consider remedy issues other than penalties in the course of this proceeding, TWTC's  
13 participation as an intervenor in this docket fully protected its right to make claims for  
14 reparations. Qwest's assertions that TWTC should have filed a complaint for reparations or  
15 overcharge separate from this docket are procedurally misguided.  
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18  
19 **C. The Commission Does Have the Authority to Order Reparations in Connection with  
20 this proceeding.**

21 Contrary to Qwest's assertions, this Commission does have authority to order refunds or  
22 reparations in connection with the unfiled agreements allegations. As Mr. Gates points out, and  
23 as Qwest acknowledges, the Commission has express statutory authority to order reparations,  
24 including interest, when a company such as Qwest has charged an excessive amount for service

1 under RCW 80.04.220. See Gates Testimony at 23; Qwest's Motion to Strike at 13, n. 31. The  
2 Commission also has express statutory authority to award refunds for overcharges, with interest,  
3 where the utility has charged more than the lawful rate. See Gates Testimony at 24; Qwest's  
4 Motion to Strike at 13, n. 32.<sup>2</sup> Thus, the Commission can lawfully determine that, by hiding from  
5 other CLECs the discounts made available to Eschelon and McLeodUSA, Qwest was in effect  
6 charging other CLECs rates that were excessive or a rate that was above what would have been  
7 the lawful rate, and order refunds or reparations.

8  
9 Qwest's reliance on the U. S. District Court decision in *Qwest Corp. v. Minn. Pub. Utils.*  
10 *Comm'n*, Civil No. 03-3476 ADM/JSM, 2004 WL 1920970 (D. Minn., Aug. 25, 2004) as  
11 authority for its argument that this Commission lacks the authority to order restitutional remedies  
12 is misplaced. As Qwest points out, the Minnesota Public Utilities Commission had ordered  
13 Qwest to pay restitutional remedies to CLECs in that commission's unfiled agreements case. The  
14 district court; however, concluded that the Minnesota Commission lacked the statutory authority,  
15 under the statutory scheme cited in that case, to impose equitable relief and, therefore, vacated the  
16 restitutional remedies from the Minnesota Commission's penalty order. The Washington  
17 statutory scheme differs from the Minnesota one in the respects discussed above—i.e., there was  
18 no indication in the district court's decision that the Minnesota Commission has express statutory  
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22 <sup>2</sup> Mr. Gates also discusses the Commission's authority under RCW 80.36.140 to remedy unjustly discriminatory or  
23 unduly preferential rates by fixing just and reasonable rates, i.e., ordering Qwest to offer a 10 percent discount to  
24 other CLECs for a period equal to the period the Eschelon and McLeodUSA discounts were in effect.

1 authority to order reparations or refunds of overcharges. This Commission is free to order  
2 remedies that are consistent with its own statutory authority and need not be paralyzed by what  
3 the district court in Minnesota says about the Minnesota's Commission's authority, as Qwest  
4 would prefer.

5  
6 **D. Mr. Gates's testimony was timely filed.**

7 Third, Mr. Gates's testimony was timely filed. Qwest's position that TWTC should have  
8 filed Mr. Gates's testimony as prefiled direct testimony due June 8, 2004 is incorrect. This  
9 proceeding was initiated by Commission Staff, and Commission Staff properly filed direct  
10 testimony in support of its complaint. As an intervenor, TWTC's testimony is in response to the  
11 Commission Staff's direct testimony. Indeed, as Qwest vociferously argues, TWTC argues for  
12 different remedies than does the Staff. It was entirely appropriate that TWTC file its testimony as  
13 response testimony. Moreover, Qwest has ample opportunity to respond in the reply round and,  
14 therefore, is not prejudiced in any way.

15  
16 **II. CONCLUSION**

17 WHEREFORE, TWTC respectfully requests that Qwest's motion to strike the testimony  
18 of Timothy J. Gates be denied.

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1 DATED this 7th day of October, 2004.

2 ATER WYNNE, LLP

3  
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1 **CERTIFICATE OF SERVICE**

2 I hereby certify that I have this 7th day of October, 2004, served the true and correct  
3 original, along with the correct number of copies, of the foregoing document upon the WUTC, via  
4 the method(s) noted below, properly addressed as follows:

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11 I hereby certify that I have this 7th day of October, 2004, served a true and correct copy of  
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25 **On Behalf Of AT&T:**

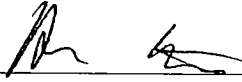
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1 I declare under penalty of perjury under the laws of the State of Washington that the  
2 foregoing is true and correct.

3 DATED this 7th day of October, 2004, at Seattle, Washington.

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