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 REPLY MEMORANDUM IN SUPPORT OF MOTION TO STRIKE TESTIMONY OF TIMOTHY J. GATES

1 Qwest Corporation ("Qwest"), by and through its undersigned counsel, respectfully submits this reply memorandum in support of its motion to strike the testimony filed in this proceeding by Timothy J. Gates on behalf of intervenor Time Warner Telecom of Washington, LLC ("Time Warner").

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2 Qwest based its motion on three categories of arguments, all three of which survive Time Warner's challenge. As to the first, Staff agrees with Qwest: this case did not and does not seek credits or payments of any sort for CLECs, Time Warner has not properly presented any claim for credits in this case, and permitting Time Warner to pursue "reparations" in this fashion would expand the issues in this case well beyond their present scope. As to the second, Time Warner argues loudly that its claims are not barred, but offers no authority supporting its illogical and demonstrably false positions. There now can be no dispute that allowing Time Warner to file Mr. Gates' testimony and to continue pursuing reparations would impermissibly, inappropriately and prejudicially expand the scope of this case.

3 Staff's response stops short of joining Qwest's motion *in toto*, however, and suggests that the portions of Mr. Gates' testimony relating to damage and harm to CLECs should not be stricken. The Commission should not compromise the result in this fashion, and particularly should not permit Mr. Gates' testimony to remain in the record for the purpose of supporting Staff's penalty claims. By Staff's own reckoning, Mr. Gates' testimony does not respond to Mr. Wilson's direct, but impermissibly adds new facts and issues beyond those Staff had pled. Like Messrs. Gray and Smith, Mr. Gates testifies only about issues and alleged bad acts beyond those at issue. Any consideration of these issues for purposes of determining penalties would, as with Messrs. Smith and Gray, work serious prejudice to Qwest and would significantly expand discovery and the forthcoming hearing.

I. STAFF CONFIRMS THAT REPARATIONS ARE NOT PART OF ITS CASE, TIME WARNER HAS NOT PROPERLY RAISED SUCH A CLAIM, AND RAISING THEM NOW WOULD SERIOUSLY DISRUPT THE CASE

4 Staff's response to this motion reveals that Staff and Qwest agree on three fundamental

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points that individually and collectively dispose of Mr. Gates' testimony. Staff agrees with Qwest that (a) Staff did not plead any reparations claim nor leave room for them in its prayer for relief, (b) Time Warner has not properly raised any such claim, and (c) permitting Time Warner to do so now would seriously disrupt the orderly and timely completion of discovery and the hearing. Qwest will not burden the Commission with a full-blown reply of its own on these points because Staff's response covers them amply. Time Warner's arguments to the contrary fly in the face of the Amended Complaint itself and common sense, but there is little Qwest could add here that Staff has not already said.

5 At the end of the day, the Amended Complaint makes clear that this is a penalty case, not a credits or "reparations" case. It cites the relevant penalty statute and asks the Commission "[t]o determine whether the Commission should impose monetary penalties against the respondents or each of them in an amount to be proved at hearing."[1] Had Staff wanted to leave open the possibility of credits, it surely would have cited the statutes potentially giving rise to them. But as we now know, Staff cited only the Commission's penalty authority, and did so for a reason: it pled this case as a penalty case and intends it to remain that way. Time Warner's invocation of the catch-all "such other orders as may be just and reasonable" language in paragraph 49 of the Amended Complaint is, in light of Staff's position, wholly unavailing. And as Qwest demonstrated in its opening motion, Qwest would suffer serious prejudice if Time Warner were allowed to disregard the Commission's rules in this fashion.

II. TIME WARNER HAS OFFERED NOTHING REFUTING THE FACT THAT ITS REPARATIONS CLAIMS ARE BARRED AS A MATTER OF LAW

6 Time Warner's token opposition to Qwest's arguments regarding the scope of the

[1] *Id.*, ¶ 48.

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pleadings and the Commission's authority merit only a brief response, especially in light of Staff's positions.

7 First, with respect to the statute of limitations, Time Warner argues out of thin air that "any cause of action for a refund would not accrue until the Commission determines that the 10% discount terms offered to Eschelon and McLeodUSA are interconnection agreements that should have been filed."[2] But under long-settled Washington law, Time Warner's claims – whatever they were – accrued when it discovered or should by exercise of reasonable diligence have discovered its right to apply to a court for relief,[3] a discovery Time Warner made or should have made well over two years ago.[4] Time Warner does not dispute its knowledge of the alleged "discount agreements" since early 2002, and offers no explanation or excuse for failing to take the appropriate steps to raise and pursue its claims in Washington. Time Warner should have known, once it read this Amended Complaint in August 2003, that it bore the burden of pursuing these claims, and its decision in the meantime not to initiate a proceeding in the manner prescribed by the Commission's rules is fatal.

8 Second, it is worth noting that Staff also raises serious questions about the Commission's authority to award refunds or reparations at all.[5] Time Warner offers effectively no counterargument – it says only that the Commission has authority because Mr. Gates says so.[6] And Mr. Gates – who is not a lawyer and is hardly qualified in any event to offer

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2 Time Warner Response at 9.

3 *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))

4 *See* Qwest Motion, ¶¶ 23-26.

5 *See* Staff Response at 6-7.

6 *See* Time Warner Response at 9-10.

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what would in any case be inappropriate legal expert testimony – simply quotes the same refund and reparations provisions discussed by Staff and says baldly that they apply here.[7] Qwest will not repeat the detailed analysis demonstrating the lack of authority here, but it will suffice here to say that neither Mr. Gates' testimony nor Time Warner's opposition offers a reasoned response.

III. MR. GATES' TESTIMONY SHOULD NOT BE CONSIDERED IN CONNECTION WITH THE COMMISSION'S CONSIDERATION OF PENALTIES OR ANYTHING ELSE

9 Staff and Qwest part company vis-à-vis Mr. Gates on two points, one minor and one significant. The easy one first: although Staff admits that Mr. Gates' testimony does not respond to Mr. Wilson's, at least insofar as it addresses Time Warner's demand for credits,[8] Staff disagrees with Qwest that Mr. Gates' testimony was filed late. This "distinction" fails on its face. Mr. Gates makes no pretense of responding to Mr. Wilson at all, nor does it make sense that he would: because Mr. Wilson discusses neither Exhibit A agreements involving Time Warner nor CLEC credits in any form, he says nothing to which Mr. Gates logically could "respond." And as such, Mr. Gates' testimony cannot rationally be considered "response testimony," but can only be direct testimony in support of Time Warner's separate claims. Time Warner seems to be saying that its status as an intervenor compelled it to file during the response round, but it cites nothing in support of that theory and, in the scheme of Order No. 06, it makes no sense at all. Again, had Time Warner paid attention to the Commission's rules, it should have filed Mr. Gates' testimony as direct testimony (which, remember, is how Time Warner itself labeled the first version it filed) on June 9, not September 14, 2004.

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[7] *See* Gates Testimony at 18:418-21:519.

[8] *See* Staff Response, ¶ 10 n.7 ("Lastly, Time Warner's testimony relating to credits (unlike the testimony of Eschelon and McLeodUSA) *really* isn't responsive to Staff's Amended Complaint and/or testimony.").

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10 Staff creates two new problems, however, when it asks the Commission only to strike the portions of Mr. Gates' testimony dealing with credits, leaving the rest in the record for the Commission to consider as it determines the appropriate penalties in this case. First, and most fundamentally, allowing any portion of Mr. Gates' testimony into the record for purposes of penalties inflicts (and, indeed, compounds) the same procedural and due process prejudice on Qwest as it will suffer if the Commission allow the testimony of Messrs. Smith and Gray. Whatever else Qwest has said about the testimony of Messrs. Smith and Gray, at least their companies were parties to agreements that are at issue in this case. Allowing Staff to utilize Mr. Gates' testimony in support of its as-yet-unarticulated penalty theory allows Staff to raise, and requires Qwest to refute, wide-ranging allegations relating to Qwest's 271 application process, rulings in other states' unfiled agreements cases and Qwest's success in the post-271 long distance market. Qwest will not repeat here the written and oral arguments it has offered in support of its motion to strike their testimony, but it bears noting that Mr. Gates' testimony represents an even more egregious violation of every principle at stake in that motion.

11 Second, but closely related, the distinction Staff attempts to make between the portions of Mr. Gates' testimony relating to credits and the portions relating to "the harm it has suffered" is an illusory distinction at best that does not overcome the multiple reasons why the testimony is not admissible that Qwest laid out in its motion. Mr. Gates filed his testimony, by his own admission, solely for the purpose of supporting Time Warner's inappropriate and unpled claim for "reparations." Every word of his testimony relates to that purpose, which – as Qwest and Staff now agree – is an improper purpose in the context of this case. Moreover, Mr. Gates does not testify as to the harm Time Warner allegedly suffered. At the same time, Mr. Gates offers no evidence that Time Warner could have or would have opted into any of the Exhibit A agreements. His harm

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discussion,[9] such as it is, assumes that Time Warner would be entitled to opt into a ten percent discount. He cannot and does not opine that Time Warner could have opted in even if it had known of the "discounts" at the time: Mr. Gates says only that "I have been told by TWTC that it would have pursued opting into the ten percent discount provisions of the secret agreements."[10] He does not identify the agreement Time Warner would pursue opting into, nor does he even attempt to argue that (or how) Time Warner would satisfy related terms. And although he certainly could have obtained and argued from actual data from Time Warner if he chose, his testimony regarding the impact of any cost disadvantage is rank speculation.[11]

12 Permitting Mr. Gates' testimony into the record for another purpose wrongly allows Staff to bring in through a back door evidence it could not present through the front. Neither Time Warner nor Mr. Gates has anything relevant to say about the penalties the Commission can or should assess in this case, particularly given the theory of penalties Staff has pursued and that Mr. Wilson articulated in his written testimony. For all of the reasons stated in Qwest's motion to strike the testimony of Messrs. Smith and Gray, as magnified by the even more attenuated relationships of Time Warner to this case and Mr. Gates to Time Warner, the Commission should reject Staff's "compromise" solution.

IV. CONCLUSION AND REQUEST FOR EXPEDITED CONSIDERATION

13 For the foregoing reasons, Qwest respectfully requests that the Commission strike the testimony filed by Mr. Gates, in its entirety and for all purposes in this case, forthwith.

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[9] Gates Test. at 12:258-271.

[10] *Id.* at 12:272-76.

[11] *See, e.g., id.* at 12:266-70 ("A 10 percent difference in the cost of a monopoly input is a tremendous difference and can make the difference between winning and losing a customer. Viewed from another perspective, the 10 percent difference in the cost structure can affect a decision to enter a market or stay in a market, or a decision whether to expand into new areas of the state."); *id.* at 12:279-80 ("The favored CLECs – knowing they were receiving discounted rates – could more aggressively market their services.") (all emphases added)

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RESPECTFULLY SUBMITTED this 12th day of October, 2004.

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