

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

BEFORE THE WASHINGTON
UTILITIES AND TRANSPORTATION COMMISSION

WASHINGTON UTILITIES AND)	UT-033011
TRANSPORTATION COMMISSION,)	Volume V
Complainant,)	Pages 156-217
vs.)	
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; XO COMMUNICATIONS,)	
INC.; f/k/a NEXTLINK COMMUNICATIONS,)	
INC.,)	
Respondents.)	

A hearing in the above-entitled matter was held at 10:07 a.m. on Tuesday, October 5, 2004, at 2425 Bristol Court, Olympia, Washington, before Administrative Law Judge ANN RENDAHL.

Barbara L. Nelson, CCR
Court Reporter

1 The parties present were as follows:

2 QWEST CORPORATION, by Douglas R. M.
3 Nazarian, Attorney at Law, Hogan & Hartson, 111 S.
4 Calvert Street, Suite 1600, Baltimore, Maryland
5 21202, and Lisa Anderl and Adam Sherr, Attorneys at
6 Law, 1600 Seventh Avenue, Room 3206, Seattle,
7 Washington 98191.

8 COMMISSION STAFF, by Christopher
9 Swanson, Assistant Attorney General, 1400 S.
10 Evergreen Park Drive, S.W., P.O. Box 40128, Olympia,
11 Washington, 98504-1028.

12 ESCHELON TELECOM OF WASHINGTON, by
13 Judith Endejan, Attorney at Law, Graham & Dunn, Pier
14 70, Suite 300, 2801 Alaskan Way, Seattle, Washington,
15 98121-1128 (via teleconference bridge.)

16 TIME WARNER, by Arthur A. Butler,
17 Attorney at Law, Ater Wynne, 5450 Two Union Square,
18 601 Union Street, Seattle, Washington, 98101 (via
19 teleconference bridge.)

20 McLEOD USA TELECOMMUNICATIONS SERVICES,
21 INC., by Dan Lipschultz, Attorney at Law, Moss &
22 Barnett, 4800 Wells Fargo Center, 90 S. Seventh
23 Street, Minneapolis, Minnesota, 55402 (via
24 teleconference bridge.)

25 AT&T COMMUNICATIONS OF THE PACIFIC
NORTHWEST, by Dan Waggoner, Attorney at Law, Davis,
Wright, Tremaine, 2600 Century Square, 1501 Fourth
Avenue, Seattle, Washington, 98101 (via
teleconference bridge.)

16
17
18
19
20
21
22
23
24
25

0158

1 JUDGE RENDAHL: Let's be on the record.
2 Good morning. We're here before the Washington
3 Utilities and Transportation Commission in Docket
4 Number UT-033011, which is captioned Washington
5 Utilities and Transportation Commission versus
6 Advanced TelCom Group, Incorporated, et al. for oral
7 argument concerning motions to strike filed by Qwest.

8 As I noted off the record, there are two
9 other issues we need to talk about this morning, how
10 to procedurally address Qwest's motion to strike Time
11 Warner testimony, which was filed on Friday, October
12 1st, and a scheduling issue concerning the additional
13 day of testimony in the middle of January.

14 Before we go any further, let's take
15 appearances, first from those here in the conference
16 room, beginning with Staff.

17 MR. SWANSON: Chris Swanson, Assistant
18 Attorney General, for Commission Staff.

19 JUDGE RENDAHL: Okay. Can those of you on
20 the bridge hear us at this point? I just want to
21 test out our facilities.

22 MR. LIPSCHULTZ: Yes.

23 MR. BUTLER: Yes, I can hear.

24 MS. ENDEJAN: It's fine.

25 JUDGE RENDAHL: All right. For Qwest?

0159

1 MR. NAZARIAN: Doug Nazarian, from Hogan and
2 Hartson, along with --

3 MR. SHERR: Adam Sherr, for Qwest, as well
4 as Lisa Anderl.

5 JUDGE RENDAHL: Okay. And on the bridge,
6 for AT&T?

7 MR. WAGGONER: Dan Waggoner, for AT&T.

8 JUDGE RENDAHL: And for Eschelon?

9 MS. ENDEJAN: Judy Endejan, for Eschelon.

10 JUDGE RENDAHL: And for McLeod?

11 MR. LIPSCHULTZ: Dan Lipschultz, for McLeod.

12 JUDGE RENDAHL: And for Time Warner Telecom?

13 MR. BUTLER: Art Butler, for Time Warner
14 Telecom.

15 JUDGE RENDAHL: Okay. Mr. Butler, you'll
16 need to either speak into the handset directly or
17 increase the volume somehow.

18 MR. BUTLER: Is this better?

19 JUDGE RENDAHL: Much better, thank you. For
20 those of you on the bridge, when you do speak, again,
21 if you could identify yourselves for the court
22 reporter, that would be helpful.

23 All right, the first issue is how to address
24 Qwest's motion to strike Time Warner testimony. I
25 received a phone call from Mr. Butler yesterday

0160

1 advising me he that is leaving town on Thursday and
2 wanted to know what the schedule was for responding
3 and whether we were going to have oral argument on
4 the Time Warner motion.

5 At that time, I indicated to Mr. Butler that
6 I didn't see the need for oral argument on the Time
7 Warner motion. And in order to resolve this quickly
8 and given Mr. Butler's going out of town, I'm happy
9 to try to resolve all of these motions next week
10 together, and if, Mr. Butler, you can file something
11 before you leave, then I think I should be able to
12 resolve it all.

13 MR. BUTLER: I guess I'll do that, Your
14 Honor.

15 JUDGE RENDAHL: Does that work for Qwest?

16 MR. SHERR: May we have a moment, Your
17 Honor?

18 JUDGE RENDAHL: Sure. Let's be off the
19 record.

20 (Discussion off the record.)

21 JUDGE RENDAHL: Let's be back on the record.
22 Mr. Sherr, Mr. Nazarian?

23 MR. SHERR: Thank you, Judge. Adam Sherr.
24 In our motion, Qwest said it would be willing, in
25 order to expedite this, to forgo the opportunity to

0161

1 do written reply, assuming we'd be able to do an oral
2 reply. We would ask for the opportunity to at least,
3 if necessary, provide a written reply, and we would
4 do it probably within a couple of days of getting Mr.
5 Butler's response.

6 MR. WAGGONER: This is Mr. Waggoner. When
7 is Mr. Butler planning to file his response?

8 MR. BUTLER: I'll file it by Thursday.

9 JUDGE RENDAHL: And that would be Thursday,
10 the 7th?

11 MR. BUTLER: Yes.

12 JUDGE RENDAHL: All right. So with that, is
13 Tuesday, by noon, possible?

14 MR. SHERR: Yes.

15 JUDGE RENDAHL: All right. So why don't we
16 say any written reply would be filed by Tuesday,
17 October the 12th, at noon, and --

18 MR. SHERR: Judge, just to clarify,
19 electronically by noon, and we could overnight it
20 that day to the Commission?

21 JUDGE RENDAHL: You know, actually, you can
22 have till the end of the day. I'm in hearings, so
23 there's no possibility of my even reading it. So I'm
24 just going to say by 5:00, and then if you can get it
25 in paper copy the next day. So instead of by noon,

0162

1 just by the end of the day, and then I will try to
2 get an order out by Thursday, the 14th.

3 MR. SHERR: Thank you, Judge.

4 JUDGE RENDAHL: And again, I'm going to try
5 to coordinate this with the Commissioners so that we
6 can get a final decision out so that that eliminates
7 an additional round of appeals, so that you can have
8 a final decision. If that's not possible with their
9 schedule, then it will be an order from me. So
10 that's the plan. All right.

11 The next issue is the additional day of
12 testimony. Right now it's scheduled for Thursday,
13 January 20th, because we have lost Wednesday, January
14 12th, to an open meeting and resolving the Covad
15 arbitration. So we scheduled an additional day of
16 hearing, should we need it, for the 20th.

17 And then I was advised Friday that the
18 Chairwoman has a conflict with that day, and wondered
19 if we could move the day of hearing to the 21st. If
20 it's not possible, then it's likely that the
21 Chairwoman would not sit on Thursday, but the other
22 two Commissioners would. So that's sort of the
23 dilemma that we're faced with. So I don't need an
24 immediate answer from you now, but I wanted to raise
25 it with you. If you do have a sense now, that would

0163

1 be helpful, but if you don't, if you can let me know
2 by Monday, then we can resolve that procedural
3 question.

4 MR. SHERR: Judge, speaking for Qwest, I
5 think that's probably fine. We'll check and get back
6 to you.

7 JUDGE RENDAHL: Okay. If you can let me
8 know if it's a no go by Monday, that would be
9 helpful.

10 MR. SHERR: Will do.

11 MR. SWANSON: And speaking for Staff, I
12 believe that that is fine, as well, and we will
13 confirm that in writing.

14 JUDGE RENDAHL: All right. Anyone on the
15 bridge?

16 MR. BUTLER: I think it's fine, from Time
17 Warner's standpoint.

18 MS. ENDEJAN: Judge Rendahl, I'll check with
19 my client.

20 JUDGE RENDHAL: All right.

21 MR. LIPSCHULTZ: And I'll do the same.

22 JUDGE RENDAHL: And that was?

23 MR. LIPSCHULTZ: Dan Lipschultz, for McLeod.

24 JUDGE RENDAHL: Okay. Thank you.

25 MS. ENDEJAN: And Judy Endejan, for

0164

1 Eschelon.

2 MR. WAGGONER: Dan Waggoner, for AT&T. We
3 have no problem.

4 JUDGE RENDAHL: All right. Well, if anyone
5 discovers that they have a problem, let me know by
6 the end of the day Monday, just so that I can send
7 out the appropriate notice and get it taken care of.

8 Okay. With that, I think we're ready to
9 proceed on oral argument on the motions to strike.
10 Because Qwest reserved the option to make an oral
11 reply to the answers, I think what I'll do is -- and
12 it's Qwest's motion, take argument from Qwest first
13 and from Staff, and then any other party that wishes
14 to weigh in. Is that acceptable?

15 MR. SWANSON: Yes.

16 JUDGE RENDAHL: Okay. Then let's proceed
17 for Qwest. And we have this room until noon, so I
18 don't know how long you were planning to argue for,
19 but you might want to not argue for more than half an
20 hour, to allow other parties and the responses we're
21 likely to engender. So go ahead, Mr. Nazarian.

22 MR. NAZARIAN: Well, I know better, Your
23 Honor, than to make concrete promises about how long
24 I'll talk, but I will certainly hope not to push the
25 envelope of the Court's time frame.

0165

1 Thank you for hearing us today. This motion
2 is, in a very real sense, unopposed. The two parties
3 that submitted the testimony of Mr. Smith and Mr.
4 Gray have not filed any opposition to this motion.
5 They have not, although their counsel are on the
6 bridge and perhaps they'll have something to say
7 about it.

8 The fact that there's no response to this
9 motion from Eschelon or McLeod demonstrates, I think
10 more vividly than any argument I could make, that
11 this really -- the testimony of Mr. Smith and Mr.
12 Gray really are supplemental direct testimony that
13 are being -- that is being submitted for the purpose
14 of supporting the Staff's case, but in a way that is
15 extremely prejudicial to Qwest, because it raises a
16 number of issues and it imports a broad range of
17 additional facts and allegations that are neither
18 pled in the amended complaint nor contained anywhere
19 in Mr. Wilson's testimony.

20 For reasons I'll discuss, there really is no
21 way that Mr. Smith and Mr. Gray can be said, I think
22 fairly, to be responding to Mr. Wilson, at least in
23 any way that's relevant to the case as it now exists.
24 I mean, and remembering, of course, that the claims
25 against Eschelon and McLeod have been dismissed.

0166

1 Staff says in its response and it has said
2 in discovery responses that it did not in any way
3 edit or direct this testimony from Mr. Smith and Mr.
4 Gray, but of course we know, from the settlement
5 agreements that have been approved by the Commission,
6 that the specific areas of testimony are defined in
7 both settlement agreements, and those provisions did
8 not come out of thin air; they clearly were
9 negotiated and, whoever proposed what, the fact is
10 that no later than the time of the settlement
11 agreements, the scope of this testimony was
12 negotiated and agreed.

13 And Staff clearly knew, anticipated, and
14 wanted the testimony on the areas set forth in the
15 settlement agreements. And because of that, it is
16 telling now that Staff is the only party, save for
17 Time Warner, I guess, actually fighting to keep this
18 testimony in the case.

19 What that tells us, and what I think, when
20 you look at how this testimony matches up against Mr.
21 Wilson's direct testimony, what it tells you is this
22 is supplemental direct testimony; that if it were
23 going to be in this case, it should have been in the
24 case three months ago. And it puts Qwest,
25 particularly for the purposes now, the penalty

0167

1 related purposes that Staff says it intends primarily
2 to rely on this testimony for, it puts Qwest in a
3 very prejudicial position as this case goes forward.

4 Remember, Your Honor, that the Staff's
5 allegations, the number of causes of action, the
6 number of days of Mr. Wilson's calculation of
7 violations would lead to a penalty of \$188 million in
8 this case.

9 You know, Qwest is being taken to task by
10 Staff for being litigious for fighting these
11 allegations, but, you know, you have to take
12 seriously and you have to defend yourself against
13 claims that have that sort of exposure in the eyes of
14 the Commission Staff.

15 And although there certainly are issues
16 about what happened in connection with the various
17 agreements in Exhibit A and whether they should have
18 been filed, Staff is seriously overreaching here when
19 you think about the case that it pled and the case
20 that was, you know, initiated over a year ago, and
21 the direct testimony that Staff has actually filed.

22 I think an instructive way to get at these
23 issues is to look -- not go line-by-line through all
24 this testimony, because Lord knows we don't have all
25 day, but to look at the exhibits that Mr. Gray and

0168

1 Mr. Smith have attached to their testimony.

2 And the exhibits are instructive for a
3 couple of reasons. I mean, first of all, they all
4 represent documents that are now being ported into
5 the record in this case through these additional
6 witnesses. They are -- none of them represents a
7 document that was attached -- that was one of Mr.
8 Wilson's 80 exhibits to his direct testimony.

9 And they're important because they all
10 harken back to a time and they harken back to other
11 proceedings that were within the public domain at the
12 time Staff considered the case it wanted to bring.
13 This stuff was all available to be considered by
14 Staff when it thought about the case it wanted to
15 file, the case it wanted to plead, the case it wanted
16 to pursue, and whether it decided -- well, for
17 whatever reason Staff decided not to go these routes,
18 the fact remains that it didn't, and for it to now
19 attempt on this posture to expand the case in this
20 way is seriously prejudicial and the testimony should
21 be stricken.

22 Starting, Your Honor, with Mr. Gray's
23 testimony, he attaches, let's see, six exhibits. The
24 first two, A-1 and A-2, are letters that McLeod's
25 chairman and general counsel wrote to Joel Klein, who

0169

1 was then the acting Assistant Attorney General in the
2 Antitrust Division of the Department of Justice on
3 May 12th of 1997.

4 MR. SWANSON: Judge, Staff is going to
5 object at this point to going through the exhibits
6 line-by-line. That was -- specific objections to the
7 exhibits should have been in Staff's initial pleading
8 in this case. I don't think it's appropriate to go
9 through these exhibits line-by-line. Staff limited
10 itself in its initial pleading, but certainly can
11 reply to Staff's comments in its response.

12 And I believe authority does say that a
13 general objection should be taken generally and that
14 a specific objection is what's required in order to
15 go to a specific issue.

16 JUDGE RENDAHL: Well, I want to listen to
17 what Qwest has to say. I think the objection is to
18 the testimony, and my understanding is that includes
19 the exhibits. Now, I don't know that we need to go
20 through the exhibits line-by-line, but I'm not sure
21 that's what Mr. Nazarian was intending to do. I'm
22 going to allow Mr. Nazarian to proceed and we'll see
23 if it's something that becomes -- rises to the level
24 that you're objecting to.

25 MR. SWANSON: Thank you, Judge.

0170

1 MR. NAZARIAN: Thank you, Your Honor, and
2 just to be clear, we're not going to go line-by-line
3 through these, and we also do assume and certainly
4 meant that our motion to strike the testimony
5 included the striking of any exhibits attached to
6 that testimony, at least to the extent those exhibits
7 are not otherwise in the record of the case, which,
8 as to all of these materials, I believe they are not.

9 Anyway, Your Honor, the first two exhibits,
10 A-1 and A-2, to Mr. Gray's testimony, are letters
11 that McLeod wrote to the Department of Justice in May
12 of 1997, objecting to certain -- what it considered
13 anticompetitive behavior that Qwest was engaged in
14 vis-a-vis McLeod that had, in its view, Section 271
15 and antitrust implications.

16 There is no conceivable way, Your Honor,
17 that this responds to anything in Mr. Wilson's
18 testimony. And maybe, before we go any further, it
19 bears a quick repeat of what -- of how -- of what
20 Staff has alleged and how Mr. Wilson's testimony laid
21 out that case. With respect to the 52 Exhibit A
22 agreements originally pled, of which I believe there
23 are 30 still in the case, Staff alleged that each of
24 those qualified as an interconnection agreement for
25 purposes of the Section 252 filing requirement.

0171

1 Then it alleged that there were three
2 separate causes of action. And now I'm jumping sort
3 of past Order Number 5 and describing only the causes
4 of action that remain in the case, but there are
5 three distinct causes of action, three distinct
6 violations of law occasioned by the failure by Qwest
7 and the other respondents to file those agreements
8 with the Commission for approval in a timely fashion,
9 okay.

10 Mr. Wilson's testimony goes through each of
11 those agreements, and he describes why, in his view,
12 each of them qualified as an interconnection
13 agreement, when that agreement should have been
14 filed, and then he calculates the number of days late
15 it was -- each agreement was either in filing or in
16 never being filed, as the case may be.

17 His testimony does not talk about the
18 history of Qwest's relations with CLECs in Washington
19 or elsewhere, it does not talk anywhere about
20 anticompetitive behavior supposedly committed by
21 Qwest in 1997, surely. And as we go through these
22 exhibits, I'll explain why specifically they bear no
23 relation at all to the case Staff has pled and to the
24 testimony Staff filed at the direct testimony phase
25 of this case.

0172

1 Exhibit B to Mr. Gray's testimony is a chart
2 entitled Exhibit of Qwest's Performance in Minnesota,
3 where it walks through a number of complaints that
4 McLeod had with Qwest's performance on certain
5 products and certain services in the state of
6 Minnesota. There is nothing in Mr. Wilson's
7 testimony remotely bearing on these issues or to
8 which this could conceivably be responsive.

9 Exhibit C is an affidavit and exhibits from
10 a gentleman named Blake Fisher, who was a group vice
11 president of McLeod back in 2000. And Mr. Fisher's
12 affidavit describes, among other things, a supposed
13 oral discount agreement between Qwest and McLeod that
14 was entered into, according to Mr. Fisher, in October
15 of 2000. That agreement is not alleged in this
16 complaint. It forms no part of Mr. Wilson's
17 testimony.

18 Even by Staff's admission, in its reply in
19 support of the approval of the settlement agreements
20 between Qwest and McLeod, by Staff's own reckoning,
21 this oral agreement is out of bounds in this case.
22 Mr. Fisher's other testimony has no relevance or does
23 not respond in any way to Mr. Fisher's -- or to, I'm
24 sorry, Mr. Wilson's direct testimony.

25 There are other issues, by the way, Your

0173

1 Honor, that I'll talk about later, and other serious
2 problems with the importation of Mr. Fisher's
3 affidavit into the record in this case, but I won't
4 slow down this particular train to talk about those
5 just yet.

6 Exhibit D to Mr. Gray is affidavit and
7 exhibits of a former McLeod employee named Lori
8 Deutmeyer, and although that pronunciation wouldn't
9 seem obvious from her spelling, that's how she does
10 it, which I know from having deposed her. Ms.
11 Deutmeyer testifies in her affidavit --

12 JUDGE RENDAHL: Mr. Nazarian, for the court
13 reporter's benefit, the spelling of Deutmeyer is
14 D-e-u-t-m-e-y-e-r.

15 MR. NAZARIAN: Thank you, Your Honor.

16 JUDGE RENDAHL: Because we can all see it,
17 but she doesn't have that.

18 MR. NAZARIAN: Fair enough. I'm sorry, I
19 apologize. Ms. Deutmeyer's affidavit talks about the
20 mechanics of carrying out, in her view and in
21 McLeod's view, this supposed oral discount agreement
22 that's discussed in Mr. Fisher's affidavit. So
23 again, that agreement, that allegation of that
24 agreement is out of bounds in this case. It's not
25 pled, it appears nowhere in Mr. Wilson's testimony,

0174

1 and its fulfillment, as it were, according to Ms.
2 Deutmeyer, is not fair response testimony in this
3 case.

4 Exhibit E to Mr. Gray's testimony is a
5 transcript from a McLeod third quarter analyst
6 conference call that doesn't seem to really have any
7 particular relevance other than to say that -- to
8 show that Mr. Gray told some stock analysts that they
9 were about to enter into an agreement with Qwest, and
10 he says some things about what -- that suggest that
11 McLeod thought that agreement was going to be filed.

12 But, again, the oral discount agreement at
13 issue is not in the case, and would be out of -- it's
14 out of bounds here and is not appropriate response
15 testimony.

16 Mr. Smith's testimony attaches a number of
17 exhibits, as well. I think a total of six, although
18 some of them contain more than one document. Exhibit
19 2 to Mr. Smith's testimony is a letter that Lynne
20 Powers, an Eschelon vice president, wrote to three
21 Qwest employees in July of 2000, complaining about
22 Qwest's UNE-P pricing. That has nothing to do with
23 anything in Mr. Wilson's testimony, nor is UNE-P
24 pricing in Minnesota in 2000 an issue that's in this
25 case.

0175

1 Exhibit Number 3 to Mr. Smith's testimony is
2 an e-mail among a variety of Eschelon and US West
3 people that recounts a great many -- it seems to be
4 meetings, minutes from a meeting among folks from
5 Eschelon and Qwest in which Eschelon complained about
6 a whole range of order, ordering provisioning,
7 billing and taxation issues, none of which are
8 discussed in any way in Mr. Wilson's testimony or
9 bear remotely on the issues pled or laid out in Mr.
10 Wilson's direct testimony.

11 Exhibit 4 to Mr. Smith's testimony is an
12 affidavit, again, from Ms. Powers, that complains
13 about UNE platform issues, performance issues,
14 provisioning issues and billing issues, among other
15 things, that are not discussed in Mr. Wilson's
16 testimony, are not pled in this case, and I might add
17 is hearsay that's just as objectionable as Mr.
18 Fisher's and Ms. Deutmeyer's affidavits, and should
19 be stricken for all those reasons, as well.

20 Exhibit Number 5 to Mr. Smith's testimony is
21 a long letter written by Eschelon to the Arizona
22 Corporation Commission, the author is Jeff Oxley,
23 O-x-l-e-y, the vice president and general counsel of
24 Eschelon, complaining about Qwest's change management
25 process as part of the Arizona Commission's

0176

1 consideration of the 271 docket there.

2 Exhibit 6 to Mr. Smith's testimony is a
3 letter -- another letter from Mr. Oxley, I believe,
4 to -- I'm sorry, it's signed by Ms. Powers. Nope,
5 I'm sorry. I apologize, Your Honor. There are --
6 Ms. Powers' affidavit is attached again to this, but
7 it's a letter from Mr. Oxley to the Arizona
8 Commission relating to the -- to Qwest's treatment of
9 CLECs in connection with Qwest's 271 application in
10 Arizona. It's not at all responsive to anything in
11 Mr. Wilson's testimony, not part of this case, as
12 pled by Staff.

13 And finally, Exhibit 7 to Mr. Smith's
14 testimony attaches a number of letters between Qwest
15 and Eschelon, in which -- the gist of which is
16 Eschelon attempting to escalate a number of
17 provisioning, account team, staffing, ordering and
18 other disputes between Qwest and Eschelon.

19 So that -- that's what -- those are the
20 documents that these two witnesses seek to inject
21 into this case. None of them is otherwise in the
22 record of this case. None of them was attached to
23 Mr. Wilson's testimony, none of them responds to Mr.
24 Wilson's testimony, and none of them in any way bears
25 on the questions that Staff actually pled and that

0177

1 Mr. Wilson testified about, which were should these
2 agreements have been filed, and if so, when, and by
3 whom.

4 In responding to this motion to strike,
5 Staff articulates a number of reasons why the
6 testimony should be allowed to stay in the case. The
7 only argument that Staff makes suggesting that the
8 testimony is responsive is that it embodies McLeod's
9 and Eschelon's perspectives on the agreements at
10 issue.

11 Well, McLeod and Eschelon have now settled
12 with the Commission. There are no claims pending
13 against McLeod and Eschelon, so to the extent their
14 perspectives on why they didn't file have some
15 relevance, in any way respond to Mr. Wilson's
16 testimony, they add nothing to the case and are not
17 appropriate now, because they shed nothing on Qwest's
18 decisions to file or not to file.

19 And beyond that, Staff doesn't really
20 attempt to characterize the testimony of Mr. Smith
21 and Mr. Gray as responsive; it just attempts to
22 characterize it as relevant, and it states a number
23 of purposes for which this testimony is relevant,
24 none of which are appropriate and certainly not
25 appropriate on this posture.

0178

1 The reasons that Staff claims that this
2 testimony is relevant include giving context to the
3 agreements. Well, Mr. Wilson didn't testify about
4 context. Mr. Wilson's analysis looks at the terms of
5 the document, bumps them up against Sections 251(b)
6 and (c) to determine whether the agreements, in his
7 view, pertained to provision of interconnection
8 services, as listed in Sections 251(b) and (c), and
9 then he determined when the agreements should have
10 been filed, if they qualify. That's what he did.

11 So the context of the agreements that's
12 described in this testimony is not responsive to Mr.
13 Wilson. It's new.

14 The motivation of the parties is another
15 reason Staff cites that this testimony is relevant.
16 That is not responsive to Mr. Wilson. Mr. Wilson
17 didn't testify about anybody's motivation. I mean,
18 it's also worth noting that none of these causes of
19 action have a mens rea element, anyway, but, that
20 said, it's not responsive for that purpose.

21 This testimony supposedly is relevant,
22 according to Staff, in order to demonstrate the
23 damage caused to the marketplace. Well, Staff didn't
24 attempt to quantify or even opine on the damage to
25 the marketplace. And in fact, when you look at the

0179

1 testimony that Mr. Smith and Mr. Gray filed in that
2 regard, they both say they can't even tell you what
3 the damage is to their companies, let alone to the
4 market at large, so they add nothing in that regard,
5 and they're not responsive.

6 Supposedly Staff says that this testimony is
7 relevant because it talks about the overall
8 relationship between Qwest and CLECs. That is not
9 part of Mr. Wilson's testimony and it is not pled in
10 this case, nor does it bear on the issues that are
11 actually pled. But the biggest thing, the biggest
12 reason why Staff says this testimony is relevant to
13 this case -- again, not responsive, but relevant --
14 is that it bears on penalties. And it is in
15 connection with that rationale, Your Honor, that this
16 testimony is most prejudicial.

17 Mr. Wilson's written testimony, on page 127,
18 which is to say the last page, in a single paragraph,
19 says Staff is not making a recommendation about
20 penalties. And Mr. Wilson does not attempt anywhere
21 in his testimony to project, quantify, estimate or
22 otherwise suggest a specific amount of penalties on
23 any of these, on any of the agreements, in Exhibit A
24 or Exhibit B.

25 Now, when we took Mr. Wilson's deposition,

0180

1 he was asked by counsel for Eschelon whether, you
2 know, if he were in a room and the Chairwoman of the
3 Commission asked him what penalties he would
4 recommend, what would he say, and Mr. Wilson answered
5 that question and a series of follow-up questions,
6 both by Ms. Endejan and by myself, the gist of which
7 is that his position is that each failure to file an
8 agreement is, by itself, a violation of the law
9 worthy of a maximum penalty from the mere fact of
10 filing.

11 Now, Mr. Wilson was also careful to say in
12 his deposition that that didn't constitute a formal
13 recommendation, and I'm not sitting here trying to
14 hold him to that, but the point is, as we sit here,
15 the sum total of Staff's theory of penalties consist
16 of not making a recommendation, augmented by Mr.
17 Wilson's view that all that matters, for purposes of
18 determining penalties, is that agreements were not
19 filed, okay.

20 Now, when you look at the exhibits that are
21 attached to Mr. Smith and Mr. Gray, which are a
22 shorthand for what's contained in their testimony --
23 I mean, we could have gone line-by-line through that
24 and seen the same thing, but we didn't. What we see
25 is now testimony about UNE-P provisioning problems

0181

1 and conversion problems, about CLECs' complaints
2 about Qwest's change management process, complaints
3 about all sorts of day-to-day issues between Qwest
4 and CLECs, many of which have nothing to do with the
5 state of Washington, by the way, being dumped into
6 the record now for, as Staff puts it, primarily the
7 purpose of bearing on penalties.

8 So where does that put us. Where that puts
9 us now is Qwest has filed its response testimony, and
10 there's going to be a round of reply testimony in
11 which we'll -- if this -- if this testimony is
12 allowed to remain in the record, which it shouldn't,
13 we would have to respond and we need to respond to
14 the wide-ranging allegations in these testimonies and
15 in these exhibits, a process that's going to very
16 dramatically expand the scope of the case that would
17 have to be presented at the hearing, but we'll get to
18 that.

19 But the biggest problem is that we would go
20 to all that response -- or reply testimony while
21 Staff has the ability to sit and now articulate in
22 its reply testimony for the first time how it is that
23 the Commission should consider damages or penalties.

24 Remember, when we did our response
25 testimony, there was no Staff position, there was no

0182

1 evidence bearing on penalties. They were just going
2 to leave it to the Commission to decide what to do.
3 Now what Staff is doing is, through these settlements
4 with McLeod and Eschelon that it negotiated, it has
5 commissioned -- you know, put in whatever neutral
6 terms you want. It has introduced into the record
7 now a whole range of new allegations, new issues that
8 it wants to use to argue penalties.

9 And when it files its reply testimony, Staff
10 no doubt will feel at liberty to argue from the
11 materials contained in all this response testimony
12 about what the penalties should be in this case, and
13 we will not have an opportunity to respond to that.
14 This case will go to hearing before this Commission
15 with only -- with all of a sudden a new theory of
16 penalties and a whole bunch of new evidence bearing
17 on it. And that is not the way this case was
18 structured, that is not the way this Commission's
19 procedural rules contemplate testimony being prepared
20 and filed in these cases, and it is simply not fair.

21 There is absolutely no reason why, if Staff
22 wanted these issues to be part of this proceeding, it
23 could not have put them in its initial complaint and
24 put them in its direct testimony. These complaints
25 have been out there, in some cases now -- McLeod's

0183

1 complaints about antitrust violations, you know, were
2 presented to the Department of Justice in 1997, but
3 even tying it slightly more to unfiled agreements
4 issues, the entire Minnesota record was available for
5 this Staff to find out about, consider and decide how
6 to frame its case in 2002.

7 It decided to file a narrower case on
8 Exhibit A; it decided to file the whole Exhibit B
9 theory, which was new to all of these cases; it
10 decided to include as respondents the CLECs who were
11 parties to these agreements. No other state did
12 that. So Staff made conscious decisions about how to
13 frame this case.

14 What it is now doing, after settling with
15 all these CLECs, is reframing the case, and it's
16 sandbagging us, particularly on the penalty component
17 of the case.

18 Now, let me say a couple of things about the
19 affidavits that have been attached, both to Mr. Smith
20 and to Mr. Gray's testimony. Staff responds to our
21 objections to those affidavits by saying that, well,
22 hearsay testimony is allowed all the time.

23 Let me give you a little history of the
24 Smith and Deutmeyer depositions that bears on this,
25 and then tell you why, even if hearsay is allowed at

0184

1 some level in administrative proceedings, why the
2 confrontation issue still is not solved.

3 The history of the Fisher and Deutmeyer
4 affidavits and depositions is, Your Honor, that those
5 materials were submitted in testimony in Minnesota,
6 to which we objected, for all the same reasons, and
7 it was decided that, because the Minnesota Department
8 of Commerce was representing to that commission that
9 it would bring Mr. Fisher and Ms. Deutmeyer for
10 hearing, that -- well, the Department of Commerce
11 took the position that because they were bringing
12 them for hearing, there would be no deposition under
13 the rules there. I mean, you have to get leave of
14 the ALJ to take discovery in deposition form under
15 the rules, as I recall them.

16 We went to the ALJ and persuaded him that we
17 should be allowed to depose Mr. Fisher and were told
18 that we could do that, given the importance of his
19 testimony, that we could take a discovery deposition,
20 because Mr. Fisher was coming to the hearing. And
21 about a week or two before the hearing came forward
22 in Minnesota, all of a sudden, Mr. Fisher was no
23 longer willing to come and the Minnesota Department
24 of Commerce didn't have the time or the resources to
25 jump through the various hoops to get him there.

0185

1 And so it was decided at the last minute in
2 Minnesota that his affidavit and his deposition
3 transcript could become part of the record in that
4 case, over our objections there, which I think were
5 well taken, and the same objections we're making
6 here.

7 But getting to the real heart of it, the
8 confrontation issue is not simply about do we get the
9 opportunity to look at Mr. Fisher and ask him
10 questions, look at Ms. Deutmeyer and ask her
11 questions; the issue is do we get to challenge their
12 testimony in a way that allows the trier of fact
13 actually to assess their credibility.

14 Now, I'm the only person in this room that
15 was at Mr. Fisher's deposition, and I think -- I
16 don't think Mr. Lipschultz was there, he'll correct
17 me, but I'm probably the only person on this call, as
18 well. I could tell you my impressions about Mr.
19 Fisher's reactions to certain questions. I could
20 tell you that I watched him become physically
21 uncomfortable when he --

22 MR. SWANSON: Objection, Judge. Is Mr.
23 Nazarian arguing or is he testifying now, factually,
24 about his impressions of the deposition? This is
25 completely improper.

0186

1 JUDGE RENDAHL: I would agree that this
2 doesn't have any bearing. I think you've made your
3 argument about confrontation. I don't need to know
4 this type of information. I don't think it's
5 particularly relevant, so -- it may be relevant, but
6 I don't think it's appropriate.

7 MR. NAZARIAN: Fair enough, Your Honor.

8 JUDGE RENDAHL: So I think you've made your
9 argument about the confrontation issue.

10 MR. NAZARIAN: Well, my only -- thank you,
11 Your Honor. My only point -- and I don't mean to be
12 testifying. I phrased it "I could tell you these
13 things" on purpose. And I'm not sworn today, and I
14 don't plan to be, today, anyway, but the point -- the
15 point is that admitting Mr. Fisher's cold transcript,
16 admitting Ms. Deutmeyer's cold deposition transcripts
17 is not a substitute for Your Honor watching those
18 people respond to questions, it's not a substitute
19 for the Commissioners watching those people respond
20 to questions.

21 And when they come up, when these issues,
22 which, again, do not respond in any way to Mr.
23 Wilson's testimony anyhow, are dumped into the record
24 in this -- on this posture and are compounded by the
25 inability of the Commission and Your Honor to assess

0187

1 their credibility personally, it just magnifies the
2 prejudice here.

3 I mean, I think what's really happening is
4 that, now that all the other CLECs are out of the
5 case, Staff would like to find a way to turn the heat
6 up on Qwest. And I understand -- you know, I
7 understand how litigation tactics change and they're
8 entitled to litigate this case vigorously, as are we.
9 But there are rules that this Commission has about
10 how cases are ordered and structured, and
11 particularly there are rules about how response
12 testimony is supposed to, in fact, respond. And this
13 response testimony is not response testimony; it's
14 direct testimony that not only supplements Mr.
15 Wilson, but it supplements the allegations in the
16 case and the claims that are before this Commission.

17 And for that reason and all the other
18 reasons I've stated, Your Honor, we would ask that
19 Mr. Smith and Mr. Gray's testimony be stricken from
20 the record of this case.

21 JUDGE RENDAHL: Okay. Thank you, Mr.
22 Nazarian. Mr. Swanson.

23 MR. SWANSON: Thank you, Your Honor. The
24 first issue that the Staff would like to address is
25 this issue of what was pled. And I believe all the

0188

1 parties are aware that what was pled in this
2 proceeding was Commission Staff was seeking
3 penalties. The Commission has a fair amount of
4 authority on what exactly needs to go into the
5 analysis when determining what those penalties are,
6 and some of those things are the intent, the damage
7 that was caused, you could think of a number of
8 different things that are important to bear on that
9 particular issue, and that issue was contained in
10 Staff's initial pleading in this matter, and that's
11 something that's important and something not to
12 forget.

13 I guess, overall, another thing that's very
14 important is there's no such thing as evidence which
15 is too good or too powerful so that it must be
16 excluded, and that's exactly the kind of evidence we
17 have here today.

18 Rather than repeat what is stated in Staff's
19 two briefs on this issue, however, Staff will make
20 two brief points here and then I'll address some of
21 the points Mr. Nazarian has made.

22 The first point Staff wants to make is that
23 the procedural order of presentation in this case is
24 consistent with Commission rules and rulings and due
25 process.

1 First, the Commission accepted the procedure
2 contemplated in the settlements as lawful and in the
3 public interest in Order Number 12.

4 Additionally, under Commission rules, the
5 order the evidence was received is appropriate.
6 Under WAC 480-07-470(6), The order of evidence
7 received will ordinarily be, first, the party having
8 the burden of proof; second, the party supporting the
9 party having the burden of proof; third, parties
10 opposing that party; and fourth, rebuttal.

11 Now, it's true that there have been some
12 procedural changes due to the settlements in this
13 case, but the evidence was received in a manner
14 substantially in compliance with this rule. Even if
15 it wasn't, however, the second part of that rule
16 says, The presiding officer may direct a modified
17 order of presentation considering the needs of the
18 parties, the Commission, and the proceeding and the
19 parties' preferences.

20 Therefore, the decision is well within the
21 discretion of the judge. This is also consistent
22 with traditional evidentiary principles. State v.
23 Williams, 118 Wash. App. 183, 2003, the Court said, A
24 motion related to order in which the evidence is
25 received is addressed to the trial court's

0190

1 discretion, the exercise of which the court will
2 review only for abuse.

3 And Evidence Rule 611 states, The Court
4 should exercise reasonable control over the order of
5 presenting witnesses; thus it's the presiding
6 officer's discretion to decide on this particular
7 issue.

8 Additionally, as Staff has stated in
9 briefing, Qwest will have every opportunity to
10 respond to all evidence offered against it,
11 consistent with due process principles. And that's
12 really the heart of the issue here, what does due
13 process require, since that's what Qwest has
14 addressed its objection and its motion to strike to.

15 The second important issue Staff wants to
16 point out is the evidence is relevant to show the
17 motivation and relationship of the parties at the
18 time the agreements were entered into. Also, the
19 evidence is relevant to show damage to the market and
20 the appropriate amount of penalties that should be
21 levied against Qwest.

22 As Staff stated earlier, this is consistent
23 with various Commission cases setting forth the
24 factors that might be used to determine the amount of
25 penalties against a violating party.

0191

1 The third point, and one I think that is
2 very important for this particular proceeding, is
3 there is no prejudice.

4 The first issue I think that also should be
5 remembered is that it's Qwest's burden on this issue.
6 In *Carson v. Fine*, 123 Wn. 2d 206, 1994, the
7 Washington Supreme Court said, under ER 403, the rule
8 related to exclusion of relevant evidence if
9 probative value is substantially outweighed and,
10 language that was cited several times in Qwest's
11 brief, the burden of showing prejudice is on the
12 party seeking to exclude, and there's a presumption
13 in favor of admissibility.

14 Another important thing to remember on this
15 issue is we are not talking about a jury here that
16 might become confused or swayed by the order in which
17 the evidence is received, the tenor of the evidence,
18 the issues in the case, or the type of evidence which
19 is relevant to a particular finding.

20 Qwest has spoken many times about how they
21 are prejudiced and how the evidence confuses the
22 issues. In *State v. Gould*, 58 Wash. App. 175, 1990,
23 the Court said, Unfair prejudice is that which is
24 more likely to rouse an emotional response than a
25 rational decision by the jury.

0192

1 We are faced here with a decision-maker that
2 is made up of professionals who are well-qualified to
3 sort out the evidence and weigh it appropriately.
4 The Commission can take the evidence as it sees it.
5 It may weigh the evidence and give it the weight that
6 it deserves. If the Commission decides that hearsay
7 evidence shouldn't be weighed as highly as in-person
8 testimony, then it may do so, and it may sort out
9 which particular issues in the evidence should go to
10 its ultimate findings in the case.

11 WAC 480-07-495 makes it clear that the
12 evidence rules that the Commission should consider
13 are those for non-jury trials. Qwest's emphasis on
14 confusion of the issues does not really apply to this
15 type of proceeding, nor does Qwest's emphasis on its
16 prejudice, since Qwest will receive all process
17 required under Commission rules, practices, and due
18 process principles.

19 I would also like to address a few of Mr.
20 Nazarian's points. First, as we mentioned earlier,
21 the procedure and specific areas discussed in the
22 settlements were approved as part of Order Number 12,
23 to which the Eschelon and McLeod USA testimony was
24 addressed. And I also want to point out that Mr.
25 Nazarian left out Public Counsel as a party that was

0193

1 responding and I believe that they did file
2 something, although they did not appear here today,
3 so I want to make that for the record.

4 As to the issue of the information in the
5 public record, Staff set out its complaint and filed
6 its testimony the way that it saw that it should file
7 that testimony. It didn't come to these settlements
8 until late in the proceeding, and that's just the way
9 that settlements work in litigation, especially
10 multi-party litigation, where the parties' interests
11 may differ.

12 Certainly, it's true that the Eschelon and
13 McLeod USA testimony may be different than Staff's
14 testimony, but that's simply because it's coming from
15 those parties, rather than Staff. And there's an
16 easy correction to that, and that is give Qwest the
17 opportunity to respond. Fortunately, that
18 opportunity is already built into the record.

19 What the exhibits do and what the testimony
20 of Eschelon and McLeod does is lay out the motivation
21 of Qwest and Eschelon and McLeod USA in terms of why
22 the agreements were not filed in this proceeding.
23 Staff believes that that is at issue in this case and
24 that such a narrow construction of what it needs to
25 respond should not be adopted by the presiding

0194

1 officer.

2 The Commission has already laid out criteria
3 that should be used to determine penalties, and this
4 testimony goes directly to that.

5 As for the issue of the oral agreements,
6 this information, though it may not, as Staff has
7 already indicated, may not go to finding a violation
8 with regard to these particular agreements, it is
9 important and it is relevant to show the relationship
10 of the parties, the transactions to which the oral
11 agreements, as well as some of the agreements listed
12 in Exhibit A, occurred at the same time and as part
13 of one particular interaction between these two
14 parties are relevant to this proceeding to show why
15 it is the parties didn't file the agreements, why it
16 is that Eschelon and McLeod USA reacted the way that
17 they did, and why it is we are faced with the issues
18 we are today.

19 As to the late hearsay objection Qwest has
20 raised to some of the affidavits in the Smith
21 testimony, Staff would simply object that it
22 certainly didn't file that in its initial pleading,
23 and in addition, again, I believe that the Commission
24 can consider this evidence and give it the weight
25 that it deserves. The Commission will not be swayed

0195

1 by evidence and is very adept at making that weight
2 and giving that evidence the weight that it should be
3 given, depending on whether it's in hearing testimony
4 or testimony that is on paper.

5 I guess another point that Staff wants to
6 make is that it's important to remember that, in all
7 likelihood and -- that in all likelihood, had Staff
8 not settled with Eschelon and McLeod, Eschelon and
9 McLeod would be filing testimony that, part of it, at
10 least, most likely, would be adverse to Qwest,
11 because it would attempt to shift the blame to Qwest.

12 What Qwest is essentially arguing is that,
13 well, I guess the result would be that Qwest would
14 benefit from the Eschelon and McLeod USA settlements
15 in the way that it wouldn't benefit had the parties
16 not settled. This is completely against the
17 determination of Order Number 12, the intent of the
18 parties in the settlement, and would not be in the
19 public interest as those issues that would have been
20 part of the record either way would now be stricken
21 from the record.

22 As for the issue of Staff's testimony on
23 damages, what I believe Mr. Wilson indicated in his
24 testimony is that -- in his, rather, deposition, is
25 that Staff believes that the Commission should decide

0196

1 on what the damages should be, and all this evidence
2 goes to that. And Staff believes that this
3 Commission has those factors in front of it to make
4 that decision.

5 Additionally, Staff has also put the parties
6 on notice that it did realize and it did want to
7 argue that the Commission could consider these
8 factors. Staff in fact raised this issue in its
9 response to the Covad petition for review of Order
10 Number 5 way back early this year, before any
11 testimony was filed.

12 As for the issue of Qwest not having the
13 opportunity to respond because it didn't get to see
14 the damages issue in Staff's initial filing in this
15 case, there's no harm. Staff now is on notice that
16 this issue is in front of the Commission. It will
17 get the chance to respond to it in its reply case.
18 Whether Staff had raised it or the parties here had
19 raised it, Qwest is still going to get the
20 opportunity to respond and weigh in what it thinks
21 the damages should be and what it thinks the
22 penalties should be.

23 And as for the issue of Staff getting the
24 last word, that's correct. That's what's under
25 Commission rule. Staff gets the last word, because

0197

1 it has the burden of proof in this proceeding. And
2 additionally, if Qwest believes that, at the end of
3 Staff's filing, that Staff has gone way beyond what
4 it could file in its response testimony, it certainly
5 has remedies available to it, though I doubt that any
6 of those remedies would be appropriate.

7 Additionally, all the parties will have the
8 opportunity to argue the issue in their briefs. As
9 Staff has already said, it reserved the right to
10 argue the issue of penalties later, as it knows the
11 Commission can consider this issue.

12 Another thing, I think it's important to
13 remind the presiding officers, Mr. Nazarian pointed
14 out that the depositions of Deutmeyer and Fisher were
15 discovery depositions. It's important to realize
16 there really isn't a distinction between those two,
17 that is, for preservation or discovery under the
18 evidence rules. And as I said, I believe that it's
19 the Commission's job to sort out how it's going to
20 weigh that evidence.

21 And certainly the issue of Qwest being
22 prejudiced by the presiding officer not being able to
23 view these individuals, I don't believe that's what
24 the rules, even the evidence rules that we're not
25 under here, we're under the WAC standard, require. I

0198

1 believe all they require is that the Commission have
2 the opportunity to cross-examine these folks, and
3 that's exactly what Qwest has had in these -- in the
4 depositions that Mr. Nazarian apparently noted up for
5 these folks.

6 For all of those reasons, Staff believes
7 that Qwest's motion to strike should be denied.
8 Thank you.

9 JUDGE RENDAHL: Thank you, Mr. Swanson. Mr.
10 Lipschultz?

11 MR. LIPSCHULTZ: Yes, Your Honor. We really
12 have nothing to add. We provided the testimony
13 pursuant to the settlement agreement covering the
14 areas that the settlement agreement set forth, and we
15 believe the testimony's relevant and we believe that
16 Qwest's due process concerns are adequately addressed
17 by the procedures available to it in the case, and
18 have nothing further to add.

19 JUDGE RENDAHL: Ms. Endejan.

20 MS. ENDEJAN: Ms. Rendahl, or Judge Rendahl,
21 to save time, I will simply state that we concur in
22 what Mr. Lipschultz just said. And Eschelon has
23 nothing further to add.

24 JUDGE RENDAHL: All right. Anything from
25 Mr. Waggoner?

0199

1 MR. WAGGONER: I have nothing further to
2 add.

3 JUDGE RENDAHL: And Mr. Butler?

4 MR. BUTLER: Yes, Your Honor. First --

5 JUDGE RENDAHL: You'll need to speak up a
6 bit. I'm sorry.

7 MR. BUTLER: All right. Can you hear me
8 now?

9 JUDGE RENDAHL: Yes.

10 MR. BUTLER: From Time Warner Telecom's
11 perspective, we generally agree with the points made
12 by Mr. Swanson. We have a different perspective on a
13 couple items, and I'd like to address those, but
14 first I'd like to remind Your Honor that the amended
15 complaint filed in this case states clearly that the
16 Commission intends to enter into a full and complete
17 investigation into the matters alleged, and it is
18 prepared to make determinations and enter orders as
19 may be just and reasonable in this case.

20 We concur with the statements of Mr. Swanson
21 that the Gray and Smith testimonies are not
22 procedurally inappropriate, that there is no due
23 process problem. We also agree that they are
24 relevant, and I want to specifically address the
25 question of the oral agreement, and we have a

0200

1 slightly different perspective than Staff does with
2 respect to that.

3 We believe that the oral agreement --

4 JUDGE RENDAHL: You're fading out again.

5 I'm sorry.

6 MR. BUTLER: We believe that the oral
7 agreement not only is relevant, but itself can become
8 the subject of penalties, and that is because, as
9 testified by Mr. Gray, Agreements 9-A, 44-A and 45-A
10 were all negotiated and entered into at approximately
11 the same time and intertwined with one another, and
12 they were, together with the oral agreement, part of
13 a larger agreement. They were, in effect, all parts
14 of the same overall agreement. The two take-or-pay
15 agreements were, according to Mr. Gray's testimony,
16 simply the mechanism proposed by Qwest through which
17 the benefit of the oral volume discount agreement
18 would at least be partially realized.

19 We think it is, therefore, directly relevant
20 and within the scope of this proceeding that the
21 Commission address what the overall agreement was
22 between the parties in this respect, and the specific
23 agreements referred to, 44-A, 45-A, were just part of
24 the overall agreement, which also Mr. Gray testified
25 Qwest was unwilling to put the entire scope of the

0201

1 agreement in writing out of the concern that other
2 carriers might seek the same agreement. In other
3 words, they might exercise the rights to which they
4 are entitled over the Telecom Act of opting into it
5 and getting the benefit of it.

6 So from that standpoint, we believe not only
7 is it relevant within the scope of the issues in this
8 proceeding, but itself can become the subject of any
9 penalty or other remedy ordered by the Commission at
10 the end of this case.

11 Similarly, the testimony or evidence
12 represented by the Deutmeyer affidavit is part of
13 that same agreement. It's simply part of the
14 implementation of the true-up mechanisms that were
15 part and parcel of that, as is the testimony about
16 the aspect of the agreement that required McLeod to
17 remain in Qwest's 271 proceedings.

18 That evidence certainly relates to the
19 culpability and the motivations of Qwest and is
20 relevant to any issue regarding penalties.

21 Finally, with respect to Mr. Nazarian's
22 complaint about the use of the deposition transcript,
23 as we stated in our answer or response to this, the
24 Civil Rules in Washington specifically contemplate
25 that the deposition of a witness, whether or not a

0202

1 party, may be used by any party for any purpose if
2 the Court finds that the party offering the
3 deposition is unable to secure the attendance of the
4 witness by subpoena. That's Civil Rule 3283. That
5 completes my comments.

6 JUDGE RENDAHL: Okay. Thank you. Anything
7 in response or reply, Mr. Nazarian?

8 MR. NAZARIAN: Very briefly, Your Honor.
9 Thank you. First of all, I think it's worth pointing
10 out that nobody else who's argued in opposition to
11 our motion made any argument today that Mr. Smith or
12 Mr. Gray's testimony is, in fact, responsive to Mr.
13 Wilson, which of course is the core problem here.

14 I mean, again, this testimony was filed in
15 this case as response testimony. It's not -- it was
16 not portrayed as I think it really is, which is
17 supplemental direct testimony. And direct testimony
18 was required to be filed first, back in June of this
19 year, and I don't hear anybody who's argued this
20 morning taking issue with what I think we've
21 demonstrated abundantly, which is that it's not
22 responsive. It's new direct testimony and it raises
23 new issues.

24 With respect to Mr. Swanson's points
25 regarding the settlement agreements, there are a

0203

1 couple of issues. First of all, the fact that Staff,
2 McLeod and Eschelon may have intended that their
3 settlements would bring about the enhancement of the
4 record of course has no bearing on whether it's, in
5 fact, appropriate to do that. That's a function of
6 this Commission's rules and Your Honor's application
7 of those rules to this case.

8 They cannot agree amongst themselves to
9 supplement the record in a manner that's prejudicial
10 to Qwest under the rules and say that, well, that
11 leaves us no recourse. And in fact, although the
12 Commission did approve the settlement agreements as
13 drafted and signed, I do believe Order Number 12
14 specifically reserved to Qwest the right to seek that
15 this testimony be stricken from the record, which is
16 exactly what we've done.

17 So while it may well be that the Commission
18 decided that the settlements were fair, reasonable
19 and in the public interest, that decision is not
20 simultaneously a decision that the testimony they
21 would file is appropriate in the record of this case
22 and can't be stricken as a matter of collateral
23 estoppel or something like that.

24 Moreover, Mr. Swanson makes the point that,
25 well, you know, these settlements came later in the

0204

1 case, these new issues came up later in the case, so
2 in litigation, these things happen. Well, in
3 litigation, when facts change and issues get expanded
4 or added to the case, what happens is the plaintiff
5 seeks leave to amend the complaint and properly
6 posture the issues in the case in a manner that
7 allows the responding parties to respond to them in a
8 procedurally appropriate fashion.

9 Nobody's done anything of the sort here.
10 What they've done is filed a settlement agreement,
11 file testimony -- or file direct testimony with a
12 response testimony label on it and then tell us sort
13 of too bad, so sad. That's not how litigation works.

14 With respect to penalties, it's interesting
15 that now, as we sit here in the state where I believe
16 the Blakely case came from, we have an argument that
17 un-pled offenses should bear on the sentencing
18 decision. I mean, this alleged oral agreement, and
19 there are things to say about this on the facts that
20 I won't go into here, but what they want to do is say
21 we don't have to plead this, we don't have to prove
22 this, but we want to dump it in the record and have
23 Qwest penalized on it, even though it's not one of
24 the agreements that we supposedly violated federal
25 and Washington law by not filing. And if Mr. Swanson

0205

1 didn't say it so explicitly, Mr. Butler did.

2 And so you've got to ask yourself if that is
3 a fair way to go about assessing penalties. And on
4 top of that, I would ask how does McLeod's complaints
5 about Qwest's antitrust -- alleged antitrust
6 violations in 1996 bear at all on penalties here.
7 How does Qwest's ability or inability to convert
8 Centrex lines to UNE-P have any relevance to the
9 issues in this case. How does -- or to Qwest's
10 penalties for failure to file agreements. How does
11 Qwest's alleged inability to satisfy Eschelon's
12 ordering and provisioning needs have any relevance to
13 a penalty for failing to file agreements.

14 The fact is, Your Honor, it doesn't, and
15 it's just -- it's designed to be sort of additional
16 bad facts to make the record look bad, to make Qwest
17 look bad, to juice up the penalty analysis on issues
18 that are not properly presented. And there are --
19 I'm sure are other littlepoints, but I will stop
20 now, Your Honor. Thank you very much.

21 JUDGE RENDAHL: Okay. I have a few
22 questions for you all. And I'll start with you, Mr.
23 Nazarian. I just want to summarize what I heard as
24 the main points you're making and make sure that I
25 haven't missed anything.

0206

1 I'm understanding that your argument is that
2 the testimony by Mr. Gray and Mr. Smith is really
3 supplemental direct testimony by Staff and directed
4 by Staff.

5 Secondly, that, through this testimony,
6 Staff is expanding the case by adding in additional
7 issues and pleading additional issues. Third, that
8 the testimony and the exhibits attached to the
9 testimony of Mr. Gray and Mr. Smith don't bear any
10 relation to the case that Staff has pled or to Mr.
11 Wilson's direct testimony, and that these new
12 allegations are really to argue the penalties issue
13 and that Qwest is prejudiced by not having an
14 opportunity to respond to whatever Staff may raise in
15 its reply testimony.

16 Does that accurately summarize your main
17 points?

18 MR. NAZARIAN: That accurately summarizes
19 our main points. I mean, there are some things in
20 our written brief I didn't emphasize here, such as,
21 for example, Mr. Gray's complete lack of any personal
22 knowledge of anything he says in his testimony, but
23 that -- you're right. That gets at it.

24 And I'm sorry, Your Honor, to jump back.
25 There was one other reply point I wanted to make, and

0207

1 it will take me one second. I believe Mr. Swanson
2 said there's no difference between a discovery
3 deposition and a testimony deposition. If I recall
4 correctly, Your Honor, you made exactly that
5 distinction in connection with Mr. Wilson's
6 deposition, that we were cautioned, and Mr. Swanson
7 tried to hold me to it, that the deposition in this
8 case was strictly a discovery deposition, that we
9 were to explore facts and not to cross-examine him.
10 So to the extent there is a difference, I believe it
11 is recognized in this very proceeding, and Your Honor
12 has, in fact, recognized it in the way she's framed
13 depositions in this case.

14 So I'm sorry to derail, but I wanted to --
15 didn't want to forget that.

16 JUDGE RENDAHL: That's fine. If Qwest has
17 the opportunity to file rebuttal testimony to any
18 testimony relating to penalties, and this is how I
19 see it coming from your arguments and hearing Staff's
20 reply, your concern is that Staff will, in response
21 to what's in Mr. Gray's testimony and Mr. Smith's
22 testimony, develop reply testimony that adds new
23 issues on penalties, to which Qwest would not have an
24 opportunity to reply in the procedure that we've set
25 up for rounds of testimony; is that correct?

0208

1 MR. NAZARIAN: That is among the many
2 problems, yes.

3 JUDGE RENDAHL: All right. I understand
4 that there's a prejudice issue and other issues.

5 MR. NAZARIAN: I understand.

6 JUDGE RENDAHL: But in terms of the
7 scheduling and the due process opportunity of no
8 opportunity to reply, that's what you're concerned
9 about?

10 MR. NAZARIAN: I'm concerned more
11 structurally than just not having the opportunity. I
12 mean, the problem is that, as this would play out
13 right now, with this testimony left in, we would
14 reply to all these many splendored factual
15 allegations while they are now taking the same
16 factual allegations and making their penalties case
17 for the very first time, okay.

18 Now, it's -- you know, it completely upsets
19 the notion of how this case was supposed to proceed
20 in the first place, but Your Honor's question is,
21 Well, if we were given a chance to rebut that, is
22 that good enough. Well, then Staff's going to want a
23 chance to rebut the rebuttal, because they are the
24 plaintiff, they get the last word.

25 And now we're butting right up to the

0209

1 hearing. I mean, assuming --

2 JUDGE RENDAHL: I'm just asking if that's an
3 option, and this is an issue the Commission has had
4 to deal with in other cases, in particular, in rate
5 cases and in cost cases, where this happens,
6 unfortunately, all too often.

7 MR. NAZARIAN: Sure.

8 JUDGE RENDAHL: So it is a procedure the
9 Commission has used in the past to address the
10 perceived prejudice that parties have in seeing
11 something for the first time in reply testimony. The
12 Commission doesn't condone parties making their cases
13 for the first time in reply testimony. It has
14 addressed that in other cases.

15 So I'm just -- I guess I'm saying to you
16 that this is an option that has been used in the
17 past. And although I understand it wouldn't
18 completely address your concerns, would it address,
19 in part, the procedural concern, the lack of an
20 opportunity to reply?

21 MR. NAZARIAN: Well, it would respond to the
22 lack of an opportunity to respond to the reply, but
23 we don't think it would cure the problem. We don't
24 think it would cure sort of the fundamental
25 reorientation of the case that it would occasion if

0210

1 the procedure -- if the response was to reorient the
2 procedure in that fashion.

3 JUDGE RENDAHL: Okay. I think that's all I
4 have for Qwest.

5 Mr. Swanson, what relationship does Mr.
6 Gray's and Mr. Smith's testimony, in your
7 understanding, what does it have to the Exhibit B
8 agreement issue, or is it just limited to the penalty
9 issue for Exhibit A?

10 MR. SWANSON: If I might have a moment,
11 Judge? Do you mind?

12 JUDGE RENDAHL: Let's be off the record.

13 (Discussion off the record.)

14 JUDGE RENDAHL: All right. Let's be back on
15 the record. Mr. Swanson.

16 MR. SWANSON: I guess I just must confess,
17 you know, I don't think I have a thorough answer,
18 although I do believe Staff, you know, would want to
19 reserve the right to argue that that information
20 would go to issues regarding Exhibit B agreements, it
21 does talk about keeping things secret, it does talk
22 about the relationship of the parties and might be
23 relevant to the claims that are at issue with regard
24 to the Exhibit B agreements, and does talk some about
25 wholesale customer preferences, which is an issue

0211

1 with Exhibit B.

2 JUDGE RENDAHL: Okay.

3 MR. SWANSON: And if I could, after you're
4 done with questions, I'd like to, if possible,
5 respond to this issue of the discovery deposition.
6 I don't know. I believe that there is authority
7 saying that, even if that's the case, even if it was
8 taken for discovery, that it could be used as a
9 preservation deposition if the witness is
10 unavailable. I'll just leave it at that, I guess.

11 JUDGE RENDAHL: All right. And I guess I'd
12 ask you, as well, similar to what I asked Mr.
13 Nazarian, in terms of if Staff's reply testimony
14 includes new positions, new allegations or arguments
15 related to penalties, based upon Mr. Smith's and Mr.
16 Gray's testimony, what's your position on the
17 opportunity for rebuttal testimony to that point?

18 MR. SWANSON: Thank you, Judge. I guess the
19 first thing I think Staff would like to have the
20 Judge consider here is the fact that this is, again,
21 consistent with Qwest's pattern of objecting to
22 testimony or objecting to evidence before it even
23 comes to the Commission or is in the record.

24 And again, I believe the procedural rules
25 were put in place to allow parties to deal with those

0212

1 issues. Staff's position would be, you know, Qwest
2 should be bringing up things when they come up as the
3 Commission rules require, not bringing them up before
4 they're even -- before they've even been talked about
5 or discussed.

6 But as to the issue about additional
7 briefing, you know, Staff is comfortable with
8 additional briefing if that's what the Commission
9 sees as appropriate.

10 JUDGE RENDAHL: Just so that you know, I'm
11 contemplating an additional round of testimony.

12 MR. SWANSON: Sure. Oh, I apologize, Judge.
13 Additional round of testimony, Staff is comfortable
14 with that, but also wants to caution Your Honor and
15 the Commission that we certainly don't want to get
16 into a pattern, as Mr. Nazarian pointed out, of sort
17 of a tit for tat kind of thing, where every party is
18 attempting to get the last word. It is Staff's right
19 to have the last word in this proceeding.

20 And to the extent that any additional
21 testimony period could cure perceived due process
22 issues, Staff would certainly agree to that, because
23 Staff wants to see that due process occurs in this
24 proceeding. Staff has an interest in that, as well.

25 JUDGE RENDAHL: Okay. I'll note that it is

0213

1 the right of the party who has the burden of proof to
2 have the last word, but the last word in this case,
3 and this applies to other cases, as well, that
4 doesn't include the right to make additional and new
5 evidence or allegations. It is reply testimony,
6 reply to the response, and replying to the arguments
7 that are made.

8 And the Commission has dealt with this in
9 cases involving Qwest, in cases involving Verizon,
10 where the tables were turned in that situation, and
11 so this is not a new situation for the Commission.
12 The Commission does not like to see new information
13 in reply testimony, and if that happens, then the
14 Commission will give the other party an opportunity
15 to respond. It's not a tit for tat. The opportunity
16 to provide reply testimony is reply. It's not an
17 opportunity to make the case anew, in a different
18 way.

19 So I guess -- and so I appreciate the
20 concern about what might happen in reply testimony,
21 and I don't believe it's inappropriate for Qwest or
22 any other party in a situation where they perceive
23 the possibility that something inappropriate might
24 occur to raise that issue, so that the Judge or the
25 Commission is aware that there might be a need for an

0214

1 additional procedural step so that we're not, at a
2 later date, confronting this for the first time.

3 So I don't think it's inappropriate for
4 Qwest to raise this issue, and it doesn't -- you
5 know, I'm not ruling on what we're going to do with
6 rebuttal testimony at this point if the need arises.
7 I'm just saying I don't think it's inappropriate for
8 you all to be dickering over that particular issue,
9 because it's been before the Commission before in
10 other cases, it's happened before, and it is
11 appropriate to allow parties to respond if new
12 information comes up in reply testimony.

13 So with that, I guess I have a question at
14 this point for -- Mr. Lipschultz, are you there?

15 MR. LIPSCHULTZ: I am.

16 JUDGE RENDAHL: Does McLeod plan to make Mr.
17 Fisher or Ms. Deutmeyer available at the hearing, or
18 does McLeod plan to rely solely on the written
19 deposition transcript and the affidavit of Ms.
20 Deutmeyer and Mr. Fisher?

21 MR. LIPSCHULTZ: I believe McLeod intends to
22 rely on the testimony and the affidavits attached to
23 the testimony, but I confess that we haven't
24 discussed that. I can tell you that McLeod really
25 has no control over Mr. Fisher. He has long since

0215

1 departed McLeod. He lives in Utah. Ms. Deutmeyer is
2 still employed by McLeod, but we haven't talked about
3 whether we might make them available, and I think, at
4 this point, the client was contemplating that they
5 would not be, that the written testimony would be it.

6 JUDGE RENDAHL: All right. And also, for
7 you, Ms. Endejan, does Eschelon plan to make Ms.
8 Powers available or was Eschelon planning to rely on
9 the affidavit alone?

10 MS. ENDEJAN: Your Honor, Eschelon was
11 planning on relying solely on the testimony of Mr.
12 Smith. I don't know about the availability of Ms.
13 Powers. I don't know what her current status or
14 situation is, so I would have to check.

15 JUDGE RENDAHL: Okay. And I think I had an
16 additional question for both McLeod and Eschelon.
17 Let me look over my notes. No, I don't think I have
18 any other questions.

19 And is there anything further anybody wants
20 to add this morning?

21 MR. NAZARIAN: Not from Qwest, Your Honor.
22 Thank you.

23 MR. SWANSON: I guess if Staff may, I would
24 like to point out it does believe, and its position
25 is that the complaint did include the contemplation

0216

1 of penalties and that does encompass the issues in
2 this case, and to the extent that Qwest is trying to
3 segregate the issues to the point of a microscopic
4 view of what the issues are in the case, I don't
5 think Staff necessarily concurs with that and Staff
6 doesn't believe that it's limited in that way.

7 MR. NAZARIAN: May I respond very briefly to
8 that, Your Honor?

9 JUDGE RENDAHL: Please go ahead.

10 MR. NAZARIAN: Thank you. It is true that
11 the amended complaint contemplates penalties. It is
12 also true that Mr. Wilson's direct testimony, which
13 is the direct testimony on which Staff relies and in
14 which Staff was obliged to put forth its case at the
15 direct testimony stage, does not raise any of these
16 issues, and in fact, it affirmatively eschews any
17 analysis of penalties.

18 And so, you know, saying that the amended
19 complaint talked about penalties actually makes our
20 point more vividly, because when you put that up
21 against the direct testimony that Staff filed and on
22 which it relies, what you see is nothing resembling
23 what is in this so-called response testimony, and
24 that's the problem.

25 JUDGE RENDAHL: Well, I'm anticipating that

0217

1 we'll have further arguments based on the reply
2 testimony, but at this point I'm going to take under
3 advisement the arguments you all have made this
4 morning, as well as the written pleadings, the
5 motion, and the responses, and as I mentioned
6 earlier, we'll endeavor to get a written order out by
7 Thursday, October the 14th, hopefully to allow you
8 all enough time to prepare the reply testimony that
9 right now is scheduled to be filed on November 8th.

10 Now, that's where we are, and I expect I
11 will hear from all of you after the 14th if there's
12 any issue that's not to your liking one way or the
13 other. So if there's nothing further, I think we're
14 adjourned this morning.

15 MR. NAZARIAN: Thank you, Your Honor.

16 MR. SHERR: Thank you, Judge.

17 JUDGE RENDAHL: Thank you. Let's be off the
18 record.

19 (Proceedings adjourned at 11:37 a.m.)

20

21

22

23

24

25