

**BEFORE THE WASHINGTON STATE
UTILITIES AND TRANSPORTATION COMMISSION**

WASHINGTON UTILITIES AND)	DOCKET NO. UT-033011
TRANSPORTATION COMMISSION,)	
)	ORDER NO. 15
Complainant,)	
)	
v.)	ORDER GRANTING, IN PART,
)	QWEST’S MOTIONS TO STRIKE
ADVANCED TELECOM GROUP,)	TESTIMONY OF STEPHEN C.
INC., et al.)	GRAY, RICHARD A. SMITH,
)	AND TIMOTHY J. GATES
Respondents.)	
.....)	

SYNOPSIS

1 *This Order grants, in part, Qwest’s motion to strike the testimony of Stephen C. Gray and Richard A. Smith, finding that certain portions of the testimonies are not responsive to Staff’s direct testimony, and that certain exhibits attached to the testimonies are either cumulative and unnecessary or outside the scope of the proceeding. The Order also grants, in part, Qwest’s motion to strike the testimony on Timothy J. Gates, finding that, although responsive to Staff’s direct testimony concerning remedies, the testimony asserts claims not raised in the Amended Complaint and not properly before the Commission.*

BACKGROUND

2 **Nature Of The Proceeding.** This is a complaint proceeding brought by the Washington Utilities and Transportation Commission (Commission), through its staff, against Qwest Corporation (Qwest) and 13 other telecommunications companies alleging that the companies entered into certain interconnection

agreements identified in Exhibit A to the Amended Complaint,¹ and failed to file, or timely file, the agreements with the Commission as required by state and federal law. The complaint also alleges that the companies entered into certain agreements to resolve disputes, but that the agreements violated federal and state law by failing to make terms and conditions available to other requesting carriers, providing unreasonable preferences, and engaging in rate discrimination.

3 **Appearances.** Christopher Swanson, Assistant Attorney General, Olympia, Washington, represents Commission Staff. Daniel Waggoner, Davis Wright Tremaine, LLP, Seattle, Washington, and Gary Witt, AT&T Law Department, Denver, Colorado, represent AT&T Communications of the Pacific Northwest and TCG Seattle (AT&T). Karen S. Frame, Senior Counsel, Denver, Colorado, represents Covad Communications Company. Charles L. Best, attorney, Vancouver, WA, represents Electric Lightwave, LLC. Judith A. Endejan, Graham & Dunn, PC, Seattle, Washington, and Dennis J. Ahlers, Senior Attorney, Minneapolis, Minnesota, represent Eschelon Telecom of Washington, Inc. (Eschelon). Richard A. Finnigan, Law Office of Richard A. Finnigan, Olympia, Washington, represents Fairpoint Carrier Services, Inc., f/k/a Fairpoint Communications Solutions, Corp., Integra Telecom of Washington, Inc., and SBC Telecom, Inc. Greg Kopta, Davis Wright Tremaine, LLP, Seattle, Washington represents Global Crossing Local Services, Inc., and XO Washington, Inc. Dan Lipschultz, Moss & Barnett, Minneapolis, Minnesota, represents McLeodUSA Telecommunications Services, Inc. (McLeodUSA). Arthur A. Butler, Ater Wynne, LLP, Seattle, Washington, and Michel Singer Nelson, Regulatory Attorney, Denver, Colorado, represent WorldCom, Inc. and its subsidiaries doing business in Washington (n/k/a MCI, Inc.). Arthur A. Butler, Ater Wynne, LLP, Seattle, Washington, represents Time Warner Telecom of Washington, LLC (TWTC). Lisa A. Anderl, Associate General Counsel, and Adam Sherr, Senior

¹ The Commission issued a Complaint against the parties on August 14, 2003, and issued an Amended Complaint on August 15, 2003 to include Exhibits A and B to the Complaint.

Attorney, Seattle, Washington, Todd Lundy, Associate General Counsel, Denver, Colorado, and Peter S. Spivak and Douglas R. M. Nazarian, Hogan & Hartson, Washington, D.C., represent Qwest. Robert Cromwell, Assistant Attorney General, Seattle, Washington, represents Public Counsel.

4 **Procedural History.** On August 14, 2003, the Commission issued a Complaint in this proceeding against Qwest and 13 other telecommunications companies. The Commission issued an Amended Complaint on August 15, 2003, attaching Exhibits A and B, which were omitted from the original complaint. Exhibit A to the Amended Complaint identifies 52 agreements that Qwest and the 13 competitive local exchange carriers (CLECs) allegedly failed to file, or timely file, with the Commission. Exhibit B identifies 25 additional agreements with CLECs that Qwest allegedly failed to file with the Commission, and which allegedly violated federal and state law by failing to make terms and conditions available to other requesting carriers, providing unreasonable preferences, and engaging in rate discrimination.

5 On February 12, 2004, the Commission entered Order No. 05 in this proceeding, an order resolving motions to dismiss and for summary determination filed by the parties. During the pleading cycle in response to the dispositive motions, TWTC filed a response to Qwest's motion to dismiss and for summary determination requesting that the Commission correct the harm resulting from allegedly discriminatory agreements reached between Eschelon and McLeod and Qwest by requiring Qwest to make available to other carriers similar discounts on all services purchased from Qwest. In paragraph 129 of Order No. 05, the Commission found that "Time Warner's request is premature, as the issue before the Commission at this stage of the proceeding is the determination of dispositive motions, not a review of evidence or the fashioning of a remedy." The Commission also stated in paragraph 129 that "We will defer Time Warner's request to the fact-finding portion of the proceeding, when Time Warner will

have an opportunity to present any relevant evidence on the issue before the Commission.”

- 6 On August 13, 2004, Commission Staff filed with the Commission a settlement agreement and narrative between Staff and Eschelon, requesting an order approving the settlement agreement. On August 20, 2004, Commission Staff filed with the Commission a settlement agreement and accompanying narrative statement between Staff and McLeodUSA requesting an order approving the settlement agreement. The settlement agreements provided that Eschelon and McLeodUSA would file responsive testimony in this proceeding.
- 7 On August 13 and 26, 2004, the Commission granted requests for extensions of time to file responsive and reply testimony in the proceeding, ultimately extending the time to file responsive and reply testimony until Monday, September 13, 2004, and Monday, November 8, 2004, respectively.
- 8 After reviewing Qwest’s objections to the proposed Eschelon and McLeodUSA settlements, in particular, the provisions of the proposed settlements providing for the filing of responsive testimony, and considering Staff’s reply, the Commission entered Order No. 12 in this proceeding approving the Eschelon and McLeodUSA settlement agreements. The Commission allowed Eschelon and McLeodUSA to file responsive testimony, noting in paragraph 32 of Order that Qwest had the option of filing a motion to strike the testimony once it is filed, and replying to the testimony in the final round of prefiled testimony.
- 9 On September 1, 2004, Eschelon filed with the Commission the prefiled responsive testimony of Richard A. Smith. On September 9, 2004, McLeodUSA filed with the Commission the prefiled responsive testimony of Stephen C. Gray. On September 14, 2004, TWTC filed with the Commission the prefiled responsive testimony of Timothy J. Gates.

10 On September 16, 2004, Qwest filed with the Commission a Motion to Strike
Testimony of Stephen C. Gray and Richard A. Smith. On September 24, 2004,
Commission Staff and Public Counsel filed answers to Qwest's motion. TWTC
filed an answer to Qwest's motion on September 27, 2004.

11 The Commission held a hearing on October 5, 2004, in Olympia, Washington,
before Administrative Law Judge Ann E. Rendahl for the purpose of hearing oral
argument on Qwest's motion to strike the testimony of Mr. Gray and Mr. Smith.

12 On October 4, 2004, Qwest filed a Motion to Strike Testimony of Timothy J.
Gates. TWTC filed an answer to Qwest's motion on October 7, 2004, and Staff
filed an answer on October 8, 2004. On October 13, 2004, Qwest filed a Reply
Memorandum in Support of Motion to Strike Testimony of Timothy J. Gates.

MEMORANDUM

A. Motion to Strike Testimony of Mr. Smith and Mr. Gray.

13 **Smith Testimony.** Mr. Smith, the President and Chief Executive Officer of
Eschelon, describes in his testimony his experience with Eschelon, as well as the
history and nature of the company. *Smith Testimony at 2-3.* Mr. Smith describes
Eschelon's business relationship with Qwest in the years 2000-2001. *Id. at 4-8.* In
describing this business relationship, Mr. Gray attaches to his testimony for
further explanation the affidavit and exhibits of Ms. F. Lynne Powers from the
Minnesota proceeding (RAS-4), a letter from Ms. Powers to Qwest (RAS-2), an e-
mail summarizing discussion from an August 2000 meeting between Qwest and
Eschelon (RAS-3), and a June 24, 2002, letter from Eschelon to the Arizona
Corporation Commission (RAS-6). *Id. at 6, 8; Exs. RAS-2, RAS-3, RAS-4, RAS-6.*

14 In his testimony, Mr. Smith describes the terms of certain agreements between
Eschelon and Qwest, agreements identified in the proceeding as Agreement Nos.

1A, 2A, 3A, 4A, 5A, 6A, 12A, 19A, and 21A, as well as Eschelon's reasons for entering into the agreements. *Id. at 9-18*. Mr. Smith discusses whether the agreements were filed with state commissions and the reasons for filing or not filing the agreements. *Id. at 8-9, 10, 11, 18-19*. Mr. Smith discusses Qwest's performance under these agreements, and attaches two exhibits to illustrate problems Eschelon alleges concerning Qwest's performance. *Id. at 14, 15, 16-17; see also Exs. RAS-5, RAS-7*. Mr. Smith also discusses Eschelon's relationship with other CLECs, and the effect of the unfiled agreements on competition in Washington State. *Id. at 13, 19-20*.

15 **Gray Testimony.** Mr. Gray, the President of McLeodUSA, explains in his testimony his relationship with McLeodUSA and describes the history and nature of the company. *Gray Testimony at 1-2, 3-4*. Mr. Gray describes the terms of agreements identified in this proceeding as Agreement Nos. 8A, 9A, 44A, and 45A, clarifying the summaries of these agreements in Mr. Wilson's direct testimony. *Id. at 2-3, 4, 6, 10, 15*. Mr. Gray describes the circumstances under which McLeodUSA entered into the agreements with Qwest. *Id. at 6-8, 11-13, 18-20*. Mr. Gray discusses McLeodUSA's relationship with Qwest and other CLECs at the time it entered into the agreements, as well as the effect of other unfiled CLEC agreements on McLeodUSA. *Id. at 8-10, 13-14, 23-24*. Mr. Gray also discusses McLeodUSA's experience under an oral volume discount agreement with Qwest. *Id. at 17-18*.

16 Mr. Gray attaches a number of exhibits to his testimony. In discussing the circumstances under which McLeodUSA entered into Agreement No. 8A, Mr. Gray refers to Exhibits A1 and A2 as illustrative of problems McLeodUSA asserts it experienced with Qwest between 1995 and 2000. *Id. at 7*. Mr. Gray attaches to his testimony a copy of Qwest's wholesale performance for McLeodUSA in Minnesota in 2000. *Id. at 12; Ex. B*. In discussing Agreement No. 45A, Mr. Gray relies on the affidavits and exhibits of Mr. Blake Fisher and Ms. Lori Deutmeyer filed in the Minnesota proceeding to document the nature and effect of an oral

volume discount agreement with Qwest. *Id. at 17-18; Exs. C and D.* Finally, Mr. Gray attaches a copy of an October 26, 2000, Quarterly Earnings conference call for McLeodUSA to describe McLeodUSA's posture on filing agreements. *Id. at 22; Ex. E.*

- 17 **Qwest's Motion.** Qwest moves to strike the testimony of both Mr. Smith and Mr. Gray asserting that the testimony is supplemental direct testimony orchestrated and supported by Staff, that the testimony and exhibits respond neither to the case that Staff has pled nor Mr. Wilson's direct testimony, and that the testimony expands the issues and allegations in the proceeding to address penalties and remedies in the proceeding.
- 18 First, Qwest objects to the timing and circumstances of the Smith and Gray testimony as violating the spirit and terms of Order No. 06 in the proceeding, to Qwest's detriment and prejudice. *Qwest Motion at 2, 8.* Qwest asserts that Order No. 06 required prefiled direct testimony to be filed on June 1, 2004, which deadline was later extended to June 8, 2004. *Id.* Because Staff filed its direct testimony on June 8, 2004, Qwest asserts that this filing establishes Staff's entire presentation of testimony and evidence supporting Staff's claims against Qwest and other respondents. *Id.* Qwest argues that the direct testimony and the deposition of Mr. Wilson establish Staff's testimony regarding the level of penalties and placed little weight on evidence of harm to CLECs as a result of the failure to file agreements. *Id. at 4-5.*
- 19 When Staff reached settlement agreements in mid-August 2004 with Eschelon and McLeodUSA providing for submission of testimony, Qwest objected, asserting that the settlements called for filing of supplemental direct testimony. *Id. at 6.* Qwest incorporates its prior arguments about the proposed testimony in its motion. *Id.* Qwest asserts that by orchestrating the testimony of Mr. Smith and Mr. Gray, Staff was supplementing its direct testimony and the nature of Staff's case, which is prejudicial to Qwest. *Id. at 6.* Qwest asserts that Staff

concedes the testimony is supplemental direct testimony by characterizing the testimony as “turning states’ evidence,” *i.e.*, a witness testifying in support of the state. *Id. at 7.*

20 Second, Qwest asserts that the Smith and Gray testimony does not respond to Staff’s direct testimony about Eschelon and McLeod, and is therefore improper supplemental direct testimony. *Id. at 8-14.* Qwest asserts that Staff’s direct testimony focuses on why each Exhibit A agreement should have been filed, when the agreements should have been filed and why, demonstrates why an agreement was untimely filed, and how the failure to file agreements on a timely basis deprived other CLECs of the opportunity to opt into the agreements. *Id. at 8.*

21 As to Eschelon, Qwest asserts that Staff addressed the timeliness of the filing of Eschelon agreements and Eschelon’s awareness of its obligations. *Id. at 8-9.* Qwest asserts that Mr. Smith’s testimony does not respond to the claims that Qwest and Eschelon failed to file certain agreements and that Qwest discriminated in connection with certain agreements. *Id. at 9.* Qwest specifically objects to Mr. Smith’s testimony relating to:

- Eschelon’s concerns with Qwest’s alleged failure to perform under the Eschelon interconnection agreement;
- Eschelon’s role in state commission Section 271 proceedings;
- The effectiveness of the Qwest-Eschelon agreements; and
- Eschelon’s historical grievances with Qwest and its predecessor, U S West.

Id. at 9-10. Qwest also objects to the exhibits attached to Mr. Smith’s testimony as irrelevant to the allegations in this proceeding or to Staff’s direct testimony. *Id. at 10.*

22 As to McLeodUSA, Qwest asserts that Mr. Wilson’s testimony focuses on certain agreements between McLeodUSA and Qwest, addresses the timeliness of filing the agreements, and the extent that McLeodUSA knew of the obligation to file

agreements. *Id. at 12-13.* Qwest asserts that the substance of Mr. Gray's testimony is even more non-responsive than Mr. Smith's, asserting that Mr. Gray lacks personal knowledge of the subjects of his testimony. *Id. at 13.* Qwest notes that Mr. Gray addresses the accuracy of Mr. Wilson's testimony concerning each McLeodUSA agreement, but asserts that the testimony merely bolsters or augments Mr. Wilson's characterization of the agreements. *Id. at 13.*

23 Qwest objects to Mr. Gray's testimony concerning historical disputes between McLeodUSA and Qwest, Mr. Gray's testimony concerning an oral agreement with Qwest not addressed in Mr. Wilson's testimony, and Mr. Gray's reliance on affidavits and other documents from the Minnesota proceeding concerning unfiled agreements. *Id. at 13-14.*

24 Qwest asserts that the testimony and exhibits concerning an oral agreement between McLeodUSA and Qwest is inappropriate as the issue was not identified in the Amended Complaint or Staff's direct testimony and—based upon Staff's pleadings—cannot be the basis for penalties in the proceeding. *Id. at 13-14.* Further, Qwest objects to the introduction of affidavits and supporting exhibits from persons who will likely not appear at the hearing on the basis that the affidavits and exhibits are hearsay evidence and violate Qwest's right to confrontation.² *Id. at 14-15.*

25 Finally, Qwest notes that the settlement agreement between Staff and McLeodUSA refers to Mr. Gray's testimony as "expert" testimony, but asserts that Mr. Gray's testimony is more in the nature of fact testimony, and that Mr. Smith has little knowledge of the facts. *Id. at 15.*

² Comments by counsel for Qwest, McLeodUSA, and Eschelon at the October 5, 2004, oral argument make clear that Mr. Fisher, Ms. Deutmeyer and Ms. Powers will not be called to testify at the January hearings and, if called, would likely not appear.

26 Qwest objects that Mr. Smith's testimony simply attempts to "bash Qwest's performance, question Qwest's motives and raise new complaints about Qwest." *Id. at 10*. Qwest asserts that the testimony of Mr. Smith and Mr. Gray alters "the scope, length, complexity and tone of the proceeding," and asserts that Qwest will pursue additional discovery and cross-examination in order to defend itself against new claims, unless the Commission strikes the testimony. *Id. at 10-11, 14*.

27 **Staff's Answer.** Staff requests that the Commission deny Qwest's Motion, asserting that the testimony is procedurally appropriate, lawful, and that the substance of the testimony is responsive and not within Staff's control or direction.

28 Staff asserts that the Commission has already decided in Order No. 13 in this proceeding the issue of whether the Eschelon and McLeodUSA testimony is procedurally appropriate. *Id. at 2*. Staff objects to Qwest raising the issue a second time before the Commission and attempting to color the testimony by labeling it as orchestrated by Staff and as supplemental direct testimony. *Id.* Staff requests that the Commission consider Staff's prior pleadings when considering the issue. *Id. at 1*. Staff also objects to Qwest's characterization of the time available to Staff to prepare its case since the Commission first received the unfiled agreements in March 2002. *Id. at 3*.

29 Staff asserts that Qwest "fundamentally misrepresents the nature of" the Smith and Gray testimony as supplemental direct testimony. *Id. at 3*. Staff asserts that it has not reviewed or approved of the substance of the testimony before it was filed. Staff asserts that it has only reviewed the testimony prior to the final approval of the settlement agreements "to judge the sufficiency of the testimony against specific criteria contained in the settlement agreements." *Id. at 4*. Staff asserts that Eschelon and McLeodUSA drafted the testimony independent of Staff, and that the testimonies reflect the companies' "unique perspectives." *Id.* Staff asserts that the testimony addresses issues raised in Staff's direct testimony

and that the Commission should not accept Qwest's narrow view of "response" testimony. *Id.* at 4-5.

- 30 Staff asserts that the testimony is relevant: It shows the "context in which the agreements were entered into, the motivation of the parties, the damage to the marketplace that was occurring, and the overall relationship between Qwest and the CLECs." *Id.* at 5. Staff also asserts that the testimony is relevant for use in assessing the appropriate penalties against Qwest if violations are found. *Id.* Staff asserts that it has long focused on the issue of penalties though testimony and in pleadings, asserting through Mr. Wilson's testimony that the maximum penalty should be assessed against all parties, with the Commission determining how to weight the violations, and asserting in a responsive pleading that the amount of penalties may vary depending upon factors such as intent, motivation, damage to other carriers, and bargaining position. *Id.* at 5-6.
- 31 Staff argues that the Smith and Gray testimony provide information to the Commission so the Commission may weigh the appropriate factors and determine the appropriate penalty. *Id.* at 6. Staff asserts that the historical information contained in the testimony is relevant to Qwest's behavior in the marketplace, asserting that Qwest was attempting to intimidate smaller and less powerful CLECs into certain agreements, and is also relevant to demonstrate the extent of damage to the marketplace caused by Qwest's actions. *Id.* at 7-8.
- 32 Staff asserts that Mr. Gray's testimony was inadvertently labeled as "expert" testimony in the McLeodUSA settlement agreement, and that Mr. Gray is a fact witness. *Id.* at 8, n.7. Staff asserts that, although Mr. Gray's testimony relies on hearsay evidence, *i.e.*, the affidavits of Mr. Fisher and Ms. Deutmeyer, the Commission may admit hearsay evidence pursuant to RCW 34.05.452(1) and WAC 480-07-010. *Id.* at 8-9. Staff asserts that the affidavits of Mr. Fisher and Ms. Deutmeyer are testimony that a reasonably prudent person could rely on, and

asserts that Staff is not asking the Commission to rely solely on hearsay testimony to make a finding of fact. *Id. at 9.*

33 Staff argues that Qwest's arguments concerning the lack of an opportunity for confrontation of the witness is false, as Qwest has conducted discovery on the evidence and deposed the witnesses in the Minnesota proceeding. *Id. at 10.* Staff notes that it is seeking to obtain the depositions of Mr. Fisher and Ms. Deutmeyer and will move for their admission as soon as they are obtained. *Id.* Staff asserts that the depositions will provide an "entire package of evidence" upon which a reasonably prudent person could rely. *Id. at 11.*

34 **Public Counsel's Answer.** Public Counsel opposes Qwest's motion to strike the testimony of Mr. Smith and Mr. Gray and requests that the Commission deny the motion. *Public Counsel Response at 1.* Public Counsel asserts that Qwest's due process rights are not compromised by the testimony, as Qwest may conduct discovery, note depositions, or request the opportunity to submit additional testimony to address the testimony to which it objects. *Id.* Public Counsel notes that the current procedural schedule allows sufficient time for Qwest to conduct discovery and depositions concerning the testimony. *Id. at 2.*

35 Public Counsel asserts that the testimonies of Mr. Smith and Mr. Gray appear to be directly relevant to the issues in dispute before the Commission. *Id.* Public Counsel also asserts that reliance on hearsay or double hearsay evidence is not a sufficient basis for striking testimony before the Commission. *Id.* Public Counsel notes that hearsay evidence is admissible before the Commission and that the Commission has assigned such testimony the weight it believes appropriate. *Id.*

36 **TWTC's Answer.** Similar to Staff and Public Counsel, TWTC requests the Commission deny Qwest's motion. TWTC asserts that the testimony of Mr. Smith and Mr. Gray are not procedurally inappropriate, agreeing with Staff that the Commission has already approved the settlements and the provisions in the

settlements calling for filing the testimony. *TWTC Answer at 2.* TWTC asserts that the testimonies are those of Eschelon and McLeodUSA, not Staff, and were prepared well after Staff filed its direct testimony. *Id.* TWTC asserts that Qwest's due process rights are not violated as Qwest has ample time under the procedural schedule to conduct discovery and respond to the Smith and Gray testimonies. *Id.*

37 As with Public Counsel, TWTC asserts that the testimonies are directly relevant to the issues in the proceeding, as "they describe clearly the full extent and scope of the secret agreements between each of the two CLECs and Qwest, as well as the context in which the agreements were entered into, including the motivation of the parties and the damage to the marketplace that was occurring." *Id.* TWTC asserts that the oral agreement discussed in Mr. Gray's testimony is relevant to the issues in the proceeding, *e.g.*, whether the oral agreement is part of a larger interconnection agreement between McLeodUSA and Qwest that should have been filed, and Qwest's culpability, including a pattern of conduct designed to cause damage to the marketplace. *Id. at 2-3.*

38 Like Public Counsel, TWTC asserts that Mr. Grays' testimony should not be stricken for relying on hearsay evidence, *i.e.*, the affidavits of Mr. Fisher and Ms. Deutmeyer. *Id. at 3.* TWTC asserts that hearsay testimony is admissible before the Commission, noting that the Administrative Procedure Act allows the Commission to admit and rely on hearsay evidence "if, in the judgment of the presiding officer it is the kind of evidence on which reasonably prudent persons are accustomed to rely in the conduct of their affairs." *Id. at 3, citing RCW 34.05.452(1).* TWTC asserts that the sworn affidavits from the Minnesota proceeding are the kind of evidence reasonably prudent persons would rely upon, noting that courts frequently rely upon affidavits. *Id. at 3.*

39 TWTC further asserts that Qwest's primary concern is the fact that both Mr. Fisher and Ms. Deutmeyer are former employees of McLeodUSA who are

beyond the subpoena power of the Commission. *Id.* TWTC asserts, however, that Qwest acknowledges that both Mr. Fisher and Ms. Deutmeyer were deposed in the Minnesota proceeding and that Staff intends to introduce the depositions in the proceeding pursuant to Court Rule 32(a)(3). *Id.* at 3-4.

40 **Discussion and Decision.** Qwest’s motion to strike the testimony of Mr. Gray and Mr. Smith raises questions of procedural fairness and impropriety, responsiveness of the testimony to Staff’s direct testimony, relevance to the issues in the proceeding, and expanding or adding to the scope of the proceeding. Qwest motion is focused on whether testimony should be allowed to which Qwest may file testimony in reply, not whether the testimony is in fact admissible, or should be admitted. The Commission will address the admissibility of testimony and exhibits during the hearings in this proceeding.

41 Qwest continues to argue that the timing and circumstances of Mr. Smith and Mr. Gray’s testimony appears to indicate that the testimony is supplemental direct, rather than responsive, testimony. In Order No. 13 in this proceeding, however, the Commission approved the Eschelon and McLeodUSA settlement agreements allowing the testimony to be filed, finding that “Eschelon and McLeodUSA have the option of filing testimony in response to Staff’s direct testimony even without entering into the settlement agreements.” *Order No. 13*, ¶ 31. Further, the Commission stated that Qwest may file a motion to strike testimony after it is filed, and may also file reply testimony responding to testimony filed by Eschelon and McLeodUSA. *Id.*, ¶ 32. The fact that the testimony of Mr. Smith and Mr. Gray was filed as a result of settlement does not render the testimony supplemental direct testimony. Eschelon Telecom of Washington, Inc., and McLeodUSA Telecommunications, Inc., are respondents in this proceeding and it is appropriate for these parties to file testimony in the responsive round of testimony. Given the Commission’s findings in Order No. 13, it is clear that the real issue presented in Qwest’s motion is whether the testimony is in fact responsive or relevant to the issues in the proceeding, or

whether it raises new and different issues unrelated to those Staff raised in its direct testimony.

42 The next issue to address is whether the testimony of Mr. Smith and Mr. Gray are substantively appropriate, *i.e.*, whether the testimony is responsive to and relevant to Staff's direct testimony and the allegations in the Amended Complaint, whether the testimony expands or adds to the issues in the proceeding, and whether concerns such as prejudice to Qwest or evidentiary issues such as hearsay and lack of opportunity to confront a witness override the relevance of the testimony. This Order does not apply a narrow view of whether testimony responds precisely to the matters raised in direct testimony, but considers whether the testimony is reasonably related to the matters raised and relevant to the issues in the proceeding. This Order balances the responsiveness and relevance of the testimony against the prejudicial effect and any evidentiary issues to determine whether it is appropriate to strike the testimony or attached exhibits.

43 The Amended Complaint alleges seven causes of action, two of which have been dismissed, concerning the failure to file agreements and whether Qwest gave undue preferences to certain companies, and penalties or other appropriate actions to address these violations. Mr. Wilson's direct testimony on behalf of Commission Staff addresses factual background information regarding the agreements identified in Exhibits A and B to the Amended Complaint. As noted by Qwest, Mr. Wilson addresses whether agreements were filed in a timely manner or at all, why agreements constitute interconnection agreements, whether the CLEC or Qwest was aware of the requirement to file, and the appropriate penalties for failure to file as well as for violations of state law. Mr. Wilson focuses on the presence and effects of secrecy in agreements between Qwest and CLECs throughout the testimony. *See Wilson Testimony at 7-8, 10-11, 15-16, 75, and 79.* Qwest asserts that Staff has limited its presentation to recommending the maximum level of penalties to any carrier in violation of the

federal and state statutes set forth in the Amended Complaint, and that any testimony addressing how penalties should be applied is non-responsive.

44 **Smith Testimony.** As discussed above, Qwest objects to and moves to strike Mr. Smith's testimony, asserting that it does not respond to the claims in the Amended Complaint or Staff's direct testimony, specifically objecting to testimony concerning historical grievances and allegations of Qwest's failure to perform under its interconnection agreement with Eschelon, Eschelon's role or participation in Section 271 proceedings, and testimony regarding the effectiveness of the Qwest-Eschelon agreements. Qwest also objects to the exhibits to Mr. Smith's testimony as irrelevant and non-responsive.

45 A review of Mr. Smith's testimony and Mr. Wilson's testimony demonstrates that Mr. Smith's testimony relating to historical differences between Eschelon and Qwest, particularly the testimony focusing on Eschelon's allegations of Qwest's failure to perform under its interconnection agreement, is relevant to the issue of why the agreements were entered into, the nature of the agreements, *i.e.*, whether they are in fact interconnection agreements, and whether Qwest or Eschelon knew that the agreements should have been filed with the Commission. This portion of Mr. Smith's testimony reasonably relates to Mr. Wilson's testimony, and does not expand the issues.

46 On the contrary, testimony by Mr. Smith concerning actions by Qwest or Eschelon after the agreements were entered into, such as the effectiveness of the agreements or efforts to enforce the agreements are not within the scope of this proceeding. Such testimony can only be considered as expanding the scope and focus of the proceeding and as inflammatory by asserting other bad acts by Qwest not raised in the complaint. Testimony and exhibits relating to these matters should be stricken from the record.

- 47 Mr. Smith attaches six exhibits to his testimony. Three of the exhibits, RAS-2, RAS-3, and RAS-4, relate to historical differences between Eschelon and Qwest, and include the affidavit of Ms. Powers, which was filed in the Minnesota proceeding. Ms. Powers' affidavit, Exhibit RAS-4, is also attached to Mr. Wilson's direct testimony as Exhibit TLW-76. Mr. Smith appears to include Exhibits RAS-2 and RAS-3 to support testimony regarding Qwest's alleged failures to provide UNE-P. *Smith Testimony at 6, lines 20-21*. Mr. Smith's testimony on the issue in conjunction with Ms. Powers' affidavit provides sufficient background information regarding the historical differences between Eschelon and Qwest. Exhibits RAS-2 and RAS-3 do not add significantly to the other evidence on the issue and only provide additional factual assertions and allegations by Eschelon that may unnecessarily expand the scope of the proceeding. Exhibits RAS-2 and RAS-3 are stricken from the record.
- 48 Exhibits RAS-5, RAS-6, and RAS-7 to Mr. Smith's testimony address events and actions by Qwest or Eschelon after the agreements were entered into, such as the effectiveness of the agreements or efforts to enforce the agreements. Similar to the Powers affidavit, Exhibit RAS-6, a June 24, 2003, letter from J. Jeffrey Oxley of Eschelon to Commissioner Marc Spitzer of the Arizona Corporation Commission, is included in Mr. Wilson's Exhibit TLW-76, and is appropriate for Mr. Smith to attach to his testimony and to discuss. On the contrary, Exhibits RAS-5 and RAS-7 address Eschelon's grievances with Qwest concerning problems with its agreements with Qwest and an escalation process after the agreements at issue in this proceeding were entered into. These two exhibits only expand the scope of the proceeding and could require Qwest to prepare reply testimony on matters that are not at issue in the proceeding. Exhibits RAS-5 and RAS-7 are stricken.

49 Based on the above discussion, the following portions of Mr. Smith's testimony are stricken:

- Page 4, line 5 through line 9 in total, line 12 through line 23 in total;
- Page 6, lines 20-21: "Exhibit Nos. __, __ (RAS -2, RAS -3) also describe these failures.";
- Page 14, lines 22 though 25, in total;
- Page 15, line 20, following the word "Yes," through line 25.
- Page 16, lines 7 to 8, in total, and lines 20 through 26, in total;
- Page 17, lines 1 though 13, in total;
- Page 18, the sentence beginning on line 15, "As explained . . ." through the end of line 16; and
- Exhibits RAS-2, RAS-3, RAS-5, and RAS-7.

50 **Gray Testimony.** Qwest moves to strike the testimony of Mr. Gray, asserting first that Mr. Gray lacks sufficient knowledge of the events discussed in his testimony to provide "expert" or factual testimony. Qwest asserts that Mr. Gray only bolsters or augments Mr. Wilson's characterization of the agreements. Similar to its objections to Mr. Smith's testimony, Qwest objects to Mr. Gray's testimony of historical differences between McLeodUSA and Qwest as non-responsive and expanding the scope of the proceeding. Qwest objects most strongly to testimony and evidence concerning an oral agreement between Qwest and McLeodUSA for a volume discount. Qwest asserts that the testimony is non-responsive and expands the scope of the proceeding, as Mr. Wilson did not address the oral agreement, and that the affidavits of Mr. Fisher and Ms. Deutmeyer are hearsay evidence, admission of which would significantly prejudice Qwest.

51 First, given Staff's claim that Mr. Gray's testimony was mistakenly portrayed in the settlement agreement as "expert" testimony, rather than factual testimony, the Commission will treat Mr. Gray as a fact witness.

52 Second, as with Mr. Smith's testimony, a review of Mr. Gray's and Mr. Wilson's testimony demonstrates that Mr. Gray's testimony relating to historical differences between McLeodUSA and Qwest, particularly those focusing on McLeodUSA's allegations that Qwest failed to perform under its interconnection agreement with McLeodUSA are relevant to the issue of why the agreements were entered into, the nature of the agreements, *i.e.*, whether they are in fact interconnection agreements, and whether Qwest or McLeodUSA knew that the agreements should have been filed with the Commission. This portion of Mr. Gray's testimony reasonably relates to Mr. Wilson's testimony and does not expand the issues, as the only allegations upon which the Commission may impose penalties are those agreements identified in Exhibits A and B to the Amended Complaint.

53 As discussed above, testimony by Mr. Gray concerning actions by Qwest or McLeodUSA after the agreements were executed, such as the effectiveness of the agreements or efforts to enforce the agreements are not within the scope of this proceeding. Such testimony can only be considered as expanding the scope and focus of the proceeding. Such testimony can also be seen as inflammatory by asserting other bad acts by Qwest that are not raised in the complaint. Testimony and exhibits relating to these matters should be stricken from the record.

54 Mr. Gray also attaches six exhibits to this testimony. Exhibits A1 and A2 are letters from McLeodUSA to the U.S. Department of Justice in 1997 addressing McLeod's concerns with Qwest. Exhibit B is a chart identifying Qwest's performance in Minnesota in providing Centex and UNE products. Exhibit C is the affidavit of Mr. Fisher, filed in the Minnesota proceeding. Exhibit D is the affidavit of Ms. Deutmeyer, also filed in the Minnesota proceeding. Exhibit E contains excerpts from a transcript of a McLeodUSA 3rd Quarter Analyst Teleconference call. Exhibit E is referenced in Mr. Wilson's Exhibit TLW-76.

55 Under the analysis applied to exhibits to Mr. Smith's testimony, Exhibits A1, A2 and B do not add significantly to Mr. Gray's testimony concerning historical differences between McLeodUSA and Qwest. The exhibits only provide additional factual assertions and allegations by McLeodUSA that may unnecessarily expand the scope of the proceeding. In addition, Exhibit B relates to McLeod's experience with Qwest in Minnesota, not Washington. Exhibits A1, A2, and B are stricken from the record.

56 Exhibit E is appropriately included in the testimony as relating to Staff's exhibit TLW-76, and addressing McLeodUSA's posture on the secrecy or lack of secrecy involving agreements with Qwest.

57 Qwest argues the most strongly concerning the Fisher and Deutmeyer affidavits, claiming that the Commission and Qwest will be denied the opportunity to confront the witnesses, and that the affidavits are hearsay evidence that should be stricken from the record. Staff, Public Counsel, and TWTC all correctly cite to the Administrative Procedure Act and Commission procedural rules allowing the Commission to admit hearsay evidence "if in the judgment of the presiding officer it is the kind of evidence on which reasonably prudent persons are accustomed to rely in the conduct of their affairs." *RCW 34.05.452(1)*.

58 Qwest asserts in its motion and in oral argument that Mr. Fisher and Ms. Deutmeyer were not made available in the Minnesota proceedings and that the Minnesota Commission admitted the affidavits as well as depositions taken of Mr. Fisher and Ms. Deutmeyer. Qwest asserts that allowing these affidavits in the proceeding to consider an oral agreement not listed in the Amended Complaint will expand the issues in the proceeding and would be prejudicial to Qwest. Staff and TWTC note that Qwest is aware of the affidavits and the depositions of Mr. Fisher and Ms. Deutmeyer, having taken the depositions in the Minnesota proceeding, so that they are not prejudiced by inclusion of the affidavits in the proceeding. TWTC asserts that testimony and evidence

concerning the oral agreement addresses Qwest's pattern of behavior and that the agreement may be a part of other unfiled agreements.

59 Qwest asserts that allowing the affidavits will allow Staff to expand the scope of its case by addressing penalties for violation based on new evidence not previously pled or alleged in direct testimony. Staff asserts that Mr. Gray's testimony and the attached affidavits will present the Commission with more information on which to base assessment of penalties upon a finding of violation, but disputes that this type of evidence would expand the scope of the proceeding.

60 The Fisher and Deutmeyer affidavits address the details of discussions and agreements between Qwest and McLeodUSA relating to Agreement No. 45A and an oral agreement relating to volume discounts. The affidavits address matters relating to the issue of why the agreements were entered into, the nature of the agreements, *i.e.*, whether they are in fact interconnection agreements, and whether Qwest or Eschelon knew that the agreements should have been filed with the Commission, all matters that are highly relevant to the issues in this proceeding. The Minnesota Public Utilities Commission admitted and relied upon these affidavits in their unfiled agreements proceeding. While the testimony and affidavits on the issue of the oral agreement may require Qwest to conduct some additional discovery—Qwest has already deposed Mr. Fisher and Ms. Deutmeyer—the information is hearsay evidence likely to be admissible in this proceeding and should not be stricken: the information in the affidavits is highly relevant to the proceeding, and the affidavits have been admitted, together with depositions, before the Minnesota Commission. The affidavits, Exhibits C and D to Mr. Gray's testimony, should remain in the record.

61 Based upon the discussion above, the following portions of Mr. Gray's testimony are stricken from the record:

- Page 7, lines 19-20, the sentence beginning "Some of. . .";
- Page 12, from line 5, the sentence beginning "As you can see . . . through line 9, through the word "These"; and
- Exhibits A1, A2, and B.

62 This Order strikes testimony and exhibits addressing events and actions by Qwest and CLECs after the agreements at issue were executed, and strikes exhibits that are cumulative and unnecessary in identifying the context in which agreements were entered into, whether agreements were required to be filed, and whether Qwest and the CLECs were aware of the obligation to file. These portions of the testimony and exhibits are stricken to address Qwest's claims that the testimony of Mr. Smith and Mr. Gray will alter the scope, length, complexity and tone of the proceedings. Certain portions of the testimony and exhibits are highly relevant to the issues in this proceeding and responsive to Staff's direct testimony. Qwest may address the remaining portions of the testimony of Mr. Smith and Mr. Gray in reply testimony.

B. Motion to Strike Testimony of Mr. Gates.

63 **Gates Testimony.** Mr. Gates describes in his testimony the historical background of state and FCC enforcement proceedings concerning agreements entered into between Qwest and CLECs and not filed with state commissions. *Gates Testimony at 3-5, 9-11.* Mr. Gates asserts that the recommendation in Commission Staff's direct testimony for penalties against Qwest are not sufficient, as they do not "remedy the specific harm experienced by the CLECs that did not have access to the more favorable terms, conditions and rates that were provided in the unfiled agreements." *Id. at 6-7.*

64 Mr. Gates asserts that TWTC suffered harm by not receiving the discounts made available in unfiled agreements to other CLECs, and asserts harm to the market and consumers generally. *Id. at 11-14*. Finally, Mr. Gates suggests three potential remedies for compensating TWTC and other affected CLECs and recommends a lump sum payment by Qwest to TWTC of the difference between rates paid during the time of the unfiled agreements and what TWTC might have received if it had opted in to one of the agreements. *Id. at 14-21*.

65 **Qwest Motion to Strike.** Qwest moves to strike Mr. Gates' testimony, asserting that the testimony impermissibly expands the issues in the proceeding to include reparations to CLECs, as the Complaint and Staff's testimony are limited to assessing penalties against Qwest. *Qwest Motion to Strike Gates Testimony at 2-12*. Qwest asserts that TWTC's request for reparations is barred by the time limitations in RCW 80.04.240, as TWTC was aware of the existence of the unfiled agreements in the proceeding in Minnesota, and intervened in that proceeding in June 2002. *Id. at 12-15*. Qwest asserts that TWTC has not properly asserted a claim for reparations to invoke RCW 80.04.220 or RCW 80.04.230, and that the Commission lacks authority to grant reparations in this proceeding. *Id. at 16-19*. Qwest also asserts that Mr. Gates' testimony is more appropriately direct testimony that should have been filed on June 8, 2004. *Id. at 19*. Qwest requests that the Commission strike Mr. Gates' testimony to avoid the need to conduct additional discovery, including depositions, and to relieve Qwest of the burden of filing extensive reply testimony to respond to Mr. Gates' testimony. *Id. at 20*.

66 **TWTC Answer.** TWTC asserts in response to Qwest's motion that Mr. Gates' testimony does not expand the issues in the proceeding, but is within the scope of the issues in the proceeding. *TWTC Answer at 3-4*. TWTC asserts that paragraph 49 of the Amended Complaint stated the Commission's intent "To make such other determinations and enter such orders as may be just and reasonable," in addition to determining whether to impose monetary penalties against Qwest and the CLECs, asserting that the Commission intended to

consider remedies other than penalties. *Id. at 3*. TWTC also asserts that the Commission has indicated in prior orders its intent to hear relevant evidence concerning the appropriate remedies in the proceeding. *Id. at 5*.

67 TWTC asserts that its request for reparations is not barred by any statute of limitations, arguing that a cause of action for reparations does not accrue until the Commission determines that the Eschelon and McLeodUSA agreements should have been filed. *Id. at 9*. TWTC also asserts that the Commission has authority under RCW 80.04.220 to order reparations when a public service company has charged an excessive amount for service. *Id. at 9-10*. TWTC argues that by hiding the discounts made available to other CLECs such as Eschelon and McLeodUSA, Qwest was charging excessive rates to other CLECs. *Id. at 10*. TWTC asserts that a U.S. District Court decision in *Qwest Corp. v. Minn. Pub. Utils. Comm'n*, Civil No. 03-3476 ADM/JSM, 2004 WL 1920970 (D. Minn., August 25, 2004), is not applicable, as the Minnesota statutory scheme is different from the Washington state statutory scheme. *Id. at 10-11*. TWTC also responds that TWTC, as an intervenor, properly filed responsive testimony in response to Staff's direct testimony. *Id. at 11*.

68 TWTC asserts that should the Commission determine it lacks authority to order reparations or refunds in this proceeding, that it should make findings that the failure to file agreements, in particular the Eschelon and McLeodUSA agreements, violated the Act and harmed CLECs. *Id. at 6*. TWTC asserts that Mr. Gates testimony is relevant to the issue of harm to CLECs and, for this basis, should not be stricken. *Id.*

69 **Staff Answer.** Commission Staff agrees with Qwest that it is procedurally inappropriate for TWTC to seek credits or reparations at this point in the proceeding. *Staff Answer at 1*. Staff disagrees, however, that Mr. Gates' testimony should have been filed as direct testimony, and requests that the

Commission grant Qwest's motion in part, and only strike that portion of Mr. Gates' testimony relating to reparations or credits to TWTC. *Id. at 1-2, 9-10.*

70 Staff asserts that the Amended Complaint did not limit the scope of potential relief to only penalties, but that the Commission may only grant relief for which it has the statutory authority. *Id. at 2, citing Tuerk v. Department of Licensing, 123 Wn.2d 120, 124 (1994).* Staff agrees with TWTC that paragraphs 48 and 49 of the Amended Complaint identify the remedies the Commission sought through the complaint. *Id. at 2-3.* Staff notes, however, that the statutes identified in the Amended Complaint do not include RCW 80.04.220 or RCW 80.04.230, which allow for reparations or refunds. *Id. at 3.* Staff further states that it has not identified any express or implied authority that would allow the Commission to issue or grant credits. *Id.*

71 Staff further asserts that RCW 80.04.220 or RCW 80.04.230 are not pure remedy statutes, and that it would not be procedurally appropriate to permit the Commission to consider causes of action under RCW 80.04.220 or RCW 80.04.230 without requiring a party to plead them. *Id. at 3-5.* Staff also asserts that allowing TWTC's intervention and subsequent pleadings to roughly comply with the procedures in RCW 80.04.220 and RCW 80.04.230 for filing a complaint, and subsuming the claims within the Amended Complaint, would not be consistent with Commission statutes requiring notice requirements. *Id. at 5-6, citing RCW 80.04.110(1) and (2).*

72 Staff also asserts that the provisions of RCW 80.04.220 and RCW 80.04.230 do not specifically relate to the facts set out in the pleadings. *Id. at 6.* Staff asserts that RCW 80.04.220 requires a finding by the Commission of "excessive or exorbitant rates," and that RCW 80.04.230 requires a finding of charges "in excess of the lawful rate." Staff asserts that, with regard to interconnection agreements, it is not clear that there is any one specific lawful rate in force, as there are various lawful rates for various services provided under such agreements. *Id. at 6-7.*

Staff asserts that the Commission need not reach this issue, due to the procedural defects in TWTC's request. *Id. at 7.*

73 Finally, Staff asserts that the Commission brought the complaint in this matter "acting in its role as prosecutor to penalize parties for unlawful conduct." *Id.* The Commission would need to amend the complaint to broaden the relief sought to include the reparations or credits requested by TWTC. *Id. at 8.* Staff asserts that it is not appropriate to allow a third party to consolidate a private cause of action at this phase of the proceeding, in particular as hearing TWTC's claim may add extensive discovery, lengthen the hearing time, blur the lines of regulation and private remedies, stand as a barrier to settlement, and create a basis for appeal, lengthening the conclusion of the proceeding. *Id. at 8-9.*

74 **Discussion and Decision.** Mr. Gates relies on RCW 80.04.220, RCW 80.04.230, and RCW 80.04.240, in his testimony to propose that the Commission order Qwest to pay a lump sum payment to TWTC for the difference between what TWTC paid Qwest during the time of the unfiled agreements and what TWTC would have paid had it opted into the agreements. *Gates Testimony at 17-20.* Mr. Gates asserts that the Commission can order such reparations or credits after finding that "Qwest was in effect charging other CLECs rates that were excessive." *Id. at 19, lines 460-461.*

75 Qwest's motion to strike Mr. Gates' testimony is granted, in part, as to the portion of the testimony relating to a claim or request for reparations or credits to TWTC and other CLECs. Specifically, the portion of Mr. Gates' testimony from page 14, line 330, through page 21, line 529, is stricken. This portion of the testimony, while responsive to Staff's direct testimony concerning remedies and possible harm, proposes remedies that are not within the scope of the Amended Complaint, and raises claims that have not been properly pleaded or raised in the proceeding. No party seeks further amendment of the Complaint.

76 Mr. Gates submits testimony on behalf of TWTC, an intervenor in the proceeding. Mr. Gates' testimony is responsive to Mr. Wilson's direct testimony in that it responds to Staff's discussion of the appropriate penalty for violations of federal and state law. *Gates Testimony at 6-8*. While Qwest and Staff argue that TWTC's proposal for reparations or credits is not responsive to Staffs' direct testimony, Mr. Gates' proposal at pages 14 through 21 of his testimony provides an alternative view of the appropriate remedies in this proceeding. Mr. Gates also addresses, generally, background and historical information he believes necessary to address the issue of harm raised in Mr. Wilson's direct testimony. *Id. at 9-14*. Mr. Gates' testimony is not late-filed direct testimony, but was properly filed as responsive testimony. As discussed below, however, Mr. Gates' proposal for reparations or credits is not properly an issue the Commission may consider in this proceeding.

77 The Amended Complaint asserted seven causes of action, three of which are based upon federal law and claim that Qwest and the 13 CLECs failed to file, or did not timely file, interconnection agreements with the Commission. The remaining three causes of action are based on state law, specifically RCW 80.36.170, RCW 80.36.180, and RCW 80.36.186.³ These three statutes prohibit telecommunications companies from engaging in or providing undue or unreasonable preference or advantage to other companies for services or rates.

78 In paragraphs 46 through 49 of the Amended Complaint, the Commission states:

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

(1) To determine whether the respondents or each of them have violated the statutes set forth in the allegations above;

³ The Commission dismissed the fourth cause of action under RCW 80.36.150 in Order No. 05.

(2) To determine whether the Commission should impose monetary penalties against the respondents or each of them in an amount to be proved at hearing; and

(3) To make such other determinations and enter such orders as may be just and reasonable.

79 The fifth, sixth, and seventh causes of action in the Amended Complaint addressing unreasonable preferences in rates, in conjunction with the phrase in paragraph 49 intending that the Commission will “make such other determinations and enter such orders as may be just and reasonable” could be interpreted as considering remedies such as reparations or refunds under RCW 80.04.220 and RCW 80.04.230. The Amended Complaint, however, does not identify these statutes as causes of action or possible remedies.

80 Staff and Qwest correctly assert that RCW 80.04.220 and RCW 80.04.230 are not pure remedy statutes but require a party to file a pleading – a complaint – with the Commission asserting the claim of unreasonable rates or overcharges:

When complaint has been made to the commission concerning the reasonableness of any rate, toll, rental or charge for any service performed by any public service company, and the same has been investigated by the commission, and the commission has determined that the public service company has charged an excessive or exorbitant amount for such service, and the commission has determined that any party complainant is entitled to an award of damages, the commission shall order that the public service company pay to the complainant the excess amount found to have been charged, whether such excess amount was charged and collected before or after the filing of said complaint, with interest from the date of the collection of said excess amount.

RCW 80.04.220 (emphasis added).

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

RCW 80.04.230 (emphasis added).

81 The Commission cannot allow a new cause of action under the Amended Complaint without further amending the complaint. No party, including TWTC, has filed with the Commission a claim in this proceeding or pleading raising a claim under RCW 80.04.220 or RCW 80.04.230. TWTC filed a pleading in December 2003 requesting reparations in response to Qwest's Motion to Dismiss. That pleading did not constitute a complaint under RCW 80.04.110, RCW 80.04.220, or RCW 80.04.230 filed with the Commission. Even if Mr. Gates' responsive testimony were seen as such a pleading, it is too late in the proceeding to amend the complaint to include such a third party claim or consolidate such a claim with the present docket.

82 In rejecting TWTC's request in its response to Qwest's motion to dismiss, the Commission stated in paragraph 129 of Order No. 05 that "Time Warner's request is premature, as the issue before the Commission at this stage of the proceeding is the determination of dispositive motions, not a review of evidence or the fashioning of a remedy." The Commission further stated in the paragraph "We will defer Time Warner's request to the fact-finding portion of the proceeding, when Time Warner will have an opportunity to present any relevant evidence on the issue before the Commission." TWTC asserts that through this

statement, “the Commission clearly anticipated hearing evidence relating to appropriate remedies in this case other than imposition of penalties.” *TWTC Answer at 5.*

83 While the Commission does anticipate hearing evidence relating to appropriate remedies in this proceeding, the Commission may only grant remedies that it is authorized by statute to grant. In paragraph 10 of Order No. 14, a prehearing conference order, the Administrative Law Judge determined that all issues, including the appropriate remedy for violations alleged in the Amended Complaint, should be addressed in pre-filed testimony, but that parties also may address in briefs the remedies proposed in prefiled testimony. Prefiled testimony and evidence that address remedies that the Commission may not grant, and that would expand the scope of the proceeding, are not appropriate and should be stricken.

84 Having resolved the arguments raised in Qwest’s motion to strike concerning the scope of the Amended Complaint and the failure to properly plead a claim under RCW 80.04.220 and RCW 80.04.230, the Commission need not address Qwest’s arguments concerning statutory authority and whether TWTC’s reparations proposal are time-barred.

FINDINGS OF FACT

85 Having discussed above in detail the documentary evidence received in this proceeding concerning all material matters, and having stated findings and conclusions upon issues at impasse among the parties and the reasons and bases for those findings and conclusions, the Commission now makes and enters the following summary of those facts. Those portions of the preceding detailed findings pertaining to the ultimate findings stated below are incorporated into the ultimate findings by reference.

- 86 (1) Qwest Corporation is a Bell operating company within the definition of 47 U.S.C. § 153(4), and incumbent Local Exchange Company, or ILEC, providing local exchange telecommunications service to the public for compensation within the state of Washington.
- 87 (2) Eschelon Telecom of Washington, Inc., McLeodUSA Telecommunications, Inc., and Time Warner Telecom of Washington, LLC, are local exchange carriers within the definition of 47 U.S.C. § 153(26), providing local exchange telecommunications service to the public for compensation within the state of Washington, or are classified as competitive telecommunications companies under RCW 80.36.310 - .330.
- 88 (3) The Washington Utilities and Transportation Commission is an agency of the State of Washington vested by statute with the authority to regulate the rates and conditions of service of telecommunications companies within the state, and to take actions, conduct proceedings, and enter orders as permitted or contemplated for a state commission under the Telecommunications Act of 1996.
- 89 (4) On August 14, 2003, the Commission issued a complaint against Qwest Corporation and 13 other telecommunications companies in this proceeding alleging violations of state and federal law concerning 52 agreements listed in Exhibit A and an additional 25 agreements listed in Exhibit B.
- 90 (5) On September 1, 2004, Eschelon Telecom of Washington, Inc., filed with the Commission the prefiled responsive testimony of Richard A. Smith as provided in the settlement agreement between Staff and Eschelon Telecom of Washington, Inc.

- 91 (6) On September 9, 2004, McLeodUSA Telecommunications, Inc., filed with the Commission the prefiled responsive testimony of Stephen C. Gray, as provided in the settlement agreement between Staff and McLeodUSA Telecommunications, Inc.
- 92 (7) On September 14, 2004, Time Warner Telecom of Washington, LLC, filed with the Commission the prefiled direct testimony of Timothy J. Gates. On September 16, 2004, Qwest Corporation filed with the Commission its Motion to Strike Testimony of Stephen C. Gray and Richard A. Smith.
- 93 (8) Commission Staff and Public Counsel filed answers to Qwest Corporation's motions on September 24, 2004, while Time Warner Telecom of Washington, Inc., filed an answer on September 27, 2004.
- 94 (9) On October 4, 2004, Qwest Corporation filed with the Commission its Motion to Strike Testimony of Timothy J. Gates. Time Warner Telecom of Washington, LLC, filed an answer to Qwest Corporation's motion on October 8, 2004, and Qwest Corporation filed a rely on October 13, 2004.
- 95 (10) On October 5, 2004, the Commission held a hearing before Administrative Law Judge Ann E. Rendahl for the purpose of hearing oral argument on Qwest Corporation's motions to strike the testimony of Mr. Smith and Mr. Gray.
- 96 (11) Exhibits RAS-4 and RAS-6 to Mr. Smith's testimony, and Exhibit E to Mr. Smith's testimony are attached to or referenced in Exhibit TLW-76 to Mr. Wilson's direct testimony.
- 97 (12) Mr. Gray is a fact witness, rather than an expert witness, in this proceeding.

- 98 (13) The Amended Complaint did not identify RCW 80.04.220 or RCW
80.04.230 as causes of action or possible remedies.

CONCLUSIONS OF LAW

99 Having discussed above in detail all matters material to this decision, and having
stated general findings and conclusions, the Commission now makes the
following summary conclusions of law. Those portions of the preceding detailed
discussion that state conclusions pertaining to the ultimate decisions of the
Commission are incorporated by this reference.

- 100 (1) The Commission has jurisdiction over the subject matter of this
proceeding and the parties to the proceeding.
- 101 (2) The testimony of Mr. Smith and Mr. Gray were properly filed as
responsive testimony. Eschelon Telecom of Washington, Inc., and
McLeodUSA Telecommunications, Inc., are respondents in this
proceeding and it is appropriate for these parties to file testimony in the
responsive round of testimony.
- 102 (3) In considering whether testimony is responsive to direct testimony, it is
appropriate to consider whether the testimony is reasonably related to the
matters raised in direct testimony and relevant to the issues in the
proceeding. It is also appropriate to balance the responsiveness and
relevance of the testimony against the prejudicial effect and any
evidentiary issues in determining whether to strike testimony or attached
exhibits.
- 103 (4) Testimony and certain exhibits presented by Mr. Smith and Mr. Gray
concerning historical differences between Qwest Corporation and
Eschelon Telecom of Washington, Inc., and McLeodUSA

Telecommunications, Inc., including allegations that Qwest Corporation failed to perform under its interconnection agreements, are relevant to issues in this proceeding and responsive to Mr. Wilson's direct testimony concerning why certain agreements were entered into, the nature of the agreements, *i.e.*, whether they are in fact interconnection agreements, and whether Qwest Corporation or Eschelon Telecom of Washington, Inc., knew that the agreements should have been filed with the Commission.

- 104 (5) Exhibit RAS -2 and RAS -3 to Mr. Smith's testimony, and Exhibits A1, A2, and B to Mr. Gray's testimony do not add significantly to the other evidence on the issue of historical differences between Eschelon Telecom of Washington, Inc., McLeodUSA Telecommunications, Inc., and Qwest Corporation, and may unnecessarily expand the scope of the proceeding.
- 105 (6) Testimony by Mr. Smith and Mr. Gray concerning actions by Qwest Corporation, Eschelon Telecom of Washington, Inc., and McLeodUSA Telecommunications, Inc., after certain agreements were executed, including testimony addressing the effectiveness of the agreements or efforts to enforce the agreements, is not within the scope of the proceeding and not responsive to Mr. Wilson's direct testimony.
- 106 (7) Exhibits RAS -5 and RAS -7 to Mr. Smith's testimony, which address events and actions by Qwest Corporation or Eschelon Telecom of Washington, Inc., after certain agreements were executed, are not responsive to Mr. Wilson's testimony, are likely to expand the scope of the proceeding, and could require Qwest Corporation to prepare reply testimony on matters not at issue in the proceeding.

- 107 (8) The Commission may admit hearsay evidence in its proceedings “if in the judgment of the presiding officer it is the kind of evidence on which reasonably prudent persons are accustomed to rely in the conduct of their affairs.” *RCW 34.05.452(1)*.
- 108 (9) While Mr. Gray’s testimony on the issue of oral agreements and Exhibits C and D to Mr. Gray’s testimony, the affidavits of Mr. Blake Fisher and Ms. Lori Deutmeyer, could require Qwest to conduct some additional discovery, the information is hearsay evidence likely to be admissible in this proceeding: The information in the affidavits is highly relevant to the proceeding, and the affidavits have been admitted, together with depositions, before the Minnesota Commission.
- 109 (10) Mr. Gates’ testimony on behalf of Time Warner Telecom of Washington, LLC, is responsive to Mr. Wilson’s direct testimony in that it responds to Staff’s discussion of the appropriate penalty for violations of federal and state law and provides general background and historical information that Time Warner Telecom of Washington, LLC, believes is necessary to address the issue of harm raised in Mr. Wilson’s testimony.
- 110 (11) *RCW 80.04.220* and *RCW 80.04.230* are not pure remedy statutes, but require a party to file a pleading, *i.e.*, a complaint, with the Commission asserting the claim of unreasonable rates or overcharges.
- 111 (12) The Commission may only grant remedies in this proceeding that it is authorized by statute to grant.
- 112 (13) The portion of Mr. Gates’ testimony relating to a claim or request for reparations or credits to Time Warner Telecom of Washington, LLC, and other CLECs, while responsive to Staff’s direct testimony concerning remedies and possible harm, proposes remedies that are not within the

scope of the Amended Complaint, and raises claims that have not been properly pleaded or raised in the proceeding.

ORDER

THE COMMISSION ORDERS:

- 113 (1) Qwest's Motion to Strike Testimony of Stephen C. Gray and Richard A. Smith is granted in part by striking the following portions of Mr. Smith's testimony:
- Page 4, line 5 through line 9 in total, line 12 through line 23 in total;
 - Page 6, lines 20-21: "Exhibit Nos. __, __ (RAS -2, RAS-3) also describe these failures.";
 - Page 14, lines 22 though 25, in total;
 - Page 15, line 20, following the word "Yes," through line 25.
 - Page 16, lines 7 to 8, in total, and lines 20 through 26, in total;
 - Page 17, lines 1 though 13, in total;
 - Page 18, the sentence beginning on line 15, "As explained . . ." through the end of line 16; and
 - Exhibits RAS-2, RAS-3, RAS-5, and RAS-7.
- 114 (2) Qwest's Motion to Strike Testimony of Stephen C. Gray and Richard A. Smith is granted in part by striking the following portions of Mr. Gray's testimony:
- Page 7, lines 19-20, the sentence beginning "Some of. . .";
 - Page 12, from line 5, the sentence beginning "As you can see . . . through line 9, through the word "These"; and
 - Exhibits A1, A2, and B.

- 115 (3) Qwest's Motion to Strike Testimony of Timothy J. Gates is granted in part by striking a portion of Mr. Gates' testimony beginning on page 14, line 330 through page 21, line 529.

Dated at Olympia, Washington, and effective this 22nd day of October, 2004.

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

ANN E. RENDAHL
Administrative Law Judge

NOTICE TO PARTIES: This is an Interlocutory Order of the Commission. Administrative review may be available through a petition for review, filed within 10 days of the service of this Order pursuant to WAC 480-07-810(3).