**BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION**

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| WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION,<br><br>Complainant,<br><br>v.<br><br>ADVANCED TELECOM GROUP, INC; ALLEGIANCE TELECOM, INC.; AT&T CORP; COVAD COMMUNICATIONS COMPANY; ELECTRIC LIGHTWAVE, INC.; ESCHELON TELECOM, INC. f/k/a ADVANCED TELECOMMUNICATIONS, INC.; FAIRPOINT COMMUNICATIONS SOLUTIONS, INC.; GLOBAL CROSSING LOCAL SERVICES, INC.; INTEGRA TELECOM, INC.; MCI WORLDCOM, INC.; McLEODUSA, INC.; SBC TELECOM, INC.; QWEST CORPORATION; XO COMMUNICATIONS, INC. f/k/a NEXTLINK COMMUNICATIONS, INC.,<br><br>Respondents | Docket No. UT-033011<br><br>QWEST CORPORATION'S RESPONSE TO MOTIONS OF ESCHELON TELECOM AND MCLEODUSA FOR PROTECTIVE ORDER |

*1* Qwest Corporation ("Qwest"), by and through its undersigned counsel, respectfully responds to the motions of Eschelon Telecom of Washington, Inc. ("Eschelon") and McLeodUSA Telecommunications Services, Inc. ("McLeod") seeking protective orders postponing and relocating the depositions of their senior executives (Messrs. Smith and



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Gray, respectively) to locations other than Olympia (Minneapolis and Cedar Rapids, Iowa, respectively). The Commission should deny these motions because neither Eschelon nor McLeod can credibly claim that these depositions as noticed subject it to annoyance, embarrassment, oppression or undue burden or expense, as WAC 480-07-420(3) requires.

*2* Eschelon and McLeod each made a conscious business decision to submit testimony from senior executives as part of their companies' settlements with Staff. The testimony was filed in the response phase of the case, and nobody disputes that Qwest is entitled to depose these witnesses in time to cite the transcripts in Qwest's reply testimony, which is due November 8, or that Qwest has acted diligently since their testimony was filed. But by seeking protective orders that would postpone the depositions until well after reply testimony is due, Eschelon and McLeod wrongly seek to have their cake and eat it too. On the one hand, they want the benefits of their settlements with Staff, the opportunity to remain as parties in the case and to lob accusations at Qwest, and on the other to dodge their obligation to appear for deposition and to answer questions that may assist Qwest in responding to their allegations. And their proposed alternatives – that Qwest be relegated to others' depositions from other cases or to interrogatories – would seriously prejudice Qwest.

*3* The Commission should hold Eschelon and McLeod to the obligations <u>they</u> assumed when they filed testimony in this case, should deny their motions for protective order and order Messrs. Smith and Gray to appear for deposition as noticed. In the event the Commission is not inclined to require Messrs. Smith and Gray to appear for their depositions as noted, the Commission should consider the alternative proposal discussed in section IV below.



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## I. BACKGROUND

*4* As the Commission is well aware, Messrs. Smith and Gray first surfaced as witnesses at the response testimony stage of the proceeding. Qwest first learned in mid-August, when Staff, Eschelon and McLeod revealed their settlements, that testimony would be coming, and received the testimony on August 30 and 31, 2004.

*5* Because these witnesses added a great number of additional issues to the case, and knowing that reply testimony was due on November 8, Qwest moved promptly (on September 15, 2004) to strike both witnesses' testimony and asked the Commission to rule on an expedited basis. Staff, Public Counsel and Time Warner filed oppositions on a shortened schedule, Qwest waived its right to file a written reply, the motion was argued on October 5 and was resolved in Order No. 15 on October 22, 2004.

*6* While the motion to strike was pending, however, Qwest saw that time was getting short and contacted counsel for Eschelon and McLeod to negotiate possible deposition dates in the event the motion was denied (as it ultimately was, in part). Counsel responded promptly, but the dates offered – which track the suggestions in both parties' motions – come well after Qwest's reply testimony is due. Qwest advised counsel for both parties that it would be serving the notices at issue – not to be difficult or confrontational, but because Qwest is bound by the schedule. Counsel understood, and these unfortunately-necessary motions followed.

## II. QWEST IS ENTITLED TO DEPOSE THESE WITNESSES IN TIME TO HAVE TRANSCRIPTS AVAILABLE IN CONNECTION WITH THE PREPARATION OF ITS REPLY TESTIMONY, WHICH IS DUE ON NOVEMBER 8, 2004

*7* Nobody disputes, or fairly can dispute, that Qwest is entitled to depose Messrs. Smith and Gray in advance of filing its reply testimony. WAC 480-07-410(1) specifically permits "a party [to] depose any person identified by another party as a potential witness." Likewise,



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nobody takes issue with the fact or form of Qwest's notice – the only real issues are the timing and venue of the depositions.

*8* Messrs. Smith and Gray are more than potential witnesses. They are actual witnesses who have filed testimony and are bound by the terms of their companies' Commission-approved settlements with Staff to appear and testify at the forthcoming evidentiary hearing. In its motion to strike their testimony, Qwest argued, and Staff did not dispute, that Messrs. Smith and Gray add a great many new factual issues and allegations to this case. But Order No. 15 holds that their filings qualify as response testimony that adds relevant factual context that the Commission can consider when it determines whether or to what extent it should impose penalties in this case.[1]

*9* Order No. 15 also holds that the Smith and Gray testimony properly qualify as response testimony.[2] As such, Qwest's only opportunity to counter these new allegations in written testimony comes at the reply stage,[3] and under the current schedule Qwest's reply testimony is due on or before November 8, 2004.[4] This means that Qwest must have the opportunity to depose Messrs. Smith and Gray in time to obtain transcripts and incorporate them into the reply testimony, all in less than two weeks.

## III. NEITHER ESCHELON NOR MCLEOD HAS DEMONSTRATED THAT A TIMELY DEPOSITION WOULD CAUSE ANNOYANCE, EMBARRASSMENT, OPPRESSION OR UNDUE BURDEN OR EXPENSE

*10* Neither Eschelon nor McLeod can credibly claim to be surprised that Qwest would seek the opportunity to depose its witnesses. Before it settled with Staff, Eschelon organized and led the deposition of Staff's witness, Mr. Wilson, questioning him for nearly a full

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1 *See, e.g.*, Order No. 15, ¶¶ 45, 52.

2 *Id*., ¶ 41.

3 *See* Order No. 06, Appendix B; Order No. 14, Appendix A.

4 *See* Order No. 14, Appendix A.



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day. Both companies have participated actively in this case as parties since its inception and are fully aware of the schedule, including the deadline for reply testimony. Both companies surely knew that if their witnesses' testimony survived the motion to strike, Qwest would counter their allegations in reply testimony. And both companies, which are bound by their settlements with Staff to file response testimony and produce their witnesses at the hearing, surely must have anticipated that their executives (identified by name in their respective settlement agreements) would be deposed.

*11* It is against this backdrop, then, that the Commission must analyze whether Eschelon and McLeod have satisfied their burden of proving their right to a protective order. They must prove that the depositions would cause them "annoyance, embarrassment, oppression, or undue burden or expense" justifying protection from the Commission.[5] They have failed to meet this burden. Eschelon and McLeod have reaped the benefits of their settlements with Staff. They have had Staff's claims against them dismissed, at minimal financial cost, and have been permitted to remain in the case as parties. But those benefits come with costs and obligations, and it simply is not good enough now, when those obligations come due, to be too busy to follow through.

*12* Timing. Both Eschelon and McLeod claim that the depositions cannot go forward in time for Qwest's reply testimony because their executives are busy – Mr. Smith because of a transaction Eschelon is trying to complete and Mr. Gray because of amorphous "year-end" matters and the FCC's triennial review. Qwest does not doubt their schedules or the need to address these other business issues, but does question their right to decide unilaterally that their obligations in this case take a back seat to other matters. Both Eschelon and McLeod met the deadlines that suited them, *i.e.*, the deadline for preparing

[5] *See* WAC 480-07-420(3).



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and filing their testimony against Qwest, and should be required to meet the remaining deadlines in the case as well. Moreover, neither offers a single reason why the schedules of its executives – who, again, should have anticipated this very possibility – should require Qwest to go forward with its reply testimony without the depositions to which it is entitled.

*13* Venue. The Commission's procedural rules require depositions to go forward in Olympia unless all other parties and the presiding officer agree otherwise,[6] and neither motion contains any direct indication that Staff or any other party is willing to travel to the Midwest or to forego in-person participation. Nevertheless, both Eschelon and McLeod claim that their busy executives should be deposed in their respective hometowns so they do not have to travel. And again, neither offers any reason why Qwest should be required to bear the cost of flying its Seattle-based in-house counsel to Minneapolis and Cedar Rapids, Iowa – a burden Qwest would bear twice if both motions succeed. Messrs. Smith and Gray will have to travel to Olympia for the hearing, and their depositions are no less important.

*14* Alternatives are neither fair nor practical. Rather than fulfilling their obligations as parties in this case (parties that have filed testimony hostile to Qwest), Eschelon and McLeod both suggest that Qwest should be satisfied with less than the depositions the rules provide. Eschelon claims that because Mr. Smith has been deposed in other cases, Qwest is not entitled to a deposition in this one. But there is no "other case" exception in the rule, and the fact remains that Mr. Smith offered testimony in this case that Qwest is entitled to test independently.[7] And McLeod would have Qwest settle for interrogatories,

[6] *See* WAC 480-07-410(2) and former WAC 480-09-480(6)(b).

[7] Neither of the other depositions of Mr. Smith is a satisfactory substitute for a deposition here. The more recent deposition, in a Washington federal court case, involved different issues and may be subject to a protective order that limits or curtails its usage here (Qwest is still endeavoring to sort that out). The older deposition, taken under the aegis of the Arizona Commission's unfiled agreements case, was taken by the Arizona Residential Utility Consumer



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which would allow McLeod's lawyers to assist in the preparation of responses and deprive Qwest of any opportunity to test Mr. Gray's knowledge of the matters contained in his testimony, as well as to observe his demeanor and assess his credibility. Again, the rules simply do not permit a party to substitute unilaterally interrogatories for the deposition of its witness, and McLeod cites nothing other than Mr. Gray's schedule and its own needs in support of its absurd proposal.

*15* At the end of the day, McLeod and Eschelon agreed as part of their settlements with Staff to submit testimony and continue participating in the case as parties. So long as both companies plan to leave the testimony of their executives in the record to be used (by them or by Staff) against Qwest, they bear the concomitant obligation to make their witnesses available for a timely deposition. There is no reason, and they have cited none, why Qwest must simply agree to forego its rules-given right to depositions, and to compromise its ability to defend itself in this important proceeding. The Commission should hold Eschelon and McLeod to the bargains they made and to the obligations to this case that flow from them, and therefore should order Messrs. Smith and Gray to appear for deposition as noticed.

## IV. ALTERNATIVE PROPOSAL

*16* In the event the Commission believes the depositions should not be conducted as currently scheduled, Qwest suggests that the procedural schedule be modified to permit the Gray and Smith depositions to occur on November 19 and 22 in Olympia[8] and to

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Office, not Qwest. Mr. Smith had not filed written testimony in that case at the time of the deposition, nor did he file any later; obviously, that deposition presented no opportunity to test anything like the written testimony Eschelon filed here.

[8] McLeod indicated in its motion that Mr. Gray would be available on November 19. Eschelon indicated in its motion that Mr. Smith would be available on November 18. However, this morning, Eschelon indicated to the undersigned that it has discovered that Mr. Smith has a conflict on November 18, but would be available on Monday, November 22.



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reschedule the submission of all parties' reply testimony from November 8 to December 6. Doing so would accommodate Eschelon's and McLeod's apparent scheduling conflicts while still permitting Qwest to depose Messrs. Smith and Gray prior to finalizing and filing reply testimony.

*17* Should the Commission opt for this alternative, other changes to the procedural schedule will be necessary. Notably, the discovery cutoff and deposition cutoff set out in Order No. 14 will need to be removed from the schedule, as Qwest and Staff will need the opportunity to test each other's reply testimony during the month between the filing of reply and the evidentiary hearing.

*18* It also is possible that the evidentiary hearing will need to be rescheduled in the event either party requests, and is granted, the opportunity to file surrebuttal testimony. The possibility of surrebuttal was discussed at some length during the October 5, 2004 oral argument on Qwest's motions to strike. During that hearing, the Administrative Law Judge acknowledged that if Staff were to include in its reply testimony evidence that should properly have been included in its June 2004 direct testimony, Qwest would likely be entitled to file surrebuttal testimony.[9] Qwest includes this possibility here not to disparage Staff or predict that Staff will act improperly in the reply phase, but instead to simply note that a need to amend the procedural schedule, including the hearing dates, may arise as a result of the compromise Qwest is offering for the Commission's consideration.

*19* Qwest has contacted Staff, Eschelon and McLeod regarding this alternative proposal. Staff and McLeod stated that they are not willing to support Qwest's proposal at this time. Eschelon stated that Mr. Smith could be deposed on November 22 and does not

[9] Tr.,Vol. V, at 207-214.



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oppose the other schedule adjustments discussed above. However, Eschelon continues to insist that the deposition take place in Minneapolis, where Eschelon's in-house counsel (Dennis Ahlers) is located.

## V. CONCLUSION

*20* For the foregoing reasons, Qwest respectfully requests that the Commission require Messrs. Smith and Gray to appear for deposition as noticed and that it enter an order to that effect as soon as possible.

RESPECTFULLY SUBMITTED this 26th day of October, 2004.

QWEST CORPORATION

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