[Service Date: November 22, 2004]

BEFORE THE
WASHINGTON UTILITIES AND
TRANSPORTATION COMMISSION

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION, Complainant, v. ADVANCED TELECOM GROUP, INC.; ALLEGIANCE TELECOM, INC.; *et al.*, Respondents.	Docket No. UT-033011 **TIME WARNER TELECOM OF WASHINGTON LLC'S OPPOSITION TO PROPOSED SETTLEMENT BETWEEN QWEST, STAFF AND PUBLIC COUNSEL**

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I. INTRODUCTION

1. Time Warner Telecom of Washington, LLC ("TWTC"), an intervenor in this proceeding, appreciates the conscientious, vigorous, and thorough efforts of Staff in prosecuting this case, as well as its efforts to settle the case in the interests of avoiding further expense, uncertainty, and delay. However, TWTC has a number of concerns about the settlement proposed ("proposed Settlement") by Qwest, Staff and Public Counsel (collectively, "Settling Parties") and the process apparently contemplated by the Settling Parties for evaluating it.[1] In the absence of clarifications that will alleviate those concerns, TWTC believes that the proposed Settlement and the contemplated evaluation procedure are not in the public interest and could deprive TWTC of its rights to due process. Accordingly, TWTC respectfully requests that the Commission reject the proposed Settlement, or, alternatively, clarify and/or modify the settlement review process and the proposed Settlement as discussed below.

2. As it stands now, the proposed Settlement does not contain a resolution of the complaints about the Eschelon and McLeodUSA agreements, nor does it address the harm caused by Qwest's failure to file the Eschelon and McLeodUSA secret agreements. The proposed Settlement also contains a proposed penalty that does not even begin to address the benefit Qwest obtained by violating the law's requirement that it file all interconnection agreements and make them available to other CLECs to opt-into. In short, the proposed penalty is not really a penalty at all; it is more of a reward. Unless the penalty is sufficiently large to offset the amount that Qwest would have had to make available to other CLECs, Qwest will have been rewarded for its illegal behavior. The

[1] The proposed Settlement is ambiguous in a number of respects. TWTC has issued discovery requests to the Settling Parties in an attempt to clarify the agreement. TWTC's final position on the proposed Settlement will depend on the responses and clarifications it receives.

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Commission should increase the size of the penalty imposed on Qwest to reflect the full "benefit" Qwest gained by not making the Eschelon and McLeodUSA agreements available to other CLECs.

II. THE PROPOSED SETTLEMENT

3. The proposed Settlement contains an admission by Qwest that it violated Section 252 of the federal Telecom Act by failing to file, in a timely manner, certain agreements with the Commission. Proposed Settlement, ¶4. It then recites the fact that Staff and other parties have identified transactions with Eschelon and McLeodUSA that provided for discounts off rates for services purchased by those companies from Qwest; however, the proposed Settlement mischaracterizes those agreements as relating only to intrastate wholesale services, whereas the agreements and pre-filed testimony in the case clearly demonstrate that the agreements related to all purchases made by those companies, both intrastate and interstate. The proposed Settlement goes on to state that:

> Staff believes that this evidence demonstrates and is sufficient to support a finding that Qwest willfully and intentionally violated Sec. 252, RCW 80.36.170, RCW 80.36.180, and RCW 80.36.186 by not filing, in a timely manner, its transactions with Eschelon and McLeodUSA relating to rates or discounts off of rates for Section 251(b) and (c) wholesale services."

While the proposed Settlement states that "Qwest agrees not to appeal such a finding by the Commission," it does not state that Qwest will agree that such a finding be made; nor does it address how the Commission will get the evidence necessary to support the finding. Proposed Settlement, ¶5.

4. Paragraph 25 provides that "all testimony previously filed that has not been striken should be admitted for purposes of supporting the Settlement Agreement." It is not clear from that statement whether prefiled testimony can be admitted to support the finding regarding the Eschelon and McLeodUSA agreements referenced in paragraph 5, or

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whether it can be admitted to support other findings the Commission may want to make, or to support criticism of the proposed Settlement.

5. In paragraph 6, Qwest agrees to pay a penalty of $7,824,000. It also agrees to take certain remedial steps, including retaining an independent monitor and implement certain training. Qwest also agrees to comply with federal and state legal requirements and file any yet-unfiled interconnection agreements within 45 days. Proposed Settlement, ¶¶ 6, 11, 12, 13.

6. The proposed Settlement also provides that each Settling Party can withdraw from the Settlement Agreement and seek reconsideration of the Commission's order if the Commission changes the Settlement Agreement, conditions its approval, awards any additional penalty or remedy, or does not make findings and conclusions consistent with the statements and admissions set forth in paragraphs 4 and 5. It is not clear from the language whether the Commission could make additional findings such as those referred to above or even whether the Commission could correct the mischaracterization of the Eschelon and McLeodUSA agreements.

7. The proposed Settlement also purports to limit the precedential value of any findings, conclusions, and order the Commission might issue in the case:

> Except to the extent expressly stated in this Agreement, nothing in this Agreement shall be (1) cited or construed as precedent or as indicative of the Settling Parties' positions on a resolved issue, or (2) asserted or deemed in any other proceeding, including those before the Commission, the commission of any other state, the state courts of Washington or of any other state, the federal courts of the United States of America, or the Federal Communications Commission to mean that a Settling Party agreed with or adopted another Settling Party's legal or factual assertions.

Proposed Settlement, ¶ 19. It is unclear how the Settling Parties contemplate that this provision would work. Particularly given the fact that they are offering the "admissions" of Qwest as a major part of the basis for the Commission decision they seek, it appears

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that they contemplate that any findings, conclusions, and order could not be used by any party to the case, or the Commission, or any other entity for any purpose and the Commission's findings, conclusions, and order would have no precedential value whatsoever.

8. Finally, the Settling Parties agree to support adoption of the proposed Settlement as a complete resolution of all of the issues in this proceeding. Proposed Settlement, ¶25.

III. TWTC'S CONCERNS ABOUT THE PROPOSED SETTLEMENT

A. Depending On How The Ambiguities Are Resolved, The Proposed Settlement Could Deprive TWTC Of Its Due Process Rights.

9. It is important to recognize the fact that the proposed Settlement offered by Qwest, Staff and Public Counsel is a non-unanimous settlement[2] and, therefore, is nothing more than a common position of those parties in the case. *See* WAC 480-07-730(3). Depending on how the proposed Settlement is construed, the process contemplated by the Settling Parties for evaluation of the proposed Settlement could materially impair TWTC's due process rights and should be rejected by the Commission.

10. The most fundamental principles of due process are notice and a meaningful opportunity to be heard. In the context of a complaint case before the Commission, particularly one that involved illegal action that had the effect of unduly and illegally discriminating against TWTC and other CLECs and harming both competition and consumers, it is important that all parties have a fair and full opportunity to present evidence and their position in the case. Further, it is important that the Commission have all relevant evidence available to it before it makes its findings, conclusions of law, and

[2] TWTC is not a party to the proposed Settlement and had no notice that settlement discussions were even occurring.

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issues its order in the case. The process proposed by the Settling Parties here could keep important evidence from the Commission and deprive TWTC as a non-settling party of a fair opportunity to present and argue its case.

11. The APA provides that the Commission may dispose of a contested case by agreed settlement of the parties. Specifically, RCW 34.05.060 encourages informal settlements, but specifically preserves the rights of a party not to join:

> [I]nformal settlement of matters that would make unnecessary more elaborate proceedings under this chapter is strongly encouraged. Agencies may establish by rule specific procedures for attempting and executing informal settlement of matters. ***This section does not require any party or other person to settle a matter.*** (Emphasis added.)

The key point here is that the agreement between Qwest, Staff and Public Counsel is simply an agreement to take a common position as to issues in the case. It does not, and should not, have the effect of terminating other parties rights in the case, as the foregoing statute underlines. Nor should it have the effect of subjecting non-settling parties to an unfair process or deprive them of access to relevant evidence or the right to rely upon it in presenting their case.

12. Again, depending on how the proposed Settlement is construed, the Settling Parties' proposal would not allow a "full hearing" on the issues in the case or on all of the secret agreements that have been identified during discovery or in prefiled testimony, but a truncated proceeding examining only the merits of the partial settlement. This problem can be avoided only if all of the prefiled testimony, including the prefiled testimony of witnesses for Eschelon, McLeodUSA and TWTC, is admitted into the record and available for all purposes.

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13. Evidentiary hearings can only be dispensed with by a regulatory commission when there are no disputed questions of fact.[3] In *Business and Professional People for the Public Interest v. Illinois Commerce Commission*, a decision of the ICC approving a non-unanimous settlement of an electric utility rate case was challenged by several intervenors on the grounds that it constituted an illegal settlement or rate bargain between the utility and the ICC.[4] The settlement was presented after extensive hearings had been conducted, and was approved over the objections of intervenors. The Illinois Supreme Court ruled that the ICC was required to base its decision exclusively on the record, as required by state law, and not on the settlement. The settlement was not a decision on the merits.[5] The court held that "[i]n order for the commission to dispose of a case by settlement, however, all of the parties and intervenors must agree to the settlement."[6]

14. Here, the Commission cannot conclude that no material questions of fact exist. In fact, paragraph 5 of the proposed Settlement specifically recites a dispute about the Eschelon and McLeodUSA agreements. There is also a dispute about the correct description of the terms and scope of those secret agreements. As noted, the proposed Settlement itself cannot be the basis for a Commission decision concerning any agreements about which there is a factual dispute. The Commission must base its decision on substantial evidence submitted in the record of the case. Any special procedure for evaluating the proposed Settlement must also allow for the introduction of all evidence that would be offered in the case in chief on disputed issues, including in this case the

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[3] *Dee-Dee Cab, Inc. v. Penn. Public Utility Comm'n*, 817 A.2d 593, 598 (2003).

[4] *Business and Professional People for the Public Interest v. Illinois Commerce Commission*, 136 Ill. 2d 192, 555 N.E. 2d 693 (1989).

[5] *Id.*, at 704.

[6] *Id.*, at 700-701.

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prefiled evidence of Eschelon and McLeodUSA. In fact, in the Eschelon and McLeodUSA settlement agreements, which were approved by the Commission in Order No. 12, it is specifically noted in paragraph 17 that "Eschelon and McLeodUSA will remain parties to the proceeding, sponsor and provide responsive testimony and exhibits, and make a witness available for cross-examination at the hearing. Eschelon Settlement, ¶14; McLeodUSA Settlement, ¶15." In sum, that testimony must be available at any hearing on the proposed Settlement.

15. The appearance of fairness doctrine "requires that hearings and decisions appear to be fair as well as being fair in fact."[7] Giving some special priority right to consideration of the proposed Settlement without also considering all of the other evidence that would be submitted in the case would violate this doctrine. The Washington Supreme Court in applying the appearance of fairness doctrine has opined that the basic test of fairness is whether a fair-minded person could say that everyone had been heard who should have been heard and that the decision making body gave reasonable consideration to all matters presented.[8] An unfortunate result of the type of process proposed here could be a decreased public confidence in the Commission's review of complaints about anti-competitive action.

B. The Proposed Settlement Does Not Resolve The Issues Concerning The Eschelon and McLeodUSA Secret Agreements, Nor Does It Address The Issue Of Harm To Competition, Other CLECs, Or Consumers.

16. As noted above, the proposed Settlement does not resolve the issues surrounding the Eschelon and McLeodUSA secret agreements, nor does it clearly address how the Commission will get the evidence necessary to do so. The proposed Settlement

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[7] *The Appearance of Fairness Doctrine: A Conflict in Values*, 61 Wash. L. Rev. 533 at 534 (1986).

[8] *Smith v. Skagit* County, 75 Wn. 2d 715, 453, P. 2d 832 (1969).

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simply notes that Staff and other parties have identified Eschelon and McLeodUSA transactions that should have been filed and that Staff believes the evidence is sufficient to support a finding that Qwest willfully and intentionally violated Section 252 and the relevant Washington anti-discrimination statutes by not filing those agreements in a timely fashion. Proposed Settlement, ¶5. It then simply states that Qwest would not appeal such a finding. *Id.* On this basis alone the proposed Settlement is inadequate to support a resolution of the issues in the case.

17. Moreover, the proposed Stipulation does not address the issue of the harm caused by Qwest's failure to file the Eschelon and McLeodUSA secret agreements. As stated by Mr. Wilson in his prefiled testimony:

> To the extent that one CLEC paid more for wholesale serivces that were provided more quickly or on an expedited basis for other CLECs who enjoyed the benefits of secret interconnection agreements that were not made available for adoption, the CLEC was harmed. To the extent a CLEC loses customers or reputation because of unavailability of a specific pricing or provisioning term or condition granted in secret to a competitor, it might have sustained harm.

Direct Testimony of Thomas L. Wilson, at 77. Further, as explained by TWTC's witness, Timothy J. Gates:

> Clearly Qwest forced a higher cost structure on TWTC by virtue of the higher rates paid by TWTC *vis a vis* the favored CLECs. Mr. Wilson recognizes this harm in his testimony wherein he states, "[p]ricing and provisioning are critical to entry into the local market and any improvement would have made entry easier for a CLEC." If we assume, for discussion purposes, that the discount was 10 percent, then the favored CLECs paid 10 percent less than TWTC for the same services. A 10 percent difference in the cost of a monopoly input is a tremendous difference and can make the difference between winning and losing a customer. Viewed from another perspective, the 10 percent difference in the cost structure can affect a decision to enter a market or to say in a market, or a decision whether to

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> expand into new areas of the state. Indeed, at the margin, competitors win or lose customers on tenths of a percent.

Response Testimony of Timothy L. Gates, at 12. He also discusses the harm to consumers citing the following statement of the Minnesota Commission in its unfiled agreements case:

> Furthermore, CLECs have been harmed monetarily and customers have been harmed by Qwest impeding fair competition in this manner. The direct and inevitable result of such anti-competitive behavior is that customers have been deprived of the benefit of a market place fairly and freely open to competition. While this harm may not be quantified in terms of dollars and cents, the first fruits of competition (lower prices and wider choices) were undoubtedly impacted by Qwest's anticompetitive and discriminatory behavior.

(Footnotes omitted). *Id.*, at 13. The Commission should make a finding about CLEC and consumer harm similar to that of the Minnesota Commission.

18. The Commission also should make findings about the real scope of the secret agreements. As Stephen A. Gray states in his prefiled testimony, Qwest had an oral agreement with McLeod that entitled McLeod to a volume discount of between 6.5 and 10 percent on the services it purchased from Qwest. Gray Testimony at 16, lines 18-20. Also, Agreements 44A and 45A, which were volume-based take-or-pay agreements were simply part of the overall oral agreement, essentially the mechanisms by which the oral agreement was implemented. They had the net effect of modifying the rates McLeod paid under its existing interconnection agreement. Gray Testimony at 10, lines 11-12; 15, lines 6-9; 16, lines 18-20; 17, lines 4-13. Similarly, Richard A. Smith on behalf of Eschelon testified about discounts of ten percent on all purchases from Qwest promised to Eschelon. To address the harm caused by these secret agreements, the Commission must make findings about the true scope of the agreements without the window-dressing that simply enabled the implementation of the schemes. The description of the Eschelon and

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McLeodUSA secret agreements contained in the proposed Settlement does not accurately reflect the real terms of those agreements and should be corrected.

19. Accordingly, TWTC urges the Commission to admit all prefiled evidence for all purposes and to enter findings of fact and conclusions of law that:

> (a) The agreements identified in paragraphs 12 (Eschelon) and 13 (McLeodUSA) of Order No. 12 are interconnection agreements that should have been filed by Qwest;
>
> (b) Qwest willfully and intentionally violated Section 252, RCW 80.36.170, .180, and .186 by not filing, in a timely manner, its transactions with Eschelon and McLeodUSA relating to discounts off rates for Section 251(b) and (c) services, including intrastate and interstate services;
>
> (c) The essence of the Eschelon and McLeodUSA agreements was that Qwest would provide a discount to Eschelon and McLeodUSA on whatever purchases they made; other provisions of the agreements, such as volume commitments, were simply part of the implementation of the agreements and not essential parts of them;
>
> (d) Qwest's failure to file the Eschelon and McLeodUSA agreements harmed competition, the CLECs that were deprived of the opportunity to opt-in to the 10 percent discounts offered to Eschelon and McLeodUSA, and consumers who were deprived of the lower prices that could have been offered if CLECs had the benefit of the lower costs that were made available to Eschelon and McLeodUSA.

20. The Commission should also modify the settlement's description of the Eschelon and McLeodUSA secret agreements to accurately reflect the fact that under those agreements Eschelon and McLeodUSA were offered a discount on ***all*** services they purchased from Qwest, ***both interstate and intrastate***, throughout Qwest's 14 state region, not just on intrastate services as stated in the settlement.

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C. The Commission Should Clarify That Any Findings, Conclusions, And Order It Enters In This Case Are Binding And Have Full Precedential Effect.

21. TWTC also submits that the provisions of the proposed Settlement that purport to limit the precedential value of any findings of fact, conclusions of law, and order entered in this case should be rejected. This is an important case to the protection of full and fair competition in this state. Given that fact that the Commission has indicated clearly its intention to conduct a full and complete investigation of the unfiled agreements issues, it is important that the Commission do so in a way that resolves those issues in a manner that will most effectively and efficiently address the failures to file and the consequences thereof. Also, given the fact that the Commission has decided not to address the issues of correcting the harm caused by Qwest's failure to file the secret interconnection agreements, it is important that the Commission at least make binding findings that will enable injured parties the opportunity to pursue remedies without having to completely relitigate issues that should be resolved in this case, namely which agreements should have been filed, the scope of those agreements, and the fact that the failure to file them caused harm to competition, non-favored CLECs, and to consumers.

22. Accordingly, TWTC urges the Commission to clarify that any findings of fact, conclusions of law, and order it enters in this case are binding and have the same precedential effect that any findings and conclusions or order it enters in other adjudicatory proceedings. The Commission should do this notwithstanding anything in paragraphs 15 and 19 of the proposed Settlement, which purport to limit the Settlement's precedential effect.

D. The Proposed Penalty Is Too Small And Should Be Increased To At Least Match The Benefit Qwest Gained By Not Making The Discounts Offered To Eschelon And McLeodUSA Available To Other CLECs.

23. The size of the penalty in the proposed Settlement is too small. It does not begin to address the benefit Qwest obtained by violating the law's requirement that it file

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all interconnection agreements and make them available to other CLECs. From TWTC's perspective, the failure to file the discounts that were offered to Eschelon and McLeodUSA was the most egregious violation. If the penalty imposed upon Qwest is to have any deterrent effect, it must be at least sufficiently large to offset the benefit Qwest gained by violating the law. Particularly given the fact that the remedies here will do nothing to correct the harm caused by Qwest's violations, it is important that Qwest not be rewarded by its failure to comply with the law's requirements.

24. In *Qwest Corp. v. Minn. Pub. Utils. Comm'n*, Civil No. 03-3476 ADM/JSM, 2004 WL 1920970 (D. Minn., Aug. 25, 2004), the U.S. District Court discussed the standards for an appropriate regulatory penalty in Minnesota's unfiled agreements case. In that case, the Minnesota Public Utilities Commission had ordered Qwest to pay a fine of $25.95 million and also to pay restitutional remedies to CLECs. The district court; however, concluded that the Minnesota Commission lacked the statutory authority, under the statutory scheme cited in that case, to impose equitable relief and, therefore, vacated the restitutional remedies from the Minnesota Commission's penalty order. The court, however, upheld the penalty. In doing so, it noted that, in determining the amount of a penalty, the MPUC must consider the following nine factors:

> (1) The willfulness or intent of the violation;
>
> (2) The gravity of the violation, including the harm to customers or competitors;
>
> (3) The history of past violations;
>
> (4) The number of violations;
>
> (5) The economic benefit gained by the person committing the violation;
>
> (6) Any corrective action taken or planned by the person committing the violation;

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(7) The annual revenue and assets of the company committing the violation;

(8) The financial ability of the company to pay the penalty; and

(9) Any other factors that justice may require.

The court then concluded that the MPUC properly penalized Qwest under these factors and its findings were not arbitrary and capricious. Importantly from the standpoint of this case, the MPUC specifically determined that Qwest's actions impeded fair competition and harmed customers and non-party CLECs, and that Qwest benefited economically from its actions.

25. These same factors relied upon by the MPUC and the application of which that was upheld by the U.S. District Court in Minnesota should be considered by this Commission in setting any penalty in this case. Evaluation of those factors inevitably leads to the conclusion that the penalty included in the proposed Settlement is too low and does not counteract the benefit Qwest received from just avoiding having to make the discounts offered to Eschelon and McLeodUSA available to other CLECs. The penalty should be increased.

IV. CONCLUSION

26. WHEREFORE, depending on how the ambiguities discussed above are resolved, TWTC respectfully requests that the proposed Settlement be rejected or that the Commission allow all prefiled testimony to be admitted in the proceeding for all purposes, including any proceedings to evaluate the proposed Settlement; enter findings, conclusions, and order that make clear that:

a. Qwest willfully and intentionally violated federal and state legal requirements by not filing the Eschelon and McLeodUSA secret agreements;

b. The Eschelon and McLeodUSA agreements essentially required Qwest to provide a 10 percent discount on all purchases by those CLECs, including interstate and intrastate services; and

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c. Competition, CLECs, and consumers were harmed by Qwest's failure to file the secret agreements.

The Commission should also clarify that its findings, conclusions, and order shall have the full precedential effect in other regulatory and court proceedings, in this state and in other states, that other findings, conclusions, and orders in adjudicatory proceedings have. Finally, the Commission should increase the penalty to be paid by Qwest to an amount that at least approximates the amount that Qwest would have had to pay other CLECs if they had opted-into the Eschelon and McLeodUSA agreements.

RESPECTFULLY SUBMITTED this 22nd day of November, 2004.

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I hereby certify that I have this 22nd day of November, 2004, served the true and correct original, along with the correct number of copies, of the foregoing document upon the WUTC, via the method(s) noted below, properly addressed as follows:

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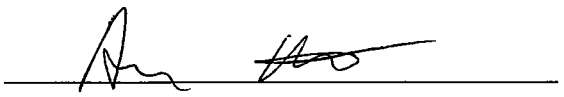
I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 22nd day of November, 2004, at Seattle, Washington.



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