

0218

1 BEFORE THE WASHINGTON STATE
2 UTILITIES AND TRANSPORTATION COMMISSION
3 WASHINGTON UTILITIES AND)
4 TRANSPORTATION COMMISSION,) Docket No. UT-033011
5))
6) Complainant,) Volume VI
7) Pages 218 to 311
8))
9) vs.))
10 ADVANCED TELECOM GROUP, INC.;)
11 ALLEGIANCE TELECOM, INC.;)
12 AT&T CORP.; COVAD)
13 COMMUNICATIONS COMPANY;)
14 ELECTRIC LIGHTWAVE, INC.;)
15 ESCHELON TELECOM, INC. f/k/a)
16 ADVANCED TELECOMMUNICATIONS,)
17 INC.; FAIRPOINT)
18 COMMUNICATIONS SOLUTIONS,)
19 INC.; GLOBAL CROSSING LOCAL)
20 SERVICES, INC.; INTEGRA)
21 TELECOM, INC.; MCI WORLDCOM,)
22 INC.; MCLEOD USA, INC.; SBC)
23 TELECOM, INC.; QWEST)
24 CORPORATION; XO)
25 COMMUNICATIONS, INC. f/k/a)
26 NEXTLINK COMMUNICATIONS, INC.,)
27))
28) Respondents.)
29 _____)

17
18 A hearing in the above matter was held on
19 November 29, 2004, from 1:35 p.m to 4:15 p.m., at 1300
20 South Evergreen Park Drive Southwest, Room 206, Olympia,
21 Washington, before Administrative Law Judge ANN RENDAHL
22 and Chairwoman MARILYN SHOWALTER and Commissioner
23 RICHARD HEMSTAD and Commissioner PATRICK J. OSHIE.
24 Joan E. Kinn, CCR, RPR
25 Court Reporter

0219

1 The parties were present as follows:

2 THE COMMISSION, by CHRISTOPHER SWANSON,
3 Assistant Attorney General, 1400 South Evergreen Park
4 Drive Southwest, Post Office Box 40128, Olympia,
Washington 98504-0128, Telephone (360) 664-1220, Fax
(360) 586-5522, E-Mail cswanson@wutc.wa.gov.

5

6 QWEST CORPORATION, by ADAM SHERR and LISA
7 ANDERL, Attorneys at Law, 1600 Seventh Avenue, Suite
3206, Seattle, Washington 98191, Telephone (206)
398-2507, Fax (206) 343-4040, E-Mail
8 adam.sherr@qwest.com; and by TODD LUNDY, 1801 California
9 Street, Suite 4900, Denver, Colorado 80202, Telephone
(303) 672-2783, Fax (303) 298-8197, E-Mail
todd.lundy@qwest.com.

10

11 TIME WARNER TELECOM OF WASHINGTON, LLC, by
12 ARTHUR A. BUTLER, Attorney at Law, Ater Wynne LLP, 601
Union Street, Suite 5450, Seattle, Washington 98101,
13 Telephone (206) 623-4711, Fax (206) 467-8406, E-Mail
aab@aterwynne.com.

14

15 THE PUBLIC, by ROBERT W. CROMWELL, JR.,
16 Assistant Attorney General, 900 Fourth Avenue, Suite
2000, Seattle, Washington 98164-1012, Telephone (206)
464-6595, Fax (206) 389-2058, E-Mail
17 robertcl@atg.wa.gov.

18

19 ESCHELON TELECOM OF WASHINGTON, INC., by
20 JUDITH A. ENDEJAN, Attorney at Law, Graham & Dunn PC,
2801 Alaskan Way, Suite 300, Seattle, Washington 98121,
21 Telephone (206) 340-9694, Fax (206) 340-9599, E-Mail
jendejan@grahamdunn.com.

22

23

24

25

0220

1 -----

2 INDEX OF EXAMINATION

3 -----

4 WITNESS: PAGE:

5 GLENN BLACKMON AND MARK REYNOLDS

6 Statement by Glenn Blackmon 224

7 Statement by Mark Reynolds 228

8 Cross-Examination by Mr. Butler 232

9 Examination by Chairwoman Showalter 252

10 Examination by Commissioner Hemstad 259

11 Examination by Judge Rendahl 260

12 BENCH QUESTIONS OF COUNSEL 271

13

14

15

16

17

18

19

20

21

22

23

24

25

0221

1 P R O C E E D I N G S

2 JUDGE RENDAHL: Good afternoon, I'm Ann
3 Rendahl, the Administrative Law Judge presiding over
4 this proceeding this afternoon with Chairwoman Marilyn
5 Showalter and Commissioners Richard Hemstad and Patrick
6 Oshie. We're here before the Washington Utilities and
7 Transportation Commission this afternoon, Monday,
8 November the 29th, 2004, in Docket Number UT-033011,
9 captioned Washington Utilities and Transportation
10 Commission versus Advanced Telecom Group, et al.

11 The purpose of this hearing this afternoon is
12 a settlement presentation to receive testimony
13 describing and explaining a proposed settlement filed by
14 Commission Staff, Qwest, and Public Counsel and
15 opposition to the settlement by Time Warner, to hear
16 argument concerning the proposal, allow questions from
17 the parties and the Bench concerning the proposal, and
18 to discuss the appropriate process for consideration of
19 the proposal. A notice setting forth that agenda was
20 issued on Wednesday, November 24th, 2004.

21 Let's take appearances from the parties
22 beginning with Commission Staff.

23 MR. SWANSON: Christopher Swanson Assistant
24 Attorney General for Commission Staff.

25 JUDGE RENDAHL: Thank you.

0222

1 And for Qwest.

2 MR. SHERR: Yes, good afternoon, Adam Sherr,
3 in-house counsel for Qwest. Here as well is Lisa
4 Anderl.

5 MR. LUNDY: And Todd Lundy on behalf of
6 Qwest.

7 JUDGE RENDAHL: Mr. Lundy, have you made an
8 appearance?

9 MR. LUNDY: Yes, I have.

10 JUDGE RENDAHL: Okay, thank you.

11 And for Public Counsel.

12 MR. CROMWELL: Robert Cromwell, Assistant
13 Attorney General on behalf of Public Counsel.

14 JUDGE RENDAHL: And for Time Warner.

15 MR. BUTLER: Arthur A. Butler from the law
16 firm of Ater Wynne LLP on behalf of Time Warner Telecom
17 of Washington.

18 JUDGE RENDAHL: Thank you. And is the button
19 up on your microphone?

20 MR. BUTLER: (Indicates.)

21 JUDGE RENDAHL: Thank you.

22 And I understand there are two persons on the
23 bridge line, Ms. Holly Dean for Qwest just listening in
24 and Mr. Brian Thomas for Time Warner also just listening
25 in.

0223

1 Is there anyone else on the bridge line who
2 wishes to identify themselves?

3 And is there any other party in the hearing
4 room who wishes to state an appearance?

5 MS. ENDEJAN: Good afternoon, Judy Endejan
6 from Graham & Dunn for Eschelon Telecom of Washington,
7 Inc. Technically we are no longer a party because of
8 the settlement agreement, but we are an interested party
9 or you might say innocent bystander, I'm not certain,
10 whatever you want to call us.

11 JUDGE RENDAHL: Thank you very much.

12 All right, I understand we have two witnesses
13 here to present the settlement, Mr. Blackmon for Staff
14 and Mr. Reynolds for Qwest. The agenda first identified
15 that there would be a presentation by counsel and then
16 the witnesses would make a presentation as well and then
17 questions from counsel and from the Bench. I understand
18 that the witnesses would like to begin by making a
19 presentation. So Mr. Sherr and Mr. Swanson, are you
20 planning to ask any preliminary questions of the
21 witnesses after I swear them in?

22 MR. SHERR: No, Judge.

23 MR. SWANSON: No, Your Honor.

24 JUDGE RENDAHL: All right.

25 Mr. Blackmon and Mr. Reynolds, starting with

0224

1 Mr. Blackmon, could you state your name for the record
2 and your work address, please.

3 MR. BLACKMON: It's Glenn Blackmon, 1300
4 South Evergreen Park Drive Southwest, Olympia,
5 Washington.

6 JUDGE RENDAHL: And Mr. Reynolds.

7 MR. REYNOLDS: Mark Reynolds, 1600 Seventh
8 Avenue, Seattle 98191.

9 JUDGE RENDAHL: Thank you.

10 And would you both raise your right hand,
11 please.

12 (Witnesses Glenn Blackmon and Mark Reynolds
13 were sworn in.)

14 JUDGE RENDAHL: Okay, let's go ahead.

15

16 Whereupon,

17 GLENN BLACKMON AND MARK REYNOLDS,
18 having been first duly sworn, were called as witnesses
19 herein and were examined and testified as follows:

20

21 MR. BLACKMON: Thank you, good afternoon.
22 What I would like to do is provide a bit of background
23 about this settlement, and then Mr. Reynolds will
24 discuss in more detail some of the specific elements of
25 the settlement.

0225

1 JUDGE RENDAHL: Could you raise the
2 microphone just a bit.

3 MR. BLACKMON: (Complies.)

4 JUDGE RENDAHL: Thank you.

5 MR. BLACKMON: This settlement would resolve
6 an issue that was initially presented to the Commission
7 in 2002 when it was reviewing Qwest's application for
8 long distance approval under Section 271. During that
9 case, Public Counsel had raised a concern about unfiled
10 agreements and argued that the Commission should not act
11 on that 271 application until questions about those
12 agreements had been resolved. In July of 2002 in its
13 271 order the Commission said that it believed those
14 agreements should be investigated separately from the
15 271 application. It invited parties that were concerned
16 about those agreements to file a formal complaint before
17 the Commission.

18 No party followed through with a formal
19 complaint, but the Commission Staff continued to
20 investigate those agreements over the year or so that
21 followed. We looked at the concern that had been raised
22 that Qwest had used those agreements to discriminate
23 among the competitive local exchange companies. And on
24 August 14th of 2003, the Commission issued a complaint
25 through its Staff alleging that Qwest had violated

0226

1 federal and state law by entering into interconnection
2 agreements that were not filed with the Commission and
3 that were not made available on a nondiscriminatory
4 basis to other competitive local exchange companies.

5 However, Qwest was not the only respondent
6 named in that complaint. 13 competitive local exchange
7 companies were also accused of violating the federal
8 requirements to file interconnection agreements. In the
9 year that followed the issuance of that complaint, the
10 Staff has worked carefully through the legal and factual
11 issues that were -- that related to each of those
12 respondents. In February of this year the Commission
13 resolved some important legal issues in its Order Number
14 5. In particular it established that all local exchange
15 companies have an obligation to file interconnection
16 agreements. And then in June of this year Staff filed
17 its direct case in the form of testimony by Thomas
18 Wilson.

19 And at that -- during that same time frame
20 the Commission approved the first settlement agreement
21 with FairPoint Communications. Qwest and the other
22 respondents conducted extensive discovery on Staff's
23 case, including three full days of depositions of
24 Mr. Wilson, and in fairly short order all of the
25 remaining competitive local exchange company respondents

0227

1 agreed to settlements with Staff, and the Commission has
2 approved all of those settlements.

3 And that brings us to the settlement that's
4 before you today, the one with Qwest Corporation. It
5 would resolve all of the remaining issues raised by the
6 Commission in its complaint. The agreement provides for
7 Qwest to admit that its failure to file various
8 interconnection agreements with the Commission was a
9 violation of federal law. The complaint also alleged
10 that Qwest violated the state antidiscrimination laws,
11 and Qwest is not directly admitting to those violations,
12 but it's agreeing not to appeal a finding by the
13 Commission that Qwest committed willful and intentional
14 violations of these laws. Staff is recommending that
15 the Commission make this finding because we believe the
16 evidence provides ample support for these findings, and
17 Staff has specifically reserved the right to walk away
18 from the settlement if the Commission does not make the
19 finding of willful and intentional violation of the
20 state antidiscrimination statutes.

21 Qwest is also agreeing to pay a penalty that
22 in Staff's view is appropriate to the circumstances
23 here. The penalty amount of \$7.824 Million reflects
24 what Staff believes to be serious violations of state
25 law by a company with significant market power relative

0228

1 to its competitors. Staff believes that Qwest failed to
2 live up to its responsibility to treat all competitors
3 in a fair and non-discriminatory manner. The penalty is
4 intended to punish Qwest for these violations and to
5 send a message to all regulated companies that the
6 Commission does not take lightly the state's
7 antidiscrimination laws. While this is a substantial
8 penalty, the amount is not as large as Staff believes it
9 would have been had Qwest in its new leadership team not
10 shown a willingness to acknowledge its mistakes and to
11 commit to remedial measures going forward. Based on
12 this, Staff believes that this is a fair resolution of
13 the remaining issues in this case, and we recommend that
14 the Commission accept this settlement.

15 JUDGE RENDAHL: Mr. Reynolds.

16 MR. REYNOLDS: Yes, as Dr. Blackmon has
17 provided a history of the events leading up to the
18 settlement agreement and a summary of how some of the
19 legal issues are resolved in the settlement agreement, I
20 intend to focus on specific penalties and requirements
21 that are addressed in Paragraph 6 of the settlement
22 agreement and how the settlement agreement resolves the
23 issues in this docket without precluding other parties
24 from having their issues heard in another proceeding.

25 First, once again under Paragraph 6 of the

0229

1 settlement agreement, Qwest must pay a penalty of
2 \$7,824,000. This significant penalty, which will be the
3 largest penalty ever assessed by this Commission, sends
4 a very strong message to Qwest and other companies
5 regarding compliance with the state and federal statutes
6 at issue in this proceeding. And as Dr. Blackmon
7 addressed, Qwest's new leadership is committed to
8 ensuring that its practices regarding the issues in this
9 proceeding are in compliance with all applicable state
10 and federal statutes. This penalty is also consistent
11 with settlement of the same issues in other states such
12 as Arizona and Colorado and is significantly greater
13 than what was recently agreed to in Oregon.

14 Second, to ensure that this Commission is
15 adequately apprised of Qwest's ongoing efforts to comply
16 with interconnection agreement filing requirements,
17 Qwest will pay for an independent third party monitor to
18 be approved by Staff to conduct an annual review of
19 Qwest's wholesale review, wholesale agreement review
20 committee for a period of three years. The wholesale
21 agreement review committee or WARC is responsible for
22 managing all agreements between Qwest and CLECs in
23 Qwest's 14 end region states to determine whether any
24 agreement or amendment should be filed with the
25 appropriate state agencies. The criteria used to

0230

1 determine filing obligations include federal
2 requirements under Sections 251(b) and (c) of the
3 Telecom Act, any applicable state and federal orders,
4 and any specific state reporting requirements. The WARC
5 is comprised of senior managers and attorneys from
6 corporate organizations involved in completing wholesale
7 agreements for Qwest. They meet on a regular basis and
8 as needed to perform their agreement evaluations. The
9 committee maintains extensive records regarding these
10 evaluations. In Arizona where Qwest has agreed to a
11 monitor of the WARC, Qwest has submitted the names of
12 John Antonuk, who is the 271 arbitrator, and Cheryl
13 Perino, former chairwoman of the Wisconsin PUC, to the
14 Arizona Staff for consideration as monitor. Qwest is in
15 the process of developing a WARC plan for the request
16 for proposal that would encompass familiarization with
17 the WARC personnel guidelines and processes, review of
18 WARC documentation and procedures to determine Qwest's
19 compliance with filing standards, and review of Qwest
20 training materials regarding Section 252 compliance.

21 Third, to ensure broad based training of and
22 compliance with Qwest interconnection agreement filing
23 requirements, Qwest must continue for three years its
24 internal Web based compliance training program
25 addressing compliance with Section 252(e) of the Telecom

0231

1 Act. This training is required of all Qwest employees
2 in the wholesale markets, local network, product
3 management, public policy, and legal corporate
4 organizations. The training provides an overview of the
5 Telecom Act in Section 251 and an in-depth review of
6 Section 252 requirements. The training explains how the
7 provisions of the Act apply to the various WARC groups
8 and how the groups interface with the wholesale
9 agreement review committee process that was previously
10 explained.

11 Finally, I would like to conclude by
12 referring the Commission to Paragraph 14 of the
13 settlement agreement, which states that the settling
14 parties intend that the settlement agreement resolves
15 all matters in dispute among them regarding the
16 complaint and amended complaint in this docket. This is
17 not intended to foreclose other parties from filing
18 their own case and pursuing whatever findings they seek
19 subject to Qwest defenses.

20 This concludes our prepared remarks, and
21 Dr. Blackmon and I are available for questions from the
22 Bench or from other parties.

23 JUDGE RENDAHL: Thank you.

24 Mr. Butler, I'm going to give you an
25 opportunity first to ask questions of the witnesses, and

0232

1 then once you're finished we'll ask questions from the
2 Bench.

3 MR. BUTLER: Thank you.

4

5 C R O S S - E X A M I N A T I O N

6 BY MR. BUTLER:

7 Q. I have a couple preliminary questions.
8 First, Mr. Reynolds, you testified that the agreement
9 was consistent with settlements that were reached in
10 Arizona and Colorado. Is it correct that in Arizona
11 there was both a penalty and additional provisions
12 designed to address the harm caused by the failure to
13 file the agreements, specifically provisions for
14 compensation to other CLECs?

15 A. (Reynolds) I believe that's correct, yes.

16 Q. And there is no such provision in this
17 settlement; is that correct?

18 A. (Reynolds) Well, I believe that the
19 Commission has considered that issue already and
20 dismissed it as it was not a part of this case.

21 Q. So this settlement just deals with the
22 penalty?

23 A. (Reynolds) Yes, that's correct.

24 Q. You mentioned a settlement in Oregon. It's
25 correct, is it not, that that is just an agreement with

0233

1 the Oregon Staff, it has not been approved by the
2 Commission yet; is that correct?

3 A. (Reynolds) I believe that is correct, but I
4 would defer to my counsel that might be more informed
5 about that.

6 MR. LUNDY: Mr. Reynolds is correct, that's a
7 settlement in principle that we anticipate presenting to
8 the Oregon Commission in the next few weeks.

9 BY MR. BUTLER:

10 Q. You mentioned Paragraph 14 as reflecting the
11 intent of the settling parties to resolve all matters at
12 issue in this proceeding. Can I direct you to Paragraph
13 5 as well of the settlement agreement.

14 A. (Reynolds) I'm there.

15 Q. Do you have that?

16 A. (Reynolds) Yes.

17 Q. That makes reference to transactions with
18 Eschelon and a transaction with McLeod USA relating to
19 rates or discounts, operates for it says here intrastate
20 wholesale services. Am I correct that this settlement
21 agreement does not resolve issues with respect to the
22 McLeod and Eschelon agreements referred to there?

23 A. (Reynolds) No, I believe it -- I believe it
24 does. The parties may disagree regarding the nature of
25 the transaction reference, but the paragraph is worded

0234

1 in such a manner so as to allow the Commission the
2 ability to make findings based on Staff's representation
3 that Qwest will not appeal, and that's the compromise
4 that we reached in Paragraph 4.

5 Q. So there -- but there is no agreement amongst
6 the settling parties that these agreements are or are
7 not interconnection agreements that should have been
8 filed?

9 A. (Reynolds) I believe that the agreement as to
10 which agreements should have been filed with the
11 Commission is in Paragraph 4 between the parties,
12 Qwest's admission as to which agreements should have
13 been filed. I believe that Paragraph 5 is different in
14 nature in regard to I think state law violations rather
15 than the 252 filing requirement.

16 Q. The agreements that are referred to in
17 Paragraph 5 with Eschelon and McLeod, they are not
18 included in the agreements referenced in Paragraph 4, or
19 are they?

20 A. (Reynolds) I would have to go back and look
21 through the list. I believe that some of them are.

22 Q. Agreement 4-A with Eschelon, that is covered;
23 is that correct?

24 A. (Reynolds) Yes.

25 Q. But the agreements with McLeod are not; is

0235

1 that correct, 44-A and 45-A?

2 A. (Reynolds) That is correct.

3 Q. And any reference to an oral agreement with
4 Qwest that was referred to in some of the pre-filed
5 testimony that 44-A and 45-A may have been a part of,
6 they're not included; is that correct?

7 A. (Reynolds) By not included, I guess I need a
8 clarification, are we still talking about Paragraph 5?

9 Q. Yeah, they're not included within the
10 agreements in Paragraph 4 to which there was an
11 agreement among the parties that these were
12 interconnection agreements that should have been filed?

13 A. (Reynolds) Well, Qwest does not believe that
14 they're interconnection agreements that need to be
15 filed, however you will need to speak to the other
16 parties as to what their belief is.

17 Q. But just from Qwest's standpoint, your
18 position is that those agreements are not covered by the
19 stipulation about which agreements should have been
20 filed?

21 A. (Reynolds) Well, to the extent that, you
22 know, I mean I guess I would have to say that Paragraph
23 5 says what it says, and it refers to I believe
24 Paragraphs 12 and 13 of the 12th Order in this
25 proceeding, and which I believe lists a number of

0236

1 agreements.

2 Q. So if I am correct then, the question about
3 whether agreements 44-A and 45-A or the so-called oral
4 agreement which they were a part, that remains
5 unresolved, that there is no resolution in this
6 settlement agreement about whether those are
7 interconnection agreements that should have been --

8 A. (Reynolds) No, I believe there is resolution
9 as we just addressed. They are no longer in or they are
10 not included in Paragraph 4, and I believe that later
11 you will find 44-A and 45-A as to Exhibit A agreements
12 that are dismissed as a part of this settlement.

13 Q. Okay, so the resolution then is that they are
14 not interconnection agreements that should have been
15 filed? I'm confused as to how you're actually treating
16 them.

17 A. (Reynolds) Well, I'm going to answer for
18 Qwest from --

19 Q. Yes, that's all --

20 A. (Reynolds) From Qwest's perspective, you
21 know, they are not intersection agreements that need to
22 be filed. I am not representing Staff or Public Counsel
23 in that statement.

24 Q. There is a reference in Paragraph 5 to a
25 Staff belief that there is sufficient evidence to

0237

1 support a finding that Qwest willfully and intentionally
2 violated Section 252 and RCWs 80.36.170, 180, and 186 by
3 not filing in a timely manner the transactions with
4 Eschelon and McLeod, and it goes on to say that Qwest
5 agrees not to appeal such a finding by the Commission.
6 From Qwest's perspective, what was the understanding and
7 the intent of the settling parties with respect to how
8 the Commission would go about making the finding that's
9 referred to here and what evidence it would have
10 available to it to make such a finding?

11 A. (Reynolds) Well, I believe that the
12 Commission has the evidence, the filed testimony of the
13 parties in this proceeding that has not been stricken,
14 that they can rely on and obviously any evidence that
15 comes out of this proceeding here today, and that's what
16 I think they have to rely on.

17 Q. Might I direct your attention, please, to the
18 last sentence of Paragraph 25 of the settlement
19 agreement.

20 A. (Reynolds) Yes, I'm there.

21 Q. And that sentence reads:

22 The settling parties agree that all
23 testimony previously filed that has not
24 been stricken should be admitted for
25 purposes of supporting the settlement

0238

1 agreement.

2 Is it, from Qwest's perspective, is it your
3 understanding and the intent of the parties that all
4 pre-filed evidence could be admitted into the proceeding
5 and considered by the Commission for all purposes, or is
6 that evidence limited only -- would be limited only for
7 the purpose of supporting the settlement agreement?

8 A. (Reynolds) Well, I think the sentence is
9 pretty specific in the way it's worded, and if there
10 were other intentions, I'm unaware of them. That is I
11 think your question went beyond what is specifically
12 stated in this sentence, and that is that the parties
13 intend for the testimony to be used for any other
14 purposes, and to my knowledge no, they did not.

15 Q. Well, let me ask you a little more
16 specifically. Is it your understanding that this
17 settlement agreement would preclude the admission and
18 consideration for all purposes of the testimony that was
19 pre-filed on behalf of McLeod USA, Eschelon, and Time
20 Warner Telecom?

21 A. (Reynolds) I guess sitting here today I don't
22 know what other purposes those would serve at this point
23 in the hearing.

24 Q. Could that evidence be admitted and
25 considered for the purpose of making the finding that is

0239

1 referred to in Paragraph 5 with respect to the Eschelon
2 and McLeod USA agreements?

3 A. (Reynolds) Yes, I would assume that it could.
4 In fact, I think that that's a fair reading of that
5 sentence, that testimony could be used to support the
6 settlement agreement, and that's one aspect of the
7 settlement agreement.

8 Q. Including a finding that Qwest willfully and
9 intentionally violated Section 252 and the referred to
10 Washington statutes by failing to timely file the McLeod
11 and Eschelon agreements?

12 A. (Reynolds) You know, I think the sentence
13 says what it says, and to the extent that the Commission
14 decides that it can rely on the testimony for that
15 purpose, I think that's something the Commission could
16 do.

17 Q. Okay. I on behalf of Time Warner Telecom had
18 sent out some discovery requests, and I just received
19 the responses today, and there were a couple things that
20 I wanted to ask you about those, but are you prepared to
21 respond?

22 A. (Reynolds) I have them here.

23 Q. If not, you know, we can --

24 JUDGE RENDAHL: I think we're here to talk
25 about the settlement unless it's somehow --

0240

1 MR. BUTLER: The discovery requests go
2 directly to the settlement. They are in effect the
3 kinds of questions I'm asking here today.

4 JUDGE RENDAHL: All right, we'll proceed, and
5 if there's an objection we'll deal with it.

6 MR. SHERR: Excuse me, Mr. Butler.

7 Would the Bench like copies?

8 MR. BUTLER: I would love to have them.

9 MR. SHERR: Do you want the entire set?

10 MR. BUTLER: Sure.

11 JUDGE RENDAHL: Let's be off the record for a
12 moment.

13 (Discussion off the record.)

14 JUDGE RENDAHL: All right, please go ahead,
15 Mr. Butler.

16 BY MR. BUTLER:

17 Q. In response to request 2-004, there is a
18 reference to Paragraphs 15 and 19 of the proposed
19 settlement agreement, and the question asks whether a
20 settling party, for the purposes of my question I guess
21 you can substitute just Qwest for that, whether a
22 settling party would have a right to withdraw from the
23 settlement agreement and seek reconsideration of the
24 Commission's order if the Commission were to make
25 findings of fact and conclusions of law to the effect

0241

1 that (a) the agreements listed in Paragraphs 12 and 13
2 of Order 12, which are the Eschelon and McLeod
3 agreements, are interconnection agreements that should
4 have been filed by Qwest, and then (b), whether Qwest
5 willfully and intentionally violated Section 252 and the
6 referred to Washington statutes by not timely filing
7 those transactions, whether CLECs and other than
8 Eschelon and McLeod USA were harmed by the failure to
9 file the agreements and whether consumers were harmed.
10 And the response is that, first, is that yes, Qwest
11 believes the finding that the agreements listed in
12 Paragraphs 12 and 13 were interconnection agreements
13 would be inconsistent with the settlement agreement and
14 would allow a party to withdraw from the settlement.
15 And unless I misunderstood your previous answers, this
16 seems to be inconsistent, and I wonder if you could
17 clarify for me whether Qwest would be, in your opinion,
18 Qwest would be entitled to withdraw from the settlement
19 agreement if the Commission were to make the finding
20 that the Eschelon and McLeod agreements are
21 interconnection agreements that should have been filed?

22 A. (Reynolds) I guess I don't understand the
23 first part of your question about how it would be
24 inconsistent, but maybe I can clarify it. I think I
25 explained --

0242

1 Q. Okay, just to clarify and to summarize, the
2 settlement agreement recites that a party would have a
3 right to withdraw from the settlement agreement and seek
4 reconsideration of the Commission order if the
5 Commission were to enter findings and conclusions that
6 are inconsistent with the settlement agreement.

7 A. (Reynolds) That's correct.

8 Q. And so the question, my question really is if
9 that finding that is referred to first in subparagraph
10 A, namely the agreements, the Eschelon and McLeod USA
11 agreements, should have been filed, the Commission made
12 that finding, the finding that's referred to in
13 Paragraph 5, would that allow Qwest to withdraw from the
14 settlement agreement? And these answers seem to say
15 yes, but I had understood your response earlier to say
16 no, if you can clarify that for me.

17 A. (Reynolds) Yes, actually when we discussed
18 this before I think I clarified that Exhibit 45-A and
19 44-A, two interconnection agreements with McLeod, have
20 been dismissed as a part of the settlement agreement.
21 And because of that, because those agreements -- because
22 those agreements are listed I believe in Paragraph 13 of
23 Order Number 12 that if the Commission made such a
24 finding that those were interconnection agreements that
25 needed to be filed, it would be inconsistent with the

0243

1 settlement agreement, with other parts of the settlement
2 agreement. And that's why in this response Qwest
3 answers yes, Qwest believes that such a finding would be
4 inconsistent with Paragraphs 4 where those agreements
5 are not included in Qwest's admission, and 5 and 8 of
6 the settlement agreement. 8 is where that the
7 agreement, those two agreements are specifically
8 dismissed. So that, you know, it's just clarifying that
9 yeah, it would be an inconsistency, and technically
10 Qwest would be able to withdraw if the Commission made
11 such a finding.

12 Q. And again, back to Paragraph 5, I'm sorry to
13 keep beating this, but I'm a little confused, Paragraph
14 5 again refers to a Staff belief that there is evidence
15 to support a finding with respect to those agreements
16 and that Qwest agrees not to appeal such a finding if
17 made by the Commission; how do you reconcile those?

18 A. (Reynolds) You know, the way I would
19 reconcile it is that the fact that those two agreements
20 have been dismissed as part of the settlement agreement
21 also sort of dismisses them for purposes of Paragraph 5.
22 That's how I would reconcile it.

23 Q. So to sum up, if the Commission were to make
24 a finding that Qwest willfully and intentionally
25 violated Sections 252 and the referred to Washington

0244

1 state statutes with respect to agreement 4-A that that
2 would not be inconsistent with the settlement agreement
3 and Qwest wouldn't appeal that but -- well, let's just
4 take that part; is that correct?

5 A. (Reynolds) Yes, and I think I know where
6 you're going with this, but I will let you proceed.

7 Q. And the same question, if they were to make
8 that finding with respect to Agreements 44-A and 45-A
9 and the oral agreement, so-called oral agreement, that
10 that would be inconsistent and allow Qwest to withdraw;
11 is that --

12 A. (Reynolds) It was never Qwest's intent to
13 foreclose the Commission from making a finding regarding
14 Paragraph 5, and that is a part of the settlement
15 agreement. To the extent that there is an inconsistency
16 between the agreements that have been dismissed as a
17 result of Paragraph 8 and that also becomes apparent in
18 reading through Paragraph 4, you know, that's an
19 inconsistency. But I can tell you here today that it's
20 not our intent to foreclose the Commission from making
21 that finding.

22 Q. Again, with respect to Paragraph 5, does the
23 description of the Eschelon and McLeod USA agreements
24 refer to those agreements as relating to rates or
25 discounts off of rates for intrastate wholesale

0245

1 services, those agreements in fact involved discounts
2 off of rates for other services as well including
3 interstate services; is that correct?

4 A. (Reynolds) I don't think they were limited to
5 any particular jurisdiction. We included intrastate
6 because of the nature of this proceeding.

7 Q. Just one final question. Did I understand
8 your testimony correctly that Qwest would not object to
9 a procedure that would allow other parties such as Time
10 Warner Telecom the opportunity to have admitted and to
11 argue the import of any of the pre-filed testimony on
12 issues relating to the settlement or the dispute between
13 the parties?

14 A. (Reynolds) I guess I don't really understand
15 the question.

16 Q. Specifically with regard to the McLeod and
17 Eschelon agreements, is it Qwest's position that this
18 settlement agreement would preclude Time Warner from in
19 this proceeding being able to argue to the Commission
20 what the nature of the McLeod and Eschelon agreements
21 were, whether they were interconnection agreements that
22 should have been filed, whether Qwest willfully or
23 intentionally violated the law in failing to timely file
24 those, whether there was any harm resulting from the
25 failure to file those agreements?

0246

1 A. (Reynolds) You know, Mr. Butler, I think
2 that's sort of outside the settlement agreement, and I
3 honestly don't know the answer to that question.

4 Q. Well, my question is really about whether the
5 settlement agreement, it's Qwest's understanding of the
6 settlement agreement that it would preclude Time Warner
7 Telecom from being able to do that?

8 A. (Reynolds) I don't know that there's anything
9 explicit in the settlement agreement that precludes Time
10 Warner from doing that. I mean the settlement agreement
11 speaks to the ability to use the testimony that's been
12 filed in this proceeding that has not been stricken to
13 support the settlement agreement, and I think it's
14 silent on the issue that you just addressed.

15 Q. Thank you, that's all the questions I have
16 for you.

17 And, Mr. Blackmon, Dr. Blackmon, excuse me,
18 if I could ask you some of the same questions with
19 respect to the Staff's understanding about how the
20 agreements work specifically with respect to Paragraph
21 5, and you referred to Eschelon and McLeod USA
22 agreements. Is it Staff's understanding that the
23 effects of this settlement agreement would be to
24 eliminate consideration of the question of whether those
25 agreements were interconnection agreements that should

0247

1 have been filed by Qwest?

2 A. (Blackmon) I'm sorry, which agreements are
3 you referring to?

4 Q. Well, let's take specifically agreements 44-A
5 and 45-A and the so-called oral agreement.

6 A. (Blackmon) Agreements 44-A and 45-A, the
7 proposal in the settlement is that those be dismissed,
8 and so the Commission would not be making any finding
9 one way or the other about those agreements and whether
10 they are interconnection agreements, whether Qwest
11 should have filed them, and whether Qwest violated any
12 state or federal law with respect to those. And we --
13 it is simply a dismissal of the complaint with respect
14 to those two agreements. This is a point I think where
15 Qwest and the Staff disagree somewhat in terms of the
16 reason behind it. Qwest advocates that these are not
17 interconnection agreements, and it's their right to
18 advocate that. Staff simply views this as being a
19 dismissal without any finding or any reason one way or
20 the other about whether they are interconnection
21 agreements.

22 Q. Could you explain to me the Staff's
23 understanding about what was intended by the language
24 that the Staff believes that the evidence demonstrates
25 and is sufficient to support a finding that Qwest

0248

1 willfully and intentionally violated Section 252 and the
2 Washington statutes by not timely filing the Eschelon
3 and McLeod transactions and that Qwest agrees not to
4 appeal such a finding by the Commission, can you explain
5 to me your understanding about what the import of that
6 language is. You're referring to specifically McLeod
7 agreements, for example, and referring to a potential
8 finding by the Commission; what were you referring to
9 there if those agreements are to be dismissed?

10 A. (Blackmon) The agreements other than those
11 two that are listed in Order Number 12.

12 Q. And are there other McLeod agreements not
13 listed in Paragraph 4 that were within the scope of
14 this?

15 A. (Blackmon) Not listed in Paragraph 4?

16 Q. Yes, which is the list of the agreements that
17 are -- that Qwest agrees were interconnection
18 agreements.

19 CHAIRWOMAN SHOWALTER: I think he meant
20 Paragraph 8 before. In other words, Dr. Blackmon,
21 weren't you saying that in Paragraph 8 there are certain
22 agreements that are dismissed and it's the others that
23 are not in Paragraph 8 that remain; is that what you
24 meant by your previous answer?

25 DR. BLACKMON: Yes, thank you very much.

0249

1 BY MR. BUTLER:

2 Q. But again 44-A, 45-A, and the oral agreement
3 are not included within the scope of this language in
4 Paragraph 5; is that right?

5 A. (Blackmon) They're not specifically, no, and
6 Paragraph 5 doesn't refer to individual agreements
7 individually. It refers to the transactions that are
8 identified and represented by those agreements to some
9 extent taken together that represent -- in Staff's view
10 they represent something above and beyond any one
11 individual agreement, a pattern of behavior that
12 constitutes willful and intentional violation.

13 Q. So when you said before that the settlement
14 agreement resolved all issues between the parties, by
15 resolved there you're referring to the fact that the
16 McLeod agreements would just by agreement would be
17 dismissed without a resolution?

18 A. (Blackmon) No, that's not dismissed without a
19 resolution, that's resolved by dismissal.

20 Q. Resolved without a finding one way or the
21 other about whether they're interconnection agreements;
22 that's fair, isn't it?

23 A. (Blackmon) That's correct.

24 Q. From the Staff's perspective, again, is it
25 consistent with the settlement agreement that there be a

0250

1 contested hearing, an opportunity for contested hearing,
2 that would allow Time Warner Telecom to address the
3 issue about whether the McLeod and Eschelon agreements
4 were interconnection agreements that should be filed?

5 A. (Blackmon) Well, Staff believes that the
6 Commission should conduct as much process as it needs in
7 order to determine whether the settlement is reasonable.
8 We're certainly not asking for further hearing on this,
9 and we believe that it's a fair resolution of this case
10 to dismiss those particular allegations, because Qwest
11 has agreed to the terms of the settlement.

12 Q. One final question. In determining that the
13 proposed amount of the penalty, the \$7.824 Million
14 penalty, was appropriate and something that the Staff
15 could support and recommend to the Commission, did the
16 Staff make any attempt to determine what the size of the
17 economic benefit to Qwest would result from it not
18 having to make the Eschelon and McLeod USA agreements
19 available to other CLECs?

20 MR. SWANSON: Staff is going to object at
21 this point. I believe the settlement speaks for itself,
22 and in terms of how that amount came about, I believe
23 that goes into the settlement discussions between the
24 parties.

25 JUDGE RENDAHL: Mr. Butler.

0251

1 MR. BUTLER: I simply asked whether the Staff
2 made any attempt to determine what the size of the
3 economic benefit was in reaching its own conclusion
4 about whether the settlement amount was appropriate to
5 recommend to the Commission. I didn't ask for any
6 discussions, any settlement discussions between the
7 other parties.

8 MR. SWANSON: Staff would additionally object
9 based on attorney work product in terms of the
10 information that Staff analyzed and the conclusions that
11 it drew in order to litigate and settle this case
12 respectively.

13 JUDGE RENDAHL: Let's be off the record for a
14 moment.

15 (Discussion on the Bench.)

16 JUDGE RENDAHL: The objection is granted, I
17 think it goes too much into the discussion of what went
18 into the settlement as opposed to what the settlement
19 itself says, so at this point the objection is granted.

20 MR. BUTLER: Your Honor, I have no further
21 questions.

22 JUDGE RENDAHL: Okay.

23 Chairwoman Showalter?

24 CHAIRWOMAN SHOWALTER: Yes.

25

1 E X A M I N A T I O N

2 BY CHAIRWOMAN SHOWALTER:

3 Q. Dr. Blackmon, can you turn to Paragraph 5.

4 A. (Blackmon) I have that.

5 Q. I don't see where in this paragraph or
6 actually anywhere else in the agreement, in the written
7 agreement, Staff makes a recommendation to the
8 Commission that we make a finding. It appears to me
9 Staff is saying that the evidence is sufficient for us
10 to make a finding, and Qwest says that if we make a
11 finding they won't appeal it, but I don't see in the
12 agreement a recommendation one way or the other. When I
13 read this, I took it to mean that it would be consistent
14 with the agreement if we made such a finding and it
15 would be consistent with the agreement if we did not
16 make such a finding, because nothing directs or even
17 recommends us to make such a finding, but maybe I
18 haven't read the agreement.

19 A. (Blackmon) I suspect that you have read the
20 agreement, and, you know, this is a topic that even
21 though we had agreed in principle how to do it, we found
22 it difficult to exactly describe that within the
23 settlement, because Qwest doesn't want to join us in
24 that recommendation. But as I understand it, they also
25 don't want to stand in our way in making that

0253

1 recommendation.

2 In Paragraph 15, subparagraph D perhaps comes
3 as close to this recommendation as anywhere else.

4 Q. I looked at that, and that just seems to go
5 right back to Paragraph 5, in other words, there is no
6 recommendation. And really maybe I just need to
7 clarify, if you're in fact making that recommendation to
8 us and it is Qwest's understanding that Staff is making
9 that recommendation, I would say that's an addition to
10 the written document here. But the important part is
11 what have you actually agreed to? Has Qwest agreed that
12 Staff will make a recommendation that we make such a
13 finding, Mr. Reynolds?

14 A. (Reynolds) It was our understanding based on
15 the part of Paragraph 15 that Dr. Blackmon just pointed
16 out that to the extent that the Commission did not make
17 such a finding, and I think Dr. Blackmon pointed this
18 out in his opening remarks, that Staff specifically
19 reserved the right to withdraw from the agreement.
20 Based on that representation, we felt that Staff was
21 making such a recommendation, and obviously, you know,
22 Paragraph 5 speaks for itself, Qwest does not intend to
23 appeal should the Commission make that finding.

24 Q. I understood that much but -- well, maybe
25 this is hypertechnical at this point, but why is it

0254

1 inconsistent with the agreement for us to fail to make a
2 finding? In other words, what does give Staff the right
3 to withdraw from the agreement if we do not make a
4 finding? Because there is nowhere that says that we
5 should make one unless you're basically intending today
6 to amend the words of the settlement agreement and
7 recommend to us in addition to the words in here that
8 you are, in fact, recommending we make such a finding.

9 A. (Blackmon) The Commission itself when it
10 issued the complaint presented the question of whether
11 there was -- there were violations of 170, 180, and 186.
12 Having concluded its investigation, Staff comes back to
13 you with what we believe to be evidence that there were
14 willful and intentional violations of those laws that
15 the Commission initially issued its complaint about.
16 Given that circumstance, I mean if we need to on brief
17 make that recommendation to you, we certainly will, but
18 I think Staff believed that the Commission complaint
19 about it, if Staff found it, then the Commission would
20 not really have any reason not to make that finding,
21 because that's the -- that would be consistent with
22 everything in the case so far.

23 Q. Well, it seems that we are here to actually
24 hear what the settlement says, but depending on what
25 intervening steps there might be, we have the choice to

0255

1 accept the settlement. So my question really is, when
2 we accept the settlement, are we accepting the
3 requirement to make such a finding? I don't find the
4 requirement to make such a finding, but I also don't
5 find the recommendation to make such a finding. I
6 simply find a statement that Staff finds the evidence
7 would be sufficient for us to make a finding and no
8 more. So isn't this in the nature of what I would say
9 an oral clarification to the agreement, if assuming that
10 the two parties agree, that you would read into
11 Paragraph 5 a sentence right before the last sentence of
12 Paragraph 5 which is, Staff recommends that the
13 Commission make such a finding? It seems to me that you
14 are assuming that and that apparently Qwest also is
15 assuming that, but it's not stated. But I don't want to
16 push you into something that you haven't agreed to.

17 A. (Blackmon) I believe that that recommendation
18 is implicit in the settlement agreement.

19 Q. Well, then the question is does either party
20 have an objection to making that explicit?

21 MR. LUNDY: Your Honor, Qwest does not. And,
22 Your Honor, from Qwest's perspective the language five
23 lines down in Paragraph 5 where Staff, where it reads,
24 Staff believes that this evidence demonstrates and is
25 sufficient, it was our understanding that that language

0256

1 was tantamount to a recommendation. So although the
2 language is not -- that word isn't used, that was our
3 understanding of the settlement agreement.

4 CHAIRWOMAN SHOWALTER: Okay.

5 BY CHAIRWOMAN SHOWALTER:

6 Q. Now, Dr. Blackmon, can you tell me which
7 agreements would we be looking at in making such a
8 finding under Paragraph 5 after we have taken note of
9 Paragraph 8 and dismissed out what exists there; what is
10 left in essence?

11 A. (Blackmon) You would be looking at the
12 transactions taken as a whole and not any individual
13 interconnection agreement on its own, but those taken as
14 a whole that are listed in Paragraphs 12 and 13 of Order
15 Number 12.

16 Q. But do you agree that in Paragraph 8 when the
17 settlement calls for dismissing those parts of the
18 complaint and amended complaint that concern or with
19 respect to agreements 19-A, 21-A, 25-A, 26-A, 44-A, and
20 45-A, doesn't that mean that those aspects of the case
21 are simply gone? I mean what I'm trying to get at here
22 is it doesn't seem to me we can both rely on those
23 agreements to make the finding in Section 5 and at the
24 same time dismiss them. We've got to have something
25 left other than those agreements upon which we would

0257

1 make the finding that you now recommend in Section 5, so
2 I was asking what is it?

3 A. (Blackmon) I have not tried to parse the
4 individual agreements that are listed in those two
5 paragraphs, you know, separate from each other. The
6 Staff has looked at and agreed to look at those as a
7 group. So I guess, I'm sorry, but I guess we can try to
8 provide more information to you on that point, but I
9 don't have a good answer for you at the moment.

10 Q. Well, with respect to Eschelon and McLeod,
11 are there agreements in the complaint about those two
12 companies, that concern those two companies, that are
13 not listed in Section 8 here?

14 A. (Blackmon) About those two companies?

15 Q. Right. In other words, are there any
16 Eschelon or McLeod agreements that are not listed in
17 Section 8 of the settlement agreement?

18 A. (Blackmon) If I could have a copy of Order
19 Number 12.

20 In Order Number 12, the Eschelon agreements,
21 so essentially the Eschelon agreements that are referred
22 to in Paragraph 5, are numbers 1, in each case the
23 letter A would follow, but 1, 2, 3, 4, 5, 6, 12, 19, and
24 21.

25 Q. Okay.

0258

1 A. (Blackmon) So Paragraph 8 would eliminate 19
2 and 21.

3 Q. So with respect to Eschelon, the agreements
4 that are left are 1-A, 2-A, 3-A, 4-A, 5-A, 6-A, and
5 12-A; is that correct?

6 A. (Blackmon) That's correct.

7 Q. All right. And then what about McLeod?

8 A. (Blackmon) Those agreements listed in
9 Paragraph 13 are 8-A, 9-A, 44-A, and 45-A.

10 Q. So 8-A and 9-A remain, are not dismissed?

11 A. (Blackmon) That's correct.

12 Q. By Paragraph 8 of the settlement agreement?

13 A. (Blackmon) That's correct.

14 CHAIRWOMAN SHOWALTER: Those are all the
15 questions I have for the witnesses, but I think if we
16 have a chance later to talk to the attorneys in this
17 case.

18 JUDGE RENDAHL: Yes, after we have finished
19 asking questions of the witnesses, we will have an
20 opportunity to discuss matters with counsel.

21 Commissioner Hemstad, do you have any
22 questions?

23 COMMISSIONER HEMSTAD: I don't have any
24 further questions of the witnesses.

25 JUDGE RENDAHL: And Commissioner Oshie?

0259

1 COMMISSIONER OSHIE: I don't believe I have
2 any questions either, I'm just checking my notes to see
3 if all the matters have been covered.

4 COMMISSIONER HEMSTAD: I do have one of
5 Dr. Blackmon.

6

7 E X A M I N A T I O N

8 BY COMMISSIONER HEMSTAD:

9 Q. Perhaps this has already been covered by
10 Mr. Butler's questions. The last sentence in Paragraph
11 25, it says, the testimony should be admitted for
12 purposes of supporting the settlement agreement. Again,
13 it was unclear, the answer that was given before, does
14 that mean admitted for all purposes or for any purpose?

15 A. (Blackmon) Certainly Staff believes that it
16 -- if you simply look at -- if you were to read the
17 sentence as saying that it's admitted only for purposes
18 of supporting settlement agreement, reading a word in
19 there that isn't there, but if you were to take that
20 view, then certainly still one of those purposes would
21 be to support the findings in Paragraph 5 regarding
22 willful and intentional violations. However, Staff
23 doesn't read into that sentence the word that's not
24 there in terms of what purposes the testimony or the
25 evidence could be used for after it's admitted. We

0260

1 don't have a particular view about what it can be used
2 for and what it can't be used for.

3 Q. All right. And again to clarify in my own
4 mind, back to Paragraph 5, if the Commission made no
5 finding with respect to the evidence leading to the
6 conclusion that Qwest willfully and intentionally
7 violated the referenced statutes, would that then
8 trigger the right of the Staff to withdraw from the
9 settlement?

10 A. (Blackmon) Yes, not just Staff, but Staff or
11 Public Counsel could withdraw.

12 COMMISSIONER HEMSTAD: Yes. That's all I
13 have, thank you.

14 COMMISSIONER OSHIE: And I don't have any
15 questions, thank you.

16 JUDGE RENDAHL: I do have a few for the
17 witnesses myself.

18

19 E X A M I N A T I O N

20 BY JUDGE RENDAHL:

21 Q. First for Mr. Reynolds. If you look at
22 Paragraph 16 of the settlement agreement, my question is
23 whether, if the Commission enters an order approving the
24 settlement agreement, whether that order, whether any
25 findings of fact and conclusions of law in that order

0261

1 need to be limited to what's stated in Paragraphs 5 and
2 6 of the settlement agreement or whether the Commission
3 under your understanding of the terms of the settlement
4 agreement can make other findings without the parties
5 withdrawing from the settlement? In a sense, is it
6 limited to those two findings of fact and conclusions of
7 law relating to those two paragraphs?

8 A. (Reynolds) I'm not sure that they're
9 specifically limited to just those two paragraphs, but I
10 think it's Qwest's position that the findings of fact
11 should be limited to the settlement agreement.

12 Q. And, Mr. Blackmon, the same question?

13 A. (Blackmon) I think that the answer about
14 whether the Commission could make other findings without
15 disrupting the settlement, the answer to that would be
16 found in Paragraph 15 rather than Paragraph 16. In
17 general, we believe that findings that are consistent
18 with the settlement are appropriate for the Commission
19 to make. Findings that would have the effect of
20 modifying the settlement would allow the parties the
21 right to withdraw from the settlement.

22 Q. Okay, thank you.

23 A. (Reynolds) I would add one more thing to
24 that, and I would also have the Commission take a look
25 at Paragraph 14 as well, because it's the intent of this

0262

1 settlement to resolve all matters in dispute in this
2 proceeding, and if there was a finding of fact that
3 created another dispute, I think that we would think
4 that we could withdraw on that basis.

5 Q. Thank you.

6 And relating to the question that
7 Commissioner Hemstad asked at the last sentence in
8 Paragraph 25, just to clarify what testimony the
9 parties, the testimony and exhibits the parties are
10 agreeing could be admitted, at this point Mr. Wilson on
11 behalf of Staff filed testimony and exhibits, I'm
12 assuming those would be admitted. I don't believe
13 anything has been stricken from Mr. Wilson's testimony
14 to my knowledge.

15 A. (Blackmon) That's correct.

16 Q. Okay. And then Mr. Hydock's testimony on
17 behalf of AT&T, would that be admitted?

18 MR. SWANSON: Your Honor, I believe that
19 Staff has filed a document referencing the AT&T
20 testimony and how it should be treated based on AT&T's
21 withdrawal from this proceeding and that perhaps it
22 wouldn't be appropriate to include it in the record in
23 terms of litigation. But I believe in terms of
24 settlement, this agreement covers it all, the fact that
25 all testimony that's been filed and hasn't been stricken

0263

1 would be admitted.

2 JUDGE RENDAHL: All right.

3 BY JUDGE RENDAHL:

4 Q. And that would include Mr. Gray, Mr. Smith,
5 and Mr. Gates' testimony that hasn't been stricken?

6 A. (Blackmon) Yes.

7 Q. All right.

8 And on behalf of Qwest, Mr. Shooshan and
9 Mr. Brotherson's testimony and exhibit, correct?

10 A. (Reynolds) (Nodding.)

11 Q. All right, I just wanted to get a sense of
12 what we were talking about.

13 A. (Reynolds) That's correct.

14 Q. Do you, Mr. Reynolds and Mr. Blackmon, have a
15 copy of Time Warner's opposition, the pleading that was
16 filed in this case?

17 A. (Blackmon) Yes.

18 Q. Mr. Blackmon, if you could turn to page 2,
19 paragraph 3 of Time Warner's opposition, and it relates
20 to Paragraph 5, I believe there was a question from
21 Mr. Butler already on this issue, but is there in a
22 sense an oral modification of the agreement that the
23 agreements at issue concerning the discount off or off
24 discount rates related to more than just intrastate
25 wholesale services?

0264

1 A. (Blackmon) I'm sorry, is there an agreement
2 about that?

3 Q. Well, I understood Mr. Reynolds -- I guess
4 let's start with Mr. Reynolds.

5 Mr. Reynolds, I understood you to say that
6 yes, your understanding was that those oral agreements
7 related to more than just intrastate wholesale rates but
8 that for purposes of the settlement agreement and the
9 complaint it was you limited the discussion to
10 intrastate.

11 A. (Reynolds) That's correct, and I think that
12 my statement was because this proceeding was about
13 intrastate matters.

14 Q. But you're not trying to characterize the
15 agreements as just limited to intrastate?

16 A. (Reynolds) That's correct.

17 Q. Okay.

18 And, Mr. Blackmon, do you have anything to
19 add to that?

20 A. (Blackmon) I would just like to reiterate
21 that the word only does not appear there, and the claim
22 that we have -- the settlement mischaracterizes those
23 agreements, that claim itself is a mischaracterization
24 of the settlement agreement. We have simply represented
25 that the intrastate services and rates that are provided

0265

1 for in those agreements are the subject of this docket
2 and this settlement.

3 Q. And what would you say to Time Warner's
4 suggestion in Paragraph 20, which is on page 10 of the
5 pleading, that the Commission modify the settlement's
6 description of the agreements to reflect the fact that
7 Eschelon and McLeod were offered a discount on all
8 services they purchased, would that be inconsistent,
9 that kind of a finding be inconsistent with the
10 settlement agreement?

11 A. (Blackmon) Staff doesn't believe that it
12 would be inconsistent for the Commission to find as a
13 matter of fact that the agreement covers both intrastate
14 and interstate services. We would encourage you not to
15 end up with an order that seems to preclude or say that
16 you're stepping into the territory of the Federal
17 Communications Commission. The FCC has taken
18 enforcement action against Qwest with regard to -- on
19 these same issues in Minnesota and Arizona, and we would
20 not want to have the Washington Commission's action
21 interfere in any way with whatever sort of enforcement
22 action the FCC might take with respect to interstate
23 services.

24 Q. Thank you.

25 Mr. Reynolds, anything further on that?

0266

1 A. (Reynolds) The only thing that I would add is
2 that it was our understanding that early on in this
3 proceeding the Commission actually issued an order that
4 limited the agreements to intrastate agreements, and I
5 think that that may have been part of the thought that
6 went into the particular phrasing in Paragraph 5.

7 Q. Okay, thank you.

8 And I assume you have also read the suggested
9 findings in Paragraph 19 of Time Warner's pleading.
10 And, Mr. Blackmon, did you have any response as to
11 whether A, B, C, or D that's suggested there would be
12 inconsistent with the settlement agreement? I think we
13 have already discussed A.

14 A. (Blackmon) Staff believes that the finding
15 that's in B would not be inconsistent with the agreement
16 except for the fact that it refers to interstate, and
17 that part I guess I think it would be wrong as a matter
18 of law to say that those interstate services, discounts
19 of those, violate the state statutes on discrimination
20 under preference, and so I think we would -- I guess I'm
21 not real clear on whether it would violate the
22 settlement agreement even if we think it's wrong as a
23 matter of law, but we know that the settlement agreement
24 does not cover interstate services one way or the other.

25 Q. Okay. And as to C?

0267

1 A. (Blackmon) That appears to me to be a finding
2 of fact that would not be either consistent or
3 inconsistent with the settlement agreement as best I can
4 tell.

5 Q. Not consistent or inconsistent?

6 A. (Blackmon) Right, so that if the Commission
7 were to make that as a finding of fact, Staff -- I don't
8 believe that that would be inconsistent with the
9 settlement agreement for the Commission to make a
10 finding of this nature.

11 Q. Okay.

12 CHAIRWOMAN SHOWALTER: I'm going to interject
13 a little word here about the word consistent and
14 inconsistent. It seems to me that it's being used
15 inappropriately. If you have a settlement agreement,
16 you either comply with it or you don't, but something
17 that isn't covered by the settlement agreement one could
18 say is consistent with it simply because it's not
19 covered by it, and I think that that does not do justice
20 to what settlement agreements are about. And usually we
21 don't talk about things being consistent with a
22 settlement agreement. We approve a settlement
23 agreement, that means we approve what's in it, not that
24 we add things that are not precluded by it. So this
25 discussion about what is consistent or inconsistent, in

0268

1 my view something is either consistent or inconsistent,
2 it can't be neither, but the problem is this word
3 consistent. Something would be consistent with the
4 agreement if it's simply not precluded by it, but an
5 agreement usually says, probably this one does too, that
6 this settles everything, this settles all disputes by
7 its terms, in which case if we start straying from its
8 terms, as one part of the settlement agreement points
9 out, that would allow the parties to withdraw. In
10 effect that means it's "inconsistent", but this is
11 getting -- I suppose it's a semantical problem I think,
12 but the essence is if we made such a finding, would it
13 justify one or the other parties withdrawing from the
14 agreement because it was not anticipated in the
15 settlement agreement.

16 JUDGE RENDAHL: And I think that's what I'm
17 really getting at.

18 BY JUDGE RENDAHL:

19 Q. And so when you're speaking to it being
20 consistent or inconsistent, Mr. Blackmon, would that
21 mean that it would cause Staff concern to withdraw from
22 the agreement?

23 A. (Blackmon) I don't think this particular
24 finding that's in Paragraph C would cause Staff to
25 withdraw from the settlement. Staff does recommend, as

0269

1 the Chairwoman suggests, that the Commission approve the
2 settlement exactly as it is and add nothing to it, but
3 we will try to answer the hypotheticals about if you
4 added this, would we still withdraw or not, so I don't
5 think C would do that to us.

6 Q. Okay. And I'm really trying to get a sense
7 given the opposition that's been filed the boundaries of
8 the issues between the parties at this point.

9 And lastly, if you can address Paragraph D in
10 the same manner.

11 A. (Blackmon) That appears to me to be a finding
12 of fact that would support the legal conclusion that
13 Qwest willfully and intentionally violated 80.36.170,
14 180, and 186, and so Staff would not withdraw if the
15 Commission were to make that finding.

16 Q. Okay, thank you.

17 And, Mr. Reynolds, as to the same, I think
18 really as to B, C, and D because I think A has been
19 addressed previously, if you can respond in the same
20 manner as Mr. Blackmon did in terms of whether Qwest
21 believes these three findings would cause a party to
22 withdraw.

23 A. (Reynolds) I think my comments regarding B
24 would be similar to Dr. Blackmon's. You know, I have
25 concerns about interstate in there, the same concerns

0270

1 that he voiced, so I think I would agree pretty much
2 with his assessment of B.

3 C and D I think create whole new issues for
4 Qwest, and based on my representation a short while ago
5 regarding Paragraph 14 of the agreement, that is that
6 it's the intent of the settling parties to resolve all
7 matters at dispute in this complaint, that creates whole
8 new issues for us, and I think on that basis alone Qwest
9 could withdraw from the settlement agreement. And
10 although I would have to talk with counsel, I believe we
11 probably would.

12 Q. Thank you.

13 A. (Reynolds) And that goes to both C and D.

14 JUDGE RENDAHL: Okay, thank you.

15 And that's all I have for the parties, for
16 the witnesses at this point.

17 Any other questions from the Bench at this
18 time? I'm thinking just of the witnesses.

19 And, Mr. Butler, was there anything else
20 maybe in follow up?

21 MR. BUTLER: No.

22 JUDGE RENDAHL: All right, well, thank you
23 very much Mr. Blackmon and Mr. Reynolds, you may step
24 down, we appreciate your time this afternoon.

25 And now we'll move to questions for counsel

0271

1 from the Bench.

2 Mr. Sherr.

3 MR. SHERR: Thank you, Your Honor, would it
4 be possible to take a short break?

5 JUDGE RENDAHL: Yes, let's take a break, we
6 will be back at 5 after 3:00.

7 (Recess taken.)

8 JUDGE RENDAHL: Let's be back on the record
9 after our break, and at this point we will have
10 questions from the Bench to the counsel.

11 Chairwoman.

12 CHAIRWOMAN SHOWALTER: Yes, Mr. Butler, I
13 have some questions for you, and I think in a sense
14 there are legal issues and policy issues with respect to
15 accepting the settlement or having some other process
16 than accepting the settlement, so it's really a little
17 two-by-two matrix, so I hope that we can keep clear with
18 each other what it is we're talking about at any one
19 time. But I think in the first instance I'm interested
20 in any legal bars to our accepting the settlement,
21 recognizing that that doesn't necessarily dispose of the
22 matter because of other issues. But first, I'm just
23 going to go through your filing, with respect to
24 Paragraph 3 on page 2.

25 MR. BUTLER: This is of my --

1 CHAIRWOMAN SHOWALTER: This is of your
2 opposition to the proposed settlement. At the end of
3 your Paragraph 3, you say that the settlement does not
4 address how the Commission will get the evidence
5 necessary to support the finding in Paragraph 5. Now
6 that we have had the discussion that we have had today,
7 is it still your opinion that we would not have
8 sufficient evidence to make the finding that the parties
9 expect us to make under Paragraph 5 of the settlement?

10 MR. BUTLER: Let me answer this way. My
11 understanding of what I heard today was that all of the
12 pre-filed testimony would be admitted or admissible for
13 the purposes of the proceeding that the Commission is
14 going to have, and in that pre-filed testimony,
15 including the testimony of Mr. Wilson, Mr. Gates,
16 Mr. Gray, and Mr. Smith, I believe there is sufficient
17 evidence to support the appropriate findings. You know,
18 being the other part of the question is what are the
19 appropriate findings, but the finding literally narrowly
20 that's referred to I think in Paragraph 5, I believe
21 that the answer to your question is yes, there would be
22 sufficient evidence with that clarification.

23 CHAIRWOMAN SHOWALTER: Okay, and we can come
24 back to other things if I haven't covered everything by
25 the time I get through. On page 4 at the end of your

0273

1 Paragraph 7, well, Paragraph 7 talks about what
2 precedential value this settlement has, and I guess my
3 understanding when I read it is that the settlement if
4 we approve it will contain findings, admissions and
5 findings of violations of law and that that would just
6 become a fact of or an outcome of the proceeding, that
7 the parties didn't want other things not contained in
8 that approval to be used for precedential purposes. And
9 I'm not certain of what your objection is, are you
10 thinking that it couldn't be stated that there was a
11 violation even though that's what the settlement and
12 approval of the settlement would say, or is there
13 something else that's not in the settlement that you're
14 concerned about?

15 MR. BUTLER: Let me answer this way. I was
16 uncertain reading the settlement agreement what the
17 parties, the settling parties, intended. And I thought
18 one possible interpretation of that settlement agreement
19 was that they were asking the Commission to make a
20 finding or statement as part of its order that none of
21 the findings and conclusions in that order would have
22 any precedential value. I did not hear that from the
23 witnesses today, and if I am correct that all they are
24 saying is that amongst themselves none of them would
25 argue in a future proceeding that, you know, Qwest had

0274

1 agreed to X, Y, or Z, that's one thing. But I did not
2 hear them say that they intended this settlement
3 agreement to require the Commission to make any kind of
4 a statement or finding that its order in the case or any
5 of its findings or conclusions would have no
6 precedential value. My concern was simply that the
7 findings and conclusions that the Commission ultimately
8 enters in this case and the order would have the same
9 precedential value as any other findings, conclusions,
10 and order entered by the Commission.

11 CHAIRWOMAN SHOWALTER: And maybe the issue is
12 what does precedential even mean. When you accept a
13 settlement, you accept it for its terms, and I don't
14 know if accepting a settlement is a precedent for what's
15 done the next time or not. In that sense, I'm not sure
16 a settlement is precedent, but in terms of the
17 settlement calling for admissions and findings of
18 certain violations of law, there that just is. Now
19 whether that means the next time around in a new
20 proceeding about something similar we need to do the
21 same thing because we approved this settlement, there I
22 think in general settlements do not have precedential
23 value in terms of dictating what the Commission does
24 next time around with a full-fledged proceeding.

25 MR. BUTLER: My view of the law is that this

0275

1 is a non-unanimous settlement, therefore it really isn't
2 a settlement at all. It is simply a stipulation among
3 some but not all of the parties in the case, and it is
4 nothing more than their common position in the case,
5 entitled to no more weight, no superior status, no
6 priority, that this is still a contested or adjudicatory
7 proceeding at which there are issues between the
8 parties, and the Commission can not as a matter of law
9 base its decision on this settlement. If it were a
10 unanimous settlement, the settlement itself could become
11 the basis for a Commission decision. Because it is not
12 a unanimous settlement, the Commission may not legally
13 base its decision on the settlement, it must base its
14 decision on substantial evidence in the record, making
15 findings and conclusions supported by substantial
16 evidence.

17 So with that preface, you know, that maybe
18 helps explain a little bit my answers and my position in
19 the case, which is essentially that we as a matter of
20 law believe we are entitled to a hearing where the
21 Commission makes findings of fact based upon substantial
22 evidence, and those findings of fact would have the same
23 precedential value and the conclusions and order as the
24 Commission's decision in any other adjudicatory
25 proceeding.

0276

1 CHAIRWOMAN SHOWALTER: And actually, that's
2 the most interesting questions that you raise I think,
3 and maybe we could go over to page 5, Paragraph 11, and
4 it may be other places as well, but you use the phrase
5 any other adjudicatory proceeding, but different
6 proceedings have different characters. And in
7 particular this one is an enforcement proceeding, which
8 seems to me quite different than say a rate case, and I
9 put to you the question of what is the right of an
10 intervenor such as yourself in an enforcement
11 proceeding? Is it the same as if when you have a
12 monetary interest directly in the outcome of a
13 proceeding such as a rate case?

14 MR. BUTLER: Well, I think that once we, Time
15 Warner Telecom, is granted intervenor status, by law it
16 had the rights, full rights of a party, and therefore we
17 have the rights that any other party had in this
18 proceeding. In an enforcement action, Time Warner
19 Telecom certainly I think has a stake in the outcome of
20 the proceeding and the enforcement action because it was
21 one of the non-favored CLECs that did not get some of
22 these special secret deals that were entered into. And
23 we believe the entire intent of section, you know, of
24 the Telecom Act and the various sections of the
25 Washington state law is to protect against

0277

1 discriminatory behavior, and the federal legal
2 requirements require that agreements that satisfy the
3 requirements in an interconnection agreement were
4 supposed to be filed and made available to other CLECs
5 to opt into. We were deprived of that right because
6 of what we believe is the willful and intentional
7 behavior of Qwest to not file these agreements.

8 So we have a stake in this enforcement
9 action, and it's a stake in ensuring that the Commission
10 makes the appropriate findings, which we might then be
11 able to take to court, you know, with an action to try
12 to recover some damages, but also to see that the
13 Commission enters an appropriate penalty that in fact is
14 going to deter this kind of activity and not simply
15 offer them a penalty that amounts to a reward, which is
16 what we think this penalty is. It doesn't even match
17 what the economic benefit would be to Qwest by not
18 making those discounts available to other CLECs.

19 CHAIRWOMAN SHOWALTER: And that gets to what
20 our authority is in an enforcement action, and perhaps
21 we have a different authority that's delegated to us by
22 the legislature to implement the Federal Telecom Act,
23 because we do have that authority. I'm used to thinking
24 of enforcement actions as involving penalties, and
25 penalties are not remedies for injured parties, they are

0278

1 like a punishment, and that's basically for the
2 violater, and you really don't ask the question or you
3 don't peg the penalty to the harm done, or the penalty
4 is not damages, put it that way. And what is your view
5 of our authority in this case on that question?

6 MR. BUTLER: If you look at pages 12 and 13
7 of my submission, there are nine factors that were
8 considered by the Minnesota Commission in its unfiled
9 agreements case, which were reviewed by the Federal
10 District Court, and listed is appropriate factors to
11 consider in determining the amount of a penalty. Listed
12 among those are number 5, the economic benefit gained by
13 the person committing the violation.

14 CHAIRWOMAN SHOWALTER: Yes, but I don't know
15 that that -- well, first of all, I don't know what
16 authority the Minnesota court has, the commission has,
17 but generally speaking in enforcement actions the damage
18 done is a factor in determining the penalty, but that
19 doesn't imply that the penalty is equal to the damage
20 done. It just means that there's a greater penalty.
21 Usually there are maximum amounts for penalties, and so
22 it might be \$100 a day or \$1,000 a day, so in an
23 enforcement action you're trying to determine where from
24 zero to the maximum should you land. But often in
25 enforcement actions the penalty amounts do not reach at

0279

1 all the actual damage done, you just take it into
2 account when setting the penalty.

3 What I'm trying to understand from you is do
4 you think that we're supposed to provide an economic
5 penalty to the violater as distinct from just a hit? I
6 haven't got the right term, I'm sorry, but in other
7 words are we supposed to negate the benefit, or are we
8 simply supposed to impose a penalty within a statutory
9 scheme?

10 MR. BUTLER: I think that the factors that
11 were listed in the Minnesota case are appropriate
12 factors to consider.

13 CHAIRWOMAN SHOWALTER: Right.

14 MR. BUTLER: The economic benefit is
15 certainly one of the factors, and I think the simple
16 reality is that if the penalty isn't sufficient to at
17 least take away the economic benefit, it isn't a penalty
18 at all, it's a reward, because they gain, Qwest gains by
19 violating the law.

20 CHAIRWOMAN SHOWALTER: Unless there are other
21 remedies in the civil world that can also go against the
22 company.

23 MR. BUTLER: That's true. Now if you look at
24 Arizona, they had a sort of a multifaceted resolution
25 there that attempted to address, one, the violation,

0280

1 both the penalty for the violation and it attempted to
2 redress the harm that was caused by the violation. We
3 don't have that in this case, we only have the penalty
4 for violating the law. And in the context of the
5 limited scope of this proceeding, it's Time Warner's
6 position that that penalty amount is simply too small
7 and functions as a reward.

8 CHAIRWOMAN SHOWALTER: In these other cases,
9 were they in fact broader cases than we have right here
10 in Arizona and Minnesota?

11 MR. BUTLER: In Minnesota and Arizona, yes,
12 they did address harm to CLECs and attempt to redress
13 that. We're not doing that in this case. And I notice
14 also in Minnesota you're talking about a penalty which
15 was upheld by the court as being appropriate considering
16 these factors that was \$25.9 Million.

17 CHAIRWOMAN SHOWALTER: Again, I just don't
18 know under what statutory scheme or other scheme the
19 Minnesota Commission was acting.

20 COMMISSIONER HEMSTAD: I wanted to pursue
21 that Minnesota case while we're on that topic. I assume
22 the appeal in Minnesota was by the company?

23 MR. BUTLER: Yes.

24 COMMISSIONER HEMSTAD: Claiming that the
25 penalty was excessive?

0281

1 MR. BUTLER: Yes.

2 COMMISSIONER HEMSTAD: Are you suggesting
3 that as a matter of fact and ultimately of law that the
4 settlement proposal here is defined to be too small
5 because it does not adequately address the question of
6 dealing with the economic benefits or losses?

7 MR. BUTLER: My argument is to you as the
8 Commission and the decisionmakers charged with the
9 responsibility for enforcing various provisions of state
10 and federal law, you're the ultimate enforcer of
11 interconnection agreements, so it's a -- I'm making a
12 policy argument to you that the appropriate penalty in
13 this case should be larger than the one that is
14 contained in the settlement agreement. I'm not trying
15 to represent that a court would hold that this penalty
16 amount is too small.

17 COMMISSIONER HEMSTAD: That's the only point
18 I was trying to pursue.

19 COMMISSIONER OSHIE: Just following up
20 briefly on the Minnesota matter, it's my understanding
21 that enforcement proceedings, and perhaps they're not
22 even called that in Minnesota, they're brought by its
23 department of commerce, and as their department of
24 commerce would prosecute that case as any other case
25 would be prosecuted with the commission sitting as in an

0282

1 adjudicatory role, certainly different from our
2 circumstance here I believe in which the Commission has
3 issued a complaint or brought the complaint against the
4 effected party and this is a resolution of that. Does
5 that, would that change your view of this, Mr. Butler,
6 if that were --

7 MR. BUTLER: No, I don't see that that makes
8 a difference.

9 COMMISSIONER OSHIE: Now in your petition to
10 intervene, did you ask for a specific relief or
11 particularly any monetary relief, I am not meaning you,
12 but your client ask for specific relief?

13 MR. BUTLER: We I thought had made it clear
14 from the time that we filed the petition to intervene,
15 and we certainly did in pre-filed testimony that we
16 submitted, that we thought that penalties in and of
17 themselves were inadequate, that we were concerned about
18 the Eschelon and McLeod USA agreements, our concern was
19 not with the other agreements, and we had requested that
20 the Commission entertain a remedy that would attempt to
21 redress the harm caused by the violation of law.

22 COMMISSIONER OSHIE: Now is that --

23 MR. BUTLER: Part of the pre-filed testimony
24 was stricken by the Commission as being outside the
25 scope of this proceeding, but, you know, our testimony

0283

1 and position is also that there has been a violation of
2 law that resulted in harm to competitors and to
3 consumers and that the company should be appropriately
4 penalized, and that's the posture which we are here
5 today. You know, it's, I can't speak for what Time
6 Warner or any other CLEC will do in the future, but we
7 would certainly hope to come out of this proceeding with
8 the Commission making the appropriate findings that
9 there were agreements that should have been filed that
10 weren't filed, that they were not filed willfully and
11 intentionally, that there was harm that resulted from
12 it. And then we will take those findings or at least
13 one -- the option to be able to take those findings and
14 go to a court to try to seek redress or maybe come back
15 to the Commission. That's, you know, a decision which
16 hasn't been made, I haven't gotten any direction from
17 the client at this point, but that's what I would hope
18 at a minimum to be able to come out of this kind of
19 proceeding with. I mean, you know, if you can't at
20 least get that, I don't know what is going on here.
21 This is a serious issue with a competitive industry
22 certainly, this kind of behavior should not be condoned
23 or permitted at all, and that's really what is driving
24 our participation in this case.

25 COMMISSIONER HEMSTAD: Is there anything in

0284

1 the evidence proposed to be filed of record here that
2 attempts to quantify the harm to competitors or to the
3 consumers about --

4 MR. BUTLER: I had issued some discovery
5 requests to Qwest, and I think you can see from the
6 responses that they have declined to respond to those,
7 and I would probably have to come to you with a request
8 to enforce those discovery requests to try to get
9 information about that.

10 CHAIRWOMAN SHOWALTER: What is your view if
11 we do approve the settlement as it is, overcoming
12 whatever objections or process is necessary to get
13 there, what is your view then of what right you have,
14 your client has, to bring any further complaint or
15 proceeding in front of this Commission as distinct from
16 a court or either one? I mean do you see this as a --

17 MR. BUTLER: I suppose we can start all over
18 again and redo the whole case, but it seems to me to be
19 a waste and not really what the Commission implied when
20 it undertook the -- issued the complaint and undertook
21 what was supposed to be a full investigation. And, you
22 know, one of the main critical agreements, secret
23 agreements out there is just dismissed under the
24 settlement agreement. There's no resolution. The
25 Commission makes no determination about whether this is

0285

1 an interconnection agreement that should have been
2 filed. I mean that seems to me to be inconsistent with
3 what the Commission represented when it undertook this.

4 CHAIRWOMAN SHOWALTER: Well, when we
5 undertook it, we authorized a complaint, we didn't reach
6 a resolution and have not reached any resolution yet.
7 So the proposed settlement has us do some things, not
8 others, dismiss others, and really my first question is
9 just strictly a legal one. Do you feel you are
10 precluded by our approval of the settlement from
11 bringing back to us as a private complaint, that is a
12 complaint initiated by you as distinct from the
13 Commission, on any of these same --

14 MR. BUTLER: Legally I don't think we're
15 precluded, we didn't sign this thing, we wouldn't sign
16 it in its present form. I don't think that the
17 Commission legally can just simply accept this like I
18 said. Now if the Commission disposes of the case in a
19 way that doesn't make any of the findings to address the
20 issues in the case, then, you know, I don't know, it
21 depends on how you deal with it. Because technically we
22 could be precluded on some theory of issue preclusion
23 from relitigating an issue that was brought before you
24 and that you resolved. And these questions I think are
25 at issue in the case that need to be resolved on the

0286

1 evidence.

2 CHAIRWOMAN SHOWALTER: Getting back to the
3 role of an intervenor in an enforcement action, it seems
4 that one implication on your position is that if you had
5 multiple parties and all but one agree to some total
6 resolution of the case but one, just one, doesn't, that
7 forces in your view a hearing. That is once there is a
8 party, then the Commission itself can not dispose of the
9 case any other way than a full hearing. Is that your
10 view?

11 MR. BUTLER: Yes.

12 CHAIRWOMAN SHOWALTER: And --

13 MR. BUTLER: Because under the Commission's
14 own rules and I think under general legal principles a
15 non-unanimous settlement is nothing more than a common
16 position of the parties to the agreement. It doesn't
17 have the status of a true settlement. A true
18 settlement, as I said, can be itself the basis for the
19 Commission decision.

20 CHAIRWOMAN SHOWALTER: And --

21 MR. BUTLER: Otherwise you're supposed to
22 make decisions and findings of fact and conclusions of
23 law based upon substantial evidence in the record.

24 CHAIRWOMAN SHOWALTER: Yes, but I'm not sure
25 that totally answers the question. Because if we, in

0287

1 this case, we would have this proposed settlement and we
2 have a record, and I guess the question in my mind is
3 are we allowed to resolve the complaint in the manner
4 proposed by the settlement based on the record that is
5 now before us, that we would say, well, this is
6 sufficient process, this is fair, this is in the public
7 interest, or do we have to in your view go to a hearing
8 if a single party wants us to?

9 MR. BUTLER: I believe that legally you are
10 required to provide due process, including the rights to
11 a fair hearing, to any party who is not a part of the
12 settlement agreement.

13 CHAIRWOMAN SHOWALTER: And there is --

14 MR. BUTLER: And, you know, if the terms of
15 the settlement are supported by the evidence in the case
16 at the end, you know, I suppose you can adopt some of
17 the terms. I don't know that some of the terms of this
18 agreement are necessarily appropriate for resolution of
19 the contested proceeding, but I haven't really thought
20 about that in great detail.

21 CHAIRWOMAN SHOWALTER: So --

22 MR. BUTLER: But at least, to directly answer
23 your question, I believe that a non-settling party is
24 entitled to a hearing that is fair and entitled to a
25 decision based upon the evidence in the record.

0288

1 CHAIRWOMAN SHOWALTER: So if we follow that
2 process and then we would hold a hearing in which
3 presumably the other parties would have the position
4 that they currently have, you then would put on
5 witnesses and that kind of thing?

6 MR. BUTLER: My understanding from Order
7 Number 12 that the Commission -- the basis for resolving
8 the McLeod and Eschelon settlements was a provision that
9 those two companies were named parties to the case and
10 would pre-file testimony and have a witness available at
11 a hearing, so that testimony would be admitted and the
12 witnesses available in the hearing. And we would have a
13 witness who would offer testimony, be available in a
14 hearing. And based upon -- and Mr. Wilson's testimony
15 would go in. And based upon that evidence, we would
16 then argue the Commission should make the kind of
17 findings that we have outlined in our opposition.
18 Obviously the other parties would argue that the
19 Commission should make different findings, and then you
20 will make the decision about what facts you believe are
21 supported by the evidence and should be found.

22 CHAIRWOMAN SHOWALTER: And so if we did that
23 just as you say and we made some additional findings
24 based on that hearing we had, then wouldn't that trigger
25 the ability of the other parties to withdraw from their

0289

1 agreement, and wouldn't we have to have yet more process
2 for them because now we had not accepted the settlement?

3 MR. BUTLER: I suppose that would be up to
4 each of them at the time to decide.

5 CHAIRWOMAN SHOWALTER: Right.

6 MR. BUTLER: I personally think it's
7 inappropriate for parties to present a non-unanimous
8 settlement and attempt to bind the Commission's hands
9 about what findings of fact it can and can not make, but
10 that's, you know, a position that they may not share.

11 CHAIRWOMAN SHOWALTER: Well, really what I
12 meant was that the parties have agreed to some
13 compromise of their positions which they will hold I
14 expect up to the point at which this Commission does not
15 approve their settlement in a satisfactory form. And so
16 should we after a fuller hearing as you would want
17 impose say a bigger penalty, just for example, then
18 whether they have the right to back up and contest the
19 whole thing.

20 MR. BUTLER: My understanding the way the
21 agreement is written is that they have the right to back
22 out of the settlement, which is their agreement about
23 their common position.

24 CHAIRWOMAN SHOWALTER: Yes.

25 MR. BUTLER: But then they would have only

0290

1 the right to petition the Commission to reopen any order
2 or reconsider any order that is presented, and you would
3 be in the position of evaluating that petition and
4 granting it or denying it according to the standards
5 that are appropriate for petitions for reconsideration
6 and rehearing.

7 CHAIRWOMAN SHOWALTER: So do you see that
8 the --

9 MR. BUTLER: They're not automatically
10 entitled.

11 CHAIRWOMAN SHOWALTER: Do you see the hearing
12 that you're requesting as being a hearing on the
13 settlement and contesting the settlement, and I think we
14 do have some rules about that, or you just see it as the
15 underlying complaint?

16 MR. BUTLER: I guess to focus it, I see it as
17 a hearing on the McLeod and Eschelon agreements, a
18 regular contested hearing that you were on the path to
19 having in the first place. We didn't even know these
20 settlement discussions were going on, and, you know,
21 we're in a position here where because some of these
22 other parties decided to get together in secret and
23 reach an agreement, we face the prospect of having our
24 interests and rights in the case jeopardized, and we
25 don't believe that's consistent with due process or the

0291

1 law regarding how the Commission is supposed to make its
2 decisions. If this were a unanimous settlement, then we
3 would be in a completely different position.

4 COMMISSIONER HEMSTAD: Would it then be your
5 position in order to have a hearing that it would not be
6 appropriate for us to approve the settlement prior to
7 holding that evidentiary hearing?

8 MR. BUTLER: Absolutely.

9 COMMISSIONER HEMSTAD: But we have this in
10 front of us in contrast to a circumstance where the
11 parties would have told us absent your support that they
12 simply have a common position and would be advocating
13 that in that proceeding.

14 MR. BUTLER: That's what I think exactly is
15 the situation.

16 COMMISSIONER HEMSTAD: So I'm looking at
17 Paragraph 8 of the settlement, which talks about
18 dismissing certain of the Exhibit B agreements, I would
19 assume it's your position that we could not conduct a
20 hearing having entered an order dismissing those
21 agreements?

22 MR. BUTLER: Correct, especially since the
23 status of the agreements 44-A and 45-A as well as the
24 so-called oral agreements ties them together we think
25 is, from our perspective anyway, is at issue in the

0292

1 case.

2 CHAIRWOMAN SHOWALTER: I don't know if you
3 have our rules in front of you.

4 MR. BUTLER: I don't have a copy of them.

5 CHAIRWOMAN SHOWALTER: Are you familiar with
6 WAC 480-07-740, it's about settlements?

7 MR. BUTLER: Yes.

8 CHAIRWOMAN SHOWALTER: The part 2(c) of that,
9 it's the very last paragraph of that rule, it says the
10 rights, it's entitled the rights of opponents of a
11 proposed settlement, so that's the situation. It says:

12 Parties opposed to the Commission's
13 adoption of a proposed settlement retain
14 the following rights: The right to
15 cross examine witnesses supporting the
16 proposal.

17 That happened today.

18 The right to present evidence opposing
19 the proposal.

20 That's what you're talking about I think.

21 The right to present argument in
22 opposition to the proposal and the right
23 to present evidence or in the
24 Commission's discretion an offer of
25 proof in support of the opposing party's

0293

1 preferred result.

2 My question is clearly these rights are under
3 our rules, are you saying that you don't think these
4 rights are sufficient, that is you actually have -- are
5 you saying you actually have a right to a hearing on the
6 underlying complaint as distinct from this little subset
7 of rights on the settlement?

8 MR. BUTLER: I believe that Time Warner has a
9 constitutional and a state law right to a hearing on the
10 underlying issues in the case and that this rule if it
11 were construed to deprive it of that right would be
12 unlawful.

13 CHAIRWOMAN SHOWALTER: And you get that from
14 the APA that you cited?

15 MR. BUTLER: I get that from the APA, I get
16 that from the Business and Professional People versus
17 the Illinois Commerce Commission case.

18 CHAIRWOMAN SHOWALTER: Well, that was where
19 I --

20 MR. BUTLER: I also get it from at least the
21 first part of the Commission settlement rule, which --
22 I'm having trouble finding the specific reference.

23 CHAIRWOMAN SHOWALTER: Well --

24 MR. BUTLER: With respect to the
25 non-unanimous settlement, the non-unanimous settlement

0294

1 is just a common position of the parties to the
2 agreement. If it's just a common position, then I don't
3 see how legally it can get paramount rights over other
4 parties and deprive them of their rights as a party to
5 the proceeding, which is what would be proposed.

6 CHAIRWOMAN SHOWALTER: And I guess it all
7 gets back to the question of what are the rights of a
8 party in a proceeding depending on what the proceeding
9 was, and it was the Illinois case that prompted my first
10 question here, which is that's a rate case, and it does
11 seem to me that a rate payer in a rate case is in
12 somewhat of a different position than an intervenor in
13 an enforcement case. I'm not meaning to disregard the
14 points that you made about why you're an intervenor, but
15 that a commission in a rate case can't determine a
16 revenue requirement or rate without a basis to do it,
17 and a settlement is one basis, and then as the court in
18 Illinois said, in a contested case you would need to go
19 to the record. I'm just not certain what any party, not
20 just you, but any party's right in an enforcement
21 proceeding is other than of course the party against
22 whom the complaint is, and that is the party who is
23 charged with the violation I'm certain has a right to be
24 heard.

25 MR. BUTLER: Yes.

0295

1 CHAIRWOMAN SHOWALTER: But where, other than
2 the sort of general statement that you made about any
3 party having the right to sort of proceed through the
4 case with no settlement, where do you get this?

5 MR. BUTLER: I don't think that under the law
6 there is a distinction to be made between a rate case
7 and an enforcement case. They're both adjudicatory
8 proceedings under the State Administrative Proceedings
9 Act, and due process rights attach to parties, including
10 intervenors that have been granted status as an
11 intervenor has the full rights of a party. So under the
12 APA it's an adjudicatory proceeding, the Commission is
13 required to base its decisions on substantial evidence,
14 make findings of fact, conclusions of law based on that
15 evidence. And under the state law which I have quoted
16 regarding informal settlement matters being encouraged,
17 but this section does not require any party or other
18 person to settle a matter.

19 CHAIRWOMAN SHOWALTER: Right.

20 MR. BUTLER: That's where I get it.

21 CHAIRWOMAN SHOWALTER: What I'm wondering in
22 my mind is where does it enter into the discussion that
23 the Commission has some role to play with judicial
24 economy and in general settlements that are complete
25 settlements we have to decide is this a full and fair

0296

1 resolution of the case, and all party settlements very
2 often don't resolve one aspect or another, and that's
3 okay in that case because no party is objecting, but
4 still we have to decide if this is a fair disposition of
5 the case. So here we are in a similar situation for
6 sake of argument, but one party doesn't agree, and I
7 think you're saying that you think your rights as an
8 intervenor have the effect of I guess overriding or
9 preempting our ability to say, well, this is a fair
10 result so long as you have had an opportunity to some
11 degree to contest the settlement, are you saying that's
12 not sufficient?

13 MR. BUTLER: I would put it differently. I
14 would say that some but not all the parties in the case,
15 if they get together with an agreement amongst
16 themselves, don't have the right to override my due
17 process rights, nor do they have the right to override
18 the requirement that the Commission resolve adjudicatory
19 proceedings by making findings of fact and conclusions
20 of law based upon substantial evidence in a record in a
21 proceeding that's conducted in a fair manner consistent
22 with due process.

23 CHAIRWOMAN SHOWALTER: Okay, well, that still
24 doesn't answer my question then, because I agree that
25 those parties don't have a right to override your

0297

1 rights, but they aren't doing it, they're asking us to
2 resolve the case, so now it's in our lap. But on the
3 second prong that you mentioned, we do have I think the
4 ability, the record that is sufficient to make certain
5 findings and resolve the complaint, not resolve it by
6 making a finding on every single element because part of
7 the resolution is that Paragraph Number 8 which would
8 dismiss certain ones, but in a way I could, when you
9 were going through your two prongs, I could answer them.
10 It seems to me it still doesn't answer the question of
11 what is your absolute right to some level of hearing
12 before we make those two judgments?

13 MR. BUTLER: I believe that every party, in
14 this case Time Warner, is entitled to a right to a fair
15 hearing and a fair opportunity to have its evidence and
16 its arguments considered on equal status with that of
17 the other parties, not subjected to some inferior status
18 and right, and we're entitled to have a decision from
19 the Commission on the issues in the case that is based
20 on substantial evidence admitted in the record. That
21 minimal supposition of your question was that, well, we
22 have already decided to dismiss these certain
23 agreements, I don't think you can make that decision
24 until you have heard all the evidence and you have made
25 the appropriate factual findings and conclusions of law.

0298

1 At that time if you conclude that the complaint should
2 be dismissed as to those because you conclude that these
3 agreements were not interconnection agreements, et
4 cetera, then that's one thing. But to do it with the
5 way that I think you described again I believe is a
6 violation of Time Warner's due process rights.

7 CHAIRWOMAN SHOWALTER: All right, so I mean
8 I'm going over old ground now, but I think what you're
9 saying is that we can only make a decision on the merits
10 based on the record as long as there's a single party
11 that doesn't agree to a settlement.

12 MR. BUTLER: Yes.

13 CHAIRWOMAN SHOWALTER: Okay, thank you.

14 COMMISSIONER HEMSTAD: Well, I would like to
15 hear from counsel for Public Counsel, Staff, or the
16 company with respect to this issue. What is the
17 procedural environment that we find ourselves in?

18 MR. SWANSON: Staff, if I may, might weigh in
19 to begin with. I guess from Staff's point of view, I
20 think the real question is not whether or not Time
21 Warner has a right to due process, it is in fact how
22 much process is due, and that analysis of course is
23 based on the extent of their interest in the proceeding.
24 I think that through the process that we have gone
25 through, everybody knows at this point what issues are

0299

1 at stake, and really what we're talking about are
2 penalties. Time Warner sought to bring in the issue of
3 what's been called by some parties as credits into this
4 proceeding, however that issue has been stricken. Now
5 we're dealing with penalties, and the extent of Time
6 Warner's interest as an intervenor, that is their
7 interest in this proceeding, really decides how much
8 process is due in terms of the idea of due process.

9 I believe that the similar case on this issue
10 is *Matthews v. Eldridge*, in which case the U.S. Supreme
11 Court said that in determining what process is due, you
12 look at the private interest at stake, you balance it
13 with the risk of erroneous deprivation of that
14 particular interest, and we're talking about the extent
15 of Time Warner's intervention and the government
16 interest. And so I think it misstates what due process
17 is to say in terms of there being a blank check for any
18 intervenor to hold up a non-unanimous settlement any
19 time they simply intervened. The correct analysis is to
20 look at what their particular interest is and based on
21 that decide what process is due to them.

22 COMMISSIONER HEMSTAD: What is your view on
23 the issue of the settlement's provision that certain of
24 the agreements will be dismissed from the proceeding,
25 and how does that affect -- can we do that without

0300

1 affecting the intervenor's due process rights to
2 litigate that question and then seek a determination as
3 to whether they are in fact interconnection agreements?

4 MR. SWANSON: Well, as the Chairwoman pointed
5 out I believe, this is a Commission initiated complaint,
6 and the remedies sought are penalties, and I believe
7 that weighs in on, you know, what the Commission can do
8 and in terms of what their discretion is. And I also
9 believe that goes into the analysis of what process is
10 due in fact, because the Commission is the initiating
11 party and they're the party that's seeking and deciding
12 on what the appropriate remedy is. Staff has performed
13 its role as investigator for the Commission as an
14 independent investigator to determine what evidence is
15 out there and present a settlement that we believe is a
16 fair resolution of the issues.

17 COMMISSIONER HEMSTAD: So is it your view
18 that the intervenor does not have a due process right to
19 have an objection to the settlement, have a right to
20 have a determination made by us as to whether these are
21 in fact interconnection agreements?

22 MR. SWANSON: The intervenor has a right to
23 the extent of their intervention. The Commission also
24 has judicial or I guess in this case Commission
25 discretion to decide on the appropriate remedy,

0301

1 including findings that may compromise -- that is
2 compromise findings in terms of making findings about
3 interconnection agreements with regard to some of the
4 agreements and dismissing some of the agreements.

5 In addition, I believe that the Commission
6 rules do set out that the multiparty settlement --
7 really of the three settlements we've got full
8 settlement, partial settlement, and multiparty
9 settlement. The only one of those three that has anyone
10 in opposition or any party in opposition is, in fact,
11 the multiparty settlement, which is what we have today,
12 and that brings us straight into WAC 480-07-740 and the
13 section in this rule which describes rights of opponents
14 of a proposed settlement and sets out what process is
15 due or what due process requires.

16 In addition, I would also mention that the
17 APA provision that Time Warner cites does provide
18 discretion to agencies to set rules related to
19 settlements, and that's in fact I believe what this
20 Commission has done.

21 CHAIRWOMAN SHOWALTER: I have a question of
22 either Mr. Butler or Mr. Swanson or the company. In
23 some judicial proceedings where there are multiple
24 parties, you get some set of parties settling and so
25 they're out of the case, and yet that leaves some of the

0302

1 remaining parties in the case. Is it a possible
2 disposition of this case to accept the settlement as far
3 as the settling parties are concerned but not with
4 respect to the non-settling party? In other words, it
5 would mean say with Paragraph 8 we would dismiss that in
6 a kind of a quotation sense, dismiss those agreements
7 from the complaint at least as far as Public Counsel and
8 Staff were concerned, but there would be a remaining
9 dispute I suppose between Time Warner and the company
10 about the rest of it, and you would be left to continue
11 the complaint with respect to the single party. I'm
12 truly thinking off the top of my head, we have not done
13 anything like that before, but it strikes me that
14 sometimes that has been done in a court setting.

15 MR. LUNDY: Your Honor, Todd Lundy for Qwest,
16 I don't think that would be the case here. We have a
17 complaint, an amended complaint that's been brought by
18 the Staff against Qwest and about a dozen other CLECs.
19 Upon dismissal of Qwest from this case pursuant to an
20 approved settlement, Qwest would no longer be a
21 defendant, they would no longer be a party defendant
22 that would be subject to any claims or allegations.
23 Time Warner nor any other CLEC or party has filed a
24 complaint or a claim against Qwest or any of the other
25 dozen CLECs. So upon dismissal of the complaint and

0303

1 amended complaint if this settlement is approved, there
2 would be no remaining claims by any viable plaintiff
3 against Qwest or any other CLEC, and I think this case
4 would be dismissed in its entirety.

5 Now this case being dismissed in its
6 entirety, again pursuant to the settlement and the
7 statements we have made today, doesn't prevent Time
8 Warner or any other entity from filing any case that
9 they think is deemed appropriate or proper, and of
10 course Qwest would then have all of its defenses as
11 well.

12 CHAIRWOMAN SHOWALTER: So in your view, thank
13 you, we just haven't heard from you very much yet, but
14 in your view if we approved the settlement after
15 whatever process we feel is due, then in your view
16 Mr. Butler could file a very similar complaint, but it
17 would be AT&T versus Qwest instead of the Commission
18 versus Qwest alleging that agreement number 45-A or
19 whatever it is was a violation and we should impose a
20 penalty or whatever remedy is appropriate in that
21 setting?

22 MR. LUNDY: I would agree that Time Warner or
23 AT&T could file a complaint before the Commission or a
24 court requesting CLEC remedies which have been excluded
25 from this case pursuant to the order of the Commission

0304

1 that Time Warner by the way has not challenged. And
2 would they have the ability to allege that agreements 44
3 and 45 are interconnection agreements under the
4 settlement agreement, the answer is yes, because the
5 settlement agreement does not have any precedential
6 value or effect upon an allegation that Time Warner or
7 anyone else may present in case number two.

8 MR. SWANSON: Your Honor, I would like to
9 weigh in if you're concluded if I may.

10 CHAIRWOMAN SHOWALTER: Go ahead.

11 MR. SWANSON: I guess from Staff's
12 perspective, I would like to at least mention that as
13 you mentioned there is case law suggesting that the
14 courts in court cases do in fact retain an intervenor
15 suit as a separate action even if the main action fails,
16 and in fact that's stated in State v. Port of Peninsula,
17 89 Wa.2d 764, that's a 1978 case. And in fact there's
18 in addition WTC versus Washington Water and Power
19 Company, Second Supplemental Order, 1993, which although
20 it's a little different it does talk about how some of
21 the issues in terms of a rate case in terms of some
22 pension issues would be deferred to a different case at
23 a different time. So I believe there is precedent for
24 treating cases that way as you mentioned.

25 JUDGE RENDAHL: Do you have a docket number,

0305

1 I'm sorry, for the Washington Water Power case?

2 MR. SWANSON: Your Honor, if I may take a
3 minute, I do have the document here, I just was reading
4 my notes, and I can locate it and provide it to you.

5 JUDGE RENDAHL: If you can do so by the end
6 of the hearing, that would be helpful.

7 MR. SWANSON: Thank you.

8 JUDGE RENDAHL: I don't want to derail this.

9 MR. SWANSON: Thank you, Your Honor.

10 JUDGE RENDAHL: Let's be off the record for a
11 moment.

12 (Discussion on the Bench.)

13 JUDGE RENDAHL: I think probably a more
14 efficient use of all of our time on this issue of
15 procedure is to have written briefs on the topic, in a
16 sense response to Mr. Butler's pleading as to due
17 process and the discussions we have had today. And I
18 think the best way of doing it is to have one
19 simultaneous round of briefing on the appropriate
20 procedure going forward in this case and have them due
21 by Tuesday the 7th at noon if that's not unreasonable.
22 Is that going to be a problem for any of the parties?

23 MR. LUNDY: It's not a problem for Qwest.

24 MR. BUTLER: Can we file electronically by
25 noon?

0306

1 JUDGE RENDAHL: Yes, and I will issue a
2 notice to that effect tomorrow, but yes, electronic
3 filing by noon with paper copy filed on the 8th.

4 And then we will take under advisement the
5 issues raised by Mr. Butler and the procedural issues
6 and the settlement.

7 Mr. Sherr, you look like you have something
8 to say.

9 MR. SHERR: Very perceptive, Judge, thank
10 you. A question just for clarification, the December 7
11 filing deadline, will that only be for Qwest, Public
12 Counsel, and Staff to respond to Mr. Butler; is that
13 what you're envisioning?

14 JUDGE RENDAHL: It's a simultaneous filing
15 date, so you can respond to Mr. Butler's comments, but
16 if he has any additional things he has to say, he can
17 file those on that day as well. That was what I was
18 envisioning.

19 CHAIRWOMAN SHOWALTER: And you can add
20 something in that's not a response to Mr. Butler too. I
21 mean I'm really interested in this question of what
22 intervenor status means in this type of contested case,
23 and I think Mr. Swanson was getting at some of the
24 issues, but it was all oral, and so we want to hear more
25 of it.

0307

1 COMMISSIONER OSHIE: As well as tying to the
2 petition to intervene and the original order allowing
3 intervention and what was requested at the time of
4 intervention as far as rights to be asserted by the
5 party affected.

6 JUDGE RENDAHL: My understanding is there may
7 have, I think there was an oral granting of the
8 petition, but I will check on that, in that first
9 pre-hearing --

10 MR. BUTLER: Followed by an order granting
11 intervention.

12 MR. SHERR: Your Honor, it was Order Number
13 1.

14 JUDGE RENDAHL: So it was the first
15 pre-hearing conference order.

16 MR. SHERR: That's correct, Paragraph 4.

17 JUDGE RENDAHL: Thank you.

18 CHAIRWOMAN SHOWALTER: And then I hope the
19 parties will also address what due process an intervenor
20 has in another or a subsequent proceeding if a
21 settlement is approved, and looking at that question
22 both legally but in also terms of judicial economy, both
23 legal and policy.

24 MR. CROMWELL: May I have a clarification?

25 CHAIRWOMAN SHOWALTER: Sure.

0308

1 MR. CROMWELL: Are you thinking about a
2 subsequent phrase of the instant docket or another
3 docket?

4 CHAIRWOMAN SHOWALTER: Either, just really
5 either one. And I suppose one way to think of this is
6 if legally due process concerns can be addressed in
7 subsequent or other proceedings, that answers one
8 question if that's the case. That doesn't necessarily
9 answer the policy reasons to do it or not. But it
10 really gets to Mr. Butler's assertion that in his view
11 we don't have the right to approve this settlement
12 without really a full hearing on the underlying
13 complaint as distinct from what our rules provide, which
14 is a hearing on the settlement. That's what I
15 understood Mr. Butler to be saying.

16 MR. BUTLER: Yes, although just to clarify,
17 it has been Time Warner's concern --

18 CHAIRWOMAN SHOWALTER: You need to use the
19 microphone.

20 MR. BUTLER: Just to clarify, it has been
21 Time Warner's concern all along that the agreements that
22 are the most egregious and are the subject of their
23 intervention are the McLeod and Eschelon agreements,
24 that Time Warner is not in the case or making an issue
25 with respect to any of the other agreements with any of

0309

1 the -- between Qwest and any of the other CLECs except
2 insofar as the number of those unfiled agreements is
3 relevant to the issue of the amount of the penalty.

4 JUDGE RENDAHL: Okay, is there any other
5 questions about the scope of the filing on the 7th?

6 Mr. Cromwell, you look a bit concerned still.

7 MR. CROMWELL: I hesitate to further muddy
8 the waters, Your Honor.

9 COMMISSIONER HEMSTAD: But go ahead.

10 MR. CROMWELL: It does occur to me though
11 that in my own thinking about due process, it's most
12 commonly informed by in representing my client what
13 process, both what procedural process I believe needs to
14 occur but more to the point what the scope of the
15 proceeding is that I'm trying to address by whatever
16 process it is that I'm advocating on behalf of my
17 client. And so what I have heard from Mr. Butler this
18 afternoon is a fairly strong focus of his client's
19 interest on the size of the penalty in essence. So, you
20 know, in my thinking about this, I'm considering this
21 sort of as a damages phase or, and I guess Mr. Butler
22 can perhaps better address this, but I guess the
23 question I would pose to the Commission and indirectly
24 to Mr. Butler is, what is the scope of the proceeding he
25 envisions as necessary to protect his client's due

0310

1 process rights, and that would better allow me to
2 address it from a due process standpoint.

3 MR. BUTLER: It's whether the Eschelon and
4 McLeod agreements, including the so-called oral
5 agreement, constitute interconnection agreements which
6 should have been filed, whether Qwest willfully and
7 intentionally violated Sections 252 and the referred to
8 Washington statutes by not filing those agreements in a
9 timely fashion, and whether non-party CLECs and CLECs
10 other than Eschelon and McLeod USA and consumers were
11 harmed by that failure to file.

12 CHAIRWOMAN SHOWALTER: But I think,
13 Mr. Cromwell, damages is a term of art, and I think we
14 are in this proceeding not to determine damages.

15 MR. CROMWELL: I apologize for using that
16 term, I was using it as sort of the generic phrase of are
17 we truly considering a penalty, and I think Mr. Butler
18 has clarified for me that he is also considering
19 questions of fact regarding harm to non-party CLECs and
20 consumers as well as the factual circumstances around
21 the Eschelon and McLeod agreements and whether they
22 constitute under the law violations.

23 JUDGE RENDAHL: All right, is there anything
24 further this afternoon?

25 MR. SWANSON: Your Honor, you indicated that

0311

1 Staff could indicate the docket at this hearing or
2 before this hearing concluded, and I can do that today,
3 or I can do that in Staff's briefing. It's at your
4 option.

5 JUDGE RENDAHL: If you have it at your
6 fingertips, that would be helpful.

7 MR. SWANSON: It's UE-900093.

8 JUDGE RENDAHL: Thank you.

9 All right, is there anything further this
10 afternoon?

11 Hearing nothing, thank you all very much for
12 being here this afternoon and presenting witnesses, and
13 this hearing is adjourned.

14 (Hearing adjourned at 4:15 p.m.)

15

16

17

18

19

20

21

22

23

24

25