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December 7, 2004

VIA UPS OVERNIGHT DELIVERY AND EMAIL

Ms. Carol J. Washburn
Executive Secretary
Washington Utilities and
Transportation Commission
1300 S. Evergreen Park Drive S.W.
Olympia, WA 98504-7250

Re: *WUTC v. Advanced Telecom Group, Inc., et al.*
Docket No. UT-033011
Time Warner Telecom of Washington, LLC's Brief regarding Process For Consideration of Multi-Party Settlement

Dear Ms. Washburn:

Enclosed please find the original and 12 copies of Time Warner Telecom of Washington, LLC's Brief regarding Process For Consideration of Multi-Party Settlement in the above referenced docket. Copies of this document have also been sent to all parties on the Certificate of Service attached to the Brief via the method(s) indicated.

If you have any questions, please feel free to contact our office.

Sincerely,

ATER WYNNE LLP

S. Arellano

Susan Arellano
Assistant to Arthur A. Butler

cc: Ann E. Rendahl, ALJ (via E-mail)
Parties of Record (via method(s) indicated)

[Service Date: December 7, 2004]

BEFORE THE
WASHINGTON UTILITIES AND
TRANSPORTATION COMMISSION

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION, Complainant, v. ADVANCED TELECOM GROUP, INC.; ALLEGIANCE TELECOM, INC.; *et al.*, Respondents.	Docket No. UT-033011 **TIME WARNER TELECOM OF WASHINGTON LLC'S BRIEF REGARDING PROCESS FOR CONSIDERATION OF MULTI-PARTY SETTLEMENT**

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I. INTRODUCTION

1. Pursuant to the Notice issued on November 30, 2004 ("Notice"), Time Warner Telecom of Washington, LLC ("TWTC"), an intervenor in this proceeding, submits the following brief addressing the process the Commission should follow in considering the multi-party settlement proposed ("proposed Settlement") by Qwest, Staff and Public Counsel (collectively, "Settling Parties"). In that Notice, the Commission asks the parties to address two issues: (1) whether TWTC, as an intervenor, has the same status as other parties in this proceeding; and (2) what due process TWTC is entitled to in both a later phase of this proceeding or in a separate proceeding initiated by the intervenor. The answer to both questions is simple. First, TWTC's petition to intervene as a party in this proceeding was granted without limitation. TWTC, therefore, is a full party with equal status to that of the other parties. Second, TWTC's rights to due process in this proceeding, and in any separate adjudicatory proceeding should one be initiated, are spelled out in the Washington Administrative Procedures Act and this Commission's rules. They include the right to a full evidentiary hearing and a decision on the merits on all material issues of fact and law that are in dispute.

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

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II. ARGUMENT

A. TWTC Has The Same Status As Other Parties.

3. The first question asked in the Notice is whether TWTC has the status as other parties in this proceeding. The answer to that question is "Yes." The Commission's rules define the term "party" in WAC 480-07-340, and subsection (1) of that regulation states that "A party is a person ... that has complied with all requirements for establishing and maintaining party status in any proceeding before the commission." WAC 480-07-340(2)(f) provides that "persons, other than original parties, that are permitted to appear and participate as parties are 'intervenors.'" Here, the Commission granted TWTC's petition to intervene pursuant to WAC 480-07-355(3), which specifically provides that "if the commission grants intervention, the petitioner becomes a ***party*** to the proceeding as an 'intervenor.'" (Emphasis added.)

4. The Commission's rule regarding intervention does state that a "presiding officer may impose limits on an intervenor's participation in accordance with RCW 34.05.443(2)." This provision, which is part of the Washington APA, provides that a presiding officer may impose conditions on an intervenor's participation in the proceedings. RCW 34.05.443(2). No such conditions were imposed on the granting of TWTC's intervenor status.

5. In sum, TWTC has complied with all requirements for establishing and maintaining party status in this proceeding and no limitations were placed on that intervention. TWTC, therefore, has the full rights of a party and equal status to all other parties in this proceeding.[1]

[1] As the Commission has noted on numerous occasions, in formal proceedings, such as this one, the Commission's regulatory staff functions as an independent party with the same rights, privileges, and responsibilities as any other party to the proceeding. RCW 34.05.455. See 10th Supplemental Order, Docket No. UT-021120 at 2, n. 2. While in a case such as this, the Staff performs investigative, prosecutorial, and advocacy functions, it remains independent from the Commission functioning in its decision-making role and has no rights that are superior to those of any other party advocating a position in the case.

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B. TWTC Is Entitled To A Full Evidentiary Hearing And A Decision On The Merits On All Material Issues Of Fact And Law That Are In Dispute.

6. The second question asked in the Notice is what due process TWTC is entitled to in both a later phase of this proceeding or in a separate proceeding initiated by the intervenor. TWTC's due process rights are set forth in the Washington Administrative Procedures Act, Chapter 34.05 RCW, and in the Commission's rules.

7. RCW 34.05.449 specifically provides that "to the extent necessary for full disclosure of all relevant facts and issues, the presiding officer shall afford ***to all parties*** the opportunity to respond, present evidence and argument, conduct cross-examination, and submit rebuttal evidence, except as restricted by a limited grant of intervention or by the prehearing order." (Emphasis added.) As explained above, TWTC is a full "party" in this proceeding and is, therefore, entitled to the full procedures and due process described in this section.

8. Key to answering the Commission's question about what kind of procedure is required for considering the proposed Settlement and resolving this case is RCW 34.05.461(3). That statute provides that "initial and final orders shall include a statement of findings and conclusions, and the reasons and basis therefor, on ***all the material issues of fact, law or discretion presented on the record, including the remedy or sanction*** ...." (Emphasis added.)

9. If the Commission issues an order approving this non-unanimous proposed Settlement without a full hearing on the merits on all material issues presented, the order will be unlawful and in violation of this provision because it will lack the necessary findings and conclusions based on substantial evidence. In particular, given the terms of the proposed Settlement, the Commission's decision to dismiss the McLeodUSA agreements without hearing evidence on whether the Qwest/McLeodUSA agreements constitute interconnection agreements that should have been filed will be clearly unlawful.

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1. The Commission Cannot Resolve This Case By Adopting a Non-Unanimous Settlement; The APA Requires A Full Evidentiary Hearing And A Decision On The Merits On All Disputed Issues.

10. As TWTC noted in its Opposition to the proposed Settlement, it is important to recognize the fact that the proposed Settlement offered by Qwest, Staff and Public Counsel is a non-unanimous settlement[2] and, therefore, is nothing more than a common position of those parties in the case. *See* WAC 480-07-730(3).

11. While the Administrative Procedures Act provides that the Commission may dispose of a contested case by agreed settlement of the parties, it specifically preserves the rights of a party not to join:

> [I]nformal settlement of matters that would make unnecessary more elaborate proceedings under this chapter is strongly encouraged. Agencies may establish by rule specific procedures for attempting and executing informal settlement of matters. ***This section does not require any 1 or other person to settle a matter.*** (Emphasis added.)

RCW 34.05.060. The key point here is that the agreement between Qwest, Staff and Public Counsel is simply an agreement to take a common position as to issues in the case. It does not have the effect of terminating other parties rights in the case, as the foregoing statute underlines. Nor does it have the effect of subjecting non-settling parties to an unfair process or deprive them of access to relevant evidence or the right to rely upon it in presenting their case or deprive them of their right to a decision on the merits on all material issues in dispute.

12. In the absence of a unanimous settlement, evidentiary hearings can only be dispensed with by a regulatory commission when there are no disputed questions of fact.[3] In *Business and Professional People for the Public Interest v. Illinois Commerce Commission*, a decision of the Illinois Commerce Commission ("ICC") approving a non-unanimous settlement of an electric utility rate case was challenged by several intervenors on the grounds that it constituted

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

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

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an illegal settlement or rate bargain between the utility and the ICC.[4] The settlement was presented after extensive hearings had been conducted, and was approved over the objections of intervenors. The Illinois Supreme Court ruled that the ICC was required to base its decision exclusively on the record, as required by state law, and not on the settlement. The settlement was not a decision on the merits.[5] The court held that "[i]n order for the commission to dispose of a case by settlement, however, all of the parties and intervenors must agree to the settlement."[6] The court went on to clarify that the ICC could ***consider*** a settlement proposal not agreed to by all of the parties and the intervenors as a decision on the merits, as long as the provisions of such a proposal are within the commission's power to impose, the provisions do not violate the laws under which the commission operates, and the provisions are independently supported by substantial evidence in the whole record. Such was not the situation in the case before the court.[7]

13. Several other state courts have held state commission orders approving non-unanimous settlements to be unlawful, where the commission failed to hold a full hearing on the issues and, therefore, was unable to make findings and conclusions based on substantial evidence, as required by the commission's own regulations.

14. In *Fischer v. Public Service Commission of Missouri*, 645 SW 2d 39 (Mo. Ct. App. 1983), for example, the Missouri Court of Appeals rejected the Missouri Public Service Commission's ("MPSC") approval of a non-unanimous settlement of a rate design case as unlawful. There, all parties but public counsel reached a compromise on the rate design issues in the docket, and a stipulation and agreement was filed with the MPSC setting forth the agreement. Thereafter, the MPSC informed public counsel that it had adopted a "limited hearing procedure" for the docket providing that after any non-signing party had been accorded a right to a hearing as

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

[5] *Id.*, at 704.

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

[7] *Id.*, at 704.

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provided by law, the commission would enter an order approving or disapproving the settlement agreement. Following this limited hearing of evidence presented by public counsel in opposition to the settlement, the MPSC approved the settlement, citing only the fact that "it resulted from extensive negotiations between groups with varying interests and economic positions." The court rejected the MPSC's order as unlawful on three separate bases. First, the MPSC's own regulations set forth minimal requirements for commission hearings and provide that all parties have the right to be heard and introduce evidence," and the MPSC's limited hearing procedure violated this provision. 645 SW 2d at 42. Second, MPSC regulations require the MPSC's orders to state the findings of fact that form the basis for the order, and the court held that:

> The findings in this case ... are completely conclusory, and provide no insights into if and how controlling issues were resolved. There are many factual issues which the Commission would necessarily have considered before entering an order adopting a rate design ... but which are absent from the findings of fact.

645 SW 2d at 42-43. Third, the court ruled that "the hearing procedure employed by the MPSC violated due process of law by denying public counsel a fair and meaningful opportunity to be heard." 645 SW 2d at 44.

15. The Missouri Supreme Court reached a similar conclusion in *Monsanto Co. v. Public Service Commission of Missouri*, 716 SW2d 791 (1986). There, the court again struck down an order issued by the MPSC adopting a rate design proposed in a non-unanimous settlement because it lacked the requisite findings of fact. In so holding, the court reasoned that "nowhere in the Report and Order does the commission make any findings of fact as to why this method would be the appropriate method for allocating the increase." 716 SW2d at 796. Despite the fact that the MPSC had held a hearing on the matter, the court found that "the lack of findings renders the report and order violative of the statute and unlawful." *Id.*

16. The Supreme Court of Kentucky has also reached a similar conclusion in *Kentucky American Water Company v. Kentucky Public Service Commission*, 847 SW 2d 737 (S.Ct.Ky.

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1993). There, two intervenors opposed the Kentucky Public Service Commission's ("KPSC") order adopting a settlement agreement reached only between the KPSC staff and the utility. On appeal, the Supreme Court of Kentucky held that: (1) the contested settlement did not constitute an evidentiary basis for the KPSC's final order; (2) the KPSC should have held a full scale rate hearing, instead of one merely to consider reasonableness of the settlement; and (3) failure to allow KPSC staff to be subjected to discovery and cross-examination violated the intervenor's due process rights.

17. In this matter, there is no unanimous settlement and the Commission cannot conclude that no material questions of fact exist. In fact, paragraph 5 of the proposed Settlement specifically recites a dispute about the Eschelon and McLeodUSA agreements. There are also disputes about: (1) the so-called oral agreement between Qwest and McLeodUSA to provide that favored CLEC discounts off all services purchased by it; (2) the correct description of the terms and scope of the Eschelon and McLeodUSA secret agreements; (3) harm to CLECs and consumers resulting from Qwest's failure to file the secret agreements and make them available for opt-in, and (4) the appropriate level of a fine to be assessed in the case. As noted, the proposed Settlement itself cannot be the basis for a Commission decision concerning any agreements about which there is a material factual dispute. Because the proposed Settlement is not unanimous, the Commission must make findings of fact on all material issues of fact and law and base its decision on substantial evidence submitted in the record of the case. The proposed Settlement can only be considered as a decision on the merits if it is supported by substantial evidence in the record as a whole, and then only if it resolves all material issues in dispute. However, by its own terms it does not.

2. The Appearance Of Fairness Doctrine Requires A Full Evidentiary Hearing.

18. Further, under the facts of this case, a full evidentiary hearing and a decision on the merits on all disputed issues is also required by the appearance of fairness doctrine. The appearance of fairness doctrine "requires that hearings and decisions appear to be fair as well as

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being fair in fact."[8] Giving some special priority right to consideration of the proposed Settlement without also considering all of the other evidence that would be submitted in the case would violate this doctrine. The Washington Supreme Court in applying the appearance of fairness doctrine has opined that the basic test of fairness is whether a fair-minded person could say that everyone had been heard who should have been heard and that the decision making body gave reasonable consideration to all matters presented.[9] To be consistent with this requirement, the Commission must conduct a full evidentiary hearing and decide all material issues of fact and law on the merits.

3. Proposed Procedure For Full Evidentiary Hearing In This Case.

19. TWTC submits that the appropriate procedural model for the Commission to follow in this case is the procedure followed in Docket No. UT-021120, which dealt with the application of Qwest Corporation for approval of the sale and transfer of its directory publishing affiliate, Qwest Dex, to Dex Holdings, LLC. In that case, a partial proposed settlement between Qwest, Dex Holdings, Public Counsel, AARP, DoD/FEA and WeBTEC was offered but was also opposed by Staff. The key point is that the Commission held full evidentiary hearings on all disputed issues. The proposed settlement was considered as a proposed resolution on the merits in the case, as was Staff's position. In this case, there should also be full evidentiary hearings. While the proposed Settlement can be considered as the Settling Parties' proposal for resolution of the issues in the case, it should not be given any superior status.

III. CONCLUSION

20. For the reasons stated above, TWTC respectfully submits that it is an independent party with the same rights, privileges, and responsibilities as any other party to the proceeding. As a party that has not agreed to the proposed Settlement between Qwest, Staff and Public Counsel, TWTC is entitled to the full due process rights spelled out in the Washington

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

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

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Administrative Procedures Act, including a fair and full evidentiary hearing on all material issues of fact and law that are in dispute in this proceeding. The proposed Settlement is merely the common position of the Settling Parties in this case and is entitled to no special or paramount status. It can be considered by the Commission as a proposed decision on the merits but only if it is supported by substantial evidence in the record as a whole and only if it resolves all disputed issues. Because it is not unanimous, the proposed Settlement cannot itself be the basis for the Commission's decision, nor can the compromises between the Settling Parties' positions it represents be such a basis for decision. The Commission must make a decision on all disputed material issues of fact and law based on substantial evidence in the record as a whole.

RESPECTFULLY SUBMITTED this 7th day of December, 2004.

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I hereby certify that I have this 7th day of December, 2004, served the true and correct original, along with the correct number of copies, of the foregoing document upon the WUTC, via the method(s) noted below, properly addressed as follows:

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

DATED this 7th day of December, 2004, at Seattle, Washington.

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