BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION, Complainant, v. ADVANCED TELECOM GROUP, INC; ALLEGIANCE TELECOM, INC.; AT&T CORP; COVAD COMMUNICATIONS COMPANY; ELECTRIC LIGHTWAVE, INC.; ESCHELON TELECOM, INC. f/k/a ADVANCED TELECOMMUNICATIONS, INC.; FAIRPOINT COMMUNICATIONS SOLUTIONS, INC.; GLOBAL CROSSING LOCAL SERVICES, INC.; INTEGRA TELECOM, INC.; MCI WORLDCOM, INC.; McLEODUSA, INC.; SBC TELECOM, INC.; QWEST CORPORATION; XO COMMUNICATIONS, INC. f/k/a NEXTLINK COMMUNICATIONS, INC., Respondents	Docket No. UT-033011 QWEST CORPORATION'S POST SETTLEMENT HEARING BRIEF

1 Qwest Corporation ("Qwest"), by and through its undersigned counsel, provides this post settlement hearing brief pursuant to the November 30, 2004 Notice of Opportunity to File Briefs Addressing Process for Consideration of Multi-Party Settlement ("Notice").

I. BACKGROUND

A. Scope of the proceeding

2 Plainly stated, this is an enforcement proceeding. Through Staff, the Commission

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commenced this case by filing a complaint (later amended) for the express purposes of determining whether the named respondents had violated statutes set forth in the amended complaint *and* determining whether the Commission should impose monetary penalties against the respondents in an amount to be proved at hearing.[1] The statutes set forth in the amended complaint included (originally) sections 252(a), (e) and (i) of the federal Act and RCW 80.36.150, .170, .180 and .186. The amended complaint does not envision that this case will consider or resolve the issue of whether certain CLECs are entitled to reparations, refunds, credits or other compensation pursuant to RCW 80.04.220, .230 or .240.

3 Significantly, no party -- not even Time Warner Telecom ("TWT") -- filed a third-party complaint or cross-claim seeking to expand the scope of this proceeding to determine whether reparations or credits are due from Qwest. As pleaded, this case is squarely and solely an enforcement/penalty proceeding, a conclusion echoed by the ALJ in Order No. 15.[2] TWT did not challenge or move for reconsideration of Order No. 15, and in fact has acknowledged that CLEC remedies are not at issue in this docket.[3]

B. The settlement agreement

4 The amended complaint names Qwest and thirteen CLECs as respondents and identifies seventy-seven (77) agreements as being at issue. Various orders and settlements have narrowed the issues in this case to allegations that Qwest violated federal and state law as to

[1] *Amended Complaint, ¶¶47-48.* The Amended Complaint also stated an intention to "make such other determinations and enter such orders as may be just and reasonable." *Id., ¶49.*

[2] *Order No. 15, ¶75 (holding that TWT response testimony demanding CLEC credits or similar remedies "proposes remedies that are not within the scope of the Amended Complaint, and raises claims that have not been properly pleaded or raised in the proceeding"), ¶76 (indicating that TWT's witness' "proposal for reparations or credits is not properly an issue the Commission may consider in this proceeding"), ¶79 (indicating that the amended complaint does not identify RCW 80.04.220 and .230 as causes of action or possible remedies), ¶81 (indicating that the Commission cannot allow a new cause of action without further amendment of the complaint and indicating that it is too late in the proceeding for any such amendment).*

[3] *TWT Opposition, ¶21.*

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thirty (30) Exhibit A agreements[4] and state law as to twenty-five (25) Exhibit B agreements. All claims against CLECs have been dismissed or settled.[5] On November 9, 2004, Qwest, Staff and Public Counsel executed and filed a settlement agreement (the "settlement agreement") intended by all three settling parties to fully and finally resolve all remaining issues in the docket and to avoid further expense, uncertainty and delay. *Settlement Agreement, ¶¶16, 19.*

5 Under the settlement agreement, Qwest is to pay an unprecedented penalty of $7.824 million and engage in other remedial activities. *Id., ¶6.* In addition, as a condition of settlement, Qwest admits that (in retrospect and upon review of the FCC's October 4, 2002 declaratory ruling) it violated Section 252 by failing to timely file twenty-four (24) of the remaining thirty (30) Exhibit A agreements; Qwest also agrees not to appeal a finding that it willfully and intentionally violated certain federal and state statutes by not filing, in a timely manner, alleged transactions with Eschelon and McLeodUSA relating to rates or discounts off of rates for Section 251(b) and (c) wholesale services. *Id., ¶¶4-5.*

6 Further, as a matter of compromise, the settling parties agree that the amended complaint should be dismissed as to six (6) specific Exhibit A agreements and all Exhibit B agreements. *Id., ¶8.* This portion of the agreement reflects that, while the settling parties likely disagree as to whether (for example) some or all of the six Exhibit A agreements constitute interconnection agreements, resolution of these particular facts is unnecessary in

[4] Based on cross-motions for summary determination and settlements that have occurred during this case, allegations against Qwest and other respondents have been dismissed with regard to twenty-two (22) of the original fifty-two (52) Exhibit A agreements.

[5] The CLEC settlements required the respondent CLECs to pay a penalty and agree to remedial efforts. The Commission approved those settlements without adding any findings or conclusions which may be relevant against the individual respondent CLECs arising out of their agreements. The Qwest settlement provides for the payment of a penalty and for remedial efforts, and thus parallels the respondent CLECs settlements approved by the Commission.

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light of the severe penalty, forthright admissions, remedial measures and other comprehensive provisions set forth in the agreement.

C. TWT's role in this proceeding and opposition to the settlement agreement

7 As of the date of the execution of the settlement agreement, the only remaining parties in this docket are the settling parties, TWT, Eschelon, McLeodUSA and AT&T, although AT&T has filed a motion requesting leave to withdraw as a party.[6] All remaining parties were offered the opportunity to respond to the settlement agreement by November 22, 2004 and to appear at a November 29, 2004 hearing at which the settlement agreement would be presented, witnesses supporting the settlement agreement would be cross-examined and argument from counsel would be received.[7] Only one party, TWT, filed an opposition to the settlement agreement.

8 Before addressing the specific points TWT raises in opposition to the settlement agreement, it is instructive to review TWT's role in this docket. TWT, a CLEC, was not named as a respondent in the amended complaint. In fact, the amended complaint does not mention TWT. TWT intervened in this case at the September 8, 2003 prehearing conference. By a written motion of that date and its argument at the prehearing conference, TWT sought and obtained the status as an intervenor under the promise that it would neither broaden the issues to be addressed nor delay this case. A putative intervenor has the right to request participation in a manner that will broaden the issues in the case,[8] but TWT represented in

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6 *AT&T's Motion to Withdraw, Oct. 29, 2004.*

7 *Notice of Opportunity to Respond to Settlement Agreement, Notice of Suspension of Procedural Schedule, Notice of Settlement Presentation, Notice of Hearing on Contested Settlement, November 12, 2004 ("November 12 Notice").*

8 Prospective intervenors must file a petition disclosing, among other things, their "interest in the proceeding," their "position(s) with respect to the matters in controversy," and, most importantly, "[w]hether the petitioner proposes to broaden the issues in the proceeding and, if so, a statement of the proposed issues or an affidavit or declaration that clearly and concisely sets forth the facts supporting the petitioner's interest in broadening the proceedings." *WAC 480-07-355(1)(c).*

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writing[9] and in its oral appeal to the bench[10] that it had no intention of doing so. Relying on TWT's representations, none of the parties objected to its petition to intervene, which was granted in Order No. 01.[11]

9 Notwithstanding its commitment not to expand the scope of or delay this proceeding, TWT has pursued CLEC remedies in connection with certain alleged unfiled agreements. Shortly after TWT was permitted to intervene, it filed a response to Qwest's motion to dismiss that made its desire for credits explicit. In Order No. 5, the Commission responded that CLEC credits were not properly at issue at that stage. Undaunted, TWT filed the response testimony of an outside consultant, Timothy J. Gates, on September 13, 2004. Mr. Gates, without even attempting to demonstrate that TWT was deprived of the opportunity to opt into any unfiled agreement, demanded that CLEC credits be ordered in this docket.[12] TWT believes it is entitled to compensatory credits under RCW 80.04.220, .230 and .240, which relate to reparations and refunds. However, TWT has not filed a complaint under those statutes seeking refunds or reparations from Qwest, and did not pursue a third-party complaint seeking to add those issues to this case. In Order No. 15, the ALJ struck all portions of Mr. Gates' testimony relating to CLEC credits.[13] As mentioned above, TWT did not seek review of that order and acknowledges that the issue of CLEC credits will not be considered or resolved in this docket.

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9 *TWT Petition to Intervene, at 2-3.*

10 *Tr. 14:22-16:8.*

11 *Order No. 01, ¶4.*

12 In his testimony, Mr. Gates recommends "that the Commission order Qwest to pay TWTC, and the other CLECs that did not benefit from the unfiled agreements, a lump sum equal to the difference between what each CLEC did pay and what it would have paid Qwest under the terms of the unfiled agreements, plus interest." *Response Testimony of Timothy J. Gates on Behalf of Time Warner Telecom of Washington LLC, at 15:339-342.*

13 *Order No. 15, ¶¶74-84, 110-112, 115.*

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10 Nevertheless, and notwithstanding the comprehensive agreement reached by the settling parties, TWT opposes the settlement agreement and argues that constitutional principles of due process entitle it to a full adjudication on the merits for the purpose of seeking findings on the following questions: (1) "whether the Eschelon and McLeod agreements, including the so-called oral agreement, constitute interconnection agreements which should have been filed;" (2) "whether Qwest willfully and intentionally violated Sections [sic] 252 and the referred to Washington statutes by not filing those agreements in a timely fashion;" and (3) "whether non-party CLECs and CLECs other than Eschelon and McLeodUSA and consumers were harmed by that failure to file."[14] TWT's motivation for demanding these findings is clear. In describing TWT's interest as an intervenor in this case, counsel stated that TWT has a "stake in ensuring that the Commission makes the appropriate findings, which [TWT] may take to court…with an action to try to recover some damages…"[15]

11 TWT, despite having no protected "due process" rights at this juncture as a matter of law, has received more than sufficient process to date. Despite TWT's persistent desire to convert this case into a direct or indirect vehicle for obtaining credits, the findings TWT demands fall outside the scope of the claims pleaded in this case and simply need not be resolved in order to determine whether the settlement agreement is in the public interest. Qwest urges the Commission, based on the evidence in the record and the argument of counsel, to approve the settlement agreement without revision or delay.

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14 *Tr. 310:3-11.*

15 *Tr. 277:8-12. See also Tr. 283:5-15.* At hearing, TWT also explained its interest as extending to wanting to ensure that "the Commission enters an appropriate penalty that in fact is going to deter this kind of activity and not simply offer [Qwest] a penalty that amounts to a reward…" *Tr. 277:12-15.* Qwest believes this latter stated interest is simply pretext. In its opposition, TWT made it clear that its motivation for seeking the three findings described above is to ease its ability to pursue CLEC credits in another proceeding. *TWT Opposition, at ¶21 ("Also, given the fact that the Commission has decided not to address the issues of correcting the harm caused by Qwest's failure to file the secret interconnection agreements, it is important that the Commission at least make binding findings that will enable injured parties the opportunity to pursue remedies without having to completely relitigate issues that should be resolved in this case…").*

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II. ISSUES PRESENTED

12 The Notice and TWT's opposition raise the following issues:

A. Whether TWT as an intervenor has the same status as other parties in this proceeding.

B. What due process TWT is entitled to in a later phase of this proceeding.

C. What due process TWT is entitled to in a subsequent proceeding it initiates.

D. What due process TWT is entitled to in this proceeding at this stage as the Commission evaluates the settlement agreement.

E. Whether this Commission, as TWT alleges, is barred as a matter of law from approving this non-unanimous settlement agreement.

F. Whether TWT is correct that principles of judicial economy require that the remaining parties fully litigate this matter prior to approving or rejecting the settlement agreement.

G. Whether and to what extent TWT can rely on pre-filed testimony in this case in a subsequent proceeding.

H. Whether the settlement agreement mischaracterizes the interstate/intrastate nature of the alleged Eschelon and McLeod discounts.

III. DISCUSSION

13 TWT's arguments in opposition to the settlement agreement are misguided, self-serving and poorly timed. TWT has inexplicably failed to press what it sees as its entitlement to CLEC credits in a proper complaint proceeding or at the outset of this case. Its failure to pursue remedies on a timely basis does not justify, let alone mandate, this Commission scuttling a comprehensive settlement of the complex unfiled agreements issues. Due to its own failure to act, TWT has no cognizable interest in this proceeding, other than as witness for the prosecution. TWT has been afforded that opportunity, its input is available for the Commission when considering the settlement agreement and no further process is required at

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this juncture.

A. A party's status as an intervenor does not guarantee it more or less process than any other party.

14 The Notice requests an analysis as to what rights an intervenor has by virtue of its status as an intervenor. That is a very difficult question to answer categorically. As a matter of law, it is not the genesis of party status (i.e., whether the party is an original petitioner, complainant, claimant or respondent or a subsequent intervenor) that controls the level of process that a party is due.[16] Instead, it is whether the party has a protected property interest in the outcome of a proceeding that drives whether the party is owed any process beyond that provided under state law or regulation,[17] and if so, how much.

15 In *Mathews v. Eldridge,*[18] the United States Supreme Court set forth a three-part test for determining whether a party to an administrative proceeding is owed any particular level of "due process." First, the private interest that will be affected by the official action must be identified. Second, the risk of an erroneous deprivation of such interest through the procedures used and the probable value (if any) of additional or substitute procedural safeguards must be assessed. Finally, the government's interest must be evaluated.[19]

16 Applying *Mathews* and other U.S. Supreme Court precedent, the Washington Supreme Court recently held in *WITA v. WUTC* that a failure to establish a protected property interest in the

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[16] An exception, although not one relevant to this proceeding, is that an ALJ may impose conditions upon an intervenor's participation. Such conditions potentially include limiting participation to designated issues, limiting the intervenor's use of discovery and requiring two or more intervenors to combine their presentations. *RCW 34.05.443; WAC 480-07-355(3).*

[17] Qwest notes that neither WAC 480-07-730(3) nor -740 distinguish between types of parties when discussing the process for considering non-unanimous settlements.

[18] *424 U.S. 319, 96 S.Ct. 893 (1976).*

[19] *Mathews, 424 U.S. at 335.*

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outcome of the case is fatal to a claim that due process has been deprived.[20] In the *WITA* decision, the Court emphasized that the range of interests protected by procedural due process is not infinite, and that to have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it or a unilateral expectation of it. He or she must, instead, have a legitimate claim of entitlement to it.[21]

17 It is thus the *Mathews* and *WITA* tests that determine the extent to which a party (here, TWT) is entitled to any particular level of process beyond that provided under statute and rule. Whether that party initiated the proceeding, was originally named as a party respondent or subsequently intervened is not determinative of the party's due process rights.

B. Qwest does not believe there can be a ''later phase'' of this docket.

18 In the Notice, the Commission asks what due process TWT is entitled to in "a later phase of this proceeding." The meaning of "later phase of this proceeding" is not clear in the context of this case. If by that phrase, the Commission envisions that the settlement agreement might be approved, but the docket left open in order to allow TWT to fully litigate the three findings described above, Qwest does not believe such a situation would ever come to pass.

19 Qwest has the right to withdraw from the settlement if, for instance, the Commission rejects all or any portion of the agreement. *Settlement Agreement, ¶15.* Paragraph 16 of the settlement requests the Commission (among other things) to approve the settlement

[20] *WITA v. WUTC, 149 Wn.2d 17, 24-26, 65 P.3d 319 (2003).* In the *WITA* case, the Washington Independent Telephone Association appealed this Commission's designation of U.S. Cellular Company as an eligible telecommunications carrier ("ETC") at an open meeting and without granting WITA a full adjudicatory hearing on the matter. After the Superior Court and Court of Appeals affirmed the Commission's order, the Washington Supreme Court affirmed as well, holding that WITA (and its member telephone companies) lacked a protected property interest in the ETC issue and were not entitled to a hearing or any "due process" for that matter.

[21] *Id. at 24 (quoting Board of Regents of State Colleges v. Roth, 408 U.S. 564, 92 S. Ct. 2701(1972)).*

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agreement, find that all matters and claims at issue in the docket are fully and finally resolved and close the docket. Were the Commission to enter an order purporting to approve the settlement, but also purporting to leave the proceeding (or a new phase of the proceeding) open to permit TWT to litigate its ancillary issues, the docket would not be fully and finally resolved and closed, and Qwest would assuredly exercise its right to withdraw from the settlement. This case would then proceed to a full evidentiary hearing on the merits.[22]

20 If by "later phase of this proceeding," the Commission is referring to the process of considering the settlement agreement, please see section III.D. below.

C. TWT's due process rights in a subsequent proceeding depend upon the nature of the proceeding and TWT's interest in the subject matter of that proceeding.

21 The Notice also requests that the parties opine as to what due process TWT would be entitled to in a separate proceeding it initiates. The answer, once again, depends on the nature of that proceeding and whether TWT has a protected property interest at stake. Assuming that the Commission is asking about a potential complaint by TWT for reparations or refunds under RCW 80.04.220 or .230, TWT would likely have broad due process rights. In an enforcement/penalty case such as the instant one, a party that is neither prosecuting nor defending against a claim or cause of action has no (or virtually no) property interest, and thus no (or virtually no) "due process" rights. To the contrary, subject of course to the respondent's defenses, a claimant in a private administrative complaint proceeding would have far broader due process rights given its proportionally greater property interest in the outcome.

[22] Furthermore, once the settlement agreement is approved, there will be no valid claims left to litigate. TWT has no claims in this docket. Courts and commissions do not litigate or make findings in the abstract in the absence of a valid complaint or claim.

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D. TWT is not *entitled* to any further process as the Commission considers the settlement agreement.

22 While it would not constitute error for the Commission to provide additional process such as that outlined in the November 12 Notice, TWT is clearly not *entitled* to any further process as the Commission evaluates whether to accept or reject the settlement agreement. TWT certainly is not entitled to a full adjudication on the merits of Staff's claims under the amended complaint or on the three ancillary findings described in paragraph 10 above.

1. TWT has received every bit of process it is due under the Commission's procedural rules.

23 Setting aside for a moment TWT's 14th Amendment procedural due process arguments, TWT has clearly received all process due to it under the Commission's procedural rules. Read together, WAC 480-07-730(3) and -740(2)(c) provide a non-settling party the following rights in the context of a non-unanimous settlement: the right to cross-examine witnesses supporting the proposal; the right to present evidence opposing the proposal; the right to present argument in opposition to the proposal; and the right to present evidence or, in the Commission's discretion, an offer of proof, in support of the opposing party's preferred result. In the discretion of the ALJ, a non-settling party may also propound discovery.

24 TWT has received each of these rights. At the November 29 hearing, counsel for TWT cross examined Mr. Reynolds for Qwest and Dr. Blackmon for Staff – as did the Commissioners and the ALJ. TWT presented argument in its November 22 opposition brief and at the November 29 hearing and presumably will do so in its post settlement hearing brief due December 7. As to the matter of presenting evidence in opposition to the settlement and supporting an alternate result, TWT has already been afforded that opportunity and is not

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entitled to a second or third bite at the apple.

25 TWT's primary argument in opposition to the settlement agreement appears to be that the stipulated penalty and other remedial terms are inadequate and, in fact, operate as a "reward" for Qwest. In its pre-filed testimony (the portions not stricken by the ALJ in Order No. 15), TWT has already stated its case-in-chief as to the appropriate remedies in this case. As a condition of the settlement agreement, that testimony will be made a part of the record and will be considered by the Commissioners in evaluating the settlement. *Settlement Agreement, ¶25.* In addition, TWT has conducted discovery of Qwest, Public Counsel and Staff relating to the settlement agreement. Qwest served its responses on November 29, and TWT's counsel had a full opportunity to cross-examine on those responses, which were admitted into the record at the November 29 hearing. Qwest assumes that Staff's and Public Counsel's responses will likewise be admitted for the Commission's consideration. Thus, TWT has received to date every right afforded it under the Commission's procedural rules.

2. Constitutional principles of procedural due process do not entitle TWT to additional process beyond that which is required by the Commission's procedural rules.

26 TWT argues that WAC 480-07-730 and -740 are unconstitutional, in violation of TWT's 14th Amendment right to due process, to the extent that they do not guarantee TWT the right to a full adjudication on the merits.[23] TWT is wrong. As discussed in section III.A. above, the United States Supreme Court and the Washington Supreme Court have both held that the extent of the party's protected property interest in the outcome of a matter – and not merely the subjective desire for a particular outcome – controls whether and to what extent that

[23] *Tr. 293:8-12 ("MR. BUTLER: I believe that Time Warner has a constitutional and a state law right to a hearing on the underlying issues in the case and that this rule if it were construed to deprive it of that right would be unlawful."). See also Tr. 285:2-11.*

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party has procedural due process rights.[24] While TWT would have the Commission believe that all adjudicative proceedings are identical[25] – be they enforcement/penalty proceedings, rate cases or private complaints for compensatory relief – the *Mathews* and *WITA* precedents mandate a different view. The nature of the proceeding does matter because it controls the type of outcome potentially available to any particular party.

27 This is simply and solely an enforcement proceeding. Issues of possible CLEC compensation are outside the scope of the case, as the ALJ ruled in Order No. 15 and TWT now acknowledges. Thus, TWT's role in this case is nothing more than as witness for the prosecution, and the prosecution has settled. While TWT obviously desires to transform this case into a vehicle by which it can simplify a subsequent case seeking reparations or refunds, it has absolutely no *entitlement* to do so. It certainly had the opportunity to try and expand this case at the prehearing conference or through a third-party complaint seeking to join the issue of CLEC credits. However, TWT neglected to do so. Its failure to protect its interests sixteen months ago does not mandate or support sidetracking the settlement agreement and delaying resolution of this case. Furthermore, it should not be forgotten that the settlement itself does not in any respect preclude TWT or any other CLEC, immediately or in the future, from seeking to enforce whatever legally cognizable rights it may still have by commencing a complaint against Qwest under RCW 80.04.220 or .230. Instead, it expressly preserves such an opportunity, subject of course to Qwest's defenses.[26] *Settlement*

[24] The existence of a protected property interest is established by reference to existing rules or understandings that stem from an independent source such as state law. *Ulrich v. San Francisco, 308 F.3d 968, 975 (9th Cir. 2002).* TWT has not pointed to any state law *entitling* it to pursue private goals in a Commission enforcement docket.

[25] *Tr. 295.*

[26] One defense TWT will have to overcome is that any claim for reparations or refunds is time barred due to its failure to pursue a claim more promptly. RCW 80.04.240 imposes a two-tiered limitations period, depending upon whether the case involves claims for reparations (six months) or refunds (two years). TWT has had notice of the alleged discounts for more than two years, and its claim for reparations or refunds (to the extent it had any as a matter of fact or law) is now time barred. *See Qwest Corporation's Motion to Strike Testimony of Timothy J. Gates (Oct. 1, 2004), section II.A.*

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Agreement, ¶17;[27] *Tr. 231:16-19, 303:5-11.*

28 Finally, even if the Commission finds that TWT has protected property interest in the outcome of this case – and thus due process rights – TWT has already received more-than-sufficient process. By TWT's own admission,[28] procedural due process (when applicable) requires notice and a meaningful opportunity to be heard. As outlined in section III.D.1 above, TWT has received both notice and a full and fair opportunity to document and voice its opposition. No further process is required.

3. Additional process of the kind envisioned by TWT would be wholly impractical and would frustrate the purpose of the settlement agreement.

29 At the November 29 hearing, TWT demanded a full hearing on the underlying issues in this case.[29] That demand could be interpreted in one of two ways, in Qwest's view. It could mean that TWT demands that the merits of all of Staff's claims be fully litigated, after which the Commission would then evaluate whether the settlement agreement provides a fair and reasonable resolution of the case and whether the three findings demanded by TWT (see paragraph 10 above) should be entered. Alternatively, TWT may be suggesting that additional testimony supporting or opposing the settlement be filed and that an evidentiary hearing follow limited to that particular testimony. Regardless of which of these interpretations of TWT's meaning is correct, any further process would be as impractical as it is unnecessary.

30 If TWT is calling for full litigation of the entire case, the settlement agreement will be a

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[27] At paragraph 17, the settlement agreement states that it "is not intended to preclude or prevent any carrier from filing a complaint with this Commission or in any other forum regarding the agreements at issue in this proceeding."

[28] *TWT Opposition, ¶10.*

[29] *Tr. 293:8-12.*

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nullity. The express purpose of the settlement is to avoid further expense, uncertainty and delay, to resolve this matter fully and finally and to close the docket. *Settlement Agreement, ¶¶16, 19.* Parties settle cases in order to avoid the burden, expense and risks of litigation. Should the Commission order the parties to fully litigate Staff's claims and causes of action, Qwest would almost assuredly withdraw from the settlement. Leaving aside that issue, in order for this case to be fully litigated, Qwest would have to depose Eschelon and McLeodUSA witnesses and possibly depose TWT's witness. Staff, Qwest and perhaps other parties would have to prepare and file the reply testimony that, prior to the Notice, was due December 6. Interested parties would then have to conduct discovery (possibly including depositions) on that reply testimony. All parties – including Eschelon and McLeodUSA – would have to prepare for and conduct a full hearing on the merits of a case on which Staff, Qwest and Public Counsel have already reached a comprehensive settlement.[30] Clearly, such an outcome – with an expectation that after full litigation the Commission will then be asked to simply approve or reject the settlement agreement (from which Qwest, Staff and/or Public Counsel could still withdraw) – would be wholly impractical and would frustrate the purpose of negotiated compromise in general, and this settlement agreement in particular. Such an outcome would invariably discourage parties from settling in the future. If a party is going to be left with the burden and expense of fully litigating a case, it has little incentive to reach compromise with other parties.

31 If TWT, instead, means that it must have the right to present additional testimony opposing the settlement and to have a hearing during which its testimony and testimony supporting the settlement are considered, such a result would likewise be impractical. TWT has already had the opportunity to file testimony as to the appropriate penalty/remedy and that testimony

[30] It is unclear whether TWT also intends to conduct a full hearing regarding the actions of the respondent CLECs that have settled with Staff.

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will be admitted and considered. There exist no other factual issues – at least none articulated by TWT – that require further development of the record.[31]

32 Again, this is an enforcement proceeding, in which the Commission has set out to determine whether certain respondents have violated the law and, if so, in what amount they should be penalized. The settlement agreement provides a fair, balanced and meaningful resolution of the matters and causes of action pleaded in the amended complaint. Under it, Qwest admits violation of the law and agrees to pay a severe penalty of $7.824 million, in addition to taking other remedial steps. TWT's self-interested desire to obtain findings to assist it in litigation aimed to answer unrelated statutory questions is not a basis for extending or delaying resolution of this case.

E. The Commission is not precluded from approving a non-unanimous settlement.

33 In its opposition, TWT argues that non-unanimous settlements are not settlements at all, but instead are merely joint statements of position.[32] TWT continues that (based on the Administrative Procedures Act and Illinois precedent) a non-unanimous settlement may not be approved without a full adjudication on the merits, as the Commission may not lawfully rest its decision on the settlement alone. Instead, TWT argues, the Commission may only

[31] At the November 29 hearing, TWT indicated that Qwest had refused to answer several data requests and that TWT may seek to compel responses. *Tr. 284:4-9.* TWT is referring to data requests (TWT to Qwest) 02-008 through 02-011. Those data requests (copies of which were admitted at the November 29 hearing) inquire as to the dollar amount of purchases by TWT and other CLECs in Washington during various periods between 2000 and 2003. They also ask for a description of such services. Such information is wholly irrelevant to this enforcement proceeding or even the three findings TWT desires to be resolved. They appear designed to support a claim for CLEC credits, but relate in no way to the appropriate size of the penalty or other terms of the settlement agreement. Development of these facts would have no bearing on the instant case or the propriety of the settlement agreement. Further, the information requested in these data requests is practically identical to the information TWT referenced in the portion of Mr. Gates' testimony (at page 17) that was stricken in Order No. 15.

[32] *TWT Opposition, ¶9; Tr. 274:25-276:9.*

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base its decision on substantial evidence in the record.[33]

34 TWT's arguments are without merit. First, TWT's argument plainly ignores the fact that the Commission's procedural rules specifically contemplate non-unanimous settlements (which the rules refer to as "multiparty" settlements) and establish a process for considering non-unanimous settlements.[34] It also ignores that the Commission has approved several non-unanimous settlement agreements in this case already – those between Staff and the respondent CLECs. Second, TWT's reliance on RCW 34.05.060[35] in support of its view that the Commission can not dispose of a case based on a non-unanimous settlement is illogical. That is not what that section of the Administrative Procedure Act says. It merely provides that a party is not obliged to join in settling a case; it does not guarantee that said party will prevail in its views or will necessarily have the option of litigating every issue (no matter how irrelevant to the case at hand) it desires to litigate.

35 Finally, TWT's reliance on the Illinois Supreme Court's decision in *Business and Professional People for the Public Interest v. ICC*[36] for the proposition that the Commission may not base its decision solely on a non-unanimous settlement is inapposite. The settling parties are not suggesting that the Commission look to the settlement agreement alone. To the contrary, the settling parties explicitly request that "all testimony previously filed that has not been stricken should be admitted for purposes of supporting" the settlement agreement. *Settlement Agreement, ¶25; Tr. 237:11-16, 238:24-239:16.* This includes, of course, Mr. Gates' response testimony. Based on the pre-filed testimony, as well as responses to TWT's

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33 *Tr. 275:2-16.*

34 *WAC 480-07-730(3); WAC 480-07-740(2)(c).*

35 In relevant part, RCW 34.05.060 provides that the section "does not require any party or other person to settle a matter."

36 *136 Ill.2d 192 (1989).*

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settlement-related data requests, counsel's and the Commission's cross-examination of Qwest and Staff witnesses and arguments of counsel, the Commission is in a position to evaluate and approve the settlement agreement based on substantial record evidence.[37]

F. TWT's arguments about judicial economy are erroneous and self-serving, especially in light of its representations at the intervention stage about its intentions in this case.

36 TWT would have the Commission believe that it should resolve TWT's three ancillary issues in this case in order to conserve resources in any subsequent case it may file to pursue credits or other remedies.[38] This position is starkly inconsistent with its commitment in its petition to intervene that it would not "broaden the issues to be addressed or delay this proceeding."[39] TWT's attempt to broaden the scope of this case by pursuing CLEC credits through its response to Qwest's motion to dismiss was rejected in Order No. 5. Its second attempt to do so through Mr. Gates' testimony was rejected in Order No. 15 (of which TWT failed to seek administrative review). And its desire to extend this case in order for three unnecessary issues to be resolved should similarly be rejected.

37 Furthermore, it is entirely unclear how the three findings TWT desires – that certain agreements are interconnection agreements; that Qwest engaged in willful misconduct; and that CLECs and consumers were harmed by such alleged misconduct – would significantly simplify such a future proceeding. TWT's bases for pursuing CLEC credits in Washington are RCW 80.04.220 ("Reparations") and .230 ("Overcharges—Refund").[40] RCW 80.04.220

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[37] After hearing Staff's and Qwest's explanation of paragraph 25 of the settlement agreement, counsel for TWT seemed to agree that the admission of the prefiled testimony would be sufficient to support an evaluation of the settlement, or at least support the finding discussed in paragraph 5 of the settlement. *Tr. 272:1-22.*

[38] *Tr. 284.* In response to a question from Chairwoman Showalter, TWT's counsel indicated that it would be "a waste" for TWT to have to litigate its issues in a subsequent case. Counsel characterized such an outcome as tantamount to TWT, the Commission and parties starting over again and redoing this "whole case."

[39] *TWT Petition to Intervene, at 2-3.*

[40] *Order No. 15, ¶74.*

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authorizes the Commission to order reparations when, upon a complaint concerning the reasonableness of a rate, the Commission determines that "the public service company has charged an excessive or exorbitant amount for" a service. RCW 80.04.230 authorizes the Commission to order a refund when it determines that a public service company has charged in excess of a lawful rate in force at the time.

38 Neither statutory scheme involves a finding of willful misconduct or that general communities of interest (CLECs or the public) were harmed by such misconduct. Thus, at least two of the three ancillary findings would be entirely irrelevant in a reparations or refund proceeding under Washington law.

39 Whether certain agreements are interconnection agreements would potentially be relevant, but determination of that fact alone will conserve very little in a subsequent proceeding. TWT would still need to prove (for example) that it could have met all related terms and conditions that accompanied the alleged discounts.[41] Whether it could prove this would be hotly disputed, and Qwest would submit substantial evidence that TWT could not. Thus, little economy would be gained from allowing TWT to pursue its three findings in this case. Instead, the resources of the Commission and the parties in this case will be unnecessarily and pointlessly drained and resolution of this long and complicated case will be delayed – all (and only) to arguably facilitate the unpleaded claims of an intervenor that promised it would not expand the issues in the case.

[41] When pick and choose was still available, a CLEC desiring to pick and choose from another CLEC's agreement could only do so if it also accepted all related terms and conditions. *AT&T v. Iowa Util. Bd., 525 U.S. 366, 369, 119 S. Ct. 721, 738 (1999) citing In re Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, 11 FCC Rcd 15499 (1996) (FCC First Report & Order) at ¶1315.*

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G. TWT will be able to utilize the record evidence admitted in this case in a subsequent proceeding to some degree.

40 In its opposition, TWT exhibits some confusion over the meaning of the last sentence of paragraph 25 of the settlement agreement, which provides that "all testimony previously filed that has not been stricken should be admitted for purposes of supporting the Settlement Agreement."[42] TWT appears concerned that said testimony (should the settlement agreement be approved) might not be available to it in a subsequent case. That was not the intent of the parties, from Qwest's perspective.

41 Like any other piece of evidence admitted into the record during an agency adjudication, the prefiled testimony in this case will be available for possible use as an exhibit if a subsequent case is brought. Obviously, the fact that the evidence will not have been rebutted, subjected to cross examination or briefed on will lessen its probative value, but the Commission will have discretion to determine its admissibility and afford it the appropriate weight in the next proceeding. Qwest would not be collaterally estopped[43] from contesting certain allegations in the prefiled testimony if used in a future proceeding, but the inability of TWT to obtain absolute certainty that it will be able to make certain allegations from this case stick in a future case is not a harm that justifies derailing the settlement or delaying the resolution of this case.

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[42] *See, e.g., TWT Opposition, ¶12.*

[43] Collateral estoppel, or issue preclusion, precludes only those issues that have actually been litigated and necessarily and finally determined in an earlier proceeding if the party against whom the doctrine is asserted had a full and fair opportunity to litigate the issue in the earlier proceeding. *Christensen v. Grant County Hosp. Dist. No. 1, 152 Wn.2d 299, 307, 96 P.3d 957 (2004).* For collateral estoppel to apply, the party seeking application of the doctrine must establish that (1) the issue decided in the earlier proceeding was identical to the issue presented in the later proceeding, (2) the earlier proceeding ended in a judgment on the merits, (3) the party against whom collateral estoppel is asserted was a party to, or in privity with a party to, the earlier proceeding, and (4) application of collateral estoppel does not work an injustice on the party against whom it is applied. *Id.*

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H. The settlement agreement does not mischaracterize the interstate/intrastate nature of the alleged Eschelon and McLeod discounts.

42 Paragraph 5 of the settlement agreement refers to allegations by Staff and other parties regarding the existence of a transaction with Eschelon and a transaction with McLeodUSA relating to rates or discounts off of rates for *intrastate* wholesale services. Paragraph 5 continues on to state that Staff believes that the evidence referred to above demonstrates and is sufficient to support a finding that Qwest willfully and intentionally violated federal and state law. Qwest, while it does not make a direct admission either to the existence of any discount agreements or to any willful or intentional misconduct, agrees not to appeal such a finding.

43 In its opposition, TWT stresses that the settlement agreement mischaracterizes the alleged Eschelon and McLeodUSA discounts by referring to them as relating to *intrastate* wholesale services, when (according to TWT) the alleged discounts related to both *interstate* and *intrastate* services.[44] At hearing, Qwest and Staff clarified that the fact that paragraph 5 speaks of *intrastate* wholesale services is reflective only of the fact that the Commission's jurisdiction is limited to considering agreements relating to intrastate services.[45] Qwest acknowledges that other parties allege discounts extend to both interstate and intrastate services.[46] Thus, this purported mischaracterization pointed to by TWT as a basis for

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[44] *See TWT Opposition, ¶¶3, 20.*

[45] *Tr. 244:22-245:6, 264:3-266:6.* That interstate services are irrelevant to this proceeding is supported by Order No. 5. In that order, the Commission dismissed claims regarding agreements relating solely to interstate services. *Order No. 5, ¶¶109-110.*

[46] At the November 29 hearing, Mr. Reynolds was asked this question twice, first by Mr. Butler (*Tr. 244:22-245:6)* and later by the ALJ (*Tr. 264:3-17).* Upon reviewing the transcript, Qwest wants to ensure that Qwest's position is clear on this point. As paragraph 5 of the settlement agreement makes clear, Qwest is not directly admitting the existence of an Eschelon discount, an oral McLeodUSA discount or that it willfully or intentionally violated the law. When Mr. Reynolds confirmed to Mr. Butler and to the ALJ that the oral agreements related to more than just intrastate services, he was referring to the fact that the *allegations* surrounding the alleged discounts extend to more than intrastate services. He did not intend to convey that Qwest admits that either alleged discount was ever offered or provided by Qwest.

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rejecting the settlement is not a mischaracterization at all, and should have no impact on the Commission's consideration of the settlement agreement.

IV. CONCLUSION

44 Based on the foregoing, Qwest requests the Commission to approve the settlement agreement without revision or further delay. TWT has received every procedural opportunity to which it is entitled, and Qwest would urge the Commission to consider the settlement without further proceedings.

DATED this 7th day of December, 2004.

QWEST

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