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 ANSWER TO TIME WARNER TELECOM'S MOTION TO COMPEL

1 Qwest Corporation ("Qwest"), by and through its undersigned counsel, hereby answers Time Warner Telecom of Washington LLC's ("TWT") Motion to Compel Discovery Responses from Qwest. This answer is provided pursuant to the Commission's December 13, 2004 Notice of Opportunity to File Answers to Time Warner's Motion to Compel. Qwest respectfully urges the Commission to deny TWT's motion.

Qwest
1600 7th Ave., Suite 3206
Seattle, WA 98191
Telephone: (206) 398-2500
Facsimile: (206) 343-4040

I. BACKGROUND

2 TWT has moved to compel responses to data requests TWT 02-008 through 02-011 (the "TWT data requests"). Those requests inquire as to the dollar amount of purchases by TWT and all CLECs in Washington during various periods between 2000 and 2003. They also ask for a description of such services. 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.

3 TWT argues that this information is relevant to determining whether the $7.824 million penalty stipulated to in the settlement agreement is too small. Qwest believes that the subject data requests are beyond the permissible scope of settlement-related discovery. Qwest also disagrees that the information sought in these unduly burdensome requests is relevant or reasonably calculated to lead to the discovery of admissible evidence. As such, TWT's motion should be denied.

II. DISCUSSION

A. The TWT data requests reach beyond the permissible scope of settlement-related discovery.

4 In the ALJ's discretion, a party opposing a proposed multiparty settlement agreement may propound discovery *on the proposed settlement*.[1] TWT was afforded that opportunity in this case and issued discovery to Qwest, Staff and Public Counsel. The majority of TWT's data requests to Qwest properly relate to the settlement agreement by seeking an understanding of various terms.[2] The data requests at issue in this motion, however, do not. Instead, they seek information related to TWT's and all CLECs' purchases of services from Qwest during

[1] *WAC 480-07-740(2)(c) (emphasis added).*

[2] *See TWT data requests 02-002 through 02-007 (copies admitted at November 29, 2004 settlement presentation hearing).*

Qwest
1600 7th Ave., Suite 3206
Seattle, WA 98191
Telephone: (206) 398-2500
Facsimile: (206) 343-4040

particular periods of time. While TWT attempts to tie that information to its theory of penalties, the requests reach far beyond the settlement agreement itself and are, therefore, inappropriate.

5 TWT had every opportunity to pursue this line of inquiry in the *year* that led up to its filing of responsive testimony – its case in chief as to the appropriate scope of penalties and other remedies in this case. TWT inexplicably failed to issue any discovery (except for a single data request issued in December 2003 seeking copies of responses to other parties' data requests), and sat on its hands until issuing data requests TWT 02-002 through -011 following the filing of the settlement agreement in November 2004. In fact, TWT did not even raise the issue of the appropriate size of the penalty in its response testimony other than to agree with Staff's view that the appropriate penalty should be decided by the Commission.[3] TWT is not entitled at this juncture to pursue full discovery of all issues relating to its theory of the case. This is especially true in a proceeding in which all parties, including TWT, have had ample opportunity to pursue discovery on the merits of the case.[4]

B. The TWT data requests seek irrelevant information and are not reasonably calculated to lead to the discovery of admissible evidence.

6 Even if the Commission believes that WAC 480-07-740(2)(c) does not limit settlement-

[3] *See Response Testimony of Timothy J. Gates for Time Warner, at 6:121-129.*

[4] *Cf. WUTC v. Avista Corporation, Docket No. UG-041515, Order No. 5 (Nov. 2, 2004) ("Avista order").* The Avista order considers the settlement agreement entered into among Avista Corporation, Commission Staff and NWIGU in Avista's still-pending rate case. Unlike in this case, the Avista settlement agreement was reached very early in the adjudication. The case was initiated by a tariff filing on August 20, that filing was suspended on September 8, the discovery rule was invoked at a prehearing conference on September 23 and the settlement was announced on October 11. The settling parties sought to permanently implement the settlement almost immediately (as of November 1), but Public Counsel objected, arguing that it had not enjoyed a reasonable opportunity to inquire into or to oppose the proposal. The Commission agreed, reserving permanent ruling on the settlement until all parties had an opportunity to inquire into the proposal, formulate positions, present their views and cross examine witnesses supporting the settlement. The procedural posture underlying the Avista order is in sharp contrast to the procedural posture in this case. TWT had over a year to propound discovery and develop its theory of penalties and remedies. Its failure to do so is not a basis for expanding the discovery rights granted to it by the ALJ pursuant to WAC 480-07-740(2)(c).

Qwest
1600 7th Ave., Suite 3206
Seattle, WA 98191
Telephone: (206) 398-2500
Facsimile: (206) 343-4040

related discovery to questions about the agreement itself, the Commission's procedural rules generally impose limits on a party's ability to propound discovery. Data requests must seek only information that is relevant to the issues in the proceeding or that may lead to the production of information that is relevant.[5] Furthermore, parties may not seek discovery that is obtainable from some other source that is more convenient, less burdensome, or less expensive.[6] Finally, a data request is inappropriate when the party seeking the discovery has had ample opportunity to obtain the information sought or the discovery is unduly burdensome, taking into consideration (among other things) the needs of the proceeding and the importance of the issues at stake in the proceeding.[7]

7 The TWT data requests seek data outside the scope of this docket and are impermissible under WAC 480-07-400(4). TWT insists that the information it seeks is relevant to determining whether $7.824 million is too small a penalty, claiming it does not begin to address the economic benefit Qwest allegedly obtained by the conduct at issue in this case. *TWT Motion, at ¶¶2, 6.* TWT also relies upon the fact that Qwest provided TWT's New Mexico affiliate similar information in the New Mexico unfiled agreements docket. TWT's arguments are off base for at least three reasons.

1. TWT cites no Washington authority supporting its theory of penalties.

8 TWT argues that a penalty is insufficient unless it exceeds the benefit the alleged violator reaped from its misconduct. *Id.; Tr. 277-279.* Otherwise, TWT argues, the penalty will not have a deterrent effect, and will instead constitute a "reward." TWT's repeated characterization of the $7.824 million penalty as a reward is simply preposterous.[8] That

5 *WAC 480-07-400(4).*

6 *Id.*

7 *Id.*

8 Qwest believes that this penalty would be (by far) the largest penalty ever imposed by this Commission.

Qwest
1600 7th Ave., Suite 3206
Seattle, WA 98191
Telephone: (206) 398-2500
Facsimile: (206) 343-4040

aside, while TWT is correct that deterrence is a factor this Commission considers when evaluating the appropriate size of a penalty, TWT cites no Washington authority for its proposition that a penalty is *per se* insufficient unless it exceeds the amount of benefit obtained by the party being punished. TWT also ignores that the Commission has limited penalty authority as a matter of statute and that those statutory limits bear no connection to the alleged "benefit" TWT discusses.[9] TWT would apparently urge the Commission to ignore these statutory limitations and set as a penalty floor whatever financial benefit TWT believes Qwest gained from the alleged Eschelon and McLeodUSA discounts.

9 TWT's analysis amounts to an argument that penalties in enforcement proceedings should be based on considerations of compensation and damage. As the Chairwoman observed during the November 29, 2004 settlement presentation hearing, TWT's position is incorrect. During that hearing, the Chairwoman and TWT's counsel had the following exchange:[10]

> CHAIRWOMAN SHOWALTER: And that gets to what our authority is in an enforcement action, and perhaps we have a different authority that's delegated to us by the legislature to implement the Federal Telecom Act, because we do have that authority. *I'm used to thinking of enforcement actions as involving penalties, and penalties are not remedies for injured parties, they are like a punishment, and that's basically for the violater, and you really don't ask the question or you don't peg the penalty to the harm done, or the penalty is not damages, put it that way.* And what is your view of our authority in this case on that question?
>
> MR. BUTLER: If you look at pages 12 and 13 of my submission, there are nine factors that were considered by the Minnesota Commission in its unfiled agreements case, which were reviewed by the Federal District Court, and listed is appropriate factors to consider in determining the amount of a penalty. Listed among those are number 5, the economic benefit gained by the person committing the violation.

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9 *RCW 80.04.380-.405.*

10 *Tr. 277-279 (emphasis added).*

Qwest
1600 7th Ave., Suite 3206
Seattle, WA 98191
Telephone: (206) 398-2500
Facsimile: (206) 343-4040

> CHAIRWOMAN SHOWALTER: *Yes, but I don't know that that -- well, first of all, I don't know what authority the Minnesota court has, the commission has, but generally speaking in enforcement actions the damage done is a factor in determining the penalty, but that doesn't imply that the penalty is equal to the damage done. It just means that there's a greater penalty. Usually there are maximum amounts for penalties, and so it might be $100 a day or $1,000 a day, so in an enforcement action you're trying to determine where from zero to the maximum should you land. But often in enforcement actions the penalty amounts do not reach at all the actual damage done, you just take it into account when setting the penalty.* What I'm trying to understand from you is do you think that we're supposed to provide an economic penalty to the violater as distinct from just a hit? I haven't got the right term, I'm sorry, but in other words are we supposed to negate the benefit, or are we simply supposed to impose a penalty within a statutory scheme?
>
> MR. BUTLER: I think that the factors that were listed in the Minnesota case are appropriate factors to consider.
>
> CHAIRWOMAN SHOWALTER: Right.
>
> MR. BUTLER: The economic benefit is certainly one of the factors, and I think the simple reality is that if the penalty isn't sufficient to at least take away the economic benefit, it isn't a penalty at all, it's a reward, because they gain, Qwest gains by violating the law.
>
> CHAIRWOMAN SHOWALTER: Unless there are other remedies in the civil world that can also go against the company.

10 TWT's theory ignores this analysis for evaluating the sufficiency of penalties. In fact, TWT appears to rely solely on Minnesota precedent to support its penalty theory. *TWT Motion*, ¶¶*7-10.* But this reliance is misguided. TWT neglects to inform the Commission that the Minnesota Public Utilities Commission is *required as a matter of statute* to consider the "economic benefit gained by the person committing the violation."[11] This Commission's

[11] *See Minn. Rev. Stat. § 237.462, subd. 2.* That statute empowers the Commission to levy penalties of between $100 and $10,000 per day per violation. It then requires that, in determining the amount of a penalty,

Qwest
1600 7th Ave., Suite 3206
Seattle, WA 98191
Telephone: (206) 398-2500
Facsimile: (206) 343-4040

penalty statutes contain no such mandate or guidance. Thus, the Minnesota decision cited repeatedly by TWT has no binding or even persuasive impact in this case. TWT's motion should be denied.

2. The data TWT seeks is not meaningful, even under its own theory of penalties.

11 Even if the Commission accepts TWT's argument that the Commission must consider the total amount Qwest benefited from the alleged discounts when fashioning an appropriate penalty, the TWT data requests are inadequate for that purpose. TWT's data requests are not reasonably calculated to meaningfully quantify the benefit Qwest obtained from its failure to file the alleged Eschelon and McLeodUSA discounts. As such, even if the Commission agrees with TWT's premise, it should deny TWT's motion to compel.

12 TWT's desire for this information necessarily relies on the following construct. Qwest, TWT would argue, provided Eschelon and McLeodUSA secret 10% discounts. By not filing these alleged agreements with the Washington Commission, Qwest avoided having to allow every other CLEC to opt into the discounts. As a result, TWT's theory goes, Qwest benefited by an amount equal to 10% of all CLEC purchases for particular periods by virtue of having failed to file the alleged discount agreements. This theory ignores analytical steps and factual burdens, and these data requests (if responses were compelled) would paint an exponentially misleading picture of the "benefit" Qwest allegedly reaped.

13 First, TWT's purported theory of relevance in no way explains why it is asking for segregated data as to its own purchases. Data requests TWT 02-008 and -009 ask for only TWT-related information. Leaving aside TWT's admission that it possesses this

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the commission *shall* consider the nine factors listed by TWT in its motion. *Id. (emphasis added).*

Qwest
1600 7th Ave., Suite 3206
Seattle, WA 98191
Telephone: (206) 398-2500
Facsimile: (206) 343-4040

information,[12] TWT wholly fails to explain how the Commission's penalty analysis will be better informed by knowing how much in "discounts" TWT claims it lost. These two data requests should be seen for what they are – yet another attempt to gather data supportive of a claim for credits or damages. By virtue of Order No. 15 and by TWT's own admission, the issue of CLEC credits/remedies has been excluded from this docket. Thus, TWT 02-008 and -009 are very clearly outside the scope of this docket and of permissible discovery.

14 Nevertheless, TWT persists in attempting to hijack this case for its own personal ends by transforming it from an enforcement proceeding into a direct or indirect vehicle for obtaining compensatory relief.[13] The Commission should see through this attempt and should deny TWT's motion to compel as to data requests TWT 02-008 and -009.

15 Likewise, data requests TWT 02-010 and -011 seek to compel figures that will dramatically misinform the Commission's consideration of the settlement agreement. While TWT would like the Commission to believe that Qwest's "benefit" can be easily calculated by multiplying the total amount Qwest billed all CLECs during certain periods by 10%, this analysis makes at least two significant and erroneous assumptions. First, TWT's theory assumes that, had Qwest filed the alleged Eschelon and McLeodUSA discount agreements, the Commission would have approved them, even if the alleged discounted rates bore no relation to a TELRIC methodology. Unless TWT can prove that the alleged discount agreements would have been approved by the Commission, it can not reasonably assert that Qwest benefited at all from failing to file the alleged discounts.

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[12] *TWT Motion, at ¶12.* As discussed above, WAC 480-07-400(4) precludes TWT from seeking through discovery data obtainable from some other source (including itself) that is more convenient, less burdensome or less expensive.

[13] The settlement agreement does not preclude TWT from pursuing compensatory relief from Qwest in another proceeding. *Settlement Agreement, ¶17 ("The Settlement Agreement 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.").*

Qwest
1600 7th Ave., Suite 3206
Seattle, WA 98191
Telephone: (206) 398-2500
Facsimile: (206) 343-4040

16 Second, even assuming that the Commission would have approved the alleged Eschelon and McLeodUSA discounts, aggregated CLEC purchase information alone will be meaningless, even under TWT's theory of penalties. As a matter of law, it is untrue that Qwest's "benefit" can be calculated simply by multiplying the total billings to all CLECs by 10%. Under Section 252(i) of the federal Act, a CLEC could only have opted in if it were able to meet all related terms and conditions that accompanied the alleged discounts.[14]

17 The McLeod and Eschelon transactions were premised upon certain essential terms which are related and tied to other aspects of the transactions. These included volume and term commitments, statewide flat-rate pricing, commitments to a minimum number of lines, retail pricing for voicemail and DSL, a one-time conversion fee and termination liability assessment fees, conversion of existing Centrex blocks and a commitment to maintain a minimum number of lines in more highly concentrated areas. For example, to opt into either the McLeod or Eschelon "discounts," a carrier first would have had to migrate its operations to the UNE-Star platform, a derivation of UNE-P.[15] The UNE-Star platform was available for opt-in in Washington, and no carrier other than Eschelon and McLeod ever opted in. Any CLEC seeking the alleged McLeod or Eschelon "discounts" also would have had to agree to significant volume commitments[16] given that McLeod committed to $480 million in

[14] 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. See also Response Testimony of Harry M. Shooshan III (Exhibit HMS-1RT), at 12-14, and Ex. HMS-3 (excerpt from the deposition of Thomas L. Wilson).*

[15] By way of example, the UNE-Star platform is described vis-à-vis Eschelon in Ex. LBB-24, which was appended to the Response Testimony of Larry Brotherson for Qwest Corporation.

[16] This is not just Qwest's position – the relevance and "relatedness" of volume commitments has been recognized by the FCC since its First Report and Order. *See Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, First Report and Order, 11 FCC Rcd 15499, 16139 ¶1315 (1996) ("For instance, where an incumbent LEC and a new entrant have agreed upon a rate contained in a five-year agreement, section 252(i) does not necessarily entitle a third party to receive the same rate for a three-year commitment. Similarly, that one carrier has negotiated a volume discount on loops does not automatically entitle a third party to obtain the same rate for a smaller amount of loops.").

Qwest
1600 7th Ave., Suite 3206
Seattle, WA 98191
Telephone: (206) 398-2500
Facsimile: (206) 343-4040

purchases over three years[17] and Eschelon committed (in addition to other specific commitments) to $150 million in purchases over five years.[18] In addition, a CLEC seeking to opt into the Eschelon "discount" would be required to provide comparable consulting services.[19]

18 TWT offers no proof that any Washington CLEC could have met all (or any) related terms and conditions. Instead, it simply asks the Commission to assume, contrary to law and common sense, that all CLECs would have been able and willing to do so. This apparently would even include Eschelon and McLeodUSA. Such a simplistic and unsupported analysis has no merit, and TWT's motion to compel responses to TWT 02-010 and -011 should be denied.

3. What Qwest disclosed in New Mexico is irrelevant.

19 In a footnote, TWT references that Qwest disclosed similar information for New Mexico to TWT and certain other CLECs in the New Mexico unfiled agreements case. Qwest acknowledges that it did so, but the scope of the two cases are entirely distinct. Unlike in this case, CLEC remedies are at issue in the New Mexico proceeding. As Order No. 15 – an order TWT chose not to challenge – excluded the issue of CLEC credits from this case, what Qwest disclosed in New Mexico is irrelevant.

C. The TWT data requests are unduly burdensome.

20 As discussed above, the Commission's procedural rules mandate that a data request is inappropriate if it is unduly burdensome, taking into account the needs of the proceeding and

[17] *See Ex. TLW-37 (Agreement 44A), ¶2.* That exhibit is an attachment to the Direct Testimony of Thomas L. Wilson for Commission Staff.

[18] *See Exs. TLW-7 (Agreement 4A), ¶¶2-3, TLW-20 (Agreement 21A), ¶2.*

[19] *See Ex. TLW-7 (Agreement 4A), ¶3.*

Qwest
1600 7th Ave., Suite 3206
Seattle, WA 98191
Telephone: (206) 398-2500
Facsimile: (206) 343-4040

the importance of the issues at stake.[20] Given the imprecise nature of TWT's requests and the corresponding lack of probative value to be gained from obtaining generalized, aggregate purchase data (without the ability to ascertain the portion of which can be fairly characterized as Qwest "benefit"), the Commission should deny TWT's motion.

21 Much of the data TWT seeks is not readily available to Qwest, at least not in the form requested by TWT. Information for certain services (including resale, unbundled loop, UNE-P and PLTS) is altogether unavailable for the November-December 2000 period. While other requested information is available, data from 2003 and other periods (depending on the product involved) needs to be extracted from various databases and analyzed. Each of these two steps will take at least three days of dedicated effort. Because of the holidays and planned family vacations of necessary Qwest personnel, Qwest could not provide this information until January 7 at the very earliest, and this date may be optimistic. Qwest believes January 14 is a more realistic and reasonable estimate. Given the irrelevance and misleading nature of the information being sought, however, the requests are unduly burdensome and Qwest should not be compelled to respond.

III. CONCLUSION

22 Based on the foregoing, Qwest requests the Commission to deny TWT's motion to compel responses to data requests TWT 02-008 through -011.

DATED this 15th day of December, 2004.

QWEST

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Lisa A. Anderl, WSBA #13236
Adam Sherr, WSBA #25291

[20] *WAC 480-07-400(4).*

Qwest
1600 7th Ave., Suite 3206
Seattle, WA 98191
Telephone: (206) 398-2500
Facsimile: (206) 343-4040

1600 7th Avenue, Room 3206
Seattle, WA 98191
Phone: (206) 398-2500

Todd Lundy
1801 California Street, Suite 4700
Denver, CO 80202
Phone: (303) 383-6599

Qwest
1600 7th Ave., Suite 3206
Seattle, WA 98191
Telephone: (206) 398-2500
Facsimile: (206) 343-4040