

BEFORE THE WASHINGTON STATE  
UTILITIES AND TRANSPORTATION COMMISSION

WASHINGTON UTILITIES AND	)	DOCKET NO. UT-033011
TRANSPORTATION COMMISSION,	)	
	)	
Complainant,	)	ORDER NO. 19
	)	
v.	)	ORDER ON PROCESS FOR
	)	CONSIDERATION OF MULTI-
ADVANCED TELECOM GROUP,	)	PARTY SETTLEMENT; PROVIDING
INC., et al.	)	OPPORTUNITY TO FILE OFFER OF
	)	PROOF ( <b>Due Tuesday, January 4,</b>
Respondents.	)	<b>2005</b> ); PROVIDING OPPORTUNITY
	)	TO FILE RESPONSES ( <b>Due Monday,</b>
	)	<b>January 10, 2005</b> ); DENYING TIME
	)	WARNER’S MOTION TO COMPEL;
	)	GRANTING AT&T’S MOTION TO
	)	WITHDRAW
.....	)	

1 **SYNOPSIS.** *This Order finds that Time Warner, an intervenor opposed to the proposed settlement, has no constitutional property interest or substantial interest in the proceeding. In this Order, the Commission limits Time Warner’s further participation in this proceeding to filing an offer of proof pursuant to the Commission’s procedural rules governing the rights of opponents of a proposed settlement. Further, the Commission will allow responses to the offer of proof, and evaluate the offer of proof and responses to determine whether further process is required. The Commission denies Time Warner’s motion to compel discovery responses from Qwest. The Commission also grants in this Order AT&T’s petition to withdraw from the proceeding.*

## I. PROCEDURAL BACKGROUND

2     **PROCEEDING.** This is a complaint proceeding brought by the Washington  
Utilities and Transportation Commission (Commission), through its staff, against  
Qwest Corporation (Qwest) and 13 other telecommunications companies. The  
Complaint alleges that the companies entered into certain interconnection  
agreements identified in Exhibit A to the Amended Complaint,<sup>1</sup> and failed to file,  
or timely file, the agreements with the Commission as required by state and  
federal law. The complaint also alleges that the companies entered into certain  
agreements to resolve disputes, but that the agreements violated federal and  
state law by failing to make terms and conditions available to other requesting  
carriers, providing unreasonable preferences, and engaging in rate  
discrimination. The Commission approved settlements involving all defending  
companies but Qwest, which is now the sole remaining subject of the Complaint.

3     **SETTLEMENT PRESENTATION HEARING.** With respect to Qwest, the  
Commission convened a settlement presentation hearing at Olympia,  
Washington on November 29, 2004, before Chairwoman Marilyn Showalter,  
Commissioners Richard Hemstad and Patrick J. Oshie, and Administrative Law  
Judge Ann E. Rendahl.

4     **APPEARANCES.** Christopher Swanson, Assistant Attorney General, Olympia,  
Washington, appeared on behalf of Commission Staff. Daniel Waggoner and  
Mary Steele, Davis Wright Tremaine, LLP, Seattle, Washington, represent AT&T  
Communications of the Pacific Northwest and TCG Seattle (AT&T). Judith A.  
Endejan, Graham & Dunn, PC, Seattle, Washington appeared on behalf of  
Eschelon Telecom of Washington, Inc. (Eschelon). Arthur A. Butler, Ater Wynne,  
LLP, Seattle, Washington, appeared on behalf of Time Warner Telecom of  
Washington, LLC (Time Warner). Lisa A. Anderl, Associate General Counsel,

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<sup>1</sup> The Commission issued a Complaint against the parties on August 14, 2003, and issued an Amended Complaint on August 15, 2003 to include Exhibits A and B to the Complaint.

and Adam Sherr, Senior Attorney, Seattle, Washington, and Todd Lundy, Associate General Counsel, Denver, Colorado, appeared for Qwest. Robert Cromwell, Assistant Attorney General, Seattle, Washington, appeared on behalf of the Public Counsel section of the Attorney General Division (Public Counsel). Other parties to the proceeding did not appear at the settlement presentation hearing or file pleadings relating to the process for consideration of the proposed settlement agreement.

5     **PROCEDURAL HISTORY.** The Commission filed the Complaint and Amended Complaint in this proceeding in August 2003 against Qwest and 13 competitive local exchange carriers (CLECs). The Amended Complaint alleged that Qwest and the 13 CLECs allegedly failed to file, or timely file, with the Commission 52 agreements identified in Exhibit A to the Amended Complaint and that Qwest failed to file with the Commission an additional 25 agreements Qwest entered with CLECs. The Amended Complaint alleged that Qwest violated federal and state law by failing to make terms and conditions available to other requesting carriers, providing unreasonable preferences, and engaging in rate discrimination.

6     Time Warner, a CLEC not named in the Amended Complaint, petitioned to intervene at the first prehearing conference held on September 8, 2004. As no party objected to Time Warner's intervention and Time Warner stated that it did not intend to broaden the issues in the proceeding, the presiding officer granted Time Warner's petition.

7     On June 8, 2004, Commission Staff witness Tom Wilson and AT&T witness Michael Hydock filed direct testimony in the proceeding.

8     By September 2004, Staff had entered into settlements agreements with, or moved to dismiss from the complaint agreements concerning, all 13 of the CLECs named in the Amended Complaint. In Order Nos. 1, 5, and 7 through 13 in this

proceeding, the Commission granted motions to dismiss 22 agreements from the Amended Complaint and approved settlement agreements involving Allegiance Telecom, Inc., Advanced TelCom Group Inc., AT&T, Covad Communications Company, Electric Lightwave, LLC, Eschelon, Fairpoint Carrier Services, Inc., f/k/a Fairpoint Communications Solutions, Corp., Global Crossing Local Services, Inc., Integra Telecom of Washington, Inc., WorldCom, Inc. and its subsidiaries doing business in Washington (n/k/a MCI, Inc.), McLeodUSA Telecommunications Services, Inc. (McLeodUSA), SBC Telecom, Inc., and XO Washington, Inc.

- 9 On September 1, 2004, Eschelon filed with the Commission the responsive testimony and exhibits of Richard A. Smith. On September 7, 2004, McLeodUSA filed the responsive testimony and exhibits of Stephen C. Gray. On September 13, 2004, Qwest filed the responsive testimony and exhibits of Harry M. Shooshan and Larry Brotherson. On September 14, 2004, Time Warner filed the responsive testimony and exhibits of Timothy J. Gates.
- 10 Following motions by Qwest to strike the testimony of Mr. Smith, Mr. Gray, and Mr. Gates, Administrative Law Judge Rendahl entered Order No. 15 in this proceeding on October 22, 2004, granting Qwest's motions in part, but allowing portions of the witnesses' testimony. The Order struck portions of Mr. Gates' testimony discussing and recommending credits or reparations to CLECs harmed by Qwest's actions.
- 11 On November 1, 2004, AT&T filed a Motion to Withdraw. In response to a notice requesting comment on the motion, Staff filed a Response to AT&T's Motion to Withdraw on November 10, 2004.
- 12 On November 9, 2004, Staff, Qwest, and Public Counsel filed with the Commission a proposed settlement in this proceeding, along with a narrative concerning the proposed settlement.

- 13 Following a conference call with the parties on November 10, 2004, the Administrative Law Judge issued a notice on November 12, 2004, allowing parties the opportunity to comment upon the settlement by November 22, 2004, and scheduling a hearing for the parties to present the settlement on November 29, 2004. The notice established a date for filing testimony addressing the settlement agreement (December 17, 2004) as well as a hearing on the contested settlement scheduled for January 13, 2005, should the Commission determine such process is necessary for consideration of the settlement. The notice also recognized Time Warner's request to conduct discovery.<sup>2</sup>
- 14 On November 22, 2004, Time Warner filed with the Commission its Opposition to Proposed Settlement Between Qwest, Staff, and Public Counsel.
- 15 On November 23, 2004, the Commission issued a notice establishing an agenda for the November 29, 2004, settlement presentation hearing.
- 16 On November 29, 2004, the Commission convened a settlement presentation hearing in this proceeding. Commission Staff presented Dr. Glenn Blackmon and Qwest presented Mr. Mark Reynolds as witnesses in support of the proposed settlement. Time Warner cross-examined Dr. Blackmon and Mr. Reynolds concerning the proposed settlement agreement and presented additional argument concerning Time Warner's opposition to the proposed settlement.
- 17 During the hearing, the Commission requested briefing from the parties concerning the process necessary to consider the proposed settlement. A formal notice requesting briefing was issued on November 30, 2004.

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<sup>2</sup> During the November 10, 2004, conference call the administrative law judge allowed Time Warner to conduct discovery on the proposed settlement pursuant to WAC 480-07-740(2)(c).

18 Time Warner, Qwest, Commission Staff, and Public Counsel all filed briefs with the Commission on December 7, 2004, addressing the procedural issues raised in the settlement presentation hearing.

19 On December 10, 2004, Time Warner filed with the Commission a Motion to Compel Discovery Responses from Qwest. Pursuant to a notice issued on December 13, 2004, Qwest filed a response to Time Warner's Motion on December 15, 2004.

20 The Commission convened a hearing on Time Warner's motion before Administrative Law Judge Rendahl, at which Time Warner, Qwest, and Staff presented argument on the motion. The administrative law judge issued an oral ruling denying Time Warner's motion.

## II. DISCUSSION

21 **A. PROCEDURAL QUESTIONS.** The primary issue the Commission must address in determining the process for considering the proposed settlement agreement is what process is due Time Warner, an intervenor opposing the proposed settlement? This question raises the following additional questions raised by Time Warner and other parties:

- How is due process, or the level of due process, determined?
- Do the Commission's procedural rules afford the due process required in this proceeding?
- May the Commission lawfully consider a non-unanimous settlement without a full hearing on the merits?
- What additional process, if any, is due Time Warner?

These issues, addressed in the parties' post-hearing briefs, are discussed below.

- 22 **1. Due Process, Generally.** Time Warner asserts that its due process rights are identified in the Washington Administrative Procedure Act (APA), chapter 34.05 RCW, and the Commission's procedural rules in chapter 480-07 WAC. *Time Warner Brief*, ¶ 6. Time Warner asserts that it is entitled to a full evidentiary hearing on all material issues of fact and law in the proceeding. *Id.*, ¶ 20. Time Warner asserts that the APA requires a presiding officer to give "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." *Id.*, ¶ 7, citing RCW 34.05.449(2).
- 23 Staff also asserts that Time Warner's due process rights are those set forth in the APA and the Commission's rules. *Staff Brief*, ¶ 7. Staff asserts that the essence of due process is notice and the right to be heard. *Id.*, ¶¶ 5, 7, citing *Soundgarden v. Eikenberry*, 123 Wn.2d 750, 768, 871 P.2d 1050, cert. denied, 513 U.S. 1056 (1994). Staff asserts that constitutional due process only applies when a protected liberty or property right is at issue and that the extent of due process depends upon the particular circumstances in a proceeding. *Id.*, ¶ 7, n.2, citing *Mathews v. Eldridge*, 424 U.S. 319, 331 (1976).
- 24 Qwest asserts that the question of whether or how much process a party is due beyond that provided under state law or regulation depends on whether a party has a protected property interest in the outcome of a proceeding. *Qwest Brief*, ¶ 14. Qwest asserts that *Mathews* provides guidance concerning the level of process owed to a party to an administrative proceeding. *Id.*, ¶ 15, citing 424 U.S. at 335. Qwest asserts that *Mathews* provides a three-part test for determining the appropriate level of process, considering (1) whether there is a private interest that will be affected by official action, (2) the risk of erroneous deprivation of the interest and probable value of any additional safeguards, and (3) the government's interest. *Id.*, ¶ 15.

25 Qwest also asserts that in *WITA v. WUTC*, 149 Wn.2d 17 (2003), the Washington Supreme Court determined that a party must have more than an abstract need or desire for a benefit, or a unilateral expectation of a benefit, in order to have a property interest in the benefit. *Id.*, ¶ 16, citing 149 Wn.2d at 24. Qwest asserts that the *WITA* court further held that the failure to establish a protected property interest in the outcome of a case is fatal to a claim that due process has been denied. *Id.*, citing, 149 Wn.2d at 24-26. Qwest notes that a protected property right is established in reference to existing rules or understandings derived from independent sources such as state law. *Id.*, n.24, citing *Ulrich v. San Francisco*, 308 F.3d 968, 975 (9<sup>th</sup> Cir. 2002).

26 Public Counsel asserts that all parties have a right to due process of law in matters brought before the Commission, where the Commission has set the matter for hearing. *Public Counsel Brief*, ¶ 1. Public Counsel defines due process as an opportunity to know the claims of an opposing party, *i.e.*, notice, a reasonable time to prepare a case, and an opportunity to be heard. *Id.*, ¶ 3, citing *Armstrong v. Manzo*, 380 U.S. 545, 549 (1965); *Rody v. Hollis*, 81 Wn.2d 88, 93 (1972). Public Counsel states “Time Warner’s due process rights arise under [the] U.S. Constitution, Washington state law, and Commission precedent.” *Id.*, ¶ 3.

27 ***Discussion and Decision.*** Procedural due process, recognized generally as notice and an opportunity to be heard, arises under state laws and rules, as well as under the state and United States constitutions.

28 Constitutional procedural due process arises when a party has a property or liberty interest protected by the Fifth or the Fourteenth Amendment, and is faced with deprivation of that interest by governmental decisions. *See Mathews*, 424 U.S. at 332. A Fourteenth Amendment property interest is created “by existing rules or understandings that stem from an independent source, such as state law-  
-rules or understandings that secure certain benefits and that support claims of



entitlement to those benefits.” *Ulrich*, 308 F.3d at 975, citing *Bd. of Regents v. Roth*, 408 U.S. 564, 576 (1972).

29 Qwest is correct that constitutional procedural due process applies only when a party has a protected property interest in a benefit or claim. See *WITA*, 149 Wn.2d at 24-26, citing *Roth*, 408 U.S. 564 (1972). Staff and Qwest are also correct that this due process is flexible and depends upon the particular circumstances presented. *Mathews*, 424 U.S. at 334. The level of notice and the form of the opportunity to be heard may range from written submissions to a full adjudicative hearing depending upon the party’s interest, the risk of erroneous deprivation of the interest, and the government’s interest. *Id.* at 335.

30 Washington state law, in particular the APA, establishes the process afforded interested persons and parties in adjudicative proceedings before state and local agencies. The APA includes the following provision governing procedure in an adjudicative hearing:

*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.*

RCW 34.05.449(2) (*emphasis added*). As Time Warner notes, the APA also provides that “[i]nitial and final orders [entered in adjudicative proceedings] shall include a statement of findings and conclusions, and the reasons and basis thereof, on all the material issues of fact, law, or discretion presented on the record, including the remedy or sanction.” RCW 34.05.461(3). The APA also provides that “[f]indings of fact shall be based exclusively on the evidence of record in the adjudicative proceeding and on matters officially noticed in that proceeding.” RCW 34.05.461(4).

31 The Commission's procedural rules governing adjudicative proceedings are set forth in Part III of chapter 480-07 WAC. Those rules specifically address the process for considering settlements, including multi-party or non-unanimous settlements. *See WAC 480-07-730; WAC 480-07-740.* The Commission considers a multi-party settlement as "an agreement of some, but not all, parties, on one or more issues" and provides that the multi-party, or non-unanimous, settlement may be offered as the position of the parties to the multi-party settlement together with evidence that supports it. *WAC 480-07-730(3).* The Commission's rules provide certain rights to opponents of a proposed settlement:

**Rights of opponents of a proposed 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. The presiding officer may allow discovery on the proposed settlement in the presiding officer's discretion.

*WAC 480-07-740(2)(c).*

32 Thus, a party can assert rights to constitutional procedural due process to the extent the party can demonstrate that it has a protected property or liberty interest in a benefit or claim at issue in a proceeding, and can meet the other requirements for procedural due process. If the party cannot meet those requirements, the party must rely on the procedures established in state law and rules, such as the APA and the Commission's procedural rules, *i.e.*, rules that do not confer a property interest and only afford procedural opportunities.

33 **2. What Process is Due Time Warner in this Proceeding?** Time Warner asserts that it is a full party to the proceeding, with the same rights and status as other parties. *Time Warner Brief*, ¶ 3. Time Warner asserts that the Commission's rules

provide that intervenors are parties to a proceeding. *Id.* Time Warner notes that the Commission may grant intervention by limiting an intervenor's participation in a proceeding, but asserts that it is a full party to the proceeding as the Commission did not limit the grant of Time Warner's petition for intervention. *Id.*, ¶ 4-5.

34 Time Warner asserts that the APA establishes requirements for entering initial and final orders that determine the procedure the Commission must follow in considering the settlement agreement. *Id.*, ¶ 8, citing RCW 34.05.461(3). Time Warner asserts that RCW 34.05.461(3)—which requires that orders “include a statement of findings and conclusions, and the reasons and basis therefore, on all the material issues of fact, law or discretion presented on the record, including the remedy or sanction,”—requires that the Commission hold a full hearing on the merits on all material issues presented. *Id.*, ¶¶ 8-9. Time Warner asserts that without such a hearing the ensuing order will be unlawful, as it will lack findings and conclusions based on substantial evidence in the record. *Id.*, ¶ 9. Time Warner specifically asserts that a decision to dismiss the Qwest/McLeodUSA agreements would be unlawful without hearing evidence as to whether the agreements are interconnection agreements. *Id.*

35 Time Warner relies on the rulings in four cases arising out of state commission decisions on non-unanimous settlements to assert that regulatory commissions must hold full evidentiary hearings before considering a non-unanimous settlement. *Id.*, ¶¶ 12-16.<sup>3</sup> Time Warner asserts that the Commission can consider the proposed settlement as a decision on the merits only “if it is supported by substantial evidence in the record as a whole, and then only if it resolves all material issues in dispute.” *Id.*, ¶ 17. Time Warner asserts that there is no unanimous settlement in this proceeding and that there are disputes of fact.

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<sup>3</sup> See, *Business and Professional People for the Public Interest v. ICC*, 136 Ill.2d 192 (1989); *Fischer v. Pub. Serv. Comm'n of Missouri*, 645 S.W.2d 39 (1983); *Monsanto Co. v. Pub. Serv. Comm'n of Missouri*, 716 S.W.2d 791 (1986); *Kentucky American Water Co. v. Commonwealth*, 847 S.W.2d 737 (1993).

*Id.* Those factual disputes include the terms of the oral agreements between Qwest and McLeodUSA, the description of the terms and scope of Eschelon and McLeodUSA agreements, harm to CLECs and consumers, and the appropriate level of the penalty. *Id.*

36 Time Warner further asserts that the appearance of fairness doctrine requires a full evidentiary hearing in the proceeding. *Id.*, ¶ 18. Specifically, Time Warner asserts 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.” *Id.*, citing *Smith v. Skagit County*, 75 Wn.2d 715 (1969).

37 Finally, Time Warner asserts that the Commission should hold full evidentiary hearing on all disputed issues in the proceeding, following the procedure used in Docket No. UT-021120, the proceeding addressing Qwest’s application for the approval of the sale and transfer of its directory publishing affiliate, Qwest Dex. *Id.*, ¶ 19.

38 Staff asserts that Time Warner’s status is limited to the scope of its intervention. *Staff Brief*, ¶ 2. Staff asserts that Time Warner intervened to take advantage of the terms of certain unfiled agreements and to ensure that it was not discriminated against. *Id.* Staff notes that the Commission may modify the scope of an intervenor’s participation. *Id.*, ¶ 8, citing RCW 34.05.443. Staff asserts that the Commission limited the scope of Time Warner’s intervention by striking portions of Mr. Gates’ testimony and determining that the issue of credits or reparations for CLECs was not appropriately within the scope of the proceeding. *Id.*, ¶¶ 4-6.

39 Staff further asserts that Time Warner has not demonstrated a constitutional property interest in the proceeding, and that Time Warner’s interest, if any, is “extremely limited.” *Id.*, n.2. Staff asserts that, under the APA, a company

seeking a change in its regulated rates has the right to a full hearing. *Id.*, ¶ 8. Staff further asserts that a company subject to penalty in an enforcement proceeding is entitled to a full adjudication due to the nature of the property interest at stake. *Id.* In contrast, staff argues that an intervenor does not have an equivalent unqualified right to full adjudication concerning another party's alleged misconduct. *Id.*, citing RCW 34.05.413(2). Staff asserts that Time Warner has been given the due process set forth in WAC 480-07-740(2)(c), and that a more formal hearing is not required. *Id.*, ¶ 13.

40 Qwest asserts that Time Warner has received all the process due to it under the Commission's procedural rules. *Qwest Brief*, ¶ 23. Qwest asserts that counsel for Time Warner cross-examined Dr. Blackmon and Mr. Reynolds, the witnesses for Staff and Qwest testifying in support of the proposed settlement. *Id.*, ¶ 24. Qwest states that Time Warner has presented argument in its November 22, 2004, comments; at the November 29, 2004, hearing; and in its December 7, 2004, brief. *Id.* Qwest asserts that the Commission has given Time Warner the opportunity to present evidence in opposition to the settlement and supporting an alternative result, and that Time Warner is not entitled to additional process. *Id.*

41 Qwest asserts that Time Warner has presented testimony concerning its position on penalties and other appropriate remedies, and has conducted discovery of Staff, Qwest, and Public Counsel concerning the proposed settlement agreement. *Id.*, ¶ 25. Qwest notes that responses to the data requests were available at the time of the November 29 hearing and that Time Warner had the opportunity to cross-examine Staff's and Qwest's witnesses concerning the responses to the data requests. *Id.*

42 Qwest asserts that the settlement agreement provides that all testimony previously filed and not stricken, which includes Mr. Gates' testimony, be considered for the purpose of supporting the settlement agreement. *Id.*, ¶ 35.

Qwest asserts that the Commission will be in a position to evaluate and approve the proposed settlement based on substantial evidence, and that the Illinois Supreme Court's decision in *Business and Professional People for the Public Interest v. ICC*, 136 Ill.2d 192 (1989), is not applicable. *Id.*

43 Qwest further asserts that Time Warner is not entitled to constitutional due process under the Fourteenth Amendment, as Time Warner cannot establish a state law entitling it to pursue private goals in a Commission enforcement docket, and because Time Warner never filed a third-party complaint or a claim under RCW 80.04.220, RCW 80.04.230, or RCW 80.04.240. *Id.*, ¶¶ 26, n.24, 27; see also ¶ 9. Qwest argues that enforcement proceedings are not the same as other adjudications, such as rate cases or private complaints, in a constitutional due process consideration. *Id.*, ¶ 26. Qwest asserts that in an enforcement proceeding, a party that is neither prosecuting nor defending against a claim in the proceeding has no interest, or virtually no interest, in the proceeding and therefore, no protected property interest. *Id.*, ¶ 21.

44 Qwest asserts that no further process is necessary for the Commission to consider the proposed settlement, asserting that Time Warner has received each of the due process rights established in the Commission's procedural rules. *Id.*, ¶ 24. Qwest asserts that Time Warner has received "both notice and a full and fair opportunity to document and voice its opposition." *Id.*, ¶ 28.

45 Qwest asserts that the process Time Warner envisions would be impractical and would likely nullify the benefit of the proposed settlement agreement. *Id.*, ¶ 30. Specifically, Qwest asserts that the parties entered into the settlement agreement "to avoid further expense, uncertainty and delay, to resolve this matter fully and finally, and to close the docket. *Id.* Qwest asserts that if the Commission pursues a full hearing in the proceeding, Qwest and other parties would most likely withdraw from the settlement. *Id.* Qwest also asserts that such an action would discourage parties from settling matters in the future. *Id.*

- 46 Public Counsel asserts that Time Warner possessed due process rights in the proceeding after the Commission granted Time Warner's intervention. *Public Counsel Brief*, ¶ 4. Public Counsel further states that "Time Warner, as a non-settling party in the present proceeding, must be afforded a reasonable opportunity to: conduct discovery, present testimony that rebuts the proposed settlement, testimony filed in support of a settlement, cross-examine witnesses, and present briefing to the Commission." *Id.*, ¶ 3.
- 47 Public Counsel asserts that the Commission may consider the proposed settlement, but must afford Time Warner a meaningful opportunity to present its position on the underlying case as well as the proposed settlement. *Id.*, ¶4. Public Counsel asserts that the scope of any additional process due Time Warner should be based upon the nature of the questions of fact and law still at issue. *Id.*, ¶ 5.
- 48 ***Discussion and Decision.*** Under the APA and Commission rules, the Commission has discretion to grant a petition for intervention, allowing the intervenor to become a party to the proceeding. *See RCW 34.05.443(1); WAC 480-07-355(3)*. A grant of intervention does not necessarily entitle the intervenor to full participation in the proceeding. The Commission may limit or impose conditions on an intervenor's participation in the proceeding, at any time. *RCW 34.05.443(2); WAC 480-07-355(3)*. Specifically, the Commission may limit an "intervenor's use of discovery, cross-examination, and other procedures so as to promote the orderly and prompt conduct of the proceedings." *RCW 34.05.443(2)(b)*. The Commission may also dismiss an intervenor from the proceeding, after notice and a reasonable opportunity to be heard, if the Commission finds that the intervenor has no substantial interest in the proceeding or "if the public interest will not be served by the intervenor's continued participation." *WAC 480-07-355(4); see also RCW 34.05.443(3)*.

- 49 The presiding officer in this proceeding granted Time Warner's petition for intervention without imposing conditions or limiting the intervention. *See Order No. 01, ¶ 4.* The Commission retains the authority and discretion, however, to limit Time Warner's participation or dismiss Time Warner from the proceeding pursuant to the requirements of RCW 34.05.443(2) and WAC 480-07-355(3) and (4).
- 50 Time Warner asserts that it is "entitled to the full procedures and due process described in" RCW 34.05.449. *Time Warner Brief, ¶ 7.* This statute does not entitle Time Warner to a full adjudicative hearing on the merits. This statute requires that a presiding officer afford parties the opportunities to specific procedures in an adjudicative proceeding, "except as restricted by a limited grant of intervention or by the prehearing order." RCW 34.05.449(2). As discussed above, either the presiding officer or the Commission may limit the process afforded to an intervenor at any time in the proceeding. RCW 34.05.443(2); WAC 480-07-355(3).
- 51 The cases on which Time Warner relies in asserting its right to a full adjudicative hearing on the merits do not warrant such reliance. All four of the cases involve non-unanimous settlements of issues in *rate* cases pending before the state commissions. In those proceedings, unlike the present circumstances, the parties opposed to the settlements were either statutory parties to the proceeding, *i.e.*, public counsel, or intervenors with a significant stake in the proceeding.
- 52 The Qwest Dex proceeding, suggested by Time Warner as a model for this proceeding, is similarly distinguishable. All parties to the Qwest Dex proceeding had a substantial interest in the proceeding and the proposed settlement was filed after all prefiled testimony had been submitted and just prior to the start of the scheduled evidentiary hearings. In this proceeding, the proposed settlement was filed prior to filing of the last round of testimony, the Commission has approved settlement agreements involving most of the other parties to the



proceeding, and most importantly, the opposing party lacks a significant interest in the proceeding.

53 In its procedural rules governing settlements and consideration of settlements, the Commission has established a process for considering multiparty or non-unanimous settlement. The Commission provides certain procedural rights to parties opposing a settlement, including the opportunity to cross-examine witnesses supporting the proposed settlement, present argument, and present evidence opposing the settlement and in support of a proposed alternative. This process is consistent with the APA, *i.e.*, RCW 34.05.449(2), and provides sufficient opportunity in this proceeding for an intervenor (especially one with no substantial interest) opposing a settlement to demonstrate its concerns to the Commission, and for the Commission to fully consider the proposed settlement.

54 In addition, Time Warner has not established that it is entitled to more process, *i.e.*, constitutional procedural due process, in this proceeding. Constitutional procedural due process applies when a party can demonstrate “(1) a property interest protected by the Constitution; (2) a deprivation of the interest by the government; and a (3) lack of required process.” *Ulrich, 308 F.3d at 974*. Time Warner has not established a protected property interest in the proceeding.

55 Time Warner is an intervenor in an enforcement proceeding. Time Warner has no stake or interest in the proceeding other than a desire for a certain benefit or outcome or an expectation of that benefit. Time Warner is not the party prosecuting the proceeding or defending against imposition of a penalty or some other deprivation of its property interest. Time Warner expressed its interest in the proceeding as:

ensuring that it is able to take advantage of contract terms and conditions that are the same or substantially the same as those offered by Qwest to similarly situated telecommunications companies, and that it is not subjected to undue or unreasonable prejudice or disadvantage or undue discrimination in gaining access to or pricing of interconnection, services, or unbundled network elements.

*Time Warner Petition for Intervention at 3.* Time Warner has also stated that it has a “stake in ensuring that the Commission makes the appropriate findings, which we may then be able to take to court ... with an action to try to recover some damages.” *Tr. 277, lines 8-12.*

- 56 In striking the portion of Mr. Gates’ testimony relating to credits or reparations for CLECs in Order No. 15, the Commission has effectively limited Time Warner’s interest in this proceeding to facilitating the Commission’s public interest deliberations by urging that the Commission make findings that Time Warner may use in a later proceeding, and urging that the penalties or other remedies applied in the proceeding are sufficient to ensure fair treatment to Time Warner and other CLECs in the future.
- 57 Time Warner has no definable property interest: It is concerned with the outcome of the proceeding, but is not subject to penalties and has not filed a cross-claim or third-party complaint relating to the issues in the proceeding. In the best light, Time Warner is here asserting an interest in protecting the “public interest.” More realistically, Time Warner is attempting to develop a record in this proceeding for use in some other proceeding, to be heard either by the Commission or in some other forum. Under either circumstance, Time Warner’s interest in the instant proceeding is not a substantial private interest, nor sufficient to demonstrate a protected property interest. Under these circumstances and under the state Supreme Court’s ruling in *WITA*, Time

Warner is not entitled to constitutional procedural due process. *See, 149 Wn.2d at 24-26.*

58 Given our findings above that Time Warner has no substantial interest in the proceeding, and no protected property interest, in our discretion we may dismiss Time Warner as a party pursuant to WAC 480-07-355(4), or limit the scope of Time Warner's participation pursuant to WAC 480-07-740(2)(c) "to promote the orderly and prompt conduct of the proceedings." *See RCW 34.05.443(2); WAC 480-07-355(3).* While we decline to exercise this discretionary authority to dismiss Time Warner as a party, we do limit Time Warner's participation in the proceeding. This is an enforcement proceeding in which the remaining parties with a stake in the proceeding or a statutory right to participate have reached a mutual proposed settlement of the issues. Time Warner's claim that its opposition renders the settlement a non-unanimous settlement is tenuous, given Time Warner's lack of a substantial interest in the proceeding. While technically a non-unanimous settlement (because one party opposes it), the settlement is more like a full settlement of all issues in the proceeding as defined in WAC 480-07-730(1). The settlement is opposed by a party with no substantial interest in the outcome, indeed, a party who may have no right to be a party.

59 Based on this determination, Time Warner deserves, at most, the process set forth in the Commission's rules governing consideration of multi-party settlements, WAC 480-07-740(2)(c). Time Warner has conducted discovery on the settlement, cross-examined witnesses supporting the settlement, and presented argument in opposition to the proposed settlement both in writing and orally in a hearing before the Commission. The only procedural step identified in WAC 480-07-740(2)(c) that Time Warner has not yet been afforded in this proceeding is the opportunity to present evidence, or in the Commission's discretion, an offer of proof.

60 Given Time Warner's tenuous interest in the proceeding, and weighing that interest against the Commission's interest in promoting the orderly and prompt conduct of the proceedings, the Commission determines, at that this time, that additional testimony on the merits in the proceeding is not necessary. The Commission limits Time Warner's participation in the proceeding to filing a written offer of proof in support of its preferred result with respect to the proposed settlement. Time Warner may file such a written offer of proof with the Commission by **Tuesday, January 4, 2005**, and any party seeking to file a response must do so by **Monday, January 10, 2005**. Time Warner may submit its offer of proof, and other parties may submit responses, with the Commission electronically or via facsimile pursuant to WAC 480-07-145(6) on the deadlines set forth above and may file paper copies with the Commission on the following business day.

61 The Commission will determine, after receiving the offer of proof and any responses, what further process is necessary.

62 **B. TIME WARNER'S MOTION TO COMPEL.** Time Warner requests that the Commission order Qwest to respond to four data requests requesting information it claims is relevant to the issue of whether the size of the penalty in the proposed settlement agreement is appropriate. *Time Warner Motion*, ¶¶ 2, 6. Time Warner requests responses to its Data Request Nos. 02-008 through 02-011, which seek information concerning the dollar amount of all purchases of Section 251(b) and (c) services, including interstate and intrastate access charges, by month" made by Time Warner and all CLECs in Washington for certain time periods, as well as a description of the services. *Id.*, ¶ 3.

63 Time Warner argues that the penalty proposed in the settlement agreement is too small and does not address the economic benefit Qwest obtained by violating the law. *Id.*, ¶ 6. Time Warner also argues that the penalty will not correct the harm caused by Qwest's violations. *Id.* Time Warner asserts that the Commission

should apply in this proceeding the standards for determining an appropriate penalty considered in a similar proceeding in Minnesota, including the economic benefit gained by the person committing the violation and the harm to customers or competitors. *Id.*, ¶¶ 7, 8. Time Warner asserts that the information sought in the data requests at issue in the motion is relevant to the issues of economic benefit and harm. *Id.*, ¶ 8.

64 Qwest requests that the Commission deny Time Warner's motion asserting that the data requests seek information that does not relate to the proposed settlement, is unduly burdensome, and is not reasonably calculated to lead to the discovery of admissible evidence. *Qwest Answer*, ¶ 3. Specifically, Qwest asserts that the data requests are outside of the scope of discovery allowed under WAC 480-07-740(2)(c). *Id.*, ¶ 4. Qwest asserts that Time Warner could have pursued this information prior to the filing of the settlement agreement, and that the information is similar to information referenced in a portion of Mr. Gates' testimony that was stricken. *Id.*, ¶¶ 2, 5.

65 Qwest disputes that the information sought in the data requests is relevant to the proceeding. Qwest asserts that the standard Time Warner proposes for evaluating the amount of a penalty is set forth in statute in Minnesota, that no similar statute exists in Washington, and that the Commission is not obligated to adopt this standard in this proceeding. *Id.*, ¶¶ 8-10.

66 Qwest asserts that the information sought is not meaningful, as "the data requests are not reasonably calculated to meaningfully quantify the benefit Qwest obtained from its failure to file the alleged Eschelon and McLeodUSA discounts." *Id.*, ¶ 11; see also ¶¶ 12-18. Specifically, Qwest asserts that an amount equal to ten percent of all CLEC purchases for particular periods "ignores analytical steps and factual burdens" in determining the actual benefit that Qwest may have gained. *Id.*, ¶ 13. Further, Qwest asserts that such a calculation

ignores the requirements under Section 252(i) of the Telecommunications Act of 1996 for opting into the terms of another agreement. *Id.*, ¶¶ 16-18.

67 Qwest asserts that Time Warner has access to its own information, and Qwest should not be required to provide information that Time Warner already has access to. *Id.*, ¶ 13. Qwest also asserts that the data requests are unduly burdensome, “taking into account the needs of the proceeding and the importance of the issues at stake.” *Id.*, ¶ 20. Qwest asserts that some information is not readily available to Qwest, some information is not available at all, and that the available information will take significant time to locate. *Id.*, ¶ 21.

68 In reply at the December 16, 2004, hearing, Time Warner asserted that the information sought is relevant regardless of the scope of the inquiry, *i.e.*, a hearing on the merits or a review of a proposed settlement. Time Warner asserted that the information is necessary to determine the size of an appropriate penalty in this proceeding. Time Warner asserted that the factors applied in the Minnesota proceeding to establish a penalty are valuable in determining an amount that will be a penalty, not a reward, for Qwest and will serve as a deterrent to future violations.

69 Time Warner asserts that it had no need to seek the information as yet in the proceeding, as the discovery cut off in the underlying case had not yet occurred at the time the settlement was filed.

70 ***Discussion and Decision.*** At the close of the December 16, 2004, hearing, the administrative law judge denied Time Warner’s motion on several bases. First, Time Warner had ample opportunity prior to filing its response testimony in this proceeding to seek the information requested in the data requests. The information requested is similar to that referenced in the portion of Mr. Gates’ stricken testimony concerning the calculation of credits and reparations.

71 Second, the information is not appropriate discovery on the proposed settlement. Again, the information sought is similar to that referenced in the stricken portion of Mr. Gates' testimony, and appears to lead more to information to bolster Time Warner's position concerning credits and reparations due to competitors than to developing information appropriate to evaluating the proposed settlement.

72 Third, while the information may be relevant to determining the appropriate penalty in a hearing on the merits, as well as whether the proposed penalty in the settlement is too small, relevance is but one of the factors the Commission must consider in determining the propriety of a data request. Qwest raises sufficient concerns as to the probative value of the information and the burden of obtaining the information, especially given "the scope of the party's interest in the proceeding," to cause us to question the propriety of allowing such discovery. *See WAC 480-07-400(4)*.

73 The Commission's procedural rules establish guidelines for considering disputes over data requests. *See WAC 480-07-400(4)*. Time Warner has a limited interest in the proceeding. Locating and providing the information sought, some of which Time Warner may obtain through its own records, could pose significant burdens on Qwest. In addition, the information sought does not appear reasonably calculated to lead to discovery of admissible evidence, as the information may be only a part of the calculation and factors to consider in determining Qwest's total benefit. After considering the Commission's guidelines and the circumstances described above, Time Warner's motion to compel is denied.

74 **C. AT&T'S MOTION TO WITHDRAW.** AT&T requests leave to withdraw from the proceeding, given that the Commission has approved the settlement agreement between Commission Staff and AT&T. AT&T asserts that its withdrawal will not prejudice any of the parties to the proceeding.

- 75 In response to a notice requesting comment on AT&T's request, Commission Staff states that it does not oppose AT&T's withdrawal from the proceeding. Staff requests that the prefiled testimony of Mr. Hydock, filed on behalf of AT&T, not be admitted in a contested hearing between Staff and Qwest, if such a hearing should occur, as AT&T would no longer be a party. *Staff Response at 1-2.*
- 76 The proposed settlement agreement requests admission of "all testimony previously filed that has not been stricken" for purposes of supporting the Settlement Agreement. *Settlement Agreement, ¶ 25.* During the settlement presentation hearing, Staff and Qwest confirmed that Mr. Hydock's testimony should be admitted for purposes of supporting the settlement. *Tr. 262, line 18 through 263, line 1.*
- 77 The Commission's procedural rules allow parties to withdraw from a proceeding after the Commission grants permission to withdraw, requiring a written motion when the Commission has commenced an adjudicative proceeding. *WAC 480-07-380(3)(b).* The Commission will grant a petition to withdraw when the party's withdrawal is in the public interest. *Id.*
- 78 As the Commission has approved the settlement agreement between Staff and AT&T resolving all pending issues between the parties, it is in the public interest to allow AT&T to withdraw from the proceeding. AT&T's request for withdrawal is granted. In addition, Staff and Qwest have provided guidance as to the treatment of Mr. Hydock's testimony under the settlement agreement and in litigation between Staff and Qwest. If a party has filed testimony in a proceeding, and later withdraws from the proceeding, the testimony may be used to support a proposed settlement filed in the proceeding. The Commission may allow the testimony to be excluded in litigation of issues between the remaining parties to the proceeding.



### III. FINDINGS OF FACT

79 Having discussed above in detail the documentary evidence received in this proceeding concerning all material matters, and having stated findings and conclusions upon issues at impasse among the parties and the reasons and bases for those findings and conclusions, the Commission now makes and enters the following summary of those facts. Those portions of the preceding detailed findings pertaining to the ultimate findings stated below are incorporated into the ultimate findings by reference.

80 (1) Qwest Corporation is a Bell operating company within the definition of 47 U.S.C. § 153(4), and an incumbent Local Exchange Company, or ILEC, providing local exchange telecommunications service to the public for compensation within the state of Washington.

81 (2) The Washington Utilities and Transportation Commission is an agency of the State of Washington vested by statute with the authority to regulate the rates and conditions of service of telecommunications companies within the state, and to take actions, conduct proceedings, and enter orders as permitted or contemplated for a state commission under the Telecommunications Act of 1996.

82 (3) The Washington Utilities and Transportation Commission issued a Complaint and Amended Complaint in this docket in August 2003 against Qwest Corporation and thirteen competitive local exchange carriers alleging violations of violations of Section 252 of the Telecommunications Act of 1996 and state law. This proceeding is an enforcement proceeding in which the Commission Staff prosecutes the Complaint and the named defendants are the only parties subject to penalties or other remedies.

- 83 (4) Time Warner Telecom of Washington, LLC, is a local exchange carrier within the definition of 47 U.S.C. § 153(26), providing local exchange telecommunications service to the public for compensation within the state of Washington, or is classified as a competitive telecommunications company under RCW 80.36.310 - .330.
- 84 (5) Time Warner Telecom of Washington, LLC, was not named as a respondent to the Amended Complaint served on August 15, 2003. The Commission granted Time Warner Telecom of Washington, LLC's, petition to intervene on September 8, 2004, with no limitation, as no party objected to the petition.
- 85 (6) Order No. 15 in this proceeding, entered on October 22, 2004, struck a portion of Mr. Timothy Gates' testimony submitted on behalf of Time Warner Telecom of Washington, LLC, relating to and recommending credits or reparations to competitors harmed by Qwest Corporation's actions.
- 86 (7) Time Warner Telecom of Washington, LLC, has no substantial interest in the proceeding: Time Warner Telecom of Washington, LLC, is not subject to penalties and has not filed a cross-claim or third-party complaint relating to the issues in the proceeding. Time Warner Telecom of Washington, LLC, desires that the Commission make findings Time Warner Telecom of Washington, LLC, may use in a later proceeding and apply penalties or remedies in the proceeding sufficient to ensure fair treatment by Qwest to competitive local exchange carriers in the future.
- 87 (8) On November 1, 2004, AT&T Communications of the Pacific Northwest and TCG Seattle filed a motion to withdraw from the proceeding.

- 88 (9) On November 9, 2004, Commission Staff, Qwest Corporation, and the Public Counsel Section of the Attorney General's Division filed a proposed settlement agreement with the Commission in this proceeding.
- 89 (10) During a conference call between the parties and Administrative Law Judge Rendahl on November 10, 2004, Time Warner Telecom of Washington, LLC, was allowed the opportunity to conduct discovery on the proposed settlement.
- 90 (11) After the Commission issued a notice on November 12, 2004, notifying parties of the opportunity to comment on the proposed settlement agreement, Time Warner Telecom of Washington, LLC, filed its Opposition to the Proposed Settlement, providing written argument in opposition to the settlement.
- 91 (12) Pursuant to a November 12, 2004, notice of the settlement presentation hearing and a November 23, 2004, notice of the agenda for the hearing, the Commission convened a settlement presentation hearing on November 29, 2004.
- 92 (13) At the settlement presentation hearing, Commission Staff presented Dr. Glenn Blackmon and Qwest Corporation presented Mr. Mark Reynolds as witnesses in support of the proposed settlement. Dr. Blackmon and Mr. Reynolds provided testimony to the Commission and were subject to cross-examination.
- 93 (14) At the November 29, 2004, hearing, counsel for Time Warner Telecom of Washington, LLC, cross-examined Dr. Blackmon and Mr. Reynolds and presented argument in opposition to the proposed settlement. Time Warner Telecom of Washington, LLC, had the opportunity at the hearing to present evidence opposing the proposal.

- 94 (15) Following the November 29, 2004, settlement presentation hearing, the parties filed briefs addressing the issue of the process due Time Warner Telecom of Washington, LLC, in this proceeding and the appropriate process for consideration of the proposed settlement agreement.
- 95 (16) The only procedural step identified in WAC 480-07-740(2)(c) that Time Warner Telecom of Washington, LLC, has not yet been afforded in this proceeding is the opportunity to present evidence, or in the Commission's discretion, an offer of proof in support of its preferred result.
- 96 (17) On December 10, 2004, Time Warner Telecom of Washington, LLC, filed with the Commission a Motion to Compel Discovery Responses from Qwest Corporation, seeking information concerning the dollar amount of all purchases of Section 251(b) and (c) services, including interstate and intrastate access charges, by month made by Time Warner Telecom of Washington, LLC, and all competitors in Washington State for certain time periods, as well as a description of the services.
- 97 (18) Time Warner Telecom of Washington, LLC, had ample opportunity to seek the information requested in Data Request Nos. 02-008 through 02-011 prior to the time it filed responsive testimony in September 2004, as well as prior to the time the proposed settlement was filed.
- 98 (19) The information Time Warner Telecom of Washington, LLC, seeks in Data Request Nos. 02-008 through 02-011 is similar to information referenced in testimony filed by Mr. Timothy Gates concerning the calculation of credits and reparations that has since been stricken from the record.
- 99 (20) Qwest Corporation filed a response to Time Warner Telecom of Washington, LLC's Motion on December 15, 2004.

100 (21) The Commission convened a hearing on Time Warner Telecom of  
Washington, LLC's motion before Administrative Law Judge Rendahl, at  
which Time Warner Telecom of Washington, LLC, Qwest Corporation,  
and Commission Staff presented argument on the motion.

#### IV. CONCLUSIONS OF LAW

101 Having discussed above in detail all matters material to this decision, and having  
stated general findings and conclusions, the Commission now makes the  
following summary conclusions of law. Those portions of the preceding detailed  
discussion that state conclusions pertaining to the ultimate decisions of the  
Commission are incorporated by this reference.

102 (1) The Commission has jurisdiction over the subject matter of this  
proceeding and the parties to the proceeding.

103 (2) Procedural due process, notice and an opportunity to be heard, arises  
under state laws and rules and the Fifth and Fourteenth Amendments to  
the United States Constitution. If a party cannot meet the requirements  
for constitutional due process protections, the party must rely on  
procedures in state law and rule.

104 (3) Constitutional procedural due process arises when a party has a property  
or liberty interest protected by the Fifth or the Fourteenth Amendment, of  
the United States Constitution and is faced with deprivation of that  
interest by governmental decisions. *See Mathews v. Eldridge*, 424 U.S. 319,  
332 (1976).

105 (4) Procedural due process under the Fourteenth Amendment applies only  
when a party in a state proceeding can establish a protected property  
interest created by existing state laws and rules that establish benefits and

support claims of entitlement to benefits. *See Board of Regents v. Roth*, 408 U.S. 564, 576 (1972; *see also WITA v. WUTC*, 149 Wn.2d 17, 24-26 (2003).

- 106 (5) Time Warner Telecom of Washington, LLC, has no stake in the proceeding other than a desire for a certain benefit or outcome of this proceeding: Time Warner Telecom of Washington has failed to establish either a substantial interest in the proceeding or a protected property interest entitling it to constitutional due process.
- 107 (6) Time Warner Telecom of Washington, LLC, is entitled only to the due process afforded by state law and rules, *i.e.*, the Administrative Procedure Act, chapter 34.05 RCW, and the procedural rules in chapter 480-07 WAC.
- 108 (7) An interested person may petition to intervene as a party in an adjudicative proceeding, subject to the discretion of the presiding officer, and subject to conditions that the presiding officer may impose at any time during the proceeding, including limiting an intervenor's use of adjudicative procedures in order "to promote the orderly and prompt conduct of the proceedings." *See RCW 34.05.443(2)*.
- 109 (8) The Commission may dismiss an intervenor from a proceeding, after notice and a reasonable opportunity to be heard, if the Commission finds that the intervenor has no substantial interest in the proceeding or "if the public interest will not be served by the intervenor's continued participation." *WAC 480-07-355(4); see also RCW 34.05.443(3)*.
- 110 (9) A presiding officer in an adjudicative proceeding must allow all parties to the proceeding the opportunity for certain procedures, except where the presiding officer has limited an intervenor's participation. *See RCW 34.05.449(2)*.

- 111 (10) Where an intervenor has no substantial interest in the proceeding, the Commission may dismiss the party pursuant to WAC 480-07-355(4), or limit the intervenor's participation in order to "promote the orderly and prompt conduct of the proceedings." *See RCW 34.05.443(2).*
- 112 (11) The Commission provides certain procedural rights to opponents of a proposed settlement, including the right to cross-examine witnesses supporting a settlement proposal, the right to present evidence opposing the proposal, the right to argument against the proposal, and the right to present evidence, or, in the Commission's discretion, an offer of proof in support of the opponents preferred result. *See WAC 480-07-740(2)(c).*
- 113 (12) Where the only party opposing a settlement agreement lacks a substantial interest in the proceeding, the affected settlement agreement becomes more like a full settlement of the parties than a multi-party (non-unanimous) settlement.
- 114 (13) Given Time Warner's lack of a substantial interest in the proceeding, and weighing the Commission's interest in promoting the orderly and prompt conduct of the proceedings, the Commission may limit Time Warner's participation in the proceeding, including restrictions on the process for consideration of multi-party settlements in WAC 480-07-740(2)(c).
- 115 (14) No additional testimony on the merits of the proceeding or any other issue is necessary, at this time, for the Commission to evaluate the settlement proposed by Commission Staff, Qwest Corporation, and Public Counsel.
- 116 (15) It is inappropriate for Time Warner Telecom of Washington, LLC, to seek, through discovery of a settlement proposal under WAC 480-07-740(2)(c),

information that it had the opportunity to obtain at an earlier phase of the proceeding.

- 117 (16) The information Time Warner Telecom of Washington, LLC, seeks in Data Request Nos. 02-008 through 02-011 is not appropriate discovery on the proposed settlement as it is the same information referenced in a stricken portion of Mr. Gates' testimony for measuring credits or reparations to competitors.
- 118 (17) Time Warner Telecom of Washington, LLC's, Data Request Nos. 02-008 through 02-011 are inappropriate pursuant to WAC 480-07-400(4), given Time Warner Telecom of Washington, LLC's, lack of interest in the proceeding and the undue burden imposed by the data requests.
- 119 (18) Where the Commission has approved a settlement agreement resolving all remaining claims affecting a party, it is in the public interest to allow the party to withdraw from the proceeding.
- 120 (19) If a party has filed testimony in a proceeding, and later withdraws from the proceeding, the testimony may be used to support a proposed settlement filed in the proceeding. The Commission may allow the testimony to be excluded in litigation of issues between the remaining parties to the proceeding.

## V. ORDER

### THE COMMISSION ORDERS:

- 121 (1) Time Warner Telecom of Washington, LLC's participation as an intervenor at this stage of this proceeding is limited to filing a written



offer of proof in support of its preferred result with respect to the proposed settlement pursuant to WAC 480-07-740(2)(c).

- 122 (2) Time Warner Telecom of Washington, LLC, may file a written offer of proof with the Commission by Tuesday, January 4, 2005.
- 123 (3) Any party to the proceeding may file with the Commission a response to Time Warner Telecom of Washington, LLC's, offer of proof by Monday, January 10, 2005.
- 124 (4) The Commission will evaluate Time Warner Telecom of Washington, LLC's, offer of proof and any responses to determine whether further process is required.
- 125 (5) Time Warner Telecom of Washington, LLC's, Motion to Compel Responses of Qwest Corporation is denied.
- 126 (6) The Motion to Withdraw filed by AT&T Communications of the Pacific Northwest and TCG Seattle is granted.

Dated at Olympia, Washington, and effective this 22<sup>nd</sup> day of December, 2004.

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

MARILYN SHOWALTER, Chairwoman

RICHARD HEMSTAD, Commissioner

PATRICK J. OSHIE, Commissioner

**NOTICE TO PARTIES:** This is an Interlocutory Order of the Commission. Administrative review may be available through a petition for review, filed within 10 days of the service of this Order pursuant to *WAC 480-07-810(3)*.