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BEFORE THE WASHINGTON STATE

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UTILITIES AND TRANSPORTATION COMMISSION

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WASHINGTON UTILITIES AND)
TRANSPORTATION COMMISSION,)

Docket No. UT-033011

4

Complainant,)

Volume VII

5

vs.)

Pages 312 to 337

6

ADVANCED TELECOM GROUP, INC.;)

7

ALLEGIANCE TELECOM, INC.;)

AT&T CORP.; COVAD)

8

COMMUNICATIONS COMPANY;)

ELECTRIC LIGHTWAVE, INC.;)

9

ESCHELON TELECOM, INC. f/k/a)

ADVANCED TELECOMMUNICATIONS,)

10

INC.; FAIRPOINT)

COMMUNICATIONS SOLUTIONS,)

11

INC.; GLOBAL CROSSING LOCAL)

SERVICES, INC.; INTEGRA)

12

TELECOM, INC.; MCI WORLDCOM,)

INC.; MCLEOD USA, INC.; SBC)

13

TELECOM, INC.; QWEST)

CORPORATION; XO)

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COMMUNICATIONS, INC. f/k/a)

NEXTLINK COMMUNICATIONS, INC.,)

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Respondents.)

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A hearing in the above matter was held on

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December 16, 2004, from 12:15 p.m to 12:50 p.m., at 1300

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South Evergreen Park Drive Southwest, Room 108, Olympia,

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Washington, before Administrative Law Judge ANN RENDAHL.

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Joan E. Kinn, CCR, RPR

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Court Reporter

0313

1 The parties were present as follows:

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

2 JUDGE RENDAHL: We're here for a hearing on
3 Time Warner Telecom's motion to compel. I just noticed
4 that on my notice sent on December 13 it said a notice
5 of hearing on Qwest's motion to compel, obviously that's
6 not correct, it's Time Warner's motion to compel in
7 Docket Number UT-033011, which is captioned Washington
8 Utilities and Transportation Commission versus Advanced
9 Telecom Group, Inc., et al. This hearing was initiated
10 because of a motion filed by Time Warner to compel
11 discovery responses from Qwest. That motion was filed
12 on December 10th. And because of the issues pending in
13 this proceeding, the procedural issues that remained
14 after the settlement presentation hearing on November
15 29th, it seemed appropriate to try to resolve this issue
16 as quickly as possible, so this hearing was scheduled to
17 hear argument on the motion. And Qwest has filed an
18 answer to the motion, I received that electronically
19 yesterday.

20 So the process for today's hearing is first
21 to hear from Time Warner and then from the other
22 parties. I think Staff because of timing will go first
23 after Mr. Butler, and then we will proceed, and I will
24 make an oral ruling at the end of the hearing today.

25 So let's take appearances briefly beginning

0315

1 with Time Warner.

2 MR. BUTLER: Arthur A. Butler from the law
3 firm of Ater Wynne, LLP, appearing on behalf of Time
4 Warner Telecom of Washington.

5 JUDGE RENDAHL: And for Staff.

6 MR. SWANSON: Chris Swanson for Commission
7 Staff.

8 JUDGE RENDAHL: And for Qwest.

9 MR. SHERR: Adam Sherr, in-house counsel for
10 Qwest.

11 JUDGE RENDAHL: And on the bridge line for
12 Qwest.

13 MR. NAZARIAN: Douglas Nazarian From Hogan &
14 Hartson for Qwest, Your Honor.

15 MS. ANDERL: And, Your Honor, Lisa Anderl,
16 in-house attorney with Qwest, is also on.

17 JUDGE RENDAHL: Thank you.

18 And, Mr. Thomas, are you on the line?

19 MR. THOMAS: I am, but I'm not an attorney.

20 JUDGE RENDAHL: Okay, so you're not stating
21 an appearance today?

22 MR. THOMAS: No, ma'am.

23 JUDGE RENDAHL: Okay, thank you.

24 Is there anyone else on the bridge line who
25 called in who may wish to make an appearance?

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1 Okay, hearing nothing, Mr. Butler, please go
2 ahead.

3 MR. BUTLER: As Your Honor is aware, Time
4 Warner Telecom has filed a written motion to compel
5 responses to discovery requests seeking information
6 about purchases made by Time Warner Telecom and other
7 CLECs in Washington from Qwest during the period of time
8 which coincides with the dates which the Echelon secret
9 agreement was in effect. We believe that that requested
10 information is relevant no matter what Your Honor and
11 the Commission should decide about the scope of the
12 future hearings in this case. Certainly if we are given
13 our full rights of a party and entitled to a hearing on
14 all issues in the case on the merits, it's relevant even
15 if the hearing is restricted just to whether the
16 proposed settlement is in the public interest and
17 reasonable. It is relevant because the information goes
18 to specifically the appropriate size of the proposed
19 penalty or fine to be issued in this case.

20 Our position is that determination about the
21 appropriateness of any proposed penalty requires
22 consideration of a number of factors. They are the same
23 factors that were discussed by the court in the Qwest
24 versus Minnesota Public Utilities Commission case.
25 Although those factors are set out in a Minnesota

0317

1 statute, in fact they logically are the kinds of factors
2 that should be considered in determining whether to
3 assess a penalty and how much, and they go specifically
4 to a willingness and intended violation and the gravity
5 of the violation including the harm to the customers or
6 competitors and among other things economic benefit
7 gained by the person committing the violation. This
8 information relates both to the gravity of the violation
9 and the economic benefit.

10 It is our view that a penalty or a fine can
11 not be a penalty, nor can it have any meaningful
12 deterrent value if in fact the violater gains as the net
13 result of having violated the law and having paid for
14 the penalty that is imposed. If, for example, Qwest
15 would have gained by the amount of \$25 Million by
16 failing to make discounts that were offered only to the
17 two favored CLECs available to them but not available to
18 other CLECs to opt into under the applicable law but
19 only then pays a penalty of somewhere between \$7 and \$8
20 Million, that in fact is net economic gain, would not
21 operate as any deterrent to Qwest and in fact would only
22 encourage them to continue to violate the law.

23 So in sum we believe the information is
24 relevant, and I want to respond specifically to the
25 responses that Qwest included in its written response to

0318

1 our motion. First, they claim that the Time Warner
2 request for information regarding dollar purchases by
3 CLECs goes beyond discovery seeking an understanding of
4 the various terms of the settlement. Our view is that
5 discovery is permissible on the proposed penalty,
6 whether it be just in a specific hearing directed to
7 whether the proposed settlement is in the public
8 interest or whether we're looking at a resolution of the
9 issue on issues on the merits is appropriate. Discovery
10 shouldn't be limited just to an understanding of what
11 the parties intended but also to go to the adequacy of
12 the basis for it. Otherwise there can't be any
13 meaningful determination about whether the settlement is
14 in the public interest. In any case, we don't think
15 that there is any cutoff on the time for discovery in
16 the underlying case, so we don't think that that
17 argument was well taken.

18 The same response to Qwest's argument that we
19 should have issued the request sooner. In fact, the
20 specific proposal for penalty was not revealed to us
21 until the proposed settlement was made public. Up to
22 that point, it was the Staff's position that it would
23 not make a specific recommendation but that the
24 Commission was free to impose any penalty up to the
25 maximum allowed. So what we are doing is seeking again

0319

1 discovery about the settlement penalty that is proposed
2 for the first time in this common position with these
3 settling parties.

4 Third, Qwest says that Time Warner cites the
5 new Washington authority, an economic benefit must be
6 considered in assessing the penalties, it is our
7 position that economic benefit and the other factors
8 including the harm caused by the violation are
9 appropriate to consider in assessing penalties. It
10 doesn't have to be a specific Washington statute or
11 authority on this point, because logic dictates that
12 result. As I said, the fine can not be a penalty if the
13 violator gains by violating the law. Time Warner is
14 entitled to make its arguments in the case, and this
15 information is relevant and important to be able to do
16 that. Qwest even admits that deterrence is appropriate,
17 but again we submit there is no deterrence if Qwest as
18 the violator gains by violating the law. And we don't
19 think that the statements of the Chairwoman that were
20 quoted by Qwest in its response are inconsistent with
21 our position in that respect.

22 As I mentioned, the Minnesota factors were
23 set out in the statute of Minnesota, but we think that
24 does not mean that they are not appropriate to be
25 considered in assessing the penalty. They may have been

0320

1 set out in that statute, but they also make logical
2 sense, and they're the kinds of factors that should be
3 considered any time a commission considers whether to
4 impose a penalty and how big the penalty should be when
5 it's looking at a violation of law.

6 Qwest then argues that the data is not
7 meaningful because CLECs could only opt in if they were
8 able to meet all the related terms and conditions that
9 accompanied the alleged discounts. Time Warner's
10 position is that this argument is also not well taken.
11 First of all, Qwest is simply seeking to benefit from
12 its violation by failing to file the secret agreements
13 and then claiming that the Commission hadn't approved
14 them. Also as the Minnesota commission and the Arizona
15 ALJ found, the other terms that Qwest claims are related
16 were really a sham. They were designed specifically to
17 keep other CLECs from being able to get the discounts
18 offered to Echelon and McLeod. Further, Qwest by this
19 argument really seeks to reverse the burden with respect
20 to related items. The FCC in its First Report and Order
21 states, when dealing with pick and choose, made clear
22 that it's the ILECs that bears the burden of proof of
23 showing that other terms are necessarily related. That
24 was upheld by the U.S. Supreme Court. Qwest hasn't made
25 that showing, and moreover we believe that the evidence

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1 will show clearly that these conditions as found by the
2 Minnesota Commission and the Arizona ALJ were a sham,
3 were not really essentially related. Therefore, we
4 think this argument as well is without merit.

5 Finally, Qwest argues that the Time Warner
6 specific data is irrelevant, we do not believe it is.
7 It at least shows harm to Time Warner, and it is no
8 extra burden on Qwest because we believe that they
9 should be providing the information as to all the other
10 CLECs so that we can get a handle on just what the harm
11 caused by the legal violation was and the economic
12 benefit enjoyed by Qwest.

13 JUDGE RENDAHL: And that concludes your --

14 MR. BUTLER: That concludes my statement.

15 JUDGE RENDAHL: Thank you.

16 Mr. Swanson.

17 MR. SWANSON: Thank you, Your Honor. As I
18 said, Staff just has some brief comments. Staff's
19 position is that Time Warner has had sufficient
20 opportunity to seek this information over the past year.
21 Irrespective of Staff's position on the penalty, as
22 Mr. Butler mentioned, Time Warner independently
23 certainly could have sought this information and that
24 indeed these DRs may very well go to Time Warner's
25 theory about credits that may come about ultimately in a

0322

1 different and separate case. And, of course, those
2 issues aren't at issue in this case. And for those
3 reasons, Staff is supportive of Qwest's position and to
4 that extent.

5 Thanks.

6 JUDGE RENDAHL: All right, thank you very
7 much.

8 Mr. Sherr.

9 MR. SHERR: Thank you, Your Honor, Adam Sherr
10 for Qwest. Qwest sets forth the reasons for its
11 opposition to Time Warner's motion in its answer, and I
12 don't want to burden you by repeating all of those, but
13 I'm sitting here listening to Time Warner's reply today,
14 I really have very little to add. Qwest remains
15 believing that these questions go beyond the permissible
16 scope of settlement related discovery that is set out
17 and defined in WAC 480-07-740(2)(c). We do not believe
18 this information is reasonably calculated to lead to the
19 discovery of admissible evidence, and we believe that
20 taking into consideration the context of the case and
21 the context of the data that's being requested here that
22 it would be unduly burdensome.

23 And 480-07-400 subsection 4 makes requests
24 impermissible or notifies that requests are
25 impermissible if they are not reasonably calculated to

0323

1 lead to the discovery of admissible evidence and if they
2 are unduly burdensome taking into account the context of
3 the questions in the proceeding. I understand the
4 motivation underlying or I believe I understand the
5 motivation underlying Time Warner's request for the
6 information, but that does not, as explained here today,
7 does not mean that it is relevant or that it's even
8 reasonably calculated to lead to the discovery of
9 admissible evidence, that this would be a, as described
10 in the answer that we submitted yesterday, it's a
11 significant amount of work that would be required to
12 provide that information. It amounts to about a week of
13 dedicated time to extract that information and to
14 analyze it and make sure it's accurate. Given the in
15 Qwest's view total lack of probative value that that
16 information will have in this case, it simply is unduly
17 burdensome.

18 I would be happy to respond to specific
19 questions that you have, but I would rest on the answer
20 that was submitted yesterday.

21 JUDGE RENDAHL: I think I have some
22 questions, but they're mostly for Mr. Butler, but,
23 Mr. Butler, do you have anything in response before I
24 ask the questions?

25 MR. BUTLER: Let me just say briefly, you

0324

1 know, Qwest and the Staff both keep trying to argue that
2 Time Warner's position on this matter is entirely
3 related to attempts to get credits and that if it's
4 going to be pursued, would have to be done in a separate
5 proceeding. There's no question about the fact that
6 Time Warner believes that something should be done in
7 some proceeding to try to cure the harm that has been
8 caused by Qwest, but in this case our position is driven
9 by a concern that there be an appropriate penalty to
10 deter this kind of illegal action on the part of Qwest.
11 Part of the concern is that if Qwest is able to gain
12 economically by violating the law, it will continue to
13 do so, there won't be any deterrent effect on Qwest.
14 And it's apparent that what Qwest is intending to do is
15 to increase the transaction cost and the burdens,
16 particularly on small CLECs, from trying to do something
17 to correct the harm, and if the Commission is not
18 willing to impose an appropriate penalty, Qwest will in
19 effect have been rewarded for violating the law.

20 When the FCC issued its proposed fine, it
21 specifically cited the fact that state commissions were
22 aggressively pursuing enforcement actions and other
23 actions on their own, and if Washington isn't willing to
24 step up and do its part, Qwest will have gained by this.
25 So the reason for seeking this information is entirely

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1 appropriate in the confines of this case as they have
2 been defined, in other words whether the proposed
3 penalty is appropriate and whether it is adequately
4 supported by the evidence in this case.

5 MR. SHERR: Your Honor, may I respond,
6 because Mr. Butler introduced something that is new in
7 that response.

8 JUDGE RENDAHL: Well, why don't you go ahead
9 and we'll see.

10 MR. SHERR: Sure, feel free to stop me
11 obviously.

12 What Mr. Butler said when he started that was
13 that Qwest and Time Warner -- that Qwest and Staff keep
14 characterizing the motivation here as trying to gather
15 information to seek credits in this case. That's what I
16 heard, either in this case or in a subsequent case. I
17 know that Staff indicated that that is a possibility,
18 and we did as well in our answer, but I think it's
19 unfair to characterize our interpretation of the
20 motivation that way.

21 I understand, after reading the motion to
22 compel, I better understand the explanation for why Time
23 Warner thinks this information is relevant. Time Warner
24 is advancing a theory that the Commission must determine
25 what the benefit was from the alleged discounts from

0326

1 Qwest, and that must be the floor of any penalty,
2 otherwise Qwest benefits and the penalty is not a
3 deterrent. So I just want to -- I want to emphasize
4 that that -- it's not Qwest's sole belief that Time
5 Warner is trying to gather this information in order to
6 advance its pursuit of credits, but I do understand the
7 theory that Time Warner is pushing.

8 I just -- I don't believe that these
9 questions are reasonably calculated to lead to
10 information that answers the question, which is what was
11 Qwest's benefit, if any, and that's what we emphasized
12 in our answer. I'm happy to walk through that some
13 more, but it again relates to you have to -- you have to
14 not only determine what the amount of purchases were
15 from CLECs during particular periods and multiply it
16 times 10%, you also have to know or assume that the
17 Commission would have approved that agreement if filed
18 by Qwest. You also have to assume that every other CLEC
19 in Washington would have been able to and willing to opt
20 in to such an agreement and accept all related terms and
21 conditions.

22 Simply by answering Mr. Butler's questions,
23 which is not simple because it's a great deal of work,
24 the Commission isn't going to have meaningful
25 information on that. That's the problem is that --

0327

1 that's the last part of the problem here, which is that
2 this information will simply produce a number. I have
3 no idea what that number is, but it will be
4 exponentially larger than anything that would resemble a
5 reasonable facsimile of the gain, if there was any gain
6 or benefit that Qwest would have enjoyed. And so it's a
7 lot of effort that leads to information that isn't
8 helpful. It's just -- it's not helpful, and there's no
9 authority that Mr. Butler -- that Time Warner has
10 pointed to that mandates that the Commission weigh or
11 compare the penalty in this case that the settling
12 parties have agreed to and line that up against the
13 alleged benefit. That's just -- it's not a requirement
14 here. It is a requirement in Minnesota, as Mr. Butler
15 acknowledged today.

16 So that's really all I wanted to say, thank
17 you.

18 JUDGE RENDAHL: Okay.

19 Mr. Butler, anything in response?

20 MR. BUTLER: Well, I think I discussed
21 earlier the fact that certainly Time Warner's position
22 is that the evidence will show, as the Minnesota
23 Commission and the Arizona ALJ found, that the so-called
24 related terms that Qwest refers to were a sham and
25 therefore not legitimately part of any requirement that

0328

1 a CLEC would have to agree to in order to opt in for the
2 discount. So certainly from our theory of the case it
3 would be perfectly legitimate to find that the dollar
4 purchase amounts multiplied by the amount of the
5 discount for the relevant periods of time to determine
6 what potential economic benefit Qwest would have been
7 and the magnitude of the harm. That's directly within I
8 think the confines of what is certainly appropriate for
9 us to argue in the case and what is relevant.

10 If you have some questions.

11 JUDGE RENDAHL: I have a couple of questions.
12 One of them I think was raised in your motion, which is
13 that Qwest responded to similar data requests I believe
14 in Arizona.

15 MR. BUTLER: New Mexico.

16 JUDGE RENDAHL: New Mexico.

17 MR. BUTLER: Well, I think they also did in
18 Arizona, but I mentioned specifically New Mexico.

19 JUDGE RENDAHL: At what point in the
20 proceeding did Time Warner make those data requests in
21 New Mexico?

22 MR. BUTLER: I don't know. But, you know, I
23 raised that to show the fact that when they can
24 understand what they are that it's certainly possible
25 for them to do it. Now I think what happened because of

0329

1 the nature of the case in New Mexico where the
2 commission was in --

3 MR. THOMAS: Your Honor, is it possible for
4 me to respond to that?

5 JUDGE RENDAHL: After Mr. Butler is finished,
6 then you can have an opportunity, but I don't believe
7 Mr. Butler is finished.

8 MR. BUTLER: My understanding is that in New
9 Mexico what happened is that Qwest gave each CLEC that
10 specific information, but the other CLECs or each of the
11 CLECs were not able to know the total amount, but the
12 posture of that case was that there was an effort to try
13 to do something to cure the harm by giving some sort of
14 reparations or discount to the CLECs, but maybe
15 Mr. Thomas can be more specific on that.

16 JUDGE RENDAHL: Is that Mr. Thomas or
17 Mr. Nazarian?

18 MR. THOMAS: It's Mr. Thomas.

19 JUDGE RENDAHL: Go ahead, Mr. Thomas.

20 MR. THOMAS: The information was furnished
21 during the course of settlement negotiations with all
22 parties in New Mexico.

23 JUDGE RENDAHL: All right.

24 And Mr. Butler and also Mr. Thomas in the
25 event that you know the answer more than Mr. Butler --

0330

1 MR. BUTLER: I won't have any chance to talk
2 if you do that.

3 JUDGE RENDAHL: What's the best way to ask
4 this. In the prefiled testimony by Mr. Gates, he
5 addresses the issue of appropriate penalty and he
6 addresses the issue of the Minnesota standards. Was
7 there any reason why Time Warner didn't gather the
8 information at that time to give the information -- to
9 give the Commission a perspective of what it believed
10 the appropriate floor was?

11 MR. BUTLER: We didn't have a specific
12 proposal from the Staff. The Staff basically said up to
13 the maximum is appropriate, so we didn't focus on the
14 adequacy of a particular number. And we also at the
15 time that that testimony was filed were under the
16 impression that the Commission would consider other
17 remedies other than simply imposing a fine. And Your
18 Honor recalls that it was our position at that point
19 that there could and should have been some allowance for
20 reparations or refunds or something or credits so that
21 overall that problem would have been addressed. We did
22 not think that we were dealing with an issue of
23 inadequate penalty, because we thought that the issue of
24 economic benefit to Qwest for violating the law was
25 going to be addressed.

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1 JUDGE RENDAHL: Mr. Thomas, at what point,
2 when did this information, when was it made available in
3 New Mexico, not just in terms of the context of the case
4 but I mean was this a year ago?

5 MR. THOMAS: Oh, no, it was, Your Honor, I
6 don't have a date, but the companies began settlement
7 discussions basically sometime this summer of 2004 or
8 maybe late summer, and it was furnished during the
9 course of that and was demanded by the CLECs and by the
10 staff of the commission in New Mexico in order to
11 further the likelihood or to provide information to the
12 CLECs to encourage a settlement essentially, so it was I
13 would say roughly August or September.

14 JUDGE RENDAHL: All right.

15 MR. THOMAS: I can provide you a date
16 specifically.

17 JUDGE RENDAHL: No, that's not necessary, I'm
18 just trying to get a sense of how recent this was.

19 And then the other question is, either to
20 you, Mr. Butler, or to anyone who knows the answer to
21 this, in New Mexico is the statutory scheme similar to
22 Minnesota in that there's a certain evaluation of
23 factors for determining penalty?

24 MR. BUTLER: I don't know the answer to that.

25 MR. THOMAS: And I'm not an attorney, so I

0332

1 don't know the answer to that.

2 JUDGE RENDAHL: Mr. Nazarian, are you at all
3 familiar with that?

4 MR. NAZARIAN: Well, there was a time when I
5 was, Your Honor.

6 JUDGE RENDAHL: I'm familiar with those
7 situations, it's fleeting information at times.

8 MR. NAZARIAN: Right. My recollection, Your
9 Honor, is that New Mexico's statutory penalty scheme is
10 nowhere near as detailed as Minnesota's, but that is a
11 recollection. If I were making a legal argument to you
12 on these issues, I would have been a lot more prepared.

13 JUDGE RENDAHL: I understand that, and I
14 understand I'm putting you on the spot, but I appreciate
15 your input.

16 MR. SHERR: And I have absolutely no idea
17 just to round this out.

18 MR. BUTLER: And you're so young you don't
19 have an excuse.

20 MR. NAZARIAN: I will say, Your Honor, that,
21 you know, in New Mexico as well as Arizona, that in all
22 these other cases the issue of the CLEC's credits or
23 reparations or whatever was always part of the case in
24 ways that it has never been a part of the case here.

25 JUDGE RENDAHL: In the sense that it was

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1 actively a part of the complaint itself?

2 MR. NAZARIAN: Absolutely. If there was a
3 complaint, it was pled, and even if it wasn't, it was
4 clearly part of the relief sought.

5 JUDGE RENDAHL: Mr. Thomas, did you have a
6 response to that?

7 MR. THOMAS: I'm not sure, Your Honor. I
8 mean I'm treading on dangerous ground here. Qwest
9 sought to have reparation kicked out, but they didn't
10 succeed in those states I guess is the way I would
11 respond.

12 MR. NAZARIAN: We have never conceded that
13 each of those state commissions had the authority to
14 impose. In fact, in Minnesota, you know, the federal
15 court there reversed the commission's reparations order.
16 And that's a matter still on appeal --

17 JUDGE RENDAHL: You will have to speak up a
18 bit, Mr. Nazarian.

19 MR. NAZARIAN: I'm sorry, Your Honor.

20 We have never conceded that -- I mean it's
21 been a state by state issue, but I mean it's we have
22 never sort of agreed in blanket form that all state
23 commissions have the authority to impose reparations or
24 refunds or credits or whatever you want to call it.
25 It's been an issue in each state. And as Your Honor may

0334

1 recall, the CLEC credits that were imposed in Minnesota
2 were reversed or vacated by the federal court that
3 reviewed the commission order there, and that issue is
4 still on appeal. So anyway, the point is it's a very
5 state by state and case by case inquiry.

6 MR. THOMAS: Your Honor, can I respond to
7 that?

8 JUDGE RENDAHL: Very briefly.

9 MR. THOMAS: Okay. The fact of the matter is
10 that in two out of three states where this has arisen,
11 Qwest has voluntarily agreed to pay reparations in order
12 to make the cases go away.

13 JUDGE RENDAHL: Okay, but that's not at issue
14 here.

15 Having considered both the written
16 presentations by Qwest and Time Warner, first, about the
17 argument that Qwest and Staff make that this information
18 seeks to gather information concerning credits or
19 reparations, to the extent that it does so, it's not
20 relevant and it should not be allowed. But going to
21 Time Warner's argument that this is relevant as to the
22 size and effect of the proposed penalty and that
23 therefore it goes to the issue, it's discovery on the
24 proposed settlement. As you might tell from my
25 questions, I'm a bit concerned about the timing of the

0335

1 data request and the scope of the data request and based
2 on Qwest's response what value the proposed responses
3 might provide to the Commission. I think Qwest points
4 out that there are some -- it doesn't provide all the
5 information the Commission would need to give an
6 appropriate floor for a penalty even if the Commission
7 determines that the factors that were used in Minnesota
8 are appropriate to use to determine whether a penalty,
9 the size of a penalty considering settlement.

10 So essentially weighing the factors of
11 whether they're going to lead to the production of
12 information that's relevant, whether they're overly
13 burdensome, obviously Time Warner has the information
14 relating to Time Warner, and taking into consideration
15 the context of this proceeding and the issues that are
16 presented, I'm going to deny the motion to compel,
17 because I don't think that the information as I stated
18 would lead to information that would be relevant to --
19 it may be relevant, but it may not lead to information
20 that's going to assist the Commission in this process
21 and therefore would be overly burdensome given the
22 actual benefit that the information would give to the
23 Commission in determining a floor for the penalty.

24 So in addition to that, it concerns me that
25 the information that's so broad, Time Warner knowing

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1 that the information could have been available based on
2 its New Mexico proceeding, that it waited until this
3 time to seek the information from Qwest. The time for
4 discovery in the main proceeding in this case has not
5 closed, but what we're addressing right now is the
6 settlement itself, and it seems to me that this
7 information is also going towards Time Warner's position
8 in seeking information to determine the harm to it
9 compared to other CLECs that it can use in another
10 proceeding. And to the extent that Time Warner seeks to
11 do that, it can do so in another proceeding. I don't
12 think it's entirely relevant to this proceeding. So on
13 that basis, the motion to compel is denied.

14 Is there anything further from the parties on
15 that?

16 MR. SHERR: No, Judge, thank you.

17 JUDGE RENDAHL: Okay, with that, this
18 determination will be included in the order that will be
19 entered tomorrow or Monday depending on the timing and
20 ability to get it out by the end of the day tomorrow.
21 So thank you all for your time today, and the order will
22 be following shortly.

23 MR. SHERR: Thank you, Judge.

24 JUDGE RENDAHL: So if there's nothing else,
25 this hearing is adjourned.

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(Hearing adjourned at 12:50 p.m.)

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