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December 7, 2004

VIA UPS OVERNIGHT DELIVERY AND EMAIL

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

Re: *WUTC v. Advanced Telecom Group, Inc., et al.*
Docket No. UT-033011
Time Warner Telecom of Washington, LLC's Petition for Review of Order No. 19

Dear Ms. Washburn:

Enclosed please find the original and 12 copies of Time Warner Telecom of Washington, LLC's Petition for Review of Order No. 19 in the above referenced docket. Copies of this document have also been sent to all parties on the Certificate of Service attached to the Motion via the method(s) indicated.

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

Sincerely,

ATER WYNNE LLP

Aaron Hottell
Assistant to Arthur A. Butler

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

[Service Date: January 3, 2005]

BEFORE THE
WASHINGTON UTILITIES AND
TRANSPORTATION COMMISSION

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION, Complainant, v. ADVANCED TELECOM GROUP, INC.; ALLEGIANCE TELECOM, INC.; *et al.*, Respondents.	Docket No. UT-033011 **TIME WARNER TELECOM OF WASHINGTON LLC'S PETITION FOR REVIEW OF ORDER NO. 19**

1. Time Warner Telecom of Washington LLP ("TWTC"), an intervenor in this proceeding, brings this petition for review of Order No. 19 pursuant to WAC 480-07-810(3).

2. In Order No. 19, the Commission denied TWTC the right to a hearing on the merits on the key issues in the case and limited TWTC's future participation in the case to filing a "written offer of proof in support of its preferred result with respect to the proposed settlement." The Commission also denied TWTC's motion to compel discovery responses relevant to quantifying the economic benefit Qwest obtained by failing to file the Eschelon and McLeodUSA secret agreements. Both rulings were in error and should be changed. Interlocutory review is necessary to avoid substantial prejudice and harm to TWTC.

3. Both rulings are based on the erroneous premise that TWTC lacks a substantial interest in this proceeding. As TWTC pointed out in its Brief Regarding Process for

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Consideration of Multi-Party Settlement, in the absence of a unanimous settlement, evidentiary hearings and a decision on the merits, based on substantial evidence, can only be dispensed with by a regulatory commission when there are no disputed questions of material fact.[1]

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

5. Order No. 19 acknowledges all of this but seeks to avoid the procedural and due process consequences by declaring that the non-unanimous settlement is "more like a full settlement of all issues in the proceeding as defined in WAC 480-07-730(1)" because it "is opposed by a party with no substantial interest in the outcome, indeed, a party who may have no

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[1] *Business and Professional People for the Public Interest v. Illinois Commerce Commission*, 136 Ill. 2d 192, 555 N.E. 2d 693 (1989); *Fischer v. Public Service Commission of Missouri*, 645 SW 2d 39 (Mo. Ct. App. 1983); *Monsanto Co. v. Public Service Commission of Missouri*, 716 SW2d 791 (1986); *Kentucky American Water Company v. Kentucky Public Service Commission*, 847 SW 2d 737 (S.Ct.Ky. 1993).

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right to be a party." This decision is wrong for two reasons. First, it violates RCW 34.05.060, which specifically preserves the rights of a party not to join a proposed settlement:

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

Order No. 19, however, would have the prohibited effect of requiring a party to settle. Under the rationale of the Order, in the absence of an agreement to settle, the Commission would simply dismiss the non-settling party from the case or limit its participation so as to deny it the right to a decision on the merits on all material issues of fact and law. The limitation on participation imposed in Order No. 19 was clearly ordered solely to enable the Commission to treat the proposed Settlement as an unanimous one. TWTC submits that, as such, the participation limitation is an abuse of discretion.

6. Second, TWTC does have a substantial interest in the outcome of this proceeding. The complaint against Qwest in this case alleges willful and repeated violations of its statutory obligations in sections 252 (e) and (i) of the Communications Act of 1934, as amended (the "Act")[2], and violations of RCW 80.36.170; RCW 80.36.180; and RCW 80.36.186.

7. Section 252(e) of the Act requires that negotiated interconnection agreements between an incumbent LEC and a CLEC be submitted to state commissions for approval. As the FCC stated in its *Local Competition Order,*

> requiring filing of all interconnection agreements best promotes Congress's stated goals of opening up local markets to competition, and permitting interconnection on just, reasonable, and nondiscriminatory terms. State commissions should have the opportunity to review *all* agreements ... to ensure that such

[2] 47 U.S.C. § 252(e) and (i).

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> agreements do not discriminate against third parties, and are not contrary to the public interest.[3]

Under Section 252(i) of the Act, ILECs like Qwest must make the terms of interconnection agreements available to CLECs who are not parties to the original agreements. Non-party CLECs can then "opt-in" and incorporate these provisions into their own interconnection agreements if they follow "the same terms and conditions, in addition to rates, as those provided in the [original] agreement."[4] During the time the unfiled agreements involved in this case were in effect, the FCC interpreted Section 252(i) to allow CLECs to "pick and choose" specific portions of an ILEC's interconnection agreement.[5] As the FCC has observed, "failure to make select portions of an agreement available [under Section 252(i)] on an unbundled basis could encourage an incumbent LEC to insert into its agreements onerous terms for a service or element ... in order to discourage subsequent carriers from making a request under that agreement."[6] It follows, then, that the basic purpose of Section 252(i) is to prevent discrimination between carriers.[7]

8. Prevention of discrimination is also the basic purpose of RCW 80.36.170, .180, and .186. RCW 80.36.170 prohibits telecommunications companies from making or giving an undue preference or advantage to any customer or subjecting any customer to undue or unreasonable prejudice or disadvantage whatsoever. RCW 80.36.180 prohibits telecommunications companies from engaging in rate discrimination, either by special rates or rebates provided by the company to one customer or class of customers that it does not provide to all other similarly situated customers. RCW 80.36.186 prohibits telecommunications companies

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[3] *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, First Report and Order, 11 FCC Rcd 15499, 15583, ¶167 (1996)(subsequent history omitted, emphasis in original)("*Local Competition Order*").

[4] 47 C.F.R. §51.809(a).

[5] *Local Competition Order*, ¶1310. This interpretation was affirmed by the United States Supreme Court in *AT&T Corp. v. Iowa Util. Bd.*, 525 U.S. 366, 396 (1999).

[6] *Id.* at ¶1312.

[7] This was expressly acknowledged by this Commission in its Order No. 5 in this docket. *See* Docket No. UT-033011, Order No. 5, ¶67, at 23 (February 12, 2004).

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from granting an undue or unreasonable preference or advantage to another telecommunications company or from subjecting another telecommunications company to an undue or unreasonable prejudice or competitive disadvantage as to the pricing or access to non-competitive services.

9. As a telecommunications company and as a customer of Qwest, TWTC is among the intended beneficiaries of these statutory prohibitions of discrimination. It is also a victim of all of the acts of discrimination, undue preference, and competitive disadvantage alleged in the complaint. As such, TWTC has a very substantial interest in the outcome of this proceeding. TWTC has a right to fair, just, reasonable, and non-discriminatory rates and practices from Qwest. And, it has a substantial interest in seeing that *all acts of discrimination* by Qwest against TWTC in violation of the Act and Washington statutes are identified and *found to be acts of discrimination in violation of law.* TWTC also has a substantial interest in seeing that the Commission impose an appropriate penalty that will deter Qwest from discriminating against TWTC and subjecting it to competitive disadvantage in the future.[8] Obviously, TWTC also has a substantial interest in seeing that the discrimination and competitive disadvantage be remedied.

10. This Commission has both the authority and the obligation to apply federal law in implementing competition, and administering and enforcing the requirements of the Act. Further, under the express dictates of RCW 80.36.610(1), this Commission is authorized to "take actions, conduct proceedings, and enter orders as permitted or contemplated for a state commission under the federal telecommunications act of 1996." As this Commission noted in Order No. 5 in this proceeding, "[t]he federal courts have recognized state commission authority to enforce the provisions of interconnection agreements."[9] This Commission also has the statutory duty to enforce this state's public service laws, including the statutory prohibitions against undue preference or advantage, undue discrimination, and discriminatory pricing of or access to non-

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[8] If Qwest can save money by violating the law and paying a monetary –penalty that is substantially less than what it would have cost to make price discounts available to non-favored CLECs, Qwest will not be deterred from future violations. It will also enjoy the added benefit of having damaged its competition in the process.

[9] Docket No. UT-033011, Order No. 5, ¶54, at 19 (February 12, 2004).

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competitive services.[10] While the Commission and its Staff have apparently chosen not to take any steps to remedy the harm from Qwest's illegal and anti-competitive actions in this case, that does not mean that the Commission should not make all findings of violations of law with respect to all secret interconnection agreements that have been identified in the course of the Commission's investigation. Other states that have investigated the secret, unfiled agreements entered into by Qwest, such as Minnesota, Arizona, and New Mexico, have made findings of violations as to all unfiled interconnection agreements, including violations with respect to the Eschelon and McLeodUSA pricing discount agreements, and have attempted to correct the harm to competitors, consumers, and to the integrity of the regulatory process caused by those agreements. Whether or not there is any future case in Washington focused on correcting the harm to TWTC caused by Qwest's violations, TWTC does have a substantial and direct interest in the outcome of this proceeding.[11]

11. The Commission should be mindful of the fact that the proposed settlement was negotiated in secret and does not represent the agreement of all of the competing interests, both public and private, that are represented in the case. Importantly, the settlement does not represent the agreement of any entity that was the direct victim of the discrimination and anti-competitive acts alleged in the complaint. On December 15, 2004, the Administrative Law Judge in the Colorado Public Utilities Commission unfiled agreements case recommended against adoption of the proposed settlement because, among other reasons, the proposed settlement was not a global one. The ALJ stated:

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[10] RCW 80.04.470 ("It shall be the duty of the commission to enforce the provisions of this title and all other acts of this state affecting public service companies, the enforcement of which is not specifically vested in some other officer or tribunal. . ."). *See also* RCW 80.36.140 ("Whenever the commission shall find, after a hearing had upon its own motion or upon complaint, that the rates ... or that the ... practices of any telecommunications company affecting such rates ... are ... unjustly discriminatory or unduly preferential, or in anywise in violation of law, ... the commission shall determine the just and reasonable rates ... to be thereafter observed and in force, and fix the same by order as provided in this title.").

[11] If Qwest can skate on any of its violations, it will have been rewarded for its illegal actions and will be encouraged to violate its obligations in the future.

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> In order for a settlement agreement to be meaningful, just, and in the public interest, it should represent the agreement of most if not all of the competing interests both public and private. A global agreement would tend to include these competing interests and result in a balanced resolution of the issues. It is recommended that the Commission not approve the Settlement Agreement.[12]

The non-unanimous settlement proposed in this case should also be rejected.

12. It was also error to deny TWTC's motion to compel discovery from Qwest. TWTC sought information about the amount and nature of the services purchased by CLECs from Qwest during the time that the Eschelon secret discount agreement was in effect. Since the discounts offered to Eschelon applied to all purchases, both interstate and intrastate, the requested information is directly relevant to the issue of the economic benefit enjoyed by Qwest by not making the discounts available to non-favored CLECs. This, in turn, is directly relevant to the issue of whether the amount of the penalty proposed in the settlement is sufficient and appropriate.

13. Order No. 19 erroneously states that the requested information is not appropriate discovery on the proposed settlement because it is similar to that referenced in the stricken portion of Mr. Gates' testimony regarding credits and reparations. Again, this is incorrect. The information would help quantify the size of the economic benefit enjoyed by Qwest by violating its legal obligation to file all interconnection agreements and make their terms available to other CLECs to incorporate into their own interconnection agreements. The Commission cannot properly evaluate whether the penalty proposed in the settlement is appropriate unless it can tell what the magnitude of the harm caused by Qwest is and what Qwest gained by not filing the secret agreements that contained discounts for only the favored CLECs.

14. Order No. 19 also erroneously states that that value of the requested information is outweighed by the burden on Qwest of obtaining the information, citing concerns about the

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[12] Recommended Decision of Administrative Law Judge William J. Fritzel That The Commission Open a Show Cause Proceeding Against Qwest, In the Matter of the Investigation into Unfiled Agreements Executed by Qwest Corporation, CPUC Docket No. 02I-572T, at 22, ¶86 (December 15, 2004).

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probative value of the information raised by Qwest. The reference is to Qwest's argument that the Commission cannot assume that other CLECs would be entitled to the ten percent discounts offered to Eschelon and McLeodUSA because there has been no showing that the Commission would have approved the Eschelon and McLeodUSA secret agreements or that the non-favored CLECs could have met the other terms, including volume commitments, that were ostensibly associated with the price discounts and credits in the secret agreements. But Qwest's argument and Order No. 19 have it backwards.

15. First, Qwest's unlawful discrimination under state law does not depend on the opt-in requirements of Section 252(i). Second, Section 252(i) would have allowed CLECs to opt into the favorable pricing provisions without the volume discounts or other ostensibly related terms. Under the relevant FCC interpretation, a CLEC can choose to opt into only those portions of an agreement it desires, unless the ILEC demonstrates to the relevant state commission that other terms in the agreement are "legitimately related" to the desired provisions.[13] It is the ILEC that bears the burden of proving to a state commission what, if any, additional terms in an agreement are legitimately related to the provisions sought by the CLEC. In other words, the onus is on the ILEC to prove that a CLEC should not be allowed to pick and choose only certain select provisions of an interconnection agreement. Qwest has not met that burden, and Order No. 19 was wrong to prejudge in Qwest's favor the issue of whether the peripheral terms of the Eschelon and McLeodUSA secret agreements were legitimately related to the favorable pricing terms. It is TWTC's position that the record amply demonstrates that the terms Qwest now claims as a shield against liability bore no legitimate relationship to the favorable pricing terms of the secret deals. And, in fact, that is exactly what the Minnesota Commission found in its unfiled agreements case.

16. Third, TWTC's request for information was not untimely. There has been no discovery cut-off ordered in the case, and prior to the filing of the proposed settlement, TWTC

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[13] *Id.* at ¶1315.

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had no idea the Staff would be supporting a specific penalty, much less one that is far below the value of economic benefit Qwest gained by violating the law.[14] Prior to the announcement of the proposed settlement, Staff's position was that the Commission should be free to choose any appropriate penalty within the maximum amounts allowed by law. Whether the penalty proposed in the settlement is appropriate is certainly a legitimate subject of discovery.

17. TWTC does not have access to information about other CLEC purchases from Qwest. Only Qwest can produce that information, as it has done in other states. The decision denying TWTC's motion to compel discovery should be reversed and the discovery ordered.

CONCLUSION

18. For the reasons state above, TWTC requests that the Commission reverse its decision to deny TWTC the right to a hearing on the merits on the key issues in the case and limit TWTC's future participation in the case to filing a "written offer of proof in support of its preferred result with respect to the proposed settlement." The Commission should also reverse its denial of TWTC's motion to compel discovery responses relevant to quantifying the economic benefit Qwest obtained by failing to file the Eschelon and McLeodUSA secret agreements.

RESPECTFULLY SUBMITTED this 3rd day of January, 2005.

[14] The fact that the Minnesota Commission found a $25 million penalty to be appropriate considering factors that included the size of the economic benefit from violating legal requirements, which was upheld by the District Court reviewing that decision, is a good indication of the fact that the size of the economic benefit enjoyed by Qwest in Washington is of the same order of magnitude.

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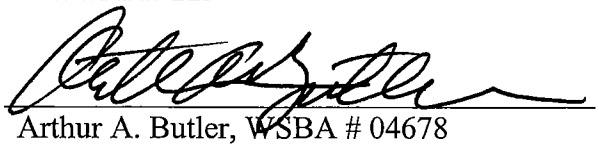
By 
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CERTIFICATE OF SERVICE

I hereby certify that I have this 3rd day of January 3, 2005, served the true and correct original, along with the correct number of copies, of the foregoing document upon the WUTC, via the method(s) noted below, properly addressed as follows:

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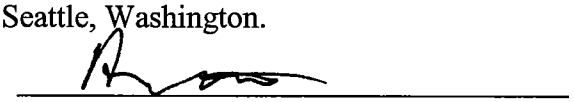
I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 3rd day of January 3, 2005, at Seattle, Washington.



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