BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION, Petitioners, v. ADVANCED TELECOM GROUP, INC., et al., Respondents.	DOCKET NO. UT-033011 COMMISSION STAFF RESPONSE TO TIME WARNER PETITION FOR REVIEW OF ORDER NO. 19

1 Time Warner LLC (Time Warner) argues that Order No. 19 should be changed because the process for consideration of the proposed settlement adopted by the Order does not account for its right, as an intervenor, to litigate the proceeding. Time Warner Telecom of Washington LLC's Petition for Review of Order No. 19 (Petition), ¶ 2. Time Warner misunderstands its role as an intervenor objecting to a multiparty settlement in this enforcement proceeding.

A. Introduction

2 WAC 480-07-810 dictates when interlocutory review is available. Time Warner has not met any of the standards set out in that rule. Order No. 19 is

consistent with state law and properly within the Commission's discretion and the law. The Order also addresses all the concerns raised by Time Warner in its Petition. Therefore, the Commission should not review the order.

3 However, if the Commission decides to review Order No. 19, the Commission should affirm its decision. As the Commission correctly points out Time Warner was accorded the process due an intervenor. The Administrative Procedure Act (APA), chapter 34.05 RCW, encourages settlements. RCW 34.05.060. Here, Staff, Public Counsel, and Qwest, the parties with a statutory or other significant stake in the outcome, have agreed to the settlement.

4 The Commission properly inquired into the degree of process Time Warner was due as an intervenor objecting to the Settlement Agreement. The Commission determined that Time Warner was due a limited amount of process based on its asserted interests. An intervenor's rights are set forth in WAC 480-07-355. In fact, the Commission could have dismissed Time Warner as an intervenor, but did not. As a result, Time Warner was afforded an opportunity to object to the settlement pursuant to Commission rule. *See* WAC 480-07-740.

5 In Order No. 19, the Commission stated the following:

> 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 this 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.
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> 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).

6 Order No. 19 ¶¶ 58-60. The Commission properly exercised its discretion to limit Time Warner's participation in the proceeding. Therefore, if the Commission decides to review Order No. 19, it should affirm it.

B. The Commission has the discretion to terminate or limit Time Warner's participation as an intervenor in this proceeding, or allow Time Warner to remain a party and object to the Settlement pursuant to Commission rules.

1. An intervenor's rights in an adjudication depend on the nature of its interests.

7 Time Warner argues, in effect, that an intervenor cannot be dismissed or have the scope of its participation modified. Petition, ¶ 5. However, Time Warner's argument is incorrect pursuant to RCW 34.05.443.

a. Intervention under the APA.

8 Intervention is discretionary with the agency. RCW 34.05.443 ("[t]he presiding officer may grant intervention at any time, upon determining that the petitioner qualifies as an intervenor under any provision of law and that the intervention sought is in the interests of justice and will not impair the orderly and prompt conduct of the proceedings."). Therefore, the agency may, but need not, permit a party to intervene. The WUTC may terminate an intervention "after notice and opportunity to be heard." WAC 480-07-355(4).

9 There are cases, however, in which third parties are permitted to intervene in an action because the party's statutorily or constitutionally protected rights are implicated by the action. In such situations, an agency adjudicates the third party's interests. *See* RCW 34.05.413(2) *("When required by law or constitutional right*, and upon the timely application of any person, an agency shall commence an adjudicative proceeding.") (emphasis added), RCW 34.05.010(1) (The definition of "[a]djudicative proceeding" is "*a proceeding before an agency in which an opportunity for hearing before that agency is required by statute or constitutional right*." (emphasis added). Whether or not that adjudication occurs in the original action or a separate action is discretionary with the agency and depends on the nature of the interests at stake.

10 Therefore, under the Commission's rules, the Commission may choose to adjudicate actions together, or permit a third party to intervene (because the original and third party's statutorily or constitutionally protected interests are tied together). WAC 480-07-320. The result in that situation would be that the third party's intervention should not be subsequently terminated unless the two actions are severed. WAC 480-07-320. However, intervenors not having a constitutionally or statutorily protected interest in the proceeding do not have the same rights to an adjudication as those parties who have constitutional or statutory interests that an agency must consider. Therefore, the Commission may terminate an intervenor's participation a proceeding upon finding that the intervenor has "no substantial interest in the proceeding, or that the public interest will not be served by the intervenor's continued participation." WAC 480-07-355(4).

b. Modification of the scope of an intervenor's participation.

11 Similarly, an agency has the discretion to modify the scope of an intervenor's participation *at any time*. RCW 34.05.443. An intervenor's participation may not be modified in such a way so as to deny an intervenor the right to a hearing if the intervenor has a statutorily or constitutionally protected interest requiring a

hearing.[1] RCW 34.05.010(1). However, even in that situation, the Commission has broad discretion.

12 The APA plainly states that the agency has the discretion to modify the scope of interventions. RCW 34.05.443 states, "[i]f a petitioner qualifies for intervention, the presiding officer may impose conditions upon the intervenor's participation in the proceeding, either at the time that intervention is granted or *any subsequent time"* (emphasis added). Such limitations include, but are not limited to, "limiting the intervenor's participation to designated issues in which the intervenor has a particular interest demonstrated by the petition" and "limiting the intervenors use of discovery, cross-examination, and other procedures so as to promotes the orderly and prompt conduct of the proceedings." *Id.* The agency's discretion to limit an intervenor's participation in an adjudication is echoed in RCW 34.05.449(2), which states "[t]o 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* (emphasis

[1] However, as the Commission noted, even if the third party has a right to an adjudicative proceeding, "[t]he 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 that interest, and the government's interest." Order No. 19, ¶ 29, (*citing Mathews v. Eldridge,* 424 U.S. 319, 335 (1976)). Therefore, in that situation any modification would need to be consistent with due process.

added).[2] Therefore, the Commission has broad discretion to modify the scope of an intervenor's participation at any time.

13 Therefore, the proper analysis for determining whether Order No. 19 fairly accounts for Time Warner's interests is to (1) determine the scope of Time Warner's interests (specifically, whether Time Warner has a statutorily or constitutionally protected interest that requires a hearing), and (2) ensure that Time Warner receives all process it is due. This is exactly the analysis the Commission undertook in Order No. 19.

2. Order No. 19 provides more process to Time Warner than is required by law.

14 Order No. 19 provides Time Warner more process than is required by law. The Commission found that Time Warner did not have a substantial interest or constitutionally protected interest in the proceeding. Order, No. 19, ¶ 58. In fact, the Commission found that the only interest that Time Warner may have in the proceeding is in advocating whether or not the Settlement Agreement is in the public interest.[3] Order No. 19, ¶ 56.

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[2] However, as discussed above, it is true that if an intervenor has a right to an adjudication "as required by law or constitutional right" pursuant to RCW 34.05.413(2), the intervenor's participation may not be limited in such a way so as to violate the intervenor's statutory or constitutional right.

[3] It is significant that the Commission drew on Order No. 15 to aid its analysis of Time Warner's interests because in that order the portions of Time Warner's testimony related to credits were struck because Time Warner had not properly raised the issue of credits. Order No. 15, paragraph 112. Time Warner did not challenge the order with a motion for reconsideration, has not filed a complaint seeking credits, and in fact, has never questioned the conclusions contained in the order.

15 The Commission afforded Time Warner an opportunity to argue whether it had a substantial interest in the proceeding. Order No. 19 resulted from the Commission's analysis of Time Warner's asserted interests following a review of the briefs of Commission Staff, Public Counsel, Qwest and Time Warner. Order No. 19, paragraph 22 - 58. Time Warner failed to demonstrate that it has a statutory or constitutional interest that the Commission must consider in an adjudication.

16 Upon finding that Time Warner does not have a substantial interest in the proceeding, the Commission had the discretion to dismiss Time Warner.[4] *See* RCW 34.05.443, WAC 480-07-355(4); Order No. 19, ¶ 58. However, the Commission chose not to dismiss Time Warner. Had the Commission dismissed Time Warner, the settlement would be unopposed. In that situation, the settlement would be a "full settlement" as defined by WAC 480-07-730.

17 Time Warner's contention that, "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," is moot because the Commission did not dismiss Time Warner from the case. In any event, the Commission had the discretion to dismiss Time Warner pursuant to WAC 480-07-355(4).

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[4] In fact, such a finding, had it been made at the time of the intervention, could have resulted in Time Warner being denied intervention. *See* RCW 34.05.443, WAC 480-07-355 ("If the petition [for intervention] discloses a substantial interest in the subject matter of the hearing or if the petitioner's participation is in the public interests, the presiding officer may orally grant the petition at a hearing or prehearing conference, or in writing at any time.").

18 Because the Commission did not to dismiss Time Warner as a party, the Commission provided Time Warner with process consistent with the Commission's rules for opponents of multiparty settlement. Under WAC 480-07-740, the Commission has the discretion to offer opponents of a multiparty settlement an opportunity to present "an offer of proof" in support of the opposing party's preferred result. In light of the Commission's finding that Time Warner had a limited interest in this proceeding, and the fact that the Commission had already afforded Time Warner the other rights contained in the rule, the Commission determined that an offer of proof was appropriate. Order No. 19, ¶ 59. The Commission's decision to provide Time Warner the opportunity to present an offer of proof, rather than present testimony, was not an abuse of discretion in light of Time Warner's limited interests in the proceeding and the extent to which the record was already developed.

C. The APA does not require unanimous settlements.

19 Time Warner objects that the Commission is without authority to order the procedures described in Order No. 19 because the APA requires unanimous settlements. Time Warner is incorrect.

20 The APA expressly authorizes the Commission to adopt rules setting forth "specific procedures for attempting and executing informal settlement of matters." RCW 34.05.060. The only limitations on the Commission's authority to promulgate

such rules is that the rules must not be "precluded by another provision of law" and that settlement "must be subject to approval by agency order." *Id.* RCW 34.05.060. As discussed above, WAC 480-07-740(2)(c) sets forth the process for consideration of a *non-unanimous settlement* or a "multiparty settlement".

21 Time Warner contends, however, that the process embodied by WAC 480-07-740(2)(c), which allows non-unanimous settlements to be approved by the Commission, is not permitted by RCW 34.05.060. Petition, ¶ 5. Despite the fact that RCW 34.05.060 encourages settlements, Time Warner points to the portion of the statute that states, "[t]his section does not require any party or other person to settle a matter", and concludes that "Order No. 19 would have the prohibited effect of requiring a party to settle" and for that reason the order is an abuse of discretion. Petition, ¶ 5.

22 Time Warner's interpretation is not supported by the language of the statute. As stated above, RCW 34.05.060 states "this section does not require any party *or other person* to settle a matter pursuant to informal procedures" (emphasis added). Beyond the fact that this section does not require that all settlements be unanimous, extending Time Warner's logic, one would have to conclude that not only "any party", but any non-party "person" objecting to a settlement could prevent a case

from being compromised.[5] This is an strained interpretation and plainly beyond the purpose of the statute, which is to encourage settlements. *State v. Fjermestad*, 114 Wn.2d 828, 836 (1990) ("statutes should be construed to effect their purpose and unlikely, absurd, or strained consequences should be avoided."). The most reasonable interpretation of RCW 36.05.060 is that it both encourages settlement and codifies the important policy that a settlement between two or more parties cannot dispose of the valid claims of third persons (be they parties or other persons) who do not agree to the settlement, or impose obligations on those same parties or persons.

23 This interpretation is further supported by the official comment to the Model State Administrative Procedure Act (1981), the provision on which RCW 34.05.060 was modeled, which says nothing about the right of intervenors to block settlements by relying on this section.[6] To the contrary, it concludes that settlements are encouraged and that the agency rules should be consulted to determine the appropriate procedures:

> This section expressly encourages informal settlements of controversies that would otherwise end in more formal proceedings. Obviously, economy and efficiency in government commends such a policy except as it is otherwise

[5] The APA definition of "person" could encompass nearly any entity. See RCW 34.05.010(14) ("person" is defined as "any individual, partnership, corporation, association, governmental subdivision or unit thereof, or public or private organization or entity of any character, and includes another agency.").

[6] Staff was unable to find any case interpreting the section in the way Time Warner proposes in either Washington or Tennessee, a state with nearly an identical section in its APA. *See* Tennessee Code § 4-5-105.

> precluded by law. A requirement that each agency issue rules providing for informal settlement procedures assures that everyone is on notice as to the availability and utility of such procedures. When accepted by an agency an offer of proof of settlement becomes an "order" because it fits the Section 1-102(5) definition of order.[7]

24 Time Warner, however, argues that "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 issues of fact." Petition, ¶ 4 [footnote omitted]. In other words, "[T]he proposed Settlement can only be considered 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." *Id.*

25 Time Warner has failed to cite any statutory authority for its interpretation of "substantial evidence." In fact, the Settlement Agreement in this case is supported by substantial evidence in the form of the testimony and narrative supporting the settlement, as well as the previously filed testimony.

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[7] The comment does indicate that a settlement becomes on order when accepted by the agency. In fact, RCW 34.05.060 explicitly states that informal settlements "must be subject to approval by agency order." RCW 34.05.010(11)(a) defines an "order" as "a written statement of particular applicability that finally determines the legal rights, duties, privileges, immunities, or other legal interests of a specific person or persons." Therefore, the Settlement Agreement, in this proceeding, if adopted, would clearly fall within the definition of "order" as it defines the rights and obligations of both the "agency" and Qwest as "the person to whom the agency action is specifically directed." *See* RCW 34.05.010(2), (12).

26 Time Warner argues, however, that several cases from other jurisdictions relating to non-unanimous settlements of rate cases require that this Commission fully litigate the case. The Commission properly disposed of this argument:

> 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 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.

Order No. 19, ¶ 51.

27 The Commission is correct. As discussed above, non-unanimous settlements are permitted by the APA. Additionally, the interests at issue for intervenors in the rate cases cited by Time Warner are far different than those involved in this penalty case.[8] A more analogous case, one that does not involve a determination of rates, is *Halstead v. Dials*, 182 W.Va. 695, 698 (1990). In that case, the Supreme Court of West Virginia stated the general rule that once intervention has been granted, the parties may not stipulate away, by a consent order or otherwise, the rights of intervenors.[9]

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[8] Furthermore, there are a number of other cases, including a United States Supreme Court case, that hold that nonunanimous settlements are permitted in rate cases. *See Mobil Oil v. Federal Power Comm'n*, 417 U.S. 283 (1974), *Atty. Gen. v. New Mexico Pub. Serv. Comm'n*, 808 P.2d 606, 610 (N.M. 1991), *City of El Paso v. Pub. Util. Comm'n*, 883 S.W.2d 179 (Tex. 1994), *Bryant v. Arkansas Pub. Serv. Comm'n*, 877 S.W. 2d 594 (Ark. Ct. App. 1994); *City of Abilene v. Public Util. Comm'n*, 854 S.W. 2d 932 (Tex. Ct. App. 1993).

[9] It should be noted that in this case, the Commission, as the "presiding officer," could dismiss Time Warner as a party, but as *Halstead* suggests, the parties could not. It should also be noted that the quoted passages from *Halstead* indicate that the agency is required to make an assessment of the agreement *on its merits*. This is far different from what Time Warner is arguing, which is that the

The court also stated, however, that:

> As a corollary to this rule, it is generally held that courts may approve settlement of a case or enter a consent order even though the intervenors do not agree. Whether the intervenors object to the terms of the settlement or decree, the court is required to make an independent assessment of the settlement on its merits. If the court determines that the settlement or decree is fair and the public interest is protected, the court may approve the agreements without the consent of the intervenors. *See, e.g. Citizens For a Better Env't v. Gorsuch*, 718 F.2d 1117 (D.C.Cir.1983); *United States v. Seymour Recycling Corp.*, 554 F. Supp. 1334 (S.D.Ind.1982); *United States v. Ketchikan Pulp Co.*, 430 F. Supp. 83 (D. Alaska 1977).
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> *We believe these principles are equally applicable to the disposition of contested cases in administrative proceedings* [emphasis added].

Halstead, 182 W.Va. at 698.

28 In the *Halstead* case, the West Virginia Department of Energy issued a letter to a mining company instructing the company to show cause why its mining permits should not be suspended or revoked for certain surface mining violations. *Halstead*, 182 W.Va. at 697. Pursuant to statutory right, residents who lived in the immediate vicinity of the mining operations sought intervention, which was granted and a hearing date was set. *Id.* The Commissioner of the West Virginia Department of Energy and the company settled the case pursuant to a consent decree, without giving the citizens the right to object. *Id*. The court concluded:

> We conclude, therefore, that once intervention has been granted in an administrative proceeding, the original parties may not stipulate away, by a consent order or otherwise, the rights of the intervenors. As a corollary to

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Commission is required to have a full adjudication of each and every factual and legal issue in dispute on their own particular merits.

> this rule, any administrative agency may approve settlement of a contested case or entry of a consent decree even though some of the parties, including intervenors, do not concur in the agreement. Where there are objections to the settlement or decree, the agency is required to make an independent assessment of the agreement on its merits. If the agency determines that the agreement is just and reasonable, with due consideration given to the public interest and applicable legislative dictates, it may confirm the settlement or enter the consent order without the authorization of the dissenting parties.

Halstead, 182 W.Va. at 699.

29 The Commission's decision in Order No. 19 is consistent with the well reasoned analysis of the *Halstead* court.

D. US Supreme Court precedent supports the Commission's exercise of discretion.

30 In *Firefighters v. Cleveland*, 478 U.S. 501, 504-508 (1986), an organization of black and Hispanic firefighters employed by the City of Cleveland brought suit against the city alleging discrimination in violation of Constitution and Title VII of the Civil Rights Act of 1964. A union moved to intervene by filing a document titled "Complaint of Applicant for Intervention". Despite its title, this document did not allege any causes of action or assert any claims against either the organization or the city, but did ask for an injunction in the prayer for relief. The City and organization negotiated and presented to the district court a proposed consent decree. The union objected, but the decree was ultimately approved.

31 The Union took nearly an identical position to that of Time Warner in its appeal:[10]

> Local 93 and the United States also challenge the validity of the consent decree on the ground that it was entered without the consent of the Union. They take the position that because the Union was permitted to intervene as a matter of right, its consent was required before the court could approve a consent decree.

Firefighters, 478 U.S. at 528. The Court rejected the argument and explained:

32 This argument misconceives the Union's rights in the litigation.

> A consent decree is primarily a means by which parties settle their disputes without having to bear the financial and other costs of litigating. It has never been supposed one party - whether an original party, a party that was joined later, or an intervenor - could preclude other parties from settling their own disputes and thereby withdrawing from the litigation. Thus, while an intervenor is entitled to present evidence and have its objections heard at the hearings on whether to approve a consent decree, it does not have the power to block the decree merely by withholding its consent.

Firefighters, 478 U.S. at 528-529. Also, like Time Warner in this case, the Union was given the opportunity to contest the settlement and present evidence and argument in opposition. The Court concluded that due process was satisfied:

> Here, Local 93 took full advantage of its opportunity to participate in the District Court's hearing on the consent decree. It was permitted to air its objections to the reasonableness of the decree and to introduce relevant evidence; the District Court carefully considered these objections and explained why it was rejecting them. Accordingly, "the District Court gave the union all the process that was due . . . . " [citations omitted]

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[10] The Union actually had a stronger position in that case than does Time Warner in this case because it was allowed to intervene as a matter of right. Here Time Warner was permitted to intervene and continues to be allowed to participate at the discretion of the Commission.

Firefighters, 478 U.S. at 529. The Court also made clear that settlements may not dispose of the claims of a third party, if those claims are valid and properly raised. However, like the Settlement Agreement in this case, the Court concluded that the Union was not prejudiced (and had failed to raise any claims). The Court explained:

> Of course, parties who choose to resolve litigation through settlement may not dispose of the claims of a third party, and a fortiori may not impose duties or obligations on a third party, without that party's agreement. A court's approval of a consent decree between some of the parties therefore cannot dispose of the valid claims of nonconsenting intervenors; if properly raised, these claims remain and may be litigated by the intervenor. And, of course, a court may not enter a consent decree that imposes obligations on a party that did not consent to the decree. However, the consent decree entered here does not bind Local 93 to do or not do anything. It imposes no legal duties or obligations on the Union at all only the parties to the decree can be held in contempt of court for failure to comply with its terms. Moreover, the consent decree does not purport to resolve any claims the Union might have under the Fourteenth Amendment. Indeed, despite the efforts of the District Judge to persuade it to do so, the Union failed to raise any substantive claims. Whether it is now too late to raise such claims, or – if not – whether the Union's claims have merit are questions that must be presented to the district court in the first instance[.][11]
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> *Firefighters*, 478 U.S. at 528-529.

33 Therefore, the Commission properly exercised its discretion to allow Time Warner to remain a party and object to the Settlement Agreement. The settlement in the *Firefighter* case, like the settlement in this proceeding, settled all claims

[11] Time Warner, like the Union, is required to bring its claims for credits "in the first instance". *See* Black's Law Dictionary, Sixth Edition (Instancia. "The first instance, *'primera instancia'* is the prosecution of the suit before the judge competent to take cognizance of it at its inception.").

between the parties to the settlement, but did not prejudice any potential claims of the intervenor or burden the intervenor with any obligations to which it did not agree.

E. The WUTC has discretion to conduct enforcement proceedings, including the right to settle those proceedings.

34 RCW 34.05.010 defines "adjudicative proceeding" as "a proceeding before an agency in which an opportunity for hearing before that agency is required by statute or constitutional right[.]" In this case, the Commission conducted an adjudicative proceeding to determine whether Qwest violated state law and provide Qwest with the opportunity to offer a defense.

35 In agency enforcement actions, it is clear that the agency retains the discretion to settle matters. In *United States v. District of Columbia,* 933 F. Supp. 42 (1996), the court stated the following with regard to a government enforcement action under the Clean Water Act (CWA), an action in which the intervenor had the right to intervene as a matter of right (unlike Time Warner in this case):

> [B]road deference should be afforded the EPA's expertise in determining an appropriate settlement and to the voluntary agreement of the parties in proposing the settlement. *In re Cuyahoga Equip. Corp.,* 980 F.2d 110, 118 (2d Cir.1992), (*citing Chevron U.S.A., Inv. V. NRDC,* 467 U.S. 837, 843-44, 104 S. Ct. 2778, 2782-83, 81 L.Ed.2d 694 (1984). Because the commencement of enforcement action under the CWA is largely discretionary, settling that action is also within the EPA's discretion. *City of Green Forest,* 921 F.2d at 1402. In *Green Forest* the court went on to note that "the CWA 'was not intended to enable citizens to commandeer the federal enforcement machinery.'" *Id.* Under the CWA any affected citizen is permitted to

intervene in a government action as a matter of right, *see* 33 U.S.C. § 1365(b)(1)(b), however, "if such a citizen were allowed to block entry of a consent decree merely by objecting to its terms it would wreak havoc upon government enforcement actions." *United States v. Ketchikan Pulp Co.,* 430 F. Supp 83, 85 (D. Ala. 1977). Moreover, "[i]t is well settled that the right to have its objections heard does not, of course, give the intervenor the right to block any settlement to which it objects.' " *Hooker Chemicals and Plastics Corporation,* 540 F. Supp at 1083 (*quoting Zipes v. Trans World Airlines, Inc.* 455 U.S. 385, 390-94, 102 S. Ct. 1127, 1131-32. 71 L.Ed.2d 234 (1982), (*quoting Air Line Stewards and Stewardesses Ass'n v. Trans World Airlines,* 630 F.2d 1164, 169 (7th Cir.1980)).

36 Therefore, it was within the Commission's discretion to prosecute the case and it is within the Commission's discretion to approve settlement, if it ultimately chooses to do so.

F. The Commission properly denied Time Warner's motion to compel.

37 Time Warner had ample opportunity prior to filing its response testimony in this proceeding to seek the information contained in the data requests, the information is similar to that referenced in the stricken portion of Mr. Gates' testimony and appears to relate to credits and reparations, and the probative value of such information is questionable. Order No. 19, paragraphs 70 -73. Significantly, Time Warner could have sought to bring its own claim and consolidate it with this proceeding, but chose not to do. Therefore, *Time Warner* (not the Commission, Staff, Public Counsel, or Qwest) limited the scope of its interest in this proceeding. As a result, it should not be permitted to issue tardy data requests that relate to those claims. The Commission properly balanced Time Warner's interests in this

proceeding against the timing and nature of the data requests pursuant to WAC 480-07-400(4). Therefore, if the Commission reviews this issue, its decision should be affirmed.

G. The offer of proof does not provide any additional information.

38 Time Warner's Offer of Proof does not provide any additional information not already contained in the record. *See Declaration of Thomas l. Wilson, Jr.* Nor has Time Warner shown any specific harm. *Id.* However, even if it had, the Settlement Agreement adequately addresses the allegations contained in the Complaint and Amended Complaint. Therefore, based on the record before the Commission, the testimony and narrative in support of the Settlement Agreement, and the Settlement Agreement itself, the Settlement Agreement should be approved by the Commission.

H. Conclusion.

39 The Commission should decline to review Order No. 19 as Time Warner has failed to met the standards for interlocutory review. However, if the Commission decides to review Order No. 19 it should affirm its decision. The Commission engaged in the proper analysis of Time Warner's due process rights in determining the procedures for objecting to the settlement set out in the order. Additionally, the Commission properly denied Time Warner's Motion to Compel. Finally, because Time Warner's offer of proof does not provide any additional information and the

Settlement Agreement addresses the claims at issue in this case, the Settlement Agreement should be approved.

DATED this 12th day of January, 2005.

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