**BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION**

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| WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION,<br><br>Complainant,<br><br>v.<br><br>ADVANCED TELECOM GROUP, INC; ALLEGIANCE TELECOM, INC.; AT&T CORP; COVAD COMMUNICATIONS COMPANY; ELECTRIC LIGHTWAVE, INC.; ESCHELON TELECOM, INC. f/k/a ADVANCED TELECOMMUNICATIONS, INC.; FAIRPOINT COMMUNICATIONS SOLUTIONS, INC.; GLOBAL CROSSING LOCAL SERVICES, INC.; INTEGRA TELECOM, INC.; MCI WORLDCOM, INC.; McLEODUSA, INC.; SBC TELECOM, INC.; QWEST CORPORATION; XO COMMUNICATIONS, INC. f/k/a NEXTLINK COMMUNICATIONS, INC.,<br><br>Respondents | Docket No. UT-033011<br><br>QWEST CORPORATION'S RESPONSE TO TIME WARNER TELECOM OF WASHINGTON LLC'S PETITION FOR REVIEW OF ORDER NO. 19 AND OFFER OF PROOF |

*1* Qwest Corporation ("Qwest"), by and through its undersigned counsel, respectfully responds to Time Warner Telecom of Washington LLC's ("TWT") Petition for Review of Order No. 19 ("Petition") and the Offer of Proof TWT filed in response to that same Order.

*2* WAC 480-07-810(2) articulates three bases on which the Commission may exercise its



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discretion to review interlocutory orders. TWT's Petition satisfies none of the three. Instead, TWT rehashes points the Commission has repeatedly rejected and asks the Commission to decide them differently this time. Qwest will not rehash in kind, but asks that the Commission decline TWT's request for yet another bite at this apple.

*3* TWT's Offer of Proof is equally derivative and equally unavailing. Order No. 19 afforded Time Warner the opportunity to articulate the evidence that in its view would support its "preferred result with respect to the proposed settlement,"[1] *i.e.*, a larger payment by Qwest. But TWT's Offer merely repeats and refers to allegations and testimony already in the record, already before the Commission, and already incorporated into Qwest, Staff and Public Counsel's settlement calculus. Nothing TWT purports to "offer" changes the already-briefed fact that the public interest is well-served by approval of this settlement. TWT offers no evidence supporting its claim that the existing penalty payment is too small, nor does it even speculate about the size of a penalty that would represent a "preferred result" in its view. And although Qwest will discuss some of the points raised in the TWT Offer of Proof, no further process is due, necessary, or appropriate. The Commission should proceed to approve the settlement on the record before it.

## I. THE PETITION FOR REVIEW OF ORDER NO. 19 SHOULD BE DENIED

*4* WAC 480-07-810 provides for discretionary review of certain interlocutory orders. There is no blanket right to reconsideration: "[t]he commission *may* accept review of interim or interlocutory orders in adjudicative proceedings *if* it finds that: (a) [t]he ruling terminates a party's participation in the proceeding and the party's inability to participate thereafter could cause it substantial or irreparable harm; (b) [a] review is necessary to prevent

[1] Order No. 19, ¶ 60.



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substantial prejudice to a party that would not be remediable by post-hearing review; or (c) [a] review could save the commission and the parties substantial effort or expense, or some other factor is present that outweighs the costs in time and delay of exercising review."[2]

*5* TWT's Petition makes no mention of these bases – it asks the Commission to revisit Order No. 19's allegedly "erroneous premise that TWTC lacks a substantial interest in this proceeding."[3] It also fails altogether to offer newly discovered law, additional evidence, or any theory the Commission has not already considered and rejected.

*6* Indeed, the Petition raises the same two fundamental points as TWT raised in its Brief Regarding Process for Consideration of Multi-Party Settlement ("TWT Settlement Brief"). First, in paragraphs 4-5, TWT argues that its opposition to the settlement renders it non-unanimous and, therefore, entitles TWT to force full-blown litigation of the issues raised – by Staff, not TWT – in this docket. But TWT made this exact argument in the TWT Settlement Brief[4] and relied on the same Washington statute[5] that it cites in the Petition.[6] Qwest countered it in its Post-Settlement Hearing Brief ("Qwest Settlement Brief"),[7] and would counter them the same way again. The Commission considered and rejected TWT's arguments in Order No. 19, and TWT offers nothing on which it could base a different ruling now.

*7* Second, TWT argues again that it has "a substantial interest in the outcome of this

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2 WAC 480-07-810(2) (emphases added).

3 Petition, ¶ 3.

4 TWT Settlement Brief, ¶¶ 10-17.

5 RCW 34.05.060.

6 *See* Petition, ¶ 5.

7 *See* Qwest Settlement Brief, ¶¶ 33-35.



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proceeding,"[8] even though Staff sought no relief from or on behalf of TWT in its Complaint and even though TWT has filed no claims against Qwest or anyone else in this case. The ALJ held as much in Order No. 15,[9] a ruling TWT asked neither the ALJ to reconsider nor the Commission to review. TWT has even acknowledged that CLEC remedies are not at issue in this docket.[10] As such, TWT lacks any protected property interest in the outcome of this proceeding and, as Qwest demonstrated in its Settlement Brief, lacks any due process rights in this case beyond, at most, those provided by WAC 480-07-740(2)(c).[11]

*8* Qwest recognizes that TWT intervened in this proceeding. But as the Commission recognized in Order No. 19, intervenor status has limits.[12] Intervenors do not have *carte blanche* to derail settlements, and it would pervert the liberal rules regarding intervention to hold, as TWT suggests, that its mere objection to this settlement trumps the decision of Staff – which brought and prosecuted this case – to settle with Qwest.[13]

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[8] Petition, ¶ 6.

[9] Order No. 15, ¶ 75 (holding that TWT response testimony demanding CLEC credits or similar remedies "proposes remedies that are not within the scope of the Amended Complaint, and raises claims that have not been properly pleaded or raised in the proceeding"), ¶ 76 (indicating that TWT's witness' "proposal for reparations or credits is not properly an issue the Commission may consider in this proceeding"), ¶ 79 (indicating that the amended complaint does not identify RCW 80.04.220 and .230 as causes of action or possible remedies), ¶ 81 (indicating that the Commission cannot allow a new cause of action without further amendment of the complaint and indicating that it is too late in the proceeding for any such amendment).

[10] *See* Time Warner Telecom of Washington LLC's Opposition to Proposed Settlement between Qwest, Staff and Public Counsel, ¶ 21.

[11] Qwest Settlement Brief, ¶¶ 14-17 (citing, among other things, *Matthews v. Eldridge*, 424 U.S. 319, 335, 96 S. Ct. 893 (1976) and *WITA v. WUTC*, 149 Wn.2d 17, 24-26, 65 P.3d 319 (2003)); *see also* Order No. 19, ¶ *59*.

[12] Order No. 19, ¶¶ 55, 57.

[13] *See United States v. District of Columbia*, 933 F. Supp. 42, 47-48 (D.D.C. 1996) ("Finally, broad deference should be afforded to EPA's expertise in determining an appropriate settlement and to the voluntary agreement of the parties in proposing the settlement. *** Because the commencement of an enforcement action under the CWA is largely discretionary, settling that action is also within the EPA's discretion. *** In Green Forest the court went on to note that "the CWA 'was not intended to enable citizens to commandeer the federal enforcement machinery.'" *** 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." *** Moreover, "it 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.'" ***) (citations omitted).



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*9* TWT spends the rest of its discussion on this issue simply reciting legal arguments to the effect that the Telecommunications Act of 1996 and Washington law forbid discrimination, that TWT is a beneficiary of those laws vis-à-vis Qwest and that the Commission has a duty to uphold and apply the law.[14] But even if TWT is right about the law, *TWT* has no right to prosecute those theories independently in this proceeding – *Staff already has done so and has decided to settle*. Staff's Amended Complaint defined the issues and claims at issue in the case and now defines the issues and claims being settled. None of those claims involves TWT, and TWT offers nothing in the Petition that alters the Commission's conclusion to that effect in Order No. 19.[15]

*10* The Petition then re-argues the same points TWT unsuccessfully raised in connection with its motion to compel certain discovery responses from Qwest.[16] TWT argued before Order No. 19 that this discovery was relevant to TWT's effort to quantify the economic benefit Qwest supposedly derived from the unfiled agreements and to support its argument that the penalty Qwest is paying under the Settlement is too small.[17] The ALJ considered and rejected this argument on the grounds that TWT had had and missed its opportunity to conduct this discovery earlier, that the discovery was not proper at this point in the case, and that the balance of relative probative value versus burden tipped against compelling Qwest to provide these data.[18] The ALJ's ruling at the close of the hearing, now embodied in Order No. 19, tracks the arguments Qwest made in opposition to TWT's motion to compel.[19] TWT responded to these points at the hearing on this

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14 Petition, ¶¶ 7-11.

15 *See* Order No. 19, ¶ 57.

16 Petition, ¶¶ 12-17.

17 Time Warner Telecom of Washington LLC's Motion to Compel Discovery Responses from Qwest, ¶ 6.

18 Order No. 19, ¶ 73.

19 Qwest Corporation's Answer to Time Warner Telecom's Motion to Compel, ¶¶ 4-21.



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motion and offers nothing new – it just disagrees with the outcome. But again, TWT makes no effort to explain how this disagreement constitutes a legitimate and sufficient basis for administrative review of an interlocutory order under WAC 480-07-810(2).

## II. THE OFFER OF PROOF JUSTIFIES NO FURTHER PROCESS

*11* After granting TWT the opportunity to submit the Offer of Proof, the Commission indicated that it "will determine, after receiving the offer of proof and any responses, what further process is necessary."[20] This suggests that TWT's Offer of Proof needs to justify any further proceedings – in other words, to place before the Commission some reason, some issue, something *TWT* would prove that somehow bears on the one remaining question, *i.e.*, whether the Settlement is in the public interest.

*12* The Offer of Proof utterly fails in this regard. Everything in TWT's Offer of Proof already is part of the record in this case, largely from testimony sponsored by other CLECs and Staff. And although TWT has (as a matter of unsubstantiated rhetoric) argued that the penalty component of the settlement is too small, the Offer contains no allusion to or summary of evidence *TWT* would present in subsequent testimony to substantiate its accusation. Specifically, TWT fails to discuss any quantitative evidence or analysis supporting its view that the settlement amount is insufficient. This was TWT's burden in light of its argument that the penalty in this case must exceed the amount Qwest allegedly obtained from the unfiled agreements. TWT failed to meet this burden. Instead, TWT merely uses the Offer as yet one more opportunity to reiterate its legal positions and the conclusions that flow from them. And nothing in the Offer justifies any further process in connection with the approval of the settlement.

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[20] Order No. 19, ¶ 61.



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*13* From paragraph 4 through paragraph 11, the Offer paraphrases Eschelon and McLeod testimony regarding the alleged Eschelon and McLeod "discount" agreements. The actual testimony memorializing these allegations is already in the record, and the Offer attributes the discussion to Mr. Smith of Eschelon and Mr. Gray of McLeod.[21] At the time Qwest executed the settlement with Staff and Public Counsel, Qwest had nearly completed reply testimony that would have countered this testimony. The timing of the settlement meant that Qwest's reply testimony never entered the record, but the terms of the settlement provide that everything filed in the case to date remains in the record and is available to the Commission as it considers whether or not to approve it. Put another way, the record contains a one-sided version of these agreements, their terms and circumstances, yet Qwest has agreed that the Commission can consider the settlement and make certain findings for purposes of reviewing the proposed settlement without Qwest's reply testimony. It is difficult to imagine how additional process could create a record *more* favorable to TWT's positions.

*14* Qwest will not trouble the Commission with a point-by-point response to the Smith and Gray allegations – the drafts of Qwest's reply testimony stretched to many dozens of pages. A few points bear a brief mention nonetheless:

- McLeod and Eschelon were the only two CLECs to convert lines to the UNE-Star platform, even though the terms of UNE-Star were filed as amendments to McLeod's and Eschelon's interconnection agreements with Qwest and approved by this Commission in early 2001. TWT has never sought to opt into UNE-Star – it simply wants to apply the alleged discount to other products without making the corresponding volume and term commitments.

[21] Offer of Proof, ¶ 4.



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- The Qwest/McLeod Purchase Agreements, Agreements 44A and 45A, were exactly that: agreements by Qwest and McLeod to purchase (or pay the shortfall of) certain amounts of services from the other. Qwest did purchase some services from McLeod, thus refuting the claim that these were sham agreements designed to hide discounts. The written drafting history of these agreements contradicts Mr. Fisher's affidavit regarding the genesis of the alleged oral discount. And most tellingly of all, McLeod booked the quarterly "discount" payments from Qwest as revenue, indicating that McLeod considered these funds the proceeds from a purchase rather than a reduction in costs.

- Qwest's reply testimony would have demonstrated that notwithstanding any differences between the terms of McLeod's or Eschelon's escalation provisions, all CLECs were afforded the opportunity to escalate issues above and beyond the vice-president level if they wished, and that no CLEC was ever denied an opportunity to escalate an issue.

- Eschelon, in addition to its commitment to purchase $150 million in services from Qwest, also was obliged in Agreement 4A to provide consulting and network services to Qwest in exchange for the payments characterized in this case as discounts. Qwest's reply testimony would have demonstrated that both companies devoted significant resources to at least three distinct consulting projects that provided tangible value to Qwest.

*15* Paragraphs 12-15 of the Offer restate (again) the conclusions TWT would like the Commission to reach in a proceeding in which the Smith and Gray allegations were aired and litigated. But, that is not this case – this case is settling, and the only issue currently before the Commission is whether approval of the settlement is consistent with the public



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interest. Again, these are nothing new, and asking whether or not the Commission could or should make these findings sheds no light on whether TWT should be afforded additional opportunities to expand the record.

*16* Paragraphs 16-17 repeat long-filed testimony (Staff's and TWT's) and arguments relating to TWT's theory of harm and the findings TWT believes the Commission should make in that regard. There is not, however, a scrap of evidence or data quantifying TWT's alleged harms in any way, and the theories of harm already are in the record. And paragraph 18 implores the Commission in exactly one sentence to make sweeping findings about the purpose and operation of the McLeod and Eschelon agreements – again, without a single piece of hard evidence.

*17* The Offer concludes, in Paragraphs 19-21, by arguing that the penalty is too small and pointing the Commission to the fine levied in Minnesota. But the Minnesota fine, in addition to the fact that it is the subject of a pending appeal, is of no relevance here. Minnesota's penalty statute is different from Washington's. It affords that commission significantly greater penalty authority – up to $10,000 per violation per day – and, unlike Washington law, requires the commission to consider the "economic benefit gained by the person committing the violation."[22] These differences aside, TWT also fails even to suggest what it considers an appropriate penalty under Washington law and under these circumstances.

*18* The Offer of Proof identifies no new evidence, law or even theories that cast any doubt on the Commission's ability to decide, on the present record, that the settlement among Qwest, Staff and Public Counsel is consistent with the public interest. There is, therefore,

[22] *See* Minn. Rev. Stat. § 237.462, subd. 2. That statute empowers the Commission to levy penalties of between $100 and $10,000 per day per violation. It then requires that, in determining the amount of a penalty, the commission *shall* consider the nine factors listed by TWT in its motion. *Id.* (emphasis added).



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no need for any further briefing, evidence or process, and the Commission should proceed to decide the matter forthwith.

## III. CONCLUSION

*19* For the foregoing reasons, Qwest respectfully requests that the Commission deny TWT's Petition for Review of Order No. 19 and approve the Settlement without further process or delay.

RESPECTFULLY SUBMITTED this 12th day of January 2005.

QWEST CORPORATION

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