

**BEFORE THE WASHINGTON STATE
UTILITIES AND TRANSPORTATION COMMISSION**

WASHINGTON UTILITIES AND	)	DOCKET NO. UT-033011
TRANSPORTATION COMMISSION,)	
	)	ORDER NO. 20
Complainant,)	
)	
v.	)	ORDER DENYING TIME
	)	WARNER'S PETITION FOR
ADVANCED TELECOM GROUP,	)	REVIEW; NOTICE OF
INC., et al.	)	PREHEARING CONFERENCE
	)	(Wednesday, February 23, 2005, at
Respondents.	)	1:00 p.m.); NOTICE OF ORAL
	)	ARGUMENT (Immediately
	)	following Prehearing Conference)
.....)	

1 **SYNOPSIS.** *In this Order, we accept Time Warner's request to review our decisions in Order No. 19 to limit Time Warner's participation in the proceeding, and to deny Time Warner's motion to compel. On review, we find that our decisions in Order No. 19 were neither in error nor an abuse of our discretion under the APA or our procedural rules. On a separate issue, while we find that Time Warner's Offer of Proof does not justify holding evidentiary hearings, we find that oral argument on the record evidence, if desired, is sufficient to protect the parties' interests.*

I. PROCEDURAL BACKGROUND

2 **PROCEEDING.** This is a complaint proceeding brought by the Washington Utilities and Transportation Commission (Commission), through its staff, against Qwest Corporation (Qwest) and 13 other telecommunications companies alleging that the companies entered into certain interconnection agreements

identified in Exhibit A to the Amended Complaint,¹ and failed to file, or timely file, the agreements with the Commission as required by state and federal law. The complaint also alleges that the companies entered into certain agreements to resolve disputes, but that the agreements violated federal and state law by failing to make terms and conditions available to other requesting carriers, providing unreasonable preferences, and engaging in rate discrimination.

3 **APPEARANCES.** Christopher Swanson, Assistant Attorney General, Olympia, Washington, represents Commission Staff. Judith A. Endejan, Graham & Dunn, PC, Seattle, Washington, represents Eschelon Telecom of Washington, Inc. (Eschelon). Arthur A. Butler, Ater Wynne, LLP, Seattle, Washington, represents Time Warner Telecom of Washington, LLC (Time Warner). Lisa A. Anderl, Associate General Counsel, and Adam Sherr, Senior Attorney, Seattle, Washington, and Todd Lundy, Associate General Counsel, Denver, Colorado, represent Qwest. Robert Cromwell, Assistant Attorney General, Seattle, Washington, represents the Public Counsel section of the Attorney General Division (Public Counsel).

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

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

- 5 Time Warner, a CLEC not named in the Amended Complaint, petitioned to intervene at the first prehearing conference held on September 8, 2004. As no party objected to Time Warner's intervention and Time Warner stated that it did not intend to broaden the issues in the proceeding, the presiding officer granted Time Warner's petition.
- 6 On June 8, 2004, Commission Staff witness Tom Wilson and AT&T Communications of the Pacific Northwest and TCG Seattle (collectively AT&T) witness Michael Hydock filed direct testimony in the proceeding.
- 7 By September 2004, Staff had entered into settlements agreements with, or moved to dismiss from the complaint agreements concerning, all 13 of the CLECs named in the Amended Complaint. In Order Nos. 1, 5, and 7 through 13 in this proceeding, the Commission granted motions to dismiss 22 agreements from the Amended Complaint and approved settlement agreements involving Allegiance Telecom, Inc., Advanced TelCom Group Inc., AT&T, Covad Communications Company, Electric Lightwave, LLC, Eschelon, Fairpoint Carrier Services, Inc., f/k/a Fairpoint Communications Solutions, Corp., Global Crossing Local Services, Inc., Integra Telecom of Washington, Inc., WorldCom, Inc. and its subsidiaries doing business in Washington (n/k/a MCI, Inc.), McLeodUSA Telecommunications Services, Inc. (McLeodUSA), SBC Telecom, Inc., and XO Washington, Inc.
- 8 On September 1, 2004, Eschelon filed with the Commission the responsive testimony and exhibits of Richard A. Smith. On September 7, 2004, McLeodUSA filed the responsive testimony and exhibits of Stephen C. Gray. On September 13, 2004, Qwest filed the responsive testimony and exhibits of Harry M. Shooshan and Larry Brotherson. On September 14, 2004, Time Warner filed the responsive testimony and exhibits of Timothy J. Gates.

- 9 Following motions by Qwest to strike the testimony of Mr. Smith, Mr. Gray, and Mr. Gates, Administrative Law Judge Rendahl entered Order No. 15 in this proceeding on October 22, 2004, granting Qwest's motions in part, but allowing portions of the witnesses' testimony. The Order struck portions of Mr. Gates' testimony discussing and recommending credits or reparations to CLECs harmed by Qwest's actions.
- 10 On November 9, 2004, Staff, Qwest, and Public Counsel filed with the Commission a proposed settlement in this proceeding, along with a narrative concerning the proposed settlement.
- 11 Following a conference call with the parties on November 10, 2004, the Administrative Law Judge issued a notice on November 12, 2004, allowing parties the opportunity to comment upon the settlement by November 22, 2004, and scheduling a hearing for the parties to present the settlement on November 29, 2004. The notice established a date for filing testimony addressing the settlement agreement (December 17, 2004) as well as a hearing on the contested settlement scheduled for January 13, 2005, should the Commission determine such process is necessary for consideration of the settlement. The notice also recognized Time Warner's request to conduct discovery.²
- 12 On November 22, 2004, Time Warner filed with the Commission its Opposition to Proposed Settlement Between Qwest, Staff, and Public Counsel.
- 13 On November 23, 2004, the Commission issued a notice establishing an agenda for the November 29, 2004, settlement presentation hearing.
- 14 On November 29, 2004, the Commission convened a settlement presentation hearing in this proceeding. Commission Staff presented Dr. Glenn Blackmon

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

and Qwest presented Mr. Mark Reynolds as witnesses in support of the proposed settlement. Time Warner cross-examined Dr. Blackmon and Mr. Reynolds concerning the proposed settlement agreement and presented additional argument concerning Time Warner's opposition to the proposed settlement.

15 During the hearing, the Commission requested briefing from the parties concerning the process necessary to consider the proposed settlement. A formal notice requesting briefing was issued on November 30, 2004.

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

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

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

19 On December 22, 2005, the Commission entered Order No. 19, in which the Commission found that Time Warner has no constitutional or substantial interest in the proceeding, and limited Time Warner's participation in the proceeding to filing an offer of proof under WAC 480-07-740(2)(c). The Commission allowed responses to the offer of proof, and stated that it would evaluate the offer of proof and responses before determining whether further process was required.

The Commission also denied Time Warner's motion to compel discovery responses from Qwest.

20 Time Warner filed a Petition for Review of Order No. 19 with the Commission on January 4, 2005. On January 5, 2005, Time Warner filed an Offer of Proof in Response to Order No. 19.

21 On January 12, 2005, Commission Staff filed a Response to Time Warner's Petition for Review of Order No. 19 and Declaration of Thomas L. Wilson, and Qwest filed a Response to Time Warner Telecom of Washington LLC's Petition for Review of Order No. 19 and Offer of Proof.

II. MEMORANDUM

22 Time Warner's Petition for Review and Offer of Proof raise several issues for consideration:

- Whether Time Warner has established a basis for seeking interlocutory review and whether the Commission should exercise its discretion to grant review;
- Whether the Commission's decision in Order No. 19 to limit Time Warner's participation was in error, or an abuse of discretion;
- Whether the Commission's decision to deny Time Warner's motion to compel was in error; and
- Whether Time Warner has presented sufficient information in its written offer of proof to suggest that further process is necessary or appropriate before the Commission considers the proposed settlement.

23 **A. INTERLOCUTORY REVIEW.** Time Warner seeks review of Order No. 19, arguing that it was error for the Commission to (1) deny Time Warner the right to a hearing on the merits on the key issues in the case and limit Time Warner's participation to a written offer of proof, and (2) deny Time Warner's motion to

compel discovery responses. Order No. 19 is an interlocutory order, as it was entered during the course of the proceeding rather than at the conclusion of the proceeding. *See WAC 480-07-810(1)*. Review of interlocutory orders is a matter of discretion for the Commission. *WAC 480-07-810(2)*. The Commission may grant review under *WAC 480-07-810(2)* after finding that:

- (a) The ruling terminates a party's participation in the proceeding and the party's inability to participate thereafter could cause it substantial and irreparable harm;
- (b) A review is necessary to prevent 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.

Id. A petition must state why the ruling is in error and why interlocutory review is necessary. *WAC 480-07-810(3)*.

24 Time Warner asserts that the decisions in the Order to deny Time Warner the right to a hearing on the merits, to limit its participation in the proceeding, and to deny its motion to compel, were in error. Time Warner asserts only that "interlocutory review is necessary to avoid substantial prejudice and harm" to Time Warner, but does not further elaborate on the nature of the asserted consequences. *See Time Warner Petition*, ¶ 2.

25 Staff argues that Time Warner has not met the standards for interlocutory review. Staff recommends the Commission not review Order No. 19, as it is consistent with state law and within the Commission's discretion, and because the Commission addressed all of Time Warner's concerns in Order No. 19 itself.

26 Similar to Staff, Qwest asserts that Time Warner's petition does not meet any of the bases in WAC 480-07-810(2) for granting interlocutory review. Qwest requests the Commission decline review of Order No. 19, asserting that Time Warner is really only asking the Commission to reconsider its decision.

27 **Decision.** Time Warner alleges substantial prejudice and harm in its petition, but does not specify the nature of the basis for that prejudice. Time Warner's petition can be justified only under WAC 480-07-810(2)(b), as the Commission did not terminate Time Warner's participation in the proceeding, review will not save the Commission time or expense, and no other factor is present that would outweigh the costs and delay of exercising review. It is clear from the petition that Time Warner believes its ability to present evidence before the Commission in a full hearing is at risk, and that this "denial" may subject it to substantial prejudice. As to the denial of the motion to compel, the Commission would have to assume that Time Warner's prejudice arises from not being able to discover certain information it would offer as evidence in the proceeding. We find that Time Warner's petition demonstrates a basis for interlocutory review under WAC 480-07-810(2)(b), and accept review of the petition.

28 **B. DECISION LIMITING TIME WARNER'S PARTICIPATION.** The focus of the Commission's Order No. 19 was the appropriate process for considering the proposed settlement agreement filed by Qwest, Commission Staff and Public Counsel, and opposed by Time Warner. The Commission evaluated this issue by examining whether Time Warner was justified in requesting a full hearing on the merits before the Commission considered the proposed settlement, focusing on Time Warner's status interest in the proceeding. The Commission determined that Time Warner had no substantial, constitutional, or statutory interest in the proceeding, and that the Commission had discretion under the Administrative Procedure Act (APA) and Commission rules to limit or dismiss an intervenor's participation in those circumstances. *Order No. 19*, ¶ 58. The Commission also distinguished this proceeding as an enforcement proceeding, in which the parties

with a stake in the proceeding, or a statutory right to participate, have reached a mutual settlement of the issues. *Id.*

29 Time Warner argues that it was error for the Commission to deny Time Warner the right to a hearing on the merits on the key issues in the case and limit Time Warner's participation to a written offer of proof. Time Warner asserts that the Commission applied the wrong premise—that Time Warner lacks a substantial interest in the proceeding. Time Warner asserts that the Commission should have started from the standard set forth in *Business and Professional People for the Public Interest v. Illinois Commerce Commission*, 136 Ill. 2d 192 (1989), and other state rate case decisions: In the absence of a unanimous settlement, a state commission can only dispense with evidentiary hearings and a decision on the merits, based on substantial evidence, when there are no disputed questions of material fact.

30 Time Warner asserts that the Commission seeks to avoid the requirements identified in *Business and Professional People* by finding in paragraph 58 of Order No. 19 that the proposed settlement is more like a full settlement because Time Warner, which opposes the settlement, has no substantial interest in the proceeding.

31 Time Warner argues that the Commission's decision to limit participation violates RCW 34.05.060, which provides that no party is required to enter into a settlement agreement. Time Warner also argues the limitation on its participation is an abuse of discretion. Time Warner insists that it has substantial interest in the proceeding, as it:

- Is a victim of discrimination, undue preference, and competitive disadvantage;
- Has an interest in seeing that all acts of discrimination are identified and found as acts of discrimination;
- Has an interest in seeing that the Commission imposes an appropriate penalty; and

- Has an interest in seeing discrimination and competitive disadvantage remedied.

32 Time Warner asserts that the Commission has the authority to enforce Section 252 of the Telecommunications Act of 1996³ and state laws prohibiting discrimination, undue preferences, and competitive disadvantages among carriers, and should not shirk from its obligations to do so. Time Warner argues that an administrative law judge in Colorado recently rejected a similar settlement, as CLECs, like Time Warner, were not included in the settlement process.

33 Staff asserts that Time Warner misunderstands its role as an intervenor objecting to a multiparty settlement in an enforcement proceeding. Staff asserts that the Commission engaged in the proper analysis in Order No. 19, by first addressing the nature of Time Warner's interests and then determining whether Time Warner has received all due process necessary. Staff asserts that the Commission properly exercised its discretion under RCW 34.05.443 to limit Time Warner's participation, and should affirm its decision

34 Staff asserts that Time Warner incorrectly argues that an intervenor may not be dismissed or the scope of its intervention limited. Staff asserts that intervenors with no constitutional or statutorily protected interest in a proceeding do not have the same rights to adjudication as those parties with statutory or constitutional rights that an agency must consider. Staff asserts that the Commission has broad discretion under the APA to modify the scope of an intervenor's participation. Staff asserts that the Commission's decision to limit Time Warner's participation was not an abuse of discretion, as the Commission could have dismissed Time Warner as a party to the proceeding, and has provided Time Warner with process consistent with the Commission's rules for multiparty settlements.

³ Public Law No. 104-104, 101 Stat. 56 (1996).

- 35 Staff disagrees with Time Warner's assertion that the RCW 34.05.060 requires unanimous settlements. Staff asserts that Time Warner's interpretation is contrary to the purpose of the statute, which is to encourage settlements. Staff interprets RCW 34.05.060 as codifying the policy that "settlement between two or more parties cannot dispose of the valid claims of third persons . . . who do not agree to the settlement, or impose obligations on those same persons or parties." *Staff Response*, ¶ 22.
- 36 Staff asserts that the Commission properly disposed of Time Warner's argument that the Commission must fully litigate the proceeding. Staff asserts that the interests of those in the cases Time Warner cites are far different than Time Warner's in this enforcement proceeding. Staff cites to a West Virginia decision, *Halstead v. Dials*, 182 W.Va. 695, 698 (1990), which found that administrative agencies, like courts, may approve a settlement even if an intervenor objects to the terms of the settlement.
- 37 Staff also cites to a U.S. Supreme Court decision as support for the propriety of the Commission's exercise of discretion: In *Firefighters v. Cleveland*, 478 U.S. 501, 504-508 (1986), the Supreme Court found due process was satisfied when a court approved a consent decree between an organization of firefighters and the city over the objection of a union organization, after the union was allowed an opportunity to contest the settlement, and present evidence and argument in opposition.
- 38 Staff also asserts that agencies have discretion to pursue or conduct enforcement proceedings, and retain discretion to approve settlements of such proceedings, citing to *United States v. District of Columbia*, 933 F.Supp. 42 (D.C.C. 1996).

39 Qwest urges the Commission to uphold its Order, asserting that the Order engaged in the proper analysis and properly found that Time Warner has no substantial interest. Like Staff, Qwest cites to *United States v. District of Columbia* to support the Commission's decision concerning the limits of intervenor status. Specifically, Qwest asserts that intervenors may not block settlement of an enforcement proceeding merely by objecting to the settlement.

40 **Decision.** We deny Time Warner's petition for review of our decision to limit Time Warner's participation in addressing the proposed settlement. Although Time Warner asserts, in part, that Order No. 19 denies Time Warner the right to a hearing on the merits on the key issues in the case, our Order does no such thing. The Order limits Time Warner's participation, at this point in the proceeding, to "filing a written offer of proof in support of its preferred result with respect to the proposed settlement." *Order No. 19*, ¶ 60. The Order provides that the Commission will determine what further process is necessary after reviewing the offer of proof and any responses. *Id.*, ¶ 61.

41 We reject Time Warner's claim that we applied the wrong premise in determining the appropriate process for considering the settlement. Time Warner asserts that the starting point for determining the appropriate process is whether or not the settlement is unanimous, and that if the settlement is not unanimous and there are questions of material fact in issue, a hearing and decision on the merits is required. The question of what process is due in this proceeding depends on the nature of the parties' interests and the severity of possible deprivation of those interests, not on the nature of the settlement or whether there are material facts in issue. *See Tellevik v. Real Property*, 125 Wn.2d 364, 884 P.2d 1319 (1995).

42 As we stated in Order No. 19, the parties opposing settlement in *Business and Professional People*, and other cases cited by Time Warner, "were either statutory parties to the proceeding, *i.e.*, public counsel, or intervenors with a significant

stake in the proceeding.” *Order No. 19*, ¶ 51. In this case, Staff, and Public Counsel are statutory parties to an enforcement proceeding. Qwest has a protected constitutional property interest in the proceeding, as it seeks to avoid deprivation of its property by imposition of penalties. Time Warner does not contest the findings in paragraphs 55-57 of the Order that it lacks a statutory or constitutional interest in the proceeding, but asserts that it has a substantial interest in the proceeding such that limiting its participation is an abuse of discretion. *Time Warner Petition*, ¶¶ 6-9.

- 43 Time Warner claims it is a victim of discrimination, undue preference and competitive disadvantage, but has not exercised its rights as a victim: Time Warner has not filed a third-party claim in this proceeding or sought to have a separate claim for enforcement consolidated with this proceeding. The other interests Time Warner expresses are merely the desire for certain outcomes in this proceeding, including findings of discrimination, an appropriate penalty for acts of discrimination, and remedies for discrimination and competitive disadvantage.
- 44 These interests do not rise to the level of a substantial interest for the purpose of establishing standing in a proceeding. *See Primark v. Burien Gardens Assoc.*, 63 Wn.App. 900, 823 P.2d 1116 (1992). This Commission has applied principles of standing when considering petitions for intervention. *See In re Application of Aqua Express, LLC*, Docket No. TS-040650, Order No. 02, Order Granting in Part Motion to Strike Protest of Inlandboatmen’s Union of the Pacific; Limiting Protest of the Inlandboatmen’s Union of the Pacific, ¶¶ 27-28 (June 7, 2004). Under the Commission’s intervention rule, however, the Commission must look not only to whether an intervenor has a substantial interest in the subject matter of the hearing, but also whether the intervenor’s participation is in the public interest. *See WAC 480-07-355(3), (4)*.

45 We maintain our finding that Time Warner has established no substantial interest in the proceeding. If we were considering Time Warner's petition to intervene in this enforcement proceeding in the first instance, it is likely that we would not grant the petition. We find, however, consistent with our decision in Order No. 19, that as Time Warner was granted intervention and has participated extensively in the proceeding, Time Warner's continued, but limited, participation is in the public interest.

46 Time Warner's claim to a right to a full hearing on the merits is premised on the erroneous theory that there are no limits to intervenor status, *i.e.*, that once Time Warner is granted party status as an intervenor, it is entitled, without change, to participate to the same extent as parties with a statutory or constitutionally recognized interest. To the contrary, once the Commission grants intervenor status, the Commission retains discretion under RCW 34.05.443 to place conditions on or dismiss an intervenor at any time. The statute provides, in relevant part:

(2) If a petitioner qualifies for intervention, the presiding officer *may* impose conditions upon the intervenor's participation in the proceedings, either at the time that intervention or at any subsequent time. Conditions may include:

(a) Limiting the intervenor's participation to designated issues in which the intervenor has a particular interest demonstrated by the petition; and

(b) Limiting the intervenor's use of discovery, cross-examination, and other procedures so as to promote the orderly and prompt conduct of the proceedings; and

(c) Requiring two or more intervenors to combine their presentations of evidence and argument, cross-examination, discovery, and other participation in the proceedings.

...

(3) ... The presiding officer *may* modify the order at any time, stating the reasons for the modification. The presiding officer shall promptly give notice of the decision granting, denying, or

modifying intervention to the petitioner for intervention and to all parties.

RCW 34.05.443(2) and (3) (emphasis added).

47 We reject Time Warner’s claim that our decision to limit its participation was an abuse of our discretion. “A court abuses its discretion when no tenable grounds exist for its decision.” *Hill v. Cox*, 110 Wn.App. 394, 409, 41 P.3d 495, review denied 147 Wn.2d 1024 (2002). Where the statute and procedural rules allow for the Commission to apply discretion in limiting an intervenor’s participation, and the Commission has fully explained its decision to limit participation on the basis of a lack of substantial interest consistent with the statute and rules, the Commission’s decision to limit participation is not an abuse of discretion.

48 We also reject Time Warner’s claim that our action to limit its participation, and by extension, the multi-party settlement procedures in WAC 480-07-740(2)(c), violate RCW 34.05.060. The statute provides:

Except to the extent precluded by another provision of law and subject to approval by agency order, informal settlement of matters that may 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.

RCW 34.05.060. Time Warner is correct that the statute does not require a party or person to settle. Time Warner, however, misinterprets the statute to preclude agency consideration of non-unanimous settlements. We interpret the statute similarly to Staff: “The most reasonable interpretation of RCW 36.05.060 [sic] 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.” *Staff Response*, ¶ 22. As Staff notes, a number of federal and state cases support the rule that courts and agencies may consider non-unanimous settlements.⁴ *Id.*, ¶¶ 27-33.

49 The statute allows agencies to adopt rules addressing the procedures for “attempting and executing informal settlement.” *RCW 34.05.060*. The Commission has done so, adopting rules in Subpart D of its procedural rules governing alternate dispute resolution, mediation, collaborative negotiation, settlement, and procedures and standards for Commission consideration of settlements. *See WAC 480-07-700 through WAC 480-07-750*. The Commission defines a multiparty settlement as “An agreement of some, but not all, parties on one or more issues [which] may be offered as their position in the proceeding along with the evidence that they believe supports it.” *WAC 480-07-730(3)*. The rule further provides that “[n]onsettling parties may offer evidence and argument in opposition.” *Id.* The rules recognize the right of parties under *RCW 34.05.060* not to enter into a settlement, and allow parties opposing Commission adoption of a proposed settlement the following procedural opportunities:

The right to cross-examine witnesses supporting the proposal; the right to present evidence opposing the proposal; the right to present argument in opposition to the proposal; and the right to present evidence or, in the commission’s discretion, an offer of proof, in support of the opposing party’s preferred result. The presiding officer may allow discovery on the proposed settlement in the presiding officer’s discretion.

⁴ *See Firefighters v. Cleveland*, 478 U.S. 501, 504-508 (1986); *Halstead v. Dials*, 182 W.Va 695, 698 (1990); *see also 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. Pub. Util Comm’n*, 854 S.W.2d 932 (Tex. Ct. App. 1993).

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

50 Order No. 19 recognized Time Warner's opposition to the settlement. The Order followed the intent of the APA and rules governing multiparty settlements to determine the appropriate process for considering the proposed settlement, given the level of Time Warner's interest in the proceeding. We found in our Order that Time Warner has cross-examined witnesses, presented written and oral argument in opposition to the proposed settlement, and was granted the opportunity to conduct discovery on the proposed settlement, consistent with WAC 480-07-740(2)(c). *Order No. 19*, ¶ 59. We properly exercised our discretion under the APA and procedural rules to limit any additional process, at this time, to Time Warner's presenting an offer of proof describing the evidence in support of Time Warner's preferred result. *Id.* By clearly identifying and outlining the bases of the exercise of discretion allowed under the APA and Commission rules, our decision cannot be seen as an abuse of discretion. *See Hill, 110 Wn.App. at 409.*

51 Finally, we must repeat our earlier findings distinguishing this proceeding, which is an enforcement proceeding, from rate cases and other proceedings before the Commission. Agencies generally have discretion in pursuing enforcement actions and retain that prosecutorial discretion in determining whether settlement is appropriate in enforcement actions. *See District of Columbia, 933 F.Supp. at 47.* In that case, an enforcement action brought under the federal Clean Water Act, the court found that allowing intervenors to block entry of a consent decree merely because they object would "wreak havoc upon government enforcement actions." *933 F.Supp at 47, quoting United States v. Ketchikan Pulp Co., 430 F.Supp. 83, 85 (D.Ala. 1977).* The court relied on the rule 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." *Id., 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, 1169 (7th Cir. 1980)). This case further supports the Commission's exercise of discretion in this proceeding.

52 **C. DECISION DENING MOTION TO COMPEL.** As a part of its discovery of the proposed settlement, Time Warner submitted Data Request Nos. 02-008 through 02-011, requesting from Qwest information concerning the dollar amount of all purchases of services under Section 251(b) and (c) of the Act, including interstate and intrastate access charges, by month made by Time Warner and all CLECs in Washington for a certain time periods, as well as a description of the services. *Order No. 19*, ¶ 62. Qwest objected to the data requests, and Time Warner filed a motion to compel responses to the requests.

53 We denied Time Warner's motion to compel in *Order No. 19* after considering the Commission's guidelines for discovery disputes and the circumstances surrounding the requested information. *Id.*, ¶ 73. We found that Time Warner had ample time to request the information earlier in the proceeding, given that the information supports claims Time Warner made in testimony filed with the Commission. *Id.*, ¶ 70. We found that the information was not appropriate discovery, in that it is similar to information that bolsters Time Warner's testimony concerning credits and reparations due to competitors—testimony that has been stricken during the proceeding. *Id.*, ¶ 71. We also found that, though the information was relevant, its relevance was outweighed by the burden on Qwest in obtaining the information, in light of the probative value of the information. *Id.*, ¶ 72.

54 Time Warner asserts that it was error to deny the motion to compel discovery from Qwest. Time Warner asserts that the information is directly relevant to the issue of the economic benefit Qwest enjoyed in not making discounts to other CLECs, as well as to whether the penalty in the proposed settlement is sufficient and appropriate. Time Warner asserts that the Commission cannot properly evaluate the proposed penalty amount unless the Commission knows the

magnitude of the harm caused by Qwest and what Qwest gained by not filing certain agreements with the Commission. Time Warner asserts that the information is a legitimate subject of discovery, and that the discovery was timely as there had not been a discovery cut-off in the proceeding.

55 Time Warner argues that the Commission's decision incorrectly finds that the value of receiving the information is outweighed by the burden on Qwest in light of the probative value of the information. The question of whether the dollar value of the services provided under the specific agreements has probative value depends on whether CLECs would likely have been able to opt into the agreements under Section 252(i) of the Act. Time Warner asserts that the information does have probative value: Qwest, not CLECs, would bear the burden to show that CLECs could not opt into the discount and credit provisions without also opting into other provisions of the agreements that are legitimately related to the desired provisions. Time Warner asserts that the Order prejudices the determination of this issue, and does so incorrectly in Qwest's favor.

56 Staff asserts that the Order properly balanced Time Warner's interests in the proceeding with the timing and nature of the requests pursuant to WAC 480-07-400(4). Staff asserts that Time Warner had ample opportunity to seek the information requested prior to the time the settlement was filed. Staff questions the probative value of the information, as it is similar to information discussed in testimony prefiled with the Commission.

57 Qwest asserts that Time Warner's disagreement with the decision on the motion to compel does not establish a basis for review. Qwest asserts that Time Warner merely restates in its petition the arguments Time Warner made in its motion to compel.

58 **Decision.** We deny Time Warner's petition for review of our decision denying the motion to compel. Our decision recognizes that the information is relevant to the issue of the appropriate size of the penalty the Commission may impose upon Qwest. *Order No. 19*, ¶ 23. Our decision also recognizes, however, that relevance is not the sole factor in determining whether to allow discovery. See *WAC 480-07-400(4)*. The Commission's discovery rules provide:

A discovery request is inappropriate when the party seeking discovery has had ample opportunity to obtain the information sought or the discovery is unduly burdensome or expensive, taking into account the needs of the adjudicative proceeding, limitations on the parties' resources, scope of the responding party's interest in the proceeding, and the importance of the issues at stake in the proceeding.

Id. In addition, under the Commission's rules governing consideration of multiparty settlements, discovery on the proposed settlement is a matter of discretion for the Commission. See *WAC 480-07-740(2)(c)*. By extension, the Commission has discretion to limit discovery concerning a proposed settlement.

59 At the time the settlement was filed, the discovery cut-off in the proceeding was set for November 30, 2004, for data requests, and December 15, 2004, for depositions. See *Order No. 14*, ¶ 5. This time limit was set aside only after the proposed settlement was filed. It is reasonable to assume, given the nature of the information requested, that Time Warner would have sought the information from Qwest prior to filing testimony in September 2004, or soon after. Time Warner only requested the information after the proposed settlement was filed in mid-November and the administrative law judge allowed discovery on the proposed settlement.

60 The information requested is quite extensive and would require significant expense and effort by Qwest to locate the information, if it could locate the information at all. *See Qwest's Answer to Motion to Compel*, ¶ 21. Taking into consideration the needs of the proceeding – considering a proposed settlement rather than holding a full hearing on the merits—and the limitations on Qwest's resources, we uphold the decision that the requested discovery is inappropriate given the nature of Time Warner's limited interest in the proceeding.

61 As to the probative value of the information, Time Warner and Qwest establish that in order to prove its point of Qwest's economic gain, Time Warner would have to show that the alleged agreements would be approved and subject to a filing requirement, and that all other CLECs would be able to obtain the same discounts as Eschelon and McLeodUSA over Qwest's objections for the need to opt into other legitimate provisions of the agreements. We continue to find Qwest's concerns about the probative value persuasive: There are too many connections to be made in this analysis, given the clear burden on Qwest, to require Qwest to provide the information to Time Warner in the context of considering the proposed settlement.

62 Given our discretion to allow discovery on proposed settlements, as well as the considerations for allowing discovery in WAC 480-07-400(4), we uphold our decision to deny Time Warner's motion to compel.

63 **D. TIME WARNER'S OFFER OF PROOF.** As discussed above, the Commission allowed Time Warner, pursuant to WAC 480-07-740(2)(c), to file a written offer of proof in support of its preferred result with respect to the proposed settlement. *Order No. 19*, ¶ 60. The Commission allowed other parties to file responses to the offer of proof. *Id.* The Commission notified the parties that it would determine the additional process necessary in the proceeding after reviewing the offer of proof and any responses. *Id.*, ¶ 61.

64 In its offer of proof, Time Warner discusses information provided in the prefiled testimony of Richard A. Smith on behalf of Eschelon and Stephen C. Gray on behalf of McLeodUSA to support Time Warner's request for findings concerning the Eschelon and McLeodUSA agreements. *Offer of Proof*, ¶¶ 4-15. Time Warner discusses testimony filed by Mr. Thomas L. Wilson on behalf of Commission Staff and Timothy L. Gates on behalf of Time Warner to support Time Warner's request for findings of harm to other CLECs, the competitive market, and consumers by Qwest's violations. *Id.*, ¶¶ 16-17. Finally, Time Warner presents information concerning the standards for determining the appropriate settlement, which information Time Warner has presented in testimony and other pleadings in this proceeding. *Id.*, ¶¶ 19-21.

65 Through the Declaration of Thomas L. Wilson, Staff asserts that Time Warner has not presented any additional information in its offer of proof that is not already contained in the record in this proceeding. *Staff Response*, ¶ 38; *see also Declaration of Thomas L. Wilson*, ¶ 4. Staff asserts that the Settlement Agreement adequately addresses the allegations in the Complaint and Amended Complaint and requests that the Commission approve the settlement based on the record, the testimony and narrative in support of the proposed settlement, and the proposed settlement agreement itself. *Id.*

66 Similar to Staff, Qwest asserts that all the information Time Warner relies on in its offer of proof is already a part of the record in the proceeding. *Qwest Response*, ¶¶ 12-13, 16-17. Qwest asserts that nothing Time Warner presents in its offer of proof justifies further proceedings in this matter. *Id.*, ¶¶ 11, 18.

67 Qwest also asserts that Time Warner's discussion of testimony by Mr. Smith and Mr. Gray represents a "one sided perspective of the testimony." *Id.*, ¶ 13. Qwest had nearly completed testimony in response to the testimony by Mssrs. Smith and Gray at the time the proposed settlement was filed. *Id.* Qwest includes in its

response to the offer of proof a number of responses to the allegations made in the Smith and Gray testimony. *Id.*, ¶ 14.

68 **Decision.** Based on our review of Time Warner's offer of proof, as well as the responses filed by Staff and Qwest, we find that Time Warner's offer of proof does not justify additional briefing or an evidentiary hearing. We find, however, that it is appropriate to allow Time Warner and the other parties an opportunity for oral argument addressing the record evidence in the proceeding.

69 Time Warner has proposed no evidence in its offer of proof that is not already included in the record through prefiled testimony or exhibits attached to prefiled testimony. Consistent with our discussion in Section A above, we do not believe a full hearing on the merits is necessary for us to review the proposed settlement given Time Warner's lack of substantial interest in the proceeding. There remain, however, a few procedural details to address before we may consider the proposed settlement.

70 First, while the record in this proceeding includes several volumes of prefiled testimony and attached exhibits, the documents have not been marked or admitted as record evidence in the proceeding. Second, while the parties had an opportunity on November 29, 2004, to present argument in favor of and opposing the proposed settlement agreement, the parties have not yet had an opportunity to present argument concerning the conclusions to be made of the record evidence. For this reason, the Commission will convene a prehearing conference to finalize the record evidence in the proceeding and a hearing to take oral argument on the record evidence. Following the hearing, the Commission will take the proposed settlement under consideration, together with the evidentiary record, testimony concerning the proposed settlement, and all briefs filed on the proposed settlement.

71 **ALL PARTIES TAKE NOTICE That a prehearing conference in this matter will be held on Wednesday, February 23, 2005, beginning at 1:00 p.m. in Room 206 of the Commission's headquarters, Chandler Plaza Building, 1300 S. Evergreen Park Drive, SW, Olympia, Washington.** The purpose of the prehearing conference is to finalize the evidentiary record in the proceeding prior to argument on the record before the Commission, and address any remaining procedural details in the proceeding. Prior to the conference, the administrative law judge will circulate a draft exhibit list to the parties to assist in finalizing the evidentiary record.

72 **ALL PARTIES TAKE NOTICE That a hearing in this matter will be held on Wednesday, February 23, 2005, immediately following the prehearing conference, in Room 206 of the Commission's headquarters, Chandler Plaza Building, 1300 S. Evergreen Park Drive, SW, Olympia, Washington.** The purpose of the hearing is to allow the parties to present argument on the evidentiary record in this proceeding. Time Warner will have 30 minutes of oral argument. Staff, Qwest, and Public Counsel will have 30 minutes of argument, altogether, and may allocate time accordingly.

III. FINDINGS OF FACT

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

- 74 (1) Qwest Corporation is a Bell operating company within the definition of 47 U.S.C. § 153(4), and an incumbent Local Exchange Company, or ILEC, providing local exchange telecommunications service to the public for compensation within the state of Washington.
- 75 (2) The Washington Utilities and Transportation Commission is an agency of the State of Washington vested by statute with the authority to regulate the rates and conditions of service of telecommunications companies within the state, and to take actions, conduct proceedings, and enter orders as permitted or contemplated for a state commission under the Telecommunications Act of 1996.
- 76 (3) Time Warner Telecom of Washington, LLC is a local exchange carrier within the definition of 47 U.S.C. § 153(26), providing local exchange telecommunications service to the public for compensation within the state of Washington, or is classified as a competitive telecommunications company under RCW 80.36.310 - .330.
- 77 (4) Time Warner was not named as a respondent to the Amended Complaint served on August 15, 2003. The Commission granted Time Warner's petition to intervene on September 8, 2004, with no limitation, as no party objected to the petition.
- 78 (5) Order No. 15 in this proceeding, entered on October 22, 2004, struck a portion of Mr. Timothy Gates' testimony submitted on behalf of Time Warner relating to and recommending credits or reparations to competitors harmed by Qwest Corporation's actions.
- 79 (6) Time Warner has no substantial interest in the proceeding: Time Warner is not subject to penalties and has not filed a cross-claim or third party complaint relating to the issues in the proceeding. Time Warner desires

that the Commission make findings Time Warner may use in a later proceeding and apply penalties or remedies in the proceeding sufficient to ensure fair treatment by Qwest to competitive local exchange carriers in the future.

- 80 (7) On November 9, 2004, Commission Staff, Qwest, and the Public Counsel Section of the Attorney General's Division filed a proposed settlement agreement with the Commission in this proceeding.
- 81 (8) During a conference call between the parties and Administrative Law Judge Rendahl on November 10, 2004, Time Warner was allowed the opportunity to conduct discovery on the proposed settlement.
- 82 (9) After the Commission issued a notice on November 12, 2004, notifying parties of the opportunity to comment on the proposed settlement agreement, Time Warner filed its Opposition to the Proposed Settlement, providing written argument in opposition to the settlement.
- 83 (10) Pursuant to a November 12, 2004, notice of the settlement presentation hearing and a November 23, 2004, notice of the agenda for the hearing, the Commission convened a settlement presentation hearing on November 29, 2004.
- 84 (11) At the settlement presentation hearing, Commission Staff presented Dr. Glenn Blackmon and Qwest presented Mr. Mark Reynolds as witnesses in support of the proposed settlement. Dr. Blackmon and Mr. Reynolds provided testimony to the Commission and were subject to cross-examination.

- 85 (12) At the November 29, 2004, hearing, counsel for Time Warner cross-examined Dr. Blackmon and Mr. Reynolds and presented argument in opposition to the proposed settlement. Time Warner had the opportunity at the hearing to present evidence opposing the proposal.
- 86 (13) Following the November 29, 2004, settlement presentation hearing, the parties filed briefs addressing the issue of the process due Time Warner in this proceeding and the appropriate process for consideration of the proposed settlement agreement.
- 87 (14) The only procedural opportunity established in WAC 480-07-740(2)(c) that Time Warner has not yet been afforded in this proceeding is the right to present evidence, or in the Commission's discretion, an offer of proof in support of its preferred result.
- 88 (15) On December 10, 2004, Time Warner filed with the Commission a Motion to Compel Discovery Responses from Qwest Corporation, seeking information concerning the dollar amount of all purchases of services pursuant to Section 251(b) and (c) of the Act, including interstate and intrastate access charges, by month made by Time Warner and all competitors in Washington State for certain time periods, as well as a description of the services.
- 89 (16) The information Time Warner seeks in Data Request Nos. 02-008 through 02-011 is quite extensive and would require significant expense and effort by Qwest to locate the information, if it could locate the information at all.
- 90 (17) Time Warner had ample opportunity to seek the information requested in Data Request Nos. 02-008 through 02-011 prior to the time it filed responsive testimony in September 2004, as well as prior to the time the proposed settlement was filed.

- 91 (18) The information Time Warner seeks in Data Request Nos. 02-008 through 02-011 is similar to information referenced in testimony filed by Mr. Timothy Gates concerning the calculation of credits and reparations that has since been stricken from the record.
- 92 (19) Qwest filed a response to Time Warner's Motion on December 15, 2004.
- 93 (20) The Commission convened a hearing on Time Warner's motion before Administrative Law Judge Rendahl, at which Time Warner, Qwest, and Commission Staff presented argument on the motion.
- 94 (21) The Commission entered Order No. 19 on December 22, 2004, limiting Time Warner's participation in the proceeding to filing an offer of proof pursuant to WAC 480-07-740(2)(c), and denying Time Warner's motion to compel.
- 95 (22) Time Warner filed a Petition for Review of Order No. 19 with the Commission on January 4, 2005, and filed an Offer of Proof on January 5, 2005.
- 96 (23) On January 12, 2005, Commission Staff filed a Response to Time Warner's Petition for Review of Order No. 19 and Declaration of Thomas L. Wilson. On the same day, Qwest filed a Response to Time Warner's Petition for Review of Order No. 19 and Offer of Proof.
- 97 (24) Time Warner has proposed no new evidence in its offer of proof, and relies only on information already included in the record through prefiled testimony or exhibits attached to prefiled testimony.

98 (25) Several volumes of prefiled testimony and attached exhibits have been filed in the record in this proceeding, but none have been marked or admitted as record evidence.

IV. CONCLUSIONS OF LAW

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

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

101 (2) Time Warner's petition for review of Order No. 19 demonstrates a basis for interlocutory review under WAC 480-07-810(2)(b), as the Order may subject Time Warner to substantial prejudice not remediable by post-hearing review by limiting Time Warner's procedural opportunities in the proceeding, and may deny Time Warner the opportunity to discover certain information.

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

103 (4) Constitutional due process arises when a party has a property or liberty interest protected by the Fifth or the Fourteenth Amendment, and is faced

with deprivation of that interest by governmental decisions. *See Mathews v. Eldridge*, 424 U.S. 319, 332 (1976).

- 104 (5) A protected Fourteenth Amendment property interest is created by existing state laws and rules that establish benefits and support claims of entitlement to benefits. *See Board of Regents v. Roth*, 408 U.S. 564, 576 (1972).
- 105 (6) The question of what process is due in this proceeding depends on the nature of the parties' interests and the severity of possible deprivation of those interests, not on the nature of the settlement or whether there are material facts in issue. *See Tellevik v. Real Property*, 125 Wn.2d 364, 884 P.2d 1319 (1995).
- 106 (7) Commission Staff and Public Counsel are statutory parties to this enforcement proceeding, and Qwest has a protected property interest in the proceeding, as it seeks to avoid deprivation of its property through imposition of penalties.
- 107 (8) Time Warner has no stake in the proceeding other than a desire for a certain benefit or outcome of this proceeding: Time Warner has failed to establish a protected property interest entitling it to constitutional due process and its stated interests do not rise to the level of a substantial interest in the proceeding.
- 108 (9) Time Warner is entitled only to the due process afforded by state law and rules, *i.e.*, the Administrative Procedure Act (APA), chapter 34.05 RCW, and the procedural rules in chapter 480-07 WAC.
- 109 (10) A presiding officer in an adjudicative proceeding must allow all parties to the proceeding the opportunity for certain procedures, except where the

presiding officer has limited an intervenor's participation. *See RCW 34.05.449(2).*

- 110 (11) Once the Commission grants intervenor status, the Commission retains discretion under RCW 34.05.443 to place conditions on or dismiss an intervenor at any time. *See RCW 34.05.443(2), (3).* Conditions on intervention include limiting an intervenor's use of adjudicative procedures in order "to promote the orderly and prompt conduct of the proceedings." *RCW 34.05.443(2).*
- 111 (12) In considering a petition for intervention, or whether to impose conditions on or dismiss an intervenor, the Commission must look not only to whether an intervenor has a substantial interest in the subject matter of the hearing, but also whether the intervenor's participation is in the public interest. *See WAC 480-07-355(3), (4).*
- 112 (13) Although Time Warner, an intervenor, has no substantial interest in the proceeding, its continued, but limited, participation in the proceeding is in the public interest.
- 113 (14) The Commission's decision to limit Time Warner's participation is not an abuse of discretion: The APA and the Commission's procedural rules allow the Commission to apply discretion in limiting participation, and the Commission has fully explained its decision to limit participation consistent with the standards in the APA and Commission rules.
- 114 (15) The portion of the APA governing informal settlement, RCW 34.05.060, does not require unanimous settlements, but encourages settlement and codifies the important policy that a settlement between two or more parties cannot dispose of the valid claims of third persons, whether parties

or other persons, who do not agree to the settlement, or impose obligations on those same parties or persons.

- 115 (16) The Commission's procedural rules governing non-unanimous settlements recognizes the right of parties not to enter into settlements, and allows parties opposing a settlement certain procedural opportunities, including cross-examining witnesses supporting a settlement proposal, presenting evidence opposing the proposal, presenting argument against the proposal, and presenting evidence, or, in the Commission's discretion, an offer of proof in support of the opponents preferred result. *See WAC 480-07-730(3), WAC 480-07-740(2)(c).*
- 116 (17) The Commission's decision to limit Time Warner's participation is not an abuse of discretion under the APA or WAC 480-07-740(2)(c): Considering Time Warner's lack of a substantial interest in the proceeding and the Commission's interest in promoting the orderly and prompt conduct of the proceeding, the Commission may limit Time Warner's participation in the proceeding, at most, to filing a written offer of proof.
- 117 (18) The Commission may apply prosecutorial discretion in pursuing enforcement actions, and retains that discretion in determining whether settlement is appropriate in enforcement actions. *See United States v. District of Columbia, 933 F.Supp. 42 (D.D.C. 1996).*
- 118 (19) As the Commission has discretion whether to allow discovery on a proposed settlement, the Commission has discretion to limit discovery concerning a proposed settlement. *See WAC 480-07-740(2)(c).*
- 119 (20) It is inappropriate for Time Warner to seek, through discovery of a settlement proposal under WAC 480-07-740(2)(c), information that it had the opportunity to obtain at an earlier phase of the proceeding.

- 120 (21) The information Time Warner seeks in Data Request Nos. 02-008 through 02-011 is not appropriate discovery on the proposed settlement as it is the same information referenced in a stricken portion of Mr. Gates' testimony concerning measuring credits or reparations to competitors.
- 121 (22) Time Warner's Data Request Nos. 02-008 through 02-011 are inappropriate pursuant to WAC 480-07-400(4) and WAC 480-07-740(2)(c), given the undue burden imposed by the data requests, the needs of the proceeding in considering a proposed settlement rather than holding a full hearing on the merits, the limitations on Qwest's resources, and Time Warner's lack of a substantial interest in the proceeding.
- 122 (23) Qwest's concerns about the probative value of the information requested in Data Request Nos. 02-008 through 02-011 are persuasive: There are too many connections to be made in Time Warner's proposed analysis of the information, given the clear burden on Qwest, to require Qwest to provide information to Time Warner in the context of considering the proposed settlement.
- 123 (24) Time Warner's offer of proof does not justify additional briefing or an evidentiary hearing, as the offer proposes no new evidence, but relies solely on information already in the record.
- 124 (25) It is appropriate to allow Time Warner and other parties the opportunity for oral argument addressing the record evidence in the proceeding, as prior argument has focused primarily on the parties' opinions concerning the proposed settlement and the appropriate process for considering the proposed settlement.

V. ORDER

THE COMMISSION ORDERS:

- 125 (1) Time Warner Telecom of Washington, LLC's, Petition for Review of Order No. 19 is accepted pursuant to WAC 480-07-810(2)(b).
- 126 (2) Time Warner Telecom of Washington, LLC's, Petition for Review of Order No. 19 is denied.
- 127 (3) The Commission convenes a prehearing conference on **Wednesday, February 23, 2005, beginning at 1:00 p.m.** to finalize the record evidence in the proceeding, and a hearing **immediately following** the prehearing conference to take oral argument, with respect to the proposed settlement on the record evidence.

Dated at Olympia, Washington, and effective this 9th day of February 2005.

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

MARILYN SHOWALTER, Chairwoman

RICHARD HEMSTAD, Commissioner

PATRICK J. OSHIE, Commissioner