

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

WASHINGTON UTILITIES AND)	DOCKET NO. UT-033011
TRANSPORTATION COMMISSION,)	
)	
Complainant,)	ORDER NO. 21
)	
v.)	
)	ORDER ADOPTING AND
ADVANCED TELECOM GROUP,)	APPROVING SETTLEMENT
INC., et al.)	AGREEMENT; CLOSING DOCKET
)	
Respondents.)	
)	
.....)	

1 **SYNOPSIS.** *In this Order, we approve and adopt a proposed settlement filed by Commission Staff, Qwest, and Public Counsel as a full and complete resolution of the remaining issues in the Amended Complaint. The action results in an appropriate resolution of an enforcement proceeding concerning Qwest’s anti-competitive and discriminatory behavior in the local telecommunications services marketplace first raised in our Section 271 proceedings. The result recognizes Qwest’s willful and intentional violation of state and federal law and proposes an unprecedented penalty that appropriately penalizes Qwest for its past behavior and serves to deter Qwest and other regulated companies from future misconduct. This Order also requires Qwest to take certain actions to ensure future compliance. We find the proposed settlement appropriately resolves the remaining issues in the Amended Complaint consistent with the Act, state law, the record of the proceeding, and the public interest.*

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 Qwest entered into certain agreements identified in Exhibit B to the Amended Complaint to resolve disputes, but that the agreements violated federal and state law by failing to make terms and conditions available to other carriers, providing unreasonable preferences, and engaging in rate discrimination.

3 **APPEARANCES.** Christopher Swanson, Assistant Attorney General, Olympia, Washington, represents Commission Staff. Lisa A. Anderl, Associate General Counsel, and Adam Sherr, Senior Attorney, Seattle, Washington, and Todd Lundy, Associate General Counsel, Denver, Colorado, represent Qwest. Arthur A. Butler, Ater Wynne, LLP, Seattle, Washington, represents Time Warner Telecom of Washington, LLC (Time Warner). Judith A. Endejan, Graham & Dunn, PC, Seattle, Washington, represents Eschelon Telecom of Washington, Inc. (Eschelon). 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 identified in Exhibit B to the Amended Complaint that Qwest entered with CLECs. The Amended Complaint alleged that Qwest violated federal and state law by failing

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.

to make terms and conditions available to other carriers, providing unreasonable preferences, and engaging in rate discrimination.

- 5 Time Warner, a CLEC not named in the Amended Complaint, petitioned to intervene at the first prehearing conference held on September 8, 2003. 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 February 12, 2004, the Commission entered Order No. 05 in this proceeding, an order resolving motions to dismiss and for summary determination filed by the parties.² In that Order, the Commission determined, among other matters, that both incumbent local exchange carriers (ILECs) and CLECs are required under Section 252 of the Telecommunications Act of 1996 (Act)³ to file interconnection agreements with state commissions. The Commission upheld this decision in Order No. 07 in this proceeding.
- 7 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 and exhibits in the proceeding.
- 8 By September 2004, Staff had entered into settlements agreements with all 13 of the CLECs named in the Amended Complaint, and moved to dismiss from the Amended Complaint 22 of the 52 Exhibit A Agreements. In Orders No. 1, 5, and 7 through 13 in this proceeding, the Commission granted the motions to dismiss⁴ and approved settlement agreements involving Allegiance Telecom, Inc.,

² A complete summary of the procedural history in this docket prior to the date the Commission entered Order No. 05 is contained in paragraphs 3-13 of Order No. 05.

³ Pub. L. No. 104-104, 100 Stat. 56, *codified at* 47 U.S.C. § 151 *et seq.*

⁴ The Commission has dismissed from the Amended Complaint Exhibit A Agreements No. 10A, 11A, 13A, 14A, 15A, 17A, 18A, 20A, 22A, 23A, 24A, 31A, 37A, 38A, 39A, 41A, 42A, 43A, 46A, 49A, 50A, and 51A.

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.

- 9 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.
- 10 Following motions by Qwest to strike the testimony of Mr. Smith, Mr. Gray, and Mr. Gates, Administrative Law Judge (ALJ) Ann E. 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 and exhibits.
- 11 On November 9, 2004, Staff, Qwest, and Public Counsel filed with the Commission a proposed settlement (Settlement) in this proceeding, along with a narrative concerning the agreement, proposing to resolve the remaining issues pending in the Amended Complaint.
- 12 Following a conference call with the parties on November 10, 2004, the ALJ issued a notice on November 12, 2004, allowing parties the opportunity to comment on the Settlement Agreement by November 22, 2004, and scheduling a hearing for the parties to present the Settlement Agreement 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 (January 13, 2005), should the Commission determine such process was

necessary for consideration of the settlement. The notice also recognized Time Warner's request to conduct discovery.⁵

- 13 On November 22, 2004, Time Warner filed with the Commission its Opposition to Proposed Settlement Between Qwest, Staff, and Public Counsel.
- 14 On November 29, 2004, the Commission convened a settlement presentation hearing in this proceeding. Commission Staff presented Dr. Glenn Blackmon 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 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. The Commission issued a formal notice on November 30, 2004, requesting briefing by December 7, 2004.
- 16 On December 7, 2004, Time Warner submitted for inclusion in the record Qwest's Responses to Time Warner's Data Requests Nos. 02-002 through 02-011.
- 17 Time Warner, Qwest, Commission Staff, and Public Counsel filed briefs with the Commission on December 7, 2004, addressing the procedural issues raised in the settlement presentation hearing.

⁵ During the November 10, 2004, conference call, Time Warner indicated its opposition to the settlement and the ALJ allowed Time Warner to conduct discovery on the proposed settlement pursuant to WAC 480-07-740(2)(c).

- 18 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.
- 19 The Commission convened a hearing on December 16, 2004, concerning Time Warner's motion before ALJ Rendahl, at which Time Warner, Qwest, and Staff presented argument on the motion. The ALJ issued an oral ruling denying Time Warner's motion.
- 20 On December 22, 2004, the Commission entered Order No. 19, in which the Commission found that Time Warner had 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.
- 21 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.
- 22 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.
- 23 On February 9, 2005, the Commission entered Order No. 20 in this proceeding, denying Time Warner's Petition for Review and finding that Time Warner's Offer of Proof does not justify holding evidentiary hearings. The Commission

notified parties of the need for a prehearing conference to finalize the evidentiary record, and of the opportunity for oral argument on the record evidence, scheduling the conference and oral argument for February 23, 2005.

24 On February 10, 2005, the Commission circulated a draft exhibit list to the parties, seeking comments concerning the list.

25 On February 18, 2005, Qwest filed a letter with the Commission on behalf of Commission Staff, Public Counsel, and Time Warner identifying no need for the oral argument and requesting that the oral argument be cancelled. The parties also stipulated to admission of the draft exhibit list, with two modifications.

26 On February 18, 2005, the Commission issued a notice cancelled the prehearing conference and oral argument scheduled for February 23, 2005, as requested by the parties.

27 On February 22, 2005, the Commission circulated to all parties a final exhibit list, identifying the exhibits admitted into the record, except where previously stricken by Order No. 15 in this proceeding.

MEMORANDUM

28 **A. THE SETTLEMENT.** The proposed Settlement and accompanying narrative statement address the issues remaining in the proceeding.⁶ These issues concern Staff's allegations against Qwest relating to the agreements listed in Exhibit B to the Amended Complaint, as well as 30 agreements listed in Exhibit A to the Amended Complaint. The proposed Settlement recommends resolving all matters in dispute between the settling parties raised in the Amended Complaint, "including, but not limited to any allegations that Qwest entered into agreements with Eschelon or McLeodUSA relating to rates or discounts off of

rates for intrastate wholesale services.”⁷ The proposed Settlement does not intend to foreclose non-settling parties, such as Time Warner, from pursuing any remedies available to them.⁸

29 The primary terms of the proposed Settlement are as follows:

- Admission by Qwest to violating Section 252 of the Act by failing to file, in a timely manner, the following 24 Exhibit A agreements: 1A, 2A, 3A, 4A, 5A, 6A, 7A, 8A, 9A, 12A, 16A, 27A, 28A, 29A, 30A, 32A, 33A, 34A, 35A, 36A, 40A, 47A, 48A, and 52A;⁹
- Dismissal of all Exhibit B agreements and Exhibit A Agreements No. 19A, 21A, 25A, 26A, 44A, and 45A from the Complaint and Amended Complaint;¹⁰
- A Commission finding that “Qwest willfully and intentionally violated Sec. 252, RCW 80.36.170, RCW 80.36.180, and RCW 80.36.186 by not filing, in a timely manner, its transactions with Eschelon and McLeod USA relating to rates or discounts off of rates for intrastate wholesale services,” based upon evidence of Qwest’s transactions with Eschelon and McLeodUSA identified in testimony and in agreements listed in paragraphs 12 and 13 of Order No. 12, which finding Qwest agrees not to appeal;¹¹
- Closure of an informal investigation into a potential complaint against Qwest concerning the failure to timely file nine interconnection agreements that the Commission approved on September 8, 2004;¹²
- Imposition of a \$7,824,000 penalty against Qwest; and

⁶ Settlement Agreement, ¶ 3; Narrative, ¶ 4.

⁷ Settlement Agreement, ¶ 14.

⁸ TR. 231:16-19 (Reynolds).

⁹ Settlement Agreement, ¶ 4.

¹⁰ *Id.*, ¶ 8

¹¹ *Id.*, ¶ 5; *see also* TR. 252:5-256:3 (Blackmon).

¹² Settlement Agreement, ¶ 7.

- Requirements that Qwest take the following remedial actions: (1) Pay for an independent, third-party monitor approved by Staff to review Qwest's Wholesale Agreement Review Committee annually for three years; (2) Continue its internal web-based Compliance Training program for Section 252(e) compliance; (3) Comply with Section 252, RCW 80.36.170, RCW 80.36.180, and RCW 80.36.186; (4) Commit to compliance with the Federal Communication Commission's (FCC) October 4, 2002, Declaratory Ruling and any other orders by the FCC or this Commission addressing filing obligations under Section 252; and (5) File any future interconnection agreements with the Commission within 30 days of execution and any interconnection agreements not yet filed with the Commission within 45 days of an order approving the proposed Settlement.¹³

30 The settling parties request that any Commission order approving the proposed Settlement make findings of fact and conclusions of law consistent with the terms of the proposed Settlement, impose the penalties and requirements identified in the proposed Settlement, find that no further enforcement is warranted with respect to the matters addressed in Paragraph 7, find that all matters and claims in the docket are fully and finally resolved, and close the docket.¹⁴ The settling parties reserve the right to withdraw from the proposed Settlement if the Commission rejects all or any portion of the agreement, conditions approval on material revisions to the settlement terms, awards any additional penalty or remedy against Qwest, or if the Commission does not make findings of fact and conclusions of law consistent with the statements and admissions in Paragraphs 4 and 5.¹⁵

¹³ *Id.*, ¶¶ 6, 11-13.

¹⁴ *Id.*, ¶ 16.

¹⁵ *Id.*, ¶ 15.

31 During the settlement presentation hearing, and through Qwest's responses to Time Warner's data requests on the proposed Settlement, it became clear that Staff and Qwest intend that the proposed Settlement resolve issues relating to Exhibit B agreements and Exhibit A Agreements No. 19A, 21A, 25A, 26A, 44A, and 45A by requesting the Commission to dismiss them from the Amended Complaint under Paragraph 8 of the proposed Settlement, and that the parties do not agree whether the six Exhibit A Agreements are interconnection agreements under Section 252.¹⁶ There is an inconsistency between Paragraphs 5 and 8 as to whether Agreements No. 19A and 21A relating to Eschelon, and 44A and 45A relating to McLeodUSA, are a part of the finding relating to the Eschelon and McLeodUSA transactions and agreements discussed in Paragraph 5 of the proposed Settlement.¹⁷ Staff views the evidence referred to in Paragraph 5 of the proposed Settlement as referring to "a pattern of behavior that constitutes willful and intentional violation," not to individual agreements.¹⁸

32 Qwest agrees that it shares a legal obligation to file and seek approval for all interconnection agreements. Similar to provisions in other proposed settlements filed in this proceeding, Qwest agrees to file any future interconnection agreements within 30 days of execution in compliance with Commission rule, and will file any interconnection agreements not yet filed with the Commission within 45 days of approval of the proposed Settlement.¹⁹ Qwest agrees to comply with the FCC's Declaratory Ruling, dated October 4, 2002, as well as any orders issued by the FCC and the Commission concerning the scope of filing requirements under Section 252 of the Act.²⁰

¹⁶ See TR. 236:8-12 (Reynolds), TR. 243:12-22 (Reynolds), TR. 247:6-21 (Blackmon), TR. 249:13-23 (Blackmon); see also Exh. 86 (Qwest's response to TWTC 02-002).

¹⁷ See TR. 242:1-243: 22 (Reynolds); TR. 247:22-248:25 (Blackmon), see also Exh. 86 (Qwest's response to TWTC 02-003, 02-004(a)).

¹⁸ TR. 249:2-12 (Blackmon).

¹⁹ Settlement Agreement, ¶¶ 11-12.

²⁰ *Id.*, ¶ 13.

33 The settling parties stipulate that any testimony filed in the proceeding that has not been stricken should be admitted to the record.²¹ During the settlement presentation hearing, the parties clarified that the testimony and exhibits that were prefiled in the proceeding may be used to support the settlement, as well as for other purposes.²²

34 The settling parties assert that the proposed Settlement is a compromise of their litigation positions, and represents a fair and reasonable resolution of the remaining matters in the proceeding.²³ The settling parties also agree that the penalties and requirements agreed to in the proposed settlement are “reasonably calculated to penalize Qwest for its violations of federal and state law and to deter and prevent such conduct from occurring in the future.”²⁴

35 **B. TIME WARNER’S OPPOSITION.** Time Warner has formally opposed the proposed Settlement through its filing opposing the proposed Settlement. It has also expressed its opposition in argument during the November 29, 2004, hearing, and in its brief addressing the appropriate process for reviewing the settlement, Offer of Proof, and Petition for Review of Order No. 19.

36 Time Warner opposes the proposed Settlement, asserting that consideration or approval of the proposed Settlement would violate Time Warner’s due process rights to a full hearing on the merits.²⁵ After receiving briefs on this issue from all parties, the Commission determined in Order No. 19 that Time Warner did not have a constitutional or substantial interest in the proceeding, and exercised discretion under statutes and rules governing intervention to limit Time Warner’s further participation in the proceeding to submitting an offer of proof.

²¹ *Id.*, ¶ 25.

²² See TR. 237:6-239:16 (Reynolds); TR. 259:9-260:2 (Blackmon); see also Exh. 86 (Qwest’s response to TWTC 02-006).

²³ Settlement Agreement, ¶ 18; see also TR. 250:5-12 (Blackmon).

²⁴ Settlement Agreement, ¶ 9.

²⁵ Time Warner Opposition, ¶¶ 9-15.

The Commission upheld this decision in Order No. 20 after considering Time Warner's petition for review and responses by other parties.

37 Time Warner raised concerns about whether Paragraph 25 of the proposed Settlement would allow prefiled testimony to be admitted to support the proposed Settlement as well as other findings the Commission may want to make.²⁶ Time Warner states that the problem of the lack of a full hearing on the merits is "avoided" if all of the prefiled testimony, including testimony filed by witnesses for Eschelon, McLeodUSA and Time Warner, are admitted into the record and made available for all purposes.²⁷ As discussed above, the parties clarified this issue during the November 29 hearing to Time Warner's satisfaction.²⁸ On February 22, 2005, the Commission circulated to all parties a final exhibit list indicating that all prefiled testimony and exhibits, as well as Qwest's responses to Time Warner's second set of data requests, are admitted to the record, except to the extent they have been stricken from the record in Order No. 15.

38 Time Warner raises a number of concerns with Paragraph 5 of the proposed Settlement. Time Warner asserts that Paragraph 5 does not resolve the complaints concerning the main critical agreements in the proceeding: Eschelon Agreements No. 19A and 21A and McLeodUSA Agreements No. 44A and 45A.²⁹ Time Warner asserts that the Staff's requested finding does not address whether the Eschelon and McLeodUSA agreements should have been filed, or whether they were filed in a timely fashion.³⁰ Time Warner asserts that the proposed Settlement is not sufficient to support a resolution of the issues in the proceeding.³¹ Time Warner also asserts that the proposed Settlement does not

²⁶ *Id.*, ¶ 4.

²⁷ *Id.*, ¶ 12.

²⁸ TR. 272:10-22.

²⁹ Time Warner Opposition, ¶¶ 2, 16; *see also* TR. 284:21-285:3.

³⁰ Time Warner Opposition, ¶ 16.

³¹ *Id.*

provide how the Commission will obtain the evidence necessary to make the finding, and mischaracterizes the Eschelon and McLeodUSA agreements as relating only to intrastate wholesale services.³²

39 During the November 29 hearing, Staff and Qwest made clear that the proposed Settlement resolves the issues in the Amended Complaint concerning Eschelon Agreements No. 19A and 21A and McLeodUSA Agreements No. 44A and 45A by dismissing them from the complaint.³³ The parties also made clear that there was no agreement as to whether or not the agreements are interconnection agreements that should have been filed.³⁴ Time Warner's concerns about the evidence to support the finding requested in Paragraph 5 were addressed during the November 29, hearing.³⁵ In addition, Staff and Qwest explained that the Eschelon and McLeodUSA transactions and agreements referenced in Paragraph 5 of the proposed Settlement were limited to intrastate services because of jurisdictional concerns.³⁶

40 Time Warner further asserts that the proposed Settlement does not address the harm caused by Qwest's failure to file the Eschelon and McLeodUSA agreements.³⁷ Time Warner requests that the Commission make certain findings concerning the nature and scope of the Eschelon and McLeodUSA agreements, as well as that Qwest's failure to file the agreements harmed competition, other CLECs, and consumers.³⁸

³² *Id.*, ¶ 3.

³³ See TR. 236:8-12 (Reynolds), TR. 243:12-22 (Reynolds), TR. 247:6-21 (Blackmon), TR. 249:13-23 (Blackmon).

³⁴ See TR. 247:6-21 (Blackmon), TR. 249:13-23 (Blackmon); *see also* Exh. 86 (Qwest's response to TWTC 02-002).

³⁵ TR. 272:10-22.

³⁶ See TR. 244:22-245:6 (Reynolds); TR. 264:5-16 (Reynolds); TR. 264:20-265:23 (Blackmon); *see also* Exh. 86 (Qwest's response to TWTC 02-007).

³⁷ Time Warner Opposition, ¶¶ 2, 17.

³⁸ *Id.*, ¶¶ 17-19.

41 Staff and Qwest agreed that it would be inconsistent with Paragraphs 5 and 8 of the agreement for the Commission to find that Eschelon Agreements No. 19A and 21A and McLeodUSA Agreements No. 44A and 45A were interconnection agreements that were required to be filed with the Commission.³⁹ Staff and Qwest agreed that the following finding would be consistent with the agreement, and would not cause a settling party to withdraw from the agreement:

Qwest willfully and intentionally violated Section 252, RCW 80.36.170, RCW 80.36.180, and RCW 80.36.186 by not filing, in a timely manner, its transactions with Eschelon and McLeodUSA relating to discounts off rates for Section 251(b) and (c) services.⁴⁰

42 Time Warner raises a concern that Paragraphs 15 and 19 of the proposed Settlement may limit the precedential value of any findings the Commission may make in resolving the Settlement Agreement.⁴¹ Time Warner's concerns about the precedential effect of the proposed Settlement and any Commission order appear to have been resolved during the hearing.⁴²

43 Finally, Time Warner asserts that the penalty proposed in the Settlement is not sufficient, arguing that the penalty does not address the benefit Qwest gained by violating the law or the harm to CLECs and the competitive environment as a result of Qwest's actions.⁴³ Time Warner recommends that the Commission apply the standards for an appropriate penalty applied in a similar case in Minnesota, and increase the penalty in the proposed Settlement.⁴⁴ In the Minnesota case, the district court identified nine factors the Minnesota

³⁹ See TR. 242:17-243:11 (Reynolds), TR. 247:6-21 (Blackmon); *See also* Exh. 86 (Qwest's response to TWTC 02-003(a), TWTC 02-004(a)).

⁴⁰ Time Warner Opposition, ¶ 19; Exh. 86 (Qwest's response to TWTC 02-004(b)); *see also* TR. 266:14-24 (Blackmon), TR. 269:23-270:2 (Reynolds).

⁴¹ Time Warner Opposition, ¶ 7.

⁴² TR. 273:15-274:10; *see also* Exh. 86 (Qwest's response to TWTC 02-005).

⁴³ Time Warner Opposition, ¶ 23.

⁴⁴ *Id.*, ¶¶ 24-25, *citing* *Qwest Corp. v. Minn. Pub. Utils. Comm'n*, Civil No. 03-3476 Adm/JSM, 2004

Commission must follow, by statute, in determining an appropriate penalty, including willfulness or intent, harm to customers or competitors, and economic benefit to the person committing the violation.⁴⁵

44 Following the November 29 hearing and our Orders No. 19 and 20 resolving procedural issues in this matter, we must address the remaining concerns raised by Time Warner: (1) Whether the proposed Settlement properly resolves the issues raised in the Amended Complaint concerning Eschelon Agreements No. 19A and 21A and McLeodUSA Agreements No. 44A and 45A; (2) Whether the Commission should make findings in addition to those requested in the proposed Settlement concerning the Eschelon and McLeodUSA agreements; and (3) Whether the proposed penalty is sufficient to address the benefits to Qwest and harm to the CLEC community and the consuming public. We will address these remaining issues below when considering whether to approve and adopt the proposed Settlement.

45 **C. CONSIDERATION OF THE SETTLEMENT.** The Commission may “approve settlements when doing so is lawful, the settlement terms are supported by an appropriate record, and when the result is consistent with the public interest in light of all the information available to the commission.”⁴⁶ In considering a settlement, the Commission “must determine whether a proposed settlement meets all pertinent legal and policy standards.”⁴⁷ We apply this standard in considering the proposed Settlement.

46 **1. Is Approving the Settlement Agreement Consistent with the Law?** This issue raises both procedural and substantive issues. Time Warner asserts that the proposed Settlement is simply a statement of the positions of the parties and that

WL 1920970 (D. Minn., Aug. 25, 2004).

⁴⁵ *Id.*

⁴⁶ WAC 480-07-750(1).

⁴⁷ WAC 480-07-740.

the Commission must address the Amended Complaint on its merits. It argues that in resolving this matter, the Commission must make findings of fact and conclusions of law respecting all *material* issues of fact, law and discretion before it in this proceeding, as required by RCW 34.05.461(3). We agree with Time Warner’s assertion, as far as it goes. We point out, however, that the proposed Settlement also contains admissions and statements of position on material factual issues, and the proposal is supported by the testimony of witnesses and exhibits of record. In this Order, we address with specific findings the facts that are material to the decision that we reach.

47 Time Warner has challenged our limitations on its participation in our review of the proposed Settlement. It urges that we improperly restrict its asserted right to a further evidentiary hearing in its effort to block the settlement proposal. We disagree with Time Warner’s fundamental proposition. As we noted in Order No. 20, “[a]gencies have discretion in pursuing enforcement actions and retain that prosecutorial discretion in determining whether settlement is appropriate in enforcement actions.”⁴⁸ Time Warner is an intervenor whose interest in this enforcement proceeding is limited. Intervenors in enforcement actions have the right to have their objections heard, but do not have the right to block a settlement to which they object.⁴⁹

48 We have permitted Time Warner to voice its objections, and have resolved the issues it raised. We have permitted it to make an offer of proof, allowing us to examine the relevance and potential significance of the evidence it wishes to present. We find nothing in its arguments—or in its asserted facts, if true—that would alter the Commission’s judgment in this matter.

⁴⁸ *WUTC v. Advanced Telecom Group, Inc., et al.*, Order No. 20, WUTC Docket No. UT-033011, ¶ 51 (Feb. 9, 2005), citing *United States v. District of Columbia*, 933 F.Supp. 42, 47 (D.C.C. 1996).

⁴⁹ *Id.*

49 We also find that approving the proposed Settlement is consistent with the law at issue in the Amended Complaint. The Amended Complaint asserts that Qwest and 13 CLECs violated the filing obligations of Section 252 of the Act, and that Qwest violated state statutes prohibiting undue preference and rate discrimination between carriers. Qwest has admitted in the proposed Settlement to violations of Section 252 of the Act for failing to file a number of interconnection agreements with the Commission, and does not object to the Commission finding that Qwest acted willfully and intentionally in violating Section 252 and state anti-discrimination laws in certain transactions with Eschelon and McLeodUSA.

50 **2. Are the Terms of the Proposed Settlement Supported by an Appropriate Record?** The record in this proceeding consists of admissions in the settlement agreement, a number of exhibits admitted by stipulation of the parties, including prefiled testimony, responses to data requests, and the transcript of the November 29 hearing. We analyze the key terms of the proposed Settlement below, in view of this record.

51 In Paragraph 4 of the proposed Settlement, Qwest admits to violating Section 252 of the Act by failing to timely file with the Commission 24 Exhibit A Agreements, namely Agreements No. 1A, 2A, 3A, 4A, 5A, 6A, 7A, 8A, 9A, 12A, 16A, 27A, 28A, 29A, 30A, 32A, 33A, 34A, 35A, 36A, 40A, 47A, 48A, and 52A. Mr. Wilson's direct testimony discusses why each of these agreements are interconnection agreements and should have been timely filed with the Commission.⁵⁰ In addition, in settlement agreements entered into by ATG, Covad, ELI, Eschelon, Fairpoint, Global Crossing, McLeodUSA, MCI, and XO, and approved by the Commission, the companies admit that the agreements are interconnection agreements subject to the filing requirements of Section 252.⁵¹ Based on the record in this proceeding, we find that Qwest violated the filing requirements of

⁵⁰ Exh. 1-TC, at 14-75 (Wilson).

⁵¹ See Order Nos. 05, 07, 08, 09, 10, and 12 in Docket No. UT-033011.

Section 252 by failing to timely file the 24 Exhibit A Agreements identified in Paragraph 4 of the proposed Settlement.

52 Paragraph 8 of the proposed Settlement, which requests that the Commission dismiss from the Amended Complaint all Exhibit B agreements and Exhibit A Agreements No. 19A, 21A, 25A, 26A, 44A, and 45A, is analogous to a motion to dismiss supported by Staff, Qwest, and Public Counsel, and opposed by Time Warner. The parties intend that the Commission dismiss these agreements without a specific finding as to whether the Exhibit A agreements are interconnection agreements.⁵² Time Warner asserts that dismissal of Agreements No. 44A and 45A is unreasonable, asserting that the agreements are the most egregious examples of Qwest's behavior.⁵³ Time Warner requests that the Commission make specific findings based on the evidence in the record that Agreements No. 44A and 45A are interconnection agreements.

53 We find the terms of Paragraph 8 reasonable and in the public interest in light of the entirety of the result. Dismissal of the Exhibit B agreements and six Exhibit A agreements is a reasonable action and in the public interest, particularly in light of our Finding of Fact No. 9 and Conclusion of Law No. 9 relating to Qwest's culpability, and the significant penalty we impose. As discussed above, we make findings of fact that are material to the issues that are relevant to our decision, including the proposed settlement, and need not make findings on the merits of every issue raised in the Amended Complaint.

54 As Qwest makes clear in its testimony, this Commission is the first to raise allegations concerning the Exhibit B agreements, rather than focus its efforts solely on Qwest's failure to file interconnection agreements. Given that such allegations have not been tested in other states, dismissing these agreements from the Amended Complaint while imposing a substantial penalty and

⁵² TR. 236:2-12 (Reynolds); TR. 247:6-21 (Blackmon); TR. 249:13-23 (Blackmon).

⁵³ See TR. 308:20-23.

remedial consequences for other violations is reasonable and consistent with the testimony and exhibits of Mr. Shooshan⁵⁴ and Mr. Brotherson.⁵⁵

55 As to the six Exhibit A agreements, we also find the terms of Paragraph 8 to be reasonable and consistent with the testimony and exhibits of Mr. Wilson,⁵⁶ Mr. Shooshan,⁵⁷ Mr. Brotherson,⁵⁸ and Mr. Hydock,⁵⁹ taking into consideration Time Warner's position, as expressed in the testimony of Mr. Gates,⁶⁰ Mr. Gray,⁶¹ and Mr. Smith.⁶² Given that we find in this Order that Qwest acted willfully and intentionally in violating Section 252 and state anti-discrimination laws in its transactions with Eschelon and McLeodUSA, and that the proposed penalty is intended to address these violations and deter future violations, the dismissal of the allegations respecting these agreements is reasonable and supported by the record.

56 In Paragraph 5 of the proposed Settlement, Staff requests that the Commission find "that Qwest willfully and intentionally violated Sec. 252, RCW 80.36.170, RCW 80.36.180, and RCW 80.36.186 by not filing, in a timely manner, its transactions with Eschelon and McLeodUSA relating to rates or discounts off of rates for Section 251(b) and (c) wholesale service." The proposed Settlement refers to transactions identified in testimony and in agreements listed in paragraphs 12 and 13 of Order No. 12 entered in this proceeding. Qwest has agreed not to appeal such a finding by the Commission.

⁵⁴ See Exh. 103-T, at 22-31 (Shooshan), Exhs. 105-107.

⁵⁵ See Exh. 112-TC, at 97-123 (Brotherson), Exhs. 142-146.

⁵⁶ Exh. 1-TC, at 42-46, 53, 115-117, 119 (Wilson); *see also* Exhs. 18, 20, 22, 23, 37, 38, 73, 76-80.

⁵⁷ Exh. 103-T, at 6-21 (Shooshan); *see also* Exhs. 109-110.

⁵⁸ Exh. 112-TC, at 34-35, 79-80, 83-85, 116-118, 121, 132 (Brotherson); *see also* Exhs. 116-117, 123, 133, 134, 135, 137, 139, 141, 143-146, 148.

⁵⁹ Exh. 82, at 2-9 (Hydock).

⁶⁰ Exh. 84-T, at 11:241-248 (Gates).

⁶¹ See Exh. 87-T (Gray), and Exhs. 91-92.

⁶² See Exh. 95-T (Smith), Exhs. 98, Exh. 100.

57 Paragraphs 12 and 13 of Order No. 12 identify a number of agreements entered into by Eschelon and McLeodUSA. Paragraph 12 identifies Eschelon Agreements No. 1A, 2A, 3A, 4A, 5A, 6A, 12A, 19A, and 21A. Paragraph 13 identifies McLeodUSA Agreements No. 8A, 9A, 44A, and 45A. During the November 29 hearing, it became apparent that there was possible inconsistency between Paragraph 8 of the proposed Settlement, which recommends dismissal of Agreements No. 19A, 21A, 44A, and 45A, and Paragraph 5 of the Settlement Agreement, which requests a Commission finding based on transactions identified in testimony and in agreements listed in paragraphs 12 and 13 of Order No. 12. Mr. Reynolds testified that to the extent there is an inconsistency between the two paragraphs of the proposed Settlement, Qwest does not intend to foreclose the Commission from making a finding regarding Paragraph 5.⁶³ Staff appears to assert that Agreements No. 19A, 21A, 44A, and 45A would be included in the scope of the finding of Paragraph 5.⁶⁴

Paragraph 5 doesn't refer to individual agreements individually. It refers to the transactions that are identified and represented by those agreements to some extent taken together that represent – in Staff's view they represent something above and beyond any one individual agreement, a pattern of behavior that constitutes willful and intentional violation.⁶⁵

...

You would be looking at the transactions taken as a whole and not any individual interconnection agreement on its own, but those taken as a whole that are listed in Paragraphs 12 and 13 of Order Number 12.⁶⁶

⁶³ TR. 244:12-21 (Reynolds).

⁶⁴ TR. 247:22-248:11 (Blackmon).

⁶⁵ TR. 249:6-12 (Blackmon).

⁶⁶ TR. 256:11-15 (Blackmon).

58 We find, based on the evidentiary record in the proceeding, that Qwest willfully and intentionally violated Section 252, RCW 80.36.170, RCW 80.36.180, and RCW 80.36.186 by not filing, in a timely manner, its transactions with Eschelon and McLeodUSA relating to rates or discounts off of rates for Section 251(b) and (c) wholesale services. The testimony and exhibits of Mr. Gray and Mr. Smith, certain exhibits to the testimony of Mr. Wilson, and agreements identified in paragraphs 12 and 13 of Order No. 12 in this proceeding, identify Qwest's intent to maintain certain transactions and agreements with Eschelon and McLeodUSA as confidential, to prevent other competitive carriers from becoming aware of the transactions and agreements, and to avoid the filing requirements under Section 252, and requirements prohibiting unfair preferences under state law.⁶⁷

59 In Paragraph 7 of the proposed Settlement, Staff recommends closure of its investigation into potential complaints against Qwest for violations relating to nine interconnection agreements approved by the Commission on September 8, 2004. Similar to our discussion of the dismissal of certain agreements from the Amended Complaint, it is reasonable to resolve in this Order all allegations of violations of Section 252 and state law relating to unfiled or secret, including allegations not identified in the Amended Complaint. We find, therefore, that no further enforcement action is warranted with respect to the agreements approved on September 8, 2004.

60 In Paragraph 6 of the proposed Settlement, the settling parties propose that Qwest pay a penalty of \$7,824,000 to resolve the issues pending against Qwest in the Amended Complaint, and that Qwest undertake certain remedial actions to ensure future compliance. This penalty would be the largest penalty or fine this Commission has ever levied against any regulated company. Time Warner asserts that the penalty is not sufficient, arguing that the penalty fails to address

⁶⁷ See Exh. 87-T (Gray), in particular page 17:7-12, and page 22:1-13; Exhs. 91 and 92; Exh. 95-T (Gray), in particular pages 8:21-9:12, page 10:8-22, page 11:15-20, 14:11-13; Exhs. 98 and 100; see also Exh. 1-TC at 79-127 (Wilson), Exhs. 73, 76 through 80.

the benefit Qwest may have gained from its anti-competitive behavior and the harm to competitors and consumers in the local telecommunication services market.

61 We are faced in this proceeding with considering whether the proposed penalty is appropriate in resolution of the Amended Complaint, given evidence of violations and Qwest's admission of culpability. We find the penalty to be appropriate given Qwest's admission of violations, our finding concerning Qwest's anti-competitive behavior, and considering the evidence and arguments relating to the determination of an appropriate penalty.

62 Time Warner asserts that the penalty should be based on the benefit to Qwest and harm to competitors, applying criteria required by statute for the state of Minnesota. The record does not quantify the benefit to Qwest or harm to competitors or consumers, and thus there is no guidance on this issue. Even if record contained such evidence, there no Washington statute identifying criteria that this Commission is obligated to follow in determining an appropriate penalty. As Mr. Gates, Mr. Brotherson, and Mr. Shooshan note, it is appropriate to consider a number of factors in evaluating whether a penalty is appropriate, including general factors such as deterrence, rehabilitation, and justice, and specific factors such as the extent of harm as a result of Qwest's actions, remedial actions taken by Qwest, and parity with penalties imposed on other carriers.⁶⁸ Based on these considerations, and the unprecedented penalty we impose, we find the penalty amount preeminently appropriate and fully supported by the record.

63 Qwest has agreed to comply with Section 252, state laws and rules, and any future determinations by the FCC or this Commission concerning filing obligations for interconnection agreements. Qwest also commits to filing any future interconnection agreements within 30 days of execution, and existing

unfiled agreements within 45 days of approval of the proposed Settlement. These commitments, together with the other remedial requirements to which Qwest commits in Paragraph 6, are appropriate to ensure future regulatory compliance concerning interconnection agreements. These remedial requirements are consistent with remedial actions Qwest has agreed to undertake in other states, including Arizona and Colorado.⁶⁹ These requirements are intended to ensure Qwest's future compliance with Section 252 and state laws and rules, and any violations will be subject to penalties as violations of this Order, as well as violations of the underlying provisions of law. We find these remedial requirements supported by the record in the proceeding.

64 Based on the analysis above, we find the record supports the terms of the proposed Settlement, including the record evidence and the transcript of the November 29 hearing.

65 **3. Is the Result in the Public Interest?** We find the result of the proposed Settlement to be in the public interest: Qwest admits to violations of Section 252 of the Act by failing to timely file a number of agreements with the Commission, and the Commission finds that Qwest acted in an anticompetitive manner in willfully and intentionally violating state and federal law in its transactions with Eschelon and McLeodUSA. The Commission also imposes an unprecedented penalty upon Qwest in recognition of Qwest's role as a company with significant market power that failed to comply with its responsibilities to treat its competitors in a fair and non-discriminatory manner.⁷⁰ The level of the penalty recognizes the significance of Qwest's anticompetitive and discriminatory actions and serves as a deterrent to other regulated companies not to take the state's anti-discrimination laws lightly.⁷¹

⁶⁸ See Exh. 103-T, at 18:11-21:17 (Shooshan); Exh. 112-TC, at 132:18-141:7 (Brotherson).

⁶⁹ TR. 229:10-231:10 (Reynolds); *see also* Exh. 84 at 11:234-240 (Gates).

⁷⁰ See TR. 227:21-228:3 (Blackmon).

⁷¹ TR. 228:3-7 (Blackmon).

66 The proposed Settlement fully and fairly resolves issues that first arose three years ago in the context of the Commission's evaluation of Qwest's compliance with Section 271 of the Act, and addresses Qwest's actions dating back to 1999. The proposed Settlement also allows the settling parties an efficient way to effect future compliance and for Qwest to acknowledge its obligations under Section 252 and state law through specific terms and appropriate penalties.

67 Based on the record in this proceeding, we find that the remaining issues in the Amended Complaint are adequately addressed and resolved by the terms of the proposed Settlement and evidence offered to the record. Under these circumstances, we are satisfied that the proposed Settlement is lawful, appropriate, and consistent with the public interest. We approve and adopt the proposed Settlement as our full and final resolution of all remaining issues pending in Docket No. UT-033011, and close the docket.

FINDINGS OF FACT

68 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.

69 (1) Qwest Corporation is a regional 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.

- 70 (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.
- 71 (3) Eschelon Telecom of Washington, Inc., McLeodUSA Telecommunications Services, Inc., and Time Warner Telecom of Washington, LLC are local exchange carriers (CLECs) 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 are classified as a competitive telecommunications companies under RCW 80.36.310 - .330.
- 72 (4) The Commission filed a Complaint and Amended Complaint in this proceeding in August 2003 against Qwest and 13 CLECs, alleging that the carriers failed to file, or timely file, with the Commission 52 agreements identified in Exhibit A to the Amended Complaint and that with respect to an additional 25 agreements identified in Exhibit B to the Amended Complaint, Qwest violated federal and state law by failing to make terms and conditions available to other carriers, providing unreasonable preferences, and engaging in rate discrimination.
- 73 (5) Staff has initiated an investigation concerning a possible complaint against Qwest for violations of law relating to nine interconnection agreements approved by the Commission on September 8, 2004.
- 74 (6) 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. The proposed Settlement contains the following key terms:

- An admission by Qwest of violations of Section 252 of the Act by failing to file 24 Exhibit A agreements with the Commission;
- Dismissal of the Complaint and Amended Complaint with respect to all Exhibit B agreements and Exhibit A agreements No. 19A, 21A, 25A, 26A, 44A, and 45A;
- A Commission finding that “Qwest willfully and intentionally violated Sec. 252, RCW 80.36.170, RCW 80.36.180, and RCW 80.36.186 by not filing, in a timely manner, its transactions with Eschelon and McLeod USA relating to rates or discounts off of rates for intrastate wholesale services,” based upon evidence of Qwest’s transactions with Eschelon and McLeodUSA identified in testimony and in agreements listed in paragraphs 12 and 13 of Order No. 12, which finding Qwest agrees not to appeal;
- Closure of an informal investigation into a potential complaint against Qwest concerning the failure to timely file nine interconnection agreements that the Commission approved on September 8, 2004; and
- Imposition of a \$7,824,000 penalty against Qwest, and requirements that Qwest take certain remedial actions to ensure future compliance.

75 (7) The parties stipulated to admission of all prefiled testimony and exhibits, as well as Qwest’s responses to Time Warner’s data requests addressing the proposed Settlement, except to the extent they were stricken from the record in Order No. 15 in this proceeding.

76 (8) Mr. Wilson’s direct testimony identifies that Exhibit A Agreements No. 1A, 2A, 3A, 4A, 5A, 6A, 7A, 8A, 9A, 12A, 16A, 27A, 28A, 29A, 30A, 32A, 33A, 34A, 35A, 36A, 40A, 47A, 48A, and 52A are interconnection agreements and should have been timely filed with the Commission. Mr. Wilson’s testimony is corroborated by admissions by ATG, Covad, ELI, Eschelon, Fairpoint, Global Crossing, McLeodUSA, MCI, and XO, in settlement agreements approved by the Commission.

- 77 (9) Qwest violated the filing requirements of Section 252 by failing to timely file the 24 Exhibit A Agreements identified in Paragraph 4 of the proposed Settlement.
- 78 (10) The testimony and exhibits of Mr. Gray and Mr. Smith, certain exhibits to the testimony of Mr. Wilson, and the agreements identified in paragraphs 12 and 13 of Order No. 12 in this proceeding, identify Qwest's intent to maintain certain transactions and agreements with Eschelon and McLeodUSA as confidential, to prevent other competitive carriers from becoming aware of the transactions and agreements, and to avoid the requirements under Section 252, and requirements prohibiting unfair preferences under state law.
- 79 (11) Paragraph 8 of the proposed Settlement recommends that the Commission resolve the issues in the Amended Complaint concerning the Exhibit B agreements, as well as Eschelon Agreements No. 19A and 21A, Integra Agreement No. 25A, AT&T Agreement No. 26A, and McLeodUSA Agreements No. 44A and 45A, by dismissing them from the Amended Complaint.
- 80 (12) This Commission is the first state commission to raise allegations against Qwest concerning the Exhibit B agreements. Dismissal of the agreements from the Amended Complaint is consistent with the testimony and exhibits of Mr. Shooshan and Mr. Brotherson.
- 81 (13) Dismissal of Exhibit A Agreements No. 19A, 21A, 25A, 26A, 44A, and 45A, from the Amended Complaint is consistent with the testimony and exhibits of Mr. Wilson, Mr. Shooshan, Mr. Brotherson, and Mr. Hydock, taking into consideration Time Warner's position, as expressed in the testimony of Mr. Gates, Mr. Gray and Mr. Smith.

- 82 (14) The penalty we impose in this proceeding is the largest penalty or fine this Commission has ever levied against any regulated company.
- 83 (15) The record in this proceeding does not quantify the benefit to Qwest or harm to competitors or consumers resulting from Qwest's actions or violations of law.
- 84 (16) There is no Washington statute that identifies criteria this Commission is obligated to follow in determining an appropriate penalty.
- 85 (17) The testimony of Mr. Gates, Mr. Brotherson and Mr. Shooshan identify a number of factors the Commission may evaluate in considering whether a penalty is appropriate, including general factors such as deterrence, rehabilitation, and justice, and specific factors such as the extent of harm as a result of Qwest's actions, remedial actions taken by Qwest, and parity with penalties imposed on other carriers.
- 86 (18) The remedial requirements identified in Paragraph 6 of the proposed Settlement are consistent with remedial actions Qwest has agreed to implement in other states, including Arizona and Colorado.

CONCLUSIONS OF LAW

87 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.

- 88 (1) The Commission has jurisdiction over the subject matter of this proceeding and the parties to the proceeding.
- 89 (2) The Commission “must determine whether a proposed settlement meets all pertinent legal and policy standards,” and may “approve settlements when doing so is lawful, the settlement terms are supported by an appropriate record, and when the result is consistent with the public interest in light of all the information available to the commission.” *See WAC 480-07-740; WAC 480-07-750(1).*
- 90 (3) The Commission must make findings of fact and conclusions of law necessary to resolve the relevant and material issues in this proceeding, including the proposed settlement, and need not make findings on the merits of every issue raised in the Amended Complaint. *See RCW 34.05.461(3).*
- 91 (4) 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, 47 (D.D.C. 1996).*
- 92 (5) Intervenors in enforcement actions have the right to have their objections heard, but do not have the right to block a settlement to which they object. *See United States v. District of Columbia, 933 F.Supp. 42, 47 (D.D.C. 1996).*
- 93 (6) Approving the proposed Settlement is consistent with the law at issue in the Amended Complaint, *i.e.*, Section 252 of the Act, RCW 80.36.170, RCW 80.36.180, and RCW 80.36.186, as Qwest has admitted to violations of Section 252 of the Act for failing to file a number of interconnection agreements with the Commission, and the Commission finds that Qwest acted willfully and intentionally in violating Section 252 and state anti-

discrimination laws in certain transactions with Eschelon and McLeodUSA.

- 94 (7) Qwest's admission of violations of Section 252 with respect to 24 Exhibit A Agreements is supported by the testimony and exhibits of Mr. Wilson, as well as settlement agreements entered into by ATG, Covad, ELI, Eschelon, Fairpoint, Global Crossing, McLeodUSA, MCI, and XO, and approved by the Commission.
- 95 (8) Dismissal of the Exhibit B agreements and six Exhibit A agreements in Paragraph 8 is a reasonable result in light of the significant penalty imposed for violations, Qwest's acquiescence in our finding that Qwest acted willfully and intentionally in violating state and federal law in its transactions with Eschelon and McLeodUSA, and consideration of the record in this proceeding.
- 96 (9) Qwest willfully and intentionally violated Section 252, RCW 80.36.170, RCW 80.36.180, and RCW 80.36.186 by not filing, in a timely manner, its transactions with Eschelon and McLeodUSA relating to rates or discounts off of rates for Section 251(b) and (c) wholesale services.
- 97 (10) It is appropriate for the Commission to resolve in this Order all allegations of violations of Section 252 and state anti-discrimination laws relating to unfiled or secret agreements, including allegations not identified in the Amended Complaint. As we approve and adopt the proposed Settlement in this Order, no further enforcement action is warranted with respect to the interconnection agreements approved by the Commission on September 8, 2004.

- 98 (11) The proposed penalty amount is reasonable and appropriate, considering that the proposed penalty is the largest this Commission has ever imposed on a regulated company, as well as the deterrent effect of the penalty, Qwest's commitment to ensuring future compliance, the lack of evidence in the record as to the extent of harm as a result of Qwest's actions, and parity with penalties imposed on other carriers in this proceeding.
- 99 (12) The requirement in this Order that Qwest comply with Section 252, state laws and rules, and any future determinations by the FCC or this Commission concerning filing obligations for interconnection agreements, together with the remedial requirements to which Qwest commits in Paragraphs 6, 11, and 12 of the proposed Settlement, will provide independent means of enforcement and provide additional assurance to CLECs and the public of Qwest's compliance with regulatory requirements.
- 100 (13) Adopting the proposed Settlement is in the public interest given Qwest's admission of violations of Section 252 of the Act, our finding that Qwest acted willfully and intentionally in violating state and federal law in its transactions with Eschelon and McLeodUSA, and the unprecedented penalty we impose on Qwest that recognizes the significance of Qwest's anticompetitive and discriminatory actions and serves as a deterrent to it and other regulated companies from violating the state's anti-discrimination laws.

ORDER

THE COMMISSION ORDERS:

- 101 (1) The November 9, 2004, proposed Settlement between Commission Staff, Public Counsel and Qwest Communications is approved and adopted as

the Commission's own complete resolution of the issues pending against Qwest Corporation in the Complaint and Amended Complaint in this proceeding.

- 102 (2) The Agreements identified in Exhibit B to the Amended Complaint and Agreements No. 19A, 21A, 25A, 26A, 44A, and 45A identified in Exhibit A to the Amended Complaint are dismissed.
- 103 (3) Within 15 days after the time has elapsed for filing an appeal of this Order under state law, Qwest Corporation must pay a penalty of \$7,824,000 to the Commission, payable to the Public Service Revolving Fund. If this order is timely appealed, Qwest must pay the penalty amount into the Public Service Revolving Fund within 15 days after a final, non-appealable order affirming this Order.
- 104 (4) Qwest must comply with the following requirements, set forth in Paragraphs 6, 11, 12, and 13 of the proposed Settlement:
- Qwest must pay for an independent, third party monitor to be approved by Staff to conduct an annual review of Qwest's Wholesale Agreement Review Committee for a period of three years;
 - Qwest must continue for three years its internal web-based Compliance Training Program addressing compliance with Section 252(e);
 - Qwest must comply with Section 252 of the Act, RCW 80.36.170, RCW 80.36.180, and RCW 80.36.186;
 - Qwest must file any future interconnection agreements with the Commission within 30 days of execution of the agreement;
 - Qwest must file with the Commission any existing agreements not yet filed within 45 days of the service date of this Order; and

- Qwest must comply with the FCC's October 4, 2002, Declaratory Ruling, as well as any orders entered by the FCC or this Commission defining the scope of the filing requirement under Section 252 of the Act.

105 (5) The Commission retains jurisdiction to ensure continued compliance with this Order.

Dated at Olympia, Washington, and effective this 28th day of February, 2005.

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

RICHARD HEMSTAD, Commissioner

PATRICK J. OSHIE, Commissioner

NOTICE TO PARTIES: This is a final order of the Commission. In addition to judicial review, administrative relief may be available through a petition for reconsideration, filed within 10 days of the service of this order pursuant to RCW 34.05.470 and WAC 480-07-850, or a petition for rehearing pursuant to RCW 80.04.200 or RCW 81.04.200 and WAC 480-07-870.