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IDAHO PUBLIC
UTILITIES COMMISSION

November 21, 2006

VIA HAND DELIVERY

Jean D. Jewell, Secretary
Idaho Public Utilities Commission
472 West Washington
Boise, ID 83702-5983

RE: Docket No. QWE-T-06-17

Dear Ms. Jewell:

Enclosed for filing with this Commission are an original and seven (7) copies of **Qwest Corporation's Reply in Support of Motion to Dismiss**. If you have any questions, please contact me. Thank you for your cooperation in this matter.

Very truly yours,



Mary S. Hobson

Enclosures

cc: Service List

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BEFORE THE IDAHO PUBLIC UTILITIES COMMISSION

<p>AT&T COMMUNICATIONS OF THE MOUNTAIN STATES, INC.,</p> <p>Complainant,</p> <p>v.</p> <p>QWEST CORPORATION,</p> <p>Respondent.</p>	<p>Case No. QWE-T-06-17</p> <p>QWEST CORPORATION'S REPLY IN SUPPORT OF MOTION TO DISMISS</p>
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INTRODUCTION

Nothing in AT&T Communications of the Mountain States, Inc.'s ("AT&T") Opposition to Qwest Corporation's ("Qwest") Motion to Dismiss saves these claims from dismissal under the two-year limitations period contained in the Telecommunications Act of 1996 (the "Federal Act"). For the reasons set forth in Qwest's opening Memorandum and below, the Commission

**QWEST CORPORATION'S REPLY MEMORANDUM
IN SUPPORT OF MOTION TO DISMISS
Case No. QWE-T-06-17 -- Page 1 of 16**

should dismiss AT&T's Complaint with prejudice.

REPLY ARGUMENT

AT&T's complaint relates to two interconnection agreements that, as the FCC has found, terminated in 2002.¹ Qwest terminated the agreements to eliminate disputes and bring itself into compliance with AT&T's then-expressed interpretation of Federal Act Section 252. Qwest has been in compliance ever since. Under federal law, terminated interconnection agreements need not be on file with state utility commissions under Sections 252(a)(1) and (e), nor must the voided terms be made available to third parties like AT&T under Section 252(i). Thus, for over four years Qwest has had no further obligations related to these terminated agreements.

To the extent AT&T believed it was harmed based on these past events, it could have filed a complaint against Qwest with this Commission long ago. Indeed, in 2002 the FCC expressly contemplated that AT&T might do so in an order addressing this very matter.² However, AT&T let the matter go, and the express two-year statute of limitations under Section 415 of the Federal Act expired in 2004. *See* 47 U.S.C. § 415.

Having sat on its federal rights for over four years, AT&T now tries to escape Section 415 by alleging in its Opposition that it is "only" asserting claims under state law. However, this is artful pleading at its best. The Federal Act expressly establishes the scope of AT&T's rights

¹ *See Application by Qwest Communications International Inc for Authorization to Provide In-Region, InterLATA Services in the States of Colorado, Idaho, Montana, Nebraska, North Dakota, Utah, Washington and Wyoming*, 17 FCC Rcd 26,303, at ¶ 491 (2002) ("FCC Section 271 Order") (rejecting arguments of AT&T and finding that it could grant Qwest's then pending application to provide long distance service in Idaho and other states because Qwest had "demonstrated that the agreements mentioned by the parties [including the two at issue here] either were filed, expired, terminated, superseded" or otherwise did not present ongoing issues, and Qwest's response to AT&T was "persuasive.")

² *See id.* at ¶ 466 (noting that if parties such as AT&T believed that issues relating to these agreements remained, including issues related to the prior period before the agreements were terminated or filed, they could enforce their rights under the Federal Act through a complaint filed with the FCC itself or a state utility commission such as this one).

here. The *operative facts* relate back to two long-ago terminated interconnection agreements formed pursuant to the requirements of Section 252 of the Act. The relevant legal issues also arise under the Federal Act: *First*, what rights does the Act give a third party – such as AT&T – to know of the terms in another carrier’s interconnection agreement (a matter addressed by Sections 252(a) and (e) and related FCC orders). *Second*, when and under what circumstances is that third party eligible to request the same terms (a matter addressed by Section 252(i) and related FCC rules). *Third*, and most relevant here, federal law also establishes the deadline by which a party may assert a claim based on these matters.

The Federal Act and Ninth Circuit precedent compel the same conclusion that the Oregon Public Utility Commission (“Oregon Commission”) already reached in August – that AT&T’s claims are time-barred by Section 415 of the Federal Act. AT&T incorrectly argues that this Commission should not apply collateral estoppel principles. But whether the Commission examines these questions anew or applies collateral estoppel, the result is the same – AT&T’s claims must be dismissed.

I. Notwithstanding AT&T’s Arguments, Section 252 of the Federal Act Governs the Duties and Rights of the Parties Here

The narrow question before the Commission is whether AT&T’s claims are, as the Oregon Commission held, “actions based on [federal law] masquerading as state law claims” that trigger the two-year federal statute of limitations.³ The answer is clearly yes: AT&T repeatedly

³ Oregon Public Utility Commission, Order No. 06-465, Order Denying Petition for Reconsideration, at 3 (August 16, 2006) (“OPUC Reconsideration Order”), *aff’g on recon.* Oregon Public Utility Commission, Order No. 06-230, Order Granting Motion to Dismiss, *AT&T Communications of the Northwest, Inc., et al. v. Qwest Corporation*, Docket No. UM-1232, at 6 (May 11, 2006) (“OPUC Complaint Order”).

has acknowledged that the facts underlying these claims relate directly to rights and duties created by Section 252 of the Federal Act. AT&T has argued numerous times, in many forums, that Qwest violated Section 252(a)(1) and (e) of the Act when it failed to file interconnection agreements with McLeod and Eschelon. AT&T then has argued that it was denied the benefit of requesting terms in those agreements. This “opt-in” right, AT&T has argued, arises under Section 252(i). AT&T made these arguments before the FCC and in various proceedings before other state commissions.⁴

Notwithstanding its current pleading strategy, AT&T was right the first time. AT&T’s claims stem from alleged violations of specific (and bounded) duties imposed on Qwest by the Federal Act to file and provide carriers such as AT&T the opportunity to opt into the Qwest/Eschelon and Qwest/McLeod agreements, not the Qwest/AT&T interconnection agreement or state law. Indeed to support its Opposition AT&T must run away from its own Complaint. There, AT&T alleged that “Qwest breached its contracts with AT&T by failing to act in good faith, by failing to act consistently with the intent of *the 1996 Act*, by hiding the secret agreements from AT&T, by intentionally failing to comply with the filing requirements of *federal* and state law, and by intentionally preventing AT&T from exercising its rights to avail itself of the discounted rates in the secret agreements,”⁵ which describes rights established by Section 252(i).

Similarly, even if Qwest had a duty to apprise AT&T and TCG of the existence of the secret agreements and not discriminate in providing services under them, those duties arose, if at

⁴ See e.g., Motion to Dismiss at 3-5.

⁵ See Complaint at ¶ 4 (emphasis added).

all, under Section 252.⁶ It follows that the Commission can decide this motion, and dismiss this case, without interpreting a single term in the Qwest/AT&T interconnection agreement. AT&T's rights with respect to its competitors' agreements (Qwest/Eschelon and Qwest/McLeod), and Qwest's duties as to those agreements, are established by federal law outside the Qwest/AT&T agreement itself.

AT&T attempts to evade Section 415 by arguing that this case involves a dispute over the interpretation or enforcement of an interconnection agreement. AT&T then tries to assert that all such matters are governed only by state law. But that is simply not the law; both federal and state law have a role in interconnection agreements. Here, the Commission need only decide whether AT&T's specific claims are "actions based on [federal law] masquerading as state law claims" that trigger the two-year federal statute of limitations.⁷ And they are.

The cases cited by AT&T are entirely consistent with a conclusion that AT&T's claims arise under the Federal Act. None of them find that interconnection agreement terms trump federal law. Those decisions stand only for the principle that, where federal law has not spoken, state law governs the interpretation of an interconnection agreement provision. For example, AT&T attempts to rely on several cases involving the complex question of whether reciprocal compensation may apply to ISP-bound traffic in the context of provisions in various

⁶ "[S]ection 252(i) mandates that the availability of publicly-filed agreements be limited to carriers willing to accept the same terms and conditions as the carrier who negotiated the original agreement with the incumbent LEC." See *First Report and Order*, 11 FCC Rcd 16139, 16140. See also *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 396 (1999) (upholding the FCC's interpretation of § 252(i)). If AT&T had no right to cherry-pick the alleged terms of the McLeod and Eschelon agreements here, then Qwest complied with federal law – and, therefore, could not have discriminated against AT&T under state law. To decide otherwise would place state and federal law in irreconcilable conflict – and, under AT&T's theory, would preempt federal law with state law (and stand the Supremacy Clause on its head). See U.S. Const. art. VI, cl.2. ("the laws of the United States "shall be the supreme Law of the Land; . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.").

⁷ OPUC Reconsideration Order at 3; OPUC Complaint Order at 6.

interconnection agreements. But in each case, before reaching that question, the court first reviewed federal law and the decisions of the FCC to determine whether (or not) this issue was one that had been left to be determined under state law.⁸

AT&T conveniently overlooks the Ninth Circuit's emphasis on a state agency's "weighty responsibilities of contract interpretation under § 252" when (mis)characterizing the Ninth Circuit's "holding" that state law applies. See *Pac. Bell v. Pac-West Telecomm, Inc.*, 325 F.3d 1114, 1128 (9th Cir. 2003). That court also held that any rules or directives of the FCC would trump any inconsistent interpretation of an interconnection agreement by a state commission.⁹ Again, AT&T has tried to evade this principle by ignoring federal law.¹⁰

Here, federal law resolves the issues conclusively. The Ninth Circuit has held that a state agency's authority to interpret or enforce an interconnection agreement derives from Section 252.¹¹ And, as the Supreme Court put it, "there is no doubt ... that if the federal courts believe a state commission is not regulating in accordance with federal policy they may bring it to heel."¹² This Commission similarly should bring AT&T to heel, and not allow the company to avoid federal law simply by pretending that it does not exist.

⁸ See, e.g., *Southwestern Bell Tel. Co. v. Public Utility Comm'n of Texas*, 208 F.3d 475, 485-86 (5th Cir. 2000) ("FCC expressly ruled that 'parties may voluntarily include [ISP-bound traffic within the scope of their interconnection agreements under sections 251 and 252]"; *Southwestern Bell Tel. Co. v. Brooks Fiber Comms of Oklahoma, Inc.*, 235 F.3d 493, 499-500 (10th Cir. 2000).

⁹ *Pacific Bell v. Pac-West Telecomm Inc.*, 325 F.3d 1114, 1130 (9th Cir. 2003).

¹⁰ In doing so, AT&T attempted to sidestep Section 252(e)(6), which provides that review of state commission enforcement actions must be brought in federal, not state, court. 47 U.S.C. §252(e)(6).

¹¹ *Pac. Bell*, 325 F.3d at 1126 ("It is clear from the structure of the Act, however, that the authority granted to state regulatory commissions is confined to the role described in § 252-that of arbitrating, approving, and enforcing interconnection agreements.").

¹² *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 379 n. 6 (1999); see also *Southwestern Bell Tel. Co. v. Brooks Fiber Communications of Oklahoma, Inc.*, 235 F.3d 493, 499 (10th Cir. 2000) (holding that the Oklahoma commission "ha[d] an obligation to interpret the Agreement within the bounds of existing federal law").

Notwithstanding this Ninth Circuit authority, AT&T tries to buoy its argument by asserting that the Commission's jurisdiction to interpret and enforce interconnection agreements derives from state and not federal law, claiming that a contrary finding would violate the Tenth Amendment.¹³ But the very cases and state statute relied on by AT&T sink the argument. Although Congress cannot "commandeer" state regulatory agencies with legislation forcing them to regulate on behalf of Congress,¹⁴ "these limitations on congressional power do not prohibit Congress from obtaining a state's voluntary consent to federal jurisdiction."¹⁵ The Seventh Circuit specifically found that, with the 1996 Telecommunications Act, "the regulation of interconnection agreements. . . are no longer, in the terms employed by the Supreme Court in *College Savings*, "otherwise permissible activit[ies]" for the states."¹⁶ Unlike the classic example where states receive federal funds, "[h]ere, the gratuity is *federal regulatory power*."¹⁷ "[T]he states are not merely acting in an area regulated by Congress; they are now voluntarily regulating on behalf of Congress."¹⁸ Specifically, "the state commissions have conducted arbitrations for interconnection agreements, have approved and enforced those agreements, and have acted on an SGAT *under a federal grant of power*. Their authority to act was derived from provisions of the Act and *not from their own sovereign authority*."¹⁹ The Seventh Circuit could not more emphatically reject AT&T's argument.

¹³ See AT&T Opposition at 6.

¹⁴ *New York v. United States*, 505 U.S. 144, 168 (1992),

¹⁵ *MCI Telecommc'ns Corp. v. Ill. Bell Tel. Co.*, 222 F.3d 323, 343-44 (7th Cir. 2000).

¹⁶ *Id.*

¹⁷ *Id.* (emphasis added).

¹⁸ *Id.*

¹⁹ *Id.*

Moreover, the Seventh Circuit stated just as clearly that it was the decision of each state to authorize state commissions to exercise federal power. Section 62-615(1) makes it abundantly evident that Idaho has authorized the Commission to exercise that federal power: “The commission shall have full power and authority to implement the federal telecommunications act of 1996” and “may promulgate rules and/or procedures necessary to carry out the duties authorized or required by the federal telecommunications act of 1996.” There is nothing “logical” about AT&T’s contrary contentions, especially given that Section 252 specifically authorizes federal court review of agency determinations involving interconnection agreements, and consequently the Commission can similarly reject them outright.

AT&T next tries to support its artful pleading by claiming that “if two carriers agree in their contract to abide by federal law,” that agreement term is subject to state law, and a longer state law limitations period attaches.²⁰ This is nothing more than rhetorical bootstrapping. That an interconnection agreement may reference federal law is hardly surprising for such an inherently federally-based and -regulated document. But under AT&T’s novel theory, a party almost always could plead a state law claim for breach of contract, or tort, related to an interconnection agreement and, in the process, evade Section 415 or other specific limitations of federal law intended to support a consistent national telecommunications policy.

AT&T also defends its Complaint by misstating Qwest’s position. AT&T suggests that Qwest is arguing that “the mere fact that a contract exists because of, or growing out of, a federal statutory scheme . . . transform[s] a claim for enforcement of a contract into a question of federal

²⁰

AT&T Opposition at 10.

law.”²¹ This is a “strawman” argument; Qwest makes no such assertion. Admittedly, courts and commissions should be particularly careful to respect the unique structure for interconnection agreements established in the Federal Act. But the issue here is not simply that this case involves an interconnection agreement. Rather, the issue is that Section 252 – expressly by its terms – addresses the operative facts and legal questions underlying AT&T’s complaint: whether AT&T has waived any rights it might have had with respect to these stale interconnection agreements by not pursuing them within the time allowed by federal law.²² Under Section 252(a) and (e), Qwest has had no obligation to file terminated interconnection agreements, or to make terminated provisions available to anyone; any such obligations ended when the interconnection agreements ended in 2002. No state law is necessary to “interpret” an interconnection agreement – federal law conclusively resolves the relevance of the old agreements. As discussed in the motion, Section 415 controls regardless of the forum, and this uniform period is consistent with Congress’ intent to provide national uniformity in the Act’s

²¹ *Id.* at 8

²² *Empire Healthchoice Assurance, Inc. v. McVeigh*, 126 S. Ct. 2121 (2006), involved construction of the Federal Employees Health Benefits Act (“FEHBA”) and is inapposite in two ways. First, unlike here, the contract at issue was an ordinary health insurance contract. Second, FEHBA’s jurisdictional provision, 5 U.S.C. § 8912, extended federal jurisdiction to civil actions only against the United States and that Congress had “considered jurisdictional issues in enacting FEHBA [,] . . . confer[ring] jurisdiction where it found it necessary to do so.” *See McVeigh*, 126 S. Ct. at 2126-27, and 2133-34. This is not a situation where federal law is merely “referenced” in a contract. Rather, federal law provides both the backbone requirement for interconnection agreements, and specific rules governing the operative facts here to establish the parties’ obligations and rights – including both their scope, and the period when such rights and obligations expire.

application.²³

II. AT&T's Attempts to Avoid Estoppel Fail.

The Commission can readily dismiss this Complaint based on its own review of federal law. But Qwest also demonstrated in its Motion why the Commission should give preclusive effect to the Oregon Commission holding that AT&T's "*claims squarely fall under federal law and the kinds of harms contemplated by the federal telecommunications framework,*" and so may not be made separately under state law.²⁴

AT&T raises several unavailing arguments as to why it should not be bound by the Oregon Commission's holding that these nominally state law claims are subject to the federal statute of limitations. *First*, AT&T argues that according preclusive effect to the Oregon decisions would be inconsistent with the 1996 Act's Interconnection Agreement scheme.²⁵ According to AT&T, that "scheme" allows states to "implement their own policy choices so long

²³ See Qwest Motion to Dismiss at 11-12. Congress amended Section 415 in 1974 but reaffirmed that one of the goals behind the provision was to ensure equality of treatment. See *In re Tele-Valuations, Inc.*, 73 F.C.C.2d 450, at ¶ 6(1979) (quoting legislative history). Congress legislates against the background of preexisting legislation and nowhere in the 1996 Act, which amended the 1934 Act and which together make up Title 47, did Congress express its desire to abrogate that limitations period. AT&T attempts to distinguish between the two sections, see AT&T Opposition at n. 5, insinuating that Section 415 applies only to provisions of the 1934 Act. The argument would torture basic principles of statutory interpretation by failing to read the Act as a whole and would repeal a preexisting provision by implication, without any statutory justification.

²⁴ *Oregon Complaint Order* at 6 (emphasis added). AT&T has separately filed a complaint in state court in Oregon raising issues related to these same interconnection agreements. *AT&T Commc'ns of the Pac. Nw. v. Qwest Corp., Multnomah County Circuit Court*, Case No. 0607-07247. In lieu of granting Qwest's motion to dismiss, at a hearing on October 27, 2006, the court directed AT&T to strike the references to "interconnection agreements" in the complaint, and allowed AT&T an opportunity to amend its complaint to address solely intrastate access services after AT&T expressly abandoned any reliance on federal law. Qwest will evaluate whether to refile its motion after reviewing any amended complaint AT&T may file.

²⁵ AT&T Opposition at 13-15.

as those choices do not impinge on federal prerogatives.”²⁶

Qwest fully agrees that the 1996 Act governs this matter and that states cannot create rights and remedies where the Act and the FCC already have spoken. Ninth Circuit and Supreme Court precedents agree. As the Supreme Court explained in *Iowa Utilities* in rejecting an analogous argument in favor of traditional state police powers, “a federal program administered by 50 independent state agencies is surpassing strange.” Rather than embrace AT&T’s position, the Supreme Court clearly rejected it: “This is, at bottom, a debate not about whether the States will be allowed to do their own thing, but about whether it will be the FCC or the federal courts that draw the lines to which they must hew.”²⁷ AT&T blatantly disregards the clear emphasis on federal law in these opinions and the outright rejection of AT&T’s argument.

Again, this is not a case where federal law is silent, leaving room for state law in the “interpretation” of a particular provision of an interconnection agreement. Rather, federal law establishes and specifies the fundamental rights and duties as to (1) when an agreement with one party must be on file with a utility commission so that third party competitors like AT&T may see it (Section 252(a)); and (2) when a third party like AT&T has a right to opt-in to the terms in such an ongoing agreement to get the same terms (Section 252(i)). Under federal law, those rights and duties expired when the agreements were terminated in 2002.

And that, as the Oregon Commission found, is exactly why these nominal state law claims are barred by the two-year statute of limitations in Section 415 of the Federal Act. AT&T

²⁶ *Id.* at 15. AT&T also suggests that the parties were free to negotiate without regard to the requirements of federal law. See AT&T Opposition at 10. AT&T fails however to acknowledge that the specific obligations to which it is referring were not “freely negotiated” and are expressly mandated by federal law. See 47 U.S.C. 251(c)(2) & (3) (imposing duties to provide interconnection and unbundled access “on rates, terms, and conditions that are just, reasonable, and nondiscriminatory”).

²⁷ *Iowa Utils. Bd.*, 525 U.S. at 378 n. 6.

chose its forum and litigated the purely legal question of whether its nominal state law claims are barred by Section 415. That is the same issue it now presents anew to this Commission. Yet this legal question deserves a uniform answer across the country – the very reason why Section 415 governs regardless of the forum. The Federal Act establishes a nationwide system of interconnection agreements, with national rules for filing agreements under Section 252(a) and (e), and for third parties to opt into such agreements under Section 252(i). A uniform statute of limitations is one stick in the bundle of rights established by the Act in this area through application of Section 415.

Furthermore, Supreme Court precedent precludes the “state-by-state allocation of authority” AT&T posits when the same parties litigate questions of federal law involving the same facts before multiple bodies. Unlike in *Global Naps v. Massachusetts Department of Telecommunications and Energy*, this Commission is not presented with a question of what state law requires, but one of what federal law demands.²⁸ The Oregon Commission found that AT&T’s claims were based on the allegation that “Qwest violated section 252(i), thereby depriving them of the opportunity to opt into more favorable contracts. Because federal law already covers the operative facts here, “the breach of contract claims may not be made separately from the violations of federal law.”²⁹

²⁸ See 427 F.3d 34, 48 (1st Cir. 2005).

²⁹ *Oregon PUC Order* at 6. (emphasis added). AT&T has separately filed a complaint in state court in Oregon raising issues related to these same interconnection agreements. *AT&T Commc’ns of the Pac. Nw. v. Qwest Corp., Multnomah County Circuit Court*, Case No. 0607-07247. Faced with the Oregon Commission decision and Qwest’s motion to dismiss, AT&T recanted its federal law allegations in state court and asserted that it was seeking recovery only for intrastate access charges. The Oregon Court then granted Qwest’s motion to strike any and all allegations relating to federal law. While the Court also denied Qwest’s motion to dismiss, it did so recognizing that Qwest could renew that motion after AT&T replied its now substantially different claims. Here, AT&T’s complaint makes no distinction between interstate and intrastate services and has not purported to similarly limit the scope of its complaint here.

Second, AT&T argues that it would be “unfair” to apply its loss in Oregon to this case because, in AT&T’s view, the Oregon Commission reached the wrong result.³⁰ There is no need to respond to this assertion, which simply cross-references AT&T’s earlier arguments on the merits, arguments that Qwest already has addressed. AT&T has presented no serious argument as to why it should be allowed to reargue the holdings of the Oregon Commission once more here. But if the Commission is not prepared to give the Commission’s orders preclusive effect, it at least should treat them as strong precedent and reach the same result, a result mandated by the Federal Act and the Supremacy Clause of the Constitution.

Qwest also must respond to AT&T’s inaccurate discussion of an interlocutory order of the WUTC, which AT&T misleadingly characterizes as creating “inconsistent decisions.”³¹ This argument is unfair to the WUTC, which in fact has not yet addressed the merits of this issue at all. In the WUTC proceeding, AT&T was appealing from an Administrative Law Judge’s decision dismissing a complaint related to the same two agreements here. But in its Washington complaint, AT&T had not asserted a breach of contract claim; instead, it attempted to claim reparations for overcharges under a specific Washington state statute. AT&T had argued that a two-year statute of limitations applied to these statutory reparations claims, a position the ALJ rejected firmly in favor of a six-month limitation period.³²

AT&T sought interlocutory review of that ruling, making only a passing reference in a footnote that “[i]f the Commission were to determine that the statutory causes of action are time

³⁰ *Id.* at 22.

³¹ Opposition at 18-21.

³² See *AT&T Communications of the Pacific Northwest, Inc. v. Qwest Corporation*, Docket No. UT-051682, Interlocutory Order Reversing Initial Order; Denying Motion for Summary Determination or Dismissal, at 4-5. Attachment 1 to AT&T’s Opposition [hereinafter “WUTC Order”].

barred – which they are not – AT&T and TWTC request leave to amend their Complaint to state a cause of action for breach of contract”³³ (which AT&T claimed would be governed by a six-year statute of limitations under state law). AT&T provided no legal authority to support its contention that it could bring a state contract claim on these facts, and indeed, expressly admitted in the footnote that it “did not include a breach of contract cause of action in [the] Complaint.”³⁴

As presented, then, neither Qwest nor AT&T had reason in Washington to address the potential applicability of the federal statute of limitations in Section 415 until and unless AT&T later were to try to amend its complaint. Although Qwest asserted in passing that AT&T would be unable to establish a breach of contract claim if given leave to amend, Qwest emphasized that “[a]t this point. . . at most they have the claim they have brought, a claim for reparations, which is time barred under the [six month] statute of limitations.”³⁵

The WUTC agreed with the ALJ and Qwest that “the six month statute is appropriate to the theory on which the complaint was pleaded.”³⁶ But then, without the benefit of briefing on the Section 415 issue, the WUTC went on to state that AT&T could amend its complaint to assert a breach of contract claim, and *sua sponte* added that a six year state statute of limitations applied. Qwest has sought review of the WUTC’s decision and expects the WUTC will correctly hold that Section 415 applies when it reviews a full record on the subject. Meanwhile, this Commission should understand the interlocutory WUTC order for what it is and what it is not.

³³ AT&T and TWTC Opposition to Qwest Motion for Summary Determination and Dismissal, attached as Exhibit A, at n. 19.

³⁴ *Id.*

³⁵ Qwest’s Reply to the AT&T/Time Warner Opposition to Qwest’s Motion to Dismiss, attached as Exhibit B, at ¶ 11.

³⁶ WUTC Order, ¶ 22.

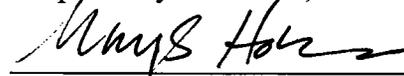
The Commission should apply collateral estoppel principles to issues necessarily decided by the Oregon Commission, such as the discovery date, and preclude AT&T from wasting valuable resources and time relitigating the same issues here.

Conclusion

For the foregoing reasons, the Commission should grant this motion and dismiss AT&T's claims with prejudice.

DATED this 20th day of November, 2006.

Respectfully submitted,



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Attorneys for Qwest Corporation

CERTIFICATE OF SERVICE

I do hereby certify that a true and correct copy of the foregoing **QWEST CORPORATION'S
REPLY MEMORANDUM IN SUPPORT OF MOTION to DISMISS** was served on the 21st
day of November, 2006 on the following individuals:

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Mary S. Hobson
Attorney for Qwest Corporation

**QWEST CORPORATION'S REPLY MEMORANDUM
IN SUPPORT OF MOTION TO DISMISS**
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EXHIBIT A

with the Commission for approval under Section 252.¹ Well over one year after these agreements were executed, Qwest provided them to the Commission as confidential documents in response to the Commission's directive to do so in connection with its review of Qwest's compliance with Section 271 of the Act.²

3. AT&T and TWTC became aware of the existence of secret agreements between Qwest and other competitive local exchange companies ("CLECs") in Minnesota when that state commission initiated complaint proceedings against Qwest in March 2002 for failure to file such agreements. AT&T and TWTC (as opposed to their Minnesota affiliates), however, did not have access to these agreements because they were protected from disclosure as confidential or "trade secret" information to be used only for the purpose of the Minnesota proceeding. Accordingly, "AT&T urge[d] the Commission to conduct an investigation into the possibility that Qwest ha[d] similar agreements in Washington" in the context of the Commission's Section 271 review.³ The Commission refused to conduct such an investigation in that proceeding but "stated that the Commission would establish a docket to allow Qwest to continue to file any unfiled agreements or amendments to interconnection agreements, and would discuss how the Commission would address the agreements within that docket."⁴

4. Commission Staff investigated the confidential agreements that Qwest filed pursuant to the Commission directives and initiated complaint proceedings in Docket No.

¹ See, e.g., *WUTC v. Advanced TelCom Group, Inc., et al.*, Docket No. UT-033011 ("Unfiled Agreements Docket"), Order No. 21 (Feb. 28, 2005).

² *In re Investigation into Qwest's Compliance with Section 271(C)*, Docket No. UT-003022 ("Section 271 Docket"), Bench Request No. 46 & Qwest response to same.

³ *Id.*, Qwest Supp. Post-Hearing Brief on Public Interest Issues at 11 (filed June 7, 2002).

⁴ *Id.*, 40th Supp. Order, ¶ 7 (July 15, 2002).

UT-033011 against Qwest and several CLECs in August 2003 for failure to file the agreements with the Commission as required under applicable federal and state law (“Unfiled Agreements Docket”).⁵ AT&T was a named defendant and TWTC intervened. Both companies actively participated in that proceeding, and TWTC expressly sought compensation for CLECs for Qwest’s unlawful conduct. In its final order issued February 28, 2005, the Commission approved a settlement between Commission Staff and Qwest that required Qwest to pay fines, but the Commission refused to consider the issue of whether Qwest should be required to pay compensation to CLECs.⁶

5. Less than nine months later, AT&T and TWTC filed their Complaint initiating this docket. The Commission has already determined that Qwest willfully violated federal and state law by failing to file its agreements with Eschelon and McLeodUSA and refusing to make the rates and discounts in those agreements available to other CLECs.⁷ AT&T and TWTC allege in their Complaint that they each would have adopted the rates and discounts and any reasonably related terms from those agreements, and accordingly Qwest overcharged AT&T and TWTC for services under their respective interconnection agreements.

ARGUMENT

6. Qwest contends that the Commission should dismiss the Complaint on two grounds: (1) the causes of action allegedly were not raised within the applicable limitations period; and (2) the Commission purportedly does not have authority to grant the relief requested. Neither of Qwest’s claims has any merit. AT&T and TWTC filed

⁵ Unfiled Agreements Docket, Order No. 21.

⁶ *Id.*

⁷ *Id.*

their Complaint less than two years after the Eschelon and McLeodUSA agreements were publicly disclosed in Washington. Even if the causes of action in the Complaint could be construed as having accrued before that disclosure, the Complaint was timely filed pursuant to the doctrine of equitable tolling. The very statutes that Qwest cites for limitations purposes, moreover, authorize the Commission to grant the relief requested in the Complaint, *i.e.*, to require Qwest to refund the difference between what AT&T and TWTC actually paid Qwest for services and the amounts they would have paid had they been able to take advantage of the rates and discounts in the unfiled Eschelon and McLeodUSA agreements. The Commission, therefore, should deny Qwest's Motion.

A. The Complaint Is Not Time Barred.

7. AT&T and TWTC timely pursued the claims raised in their Complaint. Qwest disagrees, contending that the two-year limitation period in RCW 80.04.240 and 4.16.130 began to run as early as March 2002 and expired long before AT&T and TWTC filed their Complaint. "The limitation period commences when a cause of action accrues and tolls when a complaint is filed or a summons served. A cause of action accrues when the party has a 'right to apply to a court for relief.'"⁸ More specifically, AT&T and TWTC's claims did not accrue for limitations purposes until they "discovered or reasonably should have discovered all the essential elements of [their] possible cause of action."⁹

8. AT&T and TWTC did not have sufficient information or the ability to file an individual complaint with the Commission with respect to the effect of Qwest's secret agreements with Eschelon and McLeodUSA in Washington until June 8, 2004, the date

⁸ *U.S. Oil & Refining Co. v. Department of Ecology*, 96 Wn.2d 85, 91, 633 P.2d 1329 (1981).

⁹ *Ohler v. Tacoma General Hospital*, 92 Wn.2d 507, 514, 598 P.2d 1358 (1979).

the agreements publicly were disclosed as exhibits to Commission Staff testimony in the Unfiled Agreements Docket. Qwest inaccurately imputes prior knowledge to AT&T and TWTC because of the participation of their affiliates in the Minnesota complaint proceeding. AT&T and TWTC knew that there were unfiled agreements proceedings in Minnesota, but AT&T and TWTC did not know whether any Eschelon or McLeodUSA agreements were effective in Washington. Indeed, Qwest conceded as much in June 2002 when it belittled AT&T's inability to demonstrate that the Minnesota agreements had any impact in Washington.¹⁰ Even if such information were discernable from the Minnesota agreements themselves, those agreements were protected from public disclosure as confidential information. To the extent that AT&T's and TWTC's Minnesota affiliates had access to those agreements, AT&T and TWTC could not use any information gained from such access outside of the Minnesota proceeding, including as a basis for filing a complaint in Washington.

9. Similarly in this state, Qwest provided the Eschelon and McLeodUSA agreements to the Commission as confidential documents. To the extent that AT&T and TWTC had access to the agreements that Qwest filed as parties to the Section 271 review proceeding, they could not use that knowledge for any purpose other than in that docket. Not until Commission Staff publicly disclosed the Eschelon and McLeodUSA agreements on June 8, 2004, could AT&T and TWTC file a complaint based on the provisions of those agreements. AT&T and TWTC filed their Complaint in this proceeding on November 4,

¹⁰ Section 271 Docket, Qwest Supp. Post-Hearing Brief on Public Interest Issues at 11-12.

2005, less than 17 months after that date. The Complaint thus was filed well within the 24 month limitation period.

10. The Complaint should be considered timely filed even if the Commission were to find some basis to conclude that AT&T and TWTC's claims accrued as early as June 2002 when "Qwest provided these agreements to the Commission in Washington in the context of its Section 271 proceeding."¹¹ Washington and federal "[c]ourts have held that when extraordinary forces, rather than plaintiff's lack of diligence, account for the failure to file a timely claim, equitable tolling is proper."¹²

11. Here, the limitations period should be tolled during the pendency of the Commission's Section 271 Docket and consideration of the Commission's own complaint in the Unfiled Agreements Docket. AT&T made every effort to have the Commission investigate the unfiled agreements in the context of the Section 271 Docket, but the Commission declined to do so, expressly deferring that investigation to a separate docket. Once the Commission initiated the Unfiled Agreements Docket, AT&T and TWTC reasonably believed that its scope included remedies for CLECs who were denied the lower rates and discounts that Qwest provided to Eschelon and McLeodUSA. Other state commissions in similar proceedings provided compensation for damaged CLECs as well as fines, including the Minnesota proceeding that Qwest cites.¹³ The Commission

¹¹ Motion ¶ 8. As discussed above, no earlier date is even arguably applicable.

¹² *Seattle Audubon Soc'y v. Robertson*, 931 F.2d 590, 596 (9th Cir. 1991).

¹³ In re Continued Investigation and Penalty Phase Ordered in Utility Case No. 3750 Regarding Unfiled Agreements Between Qwest and CLECs, New Mexico Public Regulatory Commission Case No. 03-00108-UT (providing CLEC recovery in the penalty phase of its proceeding); Arizona Corporation Commission Docket No. RT-00000F-02-0271 (providing CLEC recovery in the settlement proposal accepted by

expressly contemplated addressing such remedies in the Unfiled Agreements Docket,¹⁴ and TWTC vigorously pursued them. The Commission, however, ultimately refused to consider remedies for CLECs.¹⁵ The Commission should not now bar AT&T and TWTC from filing their own complaint because they relied on the Commission's Section 271 Docket and Unfiled Agreements Docket to redress their grievances.

12. AT&T and TWTC filed their Complaint well within a two-year time period that was tolled during the pendency of these related dockets. The Commission issued its final order on reconsideration in the Section 271 Docket on July 15, 2002. Staff filed its complaint in the Unfiled Agreements Docket on August 14, 2003, and the Commission issued its final order on February 28, 2005. If the Commission were to determine that the causes of action in the Complaint accrued in June 2002 – which they did not – tolling the limitations period during those times would mean that effectively only 21 months elapsed before AT&T and TWTC filed the Complaint.¹⁶ That time is reduced to nine months using the more defensible (but nevertheless incorrect) accrual date of September 8, 2003 (the date of the prehearing conference in the Unfiled Agreements Docket) if the limitations period is equitably tolled. AT&T and TWTC, therefore, timely filed their Complaint within the two-year limitation period Qwest cites.

Qwest); *In re Investigation into Unfiled Agreements Executed by Qwest Corp.*, Colorado PUC Docket No. 02I-572T (denying the original settlement proposal offered by Qwest that excluded CLEC recovery and granted the proposal that offered CLEC recovery).

¹⁴ Unfiled Agreements Docket, Order No. 5, ¶ 129.

¹⁵ *Id.*, Order No. 21.

¹⁶ From June 2002 to November 2005 is 41 months. Subtracting approximately six weeks for the Section 271 Docket and 18 and a half months for the Unfiled Agreements Docket leaves 21 months.

13. One other factor the Commission should consider in determining the timeliness of the Complaint is that Washington law provides a period of six years for actions to be brought arising out of a written contract.¹⁷ Qwest's interconnection agreements with both AT&T and TWTC that were effective during the relevant time period include "most favored nation" provisions that require Qwest to make available terms and conditions of other interconnection agreements.¹⁸ The source of this obligation is a written contract, but it is the same obligation imposed by the Act and Washington statutes that the Commission previously determined that Qwest willfully violated. AT&T and TWTC filed their Complaint well within six years from the earliest conceivable date that Qwest could argue that their cause of action arose. Qwest thus cannot reasonably contend that AT&T and TWTC's claims are "stale" or that Qwest would suffer any prejudice because AT&T and TWTC did not file their individual Complaint before now. These circumstances further demonstrate that the Commission should conclude that the Complaint was timely filed.¹⁹

¹⁷ RCW 4.16.040(1).

¹⁸ Agreement for Local Wireline Network Interconnection and Service Resale Between AT&T and [Qwest], Section 2.1 (filed July 25, 1997); Interconnection Agreement Between TCG Seattle and [Qwest] Section XXVIII (Dec. 16, 1996); TWTC (as assignee of GST Telecom) and [Qwest] Arbitrated Interconnection Agreement for the State of Washington, Section XXXIV.B.

¹⁹ AT&T and TWTC did not include a breach of contract cause of action in their Complaint. If the Commission were to determine that the statutory causes of action are time barred – which they are not – AT&T and TWTC request leave to amend their Complaint to state a cause of action for breach of contract.

B. The Commission Has Authority to Grant the Requested Relief.

14. AT&T and TWTC have requested that the Commission require Qwest to refund the difference between what AT&T and TWTC actually paid Qwest for services under their interconnection agreements and the amounts they would have paid had they been able to take advantage of the rates and discounts in the unfiled Eschelon and McLeodUSA agreements. Qwest contends that the Commission is not authorized to award such relief. Such a limitation would be news to the legislature and the Commission. Indeed, Qwest's position is a bit of a paradox, given that Qwest contends that RCW 80.04.220 through 80.04.240, which authorize the Commission to redress overcharges, apply when determining the appropriate limitations period but do not apply for purposes of determining the Commission's authority to grant AT&T and TWTC's requested relief.
15. The statutes unquestionably authorize the Commission to order the relief sought in the Complaint. The legislature has expressly empowered the Commission to require refunds of overcharges, which is precisely what AT&T and TWTC have requested. Qwest, however, maintains that the rates that AT&T and TWTC paid were not "excessive or exorbitant" or "in excess of the lawful rates" within the meaning of the statutory language because the Commission had approved those rates. The statutes are not susceptible to such a limited interpretation.
16. AT&T and TWTC have alleged that they were entitled to pay the same rates and discounts that Qwest made available to Eschelon and McLeodUSA and that Qwest unlawfully discriminated against AT&T and TWTC by refusing to make those rates available to them. In other words, the "reasonable" and "lawful" rates that Qwest should

have charged AT&T and TWTC were the same rates that Qwest charged Eschelon and McLeodUSA. Accordingly, the rates the Commission had approved generally for Section 251 services were “excessive or exorbitant” and “unlawful” when charged to AT&T and TWTC because those rates exceeded the reasonable and lawful rates that Qwest charged Eschelon and McLeodUSA and should have charged AT&T and TWTC. Indeed, if Qwest were to deny an end user customer the same rates Qwest charges other similarly situated customers, Qwest could not claim that the customer has no recourse simply because the customer is paying the tariff rate. The circumstances here are no different and do not insulate Qwest from its responsibility to charge only those rates that AT&T and TWTC were entitled to pay.

17. Qwest also relies on a Minnesota federal district court’s decision that Minnesota statutes do not authorize that state commission to grant restitutional relief. That decision is simply irrelevant. Minnesota apparently does not have statutes that are equivalent to RCW 80.04.220 through 80.04.240, which renders the Minnesota court’s analysis inapplicable on its face. Even apart from those statutory provisions, Qwest has not demonstrated that the Minnesota statutes at issue before the Minnesota court are the same as other Washington statutes or that Minnesota and Washington courts interpret their respective statutes similarly. Qwest, moreover, fails to cite any Washington court decision that interprets Washington statutes to preclude the Commission from requiring a utility to refund the difference between the discriminatory and unreasonable charges it has imposed on a customer and the lawful amounts that should have been charged. The Minnesota court decision, therefore, has no bearing whatsoever on the Commission’s authority under Washington law.

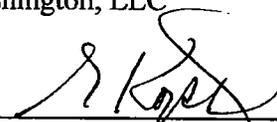
CONCLUSION

18. The Motion is yet another attempt by Qwest to evade the consequences of its illegal behavior. AT&T and TWTC timely filed a Complaint alleging that they paid excessive rates for Qwest services because Qwest unlawfully denied them the rates and discounts that Qwest offered to Eschelon and McLeodUSA. The Commission should find that AT&T and TWTC may pursue their Complaint and should deny the Motion.

DATED this 6th day of January, 2006.

DAVIS WRIGHT TREMAINE LLP
Attorneys for AT&T Communications of the
Pacific Northwest, Inc., TCG Seattle, and
TCG Oregon, and Time Warner Telecom of
Washington, LLC

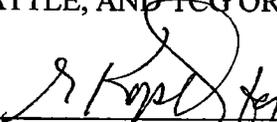
By



Gregory J. Kopta
WSBA No. 20519

AT&T COMMUNICATIONS OF THE
PACIFIC NORTHWEST, INC., TCG
SEATTLE, AND TCG OREGON

By



Letty S. D. Friesen

CERTIFICATE OF SERVICE
Docket No. UT-051682

I hereby certify that on the date given below the original and 12 true and correct copies of AT&T and TWTC Opposition to Qwest Motion for Summary Determination and Dismissal., in the above-referenced docket were delivered by Federal Express overnight delivery and email to:

Ms. Carole J. Washburn, Secretary
Washington Utilities & Transportation Commission
1300 S. Evergreen Park Drive SW
Olympia, WA 98504-7250
E-mail: records@wutc.wa.gov

On the same date, a true and correct copy was sent by email and by regular U.S. Mail, postage prepaid, to:

<p>Lisa Anderl Adam Sherr Qwest Corporation 1600 7th Avenue, Room 3206 Seattle, WA 98191 Email: Lisa.Anderl@qwest.com</p>	<p>Sally Johnston Attorney General's Office PO Box 40128 Olympia WA 98504 Email: sjohnsto@wutc.wa.gov</p>
<p>Simon ffitc Public Counsel Office of the Attorney General 900 Fourth Avenue, Suite 2000 Seattle, WA 98164 Email: simonf@atg.wa.gov</p>	

DATED this 5th day of January, 2006.

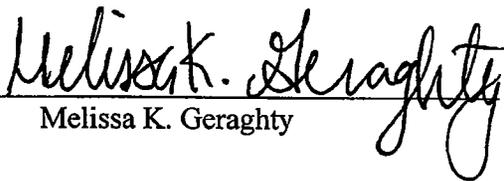
By: 
Melissa K. Geraghty

EXHIBIT B

BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

AT&T COMMUNICATIONS OF THE
PACIFIC NORTHWEST, INC., TCG
SEATTLE, AND TCG OREGON; AND
TIME WARNER TELECOM OF
WASHINGTON, LLC,

Complainants,

v.

QWEST CORPORATION,

Respondents

Docket No. UT-051682

QWEST'S REPLY TO THE
AT&T/TIME WARNER OPPOSITION
TO QWEST'S MOTION TO DISMISS

I. INTRODUCTION

- 1 Qwest Corporation ("Qwest") files this reply to the "Opposition" ("Answer") filed by
Complainants on January 6, 2006. This reply addresses the numerous inaccuracies contained
in Complainants' Answer and addresses the new matters raised in that filing.

II. ARGUMENT

A. **Complainants' Answer Contains Numerous Inaccuracies with Regard to the
Availability of the Eschelon and McLeod Agreements**

- 2 As described in the Complaint herein, Complainants take issue only with certain agreements
Qwest entered into with McLeod and Eschelon. While Complainants never specifically
describe which agreements in particular are the subject of the complaint, it is easy to see from a

review of the facts that Complainants have had reasonable access to each and every one of those agreements for far longer than the applicable limitations period. Complainants' representations to the contrary are disingenuous at best.

3 Complainants claim, at paragraph 3, that they did not have access to the agreements in the context of the Minnesota case because those agreements were designated as confidential, and because only their Minnesota affiliates were able to review or access those documents. This is simply not the case. Qwest publicly filed eleven agreements with the Minnesota Commission on March 13, 2002. *See* Attachment 1. Even if it were the case that the agreements were filed under seal, there was ample publicly available information in the Minnesota case that any reasonable person would have understood to give rise to a cause of action in Washington.

4 One of the most obvious pieces of evidence that this information was available is contained in Time Warner's comments to the Minnesota Commission, filed January 21, 2003, and included with Qwest's Motion for Summary Determination as Exhibit 3. Those comments are attached again for the Commission's convenience as Attachment 2 to this reply. Even if those comments were informed by a review of confidential material, the comments themselves were publicly available, and Time Warner's Washington affiliate, reading those comments, would have certainly been on notice of the potential for a claim in Washington. Indeed, the January 21, 2003 comments argued specifically that Time Warner should be given the benefit of a 10% discount.¹ As discussed below, many other documents in Minnesota also publicly disclosed allegations regarding discounts to Eschelon and McLeod.

5 Complainants further claim that "Qwest did not file any of these agreements with the Commission for approval under Section 252" and that "Qwest provided them to the Commission as confidential documents." *Answer at* ¶ 2. Complainants rely on these

¹ These comments establish beyond any doubt that Time Warner was, as of the date of filing, and most certainly much earlier than that, in full possession of all of the facts necessary to file a complaint for relief.

allegations to support their claim that they did not have access to the documents. However, this claim does not bear scrutiny. As to the agreements between Qwest and Eschelon and Qwest and McLeod, it is true that Qwest initially provided a number of those agreements to the Commission on a confidential basis. However, a number of agreements were also provided on a non-confidential basis.

6 In fact, the issue is not whether agreements were filed under seal or publicly available. The very heart of Complainants' case is the claim for a 10% discount off of intrastate services. The issue then is when AT&T and Time Warner had sufficient knowledge of the facts to enable them to file a claim requesting 10% refunds.² Based on the information available in the Minnesota proceedings³ and the Washington 271 proceeding, as well as the letter from AT&T to each of the state commissions in 2002 requesting reopening of the record,⁴ there can be no doubt that they had sufficient facts in 2002 to bring a complaint containing the allegations and claims raised in this docket. However, even if the issue of certain evidence being under seal were an issue, Complainants have misstated the facts for the reasons set forth herein.

7 In the Unfiled Agreements case, initiated by Commission complaint in Docket No. UT-033011, Agreements 1-6 on Exhibit A to the Complaint were agreements between Qwest and

² Complainants' claim for reparations accrued when they discovered (or should by exercise of reasonable diligence have discovered) their right to apply for relief. See, e.g., *City of Snohomish v. Seattle-Snohomish Mill Co., Inc.*, 2003 WL 22073066, *4 (Wash. App. Div. 1 Sept. 8, 2003) (citing and quoting *U.S. Oil & Refining Co. v. State Dep't of Ecology*, 96 Wn.2d 85, 91, 633 P.2d 1329 (1981) and *Janicki Logging & Constr. Co. v. Schwabe, Williamson & Wyatt, P.C.*, 109 Wn. App. 655, 659, 37 P.3d 309 (2001)).

³ The issue of a 10% discount was discussed publicly and at length in the Minnesota proceeding – in parties' comments, on the hearing record, and in the ALJ's initial order, to name just a few examples, all of which occurred in 2002. Qwest is not providing all of these documents so as not to burden this Commission with the hundreds of pages that would entail. However, a summary list is attached as Attachment 3 hereto, and those documents are available if the Commission should wish to see them. It is inconceivable that Complainants herein can legitimately claim that they were precluded from using that public information in another jurisdiction.

⁴ See, Attachment 4 hereto, AT&T's request to reopen the record filed in Colorado on May 13, 2002. AT&T filed virtually identical motions on May 13, 2002, in Iowa, Montana, Nebraska, New Mexico, South Dakota, Utah, and Wyoming. In its Motion herein, Qwest mistakenly stated that AT&T filed such a motion in Washington as well; however, that statement appears to be in error, as Qwest has been unable to locate that filing. Notwithstanding that, the issue of the unfiled agreements was raised in the Washington 271 proceeding, and AT&T was clearly aware of the agreements, as it filed a brief with the Commission on June 7, 2002, describing certain "secret agreements", and asking the Commission to delay Qwest's 271 application pending an investigation. See, Attachment 5, an excerpt from that brief. This clearly demonstrates AT&T's detailed knowledge of the facts, in 2002, upon which its current claim is based.

Eschelon. Each of those agreements had previously been provided to the Commission and the parties *on a non-confidential basis* in response to the Commission's Bench Request No. 46 in Docket Nos. UT-003022 and UT-003040, on April 18, 2002. See, Attachment 6 hereto, Qwest's first response to Bench Request No. 46. Agreement 4 on Exhibit A is the only Qwest/Eschelon agreement containing an alleged discount or lower rate. This agreement was thus available to Complainants on a public basis since April 2002 in Washington, and was also included in the group of eleven that were filed publicly in March 2002 in Minnesota.

8 Thus, there is irrefutable proof that Complainants had possession of a number of the "unfiled agreements," including one that contained an alleged discount upon which Complainants base their current action, in Washington, in April 2002. Yet Complainants continue to maintain that the statute of limitations did not begin to run until June of 2004, when Staff filed testimony in Docket No. UT-033011. Complainants claim, in paragraph 9 of the Answer, that they did not have knowledge of the Eschelon and McLeod agreements sufficient to file a complaint until June 8, 2004, when Staff publicly disclosed the agreements in filed testimony. This claim is simply preposterous.

9 As the Commission is well aware, the complaint that initiated Docket No. UT-033011 contained an Exhibit A which listed all of the purported interconnection agreements that were at issue in the case. At the point at which Complainants received the complaint in Docket No. UT-033011, Complainants could have conducted discovery to obtain the referenced agreements, or could have filed a public records request to that same end. As the record in that docket indicates, Complainants did neither. No "extraordinary forces" (*see, Answer at ¶ 10*) existed that prevented such an action, which any exercise of reasonable diligence would have produced. In fact, Qwest merely made an informal request to the Commission Staff for copies of all of the agreements, and they were produced to Qwest immediately. *See, Attachment 7 to this reply.* Complainants apparently made no effort to obtain the agreements, either through

discovery, informal request, or public records request, even though each avenue would have been open to them. Complainants, instead, sat on their rights during the pendency of the proceeding, and by doing so, saw the applicable limitations period pass them by.

B. The Six-Year Statute of Limitations is not Applicable

- 10 In a sort of dying gasp, Complainants reach for the lifeline of a six-year statute of limitations, claiming that their action is, or at least could be, based on breach of contract allegations. *Answer at ¶ 13.* This contention is not well taken. The Commission has previously found that its authority to order a refund or reparations is based on RCW 80.04.240.⁵ This telecom-specific statute, with a clearly defined limitations period particular to this industry, must prevail over the general six-year statute of limitations on written contracts.⁶ Whether the Commission is enforcing a written contract or ordering reparations for matters not governed by contract, the Commission's authority to do so is limited to that authority granted under RCW 80.04.240, and the limitations periods contained therein.
- 11 Furthermore, though Complainants allege that they could bring a breach of contract claim, and ask leave to do so, Qwest does not believe that Complainants can make a case that Qwest has breached a contract. There was never a request to "opt-in" to any other agreement, nor did Qwest wrongfully refuse such a request. At this point, Complainants could not prove facts establishing a breach of the parties' interconnection agreements – at most they have the claim they have brought, a claim for reparations, which is time barred under the statute of limitations.
- 12 The Commission should thus conclude that Complainants' claims are barred by operation of

⁵ See, *Glick v. Verizon*, Docket No. UT-040535, Order No. 3 (January 28, 2005), ¶ 43. In *Glick*, the Commission affirmed that claims for overcharges or the charging of unreasonable or unlawful rates were governed by the limitations periods in RCW 80.04.240, and that claims not falling under that provision were governed by the general two-year limitation period in RCW 4.16.130.

⁶ *Carlton v. Black (in Re Estate of Black)* 155 Wn.2d 152, 164 (2004) ("when more than one statute applies, the specific statute will supercede the general statute") (internal citations omitted).

the statute of limitations. As a result, the Commission should dismiss the Complaint with prejudice.

III. CONCLUSION

13 As set forth in its Motion, Qwest requests an order of this Commission dismissing Complainants' Complaint as barred by the statute of limitations, or in the alternative, because the Commission does not have the authority to grant Complainants' request for monetary relief.

DATED this 13th day of January, 2006.

QWEST



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