

**BEFORE THE PUBLIC UTILITY COMMISSION  
OF OREGON**

**UM 1232**

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

Complainants,

v.

QWEST CORPORATION,

Respondent.

COMPLAINANTS' RESPONSE TO  
QWEST CORPORATION'S MOTION  
TO DISMISS

**I. INTRODUCTION**

Pursuant to OAR 860-013-0035, AT&T Communications of the Pacific Northwest, Inc. and TCG Oregon (collectively "AT&T"), Time Warner Telecom of Oregon, LLC ("TWTC"), and Integra Telecom of Oregon, Inc. ("Integra") (collectively "Complainants") submit the following response to Qwest Corporation's Motion to Dismiss, filed February 2, 2005 ("Qwest's Motion"). Qwest's Motion is premised on an overly restrictive and fundamentally flawed interpretation of Complainants' claims. Complainants are not alleging that they were harmed by Qwest's failure to file the secret interconnection agreements, as Qwest contends. Rather, Complainants allege that they were harmed because Qwest provided preferential rates, terms, and conditions to McLeodUSA Telecommunications Services, Inc. ("McLeodUSA") and Eschelon Telecom ("Eschelon"), which discriminated against Complainants in violation of their interconnection agreements and state and federal law. Indeed, Qwest's Motion does not even mention the causes of action for violation of ORS sections 759.260 and 759.275, which are the heart of Complainants' claims. Qwest has failed

to provide any basis on which the Commission should dismiss any of Complainants' claims. The Commission, therefore, should deny Qwest's Motion.

## II. BACKGROUND

Qwest entered into several agreements beginning in 2000 with Eschelon and McLeodUSA governing Qwest's provisioning of services pursuant to Section 251 of the Telecommunications Act of 1996 ("Act"). At the time of execution, Qwest did not file any of these agreements with the Commission for approval under Section 252 of the Act.<sup>1</sup> Well over a year after these agreements were executed, Qwest provided copies to the Commission Staff in response to a Commission request.<sup>2</sup>

Complainants became aware of the existence of secret agreements between Qwest and other competitive local exchange carriers ("CLECs") in Minnesota when that state commission initiated complaint proceedings against Qwest in March 2002 for failure to file such agreements. Complainants (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.

On March 11, 2002, Qwest informed this Commission about the Minnesota investigation.<sup>3</sup> Commission Staff immediately began an informal investigation into the possibility of similar unfiled agreements between Qwest and CLECs in Oregon. After investigating the matter for over two years and discussing a tentative settlement with Qwest, Staff recommended that the Commission open a formal investigation regarding Qwest's

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<sup>1</sup> See *In the Matter of Qwest Corporation, An Investigation into the Failure to File Interconnection Agreements for Commission Approval under Section 252(a)(1) of the Telecommunications Act*, OPUC Docket No. UM 1168, *Order Approving Stipulation*, Order No. 05-783, June 17, 2005 ("Unfiled Agreements Order").

<sup>2</sup> *Id.*, Appendix A at 1. Qwest provided a 73 unfiled agreements to the Commission on April 19, 2002, in response to the Commission's request. Qwest produced an additional 16 agreements to Commission Staff by the end of 2004.

<sup>3</sup> *Id.*, Appendix A at 1-2.

failure to file the agreements.<sup>4</sup> The Commission opened an official investigatory docket on September 7, 2004 (“Unfiled Agreements Docket”).<sup>5</sup>

During the course of its informal investigation, various CLECs, including TWTC, raised the issue of whether the Commission would address the potential harm caused to CLECs by Qwest’s unlawful failure to file the interconnection agreements. CLECs were aware that the unfiled agreements may have given “a small number of CLECs . . . preferential interconnection-related rates, terms, and conditions.”<sup>6</sup> CLECs did not know the extent of this possible harm, however, because CLECs did not have access to these agreements because Qwest and Staff were treating them as confidential. CLECs did not even get the opportunity to request access until October 25, 2004, when the Administrative Law Judge issued a standard protective order. Although agreeing to the terms of the protective order allowed the CLECs to request copies of the unfiled agreements, the terms of the order prohibited the CLECs from using the agreements for any purpose outside of the Unfiled Agreements Docket.<sup>7</sup>

Staff sought the Department of Justice’s opinion on the issue of whether the Commission could redress potential harm to CLECs in the Unfiled Agreements Docket, but the DOJ’s written memorandum was limited to the issue of the Commission’s authority to award damages to CLECs, or impose penalties on Qwest that would be directly payable to CLECs, in the context of a proceeding under ORS 759.990.<sup>8</sup> The DOJ’s conclusion that the Commission lacked such authority was included as part of the Staff report issued on August 30, 2004.<sup>9</sup> The DOJ Memorandum did not address the Commission’s authority under ORS

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<sup>4</sup> *Id.*

<sup>5</sup> Unfiled Agreements Order at 1.

<sup>6</sup> Unfiled Agreements Docket (UM 1168), *Staff Report* at 2.

<sup>7</sup> Unfiled Agreements Docket, *Order Granting Motion for Protective Order*, Appendix A at 3, ¶ 12.

<sup>8</sup> Qwest’s Motion, Exhibit 1 (dated August 30, 2004) (“DOJ Memorandum”).

<sup>9</sup> Unfiled Agreements Docket, *Staff Report*, August 30, 2004, at 7.

sections 759.260 or 759.275, or the Commission's authority to issue refunds or other reparations to redress Qwest's discriminatory actions.

On September 30, 2004, TWTC filed a petition to intervene in the Unfiled Agreements Docket.<sup>10</sup> Qwest objected to TWTC's petition, arguing that, per the DOJ Memorandum, the Commission did not have the authority to award damages or penalties to CLECs, and therefore TWTC's petition should be denied or limited to prevent TWTC from expanding the scope of the proceedings by raising the issue of harm to CLECs.<sup>11</sup> The Administrative Law Judge denied Qwest's request and granted TWTC's petition to intervene without limitation.<sup>12</sup>

In February 2005, Commission Staff and Qwest reached a settlement in the Unfiled Agreements Docket. The Commission approved the stipulation in June 2005. In the order approving the stipulation, the Commission stated that "under the applicable penalty provision, ORS 759.990, the Commission does not have the authority to award reparations for injuries suffered by CLECs due to Qwest's failure to file the agreements."<sup>13</sup> The Commission also specifically stated that the "settlement does not preclude the CLECs from pursuing other litigation."<sup>14</sup>

On November 10, 2005 – nine months after the settlement was reached and less than five months after the Commission issued the Unfiled Agreements Order – Complainants filed a complaint alleging that they were harmed because Qwest provided preferential rates, terms, and conditions to Eschelon and McLeodUSA in interconnection agreements that Qwest failed to file with the Commission. Complainants allege that, because Qwest did not file these agreements, Complainants did not know of their existence and were denied the right to opt in

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<sup>10</sup> Unfiled Agreements Docket, *Time Warner Telecom of Oregon, LLC's Petition to Intervene*, September 30, 2004.

<sup>11</sup> Unfiled Agreements Docket, *Qwest's Response to Covad Communications Company's and Time Warner Telecom of Oregon's Petitions to Intervene*, October 5, 2004.

<sup>12</sup> Unfiled Agreements Docket, *Ruling Granting Petitions to Intervene and Setting Schedule*, October 26, 2004.

<sup>13</sup> Unfiled Agreements Order at 3.

<sup>14</sup> *Id.*

to the more favorable terms and conditions.<sup>15</sup> Complainants further allege that Qwest has violated state and federal law, as well as specific provisions in the parties' interconnection agreements by failing to provide interconnection on rates, terms, and conditions that are just, reasonable, and non-discriminatory. Complainants submitted their Amended Complaint on January 13, 2006, adding a cause of action for breach of contract (the "Amended Complaint").

### III. ARGUMENT

Qwest contends that the Commission should dismiss the Complaint on four grounds: (1) the Commission purportedly does not have the authority to grant the relief requested; (2) there is no private right of action under Sections 251 and 252 of the Act; (3) the causes of action allegedly were not raised within the applicable limitations period; and (4) the relief requested would violate the filed rate doctrine. None of Qwest's claims has merit. The claims set forth in the Amended Complaint seek relief that this Commission has full authority to grant, are not barred by any applicable limitations period, are within this Commission's jurisdiction, and seek relief that would not violate the filed rate doctrine. Accordingly, the Commission should deny Qwest's Motion.

#### **A. The Commission has General Authority to Issue Refunds for Unlawful Charges**

Complainants have requested that the Commission require Qwest to refund the difference between what Complainants 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. Qwest is

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<sup>15</sup> 47 U.S.C. § 251(i) ("A local exchange carrier *shall* make available *any* interconnection, service, or network element provided under an agreement approved under this section to which it is a party to *any other* requesting telecommunications carrier upon the same terms and conditions as those provided in the agreement.") (emphasis added).

incorrect. The Commission has the express authority to remedy violations of state statutes and interconnection agreements, as well as the implied authority to issue refunds when “such implied powers . . . are necessary to enable the agency to carry out the powers expressly granted to it.”<sup>16</sup>

This docket involves a complaint filed under ORS 756.500. The plain language of ORS 756.500(2) indicates that the legislature intended to give the Commission the authority to order reparations to injured parties as a remedy for a utility’s violation of the law:

(2) It is not necessary that a complainant have a pecuniary interest in the matter in controversy or in the matter complained of, but the commission shall not grant any order of reparation to any person not a party to the proceedings in which such reparation order is made.

This subsection simply does not make sense if the Commission does not have the ability to order reparations as a possible remedy for allegations raised in a complaint for violation of the utility laws. The Complainants seek reparations in the form of refunds of the overcharges they paid Qwest for services under their interconnection agreements. The statute authorizes the Commission to grant just such relief.

Even if the Commission were to interpret this statute not to expressly authorize the relief requested in the Amended Complaint, the Commission has the implied authority to grant the relief necessary to remedy Qwest’s statutory violations. In *Pacific Northwest Bell v. Katz*, the Commission initially concluded that it could not order a refund to customers because the Commission only had specific statutory authority to order refunds when an interim rate increase was involved.<sup>17</sup> The Commission subsequently concluded that refunds were appropriate because a portion of the rates at issue were “a partial continuation of [an] interim rate increase” and therefore ORS 759.185 applied.<sup>18</sup> The circuit court reversed the

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<sup>16</sup> *Pacific Northwest Bell Telephone Company v. Katz*, 116 Or.App. 302, 309-310, 841 P.2d 652 (1992), *rev. denied* 316 Or. 528, 854 P.2d 940 (1993).

<sup>17</sup> *Id.* at 306.

<sup>18</sup> *Id.* at 306-307.

Commission, finding that the rates at issue were permanent, not interim, and ORS 759.185 did not authorize refunds.<sup>19</sup> The Court of Appeals reversed the circuit court, finding that, although the refund was not authorized as a refund of interim rates under ORS 759.185, the Commission still had the authority to issue a refund.<sup>20</sup> The court stated that ORS 759.185 “is not the only authority by which PUC may order a refund.”<sup>21</sup> Citing the statutory provision setting forth the Commission’s general powers, ORS 759.040,<sup>22</sup> and the Commission’s broad power to perform its delegated function, the court concluded that the authority to issue refunds is an implied power that is necessary to enable the Commission to carry out the powers expressly granted to it.<sup>23</sup>

Similarly here, the Commission is expressly authorized to ensure that Qwest does not discriminate against or among its competitors and implied in that authority is the power to require Qwest to refund the difference between the rates that Qwest imposed on some carriers and the lower rates that Qwest charged other carriers. Qwest fails even to mention the Court of Appeals ruling in *Pacific Northwest Bell*, much less attempt to explain how Oregon law precludes the Commission from establishing an effective remedy for Qwest’s discriminatory conduct. Qwest instead cites to a case from a Minnesota court, interpreting Minnesota statutes and concluding that the Minnesota commission did not have implied authority to issue refunds.<sup>24</sup> The case cited by Qwest has is not precedent in Oregon and is directly contrary to established Oregon law.

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<sup>19</sup> *Id.* at 307.

<sup>20</sup> *Id.* at 308-309.

<sup>21</sup> *Id.* at 309.

<sup>22</sup> Among the powers expressly granted to the Commission in ORS 756.040 is the authority to “supervise and regulate every public utility and telecommunications utility in this state, and to do all things necessary and convenient in the exercise of such power and jurisdiction.” ORS 756.040(2). The legislature also granted the Commission the express authority to “enforce all laws of this state relating to public utilities and telecommunications utilities.” ORS 756.160.

<sup>23</sup> *Pacific Northwest Bell* at 309-310.

<sup>24</sup> Qwest’s Motion at 7-8.

Qwest's position is also inconsistent with the decision in *Metro One*, where this Commission found that the authority to enforce an interconnection agreement necessarily includes the authority to award reparations to a party injured by the other party's failure to comply with the agreement.<sup>25</sup> Qwest attempts to distinguish the *Metro One* decision by arguing that the Complainants in this case, unlike the petitioners in *Metro One*, "are not trying to enforce the terms or rates contained in *their* interconnection agreement."<sup>26</sup> Qwest is simply wrong. The Complainants in this case are, in fact, trying to enforce the terms of their interconnection agreements. AT&T seeks enforcement of the clause in its interconnection agreement with Qwest that states that Qwest agrees to provided unbundled network elements "on rates, terms, and conditions that are just, reasonable, and non-discriminatory in accordance with . . . the Oregon Statutes and regulations and the requirements of Section 251 and Section 252 of the Federal Act."<sup>27</sup> Integra's interconnection agreement with Qwest includes the exact same provision.<sup>28</sup> TWTC seeks enforcement of the clause in its interconnection agreement where Qwest agrees that "with regard to the availability of other agreements, the Parties agree that the provisions of Section 252(i) of the Act apply."<sup>29</sup> Therefore, the holding of *Metro One* is directly on point—the Commission's authority to enforce the parties' interconnection agreements "necessarily carries with it the authority to award refunds to a party harmed by the improper conduct of another."<sup>30</sup>

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<sup>25</sup> *In the Matter of Metro One Telecommunications, Inc., for Enforcement of an Interconnection Agreement with Qwest Corporation*, OPUC Docket No. IC 1, Order Granted Petition for Enforcement, Order No. 00-623 (October 6, 2000) ("*Metro One*").

<sup>26</sup> Qwest's Motion at 6 (emphasis in original).

<sup>27</sup> Amended Complaint at 5. TCG Oregon's interconnection agreement with Qwest includes provision similar to that in the TWTC/Qwest agreement: "The Parties agree that the provisions of Section 252(i) of the Act shall apply, including state and federal interpretive regulations in effect from time to time." *Id.* at 6.

<sup>28</sup> Integra opted in to the interconnection agreement between AT&T and Qwest. *See id.* at 7.

<sup>29</sup> *Id.* at 6.

<sup>30</sup> *Metro One* at 8-9. More specifically, the Commission found that the parties "have voluntarily conferred authority on this Commission to implement and enforce the provisions of the interconnection agreement. . . . Section 11.2 provides that Qwest and Metro One: '[R]ecognize and agree that the Commission has continuing jurisdiction to implement and enforce all terms and conditions of this Agreement.'" *Id.* at 8. The Commission concluded that the parties' "voluntary grant of authority to the Commission to interpret and enforce the provisions of agreements necessarily carries with it the authority to award refunds to a party harmed by the



Finally, Qwest relies heavily on the DOJ Memorandum, stating that the DOJ analyzed “this very question” and reached the conclusion that the Commission did not have the authority to issue refunds. But Qwest reads the DOJ Memorandum too broadly. The DOJ Memorandum analyzed a discrete issue – whether the Commission has authority to require Qwest to pay penalties directly to CLECs on the basis of the CLECs having been damaged by Qwest’s failure to file.<sup>31</sup> The DOJ Memorandum was narrowly focused on the Commission’s authority under the penalty provision, ORS 759.990, as well as OAR 860-016-0020(3). The DOJ did not discuss *Pacific Northwest Bell* or *Metro One*, nor did the DOJ analyze remedies for violations of 759.260 and 759.275. Even this Commission did not read the DOJ Memorandum as broadly as Qwest. In the Unfiled Agreements Order, the Commission stated that the “Attorney General advised Staff that, *under the applicable penalty provision, ORS 759.990*, the Commission does not have the authority to award reparations for injuries suffered by CLECs due to Qwest’s failure to file the agreements.”<sup>32</sup> Thus the DOJ Memorandum does not address the “very question” presented to the Commission in the Amended Complaint.<sup>33</sup>

The Commission has the express authority to enforce ORS 759.260 and 759.275. The Court of Appeals has concluded that the Commission also has such implied powers as are necessary to carry out its delegated authority, including the authority to issue refunds. The Commission itself has found it has the authority to issue refunds when enforcing the provisions of interconnection agreements. The Commission, therefore, has the authority to redress the injury caused by Qwest’s violation of the law and grant the relief requested by Complainants.

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improper conduct of another. . . . Otherwise, the dispute resolution provision of the agreement would be rendered meaningless.” *Id.* at 8-9. Two of the agreements in this docket include identical provisions to those in *Metro One*. See AT&T’s interconnection agreement with Qwest at sections 11.1, 11.2 (Docket No. ARB 3); Integra’s interconnection agreement with Qwest at sections 11.1, 11.2 (Docket No. ARB 219).

<sup>31</sup> DOJ Memorandum at 1.

<sup>32</sup> Unfiled Agreements Order at 3 (emphasis added).

<sup>33</sup> Unfiled Agreements Order at 3.

**B. Qwest Misconstrues the Amended Complaint by Claiming that There is No Private Right of Action under Sections 251 and 252 of the Act**

Qwest argues that there is no private right of action for the enforcement of Sections 251 and 252 of the Act.<sup>34</sup> This is another example, however, of Qwest's flawed reading of the Amended Complaint. The Complaint seeks remedies for Qwest's discriminatory conduct, relying primarily on state non-discrimination statutes (ORS 759.260 and 259.275). Although Qwest also violated Section 252(i) of the Act by failing to provide rates, terms and conditions that are just, reasonable, and non-discriminatory, the violation of 252(i) is not the basis for Complainants' claims.

Qwest's violation of 252(i) is relevant, however, because that provision has been incorporated into several provisions of Qwest's interconnection agreements with the Complainants. The Amended Complaint includes allegations that Qwest has violated those provisions of the interconnection agreements with its discriminatory conduct and has asked the Commission to enforce those agreements. It is well established that this Commission has the authority to enforce interconnection agreements.<sup>35</sup> Accordingly, regardless of whether the Commission finds that Complainants have brought, or could bring, an independent action for violation of Section 252(i), the Amended Complaint states a cause of action for breach of contract that incorporates Qwest's obligations under Section 252(i). The Commission, therefore, should reject Qwest's arguments that the Amended Complaint should be dismissed because there is no private right of action for violations of Section 251 and 252.<sup>36</sup>

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<sup>34</sup> Qwest's Motion at 14.

<sup>35</sup> See, e.g., *MCI Communications Corp. v. Illinois Bell Telephone Co.*, 222 F.3d 323, 338 (2000); *Iowa Utils. Bd. v. FCC*, 120 F.3d 753, 804 (8<sup>th</sup> Cir., 1997), *aff'd in part and rev'd in part on other grounds AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 119 S.Ct. 721 (1999).

<sup>36</sup> Qwest's Motion includes an extensive argument about the applicability of Sections 206 and 207 of the Act. Because Complainants did not base any allegations in the complaint on Sections 206 or 207, Complainants will not respond to Qwest's assertions.

### C. The Complaint is Not Time Barred

Qwest alleges that the Complainants claims are barred by the Act's two year statute of limitations in 47 U.S.C. § 415.<sup>37</sup> Qwest is incorrect for several reasons. First, Qwest's argument is again premised on its incorrect interpretation of the Amended Complaint. The causes of action enumerated in the Amended Complaint are based on Qwest's violation of ORS 759.260 and 759.275, as well as Qwest's breach of the interconnection agreements between Qwest and the Complainants. Accordingly, the appropriate statute of limitations for actions under these Oregon statutes is ORS 12.080, which provides a six-year limitations period for actions "upon a contract" or "upon a liability created by statute," not Section 415 of the Act. Because the Amended Complaint alleges "a liability created by" a state statute, the state statute of limitations is applicable. There is no precedent for applying a *federal* statute of limitations to a cause of action based on the violation of *state* statute. Qwest does not – and cannot – contend that Complainants did not file their Amended Complaint within six years from the date the causes of action accrued.

Second, even if the Commission were somehow to interpret Section 415 as establishing the appropriate limitations period, Complainants' timely filed their Complaint. Qwest argues that the two-year limitation period in Section 415 began to run as early as March 2002 and expired long before the Complaint was filed. But a statute of limitations does not begin to run until the "aggrieved person discovers or, by the exercise of due diligence, could have discovered, the basis of the cause of action." *Pavlak v. Church*, 727 F.2d 1425, 1428 (1984). The earliest possible date that the Complainants' causes of action

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<sup>37</sup> Qwest's assertion that the federal statute of limitations applies contradicts Qwest's arguments in a virtually identical case before the Washington Utilities and Transportation Commission ("WUTC"). In that case, TWTC and AT&T filed a complaint against Qwest, including many of the same allegations as the Amended Complaint in this docket, in November 2005. *AT&T Communications of the Pacific Northwest, Inc., TCG Seattle, and TCG Oregon; and Time Warner Telecom of Washington, LLC, v. Qwest Corporation*, WUTC Docket No. UT-051682. Qwest filed a motion for summary determination and dismissal on November 28, 2005. Qwest did not allege that the federal statute of limitations applied in that case, but rather alleged that the state's six-month statute of limitations applied. Qwest appears to choose whichever statute of limitations is most advantageous depending upon the forum. A copy of Qwest's motion is attached as Exhibit \_\_\_\_\_.

could have accrued is October 25, 2004, which is the date the ALJ issued the protective order in the Unfiled Agreements Docket. Only then were the Complainants allowed to see the McLeodUSA and Eschelon agreements in Oregon.<sup>38</sup> Complainants filed their Complaint on November 10, 2005, just over one year after the protective order was issued in the Unfiled Agreements Docket and well within the two-year limitations period of 47 U.S.C. § 415.

Third, even if the two-year statute of limitations applies, and if the Commission could somehow determine that the causes of action accrued earlier than November 10, 2003, the Commission should reject Qwest's argument that the Amended Complaint was not timely filed because the statute of limitations was tolled during the Commission's informal investigation and the course of the Unfiled Agreements Docket. Under the doctrine of equitable tolling, the statute of limitations will be tolled when a party shows "(1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way."<sup>39</sup>

During Staff's informal investigation and the course of the Unfiled Agreements Docket, CLECs had every reason to believe that the Commission would address any potential harm to CLECs from Qwest's failure to file in the context of that docket. Although the DOJ had determined that the Commission could not award damages or impose penalties against Qwest that were directly payable to CLECs, the DOJ Memorandum was limited to the Commission's authority in the context of a proceeding under ORS 759.990. CLECs' arguments regarding the Commission's authority to redress the potential harm to CLECs went beyond ORS 759.990. Further, despite Qwest's arguments that TWTC's participation

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<sup>38</sup> In a recent decision, the WUTC agreed with TWTC and AT&T that the statute of limitations did not begin to run until TWTC and AT&T had access to the McLeodUSA and Eschelon agreements in Washington *AT&T Communications of the Pacific Northwest, Inc., TCG Seattle, and TCG Oregon; and Time Warner Telecom of Washington, LLC, v. Qwest Corporation*, WUTC Docket No. UT-051682, Initial Order Granting Qwest's Motion for Summary Determination; Dismissing Complaint at 8, ¶ 19. The WUTC rejected Qwest's arguments that the statute of limitations began to run when TWTC and AT&T became involved in the Minnesota proceeding. *Id.*

<sup>39</sup> *Pace v. Guglielmo*, 125 S.Ct. 1807, 1814 (2005).

in the Unfiled Agreements Docket should be limited in light of the DOJ Memorandum, the ALJ granted TWTC's petition to intervene without limitation and TWTC was free to raise the issue of reparations to CLECs.<sup>40</sup> Contrary to Qwest's assertions, CLECs were not "sitting on their rights," but rather were actively participating in the Unfiled Agreements Docket, in an attempt to seek a remedy. CLECs did not know that their issues would not be considered by the Commission until the Commission approved the stipulation between Staff and Qwest in the Unfiled Agreements Order. Because CLECs reasonably believed that the issues raised in the Amended Complaint could be raised during the Unfiled Agreements Docket, the doctrine of equitable tolling should apply.

Complainants filed their Complaint well within the six-year limitation period established in ORS 12.080, as well as within the two year federal statute of limitations period that Qwest erroneously contends applies to Complainants' state law and contract claims. The Commission should therefore reject Qwest's arguments that the Amended Complaint should be dismissed because it was not timely filed.

#### **D. The Filed Rate Doctrine Does Not Apply**

Qwest's final argument is that the Commission would violate the "filed rate doctrine" if it awarded the relief Complainants' request. Qwest's argument is absurd. The filed rate doctrine prohibits *Qwest* (not the Commission) from charging rates other than those rates set forth in Qwest's tariffs. ORS 757.225. Even assuming that the doctrine applies to interconnection agreements, the doctrine simply prohibits Qwest from charging rates other than those enumerated in an applicable interconnection agreement. The filed rate doctrine does not prohibit the Commission from ordering refunds or reparations for Qwest's violations of the law and/or interconnection agreements.

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<sup>40</sup> Unfiled Agreements Docket, *Qwest's Response to Covad Communications Company's and Time Warner Telecom of Oregon's Petitions to Intervene*, October 5, 2004; Unfiled Agreements Docket, *Ruling Granting Petition to Intervene and Setting Schedule*, October 26, 2004.

Qwest's interpretation of the filed rate doctrine would render meaningless ORS 759.260 and 759.275, as well as 47 U.S.C. § 252(i). Under Qwest's interpretation, as long as Qwest refused to amend Complainants' interconnection agreements to incorporate lower rates charged to another carrier, the Commission could not require Qwest to charge Complainants those lower rates. State and federal statutes obviously are not subject to such an interpretation. If the Commission orders Qwest to pay the difference between what Complainants 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, the Commission will not be "enforcing rates contained in an unfiled agreement that conflict with the rates contained in a filed interconnection agreement."<sup>41</sup> Rather, the Commission will be enforcing the Complainants' right – under federal law, state law, and the parties' interconnection agreements – to just, reasonable, and non-discriminatory rates. In other words, the Commission will be enforcing the rates that would have been in the parties' interconnection agreement if Qwest had not unlawfully prevented the Complainants from including those rates in their agreements.

Qwest's argument fundamentally ignores the fact that Qwest violated the law by failing to file the McLeodUSA and Eschelon agreements or otherwise make the rates, terms, and conditions in those agreements available to the Complainants. This violation deprived the Complainants of the right to amend their interconnection agreements to include the more favorable provisions in the secret agreements. By providing interconnection on rates, terms, and conditions that were discriminatory, Qwest violated state and federal law. Qwest should not be able to profit from this illegal behavior by arguing that the filed rate doctrine bars Complainants' requested relief. The Commission, therefore, should reject Qwest's argument that the filed rate doctrine precludes the Commission's consideration of the Amended Complaint.

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<sup>41</sup> Qwest's Motion at 21.


#### IV. CONCLUSION

Qwest's Motion is yet another attempt to evade the consequences of its illegal behavior. Complainants 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 Complainants may pursue their Complaint and should deny Qwest's Motion.

RESPECTFULLY SUBMITTED this 17<sup>th</sup> day of February, 2006.

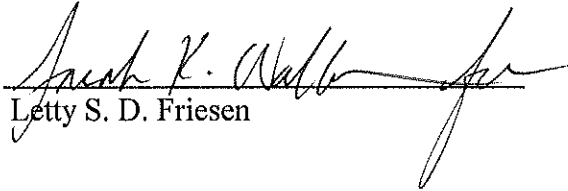
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AT&T COMMUNICATIONS OF THE  
PACIFIC NORTHWEST, INC., AND TCG  
OREGON

By:

  
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**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the COMPLAINANTS' RESPONSE TO QWEST CORPORATION'S MOTION TO DISMISS was served via electronic mail and U.S. Mail (unless otherwise specified below) on the following parties on February 17, 2006:

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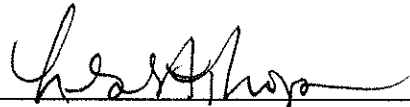
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