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February 17, 2006

Filing Center
Public Utility Commission of Oregon
550 Capitol Street N.E., Suite 215
Salem, OR 97308-2148

Re: UM 1232 Response to Qwest's Motion to Dismiss

Dear Filing Clerk:

Enclosed please find Exhibit A to Complainants' Response to Qwest's Motion to Dismiss which was inadvertently omitted from its earlier filing. Please contact our office with any questions or problems.

Very truly yours,

Davis Wright Tremaine LLP

Leslie A. Thompson
Legal Assistant to Sarah K. Wallace

Enclosure

cc: Alex M. Duarte
Letty S.D. Friesen
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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 CORPORATION'S MOTION FOR SUMMARY DETERMINATION AND DISMISSAL

I. INTRODUCTION

1 Qwest Corporation ("Qwest") files this Motion for Summary Determination, asking that the Commission dismiss the Complaint of AT&T Communications of the Pacific Northwest, Inc., TCG Seattle, TCG Oregon, ("AT&T") and Time Warner Telecom of Washington, LLC ("Time Warner") (collectively, "Complainants"). The basis for this Motion is that all of the Complainants' claims are barred by the statute of limitations. This Motion further contends that the Commission lacks statutory authority to grant Complaints' request for monetary relief.

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II. ARGUMENT – CLAIMS FOR "REPARATIONS" OR OTHER DAMAGES ARE BARRED AS A MATTER OF LAW

A. Summary Determination is an Appropriate Way to Resolve These Issues

2 The Commission's rules provide two alternative procedural vehicles for a party to seek dismissal of a pending adjudicative proceeding. A motion to dismiss (modeled after one that would be made in Superior Court pursuant to Civil Rule 12(b)(6) or 12(c)) is appropriate when the pleading the moving party seeks to be dismissed (in this case, the Complainants' Complaint) fails to state a claim upon which the Commission may grant relief. WAC 480-07-380(1).

3 Alternatively, a motion for summary determination (modeled after one that would be made in Superior Court pursuant to CR 56) is appropriate when the pleadings filed in the proceeding, along with any properly admissible evidentiary support, reveal that there is no genuine issue of material fact and that the moving party is entitled to the relief requested as a matter of law. WAC 480-07-380(2); CR 56(c).

4 In this case, either procedural vehicle is appropriate for resolution of this case since there are no relevant and material factual disputes regarding the applicability of the statute of limitations.

B. The Complainants' Claims Are Barred By Limitations

5 The Commission's authority to order reparations is limited to cases in which a carrier is found to have "charged an excessive or exorbitant amount for [a] service"[1] or to have charged a

[1] RCW 80.04.220. ("When complaint has been made to the commission concerning the reasonableness of any rate, toll, rental or charge for any service performed by any public service company, and the same has been investigated by the commission, and the commission has determined that the public service company has charged an excessive or exorbitant amount for such service, and the commission has determined that any party complainant is entitled to an award of damages, the commission shall order that the public service company pay to the complainant the excess amount found to have been charged, whether such excess amount was charged and collected before or after the filing of said complaint, with interest from the date of the collection of said excess amount.")

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customer more than the approved rate.[2] Putting aside whether reparations authority exists at all in this case, reparations claims (and claims for overcharges) are subject to at longest a strict two year limitations period:

> All complaints concerning overcharges resulting from collecting unreasonable rates and charges or from collecting amounts in excess of lawful rates shall be filed with the commission within six months in cases involving the collection of unreasonable rates and two years in cases involving the collection of more than lawful rates from the time the cause of action accrues . . . .[3]

6 Complainants' claim for reparations accrued when they discovered (or should by exercise of reasonable diligence have discovered) their right to apply for relief.[4] The only Qwest/Eschelon agreement containing an alleged discount or lower rate was entered into on November 15, 2000.[5] Because that agreement was not filed with this Commission contemporaneously, Complainants no doubt will argue that their cause of action did not accrue at signing. But the same allegations regarding a discount by Qwest to Eschelon were raised in the Minnesota Commission's "unfiled agreements" proceeding and Complainants knew – or should have been aware with the exercise of minimal diligence – of those allegations no later than March 12, 2002, the date on which the Minnesota Commission published public notice of its decision to proceed with the unfiled agreements case.[6] The filing of the amended complaint in Minnesota

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[2] RCW 80.04.230 ("When complaint has been made to the commission that any public service company has charged an amount for any service rendered in excess of the lawful rate in force at the time such charge was made, and the same has been investigated and the commission has determined that the overcharge allegation is true, the commission may order that the public service company pay to the complainant the amount of the overcharge so found, whether such overcharge was made before or after the filing of said complaint, with interest from the date of collection of such overcharge.").

[3] RCW 80.04.240 (emphasis added).

[4] *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)).

[5] *See,* Docket No. UT-033011, Agreement 4A.

[6] *See* Notice and Order for Hearing, *In the Matter of the Complaint of the Minnesota Department of Commerce Against Qwest Corporation Regarding Unfiled Agreements*, Docket No. P-421/C-02-197 (Minnesota Public Utilities Commission), March 12, 2002 (copy attached as Exhibit 1 to this motion). Even if it claims ignorance of the case from public filings, Time Warner joined the service list for the Minnesota unfiled agreements case on June 27, 2002. *See* e-mail from R. Liethen to Minnesota docket service list, June 27, 2002 (copy attached as Exhibit 2 to this motion).

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in May of 2002 should start the clock regarding the McLeod agreements, as the allegations regarding McLeod were added at that time, and both AT&T and Time Warner had actual knowledge of, and participated in, the Minnesota proceeding.

7 Qwest contends that the Complainants actually discovered, or should have, with the exercise of reasonable diligence, discovered in March and May of 2002, the facts giving rise to the allegations in this complaint. This discovery would have occurred in the Minnesota complaint. AT&T was a party to that case, appeared at every hearing, submitted extensive prehearing, post-hearing, and penalty phase pleadings, and testified during the April 2002 hearings. Time Warner was also a party to the Minnesota case – Time Warner was on the service list, filed comments on January 21, 2003, March 20, 2003 and May 19, 2003, and made arguments at the Minnesota Commission's hearings. The January 21, 2003 comments argued specifically that Time Warner should be given the benefit of a 10% discount.[7]

8 There are other relevant dates as well. In June 2002 Qwest provided these agreements to the Commission in Washington in the context of its §271 proceeding. AT&T was a party to that proceeding and subsequently filed a motion asking the Commission to reopen the proceedings to hear allegations about the unfiled agreements.[8]

9 At the very latest, these Complainants must have known of the facts that give rise to the cause of action no later than September 8, 2003, when the AT&T entities and Time Warner attended

[7] Copy attached as Exhibit 3 to this motion. 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.

[8] *See, In the Matter of the Investigation into U S WEST Communications, Inc.'s Compliance with § 271 of the Telecommunications Act of 1996*, and *In the Matter of U S WEST Communications, Inc.'s Statement of Generally Available Terms Pursuant to Section 252(f) of the Telecommunications Act of 1996*, Docket Nos. UT-003022 and 003040. AT&T's filing in Washington was made on September 18, 2002. AT&T had previously filed virtually identical motions,on May 13, 2002, in Colorado, Iowa, Montana, Nebraska, New Mexico, South Dakota, Utah, and Wyoming. AT&T's knowledge of the facts necessary to file a complaint for relief must be set no later than the date it filed motions to reopen, asking nine different Commissions to hear allegations that it then waited for three and a half years to make in a formal complaint.

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the prehearing conference in the Commission's complaint proceeding here in Washington in Docket No. UT-033011.

10 The one thing that all of these dates have in common is that each date is more than two years prior to the filing of the Complaint in this matter. As will be seen below, there is no applicable period of limitations that is longer than two years.

11 As between the two limitations periods, the Complainant's claims are more akin to a "reparations" claim than an "overcharge" claim, and thus the six-month period for "cases involving the collection of unreasonable rates" represents a better fit.[9] Indeed, Complainants do not allege, and cannot allege, that Qwest charged them anything other than the rates that were contained in their interconnection agreements. Those rates were approved by the Commission and as such must be concluded to be the approved and lawful rates in effect at the time. Complainants simply complain of the unfairness to them of Qwest's alleged favoritism toward Eschelon. They are not asserting that they were billed more than an approved rate. And as such, Complainants' claims fail as a matter of law – they filed nothing, in court or before this Commission, alleging a right to reparations from any unfiled agreement within six months of March 12, 2002, or June of 2002, or August 14 of 2003, or September 8, 2003, or even October of 2004. While it is Qwest's contention that the March 12, 2002 date is the applicable date for triggering the statute of limitations, these other dates are also relevant. Each is an additional point at which Complainants were fully aware of the facts giving rise to their claims, and yet chose to do nothing. For example the August 14, 2003 date is the date on which Staff filed its initial complaint in Docket No. UT-033011, the "unfiled agreements" case.

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[9] *See* RCW 80.04.240.

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12 Even if these claims were considered a "cas[e] involving the collection of more than lawful rates" subject to the two-year limitations period,[10] Complainants' claims are still time barred. The complaint in this matter is well over two years after March 12, 2002. Indeed, Qwest raised these very issues regarding the statute of limitations in October 2004, in Docket No. UT-033011, and still Complainants waited 13 months to file their complaint.[11]

13 Complainants assiduously avoid mention of RCW 80.04.220 -.240, no doubt well aware that the limitations issues are insurmountable. However, avoiding mention of these statutes does not make the issue go away. As noted above, Complainants have conceded that their claim is one for "overcharges", which would trigger the two year statute. Although Qwest believes that the six-month statute is more applicable, in the end it does not matter, as both periods of time have long expired. Further, Qwest believes that Complainants will be hard pressed to find any other applicable limitations period.

14 The Administrative Procedure Act, under which this proceeding is conducted, requires that adjudications be timely filed.[12] This requirement supports the view that this matter must be governed by a pertinent period of limitation, else the admonition requiring timely filing would be meaningless.[13]

15 Complainants may argue that since they have alleged violations of RCW 80.36.170, .180, and .186, as opposed to advancing a claim for relief under RCW 80.04.240, their claims are

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[10] *See* RCW 80.04.240. Complainants seem to concede that this provision applies, summing up their request for relief in paragraph 10 of the complaint as an issue involving "Qwest overcharges."

[11] *See*, Qwest's Motion to Strike TWT Testimony in Docket No. UT-033011, filed October 1, 2004.

[12] RCW 34.05.413 reads in part as follows: "(2) When required by law or constitutional right, and upon the*timely* application of any person, an agency shall commence an adjudicative proceeding." (Emphasis added).

[13] *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.

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governed by another, longer limitations period. This is incorrect.

16 First, there is no other applicable limitations period. The only other limitations provisions are contained in Chapter 4.16 RCW, and are general in nature. The limitations period in RCW 80.04.240 is specific to regulated utilities, and it is axiomatic that a more specific statute will control over a more general one – Complainants simply cannot avoid the application of the limitations period in RCW 80.04.240. Indeed, RCW 4.16.005 provides that when limitation periods are not set in subject-specific statutes, they are governed by pertinent provisions of chapter 4.16 RCW. Because RCW 80.04.240 governs any claim for reparations or overcharges, no matter the underlying basis for the claim, the provisions of Chapter 4.16 RCW are not applicable.

17 Second, even if the Commission were to find to the contrary and determine that RCW 80.04.240 is not applicable, the only provision that could arguably apply is RCW 4.16.130, which governs the limitation period for matters not otherwise specified. This statute establishes a two-year limitation period for private formal administrative complaints that are not governed by specific statutory limitations.[14]

18 Finally, as Time Warner did in Docket No. UT-033011, Complainants may well assert that "any cause of action for a refund would not accrue until the Commission determines that the 10% discount terms offered to Eschelon and McLeodUSA are interconnection agreements that should have been filed."[15] This contention should be rejected as contrary to Washington law, as well as being patently ridiculous – such a contention would be tantamount to arguing that a cause of action for personal injury does not accrue until the court finds negligence. This is of

[14] Id at ¶46. RCW 4.16.130 reads as follows: Action for relief not otherwise provided for. An action for relief not hereinbefore provided for, shall be commenced within two years after the cause of action shall have accrued.

[15] Docket No. UT-033011, Time Warner Response to Qwest Motion to Strike at 9 (October 7, 2004).

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course not the case. Under long-settled Washington law, Complainant's claims accrued when they discovered or should by exercise of reasonable diligence have discovered their right to apply to a court for relief,[16] a discovery Complainants made or should have made well over three years ago.

19 Complainants do not assert lack of knowledge of the alleged "discount agreements" since early 2002, and can offer no explanation or excuse for failing to take the appropriate steps to raise and pursue their claims in Washington. Complainants should have known, at the very latest, once they read the Amended Complaint (in Docket No. UT-033011) in August 2003, that they bore the burden of pursuing these claims, and their decision in the mean time not to initiate a proceeding in the manner prescribed by the Commission's rules is fatal.

20 The Commission should thus conclude that Complainants' claims are barred by operation of the statute of limitations. As a result, the Commission should dismiss the Complaint with prejudice.

C. The Commission Does Not Have the Authority to Order Reparations In Connection With the "Unfiled Agreements" Allegations

21 Even more fundamentally, this Commission lacks authority in the first place to award equitable remedies for violations of federal and state law arising from Qwest's failure to file interconnection agreements pursuant to 47 U.S.C. § 252. Complainants allege that Qwest violated federal and Washington law by failing to file interconnection agreements it should have filed. That failure, or the failure to do so in a timely fashion, is arguably punishable by fines.[17] But the legislature has not granted this Commission the authority to impose restitution-style remedies on behalf of CLECs for damages arising from a failure to file – even if, as is not

[16] *See* fn 4, *supra.*

[17] In fact, Qwest paid a substantial sum in settlement of this issue in Docket No. UT-033011.

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the case here, the claims were properly and timely presented.

22 As noted in the previous section, Washington statutory law permits the Commission to award reparations for charging customers "excessive or exorbitant" rates[18] or refunds for charging customers more than lawful rates.[19]

23 Complainants' "reparations" claim, to the extent it is alleged at all, is not grounded in the claim that the rate it paid was unreasonable, or that Qwest charged more than a lower approved rate. Instead, Complainants' reparations claim states that Qwest failed to file, and make available for opt-in, certain agreements that were subject to the Section 252 filing requirement. This distinction matters:

- If this were a true reparations case, Complainants would have to allege that Qwest charged "an excessive or exorbitant amount" for the Section 251(b) or (c) services they purchased from Qwest.[20] Complainants do not make that claim here, and cannot: the rates Complainants paid were approved by the Commission, even if Eschelon's were lower.

- If this were a true overcharge case, Complainants would have to allege that Qwest had charged it more than the approved rate for the Section 251(b) or (c) services they purchased from Qwest. Again, Complainants do not make that claim and cannot. The question of whether Complainants should have been charged the same amount as Eschelon requires the Commission first to consider and approve the Eschelon "rate" (the "discount" along with related terms and conditions), then to determine whether Complainants could opt into that rate. Indeed, the Telecommunications Act

18 RCW 80.04.220.

19 RCW 80.04.230.

20 *See* RCW 80.04.220.

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contemplates that different customers may, in fact, pay different prices for identical services because of other, related terms and conditions in their broader business relationship.

24 As the Commission may know, the Minnesota Public Utilities Commission initiated its own "unfiled agreements" docket in 2002. Although Qwest argued that the Minnesota Commission lacked the authority to award money or bill credits to CLECs, the Commission overruled Qwest's objections and imposed two main categories of "sanctions" on Qwest: (i) a fine and (ii) an order requiring Qwest to pay "restitutional relief" tracking exactly the "reparations" Complainants seek here.[21] And, on August 25, 2004, the United States District Court for the District of Minnesota vacated the Minnesota Commission's "restitutional relief" order, finding (as Qwest had argued) that the Minnesota Commission lacked the authority under Minnesota state law to impose equitable "penalties" on Qwest.[22] On November 1, 2005, the United States Court of Appeals for the Eighth Circuit affirmed the District Court's ruling that the Minnesota Commission lacked the authority to grant restitution.[23]

25 This ruling is important not simply because the court vacated the "reparations," but more because of the court's refusal to imply authority for the Minnesota Commission to award equitable relief in the absence of express authority. The Minnesota statutes defining that Commission's authority appear on the surface to permit a fair amount of flexibility. The Minnesota Commission has authority to "make an order respecting [an unreasonable, insufficient, or unjustly discriminatory] . . . act, omission, practice, or service that is just and

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[21] This is hardly surprising, since both AT&T and Time Warner participated in the Minnesota case. *See supra* ¶ 7 and fn 7.

[22] Memorandum Opinion and Order, *Qwest Corporation v. Minnesota Public Utilities Commission*, Civil No. 03-3476 ADM/JSM, 2004 WL 1920970, **2-3 (D. Minn. Aug. 25, 2004).

[23] *Qwest Corp. v. Minnesota Public Utilities Comm'n*, Nos. 04-3368, 04-3510, 04-3408 (8th Cir. Nov. 1, 2005).

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reasonable," and to "establish just and reasonable rates and prices."[24] But catch-all language is not enough. Like its counterpart in Minnesota, an administrative agency in Washington "must be strictly limited in its operations to those powers granted by the legislature."[25] And given the Commission's existing but narrower authority to order reparations and overcharge payments – which authority does not extend to the relief Complainants seek for the reasons discussed above – the Washington Commission should be even more reluctant than Minnesota to interpolate authority to order the "reparations" Complainants request now.

III. CONCLUSION

26 Therefore, 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 28th day of November, 2005.

QWEST

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[24] Minn. Stat. § 237.462, subd. 9. § 237.081, a complaint statute, authorizes the MPUC to "make an order respecting [an unreasonable, insufficient, or unjustly discriminatory] . . . act, omission, practice, or service that is just and reasonable," and to "establish just and reasonable rates and prices." Minn. Stat. § 237.081, subd. 4.

[25] *Cole v. Washington Utilities and Transportation Comm'n*, 79 Wn.2d 302, 306, 485 P.2d 71, 74 (1971) (citing *State ex rel. Pub. Util. Dist. No. 1 of Douglas County v. Department of Public Service*, 21 Wn.2d 201, 150 P.2d 709 (1944)); *see also, In re Electric Lightwave, Inc.*, 123 Wn.2d 530, 536-37, 869 P.2d 1045, 1049 (1994) ("An agency possesses only those powers granted by statute.").

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