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February 2, 2006

Annette Taylor
Oregon Public Utility Commission
550 Capitol St., NE, Suite 215
P.O. Box 2148
Salem, OR 97308-2148

Re: UM 1232

Dear Ms. Taylor

Enclosed for filing please find an original and (5) copies of Qwest Corporation's Motion to Dismiss the Complainants' Amended Complaint, along with a certificate of service.

If you have any question, please do not hesitate to give me a call.

Sincerely,

Carla M. Butler

CMB:
Enclosure
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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.	**QWEST CORPORATION'S MOTION TO DISMISS THE COMPLAINANTS' AMENDED COMPLAINT**

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INTRODUCTION

Respondent Qwest Corporation ("Qwest") hereby moves to dismiss the Amended Complaint that complainants AT&T Communications of the Pacific Northwest, Inc., and TCG Oregon ("AT&T"), Time Warner Telecom of Oregon, LLC ("Time Warner"), and Integra Telecom of Oregon, Inc. ("Integra") (collectively "Complainants") filed on January 13, 2006. Complainants allege violations of sections 251(b), (c), and (e) and 252(i) of the Telecommunications Act of 1996 ("the Act") and of ORS 759.260 and ORS 759.275, as well as breach of contract. Complainants premise their allegations upon Qwest's agreements with Eschelon Telecom ("Eschelon") and McLeodUSA Telecommunications Services, Inc. ("McLeod") which were the subject of a stipulated penalty before the Commission earlier this year. *See* Order No. 05-783 (June 17, 2005) in docket UM 1168 ("unfiled agreements" docket).

Four significant obstacles, however, prevent Complainants from pursuing this action.

First, whether styled as "refunds" or "damages," Complainants in essence ask the Commission to award damages for alleged overcharges resulting from the differences between the rates paid under their interconnection agreements and the rates allegedly paid under other, third-party agreements (the Eschelon and McLeod agreements). No legal basis in state law exists for the Commission to award damages or refunds to the Complainants. The Commission is limited under state law to imposing penalties; it has no statutory authority to award the relief that Complainants seek.

Second, 47 U.S.C. § 415 prohibits actions brought more than two years from the time the cause of action accrues. Complainants have been well aware of the Eschelon and McLeod agreements at issue here because numerous states were proceeding with dockets regarding those

agreements since at least 2002. Complainants have sat on their rights, and, accordingly, Complainants' action is now time-barred.1

Third, no federal law provides a private right of action under sections 251 or 252 of the Telecommunications Act of 1996. Consequently, Complainants have asserted no cognizable claims for which this Commission can award the recovery that they seek.

Fourth, the filed rate doctrine prohibits the Commission from awarding damages to Complainants.

As a result, Qwest respectfully submits the Amended Complaint must be dismissed in its entirety.

ANALYSIS

Pursuant to ORCP 21, a motion to dismiss a complaint may be made on the bases of "(1) lack of jurisdiction over the subject matter, . . . (8) failure to state ultimate facts sufficient to constitute a claim, and (9) that the pleading shows that the action has not been commenced within the time limited by statute." ORCP 21.

A motion to dismiss for lack of subject matter jurisdiction may either "attack the allegations of the complaint or may be made as a 'speaking motion' motion attacking the existence of subject matter jurisdiction in fact." *Thornhill Pub. Co. v. Gen. Tel. & Elecs.*, 595 F.2d 730 (9th Cir. 1979). Where the jurisdictional issue is separate from the merits, the adjudicative body need only consider the evidence related to the jurisdictional issue, and rule on

1 Although Complainants have now added a "breach of contract" claim (Amended Complaint, ¶¶ 22-25), no doubt hoping to invoke a six-year statute of limitations under ORS 12.080, the contracts at issue are contracts pursuant to federal law (the 1996 Telecommunications Act), and thus ORS 12.080 does not apply. As set forth in more detail below, the FCC expressly imposes a two-year statute of limitations that applies to *any actions involving claims under the Act*. 47 U.S.C. § 415; *see Pavlak v. Church*, 727 F.2d 1425, 1426-27 (9th Cir. 1984). Moreover, no breach of contract claim would be viable in any event because there are no allegations that the complainants ever made a request to "opt-in" to any other agreement, and no allegations that Qwest wrongfully refused such a request. As such, the Complainants cannot prove facts establishing a breach of the parties' interconnection agreements.

that issue, resolving factual disputes as necessary. *See id.* "No presumption of truthfulness attaches to plaintiff's allegations, and the existence of disputed material facts will not preclude the trial court from evaluating for itself the merits of jurisdictional claims." *Mortensen v. First Fed. Savs. & Loan Ass'n*, 549 F.2d 884, 891 (3d Cir. 1977). The plaintiff bears the burden of proving that jurisdiction does in fact exist. *Id.*

I. The Commission Has No Authority to Award Complainants' Requested Relief

The Commission has no authority to adjudicate private rights of action that would permit Complainants to recover damages or refunds for alleged overcharges in a Commission proceeding. The Commission is a creature of statute. *See City of Klamath Falls v. Environ. Quality Comm'n.*, 318 Or. 532, 545 (1994). It "possesses only those powers that the legislature grants and cannot exercise authority that it does not possess." *State ex rel. State for Servs. to Children & Families v. Klamath Tribe*, 170 Or. App. 106, 115 (2000). In particular, an agency that performs judicial functions does not possess general jurisdictional powers. Rather, its powers are restricted to those conferred expressly by statute or by necessary implication. *Gaynor v. Bd. of Parole and Post-Prison Supervision*, 165 Or. App. 609, 612 (2000); *SAIF Corp. v. Wright*, 312 Or. 132, 137 (1991) ("The measure of an agency's authority to administer a statutory remedy is found in the statute creating the procedure.").

ORS 759.990 sets forth the Commission's authority to act in response to a telecommunication carrier's violations of the law. Specifically, ORS 759.990(6) authorizes the Commission to assess penalties against a carrier that "violates any statute administered by the Public Utility Commission" or that "fails to obey any lawful requirement" made by the Commission. OAR 860-016-0020(3) obligates parties to an interconnection agreement under Section 252(a) to "file an application with the Commission seeking approval of the agreement, or for approval of an amendment to an approved agreement on file with the Commission." No

other statutory provisions relate to the Commission's authority. Thus, ORS 759.990 is the Commission's only basis for remedying Qwest's alleged nonfiling of a Section 252 interconnection agreement. The Commission is expressly limited to the imposition of monetary sanctions only; ORS 759.990 does not permit the imposition of other types of remedies—such as the damages or "refunds" requested by Complainants. *Cf. Archibold v. Pub. Utils. Comm'n*, 58 P.3d 1031 (Colo. 2002) (upholding the Colorado Commission's decision to order reparations where it was expressly permitted by Colorado law). In fact, the Commission has frequently made clear that it has no jurisdiction to award monetary damages. *See, e.g., Dolan v. U S WEST Commc'ns., Inc.*, Order No. 00-105, docket UC 461, 2000 WL 342784, at *2 (Feb. 17, 2000) (finding in complaint for failure to list a business line that "the Commission cannot grant monetary damages requested by Complainant for lost business opportunity. The Commission generally has no jurisdiction to award monetary damages."); *Schaefer v. Century of Or., Inc.*, Order No. 01-157, docket UC 569, 2001 WL 306832, at *1 (Feb. 8, 2001) (finding that no statute granted the Commission authority to order a utility company to pay damages for alleged monetary loss resulting from a disputed disconnection of service).

Indeed, in analyzing this very question under the same facts presented in this case, the Oregon Attorney General's Office has reached the same conclusion. Prior to approving the stipulated monetary penalty in docket UM 1168, the Commission asked the Attorney General's Office to analyze "whether the PUC has authority to require Qwest, as part of such a settlement, to pay money directly to competitive local exchange carriers (CLEC) on a theory assuming that the CLECs may have been damaged by Qwest's failure to file." In an August 19, 2004 memorandum to Chairman Beyer, the Attorney General's Office concluded that "neither [ORS 759.990] nor any other provides the [Commission] with authority to direct payment of a penalty

to one or more CLECs." *See* August 19, 2004 Memorandum from Joseph T. McNaught and Michael T. Weirich to Chairman Lee Beyer (a copy of which is attached as Exhibit 1).

The Commission also lacks jurisdiction if Complainants purport to rely on ORS 759.900. ORS 759.900 provides:

> Any telecommunications utility which does, or causes or permits to be done, any matter, act or thing prohibited by this chapter or ORS chapter 756, 757 or 758 or omits to do any act, matter or thing required to be done by such statutes, is liable to the person injured thereby in the amount of damages sustained in consequence of such violation. Except as provided in subsection (2) of this section, *the court* may award reasonable attorney fees to the prevailing party in an action under this section.

See also ORS 756.185. (Emphasis added.) ORS 759.900, by its very terms, specifically contemplates involvement of "the court" in any proceedings in which a person injured seeks to recover from a telecommunications utility.[2] It does not expressly authorize the Commission to enforce private rights of action, and there is no basis in the statute to otherwise believe that the Commission is entitled to enforce these actions by implication. *See Gaynor, supra*, 165 Or. App. at 612 (an agency's powers are restricted to those conferred expressly by statute or by necessary implication). The general provisions that govern the Commission further provide that the Commission may seek enforcement of statutes and ordinances relating to utilities or enforcement of utility laws in the courts. ORS 756.160; ORS 756.180. However, again, nothing provides the Commission with express authority to award damages or a refund based on overcharges.

Finally, although the Commission may impose penalties, any "sums" assessed by the Commission must "be paid into the General Fund and credited to the Public Utility Commission Account." ORS 759.990(8). This is precisely what Order No. 05-783 in the unfiled agreements docket (UM 1168) did. Nothing in the Act permits the Commission to award damages or

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[2] Consistent with ORS 759.900, the parties' stipulation in docket UM 1168 specifically reserved the CLECs' right to bring any "appropriate action" in any "appropriate forum." The stipulation did not purport to expand the Commission's jurisdiction beyond the express language in the statute.

"refunds" for overcharges directly to a private party. ORS 759.990 is the only express basis for the Commission's statutory authority to award remedies. No statute authorizes restitutional remedies, such as the relief that Complainants seek.

The Commission's Order No. 00-623 in docket ARB 1 (the "*Metro One* Order") does not compel a different conclusion. In that case, Metro One contended that Qwest was required to provide Directory Assistant Listings ("DALs") to Metro One at the rates "set forth" in the parties' interconnection agreement. *Metro One* Order, at pp. 2 and 8. Qwest contended that Metro One was not a telecommunications carrier providing telecommunications services, and so it was not entitled to access to DALs at the cost-based rates set forth in the interconnection agreement, and it also argued that the Commission did not have jurisdiction to assess damages on its unregulated affiliate.

In the *Metro One* Order, the Commission agreed that it has limited authority to award money damages. *Metro One* Order, at p. 8. In agreeing with Metro One, however, the Commission based its decision on a necessary condition that is not present here: There, the Commission found that the parties had *agreed* in their interconnection agreement that Qwest would provide DALs to Metro One at certain rates. Because the Commission found that Metro One was a telecommunications carrier providing telecommunications services, it ruled that Metro One was entitled to order DALs at the cost-based rates set forth in the interconnection agreement, rather than the market rates that it had paid. As a result, the Commission ruled that it had the authority to enforce the specific, agreed-upon terms contained in the interconnection agreement, and thus required Qwest to refund the overpayments that Metro One had made when Qwest had failed to provide it with DALs *at the rate specifically agreed to by the parties' interconnection agreement*. *Metro One* Order, at p. 9. In contrast, in this case, the Complainants are not trying to enforce the terms or rates contained in *their* interconnection agreement. Rather,

Complainants seek *damages* based upon Qwest's alleged conduct *outside of the terms of their interconnection agreements*, and thus the general principle that the Commission lacks authority to award damages or refunds applies.3

As the Commission knows, 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 Minnesota 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 "refunds" Complainants seek here.[4] However, 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. Memorandum Opinion and Order, *Qwest Corp. v. Minn. Pub. Utils. Comm'n*, Civil No. 03-3476 ADM/JSM, 2004 WL 1920970, **2-3 (D. Minn. Aug. 25, 2004) (copy attached as Exhibit 2 to this motion). 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. *Qwest Corp. v. Minn. Pub. Utils. Comm'n*, Nos. 04-3368, 04-3510, 04-3408 (8th Cir. Nov. 1, 2005) (copy attached as Exhibit 3 to this motion).

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3 The Complainants' invoking of the so-called section 251(i) provisions (see Amended Complaint, ¶¶ 11, 22-25) does not cure this defect. This is especially so because despite allegations that Qwest's alleged providing facilities and services to Eschelon and McLeod at lower rates or discounts than Qwest made available to them was a breach of these provisions, these allegations are premised on alleged Qwest conduct outside of their interconnection agreements. Thus, even accepting their allegations as true, there is no Metro One-like allegation that Qwest did not charge to the Complainants the rates that were specifically set forth in their interconnection agreements.

4 This is hardly surprising because both AT&T and Time Warner participated in the Minnesota case. *See infra,* fn. 4 and accompanying text .

This ruling is important not simply because the court vacated the "refunds," but more so 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 contain what appears to be a broad grant of authority. 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 reasonable," and to "establish just and reasonable rates and prices."[5] However, catch-all language is not enough. Like its counterpart in Minnesota, an administrative agency in Oregon is limited to the authority specifically enumerated by statute. *Klamath Tribe*, *supra*, 170 Or. App. at 115. Moreover, given this Commission's narrower authority to order only monetary penalties – which authority does not extend to the relief Complainants seek for the reasons discussed above – there is an even stronger case against the authority to order money damages here than in Minnesota, where two federal courts have held no such authority can be implied from the statutory structure.

Accordingly, Qwest respectfully submits that the Commission lacks the authority and jurisdiction to award the relief Complainants seek. As such, the Commission should dismiss the Amended Complaint in its entirety.

II. The Amended Complaint Must Be Dismissed because 47 U.S.C. § 415's Statute of Limitations Precludes the Action

A. Complainants' Action is Barred by the Statute of Limitations

Complainants' action is also barred by the Federal Communications Act's statute of limitations, and thus the Commission has no jurisdiction to hear the Amended Complaint. In pertinent part, 47 U.S.C. § 415 provides:

5 Minn. Stat. § 237.462, subd. 9. Section 237.081, a complaint statute, authorizes the Minnesota Commission 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.

> (a) All actions at law by carriers for recovery of their lawful charges, or any part thereof, shall be begun, within two years from the time the cause of action accrues, and not after.
>
> (b) All complaints against carriers for the recovery of damages not based on overcharges shall be filed with the Commission within two years from the time the cause of action accrues, and not after, subject to subsection (d) of this section.
>
> (c) For recovery of overcharges action at law shall be begun or complaint filed with the Commission against carriers within two years from the time the cause of action accrues, and not after, subject to subsection (d) of this section, except that if claim for the overcharge has been presented in writing to the carrier within the two-year period of limitation said period shall be extended to include two years from the time notice in writing is given by the carrier to the claimant of disallowance of the claim, or any part or parts thereof, specified in the notice.

The Federal Communications Act expressly imposes a two-year statute of limitations that applies to *any actions involving claims under the Act*. 47 U.S.C. § 415; *see Pavlak v. Church*, 727 F.2d 1425, 1426-27 (9th Cir. 1984). The statute of limitations applies, irrespective of whether the action is before the FCC, in federal court, or in front of a state commission. *See, e.g., Pavlak, supra*, 727 F.2d at 1426-27 (holding that 47 U.S.C. § 415 applies to claims filed in district court as well as to complaints filed with the FCC); *A.J. Phillips Co., v. Grand Trunk W. Railway Co.*, 236 U.S. 662, 667 (1915) (finding that the predecessor provision under the Interstate Commerce Act limits actions "whether complaint is filed with the Commission or suit is brought in a court of competent jurisdiction"); *Petition of SBC Tex. For Post-Interconnection Dispute Resolution with Tex-Link Commc'ns., Inc., under the FTA Relating to Intercarrier Comp.*, Ruling on Motion to Dismiss, 2005 WL 2834183, at 7-9 (Tex. P.U.C. Oct. 26, 2005) (finding that the two-year limitation applies to claims that a state commission is authorized to hear) (hereafter "*SBC Tex*.").

Section 415 applies to Complainants' action before the Commission here because the Commission's authority over disputes involving interconnection agreements *derives from the Federal Telecommunications Act of 1996*. As the Texas Public Utility Commission made clear, the Commission is required to follow *federal law*. *See SBC Tex.*, 2005 WL 2834183, at 7-9.

"[W]ith the 1996 Telecommunications Act, Congress has offered the states, not federal funds, but a role as what the carriers have called a 'deputized' federal regulator." *MCI Telecomms. Corp. v. Ill. Bell Tel. Co.*, 222 F.3d 323, 343-44 (7th Cir. 2000). This Commission, therefore, is "voluntarily regulating on behalf of Congress." *Id.*, 222 F.3d at 343. As such, it is bound by the limitations expressly imposed by the Act. *Sw. Bell Tel. Co. v. Connect Communications Corp.*, 225 F.3d 942, 947 (8th Cir. 2000) ("while Congress has chosen to retain a significant role for the state commissions, the scope of that role is measured by federal, not state law."). Accordingly, to the extent that the Complainants may attempt to rely on the state law statute of limitations for contract actions, ORS 12.080, for its breach of contract claim (Amended Complaint, ¶¶ 22-25), such attempt would have to necessarily fail because any such "breach of contract" claim would have to be based on *actions involving claims under the Act* (federal law), and not state law.

In their amended complaint, Complainants allege that the Commission has jurisdiction pursuant to section 252 of the Act. (Amended Complaint, at ¶ 5.) Complainants further claim that Qwest violated sections 251 and 252 by not providing them the same interconnection agreements that Qwest entered into with Eschelon and McLeod. (*Id.* at ¶¶ 13-15.) Based on these allegations, there can be no dispute that Complainants are asserting violations that arise under the Act. Any relief would have to come from the Act and correspondingly would be limited by the Act, which bars actions after two years.

Complainants' claim for refunds accrued when they discovered (or by exercise of reasonable diligence should have discovered) their right to apply for any relief they deemed appropriate. The only Qwest/Eschelon agreement containing an alleged discount or lower rate was entered into on November 15, 2000. 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. However, the same claims regarding an alleged 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. *See* Notice and Order for Hearing, *In re Compl. of the Minn. Dep't of Commerce Against Qwest Corp. Regarding Unfiled Agreements*, Docket No. P-421/C-02-197 (Minn. PUC), March 12, 2002 (copy attached as Exhibit 4 to this motion).[6] The filing of the amended complaint in Minnesota in May 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 in fact participated in, the Minnesota proceeding.

Qwest contends that 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 amended 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, posthearing, 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.[7]

In addition, in Washington, AT&T and Integra were each named defendants in a complaint brought by the Washington Utilities and Transportation Commission regarding certain

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6 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 5 to this motion).

7 As in Oregon, the Minnesota Commission sends notices out to all CLECs and interested parties. Since Integra was certificated in Minnesota in 2002, it necessarily would have also received notice of proceeding in Minnesota, but apparently elected not to appear.

unfiled agreements, and they received service on August 14, 2003. *See* Complaint and Notice of Prehearing Conference, *Wash. Utils. & Transp. Comm'n. v. Advanced Telecom Group, Inc.,* Docket No. UT-033011 (Aug. 13, 2003) (copy attached as Exhibit 6 to this motion). Time Warner was an intervenor in that case. On September 8, 2003, AT&T, Time Warner, and Integra attended a prehearing conference in the Washington Commission's complaint proceeding in Washington in Docket No. UT-033011. *See* Prehearing Conference Order, *Wash. Utils. & Transp. Comm'n. v. Advanced Telecom Group, Inc.,* Docket No. UT-033011 (Sept. 10, 2003) (copy attached as Exhibit 7 to this motion).

Given that Complainants have been aware of these proceedings for more than three years now, they are clearly precluded by 47 U.S.C. § 415. Although this Commission opened its unfiled agreements docket (UM 1168) in September 2004, this provides no excuse for Complainants to have sat on their alleged rights for so long. The Complainants cannot claim ignorance or that the statute of limitations did not begin to run until the Commission opened docket UM 1168. Their claims are governed by the discovery rule, and the exercise of due diligence would have put them on notice as a result of the on-going proceedings in multiple jurisdictions elsewhere around the region. *See Pavlak, supra,* 727 F.2d at 1428 (stating that the discovery rule determines when a statute of limitations begins to run). The Supreme Court has made clear that the "and not after" language in the provision means that "the lapse of time not only bars the remedy but destroys the liability." *A.J. Phillips Co., supra*, 236 U.S. at 667. A cause of action cannot be revived after the limitations period passes. Because no basis exists to now hear the action, the Commission must dismiss the Amended Complaint against Qwest.

B. Section 415 Precludes Complainants' State Claims

Section 415(b) also applies to Complainants' state claims, including any breach of contract claim (Amended Complaint, ¶¶ 22-25), that might be premised on the statute of

limitations in ORS 12.080 for contract actions. Its plain language reaches "all complaints against carriers for the recovery of damages not based on overcharges." This broad scope is consistent with Congress' desire to enact the two-year statute of limitations and to assure national uniformity in the Act's application. *See Swarthout v. Mich. Bell Tel. Co.*, 504 F.2d 748, 748 (6th Cir. 1974). To permit varying periods of limitation from state to state would contravene Congress' intent and discriminate against carriers that happen to be sued in states with more generous statutes of limitation. *See A.J. Phillips Co., supra*, 236 U.S. at 667.

Thus, the court in *MFS Int'l, Inc., v. Int'l Telcom Ltd.*, 50 F. Supp. 2d 517 (E.D.Va. 1999) found that the mere fact that plaintiff purported to allege state law claims did not override the sweeping language of Section 415(b) and were precluded. The Ninth Circuit also applied the two-year limitation to a plaintiff's civil rights claims against a carrier. *See Pavlak*, 727 F.2d at 1427-28 ("When a federal statute of limitations is directly applicable to the facts, is the most analogous statute of limitations, and provides a reasonable opportunity to present civil rights claims, it is the proper statute of limitations to be applied."). For the same reasons, Complainants are precluded from attempting to assert state claims based on the very same facts and alleged unlawful conduct that constitutes a wrongful act under the Act.

Because Complainants' state claims are subject to section 415(b), they are barred by the two-year limitation and must be similarly dismissed. Accordingly, Qwest respectfully submits that the Commission should dismiss the Amended Complaint in its entirety.

III. No Legal Basis Exists For Complainants' Claims for Relief or Proposed Remedies

A. The Amended Complaint Fails to Establish a Jurisdictional Basis for the Commission to Exercise Authority over Complainants' Federal Claims

Complainants attempt to assert violations of 47 U.S.C. §§ 251 and 252 and therefore allege that jurisdiction exists for this Commission to hear the claims pursuant to three provisions

of the Federal Telecommunications Act of 1996: 47 U.S.C. § 252(a), 47 U.S.C. § 252(e)(1), and 47 U.S.C. § 252(i). (*See* Amended Complaint, at ¶ 5.) Neither sections 251 nor 252, however, provide a right of action upon which Complainants can base a claim for refunds of alleged overcharges.

The statutory provisions upon which Complainants rely do not confer jurisdiction, and therefore do not provide a basis for the Commission to exercise authority over Complainants' federal law claims, notwithstanding their assertions to the contrary. Even a cursory examination of these two sections makes clear that they do not grant a private right of action to Complainants.

Aside from conclusory allegations that Qwest violated section 251 and an inaccurate averment that section 251(b) and (c) both obligate Qwest to provide access to and interconnection with its network "on rates, terms, and conditions that are just, reasonable, and nondiscriminatory" (Amended Complaint, at ¶¶ 13, 15), and identical conclusory allegations that Qwest breached a provision in each of the four interconnection agreements at issue (Amended Complaint, ¶¶ 22-25), Complainants make no showing how section 251 gives rise to a private cause of action that the Commission can entertain. Section 251 imposes duties on local exchange carriers relating to interconnection. *See MCI Telecomms. Corp. v. So. New England Tel. Co.*, 27 F. Supp. 2d 326 (D. Conn. 1998). However, no private right of action exists under section 251. *See AT&T Commc'ns. of Cal., Inc. v. Pac. Bell*, 60 F. Supp.2d 997, 1000 (N.D. Cal. 1999) (finding no basis to assert federal subject matter jurisdiction under 47 U.S.C. §§ 206, 251, 252, and also citing *Covad Commc'ns. Co. v. Pac. Bell*, No. C 98-1887 (N.D. Cal. 1998), which raised serious doubts about the existence of a private right of action for Section 251 violations).

Complainants' reliance on section 252 is similarly misplaced. Section 252 outlines the procedures for negotiation, arbitration, and approval of interconnection agreements between telecommunications carriers. *See generally AT&T Commc'ns. of Cal., Inc. v. Pac. Bell, supra,*

60 F.3d at 1000. Specifically, section 252(a) permits a local exchange carrier to negotiate and enter into a binding prospective interconnection agreement with a requesting carrier, and also allows parties involved in such negotiations to ask a state commission to participate in the negotiations and mediate. Complainants make no allegation that they requested to enter into negotiations for a prospective interconnection agreement with Qwest and that Qwest refused to negotiate with them. This section therefore provides no basis for Complainants' alleged federal causes of action and, importantly, is devoid of any jurisdictional language that would permit the Commission to hear Complainants' purported claims. As a result, Complainants' reliance on this section is misplaced.

Section 252(e)(1), which provides that an "interconnection agreement adopted by negotiation or arbitration shall be submitted for approval to the State commission" and that a state commission shall determine whether to approve or reject the agreement, also fails to provide a basis for a private right of action. This is made even more evident by considering the crux of Complainants' action. Complainants' stated complaint is that Qwest violated sections 251 and 252 "[b]y providing facilities and services to Eschelon and McLeodUSA at rates or discounts off of rates that were lower than the rates and/or discounts that Qwest made available to" Complainants. (Amended Complaint, at ¶ 15.) This alleged harm is entirely unrelated to the submission of an interconnection agreement for approval and makes out no violation of the section upon which Complainants seem to rely. Although subsection (e)(6) contains an express instance of providing for jurisdiction by allowing any aggrieved party to seek judicial review of a state commission's actions, it undermines Complainants' assertions as to any express private cause of action. The provision manifests Congress' intent to vest state commissions with the ability to regulate interconnection agreements in the first instance. Moreover, while Congress envisioned that state commissions would play a vital role in carrying out the goals of this section,

there is no evidence that Congress also intended for private parties to be able to assert causes of action for violations of this section that would accrue to their own benefit.

Finally, Complainants unavailingly rely on section 252(i) as a supposed basis for establishing the Commission's jurisdiction over their purported private causes of action. Section 252(i) provides that "[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." It says nothing about a cause of action. The FCC, moreover, has taken upon itself to clarify the import of this section and has made no provision in its regulations for a private right of action. *See* 47 C.F.R. § 51.809. Rule 51.809 generally makes interconnection agreements available to any *requesting* carrier but exempts incumbents that can prove that providing a particular interconnection agreement to a requesting carrier is either (1) more costly than providing it to the original carrier, or (2) technically infeasible. Although this Commission, like all state commissions, has a central role in enforcing these provisions, that fact does not imply that any private party is also able to enforce the provisions for its own benefit, particularly when one considers that Congress enacted the Act for the benefit of the general public through more competitive markets. *See* Telecommunications Act of 1996, Pub. L. No. 104-104, purpose statement, 110 Stat. 56, 56 (1996) ("An Act to promote competition and reduce regulation in order to secure lower prices and higher quality of services for American telecommunications consumers. . . ."); *accord Global NAPS, Inc. v. Bell-Atl.-N.J., Inc.*, 287 F. Supp.2d 532, 535 (D.N.J. 2003) (discussing goals of the Act).

In sum, the Act and FCC's federal regulations are silent on the issue and therefore provide no basis for assuming or implying that Congress or the FCC provided a private right of action to enforce the statute or regulations. *See Maydak v. Bonded Credit Co.*, 96 F.3d 1332,

1333 (9th Cir. 1996) (noting a strong presumption against private actions under the Act); *Conboy v. AT&T Corp.*, 84 F. Supp.2d 492, 500 (S.D.N.Y. 2000) (finding no private right of action to enforce regulations promulgated pursuant to the Act). The Amended Complaint fails to allege anything to the contrary, and, as a result, must be dismissed.

B. Complainants Fail to Establish that 47 U.S.C. §§ 206 and 207 Apply

1. Complainants' Allegations Fail to Show Actual Injury or Damages

While 47 U.S.C. §§ 206 and 207 provide a private cause of action to "persons injured" by a common carrier's act or omission in violation of the original Communications Act of 1934, Congress set up sections 251 and 252 with the intent that state commissions address the negotiation, approval, and enforcement of interconnection agreements in the first instance. *Global NAPS, supra,* 287 F. Supp.2d at 544-45. Sections 206 and 207 provide:

> In case any common carrier shall do, or cause or permit to be done, any act, matter, or thing in this chapter prohibited or declared to be unlawful, or shall omit to do any act, matter, or thing in this chapter required to be done, such common carrier shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of any such violation of the provisions of this chapter, together with a reasonable counsel or attorney's fee, to be fixed by the court in every case of recovery, which attorney's fee shall be taxed and collected as part of the costs in the case.

Section 207 permits any person claiming to be injured by a common carrier to complain to the FCC or alternatively to sue in district court. In enacting the Act, Congress did not intend to grant private rights of action under all of the Act's provisions. *Law Offices of Curtis V. Trinko, L.L.P. v. Bell Atlantic Corp.*, 305 F.3d 89, 98 (2d Cir. 2002) (stating that "a particular substantive provision may not provide the plaintiff with a particular right" although sections 206 and 207 may confer upon the plaintiff the right to bring an action if the plaintiff can show an actual injury that results from the violation). In this regard, Congress did not expressly provide carriers with a private right of action to enforce another carrier's duty to file its interconnection agreements with the Commission.

Even assuming that sections 206 and 207 may apply, which Complainants do not even rely on in their amended complaint, Complainants must still point to a violation of the Act, separate and apart from sections 206 and 207. The plain language of section 206 requires Complainants to allege (1) violation of the Act by a common carrier that (2) directly results in injury (3) with concrete and provable damages. Because Complainants have not alleged anything more than hypothetical and speculative damages, Complainants have no basis for asserting a private right of action to enforce sections 251 or 252.

Complainants apparently rely on the hope that the Commission will presume injury and damages by virtue of their allegations that Qwest did not file the McLeod and Eschelon agreements. This hope is misplaced. While the nonfiling of a Section 252 interconnection agreement may contravene a specific requirement of the Act, that does not establish *per se* discrimination against a CLEC under the Act and in fact would not even suffice to establish standing. *See, e.g., Ashley Creek Phosphate Co. v. Norton*, 420 F.3d 934, 937-38 (9th Cir. 2005) (finding no standing to challenge agency's failure to comply with procedural statute because "[a] free-floating assertion of a procedural violation, without a concrete link to the interest protected. . . does not constitute injury in fact"). Moreover, Congress enacted these provisions to foster competition and benefit the general public. *See* Telecommunications Act of 1996, Pub. L. No. 104-104, purpose statement, 110 Stat. at 56; *accord Global NAPS*, *supra*, 287 F. Supp.2d at 535. Thus, any alleged harm arising from Qwest's nonfiling would not necessarily harm Complainants individually in a legally cognizable manner, anymore than a generalized harm shared by everyone. *See City of Sausalito v. O'Neill*, 386 F.3d 1186, 1197 (9th Cir. 2004) (noting that attempting to sue on behalf of citizens does not satisfy the particularized injury requirement). It should also be apparent that Complainants fail to meet prudential standing requirements because Congress intended to benefit the general public and did not expressly grant

ILECs in particular a right to sue by enacting the Act. *See id.*, 386 F.3d at 1199-1200 (discussing prudential standing requirements).

Failure to file an interconnection agreement will not necessarily be unjust, unreasonable, and discriminatory unless Complainants can show that they could have opted into the agreement and some concrete damages as a result. Courts have made clear that both the Act, and its predecessor the Interstate Commerce Act, require an actual showing of measurable damages resulting from the defendant's alleged violations. *See In re Communications Satellite Corp.*, 97 F.C.C.2d 82, 91, at ¶¶ 24-26 (1984); *Int'l Telecomm. Exch. Corp. v. MCI Telecomm. Corp.*, 892 F. Supp. 1520, 1545 (N.D. Ga.1995) (stating that "[d]amages are not presumed under the private right of action provided for in Section 206" of the Act). Such an analysis is similar to what courts have required of plaintiffs in order to prove discrimination under 47 U.S.C. § 202(a). *See, e.g., Ting v. AT&T Corp.*, 319 F.3d 1126 (9th Cir. 2003) ("First, we ask whether the services are "like." If they are, we ask whether there is a price difference between them, and if so, whether the difference is reasonable.").

Here, Complainants' basis for recovery is merely hypothetical and speculative, especially considering their conclusory, bare-bone allegations, and this is reinforced by the fact that CLECs do not have an absolute and automatic right to benefit from any interconnection agreement. First, the Act allows a telecommunications carrier to *request* to opt into any interconnection agreement "upon the same terms and conditions as those provided in the agreement." 47 U.S.C. § 252(i); 47 CFR § 51.809(b). Notably, Complainants have not alleged that they requested to opt-in or even attempted to negotiate with Qwest for any prospective terms, such as those that Eschelon and McLeod allegedly obtained. Further, in any event, Complainants do not, and cannot, seek the adoption of prospective terms for an alleged discount in either the Eschelon or the McLeod agreements, because those agreements terminated years ago and are not prospective in nature.

Thus, Complainants cannot even show that they have complied with the procedures detailed in section 252. Rather, they attempt to circumvent the Act by asserting a private right to recover without any showing of actual injury or damages.

Second, a carrier must be willing and able to accept all legitimately related terms in an existing agreement. *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 398 (1999). Notwithstanding Complainants' unsubstantiated allegations that they "would have adopted, or otherwise would have agreed to, the rates and reasonably related and legitimate terms and conditions" in the two agreements (Amended Complaint, at ¶ 9), the Amended Complaint falls far short of alleging that the Complainants could comply with the terms and conditions and would have chosen to accept the terms and conditions. In short, Complainants fail to show any legally cognizable injury based on their allegations and any concrete damages as a result. The mere allegation that Qwest may not have filed an interconnection agreement with the Commission does not by itself entitle Complainants to recover for overcharges or damages. Consequently, the Amended Complaint fails to allege any type of cognizable injury or show any concrete, measurable damages that could serve as the basis for a claim and provide this Commission with jurisdiction over it.

Accordingly, for the reasons set forth above, even if the Commission had authority to award Complainants any relief (which it does not), and even if the Amended Complaint was timely under the two-year statute of limitations of 47 U.S.C. § 415 (which it is not), there is no legal or jurisdictional basis for the Complainants' claims for relief or proposed remedies. Further still, Complainants fail to establish that U.S.C. §§ 206 and 207 apply here in any event. As such, Qwest respectfully submits that the Commission should dismiss the Amended Complaint in its entirety.

IV. Complainants' Requested Refunds Would Violate the Filed Rate Doctrine

Finally, the relief that Complainants request—refunds for alleged overcharges or damages—would violate the filed rate doctrine. An interconnection agreement "is functionally no different from a federal tariff." *Verizon Md., Inc. v. RCN Telcom Serv., Inc.*, 232 F. Supp.2d 539, 552, fn. 5 (D. Md. 2002). An interconnection agreement is not a "binding final agreement . . . until after the Commission reviews and approves the agreement." *GTE Nw. Inc. v. Hamilton,* 971 F. Supp. 1350, 1353 (D. Or. 1997). Like a tariff, any attempt to enforce rates contained in an unfiled agreement that conflict with the rates contained in a filed interconnection agreement, would violate the filed rate doctrine. Thus, to grant the relief that Complainants seek, the Commission would have to take the unprecedented measure of enforcing rates found in an unfiled interconnection agreement and disregard the existing rates found in the filed and approved interconnection agreements between Qwest and Complainants. *See Goldwasser v. Ameritech Corp.*, 222 F.3d 390, 402 (7th Cir. 2000) (holding that the filed rate doctrine barred a claim for damages where the filed rates in question were those in filed interconnection agreements approved under Section 252); *see also Maislin Indust., U.S., Inc. v. Primary Steel, Inc.*, 497 U.S. 116, 126 (1990) ("The legal rights of shipper as against carrier in respect to a rate are measured by the published tariff. Unless and until suspended or set aside, this rate is made, for all purposes, the legal rate, as between carrier and shipper. The rights as defined by the tariff cannot be varied or enlarged by either contract or tort of the carrier"). Qwest can find no authority to support a state commission's ability to impose such an extraordinary remedy as Complainants propose. The appropriate remedy, if any, under the filed rate doctrine would be the disgorgement of the difference between the tariffed rate and the non-tariffed rate by the parties that receive those non-tariffed rates.

If a regulatory statute requires rates to be filed under tariffs or similar documents to preclude discrimination, the filed rate prevails over any other rate—even one that was mutually agreed upon by carrier and customer. Under long-standing Supreme Court precedent, the filed rate must be strictly enforced, notwithstanding other legal theories or equitable defenses. *Louisville & Nashville R.R. Co. v. Maxwell*, 237 U.S. 94, 97 (1915) ("This rule is undeniably strict and it obviously may work hardship in some cases, but it embodies the policy which has been adopted by Congress in the regulation of interstate commerce in order to prevent unjust discrimination."). The filed rate doctrine precludes parties from effectively obtaining lower rates than the lawful filed rate, whether through a breach of contract theory, tort theory, or antitrust theory. *See, e.g., Square D Co. v. Niagara Frontier Tariff Bureau,* 476 U.S. 409 (1986); *AT&T Co. v. Cent. Office Tel., Inc.*, 524 U.S. 214 (1998).

Under the filed rate doctrine, a carrier's tariff is considered to "'conclusively and exclusively enumerate the rights and liabilities' as between the carrier and the customer." *Evanns v. AT&T Corp.*, 229 F.3d 837, 840 (9th Cir. 2000). (Footnote omitted.) Once a tariff is filed and approved, a common carrier like Qwest "may not deviate from its terms." *Cahnmann v. Sprint Corp.*, 133 F.3d 484, 487 (7th Cir. 1998).

American Telephone and Telegraph v. Central Office Telephone Co., Inc., 524 U.S. 214 (1998), reaffirmed the validity of the filed rate doctrine in telecommunications law. The plain language of *Central Office* indicates that claims for damages arising wholly from rates and services contained in a properly filed tariff are barred by the filed rate doctrine. *See id.*, at 226 ("Because respondent asks for privileges not included in the tariff, its state-law claims are barred . . . ."). In *Central Office*, the issue was a dispute between a long distance provider and one of its wholesale customers. The provision of long distance services operates under a "tariff" scheme wherein every common carrier must file a tariff with the FCC "showing all charges," and

"the classifications, practices, and regulations affecting such charges." 47 U.S.C. § 203(a). Under section 203(c), a common carrier may not, "extend to any person any privileges or facilities in [long distance] communication, or employ or enforce any classifications, regulations, or practices affecting such charges, except as specified in such a schedule." 47 U.S.C. § 203(c). Contrast this with the filing requirement in Section 252 at issue here, which states that the filed interconnection agreement shall contain, "a detailed schedule of itemized charges for interconnection and each service or network element included in the agreement." 47 U.S.C. § 252(a)(1).

The Supreme Court specifically relied upon the statutory language of Section 203 to determine that the filed rate doctrine operated to preclude not only private contracts for rates different from those in the filed tariff, but also private contracts for services different from those in the filed tariff. *See Central Office, supra*, 524 U.S. at 223-24. Thus, whether a tariff sets forth a rate or a service has no significance to the filed rate doctrine. *AT&T v. Central Office* is therefore properly read to bar the awarding of damages under such circumstances. Indeed, the very point of the filed rate doctrine is to bar damages arising wholly from rates and services contained in a properly filed tariff. If an ILEC gives a customer a preferential rate or term of service in an unfiled interconnection agreement that departs from the filed tariffs, the filed rate doctrine does not permit a court or this Commission to attempt to remedy the alleged harm by then extending the unfiled rates to other customers, such as Complainants. Thus, the filed rate doctrine bars Complainants' requested relief.

Accordingly, any relief that the Commission might grant to Complainants would violate the filed rate doctrine. The Commission should dismiss the Amended Complaint in its entirety.

CONCLUSION

For the foregoing reasons, Qwest respectfully submits that this Commission should grant Qwest's motion to dismiss, and thus dismiss the Amended Complaint in its entirety.

Dated this 2nd day of February, 2006.

Respectfully submitted,

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DEPARTMENT OF JUSTICE
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MEMORANDUM

DATE: August 19, 2004

TO: Lee Beyer
Chairperson
Public Utility Commission

FROM: Joseph T. McNaught, Deputy Division Administrator
Michael T. Weirich, Senior Assistant Attorney Generral

Re: Payment of Proceeds from Settlement of Penalty Action to CLECs
Claim under ORS 759.990(6)
DOJ File No. 860105/860105

A. Question Presented

Qwest failed to file interconnection agreements with the Public Utility Commission ("PUC") as required by OAR 860-016-0020(3). It may be willing to enter into a settlement agreement in advance of the PUC commencing a penalty proceeding against it under ORS 759.990(6). You have asked whether the PUC has authority to require Qwest, as part of such a settlement, to pay money directly to competitive local exchange carriers (CLEC) on the basis of the CLECs having been damaged by Qwest's failure to file.

B. Short Answer

The penalty provisions of ORS 759.990 control the PUC's actions in response to Qwest's failure. In the given circumstances, neither that statute nor any other provides the PUC with authority to direct payment of a penalty to one or more CLECs.

C. Discussion

1. Violations of OAR 860-016-0020(3)

OAR 860-016-0020(3) regulates the filing and approval of telecommunications interconnection agreements.[1] A federal law, not a state statute, requires that such agreements be

[1] OAR 860-016-0020(3) provides:

submitted to the PUC for approval. *See* 47 U.S.C. § 252(e)(1). OAR 860-016-0020 cites ORS chapters 183 and 756 as the PUC's authority for the rule. The rule does not purport to be based upon the PUC's ratemaking authority for telecommunications utilities in ORS chapter 759.

Subsections (6) and (8) of ORS 759.990 establish the PUC's authority to act in response to a telecommunications carrier's violation of ORS 860-016-0020(3). Subsection (6) establishes penalties for the PUC to assess against a telecommunications carrier for violation of a "lawful requirement" of the PUC.[2] Subsection (8) limits the PUC's authority to dispose of penalties "collected or paid" under subsection (6):

> Except when provided by law that a penalty, fine, forfeiture or other sum be paid to the aggrieved party, all penalties, fines, forfeitures or other sums collected or paid under subsection (6) of this section shall be paid into the General Fund and credited to the Public Utility Commission Account.

ORS 759.990(8).

We have identified no state law that provides for money to be paid to a CLEC aggrieved as a result of a telecommunications carrier's failure to file its interconnection agreements. Therefore, unless the PUC has authority that supercedes the restrictions of ORS 759.990(8), it may not enter into a settlement that provides for Qwest to make payments to one or more CLECs.[3]

> After the parties reach agreement under Section 252(a) of the Act, they shall file an application with the Commission seeking approval of the agreement, or for approval of an amendment to an approved agreement on file with the Commission. The application shall include an original plus three copies of the negotiated agreement and a completed Carrier-to-Carrier Agreement Checklist. A copy of the checklist is available on the Commission's Internet website. The parties may also include any other supporting information with their application.

[2] ORS 759.990(6) provides:

> A telecommunications carrier, as defined in ORS 759.400, shall forfeit a sum of not less than $ 100 nor more than $50,000 for each time that the carrier:
>
> (a) Violates any statute administered by the Public Utility Commission;
> (b) Commits any prohibited act, or fails to perform any duty enjoined upon the carrier by the commission;
> (c) Fails to obey any lawful requirement or order made by the commission; or
> (d) Fails to obey any judgment made by any court upon the application of the commission.

This memorandum assumes, but does not decide, that an action under ORS 759.990(6) is appropriate in this circumstance. It expressly does not analyze (1) whether the procedures described in ORS 759.455 apply to this matter; or (2) whether ORS 759.990(6) applies to an action by a telecommunications carrier acting in its wholesaler role in situations other than those addressed in ORS 759.455.

[3] Commissions in some states have express statutory authority to impose remedies other than civil penalties for violations of their rules. In a recent Colorado case, the Colorado PUC's selection of a reparations remedy instead of a civil penalty remedy was challenged. *Archibold v. Public Utilities Commission*, 58 P3d 1031 (Colo. 2002). Reparations for customers are expressly permitted by a Colorado statute. Since the statutes did not obligate the

2. Scope of PUC Authority

The PUC is a statutorily created state agency. *See* ORS 756.014(1). It has only those powers expressly granted it by the legislature and such implied powers as are necessary to carry out the powers that are expressly granted. *Ochoco Const. v. DLCD*, 295 Or 422, 667 P2d 499 (1983); *Warren v. Marion County et al.*, 222 Or 307, 353 P2d 257 (1960). The commission may not expand its authority beyond that granted by the terms of its statutes. *See Gates v. Public Service Commission*, 86 Or 442, 453, 168 P. 939 (1917) ("the commission has only such authority as the lawmakers have seen fit to confer upon it").

ORS 756.040(1) provides that the PUC was created to represent utility customers and the public in all matters concerning utility rates, valuations, and service within the PUC's jurisdiction. To aid it in carrying out these duties, the legislature delegated to the PUC the power 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 Oregon courts have stated that, in cases involving the setting of utility rates, ORS 756.040 grants the commission "the broadest authority – commensurate with that of the legislature itself" to carry out its regulatory duties. *Pacific N.W. Bell v. Sabin*, 21 Or App 200, 214, 534 P2d 984 (1975). *See also American Can Co. v. Davis*, 28 Or App 207, 221, 559 P2d 898, *rev den* 278 Or 393 (1977); *Cascade Natural Gas Corp. v. Davis*, 28 Or App 621, 560 P2d 301, *rev den* 279 Or 1 (1977). In addition, ORS 756.060 empowers the commission to adopt "reasonable and proper" rules "relative to all statutes administered" by it.

However, in more recent decisions, the courts have taken a more limited view of the scope of the commission's powers under ORS 756.040 and 756.060. In *Pacific Northwest Bell v. Davis*, 43 Or App 999, 608 P2d 547, *rev den* 289 Or 107 (1980), the court considered the validity of the commission's "tag-line" rule. This rule required all investor-owned public utilities to include a statement in all advertisements stating whether the advertisement was paid for by either customers or stockholders. The commission argued that the rule was valid under the broad grants of authority provided by ORS 756.040 and 756.060. In considering this issue, the court observed that "an administrative agency must, when its rulemaking power is challenged, show that its regulation falls within a clearly defined statutory grant of authority. *PNB*, 43 Or App at 1006-1007. The court then struck down the "tag-line rule because ORS 756.040 and 756.060 did not constitute a "clearly defined statutory grant of authority" for its enactment. *Id.* at 1007 *quoting Ore. Newspaper Pub. v. Peterson*, 244 Or 116, 123, 415 P2d 21 (1966.

In *Pacific Northwest Bell Telephone Co. v. Eachus*, 135 Ore. App. 41, 898 P2d 774, *rev den* 322 Or 193, 903 P2d 886 (1995), the PUC conducted an "own motion" proceeding in which it concluded that a utility's existing rates were generating excessive revenue. It ordered the utility to reduce its rates effective at the beginning of 1990. CUB sought to have the existing rates declared "interim" and, therefore, subject to customer refunds from the time the proceeding was initiated approximately one year before the order requiring the rate reduction was entered. The PUC concluded that it lacked authority to do this. The Oregon Court of Appeals agreed,

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Colorado PUC to collect civil penalties for every violation of its rules and the reparations remedy was not unlawful, unjust or unsupported by the record, the Colorado Supreme Court upheld the Colorado commission's action.

stating:

> ORS 756.040(1) authorizes PUC to protect ratepayers and the public "from unjust exactions and practices and to obtain for them adequate service at fair and reasonable rates." ORS 756.040(2) vests powers in the commission "to do all things necessary and convenient" in the exercise of its jurisdiction. CUB contends that within those broad grants of authority to oversee ratemaking, the legislature has given to PUC the power to issue an order declaring existing rates to be interim.
>
> * * *
>
> We agree that the text of those statutes [is] broad enough to permit the type of order that CUB seeks. However, other provisions of the public utility statutes show that PUC's authority to declare rates to be interim and subject to refund is circumscribed.

PNWB, 135 Or. App at 48-49. The court concluded that, notwithstanding the broad and general grant of ratemaking authority under ORS 756.040, the specific statutes dealing with the process for establishing and changing rates, *e.g.*, ORS 759.205, precluded PUC from taking the action that CUB desired. *PNWB*, 135 Or App at 49-50.

Finally, in *Citizens' Util. Bd. v. PUC*, 154 Ore. App. 702, 716-717, 962 P2d 744 (1998) *rev granted* 328 Or 464, 987 P2d 513 (1999), *rev dismissed* 335 Or 91, 58 P3d 822 (2002), the court similarly ruled that the PUC's broad authority under ORS 756.040 did not enable it to approve rates that are contrary to other statutory limitations. This case involved a return component on PGE's investment in the Trojan nuclear power plant. The court found that ORS 757.140(2) and ORS 757.355 preclude the PUC from allowing rates that include a rate of return on capital assets that are not currently used for the provision of utility services. Like the specific statutes that "circumscribed" PUC's authority in *PNWB*, the court decided that these specific statutes overrode the general grants of authority to the PUC in ORS 756.040 and its other general statutes. *CUB*, 154 Or App at 716.

3. Conclusion

Although the PUC has broad regulatory power under ORS 756.040, a court likely would conclude that the legislature, through enactment of ORS 759.990, has circumscribed that power with respect to responding to violations of OAR 860-016-0020(3). The PUC may seek penalties for such violations, but the penalties must be deposited in the General Fund, and an alternative remedy is not clearly authorized.

This does not mean, however, that the PUC's sole remedy in every instance that a telecommunications utility violates a PUC legal requirement or fails to meet the PUC's standards is a penalty action and deposit in the General Fund. In cases where the PUC can point to other specific sources of authority for an alternative action, the PUC likely can fashion regulatory remedies alternatives to those authorized under ORS 759.990(6) and (8).

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Qwest Corporation, a Colorado corporation,

Plaintiff,

v.

The Minnesota Public Utilities Commission; and R. Marshall Johnson, in his official capacity as a member of the Minnesota Utilities Commission; Leroy Koppendrayer, in his official capacity as a member of the Minnesota Utilities Commission; Phyllis Reha, in her official capacity as a member of the Minnesota Public Utilities Commission; and Gregory Scott, in his official capacity as a member of the Minnesota Public Utilities Commission,

Defendants,

CLEC Coalition; and AT&T Communications of the Midwest, Inc.,

Intervenors.

MEMORANDUM OPINION AND ORDER
Civil No. 03-3476 ADM/JSM

Peter S. Spivack, Esq., Hogan & Hartson L.L.P., Washington, D.C., and Jason D. Topp, Esq., and Todd L. Lundy, Esq., Qwest Corporation, Minneapolis, MN, and Denver, CO, appeared for and on behalf of Qwest Corporation.

Steven H. Alpert, Assistant Attorney General, St. Paul, MN, appeared for and on behalf of Defendants.

Dan M. Lipschultz, Esq., Moss & Barnett, Minneapolis, MN, appeared for and on behalf of Intervenor the CLEC Coalition; Thomas E. Bailey, Esq., Briggs & Morgan, P.A., Minneapolis, MN, appeared for and on behalf of Intervenor AT&T Communications of the Midwest, Inc.

I. INTRODUCTION

Plaintiff Qwest Corporation's ("Qwest") Motion for Judicial Review, Declaratory Relief and Injunctive Relief [Docket No. 28] was argued before the undersigned United States District Judge on June 11, 2004. Qwest disputes the legality of a liability order ("Liability Order") and two penalty orders (collectively, "Penalty Orders") issued by Defendant the Minnesota Public Utilities Commission ("MPUC" or "Commission") for alleged violations of the 1996 Telecommunications Act ("Act"). For the reasons set forth below, Qwest's Motion is denied in part and granted in part.

II. BACKGROUND

This dispute concerns Qwest's alleged failure to comply with federal and state telecommunications law. The Act requires incumbent local exchange carriers ("ILECs") such as Qwest to lease their networks to competitive local exchange carriers ("CLECs"). See 47 U.S.C. § 251(c). Under the Act, Qwest must submit interconnection agreements ("ICAs") it forms with CLECs to the MPUC for approval. See id. §§ 252(a), (e). Additionally, ILECs must make the terms of ICAs available to CLECs who are not parties to the original agreements. See id. § 252(i).[1] Non-party CLECs can then "opt-in" and incorporate these provisions into their own ICAs, assuming that they follow "the same terms and conditions, in addition to rates, as those provided in the [original] agreement." 47 C.F.R. § 51.809(a). In exchange for leasing their networks to competitors, the 1996 Act allows ILECs to provide regional long distance services after the FCC determines the

[1] The full text of § 252(i) states, "[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." 47 U.S.C. § 252(i).

company meets certain requirements. See 47 U.S.C. § 271. These requirements reflect the legislative intent of opening local telephone service markets to new competitors. See Telecommunications Act of 1996, Pub. L. No. 104-104, Purpose Statement, 110 Stat. 56, 56 (1996); Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, First Report and Order, 11 F.C.C.R. 15499 ¶ 167 (1996) ("Local Competition Order").

On February 14, 2002, the Minnesota Department of Commerce ("DOC") filed a complaint ("DOC Complaint") against Qwest alleging violations of federal and state telecommunications law. See Second Am. Verified Compl. ¶ 5 (Bailey Aff. Ex. A). Specifically, the DOC Complaint asserted that Qwest had formed twelve secret ICAs with CLECs and had not submitted them to the MPUC. Id. ¶¶ 14-25. The DOC Complaint averred that this failure discriminated against CLECs who were not parties to the secret ICAs because these CLECs lacked access to the same favorable terms contained in the agreements with the favored CLECs. Id.

The DOC referred the case to the Office of Administrative Hearings for a contested case proceeding before an administrative law judge ("ALJ"). See Notice & Order for Hearing (Bevilacqua Aff. Ex. 2). After conducting hearings on April 29 through May 2, 2002, and August 6, 2002, ALJ Allan W. Klein concluded that Qwest had knowingly and intentionally violated §§ 251 and 252 of the Act by failing to file twelve ICAs. See Findings of Fact, Conclusions, Recommendation, and Memorandum ("ALJ Report") at Conclusion ¶¶ 2-5 (Bevilacqua Aff. Ex. 3). These unfiled ICAs included six agreements with Eschelon Telecom Inc. ("Eschelon"), three with McLeodUSA Telecommunications Service, Inc. ("McLeodUSA"), and one each with Covad Communications Company ("Covad"), USLink, Inc. ("USLink"), and a group of ten CLECs ("Small CLECs"). Id. ¶¶

37, 78, 89, 119, 151, 168, 232, 270, 283, 292, 316, and 348. The ALJ also determined that Qwest "knowingly and intentionally" discriminated against other CLECs because Qwest had not made provisions of the twelve ICAs available to them. Id. ¶¶ 46, 59, 67, 77, 88, 105, 115, 140, 150, 167, 187, 198, 207, 215, 223, 231, 242, 250, 258, 266, 282, 291, 304, 313, 344, and 354.

On November 1, 2002, the MPUC issued a liability order adopting the ALJ's Report and establishing a comment period regarding remedies. See Liability Order at 7 (Bevilacqua Aff. Ex. 4). The MPUC found that Qwest had "knowingly and intentionally" violated both federal and state law by failing to file the twelve ICAs, creating discriminatory conditions on resale, and infringing state anti-discrimination statutes. Id. at 4-7.

The MPUC issued two orders assessing penalties and restitutional relief, the first on February 29, 2003, and the second on April 30, 2003. See Order Assessing Penalties ("Penalty Order I") at 1 (Bevilacqua Aff. Ex. 5); Order After Reconsideration On Own Motion ("Penalty Order II") at 1 (Bevilacqua Aff. Ex. 6). In Penalty Order I, the MPUC imposed a penalty of $25.95 million after considering several factors outlined in Minn. Stat. § 237.462, subd. 3. See Penalty Order I at 7-18. The MPUC, basing its actions on state law, also granted restitutional relief to CLECs, authorizing remedies that included credits and discounts for certain services. Id. at 19-22. In Penalty Order II, the MPUC reconsidered portions of Penalty Order I, but ultimately retained the $25.95 million penalty and many of the restitutional remedies from Penalty Order I. Penalty Order II at 12-13. Qwest filed a Complaint appealing the Liability and Penalty Orders on June 19, 2003.

III. DISCUSSION

Qwest seeks judicial review, declaratory judgment and injunctive relief to prevent enforcement

of the Liability Order and the Penalty Orders.

A. Standard of Review

Title 47 U.S.C. § 252(e)(6) authorizes federal district court review of state commission actions. This Court possesses supplemental jurisdiction over any state law claims under 28 U.S.C. § 1367. In considering appeals of state commission orders, federal courts apply de novo review to questions of federal law. See Mich. Bell Tel. Co. v. MFS Intelnet of Mich. Inc., 339 F.3d 428, 433 (6th Cir. 2003); S.W. Bell Tel. Co. v. Apple, 309 F.3d 713, 717 (10th Cir. 2002); MCI Telecomm. Corp. v. Bell Atlantic Pa., 271 F.3d 491, 517 (3d Cir. 2001); S.W. Bell Tel. Co. v. Pub. Util. Comm'n, 208 F.3d 475, 481 (5th Cir. 2000); GTE S., Inc. v. Morrison, 199 F.3d 733, 742 (4th Cir. 1999). The arbitrary and capricious standard applies to district court review of state commissions' factual findings and application of law to fact. See Mich. Bell, 339 F.3d at 433; SW Bell, 208 F.3d at 482; US W. Communications, Inc. v. Hamilton, 224 F.3d 1049, 1052 (9th Cir. 2000). Thus, the Court will review de novo whether the Liability Order and Penalty Orders violate the Act, but will review the MPUC's factual findings under the arbitrary and capricious standard.

B. Legality of the Restitutional Remedies

Qwest challenges the Penalty Orders' imposition of restitutional remedies on numerous legal grounds. First, Qwest argues that state law does not authorize the MPUC to grant equitable relief and that the restitution imposed here is equitable in character. The MPUC contends Minnesota telecommunications statutes permit it to grant restitutional remedies, including discounted rates, rebates

and credits designed to rectify Qwest's past discriminatory behavior.[2]

The MPUC, "being a creature of statute, has only those powers given to it by the legislature." Peoples Natural Gas Co. v. Minn. Pub. Utils. Comm'n, 369 N.W.2d 530, 534 (Minn. 1985) (internal quotation omitted). Consequently, the MPUC may not impose restitutional remedies absent express or implied statutory authority. Id. Because state telecommunications law does not expressly allow the MPUC to grant restitutional relief, the relevant inquiry is whether implied authority permits the Commission's actions. In interpreting the extent of the MPUC's implied powers, "express statutory authority need not be given a cramped reading . . . ." Id. However, as Justice Simonett cautioned, "any enlargement of express powers by implication must be fairly drawn and fairly evident from the agency objectives and powers expressly given by the legislature." Id.

The MPUC argues that Minn. Stat. §§ 237.081, 237.461 and 237.462 authorize imposition of restitutional relief. Section 237.461 is a competitive enforcement statute which permits the MPUC to seek criminal prosecution, recover civil penalties, compel performance, or take "other appropriate action." See Minn. Stat. § 237.461 subd. 1. Section 237.462, also a competitive enforcement statute, emphasizes that "[t]he payment of a penalty does not preclude the use of other enforcement provisions . . . ." Minn. Stat. § 237.462, subd. 9. Finally,

§ 237.081, a complaint statute, authorizes the MPUC to "make an order respecting [an unreasonable,

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[2] As a threshold matter, the parties disagree on which standard of review federal district courts should apply when reviewing state commissions' interpretations of state law. While both Qwest and the CLEC Intervenors assert that the arbitrary and capricious standard controls this review, the MPUC states that review is de novo. However, as explained below, the MPUC lacks authority under Minn. Stat. §§ 237.081, 237.461 and 237.462 to order restitutional relief, even assuming that the more deferential arbitrary and capricious standard applies.

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.

A fair reading of these statutes vests the MPUC with broad statutory authority to regulate the telecommunications market in Minnesota. However, the critical issue is whether this power includes the authority to impose equitable relief. In Peoples Natural Gas, the Minnesota Supreme Court held that the MPUC lacked statutory authority to order a natural gas utility to refund revenue collected in violation of a MPUC order. Peoples Natural Gas Co., 369 N.W.2d at 535-36. The court reached a different conclusion in In re Minnegasco, 565 N.W.2d 706, 713 (1997), holding that the MPUC had statutory authority to order a recoupment remedy where Minnegasco incurred losses from an illegal rate order the MPUC issued. Finally, in In re New Ulm Telecom, Inc., 399 N.W.2d 111, 121-22 (Minn. Ct. App. 1987), a Minnesota Court of Appeals panel reviewed § 237.081 and determined that the MPUC lacked jurisdiction to award equitable relief.[3]

Based on this case law, the MPUC lacked implied statutory authority to order restitution in the Penalty Orders. First, no published authority from the Minnesota courts has held that §§ 237.081, 237.461 and 237.462 permit imposition of equitable remedies. Rather, in In re New Ulm,

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[3] The unpublished decision of In re the Members of MIPA, No. C0-97-606, 1997 WL 793132, at * 3 (Minn. Ct. App. Dec. 30, 1997) held that § 237.081, subd. 4, authorized the MPUC to order refunds. The decision broadens the holding of In re Minnegasco because it permits refunds for losses that resulted from a telecommunications company's actions, rather than an unlawful MPUC order. Id. However, as an unpublished order, the case is not controlling. See Vhalos v. R&I Constr. of Bloomington, Inc., 676 N.W.2d 672, 676 n.3 (Minn. 2003) (stressing that unpublished opinions of the court of appeals are not precedential and discouraging reliance on them as authority).

the court held that § 237.081 does not give the MPUC jurisdiction to award equitable relief. See 399 N.W.2d 111, 121-22. Second, while the specific remedy at issue in In re New Ulm was equitable estoppel, there is no legally distinguishable difference between this remedy and the restitution granted in the Penalty Orders. Id. Finally, the Minnegasco court's narrow holding that the MPUC can order a recoupment remedy to rectify its own mistake in issuing an illegal order does not suggest that the Commission possesses broad authority to grant equitable relief under the circumstances here. In re Minnegasco, 565 N.W.2d at 711-13. Therefore, because the MPUC lacked statutory authority to impose equitable relief, the restitutional remedies from the Penalty Orders are invalid and must be vacated.[4]

C. Legality of the $25.95 Million Penalty

Qwest also contests the legality of the $25.95 million penalty imposed in the Penalty Orders.

1. The Penalty's Validity Under State Law

First, Qwest argues that the MPUC violated state law in assessing the penalty amount because the Commission failed to consider the requisite statutory factors. Instead, Qwest avers that the MPUC imposed a figure it hoped would "incentivize" Qwest to accept the Penalty Orders' restitutional relief.

Minn. Stat. § 237.462 authorizes the MPUC to order monetary penalties. See Minn. Stat. § 237.462, subd. 1. In determining the amount of a penalty, the MPUC must consider the following nine factors: (1) the willfulness or intent of the violation; (2) the gravity of the violation, including the harm to customers or competitors; (3) the history of past violations; (4) the number of violations; (5) the

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[4] Because the MPUC lacks statutory authority to award equitable relief, Qwest's other arguments concerning the Penalty Orders' restitutional remedies will not be addressed.

economic benefit gained by the person committing the violation; (6) any corrective action taken or planned by the person committing the violation; (7) the annual revenue and assets of the company committing the violation; (8) the financial ability of the company to pay the penalty; and (9) any other factors that justice may require. See Minn. Stat. § 237.462, subd. 2.

Qwest argues that the MPUC improperly considered these statutory factors only as justification after setting the penalty at an amount sufficient to motivate Qwest to accept the restitutional relief of dubious legality. The hearing transcript does support the MPUC's intention to impose a penalty that would encourage Qwest to accept the restitutional remedies and implement more competitive practices. See Tr. of 02/04/03 at 288, 294 (Bevilacqua Aff. Ex. 28). However, this goal does not automatically invalidate the $25.95 million penalty, as monetary penalties are inherently designed to change behavior. See Duquesne Light Co. v. E.P.A., 791 F.2d 959, 960 (D.C. Cir. 1986) (noting that government may assess penalties to obtain desired behavior). Rather, the pivotal issue is whether the MPUC analyzed the statutory factors and whether its conclusions justify imposing a $25.95 million penalty.

The Penalty Orders' discussion of the § 237.462 factors reveals that the MPUC properly penalized Qwest under state law and that the MPUC's factual findings were not arbitrary and capricious. First, the MPUC found that Qwest willfully violated both federal and state anti-discrimination laws by failing to file the twelve agreements and providing preferential treatment to some CLECs. See Penalty Order I at 3-4, 7; see also 47 U.S.C. §§ 251(b)(1), (c)(2)(D), 252(a) and (e); Minn. Stat. §§ 237.09, 237.121 subd. 5, 237.60 subd. 3. Qwest concedes that it had notice that at least some of the ICAs should have been filed, and that this failure violated the Act. Thus, the MPUC had sufficient evidence to support its willfulness finding. See Mem. in Support at 36; see also Penalty

Order I at 7-8. Concerning factors two through four, the MPUC determined that Qwest's actions impeded fair competition and harmed customers and non-party CLECs, that Qwest had a history of similar anti-competitive behavior, and that Qwest committed twenty-six individual violations. See Penalty Order I at 8-12. Further, the MPUC found that Qwest benefitted economically from its actions because in return for its private arrangements with CLECs Eschelon and McLeodUSA, the two companies maintained neutrality during proceedings for Qwest's § 271 application. Id. at 13.

The remaining factors also support the penalty. The MPUC recognized some value in a few of Qwest's suggested corrective actions. Id. at 13-17. However, the Commission rejected Qwest's proposals because Qwest "failed to take responsibility for its anti-competitive . . . behavior." Id. at 14. Additionally, the MPUC determined that some proposed remedies might actually retard competition, and that some suggestions benefitted rather than penalized Qwest. Id. at 13-17. Finally, the MPUC concluded that a penalty of $25.95 million would not unreasonably impact Qwest financially, and hoped it would motivate Qwest to "desist in the future from anti-competitive behavior." Id. at 18.

Review of the MPUC's analysis reveals strong evidentiary support for the $25.95 million penalty based on the statutory factors in Minn. Stat. § 237.462. Therefore, the penalty is valid under Minnesota law.

2. The Penalty's Validity Under the Preemption Doctrine

Qwest argues further that the $25.95 million penalty violates § 252(i) of the Act and is thus invalid under the preemption doctrine. Specifically, Qwest asserts that the MPUC impermissibly found discrimination under state law without regard to § 252(i). Under § 252(i), ILECs like Qwest must make the terms of ICAs available to CLECs who are not parties to the original agreements. See 47

U.S.C.§ 252(i). Non-party CLECs can then "opt-in" and incorporate these provisions into their own ICAs if they follow "the same terms and conditions, in addition to rates, as those provided in the [original] agreement." 47 C.F.R. § 51.809(a). Qwest argues that before finding that discrimination resulted from its failure to file the twelve ICAs, the MPUC must first evaluate whether CLECs could opt-in under § 252(i). Additionally, Qwest contends that § 252(i)'s allegedly more rigorous discrimination analysis preempts penalty assessment under authority of state law provisions.

Preemption is based on the Supremacy Clause of Article VI of the United States Constitution. U.S. Const. art. VI, cl. 2. The Supremacy Clause invalidates state laws that interfere with or are contrary to federal law. Wis. Pub. Intervenor v. Mortier, 501 U.S. 597, 604 (1991). Congressional intent determines whether federal law preempts state law, and "may be explicitly stated in [a federal] statute's language or implicitly contained in its structure and purpose." Cipollone v. Liggett Group, Inc., 505 U.S. 504, 516 (1992). Absent an express Congressional command, state law is still preempted if it "actually conflicts with federal law," or if federal law "thoroughly occupies a legislative field . . . ." Id. (internal citation omitted).

The Act does not expressly preempt state telecommunications law. Rather, it preserves state commissions' authority to implement state law that is consistent with the Act. See 47 U.S.C. §§ 251(d)(3), 252(e)(3), and 253(b). Therefore, the issue is whether the Act implicitly preempts Minnesota's anti-discrimination telecommunications statutes by requiring the MPUC to conduct § 252(i) opt-in analysis before finding that discrimination occurred under state law from Qwest's failure to file ICAs.

For § 252(i) to implicitly preempt state law, it must either actually conflict with Minn. Stat. §§

237.09, 237.121 subd. 5, 237.60 subd. 3, or thoroughly occupy the area of discrimination analysis that regulators should employ when evaluating an ILEC's failure to file an ICA. Cipollone, 505 U.S. at 516. First, while § 252(i) and federal regulations limit ICA opt-in to the same terms and conditions in the original ICA, they do not actually conflict with state anti-discrimination statutes. Nothing in § 252(i) or 47 C.F.R. § 51.809(a) requires that opt-in analysis must be conducted before finding that discrimination occurred. Additionally, the FCC has ruled that discrimination results from an ILEC's failure to file simply because non-party CLECs will lack critical information. Specifically, "[r]equiring all contracts to be filed . . . limits an incumbent LEC's ability to discriminate among carriers . . ." because "public filing of agreements enables carriers to have information about rates, terms, and conditions that an [ILEC] makes available to others." Local Competition Order, ¶ 167. Therefore, the MPUC's determination under state law that Qwest's failure to file discriminated against non-party CLECs does not conflict with the Act.

Similarly, § 252(i) and 47 C.F.R. § 51.809(a) do not thoroughly occupy the discrimination inquiry. Rather, the Act imposes several requirements concerning ICAs and their provisions, revealing that discrimination from a failure to file exists in numerous forms. For example, §§ 252(a) and (e) require ILECs to file ICAs and to submit them to state commissions for approval, making the information in ICAs readily available to all CLECs. See 41 U.S.C. §§ 252(a) and (e). These provisions are designed to minimize disparate and discriminatory access to ICAs and to provide a level playing field. See Purpose Statement, 110 Stat. at 56. Additionally, the FCC has adopted a broad view of discrimination, stating that the mere failure to file, in itself, is discriminatory. See Local Competition Order, ¶ 167. Further, while Congress implemented the

federal Act to open local telephone service markets to new competitors, it expressly preserved state authority to "protect the public safety and welfare" under state law. See 47 U.S.C. § 253(b). Consequently, Congress did not intend for § 252(i) to thoroughly occupy discrimination analysis regarding an ILEC's failure to file an ICA. Thus, § 252(i) does not implicitly preempt the MPUC's finding of discrimination under state law. It follows that a penalty granted under these same state statutes does not violate the Act on preemption grounds.

3. The Penalty's Validity Under the Fair Notice Doctrine

Citing the fair notice doctrine, Qwest argues additionally that it should not be penalized for failing to file some of the twelve ICAs because it did not know which agreements were subject to the Act's filing requirement. The fair notice doctrine permits a party to challenge application of a rule if there has not been "fair warning that the allegedly violative conduct was prohibited." United States v. Chrysler Corp., 158 F.3d 1350, 1355 (D.C. Cir. 1998). Qwest avers that the doctrine applies here because the Act does not expressly define "interconnection agreement." Further, Qwest contends that no state commission or court, or the FCC had provided a definition before the Complaint was issued in this matter. Thus, Qwest claims it could not have known exactly which agreements should have been filed under § 252.

Qwest's argument is unavailing. First, Qwest's admission that it failed to file even the agreements it knew were subject to the Act's filing provision seriously undermines the credibility of its "no notice" argument. See Mem. in Support at 36. This failure suggests that Qwest was willfully blind in determining which agreements should be filed.

Second, despite the absence of a definition in the Act, other sources outlined the scope of §

252 and provided notice. For example, § 271 includes a comprehensive checklist of items that must be included in ICAs before an ILEC may receive authority to provide regional long distance service. See 47 U.S.C. § 271(c)(2). This list reveals that any agreement containing a checklist term must be filed as an ICA under the Act. Id. While the checklist does not include every possible term that may arise in an agreement, its exhaustive recitation shows that Congress adopted a broad view of ICAs. Id. Consequently, Qwest's argument that § 271 failed to specify that dispute resolution and escalation clauses in particular must be filed lacks merit.

Qwest received additional notice from the Local Competition Order, where the FCC broadly interpreted the Act's filing requirement. In the Local Competition Order, the FCC stated that any agreements concerning rates, terms, conditions, and interconnection, service and network elements must be filed. Local Competition Order, ¶ 167. Qwest correctly states that the FCC did not address Qwest's petition for a declaratory ruling on the scope of § 252(a) until October 4, 2002, after the DOC filed a Complaint initiating this case. See In re Qwest Communications Int'l Inc. Petition for Declaratory Ruling, 17 FCCR 19337 ¶ 1 (2002) (Bevilacqua Aff. Ex. 8). However, the FCC's comprehensive view of ICAs in the Local Competition Order, which predates the DOC Complaint, gave Qwest fair notice that it should have filed all twelve agreements at issue. See Local Competition Order, ¶ 167.

Third, evidence from the ALJ hearing shows that the telecommunications industry generally understood the filing provision's limits despite lack of an explicit definition of "interconnection agreement." The ALJ found that while the parties involved in the hearing proposed numerous definitions for ICAs, at the core all included "any contractual agreement or amendment thereto, whether

negotiated or arbitrated, between an ILEC and another telecommunications carrier, that concerns the rates, terms or conditions for provision of interconnection, services or network elements." ALJ Report ¶¶ 28-29. Further, Qwest's broad definition of interconnection agreement in its own materials emphasizes that Qwest understood its responsibilities under the Act. See id. ¶¶ 24, 160. Therefore, the fair notice doctrine does not require abatement of the $25.95 million penalty.

4. The Penalty's Validity Under the Excessive Fines Clause

Finally, Qwest argues that the penalty violates the Eighth Amendment's Excessive Fines Clause. See U.S. Const. amend. VIII, cl. 2. The Eighth Amendment's prohibition on excessive fines applies to the States through the Fourteenth Amendment's Due Process Clause. See Cooper Indus. Inc v. Cooper Leatherman Tool Group, Inc., 532 U.S. 424, 433-34 (2001). In the criminal context, the Supreme Court has ruled that a fine is unconstitutionally excessive if the amount is grossly disproportional to the gravity of the offense. See United States v. Bajakajian, 524 U.S. 321, 334-35 (1998). Relevant factors in this analysis include legislative intent in establishing fines, and the difference between the penalty and the actual damages caused by the offense. Id. at 336-37; see also State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 418 (2003).

While the Supreme Court has not considered whether the gross disproportionality test pertains to administrative penalties, other courts have adopted this approach. See Kelly v. U.S. E.P.A., 203 F.3d 519, 524 (7th Cir. 2000). Applying the test to the case at bar, this Court must uphold the $25.95 million penalty unless it greatly outweighs the harm caused by Qwest's violations of state and federal law.

The $25.95 million penalty is not unconstitutionally excessive because Qwest has not proven

that this amount is grossly disproportional to its offenses. The penalty is consistent with the intent of the Minnesota Legislature and falls within statutory limits. Minn. Stat. § 237.462 permits the Commission to assess penalties of $10,000 a day for each violation of state telecommunications laws. See Minn. Stat. § 237.462, subd. 2. A related statute outlining court enforcement of these same telecommunications laws authorizes civil penalties of up to $55,000 per day for each violation. See Minn. Stat. § 237.461, subd. 3. The MPUC imposed the maximum fine of $10,000 a day for two violations, but assessed $2500 for the other ten infractions. See Penalty Order I at 4. Because the $25.95 million penalty does not exceed statutory limits, but falls below the possible maximum, it coincides with legislative policy and favors a finding of constitutionality. See Bajakajian, 524 U.S. at 334-35.

Additionally, Qwest has not shown that the penalty greatly exceeds the damages caused by its failure to file the ICAs. State Farm Mut. Auto. Ins. Co., 538 U.S. at 418. While ALJ Klein discussed the difficulty of quantifying the exact damages that resulted from Qwest's offenses, hearing testimony demonstrated that CLECs were actually harmed because they lacked access to unfiled agreement terms. See ALJ Hearing ¶ 374. The ALJ concluded that damages "would amount to several million dollars for Minnesota alone." Id. Therefore, the penalty is not grossly disproportional to actual damages. State Farm Mut. Auto. Ins. Co., 538 U.S. at 418.

Qwest's reliance on Bajakajian is misplaced. In Bajakajian, the Supreme Court held that requiring the defendant to forfeit over $350,000 for failing to report exported currency violated the Excessive Fines Clause. 524 U.S. at 337-38. The Court concluded that the defendant's crime "was solely a reporting offense," because it was legal for the defendant to transport money out of the United

States and his failure to report was not related to any other illegal activity. Id. In this case, Qwest's failure to file ICAs was not merely a reporting offense. By keeping the terms of select ICAs private from all CLECs, Qwest hampered competition in Minnesota's telecommunications industry. See Penalty Order I at 3-4 and 7-9. Further, the maximum fine under the Sentencing Guidelines for Defendant Bajakajian was only $5000, far less than the amount of money forfeited, unlike the $25.95 million penalty here which falls well below the statutory maximum. Bajakajian, 524 U.S. at 337-38; see also Minn. Stat. § 237.462, subd. 2. Therefore, the $25.95 penalty is within constitutional bounds.

D. Legality of the Liability Order

Qwest also contests the portion of the Liability Order which concluded that Qwest discriminated against CLECs who were not parties to the secret ICAs. See Liability Order at 4-6. In its Liability Order argument, Qwest reasserts its view that the MPUC should have conducted opt-in analysis before concluding that Qwest's actions were discriminatory.

Again, Qwest's argument lacks merit. As discussed above, discrimination may result from an ILEC's failure to file ICAs beyond the opt-in concerns under § 252. See supra Part B. The FCC's Local Competition Order adopts a broad view of discrimination, and the FCC has ruled that discrimination can result merely from an ILEC's failure to file ICAs. See Local Competition Order, ¶ 167. Further, the MPUC determined that Qwest violated Minnesota anti-discrimination statutes because the terms in the secret ICAs were not available to all CLECs. See Penalty Order I at 9-10. Because the MPUC properly determined that Qwest's actions were discriminatory, the Liability Order is valid.

IV. CONCLUSION

Based on the foregoing, and all the files, records and proceedings herein, **IT IS HEREBY ORDERED** that:

1. Plaintiff Qwest Corporation's appeal of Minnesota Public Utilities Commission Orders [Docket No. 1] is **GRANTED** as to the Penalty Orders' restitutional remedies.

2. Qwest Corporation's appeal of the Liability Order and the Penalty Orders' $25.95 million penalty is **DENIED**. The portions of the Penalty Orders relating to restitutional remedies are vacated.

LET JUDGMENT BE ENTERED ACCORDINGLY.

BY THE COURT:

s/Ann D. Montgomery
ANN D. MONTGOMERY
U.S. DISTRICT JUDGE

Dated: August 25, 2004.

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

Nos. 04-3368, 04-3408, and 04-3510

Qwest Corporation, a Colorado corporation,	*	
Plaintiff-Appellee/ Cross-Appellant,	*	
v.	*	
The Minnesota Public Utilities Commission; R. Marshall Johnson, in his official capacity as a member of the Minnesota Public Utilities Commission; Leroy Koppendrayer, in his official capacity as a member of the Minnesota Public Utilities Commission; Phyllis Reha, in her official capacity as a member of the Minnesota Public Utilities Commission; Gregory Scott, in his official capacity as a member of the Minnesota Public Utilities Commission;	*	Appeals from the United States District Court for the District of Minnesota.
Defendants-Appellants/ Cross-Appellees,	*	
CLEC Coalition; AT&T Communications of the Midwest, Inc.,	*	
Intervenors Below-Appellants/ Cross-Appellees.	*	

Submitted: September 12, 2005
Filed: November 1, 2005

Before RILEY, LAY, and FAGG, Circuit Judges.

LAY, Circuit Judge.

Minnesota Public Utilities Commission and Intervenors CLEC Coalition and AT&T Communications of the Midwest, Inc. (collectively, "MPUC" or "Commission") appeal the district court's[1] decision that MPUC lacks the authority under Minnesota law to order Qwest Corporation ("Qwest") to comply with restitution for competitive local exchange carriers that were not parties to unfiled interconnection agreements. Qwest cross-appeals, challenging the decision affirming the Liability Order and Penalty Orders' $25.95 million penalty. We conclude that MPUC lacks the authority to order restitution under Minnesota law. However, we find that MPUC properly ordered the $25.95 million penalty. Therefore, we affirm.

I.

MPUC issued a liability order and two penalty orders against Qwest for alleged violations of the 1996 Telecommunications Act ("Act"). The Act was intended to create competition between carriers in local telecommunication service markets, which had been traditionally dominated by a single monopoly carrier. Incumbent local exchange carriers ("ILECs"), such as Qwest, own the network infrastructure necessary to provide local telephone service. The Act allows competitive local exchange carriers ("CLECs") to access this infrastructure by entering into agreements with an ILEC. Interconnection agreements ("ICAs") between an ILEC and CLECs

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[1]The Honorable Ann D. Montgomery, United States District Judge for the District of Minnesota.

must be submitted to the MPUC for approval. 47 U.S.C. § 252(a), (e). The terms of these ICAs must be made available to other CLECs that are not parties to the original agreement. See id. § 252(i). Non-party CLECs can then opt in and incorporate the provisions of the original agreement in their entirety into their own ICAs. 47 C.F.R. § 51.809(a).

On February 14, 2002, the Minnesota Department of Commerce filed a complaint against Qwest alleging that Qwest had formed secret ICAs with CLECs that were not properly submitted to MPUC. The complaint asserted that Qwest's failure to disclose discriminated against other non-party CLECs because these CLECs were not given access to the terms contained in the secret ICAs. On March 12, 2002, the Commission referred the case for contested case proceedings before an administrative law judge ("ALJ").

On November 1, 2002, MPUC issued a liability order adopting the ALJ's findings that Qwest knowingly and intentionally violated §§ 251 and 252 of the Act by failing to file twelve ICAs. The unfiled ICAs included six agreements with Eschelon Telecom, Inc., three with McLeodUSA Telecommunications Service, Inc., and one each with Covad Communications Company, USLink, Inc., and a group of ten smaller CLECs. MPUC found that Qwest "knowingly and intentionally" violated both federal and state law by failing to file the twelve ICAs, thereby creating discriminatory conditions on resale and infringing state anti-discrimination statutes. The MPUC imposed a $25.95 million penalty against Qwest and granted restitutional relief for the injured CLECs based upon its interpretation of state statutes.

Qwest brought suit in district court, challenging the liability order and the penalty order. The district court vacated the order for restitutional relief, holding that MPUC lacked either the express or implied authority under Minnesota law to grant

restitution. However, the district court upheld the $25.95 million penalty, finding that it was valid under Minn. Stat. § 237.462.

Title 47 U.S.C. § 252(e)(6) provides for federal court review of state commission decisions. Our sister circuits have held that federal courts review state commission orders under the Act de novo. Mich. Bell Tel. Co. v. MFS Intelenet of Mich., Inc., 339 F.3d 428, 433 (6th Cir. 2003); S.W. Bell Tel. Co. v. Apple, 309 F.3d 713, 717 (10th Cir. 2002); MCI Telecomm. Corp. v. Bell Atlantic Pa., 271 F.3d 491, 517 (3d Cir. 2001); S.W. Bell Tel. Co. v. Pub. Util. Comm'n, 208 F.3d 475, 482 (5th Cir. 2000); GTE S., Inc. v. Morrison, 199 F.3d 733, 742 (4th Cir. 1999). Here, we adopt that standard. This court has supplemental jurisdiction over state law claims under 28 U.S.C. § 1367. Although the arbitrary and capricious standard applies when reviewing a state commission's findings of fact, Mich. Bell, 339 F.3d at 433; S.W. Bell, 208 F.3d at 482; US West Communications, Inc. v. Hamilton, 224 F.3d 1049, 1052 (9th Cir. 2000), whether an agency acts within its statutory authority is a question of law to be reviewed de novo. In re Qwest's Wholesale Serv. Quality Standards, 702 N.W.2d 246, 259 (Minn. 2005) (hereinafter "Qwest's Wholesale").

II.

MPUC asserts that it has statutory authority to order restitution under Minn. Stat. §§ 237.081, 237.461, 237.462, and 237.763. MPUC, "being a creature of statute, has only those powers given to it by the legislature." Peoples Natural Gas Co. v. Minnesota Pub. Util. Comm'n, 369 N.W.2d 530, 534 (Minn. 1985) (internal quotation omitted). MPUC may not impose restitutional remedies absent express or implied statutory authority. A review of the statutory language and applicable Minnesota case law shows that MPUC has neither. Nothing in the statutory language expressly grants MPUC the authority to order restitution. Moreover, Minnesota case law supports the

conclusion that we should not find implied statutory authority to order restitution, absent a clear grant of authority by the legislature.

MPUC argues that it has express authority to order restitutional relief under Minn. Stat. § 237.081, which authorizes 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. MPUC also claims the authority to order restitution is encompassed within Minn. Stat. §§ 237.461 and 237.462.[2] Section 237.461 is a competitive enforcement statute that permits MPUC to seek criminal prosecution, recover civil penalties, compel performance, or take "other appropriate action." Minn. Stat. § 237.461, subd. 1. Section 237.462 is also an enforcement statute which states that "[t]he imposition of administrative penalties in accordance with this section is in addition to all other remedies available under statutory or common law. The payment of a penalty does not preclude the use of other enforcement provisions . . . ." Minn. Stat. § 237.462, subd. 9. MPUC asserts that this statutory framework supports a finding that MPUC possesses the express or implied authority to order restitution in this case.

While we agree that these statutes give MPUC broad statutory authority to regulate the telecommunications market in Minnesota, none of them vest MPUC with the express authority to order remedial relief. We therefore agree with the district court that because none of these statutes expressly refer to remedial/restitutional relief,

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[2]MPUC also relies upon Minn. Stat. § 237.763, which discusses exemptions for alternative regulation plans but retains MPUC's authority under § 237.081 "to issue appropriate orders." Minn. Stat. § 237.763. Other than referring to § 237.081, this statute gives MPUC no additional support for its assertion of authority and we find it to be inapplicable.

the relevant inquiry is whether MPUC has the implied authority to order restitution. We conclude that no such authority exists.

In Peoples Natural Gas, the Minnesota Supreme Court observed that, "[w]hile express statutory authority need not be given a cramped reading, any enlargement of express powers by implication must be fairly drawn and fairly evident from the agency objectives and powers expressly given by the legislature." 369 N.W.2d at 534. The Minnesota court then held that MPUC lacked the implied authority under Minn. Stat. §§ 216B.03 and 216B.08 to order a public utility to refund revenues collected from its customers in violation of a MPUC order, rejecting MPUC's argument that the Commission's duty to assure rates that are "just and reasonable" vested MPUC with the authority to order a refund. Id. at 534-36.

In holding that MPUC lacked this authority, the Minnesota Supreme Court observed that "[i]t is of some significance that the legislature has not seen fit expressly to grant refund powers to the Commission, although it could have done so and in one instance has at least recognized its use." Id. The court was reluctant to interpret the statute as providing implied authority of this kind because "this is not the kind of agency authority that can or should be implied in the absence of more explicit legislative action. It is not enough that the power to order refunds would be useful to the Commission as an enforcement measure." Id. at 535.

The same holds true in this case. MPUC attempts to distinguish Peoples Natural Gas by asserting that the statutory framework has changed significantly since this decision. However, MPUC claims authority under statutory language that is quite similar to that construed by the Minnesota Supreme Court in Peoples Natural Gas. Given the Minnesota court's reluctance to infer authority to grant refund powers in Peoples Natural Gas, we conclude the power to make orders or set rates that are "just and reasonable" or to take "appropriate" action is not a grant of authority to order

restitution. The Minnesota legislature has had twenty years to respond to Peoples Natural Gas, yet "the legislature has not seen fit expressly to grant [restitution] powers to the Commission." Peoples Natural Gas, 369 N.W.2d at 534.

Moreover, in In re New Ulm Telecom, Inc., 399 N.W.2d 111 (Minn. Ct. App. 1987), a Minnesota Court of Appeals panel applied Peoples Natural Gas to uphold a Commission decision that it lacked the authority under § 237.081, subd. 4, to estop a utility from providing service absent a finding of inadequate service under § 237.16, subd. 5. Id. at 122.[3] The court noted that merely because a statute has "references to the words 'fair,' 'just,' and 'reasonable,' nothing in the statutory scheme suggests that the Commission may act as a court of equity." Id. As discussed above, the same is true in this case. The statutory language is too vague to support a conclusion that MPUC has the implied authority to order restitution.

We are also not convinced by MPUC's argument that In re Minnegasco, 565 N.W.2d 706 (Minn. 1997) and the unpublished In re the Members of MIPA, No. C0-97-606, 1997 WL 793132 (Minn. Ct. App. Dec. 30, 1997) support its assertion that the Commission had implied authority to order restitution in this case. In Minnegasco, the Minnesota Supreme Court held that MPUC had the implied authority under Minn.

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[3]MPUC and the Intervenors object to the district court's reliance on New Ulm. MPUC attempts to distinguish New Ulm on the grounds that there was a statutory violation in the present case, and therefore an equitable remedy under § 237.081 is appropriate. However, we do not read New Ulm to stand for the proposition that § 237.081 authorizes equitable remedies whenever a statutory violation has occurred. A violation of § 237.16, subd. 5, itself justifies the suspension or revocation of an offending utility's license. Minn. Stat. § 237.16, subd. 5. Therefore, the New Ulm court was merely stating that, absent a violation of § 237.16, subd. 5, preventing a utility from providing service would not be appropriate. In re New Ulm, 399 N.W.2d at 122. The district court correctly read New Ulm to hold that § 237.081 does not grant MPUC the authority to impose equitable remedies.

Stat. chapter 216B to order a recoupment remedy to compensate a utility for losses resulting from an error made by MPUC. Minnegasco, 565 N.W.2d at 713. The Minnesota Court of Appeals relied upon and broadened the scope of Minnegasco in its unpublished MIPA opinion, where it held that MPUC had the implied authority to order refunds under Minn. Stat. § 237.081. MIPA, 1997 WL 793132, at *3.

However, these cases do not support MPUC's position. Minnegasco does not provide MPUC with the broad authority to grant equitable relief. Rather, Minnegasco has a limited holding that MPUC has the implied authority to order a recoupment remedy to correct *its own mistake*. Minnegasco, 565 N.W.2d at 711-13. Furthermore, the court in Minnegasco was interpreting "statutory ambiguity" as to whether a utility could get retroactive relief after a judicial decision striking down a MPUC order. Id. at 711-12. In this case, we have no statutory ambiguity because there is a complete absence of statutory language supporting MPUC's position. "We have no ambiguous language to construe, unless perhaps the ambiguity of silence. Consequently, we must look at the necessity and logic of the situation." Peoples Natural Gas, 369 N.W.2d at 534. As for MIPA, as an unpublished order, it is not controlling.[4] See Minn. Stat. § 80A.08, subd. 3; see also Vlahos v. R&I Constr. of Bloomington, Inc., 676 N.W.2d 672, 676 n.3 (Minn. 2004) (discouraging reliance on unpublished opinions as authority).

Moreover, a recent opinion by the Minnesota Supreme Court clearly supports the conclusion that MPUC lacks the authority it asserts in this case. In Qwest's Wholesale, supra, the court held that MPUC does not have the express or implied authority under Minnesota state law to order self-executing penalties. Qwest's Wholesale, 702 N.W.2d at 262. "Historically, we have been reluctant to find implied

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[4]Furthermore, the MIPA decision fails to adequately address how Minnegasco's limited holding can be expanded to assert refund authority.

statutory authority in the context of the MPUC's remedial power. As a general rule, we resolve any doubt about the existence of an agency's authority against the exercise of such authority." Id. at 259 (citations omitted).

In Qwest's Wholesale, like the present case, MPUC relied in part upon its express authority to ensure "just and reasonable rates" under Minn. Stat. § 237.081, subd. 4, and Minnegasco to support its assertion of implied authority. Id. at 260-61. The court rejected these arguments, relying upon Peoples Natural Gas and distinguishing Minnegasco. Specifically, the Minnesota court observed:

> [W]e must look closely at the statutory scheme created by the legislature. Doing so, we see no language from which the authority for the MPUC to impose the self-executing payments can be fairly drawn. *The problem we face is that, if nothing more than a broad grant of authority were needed to show that implied authority could be fairly drawn from the statutory scheme, the implied authority would be present in all cases in which the agency had a broad grant of authority.* We declined to adopt such a sweeping rule in Peoples Natural Gas. In that case, noting that we had "no ambiguous language to construe, unless perhaps the ambiguity of silence," we indicated that "we must look at the necessity and logic of the situation." As in Peoples Natural Gas, we think it significant here that the legislature did not expressly provide for remedial authority with respect to wholesale service quality standards even though it could have done so . . . . We also think it significant that the legislature has expressly provided the MPUC the authority to issue administrative penalties for violation of certain MPUC rules and orders.

Id. at 261 (emphasis added) (internal citations omitted).

The court distinguished Minnegasco on several grounds. Most importantly for our purposes, the statutory language at issue in Qwest's Wholesale was not ambiguous. Rather, it was silent. Therefore, the court found that the statutory framework in Qwest's Wholesale was closer to Peoples Natural Gas than Minnegasco. Id. As discussed above, the same is true here. MPUC asserts authority under statutory language that is not ambiguous, but rather fails to address any power to order restitution or remedial measures at all.[5]

We therefore hold that MPUC lacks the statutory authority to order restitution and the restitutional remedies in the Penalty Orders are invalid.[6]

III.

We now turn to Qwest's objections to the $25.95 million penalty imposed by MPUC. Qwest makes three arguments challenging the legality of the $25.95 million penalty: (1) that MPUC violated Minnesota law by failing to follow the requisite statutory factors; (2) that the penalty violated the fair notice doctrine because there was no standard for filing ICAs at the time of the relevant agreements; and (3) that the penalty violates the Excessive Fines Clause. As discussed below, we conclude that each of these arguments must fail.

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[5]In addition, the court distinguished Minnegasco on the grounds that it involved the correction of an unlawful MPUC order. See Qwest's Wholesale, 702 N.W.2d at 261-62. This supports our conclusion that the holding of Minnegasco is limited to correcting MPUC error and does not sustain MPUC's assertion of implied power to order restitution in this case.

[6]Because we affirm the district court on this issue, we decline to address Qwest's other arguments in opposition to the order for restitution.

A. State Statutory Factors

MPUC has the authority to order monetary penalties for violation of the Act under Minn. Stat. § 237.462. Section 237.462, subd. 2, sets out nine factors that the MPUC must consider in setting the penalty amount: (1) the willfulness or intent of the violation; (2) the gravity of the violation, including the harm to customers or competitors; (3) the history of past violations; (4) the number of violations; (5) the economic benefit gained by the person committing the violation; (6) any corrective action taken or planned by the person committing the violation; (7) the annual revenue and assets of the company committing the violation; (8) the financial ability of the company to pay the penalty; and (9) other factors that justice may require. See Minn. Stat. § 237.462, subd. 2.

Qwest argues that MPUC did not calculate the penalty amount in accordance with these statutory factors. Rather, Qwest's position is that MPUC crafted the large penalty to coerce Qwest to agree to the restitution in return for a suspension of the penalty. Qwest contends that the discussion of the statutory factors in the Penalty Orders is merely an attempt by MPUC to justify the penalty amount after it had already been arbitrarily set.

We agree that the transcripts of MPUC hearings do suggest that MPUC intended the penalty to act in part as an incentive for Qwest to comply with the restitutional remedies. However, this motivation does not necessarily make the penalty improper. Our only concern is whether MPUC properly considered the statutory factors as required by law, and whether MPUC's findings are arbitrary and capricious. If the penalty amount is justified by MPUC's consideration of the statutory factors, we need not delve into any further analysis regarding motivation.

MPUC extensively analyzed the § 237.462 statutory factors in the Penalty Orders. The written orders show a considered analysis of both the facts and the statutory framework. There was sufficient evidence to support the Commission's findings that Qwest willfully violated both federal and state law, thereby impeding fair competition in Minnesota and profiting in the process. The Commission's actions were not arbitrary and capricious. We therefore conclude that the district court correctly held that the MPUC Penalty Order of $25.95 million dollars does not violate state law.

B. Fair Notice Doctrine

Qwest also argues that the penalty violates the fair notice doctrine. Under the fair notice doctrine, "application of a rule may be successfully challenged if it does not give fair warning that the allegedly violative conduct was prohibited." United States v. Chrysler Corp., 158 F.3d 1350, 1355 (D.C. Cir. 1998). The Act does not expressly define "interconnection agreement," and Qwest claims there was no standard for filing ICAs at the time the agreements at issue were created. Therefore, Qwest argues it did not know which agreements should have been filed under 47 U.S.C. § 252.

This argument fails for several reasons, all pointing to the conclusion that Qwest had ample notice that it was required to file the agreements at issue with MPUC for approval. First, Qwest admits that it had fair notice that the agreements containing favorable rates were subject to the filing requirement, yet it failed to file these agreements with MPUC. Failure to comply with *known* standards does nothing to bolster Qwest's argument that it lacked notice.

As for the filing requirements of which Qwest claims ignorance, there are several sources that provide notice as to the breadth of "interconnection agreements." Section 271(c)(2) has an extensive "competitive checklist" that specifies what ILECs must include in ICAs in order to receive authority to provide interLATA long distance service. See 47 U.S.C. § 271(c)(2). As part of this checklist, § 271(c)(2) references § 251(c), which requires ILECs to provide CLECs with interconnection and unbundled access, "on rates, terms, and conditions that are just, reasonable, and nondiscriminatory, in accordance with . . . section 252 of this title." See 47 U.S.C. § 251(c)(2)-(c)(3). In addition, the Federal Communications Commission has broadly interpreted the Act's filing requirement to include any agreements concerning rates, terms, and conditions an ILEC makes available to other CLECs. See In re Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, 11 F.C.C.R. 15,499 ¶ 167 (1996).

Moreover, Qwest's own broad definition of "interconnection agreement" in its Statement of Generally Available Terms suggests that Qwest's arguments about the above sources' failure to explicitly define which "business-to-business arrangements" constitute terms of interconnection are without merit. Terms regarding dispute resolution, escalation, on-site support, and quarterly meetings have a commonsense relevance to interconnection and unbundled access. As noted by the United States Supreme Court (albeit in the context of the filed-rate doctrine), "[r]ates . . . do not exist in isolation. They have meaning only when one knows the services to which they are attached." American Tel. & Tel. Co. v. Cent. Office Tel., Inc., 524 U.S. 214, 223 (1998). The same is true here. Qwest had ample knowledge that the above terms were relevant to the value of its services to CLECs and should have been filed with MPUC. Therefore, the fair notice doctrine does not apply.

C. Excessive Fines Clause

Finally, Qwest argues that the penalty violates the Excessive Fines Clause of the Eighth Amendment. See U.S. Const. amend. VIII, cl. 2. The Eighth Amendment's prohibition of excessive fines applies to the states through the Due Process Clause of the Fourteenth Amendment. Cooper Indus., Inc. v. Leatherman Tool Group, Inc., 532 U.S. 424, 433-34 (2001). A penalty violates the Excessive Fines Clause if it is "grossly disproportional" to the gravity of the offense. See United States v. Bajakajian, 524 U.S. 321, 334 (1998). Two considerations in the "grossly disproportional" analysis are legislative intent and the gravity of the offense relative to the fine. Id. at 336-37.

The Minnesota legislature empowered MPUC with several ways to penalize ILECs that fail to comply with the reporting requirements. See, e.g., Minn. Stat. §§ 237.462, subd. 2; 237.16, subd. 5. Relevant to our current discussion, under § 237.462 MPUC may impose a penalty of up to $10,000 a day per violation. Minn. Stat. § 237.462, subd. 2. MPUC imposed a penalty of $10,000 per day for two of the most egregious violations, and $2,500 per day for the other ten. These amounts are well within the statutory limits and are consistent with the general statutory scheme.

The penalty amount is also not excessive in light of the gravity of the harm caused by Qwest's failure to file. Millions of dollars are at stake in ICAs. Qwest's failure to file these agreements violated both federal and state law. This failure affected the state regulatory body, the competitive environment in Minnesota, and CLECs that were not parties to these agreements. Therefore, the penalty is not grossly disproportional to the harm caused by Qwest's actions.

Qwest's attempt to frame its infractions as mere "filing offenses" under Bajakajian fails. In Bajakajian, the offense was solely a failure to report the transportation of money outside the United States, with no relation to other illegal

activities, and the defendant was not a money launderer, drug trafficker, or tax evader, the type of individual the statute was designed to punish. Bajakajian, 524 U.S. at 337-38. Furthermore, the defendant's failure to provide information only affected the United States, and in a relatively minimal way. Id. at 339. In the present case, Qwest's failure to report affected the rights of many CLECs operating in Minnesota, and MPUC ordered the penalty under a statute expressly designed to address the present situation. Given the millions at stake in the telecommunications industry and the legislative decision to punish anti-competitive behavior, the penalty in this case is not in violation of the Excessive Fines Clause.

IV.

For the foregoing reasons, we affirm the decision of the district court.

BEFORE THE MINNESOTA PUBLIC UTILITIES COMMISSION

Gregory Scott	Chair
Edward A. Garvey	Commissioner
Marshall Johnson	Commissioner
LeRoy Koppendrayer	Commissioner
Phyllis A. Reha	Commissioner

In the Matter of the Complaint of the Minnesota Department of Commerce Against Qwest Corporation Regarding Unfiled Agreements

ISSUE DATE: March 12, 2002

DOCKET NO. P-421/C-02-197

NOTICE AND ORDER FOR HEARING

PROCEDURAL HISTORY

On February 14, 2002, the Minnesota Department of Commerce (DOC) filed a Complaint against Qwest claiming Qwest had violated state and federal law by not submitting for Commission approval numerous agreements with Competitive Local Exchange Carriers (CLECs). Among other things, the Complaint requested an expedited hearing and temporary relief, pursuant to Minn. Stat. § 237.462.

On March 1, 2002 Qwest filed its Answer to the Complaint of the DOC. As part of its answer, Qwest joined the DOC in its request for an expedited proceeding in this case.

On March 1, 2002, Qwest filed its Opposition to Temporary Relief.

On March 1, 2002, Qwest also filed its Conditional Application for Approval of certain negotiated agreement provisions between Qwest and Eschelon Telecom, Inc., Covad Communications Company, Small CLECs, McLeod USA, US Link, InfoTel and Advanced Telecommunications, Inc.

Pursuant to Minn. Stat. § 237.462, Subd. 7, when there is a request for temporary relief, the Commission has 20 days from the filing of the complaint to issue a decision on such a request. March 6, 2002, is the twentieth day from the date of filing.

Further, pursuant to Minn. Stat. § 237.462, Subd. 6 (f), when there has been a request for an expedited hearing, the Commission has 15 days from the receiving an answer to determine whether an expedited hearing is warranted. March 16, 2002 is the fifteenth day from the filing of Qwest's answer.

These matters came before the Commission on March 5, 2002.

FINDINGS AND CONCLUSIONS

I. Background

A. Summary of the Complaint

The complaint alleges, among other things, that Qwest has entered into numerous[1] secret agreements with Competitive Local Exchange Carriers (CLECs) to provide interconnection, access to network elements, resale, number portability, dialing parity, access to rights-of-way, reciprocal compensation and collocation to the CLEC. Further, the complaint alleges that Qwest has not submitted these agreements for Commission approval, as required by statute.[2] As a result, the terms of these agreements are unknown to CLECs not a party to these agreements and are not available for adoption by other CLECs, as required.[3]

The complaint requests expedited proceedings, temporary relief and penalties.

II. Jurisdiction

The Commission has jurisdiction over this complaint pursuant to 47 U.S.C. § § 252(e) and 251 (c)(2), (authority of state commissions to enforce interconnection agreements, and duty of incumbent carriers to interconnect with CLECs, respectively) and Minn. Stat. § § 237.081(Commission investigations) and 237.462 (competitive enforcement).

III. The Request for Temporary Relief and Expedited Hearings

The DOC requested that the Commission order Qwest to immediately make any and all of the specified terms or conditions of interconnection or service public, and also make the specified terms and conditions immediately available to any other CLEC that wishes to adopt these provisions.

Both the DOC and Qwest requested expedited proceedings.

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[1] Approximately thirty-three provisions in eleven agreements.

[2] 47 U.S.C. § 252(e).

[3] 47 U.S.C. § 252(i).

IV. Parties Positions on the Issue of Temporary Relief

A. DOC

In its Complaint the DOC argued that temporary relief was necessary to protect the public's interest in fair and reasonable competition. It argued that Qwest was offering terms and conditions of interconnection in a discriminatory manner. If Qwest were not required to make the specified terms or conditions of interconnection immediately available to all CLECs, Qwest would be continuing to limit competition and to provide access to its network and its services in a discriminatory manner.

At the hearing before the Commission, the DOC did indicate that a Commission decision to resolve the Complaint under expedited time lines would significantly mitigate the need for temporary relief.

B. Qwest

Qwest argued that the relief the DOC is requesting is not temporary relief but is, in fact, immediate, complete and permanent relief. Qwest further argued that it has submitted the terms of the agreements to the Commission without a request for confidential treatment and in doing so has made the terms public.

Qwest also argued that the DOC has not met the statutory requirements[4] for such relief. The DOC has made assertions but has not adequately shown that there has been any effect on competition from the non-filing of the agreements. Further, Qwest argued, the DOC is unlikely to succeed on the merits because the terms at issue were not properly the subject of interconnection agreements.

V. Commission Action

The Commission recognizes that there are contested issues of material fact arising from this complaint that the Commission cannot satisfactorily resolve on the basis of the parties' filings. For this reason the Commission will refer this matter to the Office of Administrative Hearings (OAH) for contested case proceedings. The Commission will request that the OAH hear this matter on an expedited time schedule following the guidelines for expedited hearings set forth in Minn. Stat. § 237.462, Subd. 6. Hearing this matter on an expedited schedule will address the concerns of both parties that this issue be quickly resolved.

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[4] See Minn. Stat. 237.462, Subd. 7(c) requiring: (1) the party seeking relief will likely succeed on the merits, (2) the order is necessary to protect the public's interest in fair and reasonable competition, and (3) the relief sought is technically feasible.

Further, the Commission recognizes that to make a determination on whether temporary relief should be granted, the merits of the case would necessarily need to be addressed. Since the merits of the case will be addressed on an expedited basis, and the complainant has indicated its agreement, the Commission will not award temporary relief at this time.

VI. Issues to be Addressed

The scope of the issues to be addressed in the contested case hearing are as follows:

- whether the agreements or any portion thereof needed to be filed with the Commission for review;[5]
- if the agreements needed to be filed whether they were filed under other settings;
- whether there were any exculpatory reasons why they were or were not filed;
- recommendations as to whether disciplinary action/penalties are appropriate.

VII. Procedural Outline

A. Administrative Law Judge

The Administrative Law Judge assigned to this case is Allan W. Klein. His address and telephone number are as follows: Office of Administrative Hearings, Suite 1700, 100 Washington Square, Minneapolis, Minnesota 55401-2138; (612) 341-7609.

B. Hearing Procedure

Controlling Statutes and Rules

Hearings in this matter will be conducted in accordance with the Administrative Procedure Act, Minn. Stat. §§ 14.57-14.62; the rules of the Office of Administrative Hearings, Minn. Rules, parts 1400.5100 to 1400.8400; and, to the extent that they are not superseded by those rules, the Commission's Rules of Practice and Procedure, Minn. Rules, parts 7829.0100 to 7829.3200.

Copies of these rules and statutes may be purchased from the Print Communications Division of the Department of Administration, 117 University Avenue, St. Paul, Minnesota 55155; (651) 297-3000. These rules and statutes also appear on the State of Minnesota's website at www.revisor.leg.state.mn.us.

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[5] The Commission clarified that this included terminated agreements.

The Office of Administrative Hearings conducts contested case proceedings in accordance with the Minnesota Rules of Professional Conduct and the Professionalism Aspirations adopted by the Minnesota State Bar Association.

Right to Counsel and to Present Evidence

In these proceedings, parties may be represented by counsel, may appear on their own behalf, or may be represented by another person of their choice, unless otherwise prohibited as the unauthorized practice of law. They have the right to present evidence, conduct cross-examination, and make written and oral argument. Under Minn. Rules, part 1400.7000, they may obtain subpoenas to compel the attendance of witnesses and the production of documents.

Parties should bring to the hearing all documents, records, and witnesses necessary to support their positions.

Discovery and Informal Disposition

Any questions regarding discovery under Minn. Rules, parts 1400.6700 to 1400.6800 or informal disposition under Minn. Rules, part 1400.5900 should be directed to Kevin O'Grady, Public Utilities Rates Analyst, Minnesota Public Utilities Commission, 121 Seventh Place East, Suite 350, St. Paul, Minnesota 55101-2147, (651)282-2151; or Karen Hammel, Assistant Attorney General, 1100 NCL Tower, 445 Minnesota Street, St. Paul, Minnesota 55101, (651) 297-1852.

Protecting Not-Public Data

State agencies are required by law to keep some data not public. Parties must advise the Administrative Law Judge if not-public data is offered into the record. They should take note that any not-public data admitted into evidence may become public unless a party objects and requests relief under Minn. Stat. § 14.60, subd. 2.

Accommodations for Disabilities; Interpreter Services

At the request of any individual, this agency will make accommodations to ensure that the hearing in this case is accessible. The agency will appoint a qualified interpreter if necessary. Persons must promptly notify the Administrative Law Judge if an interpreter is needed.

Scheduling Issues

The times, dates, and places of public and evidentiary hearings in this matter will be set by order of the Administrative Law Judge after consultation with the Commission and intervening parties.

Notice of Appearance

Any party intending to appear at the hearing must file a notice of appearance (Attachment A) with the Administrative Law Judge within 20 days of the date of this Notice and Order for Hearing.

Sanctions for Non-compliance

Failure to appear at a prehearing conference, a settlement conference, or the hearing, or failure to comply with any order of the Administrative Law Judge, may result in facts or issues being resolved against the party who fails to appear or comply.

C. Parties and Intervention

The current parties to this case are Qwest and the Minnesota Department of Commerce. Other persons wishing to become formal parties shall promptly file petitions to intervene with the Administrative Law Judge. They shall serve copies of such petitions on all current parties and on the Commission. Minn. Rules, part 1400.6200.

D. Prehearing Conference

A prehearing conference will be held in this case on Wednesday, March 20, 2002, at 9:30 a.m. in Conference Room B of the Public Utilities Commission, 121 Seventh Place East, Suite 350, St. Paul, Minnesota 55101. Persons participating in the prehearing conference should be prepared to discuss time frames, scheduling, discovery procedures, and similar issues. Potential parties are invited to attend the pre-hearing conference and to file their petitions to intervene as soon as possible.

E. Time Constraints

The Commission requests that this matter be heard on an expedited time schedule following the guidelines in Minn. Stat. 237.462, Subd. 6 for expedited hearings.

VIII. Application of Ethics in Government Act

The lobbying provisions of the Ethics in Government Act, Minn. Stat. §§ 10A.01 et seq., may apply to this case. Persons appearing in this proceeding may be subject to registration, reporting, and other requirements set forth in that Act. All persons appearing in this case are urged to refer to the Act and to contact the Campaign Finance and Public Disclosure Board, telephone number (651) 296-5148, with any questions.

IX. Ex Parte Communications

Restrictions on ex parte communications with Commissioners and reporting requirements regarding such communications with Commission staff apply to this proceeding from the date of this Order. Those restrictions and reporting requirements are set forth at Minn. Rules, parts 7845.7300-7845.7400, which all parties are urged to consult.

ORDER

1. The Commission hereby refers this case to the Office of Administrative Hearings for contested case proceedings as set forth above.

2. A prehearing conference shall be held on Wednesday March 20, 2002, at 9:30 a.m. in Conference Room B, Public Utilities Commission, 121 Seventh Place East, Suite 350, St. Paul, Minnesota 55101.

4. This Order shall become effective immediately.

BY ORDER OF THE COMMISSION

Burl W. Haar
Executive Secretary

(S E A L)

This document can be made available in alternative formats (i.e., large print or audio tape) by calling (651) 297-4596 (voice), (651) 297-1200 (TTY), or 1-800-627-3529 (TTY relay service).

ATTACHMENT A

BEFORE THE MINNESOTA OFFICE OF ADMINISTRATIVE HEARINGS
100 Washington Square, Suite 1700
Minneapolis, Minnesota 55401-2138

FOR THE MINNESOTA PUBLIC UTILITIES COMMISSION
121 Seventh Place East Suite 350
St. Paul, Minnesota 55101-2147

In the Matter of the Complaint of the Minnesota Department of Commerce Against Qwest Corporation Regarding Unfiled Agreements	MPUC Docket No. P-421/C-02-197 OAH Docket No.

NOTICE OF APPEARANCE

Name, Address and Telephone Number of Administrative Law Judge:

Allan W. Klein, Office of Administrative Hearings, Suite 1700, 100 Washington Square, Minneapolis, Minnesota 55401; (612) 341-7609.

TO THE ADMINISTRATIVE LAW JUDGE:

You are advised that the party named below will appear at the above hearing.

NAME OF PARTY:

ADDRESS:

TELEPHONE NUMBER:

PARTY'S ATTORNEY OR OTHER REPRESENTATIVE:

OFFICE ADDRESS:

TELEPHONE NUMBER:

SIGNATURE OF PARTY OR ATTORNEY:_____

DATE: _____

From: Rebecca M. Liethen [RMLiethen@rkmc.com]
Sent: Thursday, June 27, 2002 9:01 AM
To: jrshaddix@aol.com; gwitt@att.com; shofstetter@att.com; weigler@att.com; AYOMAR@briggs.com; clay@deanhardt.com; geri.santos-rach@dora.state.co.us; joseph.molloy@dora.state.co.us; gregory.merz@gpmlaw.com; Mitchell, Cynthia; Nazarian, Douglas R.M.; Rohrbach, Peter A.; Spivack, Peter S.; jbrowne@lga.att.com; joy.gullikson@onvoy.com; michael.hoff@onvoy.com; jtopp@qwest.com; tlundy@qwest.com; anne.botterud@state.co.us; allan.klein@state.mn.us; Julia.Anderson@state.mn.us; Kevin.Ogrady@state.mn.us; Michelle.Rebholz@state.mn.us; Peter.Marker@state.mn.us; steve.alpert@state.mn.us; Tony.Mendoza@state.mn.us; Lesley.Lehr@wcom.com; tomkoutsky@yahoo.com
Cc: John F. Gibbs; brian.thomas@twtelecom.com
Subject: Addition to Service List (MPUC Docket No. P-421/C-02-197; OAH Docket No. 6-2500-14782-2)

>>>> Please read the confidentiality statement below <<<<

On behalf of Time Warner Telecom of Minnesota, LLC please add the following individuals to the service list for the above referenced docket:

Brian Thomas (brian.thomas@twtelecom.com) Time Warner Telecom of Minnesota, LLC 520 S.W. Sixth Avenue Suite 300 Portland, Oregon 97204
phone: (503) 416-1588
fax: (503) 416-1876

John F. Gibbs (jfgibbs@rkmc.com)
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2800 LaSalle Plaza
800 LaSalle Avenue
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Rebecca M. Liethen (rmliethen@rkmc.com)
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Please do not hesitate to contact me if you have any questions.

Rebecca M. Liethen

[Service Date August 14, 2003]

BEFORE THE WASHINGTON STATE
UTILITIES AND TRANSPORTATION COMMISSION

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION, Complainant, v. ADVANCED TELECOM GROUP, INC; ALLEGIANCE TELECOM, INC.; AT&T CORP; COVAD COMMUNICATIONS COMPANY; ELECTRIC LIGHTWAVE, INC.; ESCHELON TELECOM, INC. f/k/a ADVANCED TELECOMMUNICATIONS, INC.; FAIRPOINT COMMUNICATIONS SOLUTIONS, INC.; GLOBAL CROSSING LOCAL SERVICES, INC.; INTEGRA TELECOM, INC.; MCI WORLDCOM, INC.; McLEODUSA, INC.; SBC TELECOM, INC.; QWEST CORPORATION; XO COMMUNICATIONS, INC. f/k/a NEXTLINK COMMUNICATIONS, INC., Respondents.	)	DOCKET NO. UT-033011 COMPLAINT AND NOTICE OF PREHEARING CONFERENCE (SEPTEMBER 8, 2003)

1 The Washington Utilities and Transportation Commission (Commission) on its own motion, and through its Staff, alleges as follows:

I. INTRODUCTION

2 Under the Telecommunications Act of 1996, *47 U.S.C. §§ 151 et seq.*, incumbent telecommunications companies (ILECs), such as respondent Qwest Corporation

(Qwest)[1] are required to enter into interconnection agreements with other telecommunications carriers requesting access to Qwest's network. *47 U.S.C. §§ 251-252*. The carriers may negotiate agreements without the involvement of state commissions and without regard to the obligations set forth in subsections 251(b) and (c) of the Act. *47 U.S.C. § 252(a)*. If the carriers are unable to reach agreement through negotiation, one of the carriers may request the state commission to arbitrate any open issues. *Id. § 252(b)*.

3 All agreements, whether reached through negotiation or arbitration, are subject to state commission approval. *47 U.S.C. § 252(e)*. All agreements must be filed with the state commission, and the state commission must make all final agreements available for public inspection. *Id. § 252(h)*. The Commission has established procedures for the filing and approval of interconnection agreements.[2]

4 In response to a petition for a declaratory ruling from Qwest Communications International, Inc., the Federal Communications Commission (FCC) held that an agreement creating "an ongoing obligation pertaining to resale, number portability, dialing parity, access to rights-of-way, reciprocal compensation, interconnection, unbundled network elements, or collocation is an interconnection agreement that must be filed pursuant to section 252(a)(1)."[3]

5 The federal Act requires local exchange carriers, such as Qwest and the competitive local exchange carrier respondents (CLEC Respondents),[4] to make

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[1] All references to Qwest Corporation include its predecessor, US West Communications, Inc.

[2] *See In the Matter of Implementation of Certain Provisions of the Telecommunications Act of 1996*, Interpretive and Policy Statement Regarding Negotiation, Mediation, Arbitration, and Approval of Agreements Under the Telecommunications Act, Docket No. UT-960269 (June 28, 1996).

[3] *In the Matter of Qwest Communications International Inc. Petition for Declaratory Ruling on the Scope of the Duty to File and Obtain Prior Approval of Negotiated Contractual Agreements under Section 252(a)(1)*, WC Docket No. 02-89, Memorandum Opinion and Order, FCC 02-276, 17 FCC Rcd. 19,337, ¶ 8 (Oct. 4, 2002).

[4] All of the respondents to this complaint, except Qwest, are collectively referred to as "CLEC Respondents."

available any interconnection, service, or network element provided under an approved interconnection agreement to any other requesting carrier at the same terms and conditions as those provided in interconnection agreements. *47 U.S.C. § 252(i).* The Commission has put all telecommunications companies on notice that interconnection agreements and amendments thereto must be made available for public review, and adoption by other carriers pursuant Section 252(i).[5]

6 Washington law prohibits telecommunications companies that provide noncompetitive services from prejudicing or granting preferences to other telecommunications companies in the provision of those services. *RCW 80.36.186.*

7 Like the federal Telecommunications Act, Washington law also requires telecommunications companies to file with the Commission all contracts for telecommunications services with other telecommunications carriers. If noncompetitive services are provided by such contracts, the providing company must make the services available to other companies at the same or substantially the same rates, terms, and conditions. *RCW 80.36.150.*

8 As alleged below, Qwest and the CLEC Respondents entered into agreements regarding the parties' on-going obligations pertaining to such matters including, but not limited to, resale, number portability, reciprocal compensation, interconnection, unbundled network elements, or collocation. The agreements are identified in Exhibit A. Qwest and the CLEC Respondents failed to file the majority of the agreements with the Commission, and the agreements were not approved. Qwest filed the agreements marked with an asterisk in an untimely manner, and the Commission approved those agreements.

9 Qwest also entered into numerous agreements with other telecommunications companies to resolve disputes, which were largely billing related disputes. In consideration for payments from Qwest, the other companies, in general, agreed to forego their litigation positions in various proceedings, agreed not to oppose

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[5] *See In the Matter of the Implementation of Section 252(i) of the Telecommunications Act of 1996*, First Revised Interpretive and Policy Statement, Docket No. UT-990355 (April 12, 2000).

Qwest positions in various proceedings, or agreed to dismiss complaints they had brought against Qwest. These agreements are listed in Exhibit B.

PARTIES

10 The Commission is an agency of the state of Washington, authorized by state law to regulate the rates, practices, accounts, and services of public service companies, including telecommunications companies, under the provisions of Title 80 RCW.

11 The respondents are telecommunications companies subject to regulation by the Commission pursuant to RCW 80.01.040(3).

JURISDICTION

12 The Commission has jurisdiction over this matter pursuant to RCW 80.01.040, RCW 80.04.110, RCW 80.36.140, RCW 80.36.150, RCW 80.36.170, RCW 80.36.180, RCW 80.36.186, RCW 80.36.610, 47 U.S.C. § 252(a), 47 U.S.C. § 252(e)(1), 47 U.S.C. § 252(i).

FACTUAL ALLEGATIONS

13 The respondents are telecommunications companies authorized to provide telecommunications service in the state of Washington.

14 The respondents are subject to regulation under the provisions of Title 80 RCW.

15 Beginning at least as early as January 1999, continuing through at least March 2002, Qwest and the CLEC Respondents entered into the agreements identified in Exhibit A for the provision of interconnection, services, or network elements.[6] Qwest and/or the CLEC Respondents did not seek approval or timely approval of these agreements from the Commission as required by 47 U.S.C. § 252(e)(1). The agreements are identified in Exhibit A, which is attached and incorporated hereto by this reference. The agreements that were not timely filed are marked on Exhibit A with an asterisk; the remaining agreements were not filed.

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[6] Qwest is a party to each of the agreements identified in Exhibit A. The CLEC Respondents are parties only to those agreements that identify them by name.

16 With respect to the agreements identified in Exhibit A, neither Qwest nor the CLEC Respondents filed or timely filed the agreements with the Commission as required by 47 U.S.C. § 252(a)(1), (e) and RCW 80.36.150.

17 In addition to the agreements identified in Exhibit A, Qwest also entered into numerous agreements with other telecommunications companies whereby Qwest and the other companies agreed to settle outstanding disputes. These agreements generally provide for cash payments made by Qwest in exchange for the other company's agreements to forego certain litigation positions, not to pursue complaints, or not to participate in various proceedings against Qwest, or an agreement not to oppose positions taken by Qwest.

FIRST CAUSE OF ACTION
(Violation of 47 U.S.C. § 252(a))

18 The Commission, through its Staff, realleges the allegations contained in paragraphs 2-17 above.

19 47 U.S.C. § 252(a) requires submission to the state commission of agreements for interconnection, services, or network elements entered into between ILECs, such as Qwest, with other telecommunications companies, such as the CLEC Respondents.

20 Each respondent violated 47 U.S.C. § 252(a) for each agreement to which it was a party by failing to submit the agreements to the Commission. The respondents committed additional violations of 47 U.S.C. § 252(a) by failing to timely file the agreements marked with an asterisk.

SECOND CAUSE OF ACTION
(Violation of 47 U.S.C. § 252(e))

21 The Commission, through its Staff, realleges the allegations contained in paragraphs 2-17 above.

22 47 U.S.C. § 252(e) requires state commission approval of agreements between incumbent local exchange companies and other telecommunications companies for interconnection, services, or network elements.

23 Each respondent violated 47 U.S.C. § 252(e) for each agreement to which it was a party by entering into numerous agreements that were not approved by the Commission. The respondents committed additional violations of 47 U.S.C. § 252(e) by failing to seek Commission approval in a timely manner regarding the agreements marked with an asterisk.

THIRD CAUSE OF ACTION
(Violation of 47 U.S.C. § 252(i))

24 The Commission, through its Staff, realleges the allegations contained in paragraphs 2-17 above.

25 47 U.S.C. § 252(i) requires local exchange carriers to make available any interconnection, service, or network element provided under an approved interconnection agreement to any other requesting carrier at the same terms and conditions as those provided in the agreement. *47 U.S.C. § 252(i).*

26 By failing to obtain Commission approval of numerous agreements, Qwest committed multiple violations of 47 U.S.C. § 252(i) by failing to make available to other carriers the interconnection, service, or network elements provided under the agreements to any other requesting carrier. Qwest committed additional violations of 47 U.S.C. § 252(i) by failing to make available for other carriers in a timely manner the terms and conditions set forth in the agreements marked with an asterisk.

FOURTH CAUSE OF ACTION
(Violation of RCW 80.36.150)

27 The Commission, through its Staff, realleges the allegations contained in paragraphs 2-17 above.

28 RCW 80.36.150 requires telecommunications companies to file agreements, arrangements, or contracts for services with the Commission. RCW 80.36.150 requires telecommunications companies providing noncompetitive services through contracts to make those services available to all purchasers under the same or substantially the same circumstances under the same rate, terms, and conditions set forth in the contract.

29 Each respondent violated RCW 80.36.150 for each agreement to which it was a party by failing to file the agreements set forth in Exhibit A. The respondents committed additional violations of RCW 80.36.150 by failing to file the agreements marked with an asterisk in a timely manner.

30 Qwest further violated RCW 80.36.150 by failing to file the agreements identified in Exhibit B with the Commission or failing to file the agreements in a timely manner; by failing to demonstrate that the agreements identified in Exhibits A and B are in the public interest; and/or by failing to make the rates, terms, and conditions of the agreements identified in Exhibits A and B available to companies similarly situated to the customers receiving agreement terms.

31 Pursuant to RCW 80.04.380, each day any of the contracts were in effect without filing with the Commission constitutes a separate violation of RCW 80.36.150.

FIFTH CAUSE OF ACTION
(Violation of RCW 80.36.170)

32 The Commission, through its staff, realleges the allegations contained in paragraphs 2-17 above.

33 RCW 80.36.170 prohibits a telecommunications company from making or giving an undue or unreasonable preference or advantage to any customer or by subjecting any customer to undue or unreasonable prejudice or disadvantage whatsoever.

34 Qwest committed numerous violations of RCW 80.36.170 by giving those companies to which it offered the terms and conditions in the contracts set forth in Exhibit A an undue or unreasonable preference or advantage in the access to or pricing of the interconnection, services, or network elements provided in the contracts while subjecting the companies that were not offered such contract provisions to undue or unreasonable prejudice or disadvantage.

35 With respect to the contracts listed in Exhibit B, Qwest committed numerous violations of RCW 80.36.170 by giving the companies to which it offered settlements an undue or unreasonable preference or advantage in resolving disputes while subjecting the companies that were not offered such agreements to undue or unreasonable prejudice or disadvantage.

36 Pursuant to RCW 80.04.380, each day Qwest violated RCW 80.36.170 constitutes a separate violation.

SIXTH CAUSE OF ACTION
(Violation of RCW 80.36.180)

37 The Commission, through its Staff, realleges the allegations contained in paragraphs 2-17 above.

38 RCW 80.36.180 prohibits a telecommunications company from engaging in rate discrimination, either by special rates or rebates provided by the company to one customer or class of customers that it does not provide to all other similarly situated customers.

39 Qwest committed numerous violations of RCW 80.36.180 by providing interconnection, services, or network elements through the contracts listed in Exhibit A, and by offering settlement agreements as demonstrated in Exhibit B, to certain and not to all other similarly situated companies, thereby discriminating against those companies who were not offered the same contract terms.

40 Pursuant to RCW 80.04.380, each day Qwest violated RCW 80.36.180 constitutes a separate violation.

SEVENTH CAUSE OF ACTION
(Violation of RCW 80.36.186)

41 The Commission, through its staff, realleges the allegations contained in paragraphs 2-17 above.

42 RCW 80.36.186 prohibits a telecommunications company from granting an undue or unreasonable preference or advantage to another telecommunications company or from subjecting another telecommunications company to an undue or unreasonable prejudice or competitive disadvantage as to the pricing or access to noncompetitive services.

43 Qwest committed numerous violations of RCW 80.36.186 by giving those companies offered the terms and conditions in the contracts set forth in Exhibit A

an undue or unreasonable preference or advantage in the pricing of or access to noncompetitive services. Such conduct also subjected those companies that were not offered the same terms and conditions as in the contracts to an undue or unreasonable prejudice or competitive disadvantage.

44 By entering into the contracts set forth in Exhibit B, Qwest agreed to resolve disputes with certain carriers in exchange for certain consideration such as an agreement not to pursue litigation or take positions against Qwest. Such conduct subjected companies that were not offered such agreements, that were unwilling to make such agreements, or that could not make such agreements to an undue or unreasonable prejudice or disadvantage.

45 Pursuant to RCW 80.04.380, each day Qwest violated RCW 80.36.186 constitutes a separate violation of RCW 80.36.186.

46 THEREFORE, the Commission enters into a full and complete investigation into the matters alleged and will commence an adjudicative proceeding pursuant to chapter 34.05 RCW and chapter 480-09 WAC for the following purposes:

47 (1) To determine whether the respondents or each of them have violated the statutes set forth in the allegations above;

48 (2) To determine whether the Commission should impose monetary penalties against the respondents or each of them in an amount to be proved at hearing; and

49 (3) To make such other determinations and enter such orders as may be just and reasonable.

NOTICE OF PREHEARING CONFERENCE

50 Hearing in this matter is being held pursuant to Part IV of chapter 34.05 RCW pertaining to adjudicative proceedings and RCW 80.04.110 and RCW 80.04.120. The Commission has jurisdiction over this matter under Title 80 RCW, having legal authority to regulate the rates, practices, and services of telecommunications companies. Statutes involved include but are not limited to 47 U.S.C. § 252, particularly 47 U.S.C. § 252(a), (e) and (i), and those statutes within chapter 80.04 RCW and chapter 80.36 RCW, particularly RCW 80.04.010,

RCW 80.04.110, RCW 80.04.380, RCW 80.04.405, RCW 80.36.130, RCW 80.36.140, RCW 80.36.150, RCW 80.36.170, RCW 80.36.180, and RCW 80.36.186. Rules involved include but are not limited to those within chapter 480-09 WAC. The ultimate issues are as stated in the above complaint.

51 **NOTICE IS HEREBY GIVEN** That a prehearing conference in this matter will be held at 9:30 a.m. on September 8, 2003, in the Commission's Hearing Room, Second Floor, Chandler Plaza Building, 1300 S. Evergreen Park Drive S.W., Olympia, Washington. The purpose of the prehearing conference is to consider formulating the issues in the proceeding, and to determine other matters to aid in its disposition, as specified in WAC 480-09-460. Petitions to intervene should be made in writing prior to that date or made orally at that time. Appearances will be taken.

52 If any party or witness needs an interpreter or other assistance, please fill out the form attached to this notice and return it to the Commission.

53 NOTICE IS FURTHER GIVEN THAT ANY PARTY WHO FAILS TO ATTEND OR PARTICIPATE IN THE HEARING SET HEREIN, OR OTHER STAGE OF THIS PROCEEDING, MAY BE HELD IN DEFAULT IN ACCORDANCE WITH THE TERMS OF RCW 34.05.440. THE PARTIES ARE FURTHER ADVISED THAT THE SANCTION PROVISIONS OF WAC 480-09-700(4) ARE SPECIFICALLY INVOKED.

54 Ann E. Rendahl has been appointed as the Administrative Law Judge from the Utilities and Transportation Commission's Administrative Law Division, 1300 S. Evergreen Park Drive S.W., Olympia, Washington 98504-7250 and will preside at the prehearing conference.

55 The names and mailing addresses of all parties and their known representatives are as follows:

Complainant: Washington Utilities and
Transportation Commission
1300 S. Evergreen Park Drive S.W.
P. O. Box 47250
Olympia, WA 98504-7250
(360) 664-1160

Representative:	Shannon E. Smith Assistant Attorney General 1400 S. Evergreen Park Drive S.W. P. O. Box 40128 Olympia, WA 98504-0128 (360) 664-1192
Respondent:	Advanced Telecom Group, Inc.
Representative:	Unknown
Respondent:	Advanced Telecom Group, Inc.
Representative:	Unknown
Respondent:	Allegiance Telecom, Inc.
Representative:	Unknown
Respondent:	AT&T Corp
Representative:	Unknown
Respondent:	Covad Communications Company
Representative:	Unknown
Respondent:	Electric Lightwave, Inc.
Representative:	Unknown
Respondent:	Eschelon Telecom, Inc.
Representative:	Unknown
Respondent:	Fairpoint Communications Solutions, Inc.
Representative:	Unknown

Respondent:	Global Crossing Local Services, Inc.
Representative:	Unknown
Respondent:	Integra Telecom, Inc.
Representative:	Unknown
Respondent:	McLeodUSA Inc.
Representative:	Unknown
Respondent:	MCI Worldcom, Inc.
Representative:	Unknown
Respondent:	Qwest Corporation 1600 Seventh Avenue Seattle, WA 98191
Representative:	Lisa A. Anderl Attorney at Law 1600 Seventh Avenue, Room 3206 Seattle, WA 98191 (206) 345-1574
Respondent:	SBC Telecom, Inc.
Representative:	Unknown
Respondent:	XO Communications, Inc.
Representative:	Unknown

56 Notice of any other procedural phase will be given in writing or on the record as the Commission may deem appropriate during the course of this proceeding.

DATED at Olympia, Washington, and effective this 13th day of August 2003.

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

MARILYN SHOWALTER, Chairwoman

RICHARD HEMSTAD, Commissioner

PATRICK J. OSHIE, Commissioner

Inquiries may be addressed to:

Executive Secretary
Washington Utilities and
Transportation Commission
Chandler Plaza Building
1300 S. Evergreen Park Drive S.W.
P. O. Box 47250
Olympia, WA 98504-7250
(360) 664-1160

[Service Date August 14, 2003]

NOTICE

PLEASE BE ADVISED that the hearing facilities are accessible to interested people with disabilities; that smoking is prohibited; and that if limited English-speaking or hearing impaired parties or witnesses are involved in a hearing and need an interpreter, a qualified interpreter will be appointed at no cost to the party or witness.

The information needed to provide an appropriate interpreter or other assistance should be designated below and returned to:

Carole J. Washburn, Executive Secretary
Washington Utilities and Transportation Commission
1300 S. Evergreen Park Drive S.W.
P. O. Box 47250
Olympia, WA 98504-7250.

(SUPPLY ALL REQUESTED INFORMATION)

Docket No.: **UT-033011**

Case Name: **WUTC v. Advanced Telecom Group, Inc., et al**

Hearing Date:_____ Hearing Location:_____

Primary Language:_____

Hearing Impaired (Yes) ☐ (No) ☐

Do you need a certified sign language interpreter: (Yes) ☐ (No) ☐

Visual_____ Tactile_____

Other type of assistance needed:_____

English-speaking person who can be contacted if there are questions:

Name:_____

Address:_____

_____

Phone No.: (____)_____

[Service Date September 10, 2003]

BEFORE THE WASHINGTON STATE UTILITIES AND TRANSPORTATION COMMISSION

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION,	)	DOCKET NO. UT-033011
Complainant,	)	ORDER NO. 01
v.	)	PREHEARING CONFERENCE ORDER; NOTICE OF PREHEARING CONFERENCE; **(Set for February 10, 2004)**
ADVANCED TELECOM GROUP, INC; ALLEGIANCE TELECOM, INC.; AT&T CORP; COVAD COMMUNICATIONS COMPANY; ELECTRIC LIGHTWAVE, INC.; ESCHELON TELECOM, INC. f/k/a ADVANCED TELECOMMUNICATIONS, INC.; FAIRPOINT COMMUNICATIONS SOLUTIONS, INC.; GLOBAL CROSSING LOCAL SERVICES, INC.; INTEGRA TELECOM, INC.; MCI WORLDCOM, INC.; McLEODUSA, INC.; SBC TELECOM, INC.; QWEST CORPORATION; XO COMMUNICATIONS, INC. f/k/a NEXTLINK COMMUNICATIONS, INC.,	)	
Respondents.	)	

. . . . . .

1 **Nature of the Proceeding:** This is a complaint proceeding brought by the Washington Utilities and Transportation Commission (Commission), through its staff, against Qwest Corporation (Qwest) and 13 other telecommunications companies alleging that the companies entered into certain interconnection agreements identified in Exhibit A to the Amended Complaint,[1] and failed to file, or timely file, the agreements with the Commission as required by state and federal law. The complaint also alleges that the companies entered into certain

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

agreements to resolve disputes, but that the agreements violated federal and state law by failing to make terms and conditions available to other requesting carriers, providing unreasonable preferences, and engaging in rate discrimination.

2 **Prehearing Conference:** The Commission convened a prehearing conference in this docket at Olympia, Washington on September 8, 2003, before Administrative Law Judge Ann E. Rendahl. The purpose of the prehearing conference was to take appearances of the parties, consider petitions for intervention, determine the current status of the proceeding, determine whether it is possible to narrow the issues or consider stipulations of facts or issues, identify the issues in the proceeding, and establish a procedural schedule for the proceeding.

3 **Appearances.** Shannon Smith, Assistant Attorney General, Olympia, WA, represents Commission Staff. Brooks E. Harlow and William R. Connors, attorneys, Seattle, WA, Victor A. Allums, attorney, Atlanta, GA, and Brad E. Mutschelknaus, attorney, Washington, D.C., represent Advanced TelCom Group Inc. Brooks E. Harlow and William R. Connors, attorneys, Seattle, WA, represent Covad Communications Company. Daniel Waggoner and Mary Steele, attorneys, Seattle, WA, represent AT&T Corporation. Charles L. Best, attorney, Vancouver, WA, represents Electric Lightwave, Inc. Judith A. Endejan and Richard J. Busch, attorneys, Seattle, WA, and Dennis J. Ahlers, attorney, Minneapolis, MN, represent Eschelon Telecom, Inc. Richard A. Finnigan and Seth Bailey, attorneys, Olympia, WA, represent Fairpoint Communications Solutions, Inc., Integra TelCom, Inc., and SBC Telecom. Mark Trinchero, attorney, Portland, OR, represents Global Crossing Local Services, Inc. David Conn, attorney, Cedar Rapids, IA, represents McLeodUSA, Inc. Arthur A. Butler, attorney, Seattle, WA, and Michel Singer Nelson, attorney, Denver, CO, represent MCI/WorldCom, Inc. Lisa A. Anderl and Adam Sherr, attorneys, Seattle, WA, Todd Lundy, attorney, Denver, CO, Peter S. Spivak and Martha L. Russo, attorneys, Washington, D.C., and Cynthia Mitchell, attorney, Boulder, CO, represent Qwest Corporation. Arthur A. Butler, attorney, Seattle, WA, represents Time Warner Telecom of Washington, LLC. Greg Kopta, attorney, Seattle, WA, represents XO Communications, Inc. Robert Cromwell, Assistant Attorney General, Seattle, WA, represents Public Counsel. Contact information for the parties' representatives is attached as Appendix A to this order.

4 **Petition for Intervention.** On September 8, 2003, Time Warner Telecom of Washington, LLC filed with the Commission a Petition to Intervene in the proceeding. No party objected to the petition for intervention. TimeWarner's petition was granted.

5 **Motion to Dismiss.** On September 4, 2003, Commission Staff filed with the Commission a Motion to Dismiss Allegations against Allegiance Telecom, Inc. (Allegiance) and Motion to Amend Exhibit B. Commission Staff asserts that upon further investigation of the allegations against Allegiance, Staff has discovered that the agreement between Allegiance and Qwest is not an interconnection agreement subject to the filing requirement of 47 U.S.C. § 252(a) or the state commission approval requirement of 47 U.S.C. § 252(e). Staff requests that the agreement be moved to the list of agreements in Exhibit B for which separate allegations are made against Qwest.

6 No party opposed the motion, and the motion was granted. Allegiance is dismissed from the complaint, and the agreement between Allegiance and Qwest will be moved to Exhibit B to the Amended Complaint.

7 **Correction of or Further Amendment of the Complaint.** Several parties raised concerns that party names were misspelled or that the telecommunications company listed in the Amended Complaint was the national parent company, not the competitive local exchange company (CLEC) registered in Washington state. Commission Staff will work with the parties to correct the names of the companies listed in the Amended Complaint by requesting that the Commission correct the caption or further amend the complaint. Commission Staff will file such a request with the Commission by September 18, 2003.

8 **Protective order.** The parties asked the Commission to enter a protective order in this docket pursuant to RCW 34.05.446 and RCW 80.04.095, to protect the confidentiality of proprietary information. The request was granted and a protective order will be entered.

9 **Discovery.** Parties desire to engage in discovery of information in the proceeding. The proceeding qualifies under WAC 480-09-480 as a proceeding in which inquiries may be made to the extent provided in the rule. The discovery rule is invoked.

10 **Dispositive Motions.** The parties agreed to narrow the issues in this proceeding through filing dispositive motions, including summary disposition under WAC 480-09-426. Following resolution of the dispositive motions, the Commission will establish a further procedural schedule in the proceeding. The following schedule will govern dispositive motions:

Dispositive Motions	**Friday, November 7, 2003**
Answers to Motions	**Friday, December 5, 2003**
Replies to Answers	**Friday, December 19, 2003**

11 **Notice of Prehearing Conference.** The Commission convenes a prehearing conference in this matter to determine the current status of the proceeding, identify the remaining issues in the proceeding, determine whether it is possible to narrow the issues or consider stipulations of facts or issues, and establish a procedural schedule for the proceeding. The conference will be held in Room 206, Chandler Plaza Building, 1300 S. Evergreen Park Drive S.W., Olympia, Washington **at 9:30 a.m., on Tuesday, February 10, 2004**. Persons who cannot attend in person may participate via the Commission's teleconference bridge line **360-664-3846**. Persons desiring to participate via the bridge line must make advance reservations by calling Kippi Walker at 360-664-1139, no later than Thursday, February 5, 2004.

12 **Document preparation and process issues.** Parties must file 12 copies of each document filed with the Commission. Appendix B states relevant Commission rules and other directions for the preparation and submission of evidence and for other process in this docket. Parties will be expected to comply with these provisions.

13 **Alternate dispute resolution**. The Commission supports the informal settlement of matters before it. Parties are encouraged to consider means of resolving disputes informally. The Commission does have limited ability to provide dispute resolution services; if you wish to explore those services, please call the Director, Administrative Law Division, at 360-664-1142.

Dated at Olympia, Washington, and effective this 10th day of September 2003.

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

ANN E. RENDAHL
Administrative Law Judge

NOTICE TO PARTIES: Any objection to the provisions of this Order must be filed within ten (10) days after the date of mailing of this statement, pursuant to WAC 480-09-460(2). Absent such objections, this prehearing conference order will control further proceedings in this matter, subject to Commission review.

APPENDIX A

PARTIES REPRESENTATIVES

DOCKET NO. UT-033011 Updated 9/8/03

COMPANY	REPRESENTATIVE AND ADDRESS	PHONE NUMBER	FAX NUMBER	E-MAIL ADDRESS
Commission Staff	SHANNON SMITH Asst. Attorney General 1400 S. Evergreen Park Dr. SW PO Box 40128 Olympia, WA 98504-0128	360-664-1192	360-586-5522	ssmith@wutc.wa.gov
Advanced TelCom Group, Inc.	BROOKS E. HARLOW *(E)* WILLIAM R. CONNORS Miller Nash LLP 4400 Two Union Square 601 Union Street Seattle, WA 98101	206-622-8484 206-777-7515	206-622-7485 (Same)	brooks.harlow@millernash.com bill.Connors@millernash.com
	(E-mail only) VICTOR A. ALLUMS General Counsel GE Business Productivity Solutions, Inc. 6540 Powers Ferry Rd., Atlanta, GA 30339	770-644-7606	770-644-7752	vic.alums@ge.com
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Presiding Administrative Law Judge	ANN E. RENDAHL 1300 S. Evergreen Park Drive SW PO Box 47250 Olympia, WA 98504-7250	360-664-1144	360-664-2654 (ALD fax only – do not use to file)	arendahl@wutc.wa.gov

Appendix B

I. Requirements for ALL paper copies of testimony, exhibits, and briefs

The following requirements are restated from and clarify the Commission's rules relating to adjudications.

A. All paper copies of briefs, prefiled testimony, and original text in exhibits must be

- On 8-1/2x11 paper, punched for insertion in a 3-ring binder,
- Punched with OVERSIZED HOLES to allow easy handling.
- Double-spaced
- 12-point or larger text and footnotes, Times New Roman or equivalent serif font.
- Minimum one-inch margins from all edges.

Other exhibit materials need not be double-spaced or 12-point type, but must be printed or copied for optimum legibility.

B. All electronic and paper copies must be

- SEQUENTIALLY NUMBERED (all pages). **THIS INCLUDES EXHIBITS**. It is not reasonable to expect other counsel or the bench to keep track of where we are among several hundred (or sometimes even just several) unnumbered pages.
- DATED ON THE FIRST PAGE OF EACH ITEM and on the label of every diskette. If the item is a revision of a document previously submitted, it must be clearly labeled (REVISED), with the same title, and with the date it is filed clearly shown. Electronic files must be designated R for revision, when applicable, with an ordinal number showing the revision number.

II. Identifying exhibit numbers; Exhibits on cross examination.

A. **Identifying exhibits.** It is essential to mark documents so you, opposing counsel, and the Commission can find them. We ask you to comply with this clarification of prior practice, based on recent experience:

- **Use the witness's initials and add an ordinal number for each exhibit.** Identify testimony with a T and confidential exhibits with a C. Example: Witness Jane Quintessentia Public. Her original testimony would be JQP-1T or JQP-1TC, her first attached exhibit would be JQP-2, etc. NEVER identify the attachments merely with a single ordinal number, as that will provide the maximum confusion to everyone, including your witness.

B. Prepare a list of your exhibits with their title and (JQP) designation in digital form and in a format specified by the Commission. Send it to the presiding officer before the appropriate prehearing conference. That will simplify identification and ease administrative burdens.

NOTE: **Be prepared to submit all of your possible exhibits on cross examination several days prior to the hearing.** We will attempt to schedule a prehearing conference to deal with the exhibits as close as possible to the hearing itself, but we have administrative needs that require prefiling.

CERTIFICATE OF SERVICE

UM 1232

I hereby certify that on the 2nd day of February, 2006, I served the foregoing **QWEST CORPORATION'S MOTION TO DISMISS THE COMPLAINANTS' AMENDED COMPLAINT** in the above entitled docket on the following persons via U.S. Mail, by mailing a correct copy to them in a sealed envelope, with postage prepaid, addressed to them at their regular office address shown below, and deposited in the U.S. post office at Portland, Oregon.

.

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DATED this 2nd day of February, 2006.

QWEST CORPORATION

By: _____

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