[Service Date June 8, 2006]

BEFORE THE WASHINGTON STATE UTILITIES AND TRANSPORTATION COMMISSION

AT&T COMMUNICATIONS OF THE PACIFIC NORTHWEST, INC., TCG SEATTLE, AND TCG OREGON; AND TIME WARNER TELECOM OF WASHINGTON, LLC,	)	DOCKET UT-051682
	)	ORDER 04
Complainants,	)	INTERLOCUTORY ORDER REVERSING INITIAL ORDER; DENYING MOTION FOR SUMMARY DETERMINATION OR DISMISSAL
v.	)	
QWEST CORPORATION,	)	
Respondent.	)	
. . . . .	)	

1 ***Synopsis:*** *This order reverses an initial order dismissing this action for failure of complainants to file their complaint within the applicable limitation period. We find that the dispute falls within the six-year statute of limitation for contracts, RCW 4.16.040(1), and that all possible pertinent accrual dates are within the limitation period. We return the docket to the administrative law judge for further proceedings.*

I. INTRODUCTION

2 **Nature of proceeding.** This docket involves a complaint filed by competitive local exchange carriers (CLECs) AT&T Communications of the Pacific Northwest, Inc., TCG Seattle and TCG Oregon (collectively, AT&T) and Time Warner Telecom of Washington, LLC (Time Warner or TWTC) against Qwest Corporation (Qwest).

3 The complaint alleges that Qwest charged the complainants more for certain facilities and services than Qwest charged other CLECs under unfiled agreements with those CLECs. Complainants contend that this practice violated federal and state laws and their own contracts with Qwest, and that they are entitled to compensation for the difference between the actual charges and the lower, unfiled rates.

4 **Motion for summary determination and dismissal.** Qwest moved for dismissal and summary determination under WAC 480-07-380(1) and (2), arguing that the pertinent statute of limitation bars the complaint. Complainants oppose the motion.

5 **Appearances.** Lisa A. Anderl and Adam Sherr, attorneys, Seattle, represent Qwest. Gregory J. Kopta, attorney, Seattle, represents AT&T and Time Warner.

6 **Initial order.** The initial order, by Administrative Law Judge Theodora Mace, would grant the motion and dismiss the complaint. The order ruled that the action accrued on September 8, 2004, with the release by Commission Staff (Staff) of unfiled agreements. Finding that the six-month limitation period in RCW 80.04.240 applied, the judge held the complaint, filed November 4, 2005, was barred.

7 **Petition for administrative review.** Both parties seek administrative review of the initial order. Complainants challenge the result of the order and the application of the six-month limitation statute; Qwest challenges the order's determination of the date the cause of action accrued.

8 **Decision on review.** We reverse the initial order and return the matter to the administrative law judge for further proceedings.

II. BACKGROUND

9 Under section 251 of the Telecommunications Act of 1996, competitive local exchange carriers ("CLECs," such as the complainants) may enter interconnection agreements with incumbent local exchange companies (such as the respondent) to receive services from the incumbents that enable them to serve their own customers. Qwest and carriers entering interconnection agreements with Qwest regarding service provided in Washington must file the agreements with this Commission. Filed agreements are subject to approval, and other competitive carriers may "opt into" terms of filed, approved agreements.

A. The unfiled agreements.

10 The unfiled interconnection agreements at the center of this dispute were for services in Washington between Qwest and Eschelon Telecom (Eschelon)[1] and between Qwest and McLeodUSA Telecommunications Services, Inc. (McLeodUSA).[2] Among the terms of these agreements was a provision granting a 10% discount on certain intrastate telephone services. These agreements were among a number of such agreements that initially were not filed with any state regulatory commission and were not publicly disclosed.

11 A complaint was filed against Qwest in Minnesota in February 2002, alleging that Qwest violated the law by entering and failing to file the agreements. AT&T urged this Commission to pursue the matter in the then-pending "271 docket"[3], which we declined to do on July 15, 2002.[4] In the unfiled agreements case, Docket UT-033011, we addressed regulatory violations involved in the agreements but declined to pursue claims on behalf of carriers. We ultimately approved a settlement in that docket which found Qwest to have committed serious violations and assessed penalties of nearly $8 million against it.[5]

B. The complaint.

12 Complainants are CLECs also operating under interconnection agreements with Qwest. They contend that federal law, state law and their interconnection agreements with Qwest entitle them to the rate or rates for comparable services that Qwest offers to their competitors under unfiled agreements. Complainants seek compensation for

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[1] The complaint alleges that Qwest "entered into a series of interconnection agreements with Eschelon" beginning on or about February 2000. Qwest states that the only agreement with Eschelon containing a discount or lower rate was signed November 15, 2000.

[2] The complaint alleges that the McLeodUSA agreements were entered into beginning on or about April 2000. The list of agreements attached to the Amended Complaint in Docket UT-033011 includes two McLeodUSA agreements dated April 28, 2000 and October 21, 2000.

[3] *In the Matter of the Investigation Into U S WEST COMMUNICATIONS, INC.'s Compliance with Section 271 of the Telecommunications Act of 1996,* Docket UT-003022. In that docket, Qwest was pursuing its request to provide long distance service under 47 U.S.C. 271.

[4] 40th Supplemental Order, July 15, 2002.

[5] *Washington Utilities and Transportation Commission v. Advanced Telecom Group, Inc., et al.*, Docket UT-033011, Order 21, February 28, 2005.

the difference between the amount they actually paid for service and the amount they would have paid if the unfiled agreements had been filed, and complainants had opted into their relevant terms.

13 The complaint cites RCW 80.04.220 and 80.04.230, which govern overcharges and illegal rates, respectively, as the basis for the remedy sought.

C. The motion to dismiss or for summary determination.

14 Qwest answered the complaint and filed a motion to dismiss or for summary determination. [6]

15 Qwest argued that the complaint was not timely filed. It contends that complainants should have known to file a complaint as early as March 12, 2002, when a regulatory complaint was filed against Qwest before the Minnesota commission. Qwest also argues that complaint should be seen as one for overcharges, arising under RCW 80.04.220, which carries a six-month limitation period. Qwest points out that the rates set out in the interconnection agreement were approved by the Commission and thus were lawful until changed, so the complaint does not seek redress for unlawful rates and the two-year limitation period for a complaint under RCW 80.04.230 would not apply.

16 Complainants argued that the six-year general statute of limitation, RCW 4.16.040(1), should apply because Qwest violated the most favored nation clause in complainants' contracts with Qwest.

D. The initial order.

17 The initial order ruled: 1) The complaint accrued on June 8, 2004, with Staff's release of the unfiled agreements to the public with the amended complaint in Docket UT-033011; 2) The complaint sought reparations for overcharges rather than for the application of an illegal rate; 3) The six-month limitation period applied; 4) The

[6] The initial order correctly treated the motion as one for summary determination. *WAC 480-07-380(1)(a).*

complaint was therefore barred by the limitation period and should be dismissed, and; 5) The six year limitation statute was inapplicable.

III. ADMINISTRATIVE REVIEW

18 Both parties seek administrative review of the initial order. Complainants contend that the order erred in defining the nature of the complaint and finding the shorter limitation period to apply, and Respondent contends that the order's proposed accrual date for the action is improperly late in the factual scenario underlying the complaint.

A. Decision on the contested issues.

19 We rule that Qwest is correct on the accrual date, and that the initial order erred in finding that the action accrued on June 8, 2004. That is when Commission Staff released the unfiled agreements in a public filing in Docket UT-033011.

20 The test for accrual, as Qwest points out, is not when the aggrieved party actually discovered the injury, but when the aggrieved party *in the exercise of reasonable diligence* should have discovered the injury.[7] That date is July 15, 2002, when the Commission rejected pleas to pursue the asserted violations in the 271 docket. It was then common knowledge that possible violations had occurred; that the violations could have affected complainants; that the Commission refused to take up the matter at that time; and that Commission action of an indefinite nature would occur only at some indefinite point in the future. Complainants knew that Commission action was not imminent, and that a six-month limitation period could potentially bar their actions. A reasonable CLEC at that point would have begun serious inquiries, particularly given the possibility of considerable damages.

21 Complainants argue that the unfiled agreements were confidential documents at that time, and were not in the public domain. It is inconceivable to us that, had complainants asked for documents for the purpose of determining whether they had

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[7] One who has notice of facts sufficient to prompt a person of reasonable prudence to inquire is deemed to have notice of all the facts that a reasonable inquiry would disclose. *Enterprise Timber Inc. v. Washington Title Ins. Co.*, 79 Wn.2d 479, 457 P.2d 600 (1969).

been injured, access to the documents would have been denied. We reverse the initial order on this issue.

22 We also rule that the six-month statute is appropriate to the theory on which the complaint was pleaded. The rates in complainants' interconnection agreements were not made unlawful by Qwest's entry into agreements that granted others more favorable rates—rates that were themselves later found to be unlawful. Complainants' challenge to the initial order on this point is denied.

B. The six-year statute of limitation.

23 Complainants argue that the six-year statute of limitations should apply, based on a cause of action under contract. They did not clearly explain the basis of this cause to the administrative law judge. The initial order rejected Complainants' argument.[8]

24 Complainants argue that their interconnection agreements contain "most favored nation" provisions that entitle them to any more-favorable provisions that Qwest may grant to other carriers in comparable conditions. We disagree with the initial order's statement that this is "a pure breach of contract action . . . outside the scope of an interconnection agreement enforcement action."

25 RCW 80.36.610 grants the Commission jurisdiction over disputes for which the Telecommunications Act of 1996 ("the Act") permits or contemplates state action.[9] Interconnection disputes are matters for which the Act provides for state action.[10] Complainants cite RCW 80.36.610.

26 The statute allows the Commission to take action to enforce the terms of interconnection agreements. WAC 480-07-380[11] implements the statutory authority, although it is not the exclusive means of seeking enforcement.[12]

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[8] Paragraph 36, page 13.
[9] RCW 80.36.610(1) reads in relevant part as follows: "The commission is authorized to take actions, conduct proceedings, and enter orders as permitted or contemplated for a state commission under the federal telecommunications act of 1996 . . .".
[10] 47 U.S.C. Sec. 252.
[11] "A telecommunications company that is party to an interconnection agreement with another telecommunications company may petition under this rule for enforcement of the agreement." WAC 480-07-380(1).

27 Complainants seek to enforce the most favored nation provision in their interconnection agreements (contracts) by achieving the benefit of the bargain for which they contracted. This is an action within the terms of RCW 80.36.610. Enforcement of interconnection agreements is a specific remedy afforded by statute and rule in limited circumstances involving telecommunications act matters. To the extent it might be inconsistent with the compensation remedies provided in RCW 80.04.220 and -.230, the specific statutory remedy takes precedence over the general[13] and the more recent over the earlier.[14] Complainants may pursue enforcement of their interconnection agreement as a contract claim.

28 RCW 80.04.240 sets out limitation periods for the causes of action specified in RCW 80.04.220 and -.230. It does not speak to actions seeking to enforce interconnection agreement contracts. The *Glick* decision,[15] as the initial order correctly notes, demonstrates that the Commission will look to the generally applicable limitation period set by state statutes when there is no specific limitation period established for matters within our jurisdiction. Therefore, we look to the limitation period for actions based on contract, RCW 4.16.040(1). Actions on a written contract must be filed within six years after they accrue. [16]

29 None of the proposed accrual dates predate the filing of the complaint by more than six years. Therefore, the complaint should not be dismissed.

30 **Further process.** Complainants asked, and we grant, the opportunity to amend the complaint to reflect decisions in this order. We return the matter to the administrative law judge for further proceedings consistent with the result of this order.

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[12] The rule by its terms ("may petition") contemplates enforcement by other process.
[13] *In re Estate of Black*, 153 Wn.2d 152, 101 P.3d 796 (2004).
[14] *Tunstall v. Bergeson*, 141 Wn.2d 201, 5 P.3d 691 (2000), cert. den. 532 U.S. 920.
[15] *Glick v. Verizon*, Docket UT-040535, Order 03, January 28, 2005.
[16] "The following actions shall be commenced within six years: (1) An action upon a contract in writing, or liability express or implied arising out of a written agreement." *RCW 4.16.040.*

IV. O R D E R

31 The Commission reverses the initial order, denies the motion for summary determination, and returns the matter to the administrative law judge for further proceedings consistent with the terms of this order.

Dated at Olympia, Washington, and effective June 7, 2006.

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

MARK H. SIDRAN, Chairman

PATRICK J. OSHIE, Commissioner

PHILIP B. JONES, Commissioner

NOTICE TO PARTIES: This is an Interlocutory Order of the Commission. Administrative review may be available through a petition for review, filed within 10 days of the service of this Order pursuant to *WAC 480-07-810*.