BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION, Complainant, v. ADVANCED TELCOM, INC., dba ADVANCED TELCOM GROUP; ALLEGIANCE TELECOM, INC.; AT&T COMMUNICATIONS OF THE PACIFIC NORTHWEST AND TCG SEATTLE; COVAD COMMUNICATIONS COMPANY; ELECTRIC LIGHTWAVE, LLC; ESCHELON TELECOM OF WASHINGTON, INC.; FAIRPOINT CARRIER SERVICES, INC. f/k/a FAIRPOINT COMMUNICATIONS SOLUTIONS CORP.; GLOBAL CROSSING LOCAL SERVICES, INC.; INTEGRA TELECOM OF WASHINGTON, INC.; WORLDCOM, INC.; McLEODUSA TELECOMMUNICATIONS SERVICES, INC.; SBC TELECOM, INC.; QWEST CORPORATION; and XO WASHINGTON, INC. Respondents.	UT-033011 SBC TELECOM, INC.'S MOTION FOR SUMMARY DISPOSITION

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COMES NOW Respondent, SBC Telecom, Inc. ("SBC"), by and through its attorneys of record, Richard A. Finnigan and B. Seth Bailey, attorneys at law, and files this Motion for Summary Disposition with the Washington Utilities and Transportation Commission (the "Commission").

INTRODUCTION

Pursuant to WAC 480-09-426, SBC submits to the Commission that there is no genuine issue as to any material fact and that SBC is entitled to summary disposition in its favor. Under the requirements of WAC 480-09-426, the Commission is to look to CR 56 for guidance on how to deal with motions for summary disposition. The law surrounding CR 56 motions for summary judgment is well settled. Like the explicit requirements of WAC 480-09-426, under CR 56, summary judgment must be entered if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. FRCP 56(c); Tanner Electric Coop. V. Puget Sound Power & Light Co., 128 Wn.2d 656, 668, 911 P.2d 1301 (1996).

Once the moving party meets its initial burden of showing the absence of any genuine issues of material fact, the burden then shifts to the non-moving party to set forth specific facts, not just speculation, to avoid summary judgment being entered against it. FRCP 56(e); Kendall v. Public Hospital Dist., 118 Wn.2d 1, 8-9, 820 P.2d 497 (1991). "The whole purpose of summary judgment procedure would be defeated if a case could be forced to trial by a mere assertion that an issue exists without any showing of evidence." See, Reed v. Streib, 65 Wn.2d 700, 707, 399 P.2d 338 (1965). Thus, since SBC has demonstrated below that there is no materially disputed fact, and it is entitled to judgment as a matter of law, the burden shifts to the Commission to affirmatively demonstrate with more than mere allegations that summary disposition is not appropriate.

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FACTS[1]

On June 1, 2000, Kathrine Fleming, Vice President of Interconnection Implementation for U S West Communications, Inc. ("U S West"), now known as Qwest Corporation ("Qwest"), sent a letter designed to serve as a settlement between SBC and Qwest (the "Settlement Letter") to SBC's General Counsel, Thomas Hartmann.[2] See, Settlement Letter, attached as Exhibit 1.

In order to understand the purpose behind the Settlement Letter, the history of the agreement must be understood. SBC was in the process of completing its merger with Ameritech. As a part of the SBC/Ameritech merger, the Federal Communications Commission ("FCC") had placed several requirements on SBC. One of these requirements was that SBC would offer services as a competitive local exchange carrier ("CLEC") outside of SBC's traditional thirteen-state incumbent local exchange carrier ("ILEC") territory.

As a part of this requirement to offer services as a CLEC, the FCC had established a schedule by which SBC had to provide services (as a CLEC) in various states and, in particular, in the top 30 markets within those states. If SBC failed to meet the FCC's imposed deadlines, SBC was subject to millions of dollars of potential fines. As a result, time was truly of the essence in ensuring that SBC, as a CLEC, was able to fully implement the FCC's schedule, by working with the ILECs in the various locations.

One of the locations in which SBC was required to offer services as a CLEC was the Seattle, Washington market. Indeed, Seattle was one of the first places on the FCC's schedule where SBC had to provide services as a CLEC. In an effort to comply with the requirements of the FCC's

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[1] These facts are supported by the accompanying Declaration of David Hammock.

[2] Attached to the Settlement Letter that was filed with the Staff's Amended Complaint is a lengthy "line sharing" amendment to an interconnection agreement. This appears to be an error on Qwest's part when it produced to Staff the various agreements that are the subject matter of this dispute. The line sharing amendment was never part of the Settlement Letter and was not executed by SBC and Qwest in relation to the Settlement Letter or in any other context. See, Declaration of David Hammock.

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merger order, SBC was willing to withdraw its opposition to the U S West/Qwest merger in exchange for U S West's willingness to allow SBC to implement certain terms and conditions in the executed agreements prior to Commission approval which would allow SBC to comply with the FCC's order regarding its merger with Ameritech. SBC was determined to do its best to comply with the FCC's schedule. Thus, the critical issue for SBC was the timing of the interconnection agreements – even above the actual provisions themselves.

Along these lines, the Settlement Letter spells out one specific requirement that Qwest had to perform, in addition to timely entering into an interconnection agreement, in order to allow SBC to meet the FCC's schedule. That involved the provisioning of an OC 12 at SBC's facilities in Seattle. If Qwest was willing to provision an OC 12 in Seattle for SBC's use by the deadlines listed in the Settlement Letter, SBC felt confident that it would be able to meet the FCC's deadline that it begin providing services in the Seattle area within a specific timeframe. This was a one-time provision that was not "ongoing" in nature.

With respect to the various provisions in the Settlement Letter associated with entering into interconnection agreements in the states (including Washington), under the explicit terms of the Settlement Letter, unbundling of network elements, transporting live traffic and other "interconnection" type activities could not be implemented until after the appropriate various state commissions had approved the interconnection agreement for that state under 47 U.S.C. § 252. The Settlement Letter did call for Qwest to begin to "process service orders" after the execution of the various interconnection agreements, but before final state commission approval. This provision was merely to ensure that everything was in place upon state commission approval for actual implementation of the interconnection agreements. All of the "interconnection" types of obligations were explicitly postponed until after state commission approval.

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ARGUMENT

1. The Staff's Analysis of the Types of Agreements that Must Be Filed with the Commission Under 47 U.S.C. § 252 is Faulty:

The Commission Staff ("Staff") has alleged that the Settlement Letter should have been filed with the Commission but was not, thus violating 47 U.S.C. § 252 and RCW 80.36.150. See, Amended Complaint, causes of action 1, 2 and 4.[3] In its Amended Complaint, the Staff relies on 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 Arrangements under Section 252(a)(1), Memorandum Opinion and Order, FCC 02-276, 17 FCC Rcd. 19,337, ¶ 8 (Oct. 4, 2002) (the "FCC Filing Requirements Order") for its argument that the Settlement Letter should have been filed with the Commission. See, Amended Complaint, at ¶ 4. However, by its own terms, the FCC Filing Requirements Order excludes the Settlement Letter from the types of agreements that must be filed with state commissions.

The FCC Filing Requirements Order attempts to parse out which agreements between telecommunications companies are "interconnection agreements" under 47 U.S.C. §§ 251 and 252, and therefore subject to the filing requirements, and which agreements are settlement agreements that need not be filed with the state commissions. When discussing the types of agreements that do need to be filed with a state commission like the Commission, the FCC stated generally:

> Based on these statutory provisions, we find that an agreement that creates 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). (Emphasis in original).

See, FCC Filing Requirements Order, at ¶ 8.

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[3] Causes of action 3, 5, 6 and 7 are not applicable to SBC.

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However, the FCC acknowledged (contrary to the assertions of several state commissions that filed comments in the FCC's proceeding) that not all agreements need to be filed with the state commissions. The FCC Filing Requirements Order specifically excludes certain types of settlement agreements from those types of agreements that need to be filed with state commissions. Admittedly, not all settlement agreements are free from the filing requirements of Section 252(a)(1). However, those agreements that do not have an "ongoing" interconnection nature to them are not required to be filed with state commissions.

2. The Settlement Letter was a "Backward-Looking" Agreement with No Specific Interconnection Provisions Obligated Under It:

In this case, the only requirements imposed on the parties by the Settlement Letter were to enter into and partially implement interconnection agreements (e.g. allow the ordering and provisioning of interconnection facilities and trunks with the understanding that no live traffic would be exchanged until the Agreement was approved by the appropriate state commission), and a one-time provisioning of facilities necessary for Qwest to terminate an OC 12 on SBC's premises. These two obligations were not "ongoing" within the meaning of the FCC Filing Requirements Order. The Settlement Letter does not specifically involve any of the provisions of an interconnection agreement such as resale, number portability, collocation, etc.

a. The Obligation Under the Settlement Letter to Enter Into Interconnection Agreements Was Not Ongoing and Did Not Involve "Interconnection" type Services:

Although the obligations in the interconnection agreements themselves were obviously "ongoing" as that term is used by the FCC Filing Requirements Order, the obligation to enter into an interconnection agreement was not an ongoing obligation. The agreement to enter into

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interconnection agreements only existed once in each state for a finite period of time. Thus, the "ongoing" requirement necessary for an agreement to be the type of agreement that needs to be filed with the state commissions is completely lacking from the provisions calling for the parties to enter into interconnection agreements.

Further, the obligation to enter into an interconnection agreement is not an "interconnection" type obligation that makes the agreement subject to the filing requirements. The Settlement Letter only bound SBC and Qwest to do what the Telecommunications Act of 1996 (the "Act") required of them anyway. See, 47 U.S.C. §§ 251, 252. In other words, in exchange for SBC's willingness to drop its opposition to the U S West / Qwest merger, Qwest agreed to fulfill its obligations under the Act in a timeframe that allowed SBC to meet the obligations imposed on SBC by the FCC as a result of the SBC/Ameritech merger.

This does not mean that the terms of the interconnection agreements themselves were not disputed. They were. The terms of each interconnection agreement entered into by SBC and Qwest was negotiated in the traditional manner and submitted to the various state commissions in the traditional manner as outlined by Section 252 of the Act. See, Declaration of David Hammock. Any other CLEC could have invoked the same provisions of the Act that required Qwest to enter into an interconnection agreement with SBC. Thus, the agreement in the Settlement Letter that Qwest and SBC would execute interconnection agreements did not entitle SBC to any benefit that any other CLEC could not have obtained. It only ensured that Qwest would live up to its obligation imposed upon it under Sections 251 and 252 of the Act to enter into an interconnection agreement.

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b. The Obligation to Provision Facilities for an OC 12 Was Not an "Interconnection" Type Service that Subjected the Settlement Letter to the Filing Requirements:

In one of its clarifications of the types of settlement agreements that need not be filed with state commissions, the FCC stated:

> The first matter concerns which settlement agreements, if any, must be filed under section 252(a)(1). . . . Merely inserting the term "settlement agreement" in a document does not excuse carriers of their filing obligation under section 252(a) or prevent a state commission from approving or rejecting the agreement as an interconnection agreement under section 252(e). However, we also agree with Qwest that those settlement agreements that simply provide for "backward-looking consideration" (*e.g.*, the settlement of a dispute in consideration for a cash payment or the cancellation of an unpaid bill) need not be filed.

FCC Filing Requirements Order, at ¶ 12 on page 6 (emphasis added).

The Settlement Letter's requirement that Qwest terminate an OC 12 at SBC's building was the same type of obligation as a cash payment or cancellation of an unpaid bill. It was a one-time "payment" type arrangement between the parties in exchange for SBC's withdrawal of its opposition to the U S West/Qwest merger. Once it was done, there were no continuing obligations under the Settlement Letter, just like once the check is written there are no continuing obligations under a settlement of past billing disputes. In other words, once the OC 12 matter was handled, neither SBC nor Qwest ever pulled out the Settlement Letter to determine what their "ongoing" obligations were under its terms.

3. Application of the Staff's Interpretation of the Filing Requirements as Outlined in the Amended Complaint Is Against Public Policy:

If even the most technical and minor obligations, such as the agreement to negotiate interconnection agreements or the one-time OC 12 agreement in the Settlement Letter, result in a filing obligation under Section 252(a)(1), it will place a significant damper on the ability of

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companies to settle disputes. The Staff's approach to these types of agreements will have a chilling effect that will lead to parties being less capable of efficiently resolving disputes for fear of enduring the protracted Commission approval process on the one hand or fines on the other hand.

This chilling effect is expressly counter to established Washington and Commission policy. For example, WAC 480-09-466 states: "The Commission favors the voluntary settlement of disputes within its jurisdiction." In State v. Noah, 103 Wn. App. 29, 42, 9 P.3d 858 (2000), the Court stated: "The express public policy of the state is to encourage settlement. The law 'strongly favors' settlement." (Citations omitted). In In the Matter of the Investigation Into U S West Communications, Inc.'s Compliance With Section 271 of the Telecommunications Act of 1996, Docket Nos. UT-003022 & UT-003040, 39th Supplemental Order (the "Qwest 271 Order"), the Commission stated that "it is not good public policy to prohibit companies from negotiating with each other to resolve disputes." See, Qwest 271 Order, at ¶ 291. This Complaint against SBC, however, if successful, will do exactly that – it will discourage companies from negotiating with each other to resolve disputes.

4. Procedural Deficiencies in 47 U.S.C. § 252 and RCW 80.36.150 Make It Impossible for the Commission to Enforce Any Penalties Against SBC:

Assuming that the Settlement Letter should have been filed with the Commission, the procedural deficiencies in the Staff's attempt to enforce 47 U.S.C. § 252 and RCW 80.36.150 still prevent the Commission from assessing any penalties against SBC. First, RCW 80.36.150 and the Commission's rules fail to specify any timeframe during which an applicable agreement must be filed with the Commission. Second, the Commission does not have the jurisdiction or legal authority to impose a penalty under 47 U.S.C. § 252. As a result of these deficiencies, even if,

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arguendo, the Settlement Letter should have been filed with the Commission, there are no remedies available for such violations.

a. RCW 80.36.150 and the Commission Rules Fail to Impose Any Specific Penalty or Timeframe in Which to File an Interconnection-type Agreement:

RCW 80.36.150 provides, in part:

> Every telecommunications company shall file with the commission, as and when required by it, a copy of any contract, agreement or arrangement in writing with any other telecommunications company, or with any other corporation, association or person relating in any way to the construction, maintenance or use of a telecommunications line or service by, or rates and charges over and upon, any such telecommunications line. The commission shall adopt rules that provide for the filing by telecommunications companies on the public record of the essential terms and conditions of every contract for service.

(Emphasis added).

Like 47 U.S.C. § 252, RCW 80.36.150 does not require that every agreement between telecommunications companies be filed with the Commission. Instead, agreements that relate to "the construction, maintenance or use of telecommunications lines" are the agreements that the Commission has deemed to be ongoing in nature and subject to the Commission's filing requirements. It is clear from the discussion above about the Settlement Letter that it does not involve "the construction, maintenance or use of telecommunications lines" in such a manner as to trigger the filing requirements of RCW 80.36.150. However, even if the Settlement Letter is the type of agreement that needed to be filed under RCW 80.36.150, the lack of any specific timeframe in which it should have been filed is fatal to the Staff's Amended Complaint.

There is no provision in Washington state law or the Commission's rules stating a timeframe or deadline during which any agreement must be filed with the Commission. As a result, from a procedural standpoint, there can be no such thing as a "late" filed agreement. If there is no such

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thing under RCW 80.36.150 as a late agreement, there can be no penalty associated with "late" filing of an agreement. Thus, the Commission is powerless to pursue any remedy against SBC through the Amended Complaint.

Perhaps recognizing this fatal deficiency, the Staff relies in its Amended Complaint on two interpretive policy statements.[4] The 1996 Policy Statement states:

> An interconnection agreement shall be submitted to the Commission for approval under Section 252(e) within 30 days after the issuance of the Arbitrator's Report, in the case of arbitrated agreements, or, in the case of negotiated agreements, within 30 days after the execution of the agreement.

1996 Policy Statement, at 9. Without this paragraph in the 1996 Policy Statement, Staff is completely devoid of any specific requirements relating to the timeframe in which a negotiated interconnection agreement must be filed with the Commission.

The Policy Statements cannot be the basis for Staff's Amended Complaint because the guidelines in the Policy Statements have not gone through the rulemaking notice and comment procedure necessary to rely on them for binding legal authority. The Policy Statements acknowledge this fact explicitly. For example, the 1996 Policy Statement states that it is "advisory." See, 1996 Policy Statement, at 1. The 2000 Policy Statement calls the 1996 Policy Statement a "guideline." See, 2000 Policy Statement at ¶ 2. The 1996 Policy Statement states:

> Given the time required to complete rulemaking, the constraints imposed by the Act, and the fact that the Commission may be presented with requests for mediation or arbitration at any time, it is not feasible or practical to adopt formal administrative rules at this time. RCW 34.05.230(1). It is the intention of the Commission, however, to undertake any necessary rulemaking as soon as practicable. RCW 34.05.230(2).

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[4] See, Amended Complaint, at ¶ 3, n.2 (referencing In the Matter of Implementation of Certain Provisions of the Telecommunications Act of 1996, Interpretive Policy Statement Regarding Negotiation, Mediation, Arbitration, and Approval of Agreements Under the Telecommunications Act, Docket No. UT-960269 (June 28, 1996) (the "1996 Policy Statement"); and Amended Complaint, at ¶ 5, n.5 (referencing 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) (the "2000 Policy Statement") (collectively the "Policy Statements").

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See, 1996 Policy Statement, at 1. This, however, was 1996. The Commission cannot assert that in the intervening seven years it has not had the time to adopt formal rules as required by RCW 34.05.230(1).

The 2000 Policy Statement is even more explicit about its non-binding effect than the 1996 Policy Statement is. The 2000 Policy Statement provides:

> This interpretive and policy statement is not an order of the Commission, nor is it binding on the Commission or parties who may come before it in formal proceedings. This statement is the current opinion held by the Commission regarding Section 252(i) of the Act. The Commission intends to use these principles in developing its opinions and decisions regarding interconnection agreements that come before it.
>
> This interpretive policy statement is not a rule.

See, 2000 Policy Statement, at ¶¶ 10-11 (emphasis added).

Under RCW 34.05.230(1), these Policy Statements do not have the force and effect of law. RCW 34.05.230(1) states, in part:

> An agency is encouraged to advise the public of its current opinions, approaches, and likely courses of action by means of interpretive or policy statements. Current interpretive and policy statements are advisory only. To better inform and involve the public, an agency is encouraged to convert long-standing interpretive and policy statements into rules.

(Emphasis added). Thus, contrary to statute, which specifically advises the Commission to convert its "long-standing interpretive and policy statements into rules," the Commission has chosen to keep the Policy Statements as advisory, non-binding policy statements. The Commission cannot be heard now to assert that SBC is legally bound by these Policy Statements, including any time limitations for filing agreements delineated in the Policy Statements.

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b. The Commission Does Not Have Authority to Penalize SBC for a Violation of 47 U.S.C. § 252:

Under the Act, a state commission's regulatory authority over interconnection agreements is very limited. Indeed, "[t]he question . . . is not whether the Federal Government has taken the regulation of local telecommunications competition away from the states. With regard to the matters addressed by the 1996 Act, it unquestionably has." AT&T Corp. v. Iowa Util. Board, 525 U.S. 366, 379 n.6 (1999). The question, then, is whether the Commission has the authority to issue some type of punishment against SBC for violation of the Act, a federal statute, under the Commission's very limited regulatory authority granted to it by the Act.

It is important to define this issue clearly. The question is not whether the Commission's authority to regulate the filing of interconnection agreements under 47 U.S.C. §§ 251, 252 and 253 has been preempted by the Act. Clearly, under these provisions, the Commission has the authority to regulate certain limited aspects of filing interconnection agreements if there are binding, specific state laws or regulations in place for that regulation. The lack of these binding, specific laws or regulations is discussed above.

The issue here is whether the Commission has the authority, as claimed by the first and second causes of action in the Amended Complaint, to impose some sanction or penalty for non-compliance with a state commission's interpretation of 47 U.S.C. §§ 252(a) and (e). There is no such specific grant of authority to state commissions. Because the Commission does not have the authority to impose sanctions on SBC under 47 U.S.C. §§ 252(a) and (e), the Staff's first and second causes of action involving violations of these federal provisions must fail. Thus, SBC has presented evidence demonstrating that the Staff's first and second causes of action are legally deficient. As a result, SBC is entitled to summary disposition on the first and second causes of

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action unless the Staff can demonstrate by some affirmative evidence that it does, in fact, have the specific legal authority to impose sanctions under 47 U.S.C. §§ 252(a) and (e).

5. Any Obligation to File the Settlement Letter with the Commission was Qwest's Obligation:

Even if the Settlement Letter needed to be filed with the Commission, and the Staff can overcome the procedural deficiencies confronting it, Qwest bore any obligation to file the Settlement Letter. In its Amended Complaint, the Staff implicitly acknowledged that Qwest, and not SBC, had the obligation to timely file any "interconnection" type agreement. At the top of Exhibit A (containing reference to the only agreement applicable to SBC), the Amended Complaint states: "Interconnection Agreements Qwest Failed to File or Failed to File in a Timely Manner." Amended Complaint, Exhibit A (emphasis added).

Because Sections 251 and 252 do not explicitly delineate whether it is the ILEC or the CLEC that is obligated to file applicable agreements with the state commissions, the course of dealing between ILECs and CLECs is helpful in determining this issue. When an agreement is entered between an ILEC and a CLEC, it is the ILEC that almost always files the agreement with the state commission – if filing is necessary. Such precedent is relevant to the Commission's determination of whether SBC should be punished for failure to file the Settlement Letter.

RCW 62A.1-205(1), dealing with the Uniform Commercial Code ("UCC"), defines the prevailing law on course of dealing as:

> a sequence of previous conduct between the parties to a particular transaction which is fairly to be regarded as establishing a common basis of understanding for interpreting their expressions and other conduct.

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This definition has been applied to situations outside the UCC as well. See, e.g., Liebergesell v. Evans, 93 Wn.2d 881, 892, 613 P.2d 1170 (1980) (applying the course of dealing definition in RCW 62A.1-205(1) to a non-UCC agreement).

The Commission's own actions also lend themselves by analogy to evaluation under the concept of course of dealing. Neither the Commission nor the Staff has ever previously instigated action against CLECs for failure to file an ILEC / CLEC agreement. To do so now is suspect. It is unclear what would motivate the Staff to seek sanctions against the CLECs for an obligation that has traditionally been the obligation of ILECs like Qwest. Regardless of the motivation, it is inappropriate to attempt to impose sanctions on SBC for an obligation that, through course of dealing, has been conclusively established as Qwest's sole obligation, if such an obligation actually existed with respect to the Settlement Letter in the first place.

Further, other state commissions, when faced with situations far more drastic than the situation involving the Settlement Letter between Qwest and SBC, have sought to require filing at the hands of Qwest, the ILEC. For example, in Minnesota the state PUC investigated certain agreements that should have been filed by Qwest, which were deliberately withheld from filing in an effort to keep those agreements "secret."[5] See, In the Matter of the Complaint of the Minnesota Department of Commerce Against Qwest Corporation Regarding Unfiled Agreements, Docket No. P-421/C-02-197, Order After Reconsideration on Own Motion (April 30, 2003) (the "Minnesota

[5] These facts are disputed by Qwest.

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PUC Qwest Order").[6] The Minnesota PUC ultimately found that Qwest's actions were egregious enough to warrant a sanction in the amount of $25,955,000.00.[7] See, Minnesota PUC Qwest Order, at 2.

However, even in that instance, the Minnesota PUC only took action against Qwest and not the CLECs who were parties to various of the alleged "secret" agreements. Indeed, the Minnesota PUC specifically stated:

> The Commission clarifies that no part of the Commission's February 28, 2003 Order or the current Order should be viewed as a penalty against either company [Eschelon and McLeod] for their involvement in the unfiled agreements. This is a complaint proceeding brought by the Department against Qwest pursuant to Minn. Stat. § 237.462.

Minnesota PUC Qwest Order, at 11 (emphasis added). This fact is especially telling since there was little question that Qwest should have filed the agreements with the Minnesota PUC and no question that CLECs like Eschelon and McLeod were given ongoing interconnection benefits under the agreements that other CLECs did not enjoy. Despite these facts, the Minnesota PUC made it clear that only Qwest was responsible for failing to file the agreements.

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[6] In the Minnesota PUC Qwest Order, Qwest made arguments similar to those made above concerning the procedural defects of the Commission's ability to issue sanctions against SBC under the Amended Complaint. The Minnesota PUC rejected Qwest's arguments and issued sanctions against Qwest anyway. SBC does not mean to suggest by citing the Commission to the Minnesota PUC Qwest Order that SBC's procedural arguments above are not valid. To the contrary, the laws and rules the Minnesota PUC based its Order on were binding on Qwest, unlike the non-binding Policy Statements at issue here. Regardless, the point of citing the Commission to the Minnesota PUC Qwest Order is that even in egregious circumstances of failing to file an interconnection agreements (which no one could argue is the case with the Settlement Letter here), it was only Qwest and not the CLECs that was subjected to penalties.

[7] This amount was in addition to the restitution requirements. Naturally, with an award the size of the one in the Minnesota PUC Qwest Order, it is being appealed.

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CONCLUSION

The reasons why summary disposition is appropriately granted in SBC's favor are numerous.

1. The Settlement Letter does not involve any of the specific "interconnection" type provisions that subject an agreement to the filing requirements.

2. There is no binding rule or procedure granting the Commission the ability to manufacture sanctions.

3. The Commission does not have authority to impose sanctions against SBC under 47 U.S.C. §§ 252(a) and (e).

4. Any obligation to file the Settlement Letter that did exist was Qwest's obligation.

For all of these reasons, SBC is entitled to prevail on its Motion for Summary Disposition.

WHEREFORE, SBC prays for an Order from the Commission granting SBC's Motion for Summary Disposition and dismissing SBC from any further proceedings in this matter.

RESPECTFULLY SUBMITTED, this _____ day of _____, 2003.

_____

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing SBC Telecom, Inc.'s Motion for Summary Disposition has been sent to the following parties by U.S. mail, postage prepaid:

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DATED this ____ day of _____, 2003.

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Kathy McCrary

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