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 FAIRPOINT CARRIER SERVICES, INC.'S MOTION FOR SUMMARY DISPOSITION

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COMES NOW Respondent, FairPoint Carrier Services, Inc. f/k/a FairPoint Communications Solutions Corp. ("FairPoint"), 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, FairPoint submits to the Commission that there is no genuine issue as to any material fact and that FairPoint 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 [or hearing] 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 FairPoint has demonstrated below that there is no materially disputed fact, and that it is entitled to judgment as a matter of law, the burden shifts to the Commission Staff ("Staff") to affirmatively demonstrate with more than mere allegations that summary disposition is not appropriate.

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FACTS

On September 4, 2001, FairPoint and Qwest Corporation ("Qwest") entered into a settlement agreement to resolve past billing disputes (the "Settlement Agreement"). A copy of the Settlement Agreement is attached to this Motion for Summary Disposition as Exhibit 1.[1] There is no dispute that the Settlement Agreement was, in fact, a settlement agreement. It is entitled "Confidential Billing Settlement Agreement." Further, the Settlement Agreement states:

> 4. Various billing disputes have arisen between the Parties [FairPoint and Qwest] in the performance under the Interconnection Agreements regarding certain interconnection services, including collocation decommissioning and the provisioning of interconnection trunks and interoffice transport facilities (referred to hereinafter as the "Disputes").
>
> 5. In an attempt to finally resolve the Disputes and to avoid delay and costly litigation, and for valuable consideration, the Parties voluntarily enter into this Agreement to resolve fully the Disputes.

See, Exhibit 1, page 1.

There is no question that the Settlement Agreement was to resolve past billing disputes. There were no "ongoing" interconnection obligations associated with the Settlement Agreement. Instead, as paragraph 6 of the Settlement Agreement makes clear, a one-time payment was made by Qwest to FairPoint to resolve past billing disputes. In the language of the FCC Filing Requirements Order, discussed below, this was a "backward-looking" settlement.

The second half of paragraph 6 on page 2 of the Settlement Agreement was the only provision that called for any "ongoing" interconnection obligations as that term is used by the FCC Filing Requirements Order. However, that part of paragraph 6 that was "forward-looking" was

[1] The Amended Complaint states that the Settlement Agreement was filed by Qwest with the Commission on August 22, 2002, but was filed "late." The letter from Qwest to the Commission, dated August 21, 2002, which accompanied the Settlement Agreement is attached as Exhibit 2.

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specifically lined out of the Settlement Agreement by FairPoint and Qwest prior to its execution. The Declaration of Mr. John LaPenta states conclusively that FairPoint and Qwest never operated under the lined out provision of paragraph 6. See, Declaration of John LaPenta.

Paragraph 7 of the Settlement Agreement contains a boilerplate "escalation clause" that governs the parties' efforts to resolve any potential future disputes, should any have arisen, under the interconnection agreement entered into by FairPoint and Qwest. It states:

> Further, as part of this Agreement, and to foster improved communications between the Parties for the purpose of avoiding costly disputes in the future, the Parties agree to implement the dispute resolution escalation process attached hereto as Attachment A, applicable to any business issues that may arise under the Interconnection Agreements.

See, Exhibit 1, page 2.

This boilerplate language has not been used by the parties. See, Declaration of John LaPenta. Indeed, FairPoint sold the assets that the Settlement Agreement involved shortly after execution of the Settlement Agreement. See, Declaration of John LaPenta. Further, the boilerplate escalation clause does not mandate any specific "interconnection" action. It merely lays out a theoretical framework for the parties to avoid litigation costs in the future. However, it is apparently based exclusively on this one paragraph that the Staff has initiated these proceedings against FairPoint.

ARGUMENT

1. The Settlement Agreement is a "Backward-Looking" Agreement that Need Not Be Filed with the Commission:

The Staff has alleged that the Settlement Agreement 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. In its Amended Complaint, the Staff relies on In the Matter

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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 Agreement 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 Agreement 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, 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.

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.

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In its clarification of the types of settlement agreements that need not be filed with state commissions, the FCC specifically made reference to settlement agreements resolving "billing disputes." It 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). In this context, the FCC also quoted the Minnesota Department of Commerce's ("MDC") comments by stating with approval that the MDC "did not include in its complaint against Qwest filed with the Minnesota Public Utility Commission 'settlement agreements of what appear to be legitimate billing disputes.'" See FCC Filing Requirements Order, n.32, page 6 (emphasis added).

The FCC made no mention of a boilerplate escalation clause taking "legitimate billing disputes" out of the realm of "backward-looking" settlement agreements that need not be filed with the state commissions. In other words, just like inserting the words "settlement agreement" into a contract does not automatically relieve the ILEC from its obligation to file an agreement with the state commission, inserting a boilerplate "escalation clause" does not automatically impose a filing obligation. The FCC makes it clear that it is the overall nature and purpose of the settlement agreement that governs whether it should be filed with a state commission, not any one individual phrase or clause.

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2. There Are No Specific Interconnection Provisions Obligated by the Settlement Agreement, Including the Boilerplate Escalation Clause:

In the context of the FCC Filing Requirements Order, it is valuable to review the types of clauses and agreements that the Order labels as "interconnection" agreements requiring filing:

> 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). (Italics emphasis in original; underlined emphasis added).

See, FCC Filing Requirements Order, at ¶ 8.

In this case, the boilerplate escalation clause does not specifically involve any of the provisions of an interconnection agreement such as number portability, unbundled network elements, collocation, etc. Instead, it simply lays out a procedure whereby the parties could avoid costly litigation.

3. There is No Filing Requirement If the Terms of the Settlement Agreement Are Already Available to Other Similarly Situated CLECs Through Other Agreements or Qwest's Web Site:

In addition to the fact that (1) the Settlement Agreement is backward-looking, (2) the escalation clause was never used and (3) the Settlement Agreement, including the escalation clause, did not pertain to specific "interconnection" issues, there are other reasons why the Settlement Agreement did not need to be filed with the Commission. One of these reasons is that the escalation provisions outlined in the Settlement Agreement are already available to all similarly situated CLECs as part of Qwest's Statement of Generally Acceptable Terms and Conditions ("SGAT") for the state of Washington. Qwest's SGAT along with all accompanying exhibits is available on Qwest's web site at http://www.qwest.com/wholesale/downloads/2002/020708/WA-SGAT-

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0062502.doc. Under the FCC Filing Requirements Order, this removes the Settlement Agreement from the filing obligations. This is especially true where, as is the case here, only a very small portion of the agreement (if any at all) could even be argued to be "ongoing."

In clarifying the manner in which terms should be made available to similarly situated CLECs, the FCC stated that if the information contained in the agreements in question "is generally available to carriers (*e.g.*, made available on an incumbent LEC's wholesale web site)," then the filing requirements are satisfied. See, FCC Filing Requirements Order, at ¶ 9 on page 5 (emphasis added). In this case, Qwest's SGAT and related exhibits handle escalation procedures by providing provisions to all similarly situated CLECs that are more advantageous to CLECs than the boilerplate escalation clause in the Settlement Agreement. See, Qwest's SGAT, at ¶¶ 12.2.6 through 12.3.12 and Exhibit G to SGAT, at ¶ 14.

Given the detailed nature of these provisions that Qwest makes available to all CLECs, not just FairPoint, it cannot be argued that the boilerplate escalation clause in the Settlement Agreement resulted in any obligation to file the Settlement Agreement with the Commission. It certainly did not result in any harm to any other CLEC not a party to the Settlement Agreement because all similarly situated CLECs could take advantage of equal or more favorable terms as those available to FairPoint in the boilerplate escalation clause.

This fact is conclusively demonstrated by the interconnection agreement that FairPoint and Qwest have entered into, which was timely filed with and approved by the Commission. See, UT-990343. This interconnection agreement contains an escalation provision that the Commission approved. See, Section 26, page 23. This escalation clause likely provides greater protection and quicker resolution of potential disputes than the boilerplate escalation clause in the Settlement Agreement would have provided (had it ever actually been used). For example, in the interconnection agreement's escalation clause, the parties exchanged contact information, including

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vice-president level contact information. In the Settlement Agreement's boilerplate escalation clause, the parties would have had to first go through two separate ten-day waiting periods at the director and then senior/executive director levels of management before getting to the vice-president stage of involvement. At the very least, the boilerplate escalation clause in the Settlement Agreement cannot be said to be any more advantageous than that found in the parties' interconnection agreement, which was timely filed and approved.

Given the fact that the boilerplate escalation clause in the Settlement Agreement would have been of equal or lesser value to FairPoint (or any other CLEC for that matter) as the escalation clause in FairPoint's interconnection agreement with Qwest, it is important to note that FairPoint merely opted in to the interconnection agreement with Qwest by adopting, in its entirety, the previously arbitrated and approved AT&T of the Pacific Northwest, Inc. ("AT&T") interconnection agreement with Qwest (then U S West). Thus, FairPoint demonstrated the very point made above – namely, that any similarly situated CLEC could have adopted provisions at least as advantageous to the CLEC as those of the boilerplate escalation clause in the Settlement Agreement. This is yet another reason why the Settlement Agreement is not the type of agreement the FCC contemplated when establishing its specific filing requirements as outlined in the FCC Filing Requirements Order.

4. 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 boilerplate escalation clause in the Settlement Agreement, result in a filing obligation under Section 252(a)(1), it will place a significant damper on the ability of companies to settle disputes and will be a trap for the unwary. This is especially true when the disputes being settled are completely "backward-looking" matters involving a straight "payment-for-wrong" type situation like the one remedied by the Settlement

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Agreement in this matter. The Staff's interpretation 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 state law 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 FairPoint, however, if successful, will do exactly that – it will discourage companies from negotiating with each other to resolve disputes.

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

Assuming that the Settlement Agreement 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 FairPoint. 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 Agreement 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 Agreement 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 Agreement 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 rules stating a timeframe or deadline during which any agreement must be filed with the Commission. As a result, there can be no such thing as a "late" filed agreement. If there is no such thing under RCW 80.36.150 as a

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late agreement, there can be no penalty associated with "late" filing of an agreement. Thus, the Commission lacks authority to assess a penalty against FairPoint through the Amended Complaint.

Perhaps recognizing this fatal deficiency, the Staff relies in its Amended Complaint on two interpretive policy statements.[2] 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.

However, 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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[2] 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. It states:

> 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 policy statements. The Commission cannot be heard now, to assert that FairPoint is legally bound by these Policy Statements, including any time limit delineated therein for filing negotiated interconnection agreements – which the Settlement Agreement is not.

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

Under the Telecommunications Act of 1996 (the "Act"), a state commission's regulatory authority of 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 FairPoint under its 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. 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 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 FairPoint under 47 U.S.C. §§ 252(a) and (e), the Staff's first and second causes of action involving violations of these provisions must fail. Further, FairPoint has presented evidence demonstrating that the Staff's first and second causes of action are legally deficient. As a result, FairPoint is entitled to summary disposition on the first and second causes of action unless the Staff can demonstrate by some

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

6. Any Obligation to File the Settlement Agreement with the Commission was Qwest's Obligation:

Even if the Settlement Agreement 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 Agreement. In its Amended Complaint, the Staff implicitly acknowledged that Qwest, and not FairPoint, had the obligation to timely file any "interconnection" agreement under the FCC Filing Requirements Order. At the top of Exhibit A (containing reference to the only agreement applicable to FairPoint), the Amended Complaint states: "Interconnection Agreements Qwest Failed to File or Failed to File in a Timely Manner." Amended Complaint, Exhibit A (emphasis added).

Further, 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.

This is consistent with the prevailing law on course of dealing. RCW 62A.1-205(1), dealing with the Uniform Commercial Code ("UCC"), defines a 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 FairPoint 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 Agreement in the first place.

Further, other state commissions, when faced with situations far more drastic than the situation involving the Settlement Agreement between Qwest and FairPoint, 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." 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 PUC Qwest Order").[3] The Minnesota PUC ultimately found that Qwest's actions were

[3] 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 FairPoint under the Amended Complaint. The Minnesota PUC rejected Qwest's arguments and issued sanctions against Qwest anyway. FairPoint does not mean to suggest by citing the Commission to the Minnesota PUC Qwest Order that FairPoint'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 interconnection agreements (which no one could argue is the case with the Settlement Agreement here), it was Qwest and not the CLECs that was subjected to penalties.

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egregious enough to warrant a sanction in the amount of $25,955,000.00.[4] 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 also party 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. This fact is especially telling since there was no question that Qwest should have filed the agreements with the Minnesota PUC and no question that 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.

Finally, Qwest's own actions demonstrate that it was aware of and accepted that it, and not FairPoint or the other CLECs, had the obligation to file any interconnection type agreements with the Commission. In the letter Qwest wrote to the Commission accompanying the Settlement Agreement when it filed it on August 21, 2002, Qwest presented numerous explanations to the Commission for why it had not previously filed the Settlement Agreement. It stated that there was confusion; that it did not think that it needed to file the Settlement Agreement; that its filing was based on newly issued rulings from other state commissions, etc. The one argument that Qwest never made in its three-page letter accompanying the Settlement Agreement was that FairPoint, and

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[4] 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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not Qwest, was obligated to file it. Although it is implicit, Exhibit 2 adds considerable weight to the argument that Qwest understood that any filing obligation that existed for the Settlement Agreement was its obligation, and not that of FairPoint.

CONCLUSION

The reasons why summary disposition should be appropriately granted in FairPoint's favor are numerous.

1. The Settlement Agreement is a "backward-looking" agreement to resolve billing disputes.
2. The "ongoing" nature of the escalation clause, if any part of it can in fact be deemed "ongoing," is eliminated by the fact that the parties never acted on the escalation clause.
3. The escalation clause did not involve any of the specific "interconnection" type provisions that subject an agreement to the filing requirements.
4. The provisions of the escalation clause have been made available to other similarly situated CLECs through Qwest's SGAT available on Qwest's web site.
5. Any application under the escalation clause (although no application ever existed) would only have been a "form" type of contract due to the universal availability of the escalation provisions to other similarly situated CLECs.
6. Penalizing FairPoint for failure to file the Settlement Agreement would be expressly counter to both the Commission's policy and Washington state law concerning the desire to foster settlement among litigating parties.
7. There is no binding rule or procedure granting the Commission the ability to manufacture sanctions.

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

9. Any obligation, if there is any, to file the Settlement Agreement was Qwest's obligation.

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

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

RESPECTFULLY SUBMITTED, this 7th day of November, 2003.

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing FairPoint Carrier Services, Inc. f/k/a FairPoint Communications Solutions Corp.'s Motion for Summary Disposition has been sent to the following parties by U.S. mail, postage prepaid:

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