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 INTEGRA TELECOM OF WASHINGTON, INC.'S MOTION FOR SUMMARY DISPOSITION

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COMES NOW Respondent, Integra Telecom of Washington, Inc. ("Integra"), 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, Integra submits to the Commission that there is no genuine issue as to any material fact and that Integra 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 Integra 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 to affirmatively demonstrate with more than mere allegations that summary disposition is not appropriate.

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FACTS

On February 1, 2001, Integra and Qwest Corporation ("Qwest") entered into an "Agreement for CMDS Hosting and Message Distribution for CLECs (In-Region with Operator Services) and Addendum to CMDS Hosting and In-Region Message Distribution Agreement" (the "Agreement" or the "CMDS Agreement"). A copy of the CMDS Agreement is attached as Exhibit 1. The Agreement was filed with the Commission on July 22, 2003.[1]

The Agreement represents a standard form with terms that are posted on Qwest's web site and available to all competitive local exchange carriers ("CLECs") similarly situated to Integra. A form agreement containing all of the terms, definitions, conditions and pricing of the CMDS Agreement that Integra and Qwest entered into can be found on Qwest's web site at: http://www.qwest.com/wholesale/downloads/2003/030701/CMDSAmendment6-20-03.doc. A copy of the form agreement downloaded from Qwest's web site is attached as Exhibit 3.

In addition to being a form agreement, the facts are that the CMDS Agreement is not an "interconnection" agreement because under Qwest's Statement of Generally Available Terms and Conditions ("SGAT") and the existing interconnection agreement between Qwest and Integra, CMDS services are not "interconnection" services. Qwest's SGAT in Washington is located at http://www.qwest.com/wholesale/downloads/2002/020708/WA-SGAT-0062502.doc. The existing interconnection agreement between Qwest and Integra is on file with the Commission.

[1] Exhibit A attached to the Amended Complaint alleges inaccurately that the Agreement was not filed with the Commission. As demonstrated by Exhibit 2 attached to this Motion for Summary Disposition, the Agreement was filed by Qwest with the Commission. However, as demonstrated below, the Agreement did not have to be filed with the Commission under the applicable rules and orders pertaining to this matter.

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ARGUMENT

1. The CMDS Agreement is a "Form Contract" That Need Not Be Filed With the Commission:

In its Amended Complaint, the Commission Staff ("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 Agreements should have been filed with the Commission. See, Amended Complaint, at ¶ 4. However, by its own terms, the FCC Filing Requirements Order excludes the CMDS 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 need not be filed with the Commission. 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.

However, the FCC acknowledged (contrary to the assertions of several state commissions that filed comments in the FCC's proceedings) that not all agreements need to be filed with the state commissions. The FCC Filing Requirements Order specifically excludes certain types of agreements from those types of agreements that need to be filed with state commissions. In a

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clarification of its general statement quoted above concerning the types of agreements that need to be filed with state commissions, 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).

As demonstrated by Exhibit 3, the generic CMDS Agreement downloaded from Qwest's wholesale web site, the terms and conditions of the Agreements in this case are generally available to any CLEC that wishes to enter into a CMDS Agreement with Qwest. In short, there is nothing unique about the CMDS Agreement between Integra and Qwest. As such, and given the fact that these terms are posted without deviation from Qwest's web site, there is no requirement that Qwest or Integra file the Agreements with the Commission.

Additionally, the FCC specifically excluded "order and form contracts" from the types of agreements that need to be filed with the state commissions. In the FCC Filing Requirements Order, the FCC Stated:

> Qwest has also argued, in another proceeding, that order and contract forms used by competitive LECs to request service do not need to be filed for state commission approval because such forms only memorialize the order of the specific service, the terms and conditions of which are set forth in the interconnection agreement. We agree with Qwest that forms completed by carriers to obtain service pursuant to terms and conditions set forth in an interconnection agreement do not constitute either an amendment to that interconnection agreement or a new interconnection agreement that must be filed under section 252(a)(1).

See, FCC Filing Requirements Order, at ¶ 13, pages 6-7 (emphasis added). As alluded to in the "Facts" section above, the CMDS Agreement at issue in this matter is nothing more than form a contract ordering the CMDS services.

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The generic CMDS Agreement downloaded from Qwest's web site demonstrates that, like any other form agreement, all a company in Integra's position must do is fill in the appropriate blanks for its name and state of operation, etc. This is the epitome of a "form contract" and exactly the type of agreement that the FCC stated does not need to be filed with state commissions. In short, the CMDS Agreement, attached as Exhibit 1, and the virtually identical agreement downloaded from Qwest's web site and attached as Exhibit 3, are both form agreements used to order CMDS services from Qwest.

This fact is conclusively demonstrated by the attached Declaration of Patti Bowie, Integra's Director of Billing Analysis, who was involved in securing the CMDS Agreement, which was signed by Integra's then-CFO, Wayne Graham. Ms. Bowie states that Integra did not negotiate the CMDS Agreement with Qwest in the way that it would an interconnection agreement. Instead, Integra simply ordered CMDS service from Qwest by filling out a form contract like the one found on Qwest's web site. See, Exhibit 3. Because Integra simply ordered CMDS service from Qwest through use of the form CMDS Agreement, there was no requirement to file the Agreement with the Commission.

2. The CMDS Agreement is Not an "Interconnection" Agreement that Must Be Filed With the Commission Under the FCC Filing Requirements Order:

In addition to being a form agreement, the CMDS Agreement did not need to be filed with the Commission for other reasons as well. One of these reasons is that the CMDS Agreement is specifically excluded from both the terms of Qwest's SGAT, which the Commission has approved, and Qwest and Integra's interconnection agreement, which the Commission has also approved, from being an "interconnection" type agreement.

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In this context, it is valuable to look again at the types of agreements that the FCC said were "interconnection" agreements that should be filed with state commissions:

> 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).

FCC Filing Requirements Order, at ¶ 8, page 6 (emphasis added). CMDS service does not involve resale of telecommunications services; it does not involve number portability or dialing parity; it has nothing to do with access to rights-of-way; it does not involve reciprocal compensation, interconnection or unbundled network elements; and it does not involve collocation. As a result, CMDS service does not involve matters that need to be filed with the Commission under the FCC Filing Requirements Order.

The fact that CMDS services are not "interconnection" services is made explicitly clear by Qwest's SGAT. Qwest, as a Bell Operating Company under the Telecommunications Act of 1996 (the "Act"), is specifically authorized by the FCC and the Commission to file a SGAT under which CLECs can "pick and choose" "interconnection" type provisions. Under the terms of the SGAT, it states:

> 7.7.2 The exchange of Billing records for alternate billed calls (e.g., calling card, bill-to-third-number and collect) will be distributed through the existing CMDS processes, unless otherwise separately agreed to by the Parties.

Thus, Qwest's SGAT contemplates that CLECs like Integra will either operate under an "existing" agreement, i.e. a pre-interconnection agreement or by a "separate," form agreement, i.e., a non-interconnection agreement. Either as a pre-existing matter or a separate matter, the provisions involving CMDS, by definition under the SGAT in Washington, are not "interconnection" terms. This SGAT and its terms were approved by the Commission.

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Along these same lines, Integra and Qwest have entered into an interconnection agreement that was filed and approved by the Commission in accordance with the requirements of 47 U.S.C. § 252(e). Similar to the provisions of the SGAT quoted above, the interconnection agreement between Integra and Qwest specifically contemplates that Integra and Qwest will either operate under then-existing, pre-interconnection practices or enter into a separate, non-interconnection form agreement to handle CMDS services. To this end, the interconnection agreement states:

> 22.2 The exchange of billing records for alternate billed calls (e.g., calling card, bill-to-third number, and collect) will be distributed through the existing CMDS processes, unless otherwise separately agreed to by the Parties.

With respect to the option to enter into a separate, form agreement, as Integra and Qwest decided to do in this case, the interconnection agreement is explicit that such an agreement is not an "interconnection" agreement. Under the heading "Miscellaneous Ancillary Services," the interconnection agreement states:

> Miscellaneous ancillary services will be addressed in separate agreements between the Parties. These include, but are not limited to 800 and **CMDS**.

See, Interconnection Agreement, at Section 9.10 (emphasis added). Thus, by the very terms of the interconnection agreement, which was approved by the Commission, CMDS services are "separate" from the interconnection agreement. As a result, CMDS services are not "interconnection" services.

It is in this context that the CMDS Agreement refers to the interconnection agreement between Integra and Qwest. The CMDS Agreement states:

> This Agreement arises out of an Interconnection Agreement between the Parties [Integra and Qwest], in the state of Washington [that] was approved by the Washington Utilities and Transportation Commission.

See, CMDS Agreement, at Section 2, page 1. Thus, as demonstrated above in relation to Qwest's SGAT, the Agreement that is the subject of this matter involving Integra and Qwest is a form

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contract agreement designed to allow Qwest and Integra to memorialize the terms and conditions of CMDS services. CMDS services, however, are not interconnection services. There was no requirement that the CMDS Agreement be filed with the Commission.

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

Assuming that the CMDS 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 Integra. 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, *arguendo*, the CMDS 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).

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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 CMDS 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 CMDS 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, from a procedural standpoint, there can be no such thing as a "late" filed agreement. If there is no such 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 Integra 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.

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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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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).

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).

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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 Integra is legally bound by these Policy Statements, including any time limit delineated therein for filing agreements.

b. The Commission Does Not Have Authority to Penalize Integra 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 Integra 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

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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. Further, the Commission cannot manufacture the authority to impose sanctions under the Act. Instead, for a state regulatory agency to impose sanctions under a federal act that specifically limits the state regulatory agency's authority, there must be some specific grant of authority for the state agency to have the power to issue sanctions.

Because the Commission does not have the authority to impose sanctions on Integra 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, Integra has presented evidence demonstrating that the Staff's first and second causes of action are legally deficient. As a result, Integra is entitled to summary disposition on the first and second causes of 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).

4. Any Obligation to File the CMDS Agreement with the Commission was Qwest's Obligation:

Even if the CMDS 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 CMDS Agreement. In its Amended Complaint, the Staff implicitly acknowledged that Qwest, and not Integra, had the obligation to timely file any "interconnection" type agreement. At the top of Exhibit A (containing reference to the only agreement applicable to Integra), the Amended

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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 Integra should be punished for failure to file the CMDS Agreement.

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.

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 never 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 Integra for an obligation that, through the course of dealing, has been conclusively established as Qwest's sole obligation, if such an obligation actually existed with respect to the CMDS Agreement in the first place.

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Further, other state commissions, when faced with situations far more drastic than the situation involving the CMDS Agreement between Qwest and Integra, 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."[3] 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").[4] The Minnesota PUC ultimately found that Qwest's actions were egregious enough to warrant a sanction in the amount of $25,955,000.00.[5] 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. This fact is especially telling since there was little question

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[3] These facts are disputed by Qwest.

[4] 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 Integra under the Amended Complaint. The Minnesota PUC rejected Qwest's arguments and issued sanctions against Qwest anyway. Integra does not mean to suggest by citing the Commission to the Minnesota PUC Qwest Order that Integra'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 CMDS Agreement here), it was only Qwest and not the CLECs that was subjected to penalties.

[5] 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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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.

Finally, Qwest's own actions demonstrate that it was aware of and accepted that it, and not Integra or the other CLECs, had the obligation to file any interconnection type agreements with the Commission. In the letter Qwest wrote to the Commission to file the CMDS Agreement, Qwest stated that it was filing the CMDS Agreement "out of an abundance of caution." See, Exhibit 2 (letter from Qwest to the Commission accompanying the CMDS Agreement when Qwest filed it). Qwest did not argue that Integra, and 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 CMDS Agreement was its obligation, and not that of Integra.

CONCLUSION

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

1. The provisions of the CMDS Agreement have been made available to other similarly situated CLECs through Qwest's SGAT available on Qwest's web site.

2. The CMDS Agreement was a "form contract" to order services and thus not the type of agreement that the FCC Filing Requirements Order contemplates being filed with the state commissions.

3. The CMDS Agreement does not involve any of the specific "interconnection" type provisions that subject an agreement to the filing requirements.

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4. By the very terms of Qwest's SGAT and the parties' interconnection agreement, the CMDS Agreement is not an "interconnection" type agreement.

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

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

7. Any obligation to file the CMDS Agreement that did exist was Qwest's obligation.

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

WHEREFORE, Integra prays for an Order from the Commission granting Integra's Motion for Summary Disposition and dismissing Integra 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 Integra Telecom of Washington, Inc.'s Motion for Summary Disposition has been sent to the following parties by U.S. mail, postage prepaid:

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