BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION, Complainant, v. ADVANCED TELECOM GROUP, INC; ALLEGIANCE TELECOM, INC.; AT&T CORP; COVAD COMMUNICATIONS COMPANY; ELECTRIC LIGHTWAVE, INC.; ESCHELON TELECOM, INC. f/k/a ADVANCED TELECOMMUNICATIONS, INC.; FAIRPOINT COMMUNICATIONS SOLUTIONS, INC.; GLOBAL CROSSING LOCAL SERVICES, INC.; INTEGRA TELECOM, INC.; MCI WORLDCOM, INC.; McLEODUSA, INC.; SBC TELECOM, INC.; QWEST CORPORATION; XO COMMUNICATIONS, INC. f/k/a NEXTLINK COMMUNICATIONS, INC., Respondents	Docket No. UT-033011 MOTION TO DISMISS AND MOTION FOR SUMMARY DETERMINATION OF QWEST CORPORATION

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I. INTRODUCTION

Pursuant to WAC 480-09-426(1), Qwest Corporation ("Qwest") hereby files this motion to dismiss all agreements in Exhibit B to the Complaint, Counts One, Three, and Four of the Complaint in their entirety, and certain other agreements in Exhibit A to the Complaint because they fail to state a claim upon which relief can be granted.[1] Qwest also moves for summary determination pursuant to WAC 480-09-426(2) dismissing Counts Three through Seven as they apply to the agreements that Qwest has made available on its website beginning September, 2002. Because not a single Competitive Local Exchange Carrier ("CLEC") has elected to opt into *any* of the agreements on Qwest's website, no undue prejudice can be demonstrated.

II. SUMMARY OF ARGUMENT

First, the Complaint alleges violations of federal and state law based upon Qwest having entered into settlement agreements with CLECs. These agreements, which are listed in Exhibit B to the Complaint, should be dismissed from the Complaint. Under the binding decision of the FCC,[2] settlement agreements with solely retrospective consideration do not need to be filed under Section 252. The state law claims cannot be supported solely by conclusory factual allegations to the effect that settlement agreements were entered into between Qwest and another party.[3]

Second, the Complaint alleges violations of federal and state law for failure to file agreements to later enter into particular agreements but which do not themselves contain any binding obligations relating to the providing local telephone services.[4] The Staff has already conceded that such

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[1] Under WAC 480-09-426, a party may file a motion to dismiss a cause of action if it fails to state a claim upon which relief can be granted, as that defense is understood in the Civil Rules for Washington civil court 12(b)(6). Under CR 12(b)(6), a motion to dismiss for failure to state a claim should be granted if there is no set of facts upon which a complaint states a valid legal claim. *See Washington Public Trust Advoc. v. City of Spokane*, 117 Wash. App. 178, 181 (Wash. Ct. App. 2002).

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

[3] Four Exhibit A agreements (Nos. 22, 23, 46 and 50) appear at first glance to contain going forward obligations in addition to settling disputes for solely backward-looking consideration. However, upon closer examination the agreements do not create any binding, going-forward obligations related to Section 251(b) or (c) services in Washington. These three agreements should also be dismissed from the complaint.

[4] These agreements are: Ex. A, Nos. 17, 20, 22, 23, 24, 41, and 51.

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"agreements to agree" are not subject to state or federal filing requirements. *Washington Utilities and Transportation Commission v. Advanced Telecom Group, Inc., et. al*, Docket No. UT-033011, Motion to Dismiss Allegiance Telecom, Inc. and to Amend Exhibit B of Complaint to Include the Allegiance Agreement (Sept. 4, 2003). Further, agreements that reflect a commitment to later reach an agreement cannot cause discrimination or undue disadvantage to nonparty CLECs. Thus, these agreements to agree should be dismissed from the Complaint.

Third, Exhibit A of the Complaint includes certain agreements that do not relate to Section 251(b) or (c) services, or to intrastate telephone services. Because the FCC has stated that only agreements that involve going forward obligations relating to Section 251(b) or (c) services must be filed under Section 252, and because interstate telecommunications are in the exclusive jurisdiction of the FCC, these agreements must be dismissed from the Complaint.[5] The Complaint also alleges violations of federal and state law for failure to file agreements that do not relate to local telephone services provided in the State of Washington.[6] Such agreements are outside the regulatory jurisdiction of the Commission. As a result, the motion to dismiss should be granted as to these agreements.

Fourth, Count One of the Complaint alleges violations of the filing requirement under 47 U.S.C. § 252(a)(1). However, that statutory section does not contain an independent filing requirement. Instead, Section 252(a)(1) incorporates by reference the filing requirement of Section 252(e), the subject of the second cause of action. Because Section 252(a)(1) does not create an independent filing requirement or an independent cause of action and is simply duplicative of Count Two, Count One of the Complaint should be dismissed. Similarly, Count Three of the Complaint alleges a violation of Section 252(i). However, this provision does not impose any duty on an ILEC or CLEC beyond that created in Section 252(e). Rather, the same conduct that would violate Section 252(e) – failure to file an agreement – would violate Section 252(i). Thus, Count Three is also impermissibly duplicative of

[5] The agreements that do not contain provisions relating to 251(b) or (c) services or intrastate services are: Ex. A, Nos. 15, 31, and 37.

[6] The agreements that do not apply to Washington services are: Ex. A, Nos. 11, 38, 39, 43, 49; ¶ 2 of 50, and Ex. B, No. 21. Ex. A, No. 50, ¶ 1 settles an historical dispute relating to Washington services for solely backward-looking consideration. For this reason, Ex. A, No. 50 is discussed in both Section I and Section III, *infra*.

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Count Two. Finally, Count Four of the Complaint alleges violations of RCW 80.36.150. Because this statutory section does not require proof of any facts in addition to those necessary to establish violations of Counts Five, Six, and Seven (violations of 80.36.170 and 80.36.180, and 80.36.186 respectively), it is duplicative and should be dismissed.

These portions of the Complaint do not state a valid claim for relief under any set of facts. Thus, under WAC 480-09-426(1) the Commission should dismiss the following counts and agreements for failure to state a claim upon which relief can be granted: the Exhibit B agreements; Counts One, Three, and Four, in their entirety; and Agreements 11, 15, 17, 20, 22, 23, 24, 31, 37, 38, 39, 41, 43, 46, 49, and 50 of Complaint Exhibit A.

Also at issue in the Complaint are four standard facilities decommissioning agreements – Exhibit A, Nos. 14, 16, 25, and 35. The terms and conditions of each of these agreements were subsequently filed as interconnection amendments with the Commission and approved by the Commission. Each of these agreements should be dismissed from the Complaint.

Finally, fifteen agreements targeted by the Complaint have been available on Qwest's website for adoption by interested CLECs for fourteen months. In that time, no CLEC has expressed any interest in the agreements. In light of this uncontested fact, Staff cannot establish that there is any similarly situated CLEC that has suffered discrimination or undue disadvantage or prejudice as a result of the agreements, and Counts Three through Seven should be dismissed as to Agreements Nos. 8, 9, 10, 12, 14, 16, 25, 30, 34, 35, 40, 42, and 47 of Exhibit A; and Agreements Nos. 6 and 13 of Exhibit B.

III. ARGUMENT

A. The Commission Should Dismiss All Exhibit B Agreements Because The Complaint Fails To Make Any Factual Allegations Beyond The Fact That Qwest Settled Disputes With CLECS

The Complaint describes the Exhibit B agreements as agreements to "resolve disputes, which were largely billing related disputes," wherein CLECs generally "agreed to forego [sic] their litigation positions in various proceedings, agreed not to oppose Qwest positions in various proceedings, or agreed to dismiss complaints they had brought against Qwest." *See* Complaint, at ¶ 9 and ¶ 17. These

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factual allegations establish nothing more than that Qwest and various CLECs had entered into settlement agreements to resolve potential litigation without burdening judicial or administrative resources. Such allegations are insufficient to support a cause of action on either federal or state law.

1. The FCC has ruled that settlement agreements with backward-looking consideration need not be filed under Section 252 of the 1996 Act.

The First, Second and Third causes of action allege violations of the 47 U.S.C. §§ 252(a), 252(e), and 252(i). As to all of the Exhibit B agreements, those causes of action are precluded by the FCC's ruling that settlement agreements with solely retrospective consideration need not be filed. The FCC ruling also applies to Exhibit A agreements that settle historical disputes for backward-looking consideration and do not otherwise create any binding going-forward obligations related to Section 251(b) or (c) services: Ex. A, Nos. 22, 23, and 50.

As the Complaint acknowledges, the FCC has promulgated a filing standard under Section 252 that provides that an agreement creating "an ongoing obligation pertaining to resale, number portability, dialing parity, access to rights-of-way, reciprocal compensation, interconnection, unbundled network elements, or collocation is an interconnection agreement that must be filed pursuant to section 252(a)(1)."[7] Complaint at 2, ¶ 4.

However, the Complaint fails to acknowledge that the FCC explicitly exempted settlement agreements with solely backward-looking consideration that do not create any ongoing obligations relating to Sections 251(b) or (c) services.[8] *FCC Order* at ¶ 13. The Complaint's inclusion of these settlement agreements contemplates a filing standard under 47 U.S.C. § 252 that is at odds with the FCC Order, that is contrary to Washington law and policy favoring settlements of disputes, that would be unduly burdensome to the Commission and to ILECs and CLECs, and that undermines the purpose

[7] The FCC stated its ruling in terms of Section 252(a)(1) because that is the manner in which Qwest phrased its request for ruling. After an additional year of considering this issue, Qwest is now convinced that the better reading of the statute is that the filing requirement is actually a product of Section 252(e) incorporated by reference into Section 252(a)(1) as explained *supra*. Regardless of which section contains the filing requirement, or even if both are thought to contain the filing requirement, it is clear that stating two separate claims based on the two statutory sections is impermissible for the reasons explained in Section III.E., *infra*.

[8] Section 251(b) or (c) services include those enumerated in the quote from the FCC Order.

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of the Telecommunications Act.

As the agency charged with implementing and enforcing the 1996 Act,[9] the FCC has primary responsibility for interpreting the 1996 Act, and its interpretation of the Section 252 filing requirement is binding. *See AT&T Corp. v. Iowa Util. Bd.*, 525 U.S. 366, 378 (1999). Holding that the FCC had jurisdiction to "promulgate rules regarding state review of pre-existing interconnection agreements," the Supreme Court stated that "[w]hile it is true that the 1996 Act entrusts state commissions with the job of approving interconnection agreements . . . these assignments, like the rate-establishing assignment just discussed, do not logically preclude the Commission's issuance of rules to guide the state-commission judgments." *Id*. at 385.

The FCC drafted its Order in a manner that left state commissions the authority to apply "in the first instance, the statutory interpretation [the FCC] set forth . . . to the terms and conditions of specific agreements." FCC Order at ¶ 7. The FCC thought this approach was "consistent with the structure of section 252, which vests in the states the authority to conduct fact-intensive determinations related to interconnection agreements." *Id.* To this end, the FCC defined the general scope of the filing requirement and left the specifics of applying the definition to individual agreements to state commissions.[10] However, the FCC left no room for interpretation with respect to settlement agreements that contain solely retrospective consideration and without going-forward terms of interconnection. *Id.* at ¶ 11. While stating settlement agreements were not automatically exempt from filing because they settled a dispute between an ILEC and a CLEC, the FCC held "those settlement

[9] 47 U.S.C. § 151 (creating Federal Communications Commission and charging it with task of executing and enforcing the provisions of the Telecommunications Act); 47 U.S.C. § 201(b); *AT&T Corp. v. Iowa Util. Bd*., 525 U.S. 366, 378 (1999) ("We think that the grant in § 201(b) means what it says: The FCC has rulemaking authority to carry out the "provisions of this Act," which include §§ 251 and 252, added by the Telecommunications Act of 1996."). The state commissions argued to the Court that the 1996 Act gave state commissions, and not the FCC, primary responsibility for implementing the local-competition provisions of the 1996 Act. The Court disagreed and held that the FCC had general authority to promulgate such rules. The Court also rejected several specific challenges to the FCC's jurisdiction to make rules regarding pricing, and the requirements of Sections 251 and 252. *Id*. at 384-85.

[10] For example, the FCC defined the general scope of the filing requirement, noting 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)." *Id.* ¶ 8. The FCC also noted that either the information concerning dispute resolution and escalation provisions must be made generally available (such as through the company website), or the escalation and dispute resolution provisions relating to section 252(b) and (c) obligations "are appropriately deemed interconnection agreements." *Id.* ¶ 9.

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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." *Id.* ¶ 12. The FCC's decision is binding upon state commissions and prevents them from interpreting the Section 252 filing standard to include settlement agreements with solely retrospective consideration.[11]

Thus, the First, Second and Third causes of action should be dismissed as to settlement agreements that do not create any going-forward obligations related to Section 251(b) or (c) services. This includes all of the Exhibit B agreements, and Exhibit A agreements Nos. 22, 23, 46, and 50. As explained in Section B *infra*, for agreements 22 and 23, and Section D *infra*, for agreement 50, the portions of those three agreements that go beyond settling historical disputes in exchange for backward-looking consideration do not create any binding obligations relating to Section 251(b) or (c) services. Thus, they properly should be listed with the Exhibit B agreements and should be dismissed for the same reasons.

2. Conclusory allegations that Qwest entered settlement agreements are insufficient to state a cause of action under state law, and conflict with Washington law and policy encouraging settlements.

Not only is entering into settlement agreements standard business practice in the telecommunications industry – as well as all other industries – it is encouraged by the stated public policy of Washington. Thus, a conclusory factual allegation that Qwest entered into settlement agreements is insufficient to state a claim upon which relief can be granted, and the Fourth through Seventh causes of action regarding the Exhibit B agreements should also be dismissed. *Cf. Talarico v. Foremost Ins. Co.*, 712 P.2d 294 (Wash. 1986) (en banc) (holding that alleging facts that only support

[11] Under the Supremacy Clause in the United States Constitution, the laws of the United States "shall be the supreme Law of the Land; . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const. art. VI, cl.2. "It is of the very essence of supremacy to remove all obstacles to its action within its own sphere, and so to modify every power vested in subordinate governments." *McCulloch v. Maryland*, 7 U.S. (4 Wheat.) 316, 427 (1819); *Int'l Bhd. Of Elec. Workers v. Trig Elec. Constr. Co.*, 142 Wash.2 d 431, 435 (Wash. 2000) (holding that Washington's public works lien statutes were preempted by federal law). This rule applies with equal force to rules and regulations promulgated by the FCC. *See Fidelity Fed. Sav. and Loan Ass'n. v. Cuesta*, 458 U.S. 141, 153 (1982) ("Federal regulations have no less pre-emptive effect than federal statutes."). *See also Blum v. Bacon*, 457 U.S. 132 (1982) (invalidating state law that conflicted with rules and regulations promulgated by federal agency). Section 251(d)(3) of the 1996 Act preserves the ability of state commissions to regulate interconnection and local telephone services, but only to the extent that they are "consistent with the requirements of this Section" and do "not substantially prevent implementation of the requirements of this section and the purposes of this part." 47 U.S.C. § 251(d)(3). This provision explicitly precludes state action that conflicts with federal law.

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conclusion of negligent misconduct fails to state claim for willful or wanton misconduct); *Hiner v. Bridgestone/Firestone, Inc.*, 959 P.2d 1158, 1163 (Wash. Ct. App. 1998) (holding that claim for failure to warn of product defect, which required facts that seller actually knew of danger, should be dismissed because plaintiff had not alleged facts establishing actual knowledge), *rev'd on other grounds*, 978 P.2d 505 (Wash. 1999).

The factual allegations regarding the settlement agreements in paragraphs 9 and 17 of the complaint simply allege that Qwest entered agreements to resolve largely billing related disputes and that the respective CLECs agreed to forgo certain claims and certain litigation or regulatory positions. These allegations describe *every* settlement agreement reached between telecommunications carriers, and perhaps every other type of settlement as well. The individual causes of action simply repeat the fact that Qwest entered into settlement agreements, *without further factual allegations,* and then offer legal conclusions that the mere *existence* of these settlement agreements violates the respective statutes. Counts Four and Six restate that Qwest entered settlement agreements and conclude that the existence of the settlement agreements violated RCW 80.36.150 and 80.36.180 because the settlement was not offered to similarly situated companies. These counts do not state any facts showing violation of these statutes and do not cite any statute or rule in support of the claim that such settlements are prohibited or that Qwest or any other telecommunications company has the duty to offer the settlement to any other entity. In addition, Count Five contains the conclusion that the existence of the settlement agreements violates RCW 80.36.170 by giving the CLECs that entered the agreement "unreasonable preference or advantage," without stating any facts to show such preference or advantage and without stating that entry into a settlement agreement tailored to the specific dispute between Qwest and the CLEC violates any rule or law. Finally, Count Seven concludes that the settlements imposed undue prejudice against nonparty companies that were not offered such agreements or who were unwilling or unable to enter such agreements without any facts showing undue prejudice and without any legal support that such conduct can base a claim under Washington law.[12]

[12] Count Seven also states an incorrect rule of law. There exists no authority of which Qwest is aware that would support a legal rule that precludes settlement with one party unless all other similarly situated parties are willing and

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Claims of discrimination or prejudice based upon the mere existence of settlement agreements have no basis in law and are contrary to Washington's stated policy encouraging settlement. "The express public policy of the state is to encourage settlement. The law 'strongly favors' settlement." *See State v. Noah*, 9 P.3d 858, 871 (Wash. Ct. App. 2000) (citations omitted). *See also Seafirst Ctr. Ltd. v. Erickson*, 127 Wash. 2d 355, 364 (1995) (noting that the law strongly encourages settlement). In fact, Washington courts have rejected particular interpretations of the law that would have any effect of discouraging settlement of disputes. *See City of Seattle v. Blume*, 134 Wash. 2d 243, 258 (1997) (rejecting an interpretation of the "independent business judgment rule" that would discourage settlements because it would be "contrary to the express public policy of this state which strongly encourages settlement.").

Even in a context where the Commission must be notified of settlements – where the settlement resolves disputes that are the subject of a formal complaint before the Commission – their validity has not been conditioned upon whether the settlement in question provides any undue preference or discrimination to non-parties. In *New Edge Network, Inc. v. US WEST Communications, Inc.*, the Commission granted a motion to dismiss the proceeding because the settlement agreement "adequately addressed and resolved" the issues pending in the complaint. Fourth Supplemental Order Granting Joint Motion for Dismissal of Complaint, Docket No. UT-000141 at 3, ¶ 13 (Aug. 15, 2000). Notable are the actions the Commission did not take in determining whether to grant dismissal pursuant to the settlement agreement: the Commission did not approve or adopt the settlement; it did not investigate whether there were other similarly situated CLECs and/or whether the terms of the settlement would be acceptable to those CLECs; and it did not give notice of the settlement to the industry at large and/or accept comments from other CLECs on the settlement. *See also Tel West Communications, LLC v. Qwest Corp.*, Ninth Supplemental Order: Dismissing Claims With Prejudice, Docket UT-013097 (December 17, 2002) (dismissing complaint under similar circumstances without approving settlement,

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able to accept the settlement terms. Such a rule would hold all settlement negotiations hostage to the whims of non-parties. As such, Count Seven is hostile to private settlement, contrary to Washington law and policy (*see infra*) and should be dismissed in its entirety for all agreements regardless of the Commission's conclusions regarding the other agreements or counts.

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investigating existence of similarly situated CLECs, and noticing industry of settlement).[13]

The Commission's approach in considering settlement agreements in the above cases is consistent with the decisions of the FCC that have recognized that the individualized nature of dispute settlement precludes concluding that settlements *per se* have discriminatory effect. For example, even in much more highly regulated areas where services are provided according to filed tariffs and no private negotiations of terms or rates is allowed, the FCC historically has recognized that settlement of individual disputes does not constitute discrimination under that tariffed service. *See Allnet Communications Servs., Inc. v. Illinois Bell Tel. Co.*, 8 FCC Rc'd 3030, 3037, ¶¶ 32-33 & n.78 (1993) (rejecting the contention that an award of damages to a customer, or a carrier's payment to a customer in settlement of a dispute, constitutes a violation of the non-discrimination duty under a tariffed service).

Not only are the Fourth through Seventh Causes of Action contrary to state law regarding the Exhibit B agreements, they also conflict with the 1996 Act. Section 251(d)(3) of the 1996 Act preserves the ability of state commissions to regulate interconnection and local telephone services but only to the extent that they are "consistent with the requirements of this Section" and do "not substantially prevent implementation of the requirements of this section and the purposes of this part." 47 U.S.C. § 251(d)(3). This provision explicitly precludes state action that conflicts with federal law. Allowing a cause of action under any of the state statutes to be based upon allegations that Qwest entered into settlement agreements, without further factual allegations, would undermine the deregulatory policy of the 1996 Act, the primary legislation governing the provision of interconnection services. *See*

[13] In *Tel West*, the Commission was considering a proposed settlement of a complaint that had been brought before the Commission under WAC 480-09-530. The parties had reached an agreement to resolve the remaining claims in the complaint, which "present[ed] the Commission with an issue of first impression, in particular, how the Commission should respond to a proposed settlement of all remaining claims that has been negotiated and stipulated to by the parties." *Id.* 4 ¶ 12. Deciding it did not need to approve the entire settlement agreement, the Commission relied on the 1996 Act's emphasis on principles of competition instead of principles of regulation to "conclude that we need not approve and adopt this settlement agreement in the same manner as we might in a fully regulated setting." *Id.* at 4,¶ 15. The Commission continued, noting "It is essential in *this kind of situation*, however, that parties provide access to their entire agreement so that we may review it for elements that might be unlawful or improper." *Id.* (emphasis added). The present case is not the "kind of situation" at issue in *Tel West* because the settlement agreements at issue here did not settle formal comp laints pending before the Commission. Thus the extra Commission review for unlawful or improper elements is not called for. As explained above, if a party wishes to subject settlement agreements with solely retrospective consideration to further scrutiny by bringing a complaint based upon those agreements, that party must allege more than the mere existence of the settlement agreements.

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AT&T Corp. v. Iowa Util. Bd., 525 U.S. 366, 379 n.6 (1999) ("The 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.").

One of the primary purposes of the 1996 Act was to establish competition in local telephone markets under a framework that was both pro-competitive and deregulatory. *See* Telecommunications Act of 1996, Joint Managers Statement, S. Conf. Rep. No. 104-230, 104th Cong. 2d. Sess. 1 (1996). Allowing complaints under state law against settlement agreements with solely retrospective consideration without further factual allegations of how the agreements caused undue preference or prejudice would extend the reach of regulatory control under the Act in a manner inconsistent with the deregulatory purposes of the Act. *See Tel West Communications, LLC v. Qwest Corp.*, Ninth Supplemental Order: Dismissing Claims With Prejudice, Docket UT-013097, at 4, ¶ 15 (December 17, 2002) ("Under the Telecommunications Act of 1996, interconnection agreements relate to the provision of regulated service but are part of a process that is designed to rely more on principles of competition and less on principles of regulation.").

A complaint that attempts to state a cause of action based upon an ILEC and CLEC entering into a settlement agreement with solely retrospective consideration must allege more than the mere existence of the agreement to state a claim upon which relief can be granted. In recognition of this fact, for the above stated reasons, the Commission should dismiss the Complaint as to the agreements listed in the attached Exhibit B.

B. The Commission Should Dismiss Agreements That Reflect A Commitment To Later Enter Agreements But That Do Not Themselves Create Any Obligations Related To Section 251(b) Or (c) Services

1. An agreement to later enter into and file an interconnection agreement is not itself an agreement that needs to be filed.

On September 4, 2003, the Staff filed a motion to dismiss the allegations against Allegiance Telecom, Inc. ("Allegiance") because the Allegiance agreement was not an interconnection agreement and to move the Allegiance agreement from Exhibit A of the Complaint to Exhibit B. *Washington Utilities and Transportation Commission v. Advanced Telecom Group, Inc., et. al*, Docket No.

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UT-033011, Motion to Dismiss Allegiance Telecom, Inc. and to Amend Exhibit B of Complaint to Include the Allegiance Agreement (Sept. 4, 2003). The Allegiance agreement (Ex. A to the Complaint, No. 13) settled a dispute between Qwest and Allegiance and included a one time payment of retrospective consideration to settle the dispute, as well as an agreement to file an interconnection amendment to address the disputed issue. The amendment was subsequently filed. In recognition of the fact that the agreement did not create any new going forward obligations, but was rather an agreement to agree, Staff apparently concluded (correctly) that this agreement was not an interconnection agreement.

The Exhibit A, No. 22 agreement between Qwest and Eschelon Telecom, Inc. ("Eschelon") is analogous to the Allegiance agreement that the Staff concluded was not an interconnection agreement. The Eschelon Agreement settles a billing dispute between the parties for a one-time payment of retrospective consideration and notes that Qwest will provide network elements as "part of a new platform." That new platform, and all terms and conditions upon which network elements would be provided under it, was contained in a filed interconnection amendment approved by the Commission on January 24, 2001. Thus, claims regarding this agreement as an Exhibit A agreement should be dismissed, and the agreement should be moved to Exhibit B as the Allegiance agreement was.

Agreements to later file interconnection amendments or to provide services according to the terms of filed interconnection amendments are not "interconnection agreements" because they do not create any ongoing obligation regarding Section 251(b) or (c) services. *See* FCC Order, at ¶ 8 (holding that agreements must be filed as interconnection agreements if they create an ongoing obligation relating to Section 251(b) or (c) services). Thus, the only portions of the Allegiance and Eschelon agreements that relate to Section 251(b) or (c) services are the settlements of historic disputes for solely backward-looking consideration. However, these settlements do not create any ongoing obligations and for the reasons stated in Section II, *supra*, and Section III.B.3, *infra*, they should not just be moved to Exhibit B but should be dismissed in their entirety.

Also, Exhibit A, No. 51, Agreement for Migration of Services with Advanced TelCom, Inc.

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("ATG") dated January 30, 2002, should be dismissed. Exhibit A, No. 51 is essentially an agreement to agree and the above rationale applies here as well because ATG and Qwest promptly filed interconnection amendments reflecting the terms of the implementation plan outlined in this agreement. Thus, the agreement's going-forward terms were available to other CLECs via the filed interconnection amendments and no discrimination was caused by the agreement.

2. Other agreements to later agree also do not create any ongoing obligations related to 251(b) or (c) and do not need to be filed.

The above rationale applies with equal force to other types of agreements to agree. Such agreements that do not in and of themselves create an ongoing obligation related to Section 251(b) or (c) services and do not fall within the filing standard articulated by the FCC. They do not entitle the CLEC to any particular rates, service quality levels, types of products or even particular business processes or dispute resolution procedures. If the commitment of the parties to later reach an agreement does subsequently result in an agreement related to Section 251(b) or (c) services, then that latter agreement would need to be filed as an interconnection agreement. However, whether or not that subsequent agreement is ultimately filed as Exhibit A, No. 22 was, the initial agreement to agree would still not fall within the filing standard. Any allegation regarding a failure to file would apply only to the agreement that created the interconnection obligation.

The following agreements did not themselves create any ongoing 251(b) or (c) obligations, and, thus, did not need to be filed under Section 252:

- Exhibit A, No. 17 is an agreement to execute an implementation plan at some point in the future, but does not itself create any obligations regarding 251(b) or (c) services. The implementation plan was ultimately entered into on July 31, 2001.
- Exhibit A, No. 20 is a demand letter related to reciprocal compensation that does not affect 251(b) or (c) services.
- Exhibit A, No. 23 relates to the negotiation of an Implementation plan that was ultimately agreed upon in a contract dated July 31, 2001. This agreement did not create any ongoing obligations regarding the substance of the implementation plan.[14]

[14] The only other provisions of this agreement were a settlement of an historical dispute for backward-looking consideration, which should be dismissed in their entirety for the reasons outlined in Section II.A, *supra*.

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- Exhibit A, No. 24 is a letter agreement that did not create any binding obligations regarding 251(b) or (c) services, and was superseded by a filed agreement entered ten days after the letter agreement.
- Ex. A, No. 41 was a proposal letter that was superseded by a settlement agreement entered three days later. It did not itself create any 251(b) or (c) obligations.

Counts One through Three should be dismissed as to the above agreements, and for the reasons stated in Section II.A, *supra*, and Section III.B.3, *infra*, they should not just be moved to Exhibit B but should be dismissed in their entirety.

3. The Commission should dismiss Counts Four through Seven as they apply to agreements to agree because such agreements cannot cause statutory discrimination, or undue advantage or disadvantage.

The state statutes upon which the Complaint relies do not encompass commitments to later reach a particular agreement. Thus, causes of action against such agreements to agree based upon those state statutes constitutes claims for which relief cannot be granted.

RCW 80.36.150(1) gives the Commission authority to require companies to file contracts, arrangements or agreements relating to "construction, maintenance or use of a telecommunications line or service" or "rates and charges" for use of the line or related services. As explained in Section E.3, *infra*, this section does not create a filing requirement without further action from the Commission and, thus, does not require filing of wholesale contracts. Even if this provision does create a filing requirement, by its own terms it does not encompass agreements to later reach an agreement that do not create any binding requirements that relate in any way to construction, maintenance or use of a line or service or the rates or charges for that use.

RCW 80.36.150(5) provides that noncompetitive services shall be made available to purchasers in substantially the same circumstances at the same rates, terms and conditions. This section does not apply to agreements to agree that do not create binding obligations regarding the actual rates, terms and conditions of providing noncompetitive services.

RCW 80.36.180 cannot support a cause of action against agreements to agree because it prohibits rate discrimination, and the agreements to agree create no obligations or rights pertaining to

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rates. RCW 80.36.186 prohibits unreasonable preference or advantage "as to the pricing of or access to noncompetitive services." Because the agreements to agree create no obligations or rights pertaining to the "pricing of or access to" any services, noncompetitive or otherwise, a cause of action against such agreements cannot be based upon this statute.

RCW 80.36.170 at first glance appears to be written more broadly than the other statutes in that it prohibits undue or unreasonable preference "in any respect whatsoever." However, the final sentence of the statute provides that it shall not apply to contracts offered by telecommunications companies classified as competitive, or "contracts for services classified as competitive." The clear implication of this limiting language is that if the statute does not apply to "contracts for" competitive services, it does apply to contracts for noncompetitive services. As explained above, the agreements to agree do not create any obligations regarding the rates, terms or conditions of providing or receiving noncompetitive services. Thus, RCW 80.36.170 cannot support a cause of action against the agreements to agree.

Aside from the legal infirmities of making claims against agreements to agree under the above statutes, even if the statutes do apply to such agreements, the complaint fails to allege sufficient facts to support claims against the agreements based upon those statutes. A complaint must allege sufficient facts to support an inference that hypothetically discrimination or undue advantage may have resulted from a particular agreement. When that agreement is only a commitment to later reach an agreement, the complaint must allege further facts that establish the connection between the agreement to agree and the alleged discrimination or undue advantage or disadvantage. *Cf*. *Hiner*, 959 P.2d at 1163 (holding that where a particular claim required proof of actual knowledge of a fact, actual knowledge cannot be inferred, the plaintiff must allege facts establishing actual knowledge).

For the reasons outlined in this section, all claims should be dismissed as to the agreements to agree: Ex. A, Nos. 17, 20, 22, 23, 24, 41, and 51, and the former Ex. A, No. 13 (the Allegiance agreement).

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C. The Commission Should Dismiss All Counts As To Agreements Pertaining To Services That Are Not Within The Commission's Jurisdiction

The Complaint alleges violations of Section 252 of the 1996 Act for failure to file and make generally available three agreements that do not affect obligations concerning Section 251(b) or (c) services. Under the FCC definition, an agreement between an ILEC and CLEC is an interconnection agreement subject to the Section 252 requirements only if it creates ongoing obligations relating to Section 251(b) or (c) services. FCC Order at ¶¶ 4 and 13. Thus, the agreements that do not affect Section 251(b) or (c) services do not need to be filed under Section 252, nor be subjected to the 252(i) opt-in requirements.

Further, agreements pertaining to interstate services are regulated under the exclusive jurisdiction of the FCC, not individual state commissions. 47 U.S.C. §§ 151, 152 (creating the FCC and granting it authority over interstate communications). Thus, Ex. A, Nos. 15, 31, and 37 should be dismissed from the complaint in their entirety. Ex. A, No. 15 is an agreement entered into between Qwest and Covad in 1999 before Qwest became an ILEC subject to the Section 251 and 252 requirements. More importantly, on its face, the agreement pertains to interstate private line services, not local Section 251 services. Ex. A, Nos. 31 and 37 are agreements relating solely to FCC tariffed interstate services.

These three agreements are not subject to the requirements of Section 252, and are not subject to this Commission's jurisdiction. Thus, they should be dismissed from the complaint.

D. The WUTC Should Dismiss The Complaint As To All Agreements That Do Not Have Effect In Washington

It almost goes without saying that one state does not have the authority to regulate conduct in another state. *See BMW v. Gore*, 517 U.S. 559, 572 (1996) ("[f]ollowing from principles of state sovereignty and comity, a state may not impose economic sanctions on violators of its laws with the intent of altering the violator's lawful conduct in other states"). Despite this rule, the Complaint includes several agreements that do not apply to Washington local telephone services.

In addition to violating principles of state sovereignty and comity, the effort to impose sanctions

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for interconnection agreements that did not apply in Washington exceeds the authority that this Commission possesses under the Telecommunications Act. Section 252(e) specifies that a "State commission to which an agreement is submitted *shall* approve or reject the agreement, with written findings as to any deficiencies." Thus, because a State commission is required to approve or reject all interconnection agreements submitted to it, it follows that only those interconnection agreements that a particular state commission has the authority to approve or reject are required to be filed with that commission. A State commission only possesses the authority to oversee and regulate interconnection agreements as they affect interconnection services in its state.

In each state in Qwest's 14-state region the respective state commissions have the authority to approve or reject interconnection agreements. Because of the varying infrastructures, urban/rural population mix, overall population density, and numerous other factors, each state commission must consider the unique factors in its state in evaluating proposed interconnection agreements. As a practical matter, many of the agreements between Qwest and CLECs are region-wide, or cover multiple states where the CLEC operates. However, in those instances where Qwest and a CLEC choose to tailor their interconnection agreements to suit the unique conditions in any given state and limit the agreement to the service in that state, no other state should attempt to infringe upon their ability to do so by requiring Qwest (or the CLEC) to file such agreements and possibly making those agreements available in that other state via pick-and-choose.

For the above reasons, the Commission should dismiss the Complaint as to the following agreements:

- Ex. A, Nos. 11 and 43, and Ex. B, No. 21 by their terms only apply in Minnesota
- Ex. A, Nos. 38, 39, and 49 are agreements with that only addresses out-of-region issues, and does not apply to Washington services.
- Ex. A, No. 50 contains two main provisions. Paragraph 2, applies only to services in Oregon, and, thus, does not affect any ongoing obligations in Washington and should be dismissed. Paragraph 1 settles a historical dispute for solely backward-looking consideration, which should be dismissed for the reasons stated in Section A, *supra*.

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E. The Commission Should Dismiss Counts One, Three, And Four In Their Entirety Because They Are Impermissibly Duplicative Of Other Counts In The Complaint

1. Count One does not state an independent cause of action and is impermissibly duplicative of Count Two.

The first cause of action in the Complaint is based on alleged violations of the filing requirement of 47 U.S.C. § 252(a).[15] Section 252(a) does not contain an independent filing requirement, but rather merely incorporates the filing requirement of Section 252(e) by reference. Section 252 provides two methods through which ILECs and CLECs may reach an interconnection agreement. After a CLEC makes a request for interconnection, services, or network elements pursuant to Section 251, the parties may enter into an agreement through voluntary negotiations pursuant to Section 252(a)(1). If a conflict arises during negotiations, however, either party may petition a state commission to arbitrate any open issues pursuant to Section 252(b)(1). Subsection (e)(1) generally provides that all "interconnection agreements" – whether voluntarily negotiated pursuant to (a)(1) or arbitrated pursuant to (b)(1) – must be filed for state commission approval. Subsection (a)(1) itself contains a mandatory filing requirement only through explicit reference to subsection (e): "The agreement, including any interconnection agreement negotiated before February 8, 1996, shall be submitted to the State commission *under subsection (e) of this section*." By virtue of this structure of Section 252, if an agreement falls within the scope of subsection (a)(1), it necessarily also falls within the scope of subsection (e)(1).

Because subsections (a) and (e) necessarily overlap, the attempt to state two separate causes of action for filing to file agreements under both sub-sections of 252 is impermissibly duplicative. "The applicable rule is that, where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one is whether

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[15] Section 252(a)(1) provides, in pertinent part:

> Upon receiving a request for interconnection, services, or network elements pursuant to section 251 of this title, an incumbent local exchange carrier may negotiate and enter into a binding agreement with the requesting telecommunications carrier or carriers without regard to the standards set forth in subsections (b) and (c) of section 251 of this title. The agreement shall include a detailed schedule of itemized charges for interconnection and each service or network element included in the agreement. The agreement, including any interconnection agreement negotiated before February 8, 1996, shall be submitted to the State commission under subsection (e) of this section.

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each provision requires proof of an additional fact which the other does not." *Blockburger v. United States*, 284 U.S. 299, 304 (1932). *See also Washington v. Cole*, 128 Wash.2d 262, 285 n.18 (Wash. 1995) (noting that the *Blockburger* rule would prohibit application of both a criminal statute and a civil forfeiture statute if the elements of the statutory offenses were identical). Here, the first and second causes of action would be established by identical facts. As a result, claims of violations of Section 252(a), which explicitly references Section 252(e), should be dismissed.

2. Count Three does not state an independent cause of action and is impermissibly duplicative of Count Two.

Count Three alleges multiple violations of 47 U.S.C. § 252(i), which allows CLECs to "opt in" to the terms and conditions of an ILEC's interconnection agreements with other CLECs. Because Count Three is predicated solely on the failure to file particular agreements, it is duplicative of Count Two and should be dismissed.

Section 252(i) provides that an ILEC "shall make available any interconnection, service, or network element provided under an agreement approved under this section to which it is a party to any other requesting telecommunications carrier upon the same terms and conditions as those provided in the agreement." The Complaint alleges that Qwest violated this requirement "[b]y failing to obtain Commission approval of numerous agreements" and thereby "failing to make available to other carriers the interconnection, service, or network elements provided under the agreements to any other requesting carrier." However, there are no allegations of conduct other than possible filing violations that could support a claim for Section 252(i) violations. That is, after an interconnection agreement is filed, there is nothing more for the ILEC to do; the agreement is either approved or rejected, and if approved, then a CLEC has the opportunity to opt into the approved agreement. *See* Section 252(i). Accordingly, the second and third causes of action would be established by identical facts and are duplicative, and Count Three should be dismissed.

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3. Count Four does not state an independent cause of action and is duplicative of Counts Five through Seven.

Paragraph 30 of Count Four alleges violations of 80.36.150(5), which provides that telecommunications companies shall make noncompetitive services "available to all purchasers under the same or substantially the same circumstances at the same rate, terms and conditions." As applied to the contracts at issue in this proceeding, this part of Count Four does not allege a cause of action that would require proof of any facts in addition to those necessary to establish a violation of 80.36.170, 180, and 186 in Counts Five through Seven.

RCW 80.36.150(5) requires that a telecommunications company must grant similarly situated purchasers of its products the same rates, terms, and conditions. General unreasonable preferences or advantages are already prohibited by RCW 80.36.170, the basis for Count Five. Rate discrimination is already prohibited by RCW 80.36.180, the basis for Count Six. Unreasonable or undue advantage in pricing or access to noncompetitive services is already prohibited by 80.30.186, the basis for Count Seven. There is no set of facts regarding the agreements at issue that would establish a violation of RCW 80.36.150(5) that would not also establish a violation of one of the other statutory provisions. Thus, because violations of RCW 80.36.150(5) are established by the same set of facts that would establish a violation of RCW 80.36.170, 180, or 186 without the need to establish unique facts, a violation of RCW 80.36.150(5) in Count Four is impermissibly duplicative of the latter counts. *See Cole*, 128 Wash.2d at 285 n.18.[16]

Count Four also alleges that the failure to file the agreements at issue is a violation of RCW

[16] Counts Five through Seven are also likely duplicative to one another to the extent that as applied to these agreements the same set of facts necessary to prove a violation of one statutory provision would purportedly establish a violation of one of the other provisions. While there are some circumstances in which the facts necessary to establish a violation one of these three statutes in Counts Five through Seven are not the same as those necessary to establish a violation of one of the others, s*ee AT&T Communications of The Pacific Northwest, Inc. v. Verizon Northwest, Inc.*, Docket No. UT-020406, 11th Suppl. Order (April 12, 2003) (finding a violation of RCW 80.36.186, but not of 80.36.180), in the present case it is likely that a finding that a particular agreement violated several of the statutes would be based upon the same factual predicate. Also, to the extent that an additional fact is necessary to prove violation of an additional statute (*i.e.* a finding that a particular agreement unreasonably discriminated generally under 80.36.170 because it provided different rates and/or services to a particular CLEC, and finding that same agreement unreasonably discriminated regarding rates under 80.36.180 because it provided different rates to that CLEC) attempting to impose a penalty based on each statute would be equivalent to convicting a person of both an offense and a lesser included offense. Such double punishment for the same conduct is also prohibited as impermissibly duplicative. *Rutlege v. United States*, 517 U.S. 292, 306-307 (1996).

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80.36.150. However, this statutory provision does not itself create a filing requirement. Rather, it empowers the Commission to promulgate rules requiring filing of certain contracts. This portion of Count Four should also be dismissed for failure to state a claim. RCW 80.36.150(1) provides that "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 . . . 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." (Emphasis added). This section of the statute does not of its own force create a requirement to file agreements with the Commission, because it only requires telecommunications companies to file contracts "as and when required" by the Commission. The Commission has not promulgated any binding rules, orders or decisions to create a filing requirement for interconnection contracts with the Commission. Indeed, the Commission historically has not required any wholesale contracts to be filed under this provision.

Thus, because 80.36.150(1) does not contain a binding requirement to file the contracts at issue under state law, and 80.36.150(5) simply restates the statutory requirements of 80.36.170, 180, and 186, Count Four does not state a claim upon which relief can be granted.

F. All Of The Facilities Decommissioning Agreements Should Be Dismissed In Their Entirety Because They Were Subsequently Filed As Interconnection Amendments

The facilities decommissioning agreements should be dismissed from the complaint because they were all subsequently filed as interconnection amendments. On November 5, 2003, the Staff filed a motion to dismiss Exhibit A, No. 14, the December 27, 2001 Facility Decommissioning Agreement between Qwest and AT&T. *Motion to Dismiss Allegations Relating To December 27, 2001 Agreement Between AT&T and Qwest*, Docket No. UT-033011 (November 5, 2003) ("November 5 Motion"). Staff noted that "the terms and conditions contained in the agreement . . . were incorporated into an amendment to an interconnection agreement that Qwest filed with the Commission on January 31, 2002." *November 5 Motion*, at ¶ 2.

The terms and conditions in the remaining three agreements were also subsequently filed with,

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and approved by, the Commission. *See* Declaration of Larry Brotherson ("Brotherson Declaration") attached hereto, at ¶ 11. The decommissioning agreement with Covad (Ex. A, No. 16) was filed for Commission approval on August 8, 2002. *Id.* The Commission subsequently approved the decommissioning portions of the agreement on September, 25, 2002. The decommissioning agreement with Integra (Ex. A, No. 25) was filed on March 7, 2002, as part of an interconnection amendment between the parties related to collocation, cancellation and decommissioning. *Id.* This amendment was approved on March 28, 2002. *Id.* Qwest filed the MCI WorldCom decommissioning agreement with the Commission on August 21, 2002. *Id.* The Commission approved the agreement on October 9, 2002.

The same rationale that led the Staff to move for dismissal of the AT&T Decommissioning Agreement (Ex. A, No. 14), necessitates dismissal of the remaining decommissioning agreements in their entirety (Ex. A, Nos. 16, 25, and 35).

G. The Commission Should Grant Summary Determination In Qwest's Favor On Counts Three Through Seven Regarding Agreements That Have Been Posted On Qwest's Website

Pursuant to WAC 480-09-426(2), Qwest moves for a summary determination dismissing Counts Three, Four, Five, Six and Seven as they apply to the agreements that were posted on Qwest's website beginning in September 2002.[17] That the agreements have been available for opt-in from the website for 14 months, without any CLEC opting into the agreements – or even expressing interest in the agreements – demonstrates that those agreements did not cause any undue prejudice or discrimination.

Summary determination should be granted if there are no issues of material fact, and the moving party is entitled to judgment as a matter of law. *See* WAC 480-09-426(2) (stating that the standards for summary determination should parallel those relied upon for summary judgment under rules of civil procedure); *Pierce County v. State*, No. 73607-3, 2003 WL 22455234, at *2 (Wash. Oct. 30, 2003).

[17] These agreements are: Exhibit A Agreements Nos. 8, 9, 10, 12, 14, 16, 25, 30, 34, 35, 40, 42, and 47; and Exhibit B Agreements Nos. 6 and 16.

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Counts Three (violation of 252(i)), Four (violation of RCW 80.36.150), Five (violation of RCW 80.36.170), Six (violation of RCW 80.36.180) and Seven (violation of RCW 80.36.186) all allege the agreements at issue cause discrimination to non-parties or unreasonable or undue preferences to the parties to the agreements. Although the exact legal formulation for the various counts varies, each of these counts is dependent upon finding there exists a CLEC(s) that is similarly situated to the CLEC in an agreement, that suffered discrimination (or undue/ unreasonable disadvantage) as a result of an agreement. *See, e.g., AT&T Communications of The Pacific Northwest, Inc. v. Verizon Northwest, Inc.*, Docket No. UT-020406, 11th Suppl. Order (Aug. 12, 2003) (finding a violation of 80.36.180 where the defendant had priced access charges well above cost and given itself undue preference; finding no violation where differences in rates between interconnection and interexchange services were attributable to legal and factual differences between those services).[18] Thus, Qwest is entitled to summary determination for any agreements that did not cause undue discrimination, prejudice or disadvantage to any similarly situated CLECs.

As discussed above, one of the main purposes of the 1996 Act was to establish competition in local telephone markets under a framework that was both pro-competitive and deregulatory. *See* Telecommunications Act of 1996, Joint Managers Statement, S. Conf. Rep. No. 104-230, 104th Cong. 2d. Sess. 1 (1996). Under such a competitive framework, the best evidence of whether a particular agreement causes discrimination or undue advantage is the business practices of competing CLECs. If a particular agreement is causing a CLEC undue disadvantage or discrimination, the CLEC would seek similar terms in order eliminate its disadvantage and allow itself to compete effectively. Conversely, an agreement that does not place a CLEC at competitive disadvantage would not be of interest to a CLEC because adopting a similar agreement would not, in the CLECs judgment, improve its competitive position.

In September 2002, Qwest posted fifteen Washington agreements on its website and made

[18] Under the opt-in process of Section 252(i), a CLEC is entitled pick and choose a particular rate or service in an approved interconnection agreement only to the extent that it is similarly situated to the CLEC that is party to the agreement.

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those agreements available for CLEC opt-in beginning at that time. *See* Brotherson Declaration, at ¶¶ 7-8. Despite the availability of the posted agreements for at least fourteen months, no CLEC has opted into any of the agreements. *Id.* In fact, no CLEC has demonstrated any interest in the provisions of the posted agreements. *Id.* If those fifteen agreements caused any undue discrimination or prejudice against non-party CLECs, or granted any undue preference or advantage to the party CLECs, surely some CLEC would have at least inquired further about the posted agreements. That no CLEC has expressed any interest in opting into the posted agreements evidences that the agreements did not cause any undue discrimination or preference. It is incontrovertible that no CLEC has requested to opt into the posted agreements. Thus, it follows that there is no dispute as to the material fact as to whether CLECs suffered discrimination or undue harm or prejudice as a result of the posted agreements.

Four of the agreements that Qwest posted on its website were standard form facilities decommissioning agreements, addressed in Section III.F, *supra*. Brotherson Declaration, ¶ 11.[19] In addition to dismissing these agreements because the terms and provisions were subsequently filed, they should be dismissed from these counts because even had they not been filed, they did not cause any discrimination. A comparison of the facilities decommissioning agreements demonstrates that the agreements are substantially the same. Brotherson Declaration, ¶ 10. The agreements were made based on a standard form contract offered to any CLEC that requested decommissioning of a site. Because any requesting CLEC would receive the same terms as the posted agreements, those agreements could not, and did not, cause any discrimination or undue disadvantage.

Counts Three, Four, Five, Six, and Seven should be dismissed as they apply to the agreements posted on Qwest's website because each is dependent upon a finding that agreements caused discrimination or undue prejudice to similarly situated CLECs, a finding that cannot be supported based upon the undisputed facts in the record.

IV. CONCLUSION

For the foregoing reasons, Qwest respectfully moves that portions of the Complaint should be

[19] These agreements are: Ex. A, Nos. 14, 16, 25, and 35.

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dismissed as follows:

1. All causes of action should be dismissed as to the agreements in Complaint Exhibit B, and other settlement agreements with solely backward looking consideration – Exhibit A, Nos. 22, 23, 46, and 50.
2. All causes of action should be dismissed as to agreements to later reach particular agreements but that do not themselves create binding obligations related providing local telephone services – Exhibit A, Nos. 17, 20, 22, 23, 24, 41, and 51.
3. All causes of action should be dismissed as to agreements pertaining to interstate telephone services that are not within the Commission's jurisdiction – Exhibit A, Nos. 15, 31 and 37.
4. All causes of action should be dismissed as to agreements that do not have effect in Washington – Exhibit A, Nos. 11, 38, 39, 43, 49, and 50; and Ex. A, Nos. 21.
5. The First, Third and Fourth Causes of Action should be dismissed in their entirety as impermissibly duplicative of other causes of action.
6. Summary determination should be granted dismissing the facilities decommissioning agreements – Exhibit A, Nos. 14, 16, 25, and 35 – from the Complaint because their terms and conditions were subsequently filed with and approved by the Commission.
7. Summary determination should be granted dismissing Counts Three through Seven as applied to agreements that did not cause any undue discrimination or prejudice to non-party CLECs because the agreements were available for opt-in on Qwest's website. This includes Exhibit A, Nos. 8, 9, 10, 12, 14, 16, 25, 30, 34, 35, 40, 42, and 47; and Exhibit B, Nos. 6 and 16.

RESPECTFULLY SUBMITTED this _____ day of November, 2003.

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