BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

AT&T COMMUNICATIONS OF THE PACIFIC NORTHWEST, INC., TCG SEATTLE, AND TCG OREGON; AND TIME WARNER TELECOM OF WASHINGTON, LLC, Complainants, v. QWEST CORPORATION, Respondents	Docket No. UT-051682 QWEST CORPORATION'S MOTION FOR SUMMARY DETERMINATION AND DISMISSAL

I. INTRODUCTION

1 Qwest Corporation ("Qwest") files this Motion for Summary Determination, asking that the Washington Utilities and Transportation Commission ("Commission") dismiss the Amended Complaint of AT&T Communications of the Pacific Northwest, Inc., ("AT&T") TCG Seattle, and TCG Oregon, ("TCG") (collectively, "Complainants").[1] The Commission should grant Qwest's Motion for Summary Determination because Complainants' claims are time-barred by Section 415(b) of the federal Telecommunications Act (the "Act").[2]

[1] Aside from naming Time Warner Telecom of Washington, LLC ("Time Warner") in the caption of the Amended Complaint, Time Warner, which was a party to the initial complaint, is not otherwise referenced or described in the Amended Complaint. Qwest has consulted with counsel for Complainants and is advised that Time Warner is not seeking relief under the amended complaint, though Time Warner will continue to pursue remedies on review of the Commission's Interlocutory Order No. 04. Accordingly, Qwest does not address the breach of contract claim as it might be asserted by Time Warner.

[2] Section 415, as amended in 1970, is originally part of the federal Communications Act of 1934. The Commission's authority derives from Congress's enactment of the Telecommunications Act of 1996, and in particular 47 U.S.C. §§ 251and 252. Because no material differences exist between the two pieces of legislation for purposes of Qwest's motion for summary determination, Qwest will generally refer to the two as the Act.

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II. ARGUMENT

A. Summary Determination is an Appropriate Way to Resolve These Issues

2 The Commission's rules provide two alternative procedural vehicles for a party to seek dismissal of a pending adjudicative proceeding. A motion to dismiss is appropriate here because Complainants' Amended Complaint fails to state a claim upon which the Commission may grant relief. WAC 480-07-380(1).

3 Alternatively, a motion for summary determination is appropriate when the pleadings filed in the proceeding, along with any properly admissible evidentiary support, reveal that there is no genuine issue of material fact and that the moving party is entitled to the relief requested as a matter of law. WAC 480-07-380(2); CR 56(c). In this case, a motion for summary determination is also appropriate because there are no relevant and material factual disputes regarding the applicability of the statute of limitations.

B. The Complainants' Claims are Barred by the Applicable Federal Statute of Limitations

4 Although Complainants artfully attempt to position the Amended Complaint as a mere state law breach of contract action subject to the six-year statute of limitations in RCW 4.16.040(1), Complainants utterly fail to state a claim under state law and otherwise present no allegations that would permit the Commission to apply any statute of limitations other than 47 U.S.C. § 415 of the Act. Indeed, it is notable that in the original Complaint, Complainants pled for relief under RCW 80.36.170, .180, and .186. In this Amended Complaint, the only state law provisions that Complainants cite are those that give the Commission general power to hear complaints and, importantly for the statute of limitations issues, power to take action to enforce the interconnection provisions of the Act, RCW 80.36.610.

5 Complainants cannot plead state law breach of contract claims because they simply do not

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have any. It has already been discussed and decided that the Commission does not have general authority to award damages.[3] To the extent that Complainants would seek any remedies under state law, those remedies would be limited by the Commission's express authority to award reparations or refunds on overcharges. That authority is contained in RCW 80.04.220 and .230. Complainants' claims for relief pursuant to the Commission's authority under those statutes have already been found to be barred by the statutes of limitations contained in those specific provisions, either six-months or two-years, depending upon the relief sought.

6 Complainants now seek relief from the Commission pursuant to RCW 80.36.610. RCW 80.36.610(1) specifically authorizes the Commission "to take actions, conduct proceedings, and enter orders *as permitted or contemplated for state commission under the federal telecommunications act of 1996*. . . ."[4] As this Commission recognizes, a commission's jurisdiction to hear actions to enforce the terms of interconnection agreements derives, not from state contract law, but from the Act.[5] This structure is consistent with Congress' intent in

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[3] *AT&T v. Verizon*, Docket No. UT-020406, Eleventh Supplemental Order, August 12, 2003, ¶ 34; *D.J. Hopkins, Inc. v. GTE NW., Inc.*, 947 P.2d 1220, 1225 (Wash. App. Ct. 1997) (stating that "[a]lthough the WUTC cannot award 'damages' per se, it is allowed to order refunds of overcharges" pursuant to RCW 80.04.230). The Commission's authority to order reparations is limited to cases in which a carrier is found to have "charged an excessive or exorbitant amount for [a] service" or to have charged a customer more than the approved rate. *See* RCW 80.04.220 ("When complaint has been made to the commission concerning the reasonableness of any rate, toll, rental or charge for any service performed by any public service company, and the same has been investigated by the commission, and the commission has determined that the public service company has charged an excessive or exorbitant amount for such service, and the commission has determined that any party complainant is entitled to an award of damages, the commission shall order that the public service company pay to the complainant the excess amount found to have been charged, whether such excess amount was charged and collected before or after the filing of said complaint, with interest from the date of the collection of said excess amount."); RCW 80.04.230 ("When complaint has been made to the commission that any public service company has charged an amount for any service rendered in excess of the lawful rate in force at the time such charge was made, and the same has been investigated and the commission has determined that the overcharge allegation is true, the commission may order that the public service company pay to the complainant the amount of the overcharge so found, whether such overcharge was made before or after the filing of said complaint, with interest from the date of collection of such overcharge.").

[4] RCW 80.36.610(1) (emphasis added).

[5] See Docket UT-051682, Order 04*, Interlocutory Order Reversing Initial Order; Denying Motion for Summary Determination or Dismissal*, at ¶¶ 25-26 (June 7, 2006) [Hereinafter "Order 04"]; *Pac. Bell v. Pac-West Telecomm, Inc.*, 325 F.3d 1114, 1126 (9th Cir. 2003) ("It is clear from the structure of the Act, however, that the authority granted to state regulatory commissions is confined to the role described in § 252-that of arbitrating, approving, and enforcing interconnection agreements."). *See also Petition of SBC Tex. for Post-Interconnection Dispute Resolution with Tex-Link Commc'ns., Inc., under the FTA Relating to Intercarrier Comp., Ruling on Motion to Dismiss*, 2005 WL 2834183, at 2 (Tex. P.U.C. Oct. 26, 2005) ("Enforcement of ICAs does not rely on state law. Rather, the authority to enforce ICAs comes from federal law.") [hereinafter "SBC Tex."].

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involving states. "[W]ith the 1996 Telecommunications Act, Congress has offered the states, not federal funds, but a role as what the carriers have called a 'deputized' federal regulator."[6] And, the Act limits the scope of a state commission's authority to regulate local telecommunication competition.[7] Thus, without that authority, the Commission lacks jurisdiction to interpret or enforce interconnection agreements.

7 Because the Commission's authority over disputes involving interconnection agreements derives from the Act, the Commission must look to 47 U.S.C. § 415 to determine whether it has jurisdiction to hear Complainants' action. Section 415 provides an express two-year statute of limitations within which the Commission may exercise its authority granted by the Act and hear "complaints against carriers for the recovery of damages not based on overcharges." Once that time limit has elapsed, the Commission no longer has authority to interpret or enforce interconnection agreements.

8 Even if the Commission wanted to entertain the applicability of Washington's general six-year statute of limitations on written contracts, Washington law would still direct the Commission to choose Section 415, with a specific, clearly defined limitations period particular to the telecom industry, over the general six-year statute of limitations contained in RCW 4.16.040(1). *See In re Estate of Black*, 102 P.3d 796, 802 (Wash. 2004) ("when more than one statute applies, the specific statute will supersede the general statute") (internal citations omitted).

9 The Act expressly imposes a two-year statute of limitations that applies to any actions involving claims under the Act.[8] In pertinent part, 47 U.S.C. § 415 provides:

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6 *MCI Telecomms. Corp. v. Ill. Bell Tel. Co.*, 222 F.3d 323, 343-44 (7th Cir. 2000).

7 *Pac. Bell*, 325 F.3d at 1126-27 (discussing *AT&T v. Iowa Utils.*, *Bd*, 525 U.S. 366, 378 & n. 6, 385 & n. 10 (1999));

8 47 U.S.C. § 415; *see Pavlak v. Church*, 727 F.2d 1425, 1426-27 (9th Cir. 1984). Section 415 applies to proceedings in federal court, the FCC, or before a state commission. *See, e.g., Pavlak*, 727 F.2d at 1426-27 (holding that 47 U.S.C. § 415 applies to claims filed in district court as well as to complaints filed with the FCC); *SBC Tex.*, at 7-9 (finding that the two-year limitation applies to claims that a state commission is authorized to hear).

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> (a) All actions at law by carriers for recovery of their lawful charges, or any part thereof, shall be begun, within two years from the time the cause of action accrues, and not after.
>
> (b) All complaints against carriers for the recovery of damages not based on overcharges shall be filed with the Commission within two years from the time the cause of action accrues, and not after, subject to subsection (d) of this section.
>
> (c) For recovery of overcharges action at law shall be begun or complaint filed with the Commission against carriers within two years from the time the cause of action accrues, and not after, subject to subsection (d) of this section, except that if claim for the overcharge has been presented in writing to the carrier within the two-year period of limitation said period shall be extended to include two years from the time notice in writing is given by the carrier to the claimant of disallowance of the claim, or any part or parts thereof, specified in the notice.

The plain language of Section 415 reaches "all complaints against carriers for the recovery of damages not based on overcharges." This broad scope is consistent with Congress' desire to assure national uniformity in the Act's application.[9] To permit varying periods of limitation from state to state would contravene Congress's intent and discriminate against carriers that happen to be sued in states with more generous statutes of limitation.[10]

10 Recognizing the breadth of Section 415, courts in the Ninth Circuit have applied Section 415 in actions involving telecommunications carriers, irrespective of whether the claims were state or federal. In *Pavlak*, the Ninth Circuit applied the two-year limitation to a plaintiff's civil rights claims against a carrier.[11] *Pavlak* approvingly discussed a lower court case, *Cole v. Kelley*, which had also applied Section 415 as a bar in an action against a carrier.[12] In that case, plaintiffs brought an action against a number of defendants, including Pacific Telephone,

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9 *See Swarthout v. Mich. Bell Tel. Co.*, 504 F.2d 748, 748 (6th Cir. 1974).

10 See *A.J. Phillips Co., v. Grand Trunk W. Ry. Co.*, 236 U.S. 662, 667 (1915).

11 *See Pavlak*, 727 F.2d at 1427-28

12 438 F. Supp. 129 (C.D. Cal. 1977).

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asserting constitutional and federal statutory violations as well as a number of state law torts. As to Pacific Telephone, the *Cole* court held that the limitation period provided by Section 415(b), which at the time was one year, barred all of plaintiffs' claims. "The statute applies to civil actions brought against a federally regulated communications utility in federal court, as well as those filed with the regulatory agency."[13]

11 Similarly, other state commissions and federal courts have applied Section 415 to bar actions. For example, the Texas Public Utility Commission understood that the Act granted the Commission its authority to interpret and enforce interconnection agreements and therefore had to look to Section 415 as a limitation on its jurisdiction. As that Commission stated, "[g]iven that the authority to interpret/enforce ICAs and to award any damages comes from the FCA/FTA, the FCA's two-year limitations must apply to a claim for damages in an FTA arbitration. Thus, without that authority, the Commission lacks jurisdiction to interpret or enforce interconnection agreements."[14] Additionally, the federal district court in *MFS International, Inc., v. International Telcom Ltd.*,[15] found that the fact that plaintiff purported to allege state law claims did not override the sweeping language of Section 415(b) and were precluded. While noting that the breach of contract and conversion claims appeared not to implicate the Act, the court adhered to long-standing precedent and the plain language of the Act to find "that such putative state law claims are in fact governed by the federal statute of limitations set out in § 415(b)." Although the *MFS International* court dealt with a federally-filed tariff, rather than an interconnection agreement, any purported distinction is immaterial. The Ninth Circuit has held that "interconnection agreements have the binding force of law."[16] Thus, notwithstanding Complainants' attempt to cloak their claims as state law breach of

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13 *Id.* at 145 (citing *Ward v. Northern Ohio Telephone Co.*, 251 F.Supp. 606 (N.D. Oh. 1966)).

14 *SBC Tex.*, at 9.

15 50 F. Supp. 2d 517 (E.D.Va. 1999).

16 *Pac. Bell*, 325 F.3d at 1127; *Verizon Md, Inc. v. RCN Telecom Servs., Inc.*, 232 F.Supp.2d 539, 552 n. 5 (D. Md. 2002) (noting that an interconnection agreement "is functionally no different from a federal tariff.").

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contract claims and avoid reference to federal law, it nevertheless remains evident that the Commission must look to Section 415 to determine whether it has jurisdiction to hear Complainants' Amended Complaint.

12 In an action in Oregon, AT&T Communications of the Pacific Northwest and TCG Oregon attempted to sue Qwest based on the same allegations to those alleged here. The Oregon PUC, however, found that the provisions cited by those two Complainants "directly implicate[d] federal law." The Oregon PUC determined that "although Complainants attempt to posit their claims as breach of contract claims, the violations they assert are actually of federal law" and therefore the Federal Communications Act required that the Oregon PUC apply the two-year limitation contained in 47 U.S.C. § 415 and barred the action.[17] Even though Complainants here try to avoid referring to federal law as much as possible and attempt to frame their action as one based merely on violations of state contract law, careful examination of the Amended Complaint similarly reveals that the action is necessarily and inescapably based on federal law. The Oregon case perfectly illustrates that the Act promotes uniformity throughout the states for claims based upon the same facts arising out of interconnection agreements.

13 The need to apply Section 415 is made more compelling in this case given the nature and purpose of interconnection agreements and the likelihood that the Commission will have to turn to federal law in resolving Complainants' claims. Interconnection agreements are not ordinary contracts.[18] The very existence of interconnection agreements is mandated by the Act.[19] Interconnection agreements must set forth the "terms and conditions . . . to fulfill the

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[17] *AT&T Commc'ns of the Pacific Northwest, Inc. v. Qwest Corp.*, 2006 WL 1675379, *6, No. UM 1232, 06-230 (Or. P.U.C. May 11, 2006) (copy attached as exhibit 1).

[18] *RCN Telcom Servs., Inc.*, 232 F. Supp.2d at 552 n. 5 ("[A]n interconnection agreement is part and parcel of the federal regulatory scheme and bears no resemblance to an ordinary, run-of-the-mill private contract."); *SBC Tex.*, at 4 ("An interconnection agreement is not an ordinary private contract."); *E.Spire Commc'ns, Inc. v. N.M. Pub. Regulation Comm'n*, 392 F.3d 1204, 1207 (10th Cir. 2004) (noting that interconnection agreements are "instrument[s] arising within the context of ongoing federal and state regulation").

[19] *Qwest Corp.*, 2006 WL 1675379, at *6 (Or. P.U.C. May 11, 2006) ("The interconnection agreements are required under the Telecommunications Act, 47 U.S.C. § 251).

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duties" mandated by 47 U.S.C. §§ 251(b) and 252(c),[20] and "many so-called 'negotiated' provisions [of interconnection agreements] represent nothing more than an attempt to comply with the requirements of the 1996 Act."[21] Agreements are "cabined by the obvious recognition that the parties to the agreement had to agree within the parameters fixed by the federal standards set out in 47 U.S.C. §§ 251 and 252."[22]

14 While the Act prefers private negotiation, if no agreement is reached the Act provides for mediation and even compulsory arbitration, at the request of any party. Furthermore, any agreement reached by negotiation or arbitration must be reviewed and approved by the state commission in accordance with the standards outlined in 47 U.S.C. §§ 251 and 252. Given this context, the Ninth Circuit has held that "interconnection agreements have the binding force of law."[23]

15 Here, the provisions on which Complainants rely in their Amended Complaint were not the product of the parties' free and voluntary negotiation of the terms. Rather, the terms were mandated by federal law. For example, Complainants' breach of contract claim is premised on the allegation that Qwest breached its obligations under the interconnection agreements with AT&T and TCG by not making available "the rates, terms, and conditions of other interconnection agreements to which Qwest was a party."[24] This language is informed by and essentially mirrors the express requirements of the Act. Section 252(i) already obligates a local exchange carrier to provide interconnection "on rates, terms, and conditions that are just, reasonable, and nondiscriminatory, in accordance with the terms and conditions of the agreement and the requirements of this section and section 252 of this title." Second,

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20 47 U.S.C. §§ 251(c)(1).

21 *AT&T Commc'ns of the S. States, Inc. v. BellSouth Telecom., Inc.*, 229 F.3d 457, 465 (4th Cir. 2000) (Anderson, J., concurring) (referring to the Telecommunications Act of 1996).

22 *BellSouth Telecom., Inc. v. MCImetro Access Transmission Servs., Inc*., 317 F.3d 1270, 1281 (11th Cir. 2003).

23 *Pac. Bell*, 325 F.3d at 1127.

24 Amended Complaint at ¶ 14.

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Complainants' breach of contract claim asserts that Qwest did not "act in good faith and consistently with the intent of the 1996 Act."[25] These are not terms that the parties could voluntarily negotiate, but rather they were terms mandated by federal law.

16 These allegations make clear that Complainants' Amended Complaint states violations that are grounded in federal law. Indeed, the Commission recognized, in allowing the filing of the Amended Complaint, that the Complainants' breach of contract claim is nothing more than a claim of a violation of Section 252(i), the most favored nation provision that is incorporated into the agreements.[26]

17 Even if the Commission were to attempt to treat Complainants' action as merely a state law breach of contract claim, which it is not, the Commission unavoidably would have to address issues of federal law arising under the Act in adjudicating Complainants' claims. For example, the 1996 Act requires that a carrier must be willing and able to accept all legitimately related terms in an existing agreement.[27] Notwithstanding Complainants' unsubstantiated allegations that they "would have adopted, or otherwise would have availed themselves of, the rates and reasonably related and legitimate terms and conditions in the Eschelon and/or McLeod USA Agreements,"[28] the Amended Complaint falls far short of alleging that the Complainants could comply with the terms and conditions and would have chosen to accept the terms and conditions.

18 Section 252(i) also provides that "[a] local exchange carrier shall make available any

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25 *Id.*

26 "Complainants seek to enforce the most favored nation provision in their interconnection agreements (contracts) by achieving the benefit of the bargain for which they contracted. This is an action within the terms of RCW 80.36.610. Enforcement of interconnection agreements is a specific remedy afforded by statute and rule in limited circumstances involving telecommunications act matters. To the extent it might be inconsistent with the compensation remedies provided in RCW 80.04.220 and -.230, the specific statutory remedy takes precedence over the genera and the more recent over the earlier. Complainants may pursue enforcement of their interconnection agreement as a contract claim." Order No. 04 at ¶ 27 (footnotes omitted).

27 *Iowa Utils. Bd.*, 525 U.S. at 398.

28 Amended Complaint at ¶ 11.

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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." 47 C.F.R. § 51.809, however, exempts incumbents that can prove that providing a particular interconnection agreement to a requesting carrier is either (1) more costly than providing it to the original carrier, or (2) technically infeasible. The Commission potentially would have to consider whether Qwest may have been exempted from providing the interconnection agreements to Complainants. If an exemption applied, Complainants' breach of contract would fail based on application of federal law.

19 Furthermore, the Commission would be required to look to the Act to determine whether Qwest "'act[ed] in good faith and consistently with the intent of the 1996 Act.'" In sum, the Commission necessarily would have to address numerous questions of federal law in determining the validity of Complainants' claims.[29] For all these reasons, Section 415 of the Federal Communications Act applies in this case and bars Complainants' action because their claims accrued more than two years prior to commencing suit.

20 Finally, Section 415 applies the appropriate limitation on the Commission's jurisdiction to interpret and enforce interconnection agreements. While state law may provide the relevant principles of contract interpretation for the Commission to apply in interpreting interconnection agreements,[30] it does not follow that the Commission may disregard Section 415 of the Act and attempt to proceed under a state statute of limitations for contract actions.

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[29] *See Verizon Md., Inc. v. Global Naps, Inc.*, 377 F.3d 355, 363-65 (4th Cir. 2004) (finding substantial questions of federal law because the agreement was federally mandated, the key disputed provisions incorporated federal law, and the contractual duty was imposed by federal law).

[30] *See e.g., Southwestern Bell v. Pub. Util. Comm'n of Tex.*, 208 F.3d 475, 485 (5th Cir.2000) (stating that state law governs questions of interpretation of agreements and enforcement of provisions); *cf. Ill. Bell Tele. Co. v. Worldcom Techs., Inc.*, 179 F.3d 566, 574 (7th Cir. 2000) (en banc) (stating in dicta that "[a] decision 'interpreting' an agreement contrary to its terms creates a different kind of problem-one under the law of contracts, and therefore one for which a state forum can supply a remedy"). Although *Pacific Bell* noted the *Southwestern Bell* decision, the Ninth Circuit did not expressly adopt the decision, emphasizing instead that the Commission's action, as characterized by the lower court, was "inconsistent with the CPUC's weighty responsibilities of contract interpretation under § 252." *Pac. Bell*, 325 F.3d at 1128.

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In the first instance, the Commission's power derives from the Act, not state law. Second, Congress enacted a jurisdictional limit on the Commission's authority, and this limitation period controls the Commission's jurisdiction and the timing of Complainants' action.[31]

C. The Commission should Grant Summary Determination because Complainants' Claims are Barred by the Statute of Limitations under the Act

21 The general rule that triggers the running of the statute of limitations under the Act is not when the aggrieved party actually discovered the injury, but when the aggrieved party in the exercise of reasonable diligence should have discovered the injury.[32]

22 Once the time to bring suit under Section 415 of the Federal Communications Act has lapsed, the Commission no longer has jurisdiction to hear the action. The Supreme Court has made clear that the "and not after" language found in Section 415 means that "the lapse of time not only bars the remedy but destroys the liability."[33] A cause of action cannot be revived after the limitations period passes. As this Commission has already determined, Complainants' claims accrued more than two years before they filed a complaint.[34]

23 Complainants' claims accrued when they discovered, or by exercise of reasonable diligence should have discovered, their right to apply for relief. The Qwest/Eschelon agreement, the only written agreement and the last agreement in time to contain an alleged discount or lower rate, was entered into on November 15, 2000.[35] The same allegations regarding a discount by Qwest to Eschelon were raised in the Minnesota Commission's "unfiled agreements" proceeding, and Complainants knew—or should have been aware with the exercise of minimal diligence—of those allegations at least as early as March 12, 2002, the date on which the

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31 *Sw. Bell Tel. Co. v. Connect Commc'ns Corp.*, 225 F.3d 942, 947 (8th Cir. 2000) ("while Congress has chosen to retain a significant role for the state commissions, the scope of that role is measured by federal, not state law.").

32 *Pavlak*, 727 F.2d at 1426-27; *MFS Int'l, Inc.*, 50 F. Supp.2d at 524.

33 *A.J. Phillips Co.*, 236 U.S. at 667.

34 *See* Order 04, at ¶ 20.

35 *See* Docket No. UT-033011, Agreement 4A.

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Minnesota Commission published public notice of its decision to proceed with the unfiled agreements case.[36]

24 The Commission found that the date on which Complainants' actions accrued was July 15, 2002. On that date, the Commission rejected AT&T's attempt to inject the asserted violations in the 271 docket.[37]

25 Because July 15, 2002 is more than two years prior to the filing of any complaint by Complainants in this matter, Complainants' action is barred by the limitations period imposed by Section 215. As a result, the Commission lacks jurisdiction to hear the pending action and must dismiss the Amended Complaint with prejudice.

III. CONCLUSION

26 For all the above reasons, Qwest requests an order of this Commission dismissing Complainants' Amended Complaint with prejudice.

DATED this ____ day of July, 2006.

QWEST

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[36] *See* Notice and Order for Hearing, *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 (Minnesota Public Utilities Commission), March 12, 2002 (copy attached as Exhibit 2 to this motion).

[37] *See* Order 04, at ¶ 20.

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