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,	)	DOCKET NO. UT-051682
Complainants,	)	AT&T'S PETITION FOR ADMINISTRATIVE REVIEW OF ORDER NO. 4
v.	)	
QWEST CORPORATION,	)	
Respondent.	)	

1. Pursuant to WAC 480-07-810(3), AT&T Communications of the Pacific Northwest, Inc., TCG Seattle, and TCG Oregon (collectively, "AT&T") respectfully petition for administrative review of Order No. 4, Interlocutory Order Reversing Initial Order; Denying Motion for Summary Determination or Dismissal ("Order No. 4").

2. In Order No. 4, the Commission made a factual finding that the claims AT&T alleged in its initial Complaint accrued on July 15, 2002, and on that basis granted Qwest's motion for summary disposition as to those claims, which were not brought within the six-month limitations period that the Commission ruled was applicable. The Commission's factual finding that the claims accrued on July 15, 2002, was both improper and unnecessary. It was improper because it resolved a disputed issue of fact, and disputed issues of fact are not properly resolved on a motion for summary disposition. And it was unnecessary because even though the parties advocated different accrual dates, all parties agreed that the claims accrued more than six months before the Complaint was filed. Accordingly, once the Commission decided that a six-month

limitations period applied to AT&T claims, it did not need to determine – and therefore should not have determined – when the claims accrued, but instead should have simply dismissed the claims on the ground that it was undisputed that they accrued more than six months before they were filed.

3. The relief AT&T seeks is narrow. This Petition does not seek to revive the claims that the Commission concluded should be dismissed; indeed, AT&T has already filed an Amended Complaint that does not assert those claims. However, because the ruling on accrual was procedurally improper and legally unnecessary, and may have adverse precedential effect on AT&T, AT&T asks the Commission to modify Order No. 4 by removing the discussion of accrual in paragraphs 19-21 and instead explaining that it has no need to reach the issue.

BACKGROUND

4. In Order No. 3, the Administrative Law Judge ("ALJ") observed that Qwest's motion for summary determination or dismissal relied on "copious supporting materials," and therefore properly concluded that the motion had to be treated as a motion for summary determination, and not as a motion to dismiss.[1] Qwest did not challenge this ruling, nor did the Commission revisit it in Order No. 4. Thus, Order No. 4 is a summary determination and must comply with the standards for such determinations. In particular, as we further discuss below, a summary determination is proper only when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law; a motion for summary determination is not an occasion for resolving material disputes of fact.

5. In Order No. 3, the ALJ decided that AT&T's claims accrued on June 8, 2004. The ALJ stated that "the existence of the unfiled agreements [the agreements between Qwest and

[1] Initial Order Granting Qwest's Motion for Summary Determination; Dismissing Complaint ("Order No. 3"), ¶¶ 10-12.

Eschelon and McLeodUSA] was not acknowledged until the Commission commenced its investigation of the issue in August 2003" and that "[u]ntil June 8, 2004, the agreements were not public even in the unfiled agreements proceeding [UT-033011]."[2] The ALJ also concluded that "[a]lthough Complainants might have requested that the Commission immediately disclose the agreements [in August 2003], it is speculative as to when that request would have been granted."[3]

6. Qwest sought administrative review of that ruling. The briefing on that request focused on hotly disputed factual issues: When did the Eschelon and Qwest agreements at issue first became publicly available in Washington? Could AT&T have obtained them earlier? If so, would the protective order in UT-033011 have prevented AT&T from using agreements obtained in that case to file a complaint like the one that initiated this case?[4] As AT&T explained at the end of this briefing, all of these arguments and the various evidentiary sources on which they relied "highlight[ed] the factual nature of the parties' dispute on this [accrual] issue."[5]

7. In Order No. 4, the Commission reversed Order No. 3's ruling on accrual and held that AT&T's causes of action accrued on July 15, 2002, "when the Commission rejected pleas to pursue the asserted violations in the 271 docket."[6] The Commission stated that AT&T could have discovered its injury and the facts supporting its causes of action earlier because "[i]t

[2] Order No. 3, ¶¶ 20-21.

[3] Order No. 3, ¶ 21.

[4] *See* Qwest Corporation's Petition for Administrative Review of Initial Order Granting Motion for Summary Determination and Dismissal, ¶¶ 7-10; AT&T and TWTC Response to Qwest Petition for Administrative Review, ¶¶ 3-8; Qwest's Reply to the AT&T and TWTC Response to Qwest's Petition for Administrative Review, ¶¶ 2-6; AT&T and TWTC Objection to Qwest Motion for Leave to File a Reply to the AT&T and TWTC Response to Qwest's Petition for Administrative Review, ¶¶ 4-11.

[5] AT&T and TWTC Objection to Qwest Motion for Leave to File a Reply to the AT&T and TWTC Response to Qwest's Petition for Administrative Review, ¶ 11.

[6] Order No. 4, ¶ 20.

is inconceivable to us that, had complainants asked for documents for the purpose of determining whether they had been injured, access to the documents would have been denied."[7] The Commission also upheld Order No. 4's ruling that a six-month limitations period applied to the claims in AT&T's original complaint.[8]

ARGUMENT

8. As noted above, the ruling here is a "summary determination" under WAC 480-07-380(2). Under that provision, the Commission can grant a motion for summary determination only if there is "no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law."[9] Put another way, if there *is* a genuine dispute over a material fact, the Commission cannot grant summary determination. Moreover, the "moving party bears the burden of demonstrating that there is no genuine dispute as to any material fact," and "all facts and reasonable inferences are considered in a light most favorable to the nonmoving party."[10] And the motion for summary disposition "should be granted only if, from all the evidence, reasonable persons could reach but one conclusion."[11]

9. The accrual decision in Order No. 4 runs afoul of this standard by prematurely ruling on genuinely disputed issues of material fact. Order No. 4 opines that it is "inconceivable" that AT&T "would have been denied" access to the unfiled agreements if AT&T had asked for them early in the generic unfiled agreements case (UT-033011). That, however, is an *assumption*, not a matter of undisputed fact, and thus is not a permissible basis on

[7] Order No. 4, ¶ 21.

[8] Order No. 4, ¶ 21. AT&T has since filed an Amended Complaint that, pursuant tot Order No. 4, included only a claim for breach of contract, which is governed by a six-year limitations period. *See* Order No. 4, ¶¶ 27-29.

[9] Order No. 3, ¶ 10 (citing WAC 480-07-380(2)).

[10] *E.g.*, *Harvey v. Snohomish County*, 157 Wn.2d 33, 38 (2006).

[11] *E.g.*, *Heg v. Alldredge*, 2006 Wash. LEXIS 498 at *10 (June 22, 2006).

which to render a summary determination. By definition, moreover, it is not the case that all "reasonable persons could reach but one conclusion" in this respect, because the ALJ could not reach that conclusion, but instead concluded that the outcome of an AT&T request for access to the unfiled agreements was speculative. Furthermore, there was no evidence in the record to support the conclusion that an AT&T request for the unfiled agreements would have been granted, or when; there was, for example, no testimony by a person to whom such a request would have been directed, and no evidence of any policy or practice with respect to requests for access to confidential documents. The finding that a request for access to the unfiled agreements would have been granted, rather than resting on a one-sided factual showing, as a summary determination must be, rests on no facts whatsoever.

10. In addition, Order No. 4 implicitly assumes that once it (hypothetically) obtained the agreements, AT&T could have immediately used them to file its own complaint, without regard to their confidential status. That too, however, is an *assumption*, not a matter of undisputed fact, and thus is not a permissible basis on which to render a summary determination.

11. Indeed, contrary to the assumptions in Order No. 4, Qwest and AT&T vigorously disagreed over when the unfiled agreements became publicly available in Washington *and about whether AT&T had any ability to obtain them earlier and use them to file its own complaint*. Qwest and AT&T each relied on competing evidence to support their competing factual allegations. For example, Qwest, relying on its discovery responses in its Section 271 proceeding (UT-003022 and UT-003040) contended that it had filed the agreements publicly in Washington in 2002, whereas AT&T contended that (pointing to the Commission's treatment of the agreements as confidential on its website and a Staff e-mail in May 2004 asking for redacted versions of the confidential agreements) that the agreements remained confidential until June 8,

2004.[12] Qwest also contended, citing its own ability to obtain the agreements from Staff through an informal request, that AT&T, too, could have obtained the agreements from Staff in the generic unfiled agreements case (UT-033011), or via a public records request.[13] AT&T responded that Staff would have treated AT&T differently than Qwest: AT&T, unlike Qwest, was not a party to the agreements, and Staff certainly would only have provided the agreements, if at all, subject to the protective order in UT-033011, which would have prohibited AT&T from using those agreements to file its own complaint in a separate case (and of course a public records request would be futile while the agreements remained confidential).[14]

12. Throughout these back-and-forth factual allegations, Qwest never denied that the protective order in UT-033011 imposed limits on AT&T's potential use of the agreements, nor did it offer any undisputed proof that it would have provided the agreements to AT&T on a public basis if asked. These facts confirm the ALJ's statement in Order No. 3 that it was "speculative" whether, or when, AT&T might have obtained the unfiled agreements on a public basis prior to June 8, 2004. In short, the factual issue of whether AT&T could have obtained and used the unfiled agreements on a public basis prior to June 8, 2004 was far from undisputed.[15] This means that as a legal matter there was no proper basis on which to make a summary determination as to the accrual date.

---

[12] *See* arguments in pleadings cited *supra*, n.3. *See also* Qwest's Reply to AT&T/Time Warner Opposition to Qwest's Motion to Dismiss, ¶ 7 and Att. 6 (discussing and attaching discovery response in Section 271 proceeding).

[13] Qwest Corporation's Petition for Administrative Review of Initial Order Granting Motion for Summary Determination and Dismissal, ¶ 9.

[14] AT&T and TWTC Response to Qwest Petition for Administrative Review, ¶¶ 6-7.

[15] The extent to which the agreements alone were sufficient to put AT&T on notice of a potential claim is subject to further speculation and dispute. As AT&T would have demonstrated had it had the opportunity to present evidence on this issue, the preferential arrangement between Qwest and McLeod was not reduced to writing, and thus mere possession of whatever written agreements existed between those two companies would not have disclosed the discriminatory terms and conditions of their arrangement to AT&T.

13. For these reasons, the Commission's summary determination on the accrual date was improper. This does not mean that the Commission must remand the matter to the ALJ for a factual inquiry into this dispute, however, for at this point there is no need to resolve the accrual issue at all. Once the Commission determined that the applicable limitations period was six months, it had no need to determine when AT&T's claims accrued in order to dispose of those claims on statute of limitations grounds.

14. The latest accrual date proposed by any party was June 8, 2004 (the date AT&T supports), and that date is not within the six-month limitations period.[16] Similarly, the question of the accrual date is irrelevant as to AT&T's current claim for breach of contract, for no party proposes an accrual date that is more than six years earlier than the filing of AT&T's Amended Complaint.[17] Thus, the precise accrual date for AT&T's claims need not – and thus should not – be addressed. As the Washington Supreme Court put it, "[p]rinciples of judicial restraint dictate that if resolution of an issue effectively disposes of a case, we should resolve the case on that basis without reaching any other issues that might be presented."[18]

CONCLUSION

15. Accordingly, in keeping with the well-established principle that courts and agencies should not rule on issues that are unnecessary to resolving a case, the Commission should simply modify and clarify Order No. 4 by removing the discussion of accrual in paragraphs 19-21 and inserting an explanation that because the Commission agrees with Order

[16] AT&T continues to disagree with the ruling that the six-month limitations period applies to its overcharge claims, but is not challenging that ruling in this Petition, for it plans to proceed on the breach of contract claim in its Amended Complaint. AT&T, however, reserves the right to seek judicial review of that ruling, particularly if the Commission adheres to the accrual finding it made in Order No. 4.

[17] *See* Order No. 4, ¶¶ 27-29.

[18] *Hayden v. Mutual of Enumclaw Ins. Co.*, 141 Wn.2d 55, 68 (2000) (internal quotation marks omitted). *Accord Cena v. Department of Labor and Industries*, 121 Wn. App. 915, 924 (2004) ("This court avoids deciding issues unnecessary to the resolution of a case.")

No. 3 that the six-month limitations period applies to the claims in AT&T's original complaint, and because no party proposes an accrual date for those claims that is within six months of the filing of AT&T's original complaint (or more than six years before the filing of AT&T's Amended Complaint), there is no need to rule on an accrual date at all, so the Commission will not reach that issue.

DATED this 21st day of July, 2006.

DAVIS WRIGHT TREMAINE LLP
Attorneys for AT&T Communications of the Pacific Northwest, Inc., TCG Seattle and TCG Oregon

By_____
Gregory J. Kopta
WSBA No. 20519

AT&T COMMUNICATIONS OF THE PACIFIC NORTHWEST, INC., TCG SEATTLE, AND TCG OREGON

By_____
Gregory L. Castle