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, Respondent.	Docket No. UT-051682 QWEST CORPORATION'S ANSWER TO AT&T'S PETITION FOR INTERLOCUTORY REVIEW OF ORDER NO. 04

I. INTRODUCTION

1 Pursuant to WAC 480-07-810(3), and the schedule agreed to herein, Qwest Corporation ("Qwest") hereby files its answer to the Petition for Interlocutory Review ("Petition") of Order No. 04, filed by AT&T Communications of the Pacific Northwest, Inc., TCG Seattle, and TCG Oregon (collectively, "AT&T").

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2 Despite the undisputed fact that AT&T had actual knowledge of the agreements that form the basis of its complaint in the spring and summer of 2002, AT&T asks the Commission to undo its findings regarding the accrual date of the statute of limitations. AT&T asks the Commission to "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 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." *Petition at ¶ 15*.

II. ARGUMENT

3 The Commission should deny AT&T's request for three reasons. First, AT&T did not timely object to the determination of the accrual date. Second, the accrual date is a disputed issue that must be decided in this proceeding. Finally, this issue remains before the Commission in connection with Qwest's current and still pending Motion to Dismiss – there, Qwest asserts that a two-year statute of limitations applies to disputes concerning an interconnection agreement ("ICA"). In order to resolve the question of whether the action on the ICA is time-barred under the two-year statute, the Commission must determine an accrual date for the cause of action. And, contrary to AT&T's assertions, that determination may appropriately be made in the context of a Motion for Summary Determination.

4 AT&T's attempt to alter the accrual date is contradicted by the fact that AT&T knew of these agreements and the facts leading to its complaint in the spring and summer of 2002 – any representations to the contrary by AT&T are patently false. Notably, AT&T's Petition does not contest the fact that it had actual knowledge of the terms and conditions of the agreements that form the basis of their complaint – AT&T only disputes the extent to which it would have

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been permitted to use those facts. Leaving aside that a plaintiff's ability to use the facts is not the relevant standard regarding the accrual date of a cause of action, it is also beyond any reasonable dispute that AT&T had *actual knowledge* of the relevant facts on a *non-confidential* basis in Washington in April 2002.[1]

A. The Commission's Decision was Proper; the Commission Must Decide All Disputed Material Issues

5 AT&T claims that the Commission's factual finding that the cause of action accrued on July 15, 2002, was both improper and unnecessary. AT&T claims that it was improper because it resolved a disputed issue of fact which should not be decided in a motion for summary determination and that 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.

6 AT&T is wrong on both counts. The date of the accrual of the cause of action has always been squarely at issue in this case, and it was proper and necessary for the ALJ and the Commission to decide it. Indeed, AT&T did not object to the resolution of that issue in the initial order, an order that decided the issue consistent with AT&T's position. AT&T did not even raise the issue of the propriety of deciding this issue until its Objection to Qwest's Motion for Leave to File a Reply to AT&T's Response to Qwest's Petition for Administrative Review.

7 AT&T did not raise this issue in its Petition for Administrative Review or its Response to Qwest's Petition, and it may legitimately be argued that AT&T waived that argument by failing to raise it in the two pleadings in which it was entitled to ask for that relief. Instead of arguing that this issue should not be decided on Summary Determination, AT&T spent the vast

[1] *See*, Attachment 6 to Qwest's January 13, 2006 Reply in this matter. Attachment 6 is a copy of Qwest's response to Commission Bench Request No. 046 in the 271 proceeding where Qwest provided copies of the unfiled agreements to the Washington Commission, as well as AT&T's attorneys, on a non-confidential basis in April 2002. Also, note AT&T's discussion of these issues in its May 13, 2002 Motion to the Colorado Commission, included as Attachment 4 to the Reply.

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majority of its Response to Qwest's Petition for Administrative Review supporting the ALJ's determination that the cause of action accrued in June 2004.

8 Qwest was legitimately entitled to dispute the ALJ's finding, as AT&T argued on review that the two-year limitations period applied, not the six-month period. As such, the date of the accrual of the cause of action is a material disputed issue before the Commission in this complaint. Under the APA, the Commission is required to decide all material issues presented to it. RCW 34.05.461(3) requires that both initial and final orders must "include a statement of findings and conclusions, and the reasons and basis therefor, on all the material issues of fact, law, or discretion presented on the record . . . ."

9 The Commission's Order No. 04 shares some characteristics of both an initial and a final order, but it is immaterial in any event what type of order it is because the requirements are the same for both. AT&T zealously argued for an accrual date of June 8, 2004. Qwest argued for an accrual date in early 2002. Because the issue of when the cause of action accrued was a disputed material issue, the ALJ and the Commission properly decided it.

10 Contrary to AT&T's assertion, this issue is not a pure issue of fact, but rather is at most a mixed question of fact and law, and it was perfectly appropriate for the Commission to decide it as it did. AT&T cannot create a disputed issue of material fact by merely asserting that a dispute exists. The Commission may, as courts do, inquire into the facts that illustrate the due diligence exercised by the complainant and may decide those factual issues as a matter of law if reasonable minds can reach but one conclusion on them. In fact, the Commission's decision regarding the accrual date is simply a decision that determines the legal import, i.e., the accrual date of the cause of action, of a number of facts that are not disputed. These facts include the availability of pleadings filed in the Minnesota proceeding – pleadings that detail the facts that form the basis for the cause of action – as well as AT&T's own statements in the 271

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proceeding in Washington, both occurring in the spring and summer of 2002.

B. The Accrual Date of the Cause of Action is not a "Genuine Issue of Material Fact"

11 Under WAC 480-07-380(2) 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."[2] AT&T argues that in this case, the accrual decision in Order No. 04 runs afoul of this standard by prematurely ruling on genuinely disputed issues of material fact. *Petition at ¶ 9.* However, AT&T is wrong – the Commission's decision on the accrual date of the cause of action is a question that may properly be decided on summary judgment.

12 The parties have agreed that a cause of action accrues when the complainant knew or reasonably should have known, in the exercise of due diligence, of the existence of facts supporting the cause of action. *Allen v. State*, 118 Wn.2d 753, 826 P.2d 200 (1992); *In re Estates of Hibbard*, 118 Wn.2d 737, 826 P.2d 690 (1992). The question of whether the complainant reasonably should have known of the facts is called the discovery rule.

13 In this case, the Commission analyzed the case under the discovery rule. This analysis gives AT&T the benefit of any doubt as to the accrual date, and it is not even necessary to engage in this analysis when, as described herein and in previously-filed pleadings in this case, there is undisputed evidence shows that AT&T had actual knowledge in 2002. AT&T did not have to do any additional "due diligence," and there no need to even analyze due diligence efforts, because AT&T knew of the agreements as a result of the Minnesota proceedings, as shown by its pleadings in the Washington 271 proceeding. Because AT&T knew of the agreements, it seems redundant or tangential to the real issue to talk about the exercise of due diligence and requests for discovery when it already knew of the agreements. Under the test of actual

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

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knowledge, AT&T knew of the agreements, so it is not necessary to apply the discovery rule, but even if the Commission does apply the discovery rule, that test is also easily satisfied.

14 If the Commission does engage in a due diligence analysis for purposes of the discovery rule, there are issues of fact involved. Nevertheless, this does not mean that summary judgment on the issue is always improper. Rather, factual questions may be decided as a matter of summary judgment if reasonable minds can reach but one conclusion on them.[3] And, the discovery rule does not require a plaintiff to understand all the legal consequences of the claim.[4]

15 AT&T states that Order No. 04 incorrectly 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). AT&T contends that that is an *assumption*, not a matter of undisputed fact, and thus is not a permissible basis on which to render a summary determination. AT&T is wrong.

16 The Commission properly concluded, as a matter of law, that the agreements would have been available to AT&T in Docket No. UT-033011. This conclusion is based on the Commission's rules regarding discovery (undisputed); the Commission's practices regarding public records requests (undisputed); and Qwest's ability to obtain those documents in that same docket (also undisputed). Furthermore, the relevant undisputed fact is that AT&T did *not* ask for the

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[3] Allen, at 760.

[4] *Reichelt v. Johns-Manville Corp.*, 107 Wn.2d 761, 772, 733 P.2d 530 (1987). "Mr. Reichelt would have us adopt a rule that would in effect toll the statute of limitations until a party walks into a lawyer's office and is specifically advised that he or she has a legal cause of action; that is not the law." It would seem a logical extension of this rule that any legal impediment that AT&T might have encountered in connection with using the facts (such as those associated with AT&T's claim of confidentiality) would also not operate to delay the accrual of the cause of action, especially where AT&T had it within its control to challenge confidentiality designations. But the Commission need not even decide that issue, as there are undisputed facts in evidence that show that the documents were *not* confidential. Further, even if they had been confidential, nothing would have prevented AT&T from using them in Docket No. UT-033011, the same docket in which they were at issue, and filing a cross claim based on them.

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documents (probably because it already had those agreements from the earlier 271 proceeding). But in any event, the Commission may properly conclude under the discovery rule that a reasonable person in the exercise of due diligence would have made that request. The Commission may further conclude, based on the undisputed factors noted above, that no reasonable person can doubt that the information would have been made available to AT&T in some fashion. AT&T cannot defeat a motion for summary determination by failing to exercise due diligence as required by the discovery rule, and then complaining that the results of that diligence, had it been performed, are disputed facts or mere speculation.

17 AT&T complains that the Order No. 04 cannot conclude find 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." *Petition at ¶ 9.* With all due respect, Qwest suggests that Order No. 04 was perfectly justified in its holding, and implicit in that holding is the conclusion that the ALJ was wrong. As noted above, and contrary to AT&T's assertions that there was no evidence in the record to support the conclusion that an AT&T request for the unfiled agreements would have been granted, there are substantial undisputed facts with regard to this issue, including the undisputed availability of the agreements to Qwest in September 2003.

18 It is telling that AT&T spends the vast majority of its Petition (¶¶ 9-12) disputing the availability of the agreements in Docket No. UT-033011, when in reality that docket did not even form the basis for the Commission's decision regarding the accrual date. AT&T's claims with regard to what was or was not available in Docket No. UT-33011 are a red herring. The Commission's conclusion in Order No. 04 was that the cause of action accrued in *July 2002*, well before Docket No. UT-033011 was even open. AT&T's Petition barely mentions the relevant proceeding, the 271 case, and ignores the undisputed facts that support the

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Commission's conclusion.

19 The Commission held that AT&T's cause of action accrued on July 15, 2002, when the Commission rejected pleas to pursue the asserted violations in the 271 docket (Docket Nos. UT-003022 and UT-003040). *Order No. 04, ¶ 20.* AT&T contends that the parties' dispute over the confidentiality of the documents illustrates that there remained a genuine issue of material fact and that the Commission should not have decided the issue on summary determination.

20 AT&T's argument misses the mark. Again, AT&T points back to the question of whether the documents were publicly available, but does not deny that AT&T knew of and had full access to those agreements. The Commission properly found that AT&T was in possession of all the facts upon which an action could have been brought.[5] Further, AT&T's own pleadings prove beyond any reasonable doubt or possibility of dispute that AT&T had available to it, in mid-2002, all the facts upon which it now bases its claim.

21 As the Commission correctly notes, by mid-2002 it was *common knowledge* that possible violations had occurred. AT&T does not dispute this fact, and indeed this fact is supported by AT&T's pleadings in the 271 proceeding. For example, on June 7, 2002, AT&T filed a brief with this Commission in the 271 proceeding, asking the Commission to further investigate what AT&T called the "Secret Agreements". AT&T summarized some of the terms of the agreements in its brief, described those terms as "preferential" and stated that it was clear that "Qwest had engaged in discrimination and preferential treatment of one group of CLECs over another".[6] As such, AT&T was demonstrably aware, as of June 7, 2002, of the existence of the agreements and the grounds upon which a complaint could be brought. As the Court in *Allen*

[5] Again, AT&T's claim that the documents were confidential, and therefore unusable, (though they were not) should not carry any weight, especially when AT&T took no action to challenge the perceived confidential designation.

[6] Attachment 5 to Qwest's January 13, 2006 Reply filed in this docket.

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noted, all that is necessary for the cause of action (in that case, a tort) to accrue is an awareness of the essential elements of the cause of action: duty, breach, causation, damages.[7] In this case, AT&T's brief in the 271 proceeding alone establishes that AT&T had an awareness of those elements. And that document is only one of many documents demonstrating that same awareness, documents that AT&T does not even bother to mention in its Petition.[8]

C. The Commission's Decision on the Accrual Date is Necessary in this Matter Because a Two-Year Statute of Limitations is Applicable.

22 Finally, AT&T argues that 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.[9] Thus, AT&T argues, the precise accrual date for AT&T's claims need not – and thus should not – be addressed.

23 Qwest believes that the Commission properly decided this issue, for the reasons stated above. Even if it were not strictly necessary to determine a specific accrual date for purposes of applying the six-month statute of limitations, it is necessary to determine such a date for the application of the two-year statute of limitations contained in Section 415 of the Communications Act. That issue is of course the subject of Qwest's current and still pending motion to dismiss the amended complaint. AT&T should not be permitted to relitigate the accrual issue, having already had it decided adversely once.

24 In addition, on June 7, 2006, AT&T commenced a civil action against Qwest in Superior Court, apparently attempting to avoid the application of a two-year statute of limitations under its own theory that the cause of action accrued on June 8, 2004. If the Commission declines to establish the accrual date of the cause of action, AT&T will no doubt attempt to litigate this

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7 *Allen* at 758, citing *Gevaart v. Metco Constr., Inc.*, 111 Wn.2d 499, 501, 760 P.2d 348 (1988).

8 For example, see Attachments 1 – 6 to Qwest's Reply.

9 *See* Order No. 4, ¶¶ 27-29.

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issue yet again in Superior Court. The Commission should not permit AT&T to ask the Commission to establish the date of accrual, and then, when the decision goes against it, to tell the Commission that the decision was unnecessary and should be undone, allowing AT&T to make its case again in a different forum.

III. CONCLUSION

25 For the foregoing reasons, Qwest respectfully submits that the Commission properly decided that AT&T's cause of action accrued no later than July 15, 2002. The Commission should not alter that decision.

DATED this 8th day of August, 2006.

QWEST

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