BEFORE THE
WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

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<tr><td>Washington Utilities and Transportation Commission,

Complainant,

v.

Advanced TelCom, Inc., et al.

Respondents.</td><td>)
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)</td><td>Docket No. UT-033011

XO MOTION TO DISMISS, OR ALTERNATIVELY, FOR SUMMARY DETERMINATION</td></tr>
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XO Washington, Inc. ("XO") hereby moves the Commission to dismiss, or alternatively to grant summary determination in favor of XO on, all claims against XO in the Commission's Amended Complaint dated August 15, 2003 ("Amended Complaint"). In support of its Motion, XO states as follows:

MOTION

1. The Amended Complaint includes multiple causes of action against Qwest Corporation ("Qwest") and several competing local exchange companies ("CLECs") because various agreements between Qwest and each CLEC were not filed with the Commission for approval. Specifically with respect to XO, the Amended Complaint alleges that XO violated both state and federal statutes by not filing the six billing settlement agreements between XO and Qwest listed in the appendices to the Amended Complaint (collectively "XO Agreements"). State statutes, however, do not require that XO file these agreements, nor are these agreements "interconnection agreements" that must be filed under the federal Telecommunications Act of 1996 ("Act"). Accordingly, the Commission should dismiss all claims against XO.

A. The Amended Complaint Fails to State a Claim Under State Statutes.

2. The Fourth Cause of Action in the Amended Complaint is for violation of RCW 80.36.150. Amended Complaint at 6-7. Subsection (1) of that statutory provision states, in relevant part,

> Every telecommunications company shall file with the commission, *as and when required by it*, a copy of any contract, agreement or arrangement in writing with any other telecommunications company, or with any other corporation, association or person relating in any way to the construction, maintenance or use of a telecommunications line or service by, or rates and charges over and upon, any such telecommunications line.

(Emphasis added.) The Amended Complaint alleges that XO violated this provision by not filing the XO Agreements. The Commission, however, has never required telecommunications companies to file these types of agreements with other telecommunications companies.

3. The only arguably applicable Commission rule is WAC 480-120-027,[1] which provides in subsection (3), "Contracts (including modifications to previously executed contracts) *for services which are governed by this section* may be offered subject to the requirements of this subsection" (emphasis added), which include filing a copy of the contracts with the Commission. The "services" governed by this section are the intrastate telecommunications services that XO offers to customers under its Washington price lists. None of the XO Agreements establish rates, terms, or conditions, or otherwise relate to, any such services. The Commission rules, therefore, did not require XO to file the XO Agreements, and XO could not, and did not, violate RCW 80.36.150 by not filing those agreements.

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[1] The Commission has replaced this rule with an amended rule on the same subject. WAC 480-80-241. The prior rule, however, was the rule in effect when the Agreements were executed and would be the rule governing any filing obligations. The analysis nevertheless would be the same under the

B. XO Did Not Violate Federal Law.

4. The remaining claims against XO in the Amended Complaint are the First and Second Causes of Action, which allege violations of Section 252 of the Act. Amended Complaint at 5-6. That section requires, "Any interconnection agreement adopted by negotiation or arbitration shall be submitted for approval to the State commission." 47 U.S.C. § 252(e)(1).[2] The Commission recognizes that the Federal Communications Commission ("FCC") considers an agreement to be an "interconnection agreement" that must be filed with state commissions as "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.'" Amended Complaint at 2 (quoting FCC order). None of the XO Agreements are "interconnection agreements" as the FCC has defined that term.

5. Most of the XO Agreements involve XO and Qwest affiliates and/or services provided in other states and thus did not give rise to any Commission filing obligation:

(a) One of two Confidential Billing Settlement Agreements dated and effective as of December 31, 2001, between Qwest Communications Corporation and XO Communications, Inc., concerns dedicated and switched access transport services that an XO affiliate was providing a Qwest affiliate outside of Washington;

(b) Another Confidential Billing Settlement Agreement dated and effective as of December

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current Commission rule.

[2] The Amended Complaint alleges a separate cause of action for violation of Section 252(a), but that subsection requires that negotiated agreements "shall be submitted to the State commission under subsection (e) of this section." To the extent that separate causes of action are appropriate, the analysis under both subsections of Section 252 is the same.

31, 2001, between Qwest Communications Corporation and XO Communications, Inc., concerns joint build projects between an XO affiliate and a Qwest affiliate in Texas;

(c) The Take or Pay Agreement dated December 31, 2001, is between Qwest Services Corporation and XO Communications, Inc., in which each of these companies commits to purchase a certain amount of services from the other company on a nationwide basis under existing service agreements or pay a shortfall charge; and

(d) The Amendment to Confidential Billing Settlement Agreement dated May 12, 2000, between U S WEST Communications, Inc., and NEXTLINK Communications, Inc., concerns a regional commitment plan under which XO and its affiliates purchase interstate tariffed private line circuits from Qwest.

None of these agreements create any obligation, or establish rates, terms, or conditions, for services that Qwest must provide under Sections 251 and 252 of the Act. None of these agreements, therefore, were required to be filed with the Commission.

6. The other two XO Agreements partially address Section 251 and 252 services in Washington but did not trigger any unfulfilled filing requirements. The only Washington-specific provision in the Confidential Billing Settlement Agreement dated and effective as of December 31, 2001, between Qwest and XO (and other XO subsidiaries) reduces the reciprocal compensation rates that Qwest had been paying to XO in Washington (page 8 of the agreement). Qwest and XO, however, amended their interconnection agreement in Washington to reflect this change. Qwest filed this Fifth Amendment with the Commission on April 8, 2002, in Docket No. UT-960356. As Staff recently recognized in its Motion to Dismiss Allegations Relating to December 27, 2001 Agreement

Between AT&T and Qwest, parties' filing obligations are satisfied if applicable terms and conditions in a settlement agreement are incorporated into an amendment to an interconnection agreement that is subsequently filed with the Commission. On that same basis, the allegations against XO with respect to this XO Agreement should be dismissed.

7. The final XO Agreement is the Confidential Billing Settlement Agreement dated May 12, 2000, between U S WEST Communications, Inc., and NEXTLINK Communications, Inc. In that agreement, the only Washington-specific issue was the charges that Qwest imposed on XO for collocation in some of its Washington central offices (pages 5-6). Consistent with FCC Rule 51.513(c)(6), the Parties' interconnection agreement deferred to Qwest's FCC tariff for applicable collocation rates as a proxy for Commission-approved rates. The settlement agreement resolved a dispute over the interpretation of Qwest's FCC tariff rate elements pending what the parties expected to be the imminent Commission establishment of collocation rates in Part A of Docket No. UT-003013. The Commission adopted permanent collocation rates in January 2001, and those rates were automatically incorporated into the interconnection agreement as required by the Commission. Under these circumstances, neither an amendment to the interconnection agreement nor the filing of the settlement agreement was necessary, and all claims against XO with respect to this agreement should be dismissed.

REQUEST FOR RELIEF

WHEREFORE, XO requests that the Commission grant the following relief:

A. An order from the Commission dismissing, or alternatively granting summary determination in favor of XO on, all claims against XO in the Amended Complaint; and

B. Such other or further relief as the Commission finds fair, just, reasonable, and sufficient.

DATED this 7th day of November, 2003.

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By ______________________________
Gregory J. Kopta