

**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

AT&T'S REPLY TO
QWEST'S ANSWER TO AT&T's
PETITION FOR REVIEW OF
ORDER NO. 4

AT&T Communications of the Pacific Northwest, Inc., TCG Seattle, and TCG Oregon (collectively "AT&T") provide the following Reply to the Answer of Qwest Corporation ("Qwest") to AT&T's Petition for Administrative Review of Order No. 4 ("Petition").

INTRODUCTION

1. AT&T's Petition seeks very limited relief. Specifically, once the Commission determined in Order No. 4 that AT&T's statutory claims were governed by a six-month statute of limitations, those claims were barred regardless of which party's proposed accrual date was accepted, for all proposed dates were more than six months prior to the filing of AT&T's original Complaint. Hence, the precise accrual date became irrelevant to the final result. AT&T

therefore asks the Commission, applying established concepts of judicial restraint,¹ to remove the ruling on the accrual date as being unnecessary to determine the timeliness of AT&T's claims.

2. In light of this limited request, Qwest's response is puzzling. Even if granted, the relief AT&T seeks would not change the ultimate result of Order No. 4 – the six-month limitations period still would apply and AT&T's statutory claims at issue still would be barred. In other words, Qwest still would succeed in dismissing those claims. Yet somehow that is not enough for Qwest, for it complains at length that it has a right to force the Commission to render an advisory opinion on the accrual date. As a prudent decisionmaker, however, the Commission should not render advisory rulings on unnecessary issues. Indeed, Qwest tellingly does not even attempt to argue that a determination of the accrual date is *necessary* to decide whether AT&T's statutory claims are barred under the six-month limitations period. That silence proves AT&T's point – there was no need to determine an accrual date in order to decide whether the claims were time-barred, and therefore the discussion of the accrual date should be removed.

ARGUMENT

3. Qwest argues that the Commission should deny AT&T's Petition for three reasons, none of which has anything to do with the actual basis for AT&T's Petition. In any event, all three theories are baseless.

4. Qwest first claims (at ¶ 3) that "AT&T did not timely object to the determination of the accrual date." Qwest contends that AT&T did not complain when the ALJ originally determined an accrual date of June 2004 in Order No. 3. But, of course, AT&T had no reason to

¹ *E.g.*, *Hayden v. Mutual of Enumclaw Ins. Co.*, 141 Wn. 2d 55, 68, 1 P.3d 1167 (2000) ("Principles 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.") (internal quotation marks omitted); *Cena v. Department of Labor and Industries*, 121 Wn. App. 915, 924, 91 P.3d 903 (2004) ("This court avoids deciding issues unnecessary to the resolution of a case.").

challenge that determination, for it was in AT&T's favor. Parties obviously do not waive positions by choosing not to challenge rulings on which they *prevail*.

5. Qwest next argues (at ¶ 8) that the accrual date is a “material” issue and that “the Commission is required to decide all material issues presented to it” under RCW 34.05.461(3). But even if one accepted, *arguendo*, Qwest’s reading of the rule, it just begs the question – was the accrual date a “material” issue, one that truly had to be decided, once the Commission decided that a six-month limitations period applied? Obviously not – and even Qwest does not contend that it was. Nothing in RCW 34.05.461(3) requires the Commission to decide non-material issues, and an issue can hardly be deemed “material” when it is not necessary to resolve the dispute before the Commission. AT&T’s Petition demonstrated that deciding on an accrual date was not essential to bar AT&T’s statutory claims once the Commission decided that a six-month limitations period applied. Since the accrual date was not necessary to the bottom-line result and ruling on the petitions for review of Order No. 3, it should not have been addressed at all.

6. Finally, Qwest argues that the accrual date is now a material issue with regard to AT&T’s Amended Complaint alleging a breach of contract. According to Qwest, even though the accrual date is irrelevant to any claim governed by the six-month limitations period, the accrual date has regained relevance with regard to AT&T’s breach of contract claim, which Qwest claims is governed by a two-year limitations period. Qwest is wrong. As demonstrated in AT&T’s response to Qwest’s petition for review of Order 4, the precise accrual date still does not matter. First of all, the Commission has already determined in Order 4 that AT&T’s contract claim is governed by a six-year limitations period, so that claim is timely whether it accrued in July 2002 (as Qwest claims) or June 2004 (as AT&T claims). Second, even if one accepted,

arguendo, Qwest's theory that the contract issue is federal and that a federal limitations period must apply, the period would be four years under 28 U.S.C. § 1658(a),² so AT&T's contract claim, filed in 2005, still would be timely regardless of whether it accrued in 2002 or 2004. Thus, even Qwest's new theory does not make the precise accrual date a material issue in determining the timeliness of AT&T's contract claim.

7. In light of the above, Qwest's contention that there can be no legitimate factual dispute about the actual accrual date is irrelevant. Even if there were no such factual dispute, the accrual ruling was still unnecessary and should be removed, an action that does no harm to Qwest. In any event, Qwest's analysis is wrong. While Qwest repeatedly and inaccurately claims that there are "undisputed" facts showing accrual in July 2002, the truth is that (i) there remains a concrete and legitimate dispute about when Qwest's secret interconnection agreements became publicly available in Washington (if, indeed, all of them have ever been made public); (ii) there remains a concrete factual dispute about whether AT&T could have obtained these contracts on a public basis earlier; and (iii) it is unclear whether the agreements alone would have been enough to put AT&T on notice of its claims in Washington (because not all of the secret discount agreements were in writing). At a minimum, these open factual questions about the proper accrual date in Washington show that it was improper to resolve that issue at the summary determination stage.

² Section 1658(a) establishes a four-year limitations period for claims under statutes enacted after 1990 that, like the 1996 Act, do not contain their own limitations period.

CONCLUSION

8. For the reasons stated herein and in AT&T's petition for review, the Commission should amend Order 4 to remove the discussion of the accrual date for AT&T's statutory claims, which is unnecessary to resolve the timeliness issue before the Commission.

DATED this 22nd day of August, 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 Castle