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Via E-mail and
Overnight Mail

Ms. Carole J. Washburn, Executive Secretary
Washington Utilities & Transportation Commission
1300 S. Evergreen Park Drive SW
P.O. Box 47250
Olympia, WA 98504-7250

Re: Docket No. UT-051682 – AT&T/TWTC Complaint
Response to AT&T's Supplemental Authority

Dear Ms. Washburn:

Qwest Corporation ("Qwest") responds here to the letter of October 30, 2006, filed in this docket by AT&T Communications of the Pacific Northwest, Inc., TCG Seattle, and TCG Oregon (collectively, "AT&T"). In that letter AT&T argues that a recent decision of the Eighth Circuit supports its opposition to Qwest's Motion for Summary Determination ("Motion").

AT&T's argument is incorrect, as can be seen from the face of the decision it relies on in its letter. AT&T's complaint relates to two interconnection agreements with its competitors that, as the FCC has found, terminated in 2002.[1] Qwest terminated the two agreements to eliminate disputes concerning this matter and bring itself into compliance with AT&T's theory of Section 252. Qwest has been in compliance ever since. Thus, the two interconnection agreements that underlie AT&T's complaint have been gone for over four years. And under applicable federal law, terminated interconnection agreements need not be on public file with state utility commissions under Sections 252(a)(1) and (e), and the voided terms need not be available under Section 252(i).

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[1] *See Application by Qwest Communications International Inc for Authorization to Provide In-Region, InterLATA Services in the States of Colorado, Idaho, Montana, Nebraska, North Dakota, Utah, Washington and Wyoming*, 17 FCC Rcd 26,303, at ¶ 491 (2002) ("FCC Section 271 Order")(rejecting arguments of AT&T and finding that it could grant Qwest's then pending application to provide long distance service in Washington and other states because Qwest had "demonstrated that the agreements mentioned by the parties [including the two at issue here] either were filed, expired, terminated, superseded" or otherwise did not present ongoing issues, and Qwest's response to AT&T was "persuasive.")

Insofar as AT&T believes it was harmed during the period prior to termination of the agreements, AT&T must admit that it could have filed a complaint against Qwest long ago. Indeed, in 2002 the FCC expressly contemplated that AT&T might do so in an order addressing this very matter.[2] However, AT&T chose not to do so, and the express two-year statute of limitations under Section 415 of the Federal Act expired in 2004. *See* 47 U.S.C. § 415. That was the end of any potential liability to Qwest in connection with these stale events. The world has moved on.

AT&T suggests that the Eighth Circuit's decision in *Connect Communications Corporation v. Southwestern Bell Telephone*[3] supports its argument that it can avoid the Federal statute of limitations by casting its claims under state law. But that case does no such thing. It simply stands for the principle that, where federal law has not spoken, state law governs the interpretation of an interconnection agreement provision. In *Connect* the court found that, at the relevant time, the FCC had expressly chosen not to preempt preexisting interconnection agreement terms dealing with compensation for in-bound ISP traffic. As a result, in that particular context, state law could govern the determination of the parties' intent.

This case is entirely different. Under Section 252(a) and (e), Qwest has had no obligation to have on file interconnection agreements that are terminated and not in existence. Under Section 252(i), AT&T has no right to terms of interconnection agreements that are not in effect. This is not a matter where state law is necessary to "interpret" an interconnection agreement. Federal law speaks clearly.

Similarly, the *Connect* decision in no way supports AT&T's argument against looking at the decision of the Oregon Public Utility Commission when that body addressed AT&T's identical attempt to evade Section 415 of the Communications Act. The Oregon Commission found that AT&T's claims were based on the allegation that "Qwest violated section 252(i), thereby depriving them of the opportunity to opt into more favorable contracts. *These claims squarely fall under federal law and the kinds of harms contemplated by the federal telecommunications framework*, so the breach of contract claims may not be made separately from the violations of federal law."[4]

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[2] *See id.* at ¶ 466 (noting that if parties such as AT&T believed that issues relating to these agreements remained, including issues related to the prior period before the agreements were terminated or filed, they could enforce their rights under the Federal Act through a complaint filed with the FCC itself or a state utility commission).

[3] Case No. 05-3698 (8th Cir. Oct. 27, 2006).

[4] *Oregon PUC Order* at 6. (Emphasis added).

This Commission can and should reach the same conclusion based on its own reading of the Federal Act and binding Ninth Circuit precedent. In *Connect* the court first found that the FCC and federal law expressly had left open for parties to negotiate, and state law to interpret, the specific and narrow question of whether, during the relevant period, ISP-bound traffic qualifies for reciprocal compensation.[5] In that context the court was prepared to defer to state commission findings that state law could answer that question differently as a matter of contract interpretation on an issue such as whether an agreement provision was "ambiguous."

But here the issue is entirely different. The Oregon Commission found as a legal matter that AT&T was asserting rights it did not have, at least following expiration of the federal statute of limitations, because federal law defines the rights and obligations of the parties on the relevant operative facts. Insofar as Qwest had any obligation to have an interconnection agreement on file, and AT&T had any rights to request its terms, those rights and obligations expired long ago when the agreements were terminated. The Oregon Commission was exactly right in finding that state law could not trump Section 252 on this fundamental legal issue.

AT&T's argument asks this Commission to engage in "reverse preemption" of federal law, and upset the balance created by the 1996 Act with regard to interconnection agreements. Nothing in the *Connect* decision supports AT&T's position; to the contrary, that order reaffirms that where federal law concerning interconnection agreements speaks, that law governs.

Sincerely,

Lisa A. Anderl

LAA/llw
cc: Counsel for AT&T (*via e-mail and U.S. Mail)*

[5] *Connect* at 3-6.