BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION, Petitioners, v. ADVANCED TELECOM GROUP, INC., et al, Respondents.	DOCKET NO. UT-033011 PUBLIC COUNSEL'S RESPONSE TO ALL DISPOSITIVE MOTIONS PENDING AS OF DECEMBER 5, 2003

I. INTRODUCTION

The Public Counsel Section of the Office of the Attorney General of Washington ("Public Counsel") hereby submits its response to all dispositive motions currently pending pursuant to the Washington Utilities and Transportation Commission's ("Commission") Amended Notice of Opportunity to Respond to Motions to Dismiss Allegations and Other Motions issued on November 10th, 2003.

The motions now pending raise 21 issues stated broadly, which the moving parties believe are dispositive as to some or all of the claims raised by the Commission Staff's Complaint. In order to more readily respond to these issues raised in the dozen motions pending Public Counsel will respond only to a subset of the issues raised rather than responding to each moving party in turn.

ATTORNEY GENERAL OF WASHINGTON
Public Counsel
900 4th Ave., Suite 2000
Seattle, WA 98164-1012
(206) 464-7744

II. ANALYSIS

A. Not all "Backward looking" settlements are exempt from the filing requirements of 47 U.S.C. §252(a)(1).

Fairpoint, SBC, Global Crossing, MCI, Qwest, and ATG claim that "backward looking" settlements need not be filed. The moving parties argue that settlement agreements between carriers which do not create an on-going obligation are not subject to the filing agreement found at 47 U.S.C. §252(a)(1). However, as counsel for Fairpoint noted, "not all settlement agreements are free from the filing requirements of §252(a)(1)." *Fairpoint Carrier Services, Inc.'s Motion for Summary Disposition, p. 5, line 21.*

It is Public Counsel's position that only those settlement agreements which, by their terms, **only** provide for "backward looking consideration" are exempt from the filing requirement of §252(a)(1) of the Telecommunications Act of 1996 ("Act"). Any settlement agreement which provides for a prospective or on-going (e.g. forward looking) obligation regarding a carrier to carrier relationship that in any way relates to interconnection is subject to the filing requirement of §252(a)(1) and must be filed with the Commission.[1] *In the Matter of Qwest Communications International Inc. Petition for Declaratory Ruling on the Scope of the Duty to File and Obtain Prior Approval of Negotiated Contractual Arrangements under Section 252(a)(1)*, WC Docket No. 02-89, Memorandum Opinion and Order, FCC 02-276, 17 FCC Rcd. 19,337, ¶ 8 (October 4, 2002) ("FCC Order"). A settlement which contains backward looking consideration does not thereby exempt an entire settlement agreement if the agreement also contains forward looking provisions subject to the obligations of §252(a)(1) and (e). Public Counsel urges the Commission to adopt this interpretation in its review of settlement agreements now before it in this proceeding and in its determination of whether a specific moving party has met its burden of persuasion for either summery determination under a CR56 analysis or for dismissal under a CR12(b)(6) analysis.

[1] The complete list of carrier duties and obligations is identified in 47 U.S.C. §251.

ATTORNEY GENERAL OF WASHINGTON
Public Counsel
900 4th Ave., Suite 2000
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B. The existence of Qwest's SGAT does not relieve carriers of their filing obligations under the Act.

Fairpoint and Qwest assert that the filing requirement does not apply if the essential terms of a given agreement are available through Qwest's Statement of Generally Acceptable Terms and Conditions ("SGAT") and can be found on Qwest's website. This argument is unsupportable as to agreements reached prior to July 10, 2002.

The filing and approval requirements found at §252(a)(1) and (e) of the Act do not contain an exclusion for these requirements when an incumbent carrier such as Qwest has an SGAT available to competing carriers seeking to establish an interconnection agreement with the incumbent carrier. Further, the record in this Commission's own §271 proceeding for Qwest makes it clear that many agreements which were secretly entered into and which were not filed with the Commission for its review and approval were entered into prior to the Commission's approval of Qwest's SGAT through the §271 process. *In the Matter of the Investigation Into U S WEST COMMUNICATIONS, INC.'s (nka Qwest) Compliance With Section 271 of the Telecommunications Act of 1996 and In the Matter of U S WEST COMMUNICATIONS, INC.'s Statement of Generally Available Terms Pursuant to Section 252(f) of the Telecommunications Act of 1996*, Docket Nos. UT-003022 and UT-003040, 39th Supplemental Order; Commission Order Approving SGAT and QPAP, and Addressing Data Verification, Performance Data, OSS Testing, Change Management, and Public Interest (July 1, 2002) ("WUTC 39th §271 Order"). In the §271 proceeding the Commission approved an effective date for Qwest's SGAT of July 10, 2002. *Id*, p. 13. To its credit, Qwest began filing prospectively all agreements as of April 17, 2002. *Id.*, p. 87. However, this does not cure the violations of federal and state law which occurred prior to this date. As noted by the Commission itself, one of the agreements had as an essential term Eschelon's agreement not to oppose Qwest's §271 filing. *Id.* Such secret agreements undermine the adversarial legal process upon which this Commission and our judicial system as a whole depend upon in order to develop facts and seek the truth. The post-

ATTORNEY GENERAL OF WASHINGTON
Public Counsel
900 4th Ave., Suite 2000
Seattle, WA 98164-1012
(206) 464-7744

facto availability of some or all essential terms in Qwest's SGAT does not excuse the misconduct alleged to have occurred prior to the Commission's approval of Qwest's SGAT. For the foregoing reasons Public Counsel urges the Commission to reject the arguments made on this issue by Fairpoint and Qwest.

Qwest also asserts that its posting on its website in September of 2002 of many of the agreements in question is grounds for dismissal of counts three through seven as to those agreements. *Motion to Dismiss and Motion for Summary Determination of Qwest Corporation*, p. 22. As discussed above, Qwest fails to acknowledge its alleged misconduct prior to September 2002, and seeks to excuse it on the grounds that it later cured the alleged violations of federal and state law which it and its agreement partners engaged in prior to these secret agreements coming to light. Further, Qwest ignores the fact that it did not proactively file these agreements, and publish them on its website out of abundance of caution, or of its own volition. Rather, Qwest's disclosure came only after extensive discovery and litigation before the Minnesota Public Utilities Commission where these agreements come to light. This Commission should take notice of these facts as well as the findings of its sister Commission in Minnesota which has completed its investigation of this matter. For the foregoing and previously stated reasons this Commission should reject the argument that Qwest is entitled to summary disposition as to claims three through seven as to certain agreements as a result of its post facto posting of certain agreements on its website.

Similarly, Integra asserts that "form" contracts need not be filed, replying upon ¶¶9 and 13 of the FCC Order. Public Counsel believes the proper interpretation of the FCC Order is that those provisions of an SGAT or generally available terms which have previously been approved by the Commission prior to execution of an agreement may not need to be filed. Thus, only those provisions of the SGAT or other form contracts which were entered into after Commission approval of those terms and conditions may be exempt from the interconnection filing requirements of the Act.

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Public Counsel
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C. The Commission Staff's interpretation of the filing requirements in §252(a)(1) of the Act are not contrary to public policy.

Fairpoint, SBC, and Qwest assert that the Commission Staff's interpretations of the filing requirements are contrary to public policy. The Commission Staff's interpretation of §252(a)(1) will not result in the improper "chilling effect" asserted by Fairpoint and SBC. Put simply, carriers are not free to enter into settlement agreements which violate state and federal law, or to violate state and federal law through their failure to file the settlement agreements with state commissions. If the Commission Staff's interpretation of §252(a)(1) has a "chilling effect" on carriers which seek to violate state and federal law in the future then such a "chilling" is entirely appropriate.

D. RCW 80.36.150 applies to these agreements and enforcement is available under RCW 80.04.380 through RCW 80.04.410.

Fairpoint, SBC, Eschelon, and Integra variously argue that the Commission cannot impose penalties for violations of RCW 80.36.150. If the Commission finds that RCW 80.36.150 is applicable to the agreements at issue in this docket then the Commission's statutory authority to impose penalties under RCW 80.04.380 through 80.04.410 will apply. It is the position of Public Counsel that the filing requirements of RCW 80.36.150 do apply to the agreements at issue in this docket and that the Commission has the statutory authority to enforce the requirements of RCW 80.36.150 including the imposition of penalties and referral for criminal prosecution of gross misdemeanors. These CLECs ignore the plain language of the statute and their assertion should be rejected.

E. Congress has implicitly delegated authority to impose penalties for violations of 47 U.S.C. §251.

Fairpoint, SBC, and Integra also argue that the Commission has no authority to impose penalties for failure to comply with §252 of the Act. Congress delegated to state Commissions the authority to review proposed interconnection agreements under sections 251 and 252 of the Act. Congress expressly reserved state authority to enforce state law at §252(e)(3). Further, the

ATTORNEY GENERAL OF WASHINGTON
Public Counsel
900 4th Ave., Suite 2000
Seattle, WA 98164-1012
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Congressional delegation of authority to state Commissions under the Act carries with it the implied authority to enforce the requirements delegated to the state Commissions. It would be contrary to public policy to assume that state commissions have the duty to review and approve (or disapprove) filed interconnection agreements, but have no authority to enforce the filing of the agreements they are required to review. The Washington state legislature recognized the Congressional delegation of authority and approved it at RCW 80.36.610(1).

Public Counsel respectfully urges the Commission to reject the moving parties' asserted interpretation of the Act and find that Congress has both expressly and implicitly authorized the Commission to require the filing of the interconnection agreements it is charged with reviewing.

F. 47 U.S.C. §252 requires that interconnection agreements be filed with state Commissions and all parties are subject to this requirement.

Fairpoint, SBC, Integra, McLeod, Global Crossing, and Eschelon argue that the filing requirements found at sections 251 and 252 of the Act only apply to incumbent carriers and do not create an affirmative duty upon competitive local exchange carriers. Public Counsel respectfully disagrees with these assertions and urges the Commission to find that the interconnection filing requirements of the Act apply equally to all parties to an agreement for the reasons set forth in *Commission Staff's Motion for Partial Summary Determination* filed on November 7, 2003 on this issue.

G. 47 U.S.C. §252(a)(1) and §252(e) refer to the same filing requirement.

MCI and Qwest argue that only one filing obligation exists which is covered by both sections 252(a)(1) and 252(e). Sections 252(a)(1) and 252(e), while referencing the same action (e.g. filing of an interconnection agreement), do contain additional independent standards and duties. It would be preferable to consider these two claims in the Complaint to be reflections of the same required action on the part of the carrier, while establishing independent sets of duties upon the carriers. The Commission at a minimum should preserve one or the other claim.

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Public Counsel
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Seattle, WA 98164-1012
(206) 464-7744

H. Interconnection agreements must be filed thirty days of execution.

MCI asserts that since §252 have no explicit deadline for filing a lack of timely filing is not actionable. The Commission should reject this argument as being counter to public policy. Under the interpretation urged by MCI no interconnection agreement ever need be filed since no deadline for filing is contained in §252 of the Act. This is an absurd result that should not be countenanced by the Commission. Section 252(a)(1) states that interconnection agreements "shall be submitted to the State commission under subsection (e) of this section." It is reasonable to infer that the obligation to file arises at the time an agreement is reached, in other words, at the time it is executed by all parties. Unless interconnection agreements are timely filed and reviewed by the Commission the intent of §252(i) to allow "opt-in" can not be properly served.

The Commission has recognized this in requiring interconnection agreements to be filed within thirty days of execution. WAC 480-07-640(2)(a)(i). Similarly, the Commission has established a process for seeking enforcement of interconnection agreements pursuant to its delegation of authority under the Act. WAC 480-07-650. MCI's assertions should be rejected.

I. 47 U.S.C. §252(i) creates a distinct obligation on the parties to an interconnection agreement.

Qwest asserts that count three of the Commission Staff complaint is duplicative of count two and does not state an independent claim for which relief can be granted. As Qwest correctly quotes, §252(i) requires carriers such as Qwest to "make available any interconnection, service, or network element provided under an agreement approved under this section…" However, Quest's interpretation of this statutory language would lead the Commission to believe that it is superfluous and merely duplicative of the carrier's obligations under §252(e). As is the case in many areas of the law, a single incident or act may create multiple liabilities. In this matter, the alleged failure to timely file interconnection agreements, and to attempt to keep some secret from regulatory authorities such as this Commission, can be both a violation of the obligation to file

ATTORNEY GENERAL OF WASHINGTON
Public Counsel
900 4th Ave., Suite 2000
Seattle, WA 98164-1012
(206) 464-7744

found at §252(a)(1) and §252(e) as well as the obligation to make the terms of the agreement available to other carriers under §252(i).

Public Counsel respectfully requests that the Commission find that count three in the Commission Staff's Complaint does state an independent cause of action for which non-compliant carriers may be found in violation.

J. Bankruptcy does not discharge WUTC claims or WUTC regulatory authority over pre-petition actions of ATG.

ATG asserts that its Chapter 11 bankruptcy proceeding bars any claim the WUTC may have against ATG. ATG fails to argue persuasively and specifically regarding the preclusive effect of its Chapter 11 bankruptcy. The Commission exercises police powers pursuant to Congressional and Washington State Legislative delegations of authority (including licensure). A regulatory complaint proceeding such as the one now before the Commission is not an executory contract to be assumed or rejected which bind the debtor once the bankruptcy plan is approved by the court. So long as ATG continues to operate as a carrier in the state of Washington it is subject to federal and state laws which vest regulatory oversight in the Commission (including authority to suspend ATG's license as a telecommunications carrier). ATG's reorganization pursuant to Chapter 11 of the Bankruptcy Code does not affect the Commission's authority to regulate ATG's actions as a carrier operating in the state of Washington, although it *may* affect the scope of potential remedies available to the Commission. For example, if the Commission finds that ATG is liable for violations of state and federal law for pre-petition actions it took, and also determines that it cannot assess penalties for such conduct, the Commission could take other action regarding ATG's status in Washington.

It is impossible to determine the legal basis of ATG's assertions given the lack of specific legal argument and the general nature of the assertions contained in ATG's *Motion for Summary Determination*, pp. 6-7. Without specific legal arguments the Commission cannot determine the precise nature of the claimed preclusion under the Bankruptcy Code.

ATTORNEY GENERAL OF WASHINGTON
Public Counsel
900 4th Ave., Suite 2000
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(206) 464-7744

Public Counsel respectfully requests that the Commission reject ATG's assertion that its bankruptcy reorganization acts as a *per se* bar to Commission enforcement of state and federal laws. ATG's motion fails to meet the standard for summary determination, e.g. that there is no dispute as to matters of fact and that it is entitled to prevail as a matter of law.

III. CONCLUSIONS

For the foregoing reasons Public Counsel urges the Commission to reject those requests for summary determination or for dismissal which are predicated upon an improper or improperly narrow interpretation of federal and state law.

Respectfully submitted on this 11th day of December, 2003.

CHRISTINE O. GREGOIRE
ATTORNEY GENERAL OF THE
STATE OF WASHINGTON

_____
ROBERT W. CROMWELL, JR.
Assistant Attorney General
Public Counsel Section
(206) 464-6595