BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION, Complainant, v. ADVANCED TELECOM GROUP, INC; ALLEGIANCE TELECOM, INC.; AT&T CORP; COVAD COMMUNICATIONS COMPANY; ELECTRIC LIGHTWAVE, INC.; ESCHELON TELECOM, INC. f/k/a ADVANCED TELECOMMUNICATIONS, INC.; FAIRPOINT COMMUNICATIONS SOLUTIONS, INC.; GLOBAL CROSSING LOCAL SERVICES, INC.; INTEGRA TELECOM, INC.; MCI WORLDCOM, INC.; McLEODUSA, INC.; SBC TELECOM, INC.; QWEST CORPORATION; XO COMMUNICATIONS, INC. f/k/a NEXTLINK COMMUNICATIONS, INC., Respondents	Docket No. UT-033011 ANSWER OF QWEST CORPORATION

With respect to the allegations contained in the separately numbered paragraphs of the Amended Complaint, Qwest Corporation ("Qwest") responds as follows:

1 Because paragraph 1 contains no legal or factual allegations, Qwest neither admits nor denies this paragraph.

I. INTRODUCTION

2 Qwest admits the legal allegations in paragraph 2 that under the Telecommunications Act of

Qwest
1600 7th Ave., Suite 3206
Seattle, WA 98191
Telephone: (206) 398-2500
Facsimile: (206) 343-4040

1996, 47 U.S.C. §§ 151 et seq., incumbent telecommunications companies (ILECs), such as Qwest, are required to interconnect with the facilities and equipment of other telecommunications carriers. 47 U.S.C. § 251. Qwest further admits that "[u]pon receiving a request for interconnection, services, or network elements pursuant to section 251 . . ., an incumbent local exchange carrier may negotiate and enter into a binding agreement with the requesting telecommunications carrier or carriers without regard to the standards set forth in subsections (b) and (c) of section 251." 47 U.S.C. § 252.

3 In further response to the legal allegations in paragraph 2, Qwest admits that if the carriers are unable to reach agreement through negotiation, the carrier or any party to the negotiation may request the state commission to arbitrate any open issues. *Id.* § 252(b).

4 Qwest denies the allegation in paragraph 3 that "*[a]ll* agreements, whether reached through negotiation or arbitration, are subject to state commission approval." 47 U.S.C. § 252(e) requires only "interconnection agreement[s]" to be submitted for approval to state commissions. Similarly, Section 252(h)'s requirement that state commissions make approved agreements available for public inspection applies only to interconnection agreements, and not to every agreement between an ILEC and a CLEC. Accordingly, Qwest denies that "*[a]ll* agreements must be filed with the state commission, and the state commission must make *all* final agreements available for public inspection."

5 In further response to the allegations in paragraph 3, Qwest admits that the Washington Utilities and Transportation Commission ("Commission") has issued an Interpretive and Policy Statement Regarding Negotiation, Mediation, Arbitration, and Approval of Agreements Under the Telecommunications Act of 1996; this Statement speaks for itself and therefore Qwest denies any suggestion that the Statement sets forth any filing requirement different than those set forth in the Telecommunication Act.[1]

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[1] *See In the Matter of Implementation of Certain Provisions of the Telecommunications Act of 1996*, Interpretive and Policy Statement Regarding Negotiation, Mediation, Arbitration, and Approval of Agreements Under the Telecommunications Act, Docket No. UT-960269 (June 28, 1996). This policy statement does not have the force and effect of law and cannot be the basis for the Amended Complaint, because the statement has not gone through

Qwest
1600 7th Ave., Suite 3206
Seattle, WA 98191
Telephone: (206) 398-2500
Facsimile: (206) 343-4040

6 In response to the allegations in paragraph 4, Qwest admits that in response to a petition for a declaratory ruling from Qwest Communications International Inc., the Federal Communications Commission ("FCC") held that 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 is an interconnection agreement that must be filed pursuant to section 252(a)(1)."[2] However, the FCC also found that while dispute resolution and escalation provisions are not *per se* outside the scope of Section 251(a)(1), such provisions need not be filed if they are otherwise known and available to CLECs, such as being posted on an ILEC's website.[3]

7 In further response to the allegations in paragraph 4, Qwest states that the FCC held that a settlement agreement providing for "backward-looking consideration," such as a cash payment, need not be filed, and that two categories of agreements "relating to" Section 251 matters need not be filed under Section 252: (i) orders and form contracts and (ii) agreements with bankrupt competitors.[4]

8 In response to the allegations in paragraph 5, Qwest admits that Section 252(i) requires local exchange carriers to "make available any interconnection, service, or network element provided under an agreement approved under this section to which it is a party to any other requesting telecommunications carrier upon the same terms and conditions as those provided in the agreement." 47 U.S.C. § 252(i). Accordingly, Qwest denies the allegations in paragraph 5 of the Amended Complaint to the extent they suggest that a requesting carrier is not required to be similarly situated to the contracting CLEC or is not required to accept

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rulemaking notice and comment. *See* RCW 34.05.230(1).

2 *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 Agreements under Section 252(a)(1)*, WC Docket No. 02-89, Memorandum Opinion and Order, FCC 02-276, 17 FCC Rcd. 19,337, ¶ 8 (Oct. 4, 2002) (emphasis that of the FCC).

3 *Id.* at ¶ 9.

4 *Id.* at ¶¶ 12-14.

Qwest
1600 7th Ave., Suite 3206
Seattle, WA 98191
Telephone: (206) 398-2500
Facsimile: (206) 343-4040

related terms and conditions.

9 In further response to the allegations in paragraph 5, Qwest admits that the Commission issued a First Revised Interpretive and Policy Statement regarding implementation of Section 252(i) of the 1996 Act.[5] However, Qwest states that this Statement speaks for itself and therefore denies the characterization of the Statement.

10 In response to the allegations in paragraph 6, Qwest states that RCW 80.36.186 speaks for itself, and therefore denies the characterization of that statute. However, Qwest admits that RCW 80.36.186 provides in part that "no telecommunications company providing noncompetitive services shall, as to the pricing of or access to noncompetitive services, make or grant any undue or unreasonable preference or advantage to itself or to any other person providing telecommunications service, nor subject any telecommunications company to any undue or unreasonable prejudice or competitive disadvantage."

11 In response to the allegations in paragraph 7, Qwest states that RCW 80.36.150 speaks for itself, and therefore denies the characterization of that statute. Qwest admits that RCW 80.36.150 provides in part that "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) RCW 80.36.150 also provides, "Such noncompetitive services shall be made available to all purchasers under the same or substantially the same circumstances at the same rate, terms, and conditions." The Commission has only required by rule the filing of retail contracts. *See* WAC 480-80-142

[5] *See In the Matter of the Implementation of Section 252(i) of the Telecommunications Act of 1996*, First Revised Interpretive and Policy Statement, Docket No. UT-990355 (April 12, 2000). This policy statement does not have the force and effect of law and cannot be the basis for the Amended Complaint, because the statement has not gone through rulemaking notice and comment. *See* RCW 34.05.230(1).

Qwest
1600 7th Ave., Suite 3206
Seattle, WA 98191
Telephone: (206) 398-2500
Facsimile: (206) 343-4040

and former WAC 480-80-330.

12 In response to the allegations in paragraph 8, with respect to the characterizations of the agreements identified in Exhibit A to the Amended Complaint, Qwest states that the agreements speak for themselves and therefore denies these allegations as stated.

13 Qwest denies the allegations in paragraph 8 that any agreements were filed in an untimely manner, and admits that the Commission approved the agreements that were filed for approval on August 22, 2002.

14 In response to the allegations in paragraph 9, Qwest admits that consistent with Commission rule, Washington public policy[6] and typical business practices, it entered into a number of agreements with other telecommunications companies whereby Qwest and the other companies agreed to settle outstanding disputes. Qwest denies the characterization of these agreements and states that the agreements speak for themselves.

15 Qwest admits the allegation in paragraph 9 that Exhibit B identifies settlement agreements entered into by Qwest and other telecommunications companies.

II. PARTIES

16 In response to the allegations in paragraph 10, Qwest admits that the Commission is an agency of the state of Washington, authorized by state law to regulate the rates, practices, accounts, and services of public service companies, including telecommunications companies, under the provisions of Title 80 RCW.

17 In response to the allegations in paragraph 10, Qwest also states that the requirements of Title 80 RCW only apply to local telephone services enumerated in 47 U.S.C. § 251(b) and (c), which are included in interconnection agreements required to be filed under 47 U.S.C. § 252(c), to the extent that Title 80 RCW does not conflict with the requirements of 47

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[6] *See* WAC 480-09-466 ("The Commission favors the voluntary settlement of disputes within its jurisdiction"). In addition, the Commission discussed the issue of settlement agreements between CLECs and Qwest in Qwest's 271 proceeding. In the 39th Supplemental Order in Docket Nos. UT-003022/003040, paragraph 291, the Commission observed that "it is not good public policy to prohibit companies from negotiating with each other to resolve disputes." *See also, e.g., State v. Noah*, 9 P.3d 858, 871 (Wash. Ct. App. 2000) ("The express public policy of the state is to encourage settlement. The law 'strongly favors' settlement.") (citations omitted).

Qwest
1600 7th Ave., Suite 3206
Seattle, WA 98191
Telephone: (206) 398-2500
Facsimile: (206) 343-4040

U.S.C. §§ 251 and 252.

18 In response to the allegations in paragraph 11, Qwest admits that it is a telecommunications company subject to regulation by the Commission pursuant to RCW 80.01.040(3).

19 In further response to the allegations in paragraph 11, Qwest states that the requirements of Title 80 RCW only apply to local telephone services enumerated in 47 U.S.C. § 251(b) and (c), which are included in interconnection agreements required to be filed under 47 U.S.C. § 252(e), to the extent that Title 80 RCW does not conflict with the requirements of 47 U.S.C. §§ 251 and 252.

III. JURISDICTION

20 In response to the allegations in paragraph 12, Qwest admits that the Commission has jurisdiction over this matter.

IV. FACTUAL ALLEGATIONS

21 In response to the allegations in paragraph 13, Qwest admits that it is a telecommunications company authorized to provide telecommunications service in the state of Washington.

22 In response to the allegations in paragraph 14, Qwest admits that it is subject to regulation under the provisions of Title 80 RCW, as well as under federal law, including the Telecommunications Act of 1996.

23 In further response to the allegations in paragraph 14, Qwest states that the Telecommunications Act of 1996 and federal rules and regulations promulgated according to that Act are the primary sources of authority to regulate competition in the provision of local telephone services.[7] The requirements of Title 80 RCW apply to local telephone services enumerated in 47 U.S.C. § 251(b) and (c), which are included in interconnection agreements required to be filed under 47 U.S.C. § 252(e), only to the extent that Title 80 RCW does not conflict with the requirements of 47 U.S.C. §§ 251 and 252.

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[7] "The question ... is not whether the Federal Government has taken the regulation of local telecommunications competition away from the States. With regard to the matters addressed by the 1996 Act, it unquestionably has." *AT&T Corp. v. Iowa Util. Board*, 525 U.S. 366, 379 n.6 (1999).

Qwest
1600 7th Ave., Suite 3206
Seattle, WA 98191
Telephone: (206) 398-2500
Facsimile: (206) 343-4040

24 In response to the allegations in paragraph 15, Qwest denies that every agreement identified in Exhibit A to the Amended Complaint is an agreement "for the provision of interconnection, services, or network elements." Moreover, Qwest denies that each agreement identified in Exhibit A to the Amended Complaint pertains to services provided or intended to be provided in the state of Washington. Qwest further denies that it was required by 47 U.S.C. § 252(e)(1) to file every agreement identified in Exhibit A.

25 In further response to the allegations contained in paragraph 15, Qwest denies that the agreements that were filed on August 22, 2002 were "not timely filed." After questions arose regarding the scope of the Section 252 filing requirement, Qwest petitioned the FCC for a declaratory ruling regarding the types of negotiated agreements between ILECs and CLECs that were within that filing requirement. Before the FCC issued its October 4, 2002 Order in response to Qwest's petition, Qwest filed a number of agreements for approval by the Washington Commission on August 22, 2002 as a precautionary measure to ensure that any and all agreements that arguably fell within the broadest possible definition of "interconnection agreement" were filed. Under the FCC's subsequently issued definition of interconnection agreement, some of the agreements filed on August 22, 2002 may not fall within the filing standard and did not need to be filed. Also, Section 252 does not contain any deadlines by which an agreement must be filed, and state law does not independently require the filing of wholesale contracts. In light of the absence of an articulated filing standard and Qwest's precautionary filing even before the FCC's Order, Qwest's filings were not "untimely."

26 In response to the allegations in paragraph 16, Qwest denies that it was required by 47 U.S.C. § 252(a)(1), (e) and RCW 80.36.150 to file every agreement identified in Exhibit A. Moreover, Qwest denies that each agreement identified in Exhibit A to the Amended Complaint pertains to services provided or intended to be provided in the state of Washington; agreements that do not pertain to Washington services are not required to be

Qwest
1600 7th Ave., Suite 3206
Seattle, WA 98191
Telephone: (206) 398-2500
Facsimile: (206) 343-4040

filed for approval with the Washington Commission.

27 In further response to the allegations in paragraph 16, Qwest denies that the agreements that were filed on August 22, 2002 were "not timely filed." 47 U.S.C. § 252(a)(1) is not an independent filing requirement; rather it states that agreements must be filed according to the requirement in 47 U.S.C. § 252(e). RCW 80.36.150 does not itself require that agreements be filed; rather it states that telecommunications agreements must be filed as provided by the rules promulgated by the Commission. Because the Commission has not promulgated any binding rules requiring the filing of interconnection or other wholesale agreements, or establishing a definition for the agreements that must be filed, there is no independent Washington state law requirement to file interconnection or other wholesale agreements. Thus, 47 U.S.C. § 252(e) contains the only legal requirement to file interconnection agreements. Additionally, Section 252 does not contain any deadlines by which an agreement must be filed and state law does not independently require the filing of wholesale agreements. As explained in paragraph 25 of this Answer, Qwest's filings in August 2002 were not untimely.

28 In response to the allegations in paragraph 17, Qwest admits that consistent with Commission rule, Washington public policy[8] and typical business practices, it entered into a number of agreements with other telecommunications companies whereby Qwest and the other companies agreed to settle outstanding disputes. Qwest denies the characterization of these agreements and states that the agreements speak for themselves.

V. FIRST CAUSE OF ACTION
(Violation of 47 U.S.C. § 252(a))

29 In response to the allegations in paragraph 18, Qwest hereby incorporates by reference and realleges, as though fully stated herein, its responses to the allegations contained in paragraphs 2-17 of the Amended Complaint.

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[8] *See supra* n. 6.

Qwest
1600 7th Ave., Suite 3206
Seattle, WA 98191
Telephone: (206) 398-2500
Facsimile: (206) 343-4040

30 In response to the allegations in paragraph 19, with respect to the characterizations of 47 U.S.C. § 252(a), Qwest states that the statute and interpretive rulings of the FCC speak for themselves and therefore denies these allegations as stated. However, Qwest admits that Section 252(a) provides in part that voluntarily negotiated interconnection agreements "shall be submitted to the State commission under subsection (e) of this section."

31 In response to the allegations in paragraph 20, Qwest denies that it violated 47 U.S.C. § 252(a) for each agreement identified in Exhibit A to the Amended Complaint by failing to submit the agreements to the Commission. Qwest further states that Section 252(a) contains a mandatory filing requirement only through explicit reference to Section 252(e), and therefore asserting violations of Section 252(a) in addition to violations of Section 252(e) is impermissibly duplicative.[9] Moreover, Qwest denies that each agreement identified in Exhibit A to the Amended Complaint pertains to services provided or intended to be provided in the state of Washington; agreements that do not pertain to Washington services are not required to be filed for approval with the Washington Commission.

32 In further response to the allegations in paragraph 20, Qwest also denies that it committed violations of 47 U.S.C. § 252(a) by failing to timely file the agreements marked with an asterisk. Section 252 does not contain any deadlines by which an agreement must be filed, and, as explained in paragraph 25 of this Answer, Qwest's filings in August 2002 were not untimely.

VI. SECOND CAUSE OF ACTION
(Violation of 47 U.S.C. § 252(e))

33 In response to the allegations in paragraph 21, Qwest incorporates by reference and realleges, as though fully stated herein, its responses to the allegations contained in paragraphs 2-17 of the Amended Complaint.

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[9] "The applicable rule is that, where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one is whether each provision requires proof of an additional fact which the other does not." *Blockburger v. United States*, 284 U.S. 299, 304 (1932).

Qwest
1600 7th Ave., Suite 3206
Seattle, WA 98191
Telephone: (206) 398-2500
Facsimile: (206) 343-4040

34 In response to the allegations in paragraph 22, with respect to the characterizations of 47 U.S.C. § 252(c), Qwest states that the statute and FCC interpretive rulings speak for themselves and therefore denies these allegations as stated. However, Qwest admits that Section 252(e) provides in part, "Any interconnection agreement adopted by negotiation or arbitration shall be submitted for approval to the State commission."

35 In response to the allegations in paragraph 23, Qwest denies that it violated 47 U.S.C. § 252(e) for each agreement identified in Exhibit A to the Amended Complaint by entering into agreements that were not approved by the Commission. Moreover, Qwest denies that each agreement identified in Exhibit A to the Amended Complaint pertains to services provided or intended to be provided in the state of Washington; agreements that do not pertain to Washington services are not required to be filed for approval with the Washington Commission.

36 In further response to the allegations in paragraph 23, Qwest also denies that it committed violations of 47 U.S.C. § 252(e) by failing to seek Commission approval in a timely manner regarding the agreements marked with an asterisk. 47 U.S.C. § 252(e) does not impose any time requirement for filing, and, as explained in paragraph 25 of this Answer, Qwest's filings in August 2002 were not untimely.

VII. THIRD CAUSE OF ACTION
(Violation of 47 U.S.C. § 252(i))

37 In response to the allegations in paragraph 24, Qwest incorporates by reference and realleges, as though fully stated herein, its responses to the allegations contained in paragraphs 2-17 of the Amended Complaint.

38 In response to the allegations in paragraph 25, with respect to the characterizations of 47 U.S.C. § 252(i), Qwest states that the statute and FCC interpretive rulings speak for themselves and therefore denies these allegations as stated. However, Qwest admits that 47 U.S.C. § 252(i) provides, "A local exchange carrier shall make available any

Qwest
1600 7th Ave., Suite 3206
Seattle, WA 98191
Telephone: (206) 398-2500
Facsimile: (206) 343-4040

interconnection, service, or network element provided under an agreement approved under this section to which it is a party to any other requesting telecommunications carrier upon the same terms and conditions as those provided in the agreement."

39 In response to the allegations in paragraph 26, Qwest denies that "by failing to obtain Commission approval of numerous agreements, Qwest committed multiple violations of 47 U.S.C. § 252(i) by failing to make available to other carriers the interconnection, service, or network elements provided under the agreements to any other requesting carrier." Section 252(i) of the Act permits CLECs to pick and choose only interconnection provisions approved and subject to Section 252(c). [10] Accordingly, Section 252(i) cannot have been violated with regard to agreements that are not "interconnection agreements" subject to Section 252(c). Moreover, in order to opt into an ongoing provision related to Section 251(b) or (c) services under Section 252(i), a CLEC must be similarly situated to the contracting CLEC and must accept all related terms. The Amended Complaint does not allege that any similarly situated CLECs were willing and able to accept all related terms in any agreement at issue. However, to the extent this paragraph implies that Qwest discriminated against any Washington CLECs, Qwest denies that allegation.

40 In further response to the allegations in paragraph 26, Qwest also denies that it committed violations of 47 U.S.C. § 252(i) "by failing to make available for other carriers in a timely manner the terms and conditions set forth in the agreements marked with an asterisk." Section 252(i) does not establish any time requirement for making terms and conditions available, and, as explained in paragraph 25 of this Answer, Qwest's filings in August 2002 were not untimely.

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[10] 47 U.S.C. § 252(i); Memorandum Opinion and Order, *In the Matter of Application of Qwest Communications International, Inc. for Authorization to Provide In-Region, InterLATA Services in the States of Colorado, Idaho, Iowa, Montana, Nebraska, North Dakota, Utah, Washington, and Wyoming*, WC Docket No. 02-314 (Dec. 20, 2002), at ¶ 488.

Qwest
1600 7th Ave., Suite 3206
Seattle, WA 98191
Telephone: (206) 398-2500
Facsimile: (206) 343-4040

VIII. FOURTH CAUSE OF ACTION
(Violation of RCW 80.36.150)

41 In response to the allegations in paragraph 27, Qwest incorporates by reference and realleges, as though fully stated herein, its responses to the allegations contained in paragraphs 2-17 of the Amended Complaint.

42 In response to the allegations in paragraph 28, with respect to the characterizations of RCW 80.36.150, Qwest states that the statute speaks for itself and therefore denies these allegations as stated. However, Qwest admits that RCW 80.36.150 provides in part that "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) RCW 80.36.150 also provides, "Such noncompetitive services shall be made available to all purchasers under the same or substantially the same circumstances at the same rate, terms, and conditions." Qwest denies that RCW 80.36.150 constitutes an independent requirement to file interconnection agreements with the Commission because there are no binding Commission rules promulgated under RCW 80.36.150 that require interconnection or other wholesale agreements to be filed.

43 In response to the allegations in paragraph 29, Qwest denies that it violated RCW 80.36.150 for each agreement identified in Exhibit A to the Amended Complaint. Moreover, Qwest denies that each agreement identified in Exhibit A to the Amended Complaint pertains to services provided or intended to be provided in the state of Washington; agreements that do not pertain to Washington services are not required to be filed for approval with the Washington Commission.

44 In further response to the allegations in paragraph 29, Qwest also denies that it committed

Qwest
1600 7th Ave., Suite 3206
Seattle, WA 98191
Telephone: (206) 398-2500
Facsimile: (206) 343-4040

violations of RCW 80.36.150 "by failing to file the agreements marked with an asterisk in a timely manner." RCW 80.36.150 does not impose any time requirement for filing, and, as explained in paragraph 25 of this Answer, Qwest's filings in August 2002 were not untimely.

45 In response to the allegations in paragraph 30, Qwest denies that it violated RCW 80.36.150 "by failing to file the agreements identified in Exhibit B with the Commission or failing to file the agreements in a timely manner; by failing to demonstrate that the agreements identified in Exhibits A and B are in the public interest; and/or by failing to make the rates, terms, and conditions of the agreements identified in Exhibits A and B available to companies similarly situated to the customers receiving agreement terms."

46 In further response to the allegations in paragraph 30, Qwest denies that the agreements in Exhibit B are required to be filed with the Commission pursuant to RCW 80.36.150. Qwest further denies that RCW 80.36.150 requires any showing by a carrier that an agreement is in the public interest, and therefore denies it was required under RCW 80.36.150 to demonstrate that the agreements identified in Exhibits A and B to the Amended Complaint are in the public interest. In addition, RCW 80.36.150 requires that only agreements that are required to be filed must be made available under the same conditions at the same rate, terms and conditions. Because Qwest contends that the agreements identified in Exhibits A and B to the Amended Complaint were not required to be filed under RCW 80.36.150, Qwest denies that these agreements were subject to the "opt in" provision of RCW 80.36.150 and denies that it violated that provision. Finally, the Amended Complaint does not allege that any similarly situated CLECs were willing and able to accept all related terms in any agreement at issue. However, to the extent this paragraph implies that Qwest discriminated against any Washington CLECs, Qwest denies that allegation.

47 In response to the allegations in paragraph 31, with respect to the characterizations of RCW 80.04.380, Qwest states that the statute speaks for itself and therefore denies these

Qwest
1600 7th Ave., Suite 3206
Seattle, WA 98191
Telephone: (206) 398-2500
Facsimile: (206) 343-4040

allegations as stated. Qwest further denies any need to calculate per day violations of RCW 80.36.150 because, for the reasons stated in paragraphs 42-46 above, that statute did not require filing of the agreements in question.

IX. FIFTH CAUSE OF ACTION
(Violation of RCW 80.36.170)

48 In response to the allegations in paragraph 32, Qwest incorporates by reference and realleges, as though fully stated herein, its responses to the allegations contained in paragraphs 2-17 of the Amended Complaint.

49 In response to the allegations in paragraph 33, with respect to the characterizations of RCW 80.36.170, Qwest states that the statute speaks for itself and therefore denies these allegations as stated. However, Qwest admits that RCW 80.36.170 provides in part that "No telecommunications company shall make or give any undue or unreasonable preference or advantage to any person, corporation or locality, or subject any particular person, corporation or locality to any undue or unreasonable prejudice or disadvantage in any respect whatsoever." Qwest also states that the requirements of RCW 80.36.170 only apply to services enumerated in 47 U.S.C. § 251(b) and (c), which are included in interconnection agreements required to be filed under 47 U.S.C. § 252(e), to the extent that RCW 80.36.170 does not conflict with the requirements of 47 U.S.C. §§ 251 and 252.

50 In response to the allegations in paragraph 34, Qwest denies that it committed violations of RCW 80.36.170 by entering into the contracts in Exhibit A. Qwest states further that many, if not most, of the services and rates contained in contracts in Exhibit A were provided to all CLECs or were available to all CLECs through other publicly available sources, such as filed interconnection agreements or Qwest's Washington SGAT. In those circumstances, no unreasonable advantage or preference was given to any person or corporation.

51 In response to the allegations in paragraph 35, Qwest denies that with respect to the contracts listed in Exhibit B to the Amended Complaint, Qwest committed any violations of RCW

Qwest
1600 7th Ave., Suite 3206
Seattle, WA 98191
Telephone: (206) 398-2500
Facsimile: (206) 343-4040

80.36.170 "by giving the companies to which it offered settlements an undue or unreasonable preference or advantage in resolving disputes while subjecting the companies that were not offered such agreements to undue or unreasonable prejudice or disadvantage." The Amended Complaint offers no facts that any Washington CLEC ever requested terms contained in the agreements listed in Exhibits A and B, even after the agreements were submitted to the Commission on August 22, 2002.

52 In further response to the allegations in paragraph 35, Qwest states that the contracts listed in Exhibit B settled individual, unique disputes between Qwest and the relevant CLECs. The settlement terms of the contracts in Exhibit B did not alter services or rates offered by Qwest to the respective CLECs such that Qwest was giving any CLEC an unreasonable preference or advantage. Qwest, like all businesses acting in accordance with Washington's stated public policy preference for encouraging settlements of disputes, routinely reaches compromises with its customers and competitors. Such individualized settlement agreements of specific historical disputes are not amenable to being offered to all customers or competitors on a universal basis.

53 In response to the allegations in paragraph 36, with respect to the characterizations of RCW 80.04.380, Qwest states that the statute speaks for itself and therefore denies these allegations as stated.

54 In further response to the allegations in paragraph 36, Qwest denies that it violated RCW 80.36.170.

X. SIXTH CAUSE OF ACTION
(Violation of RCW 80.36.180)

55 In response to the allegations in paragraph 37, Qwest incorporates by reference and realleges, as though fully stated herein, its responses to the allegations contained in paragraphs 2-17 of the Amended Complaint.

56 In response to the allegations in paragraph 38, with respect to the characterizations of RCW

Qwest
1600 7th Ave., Suite 3206
Seattle, WA 98191
Telephone: (206) 398-2500
Facsimile: (206) 343-4040

80.36.180, Qwest states that the statute speaks for itself and therefore denies these allegations as stated. However, Qwest admits that RCW 80.36.180 provides in part, "No telecommunications company shall, directly or indirectly, or by any special rate, rebate, drawback or other device or method, unduly or unreasonably charge, demand, collect or receive from any person or corporation a greater or less compensation for any service rendered or to be rendered with respect to communication by telecommunications or in connection therewith . . . than it charges, demands, collects or receives from any other person or corporation for doing a like and contemporaneous service with respect to communication by telecommunications under the same or substantially the same circumstances and conditions." Qwest also states that the requirements of RCW 80.36.180 apply only to services enumerated in 47 U.S.C. § 251(b) and (c), which are included in interconnection agreements required to be filed under 47 U.S.C. § 252(e), to the extent that RCW 80.36.180 does not conflict with the requirements of 47 U.S.C. §§ 251 and 252.

57 In response to the allegations in paragraph 39, Qwest denies that it committed numerous violations of RCW 80.36.180 by providing interconnection, services, or network elements through the contracts listed in Exhibit A, and by offering settlement agreements as demonstrated in Exhibit B, to certain and not to all other similarly situated companies. As explained in paragraph 50 above, many, if not most, of the services and rates contained in contracts in Exhibit A were provided by Qwest to CLECs or were available to all CLECs through other publicly available sources, such as filed interconnection agreements or Qwest's Washington SGAT. As explained in paragraph 52 above, the Exhibit B settlement agreements settled unique, individualized historical disputes between Qwest and the respective CLECs, that were consistent with the rates and services Qwest offered and provided to all CLECs. The Amended Complaint offers no facts that any Washington CLEC ever requested terms contained in the agreements listed in Exhibits A and B, even after the agreements were submitted to the Commission on August 22, 2002.

Qwest
1600 7th Ave., Suite 3206
Seattle, WA 98191
Telephone: (206) 398-2500
Facsimile: (206) 343-4040

58 In response to the allegations in paragraph 40, with respect to the characterizations of RCW 80.04.380, Qwest states that the statute speaks for itself and therefore denies these allegations as stated.

59 In further response to the allegations in paragraph 40, Qwest denies that it violated RCW 80.36.180.

XI. SEVENTH CAUSE OF ACTION (Violation of RCW 80.36.186)

60 In response to the allegations in paragraph 41, Qwest incorporates by reference and realleges, as though fully stated herein, its responses to the allegations contained in paragraphs 2-17 of the Amended Complaint.

61 In response to the allegations in paragraph 42, with respect to the characterizations of RCW 80.36.186, Qwest states that the statute speaks for itself and therefore denies these allegations as stated. However, Qwest admits that RCW 80.36.186 states that no telecommunications company providing noncompetitive services may "make or grant any undue or unreasonable preference or advantage to itself or to any other person providing telecommunications service, nor subject any telecommunications company to any undue or unreasonable prejudice or competitive disadvantage" with respect to those noncompetitive services. Qwest also states that the requirements of RCW 80.36.186 only apply to services enumerated in 47 U.S.C. § 251(b) and (c), which are included in interconnection agreements required to be filed under 47 U.S.C. § 252(e), to the extent that RCW 80.36.186 does not conflict with the requirements of 47 U.S.C. §§ 251 and 252.

62 In response to the allegations in paragraph 43, Qwest denies that it committed numerous violations of RCW 80.36.186 by giving any undue or unreasonable preference or advantage in the pricing of or access to noncompetitive services to the respective CLECs that were parties to the contracts in Exhibit A. Many, if not most, of the services and rates contained in contracts in Exhibit A were provided by Qwest to CLECs or were available to all CLECs

Qwest
1600 7th Ave., Suite 3206
Seattle, WA 98191
Telephone: (206) 398-2500
Facsimile: (206) 343-4040

through other publicly available sources, such as filed interconnection agreements or Qwest's Washington SGAT. The Amended Complaint offers no facts that any Washington CLEC ever requested terms contained in the agreements listed in Exhibits A and B, even after the agreements were submitted to the Commission on August 22, 2002. In those circumstances, no unreasonable advantage or preference in noncompetitive services was given to any person or corporation.

63 In response to the allegations in paragraph 44, Qwest denies that the Exhibit B contracts "subjected companies that were not offered such agreements, that were unwilling to make such agreements, or that could not make such agreements to an undue or unreasonable prejudice or disadvantage." The contracts listed in Exhibit B settled individual, unique disputes between Qwest and the relevant CLECs. The settlement terms of the contracts in Exhibit B did not alter services or rates offered by Qwest to the respective CLECs such that Qwest was giving any CLEC an unreasonable preference or advantage in noncompetitive services. Qwest, like all businesses acting in accordance with Washington's stated public policy preference for encouraging settlements of disputes, routinely reaches compromises with its customers and competitors. Such individualized settlement agreements of specific historical disputes are not amenable to being offered to all customers or competitors on a universal basis.

64 In response to the allegations in paragraph 45, with respect to the characterizations of RCW 80.04.380, Qwest states that the statute speaks for itself and therefore denies these allegations as stated. Qwest also denies that it violated RCW 80.36.186.

65 Paragraphs 46 – 55 of the Amended Complaint describe procedural matters for the conduct of the investigation into this matter, conduct of a hearing, and outlines the laws at issue in this matter. These paragraphs do not contain any factual or legal allegations that require an answer. Thus, Qwest neither admits nor denies paragraphs 46 – 55 other than to deny that it is liable for any penalty or other form of remedy whatsoever.

Qwest
1600 7th Ave., Suite 3206
Seattle, WA 98191
Telephone: (206) 398-2500
Facsimile: (206) 343-4040

66 Qwest denies any allegation in the Amended Complaint not expressly admitted above.

AFFIRMATIVE DEFENSES

Qwest asserts the following affirmative defenses:

67 The First, Third, and Fourth Causes of Action in the Amended Complaint fail to state a claim upon which relief may be granted.

68 The Second, Fifth, Sixth, and Seventh Causes of Action in the Amended Complaint fail to state a claim upon which relief may be granted with regard to agreements that are not within any federal or state filing requirement, including, without limitation, the agreements identified in Exhibit B to the Amended Complaint.

69 Qwest is not required to file agreements that do not create ongoing obligations related to Section 251(b) or (c) services. In particular, Qwest is not required to file (1) settlement agreements that resolve disagreements between ILECs and CLECs with purely backward-looking consideration; (2) orders and form contracts; and (3) agreements with bankrupt competitors.

70 Neither state nor federal law prohibits settlement agreements in which a CLEC agrees to dismiss or release its claims against an ILEC. Moreover, the law does not require that such settlement agreements be offered or acceptable to other CLECs.

71 Qwest is not required to file dispute resolution and escalation procedures that are generally available to carriers (*e.g.*, posted on Qwest's website).

72 Qwest is not required to file agreements that do not pertain to services in the state of Washington for approval with the Washington Commission.

73 In the absence of any articulated standard for the filing requirement contained in Section 252, Qwest's filings cannot be considered "untimely," nor can "untimely" filing constitute a separate and distinct claim. Moreover, Section 252 does not require filing of interconnection agreements or other wholesale agreements within any particular time.

Qwest
1600 7th Ave., Suite 3206
Seattle, WA 98191
Telephone: (206) 398-2500
Facsimile: (206) 343-4040

74 In the absence of any Washington state law or Commission rules regarding the scope of any filing requirement regarding interconnection or other wholesale agreements, Qwest's filings cannot be considered "untimely," nor can "untimely" filing constitute a separate and distinct claim. Moreover, Washington state law and Commission rules do not establish a deadline for making terms and conditions available to other carriers.

75 Qwest did not discriminate against Washington CLECs under federal or state law. In particular, many, if not most, of the services and rates contained in contracts in Exhibit A were provided to all CLECs or were available to all CLECs through other publicly available sources, such as filed interconnection agreements or Qwest's Washington SGAT.

76 Section 252(i) permits CLECs to pick and choose only interconnection provisions that are subject to Section 252(e).

77 In order to opt into an ongoing provision related to Section 251(b) or (c) services, a CLEC must be similarly situated to the contracting CLEC and must accept all related terms.

78 The Amended Complaint impermissibly multiplies statutory violations. *See Blockburger v. United States*, 284 U.S. 299, 304 (1932). In particular, Section 252(a) is co-extensive with Section 252(e), and any alleged violation may count as only one offense. In addition, Section 252(i) is dependent upon Section 252(e) approval. Thus, the First and Third Causes of Action in the Amended Complaint are duplicative.

79 Any imposition of penalties based on failure to file interconnection agreements at a time when no a clear filing standard existed would violate the fair notice doctrine and Qwest's due process rights.

80 Any remedies that extend benefits contained in unfiled agreements to other CLECs would violate the filed rate doctrine.

81 Any penalty must be proportional to the alleged offense. *See United States v. Bajakajian*, 524 U.S. 321, 324 (1998) ("The touchstone of the constitutional inquiry under the Excessive Fines Clause is the principle of proportionality: The amount of the forfeiture must bear

Qwest
1600 7th Ave., Suite 3206
Seattle, WA 98191
Telephone: (206) 398-2500
Facsimile: (206) 343-4040

some relationship to the gravity of the offense that it is designed to punish.").

82 Any penalty assessment must be based on conduct and harm occurring only in the state of Washington.

83 Any remedy cannot conflict with state and federal law prohibiting discrimination.

84 None of the federal or state statutes at issue states clearly either that they create a continuous duty or that a failure to comply gives rise to a penalty based on the length of time that the breach exists. As a result, penalties cannot be assessed on a daily basis. *See United States v. Trident Seafoods Corp.*, 60 F.3d 556 (9th Cir. 1995).

85 Qwest's filing of certain agreements on August 22, 2002 was a precautionary measure and does not constitute an admission that these agreements were required to be filed under Section 252 or state law.

DATED this 3rd day of September, 2003.

QWEST

Lisa A. Anderl, WSBA #13236
Adam Sherr, WSBA #25291
1600 7th Avenue, Room 3206
Seattle, WA 98191
Phone: (206) 398-2500

Todd Lundy
1801 California Street, Suite 4700
Denver, CO 80202
Phone: (303) 896-1446

HOGAN AND HARTSON

Peter S. Spivack
Martha Russo
555 Thirteenth Street, NW
Washington, DC 20004
Phone: (202) 637-5600

Cynthia Mitchell
1470 Walnut Street, Suite 200
Boulder, Colorado 80302
Phone: (720) 406-5300

Qwest
1600 7th Ave., Suite 3206
Seattle, WA 98191
Telephone: (206) 398-2500
Facsimile: (206) 343-4040