



the same time, it filed a motion for summary determination and dismissal of AT&T's complaint. Instead, Qwest proceeded with this litigation for a year and half, all the time knowing that the Colorado case also was pending. Now that the Commission has rejected Qwest's arguments for dismissal and determined that AT&T may proceed with its breach of contract claim, Qwest belatedly insists that the Commission must stay its hand under the "first filed" or "priority of action" doctrine. The Commission should recognize Qwest's request for a stay for what it is – simply a delay tactic to postpone the Commission's disposition of AT&T's complaint on its merits – and should summarily deny the request on waiver grounds.

3. Second, Qwest's long-delayed motion, if granted, almost certainly would lead to lengthy further delay in the disposition of AT&T's claim. The federal action that Qwest contends should have priority *is itself stayed – and, in fact, has been administratively closed –* pending the disposition of an interlocutory appeal to the Tenth Circuit. Entry of a stay in these circumstances would be unreasonable, and the ensuing delay would prejudice AT&T.

4. Third, Qwest's motion is procedurally improper in any event. Qwest purports to invoke the Commission's authority under WAC 480-07-385 to grant a "continuance, postponement, or extension of time." The Commission's rules expressly state that continuances will be granted "only to a specified date." WAC 480-07-385(4). Qwest's request for an open-ended delay plainly fails to conform to that rule and should be denied for that reason as well.

5. Fourth, wholly apart from Qwest's inexcusable delay in bringing this motion, its clear objective of simply compounding that delay with further delay in the federal court, and its failure to comply with the Commission's rules, Qwest's motion also fails on the facts and the law. To begin with, two of the plaintiffs in the case before this Commission – TCG Seattle and TCG Oregon – are not even involved in the Colorado litigation. Their claims obviously cannot

be subject to Qwest's motion. Moreover, Qwest's core contention that the claims at issue here are "substantially identical" to the counterclaims brought by AT&T in the Colorado litigation is plainly incorrect. In Colorado, AT&T has asserted counterclaims alleging that Qwest had committed various federal and state statutory violations. AT&T has no breach of contract claims in the Colorado lawsuit. Here, by contrast, AT&T's *only* claim is for breach of contract; it has no statutory claims in Washington. In short, because the two cases raise different claims and are premised on different facts, Qwest's motion should be denied.

## **II. BACKGROUND**

### **A. The Colorado Litigation.**

6. In May 2004, Qwest filed a complaint against AT&T in the United States District Court for the District of Colorado. *See Qwest Corp. v. AT&T Corp., et al*, Case No. 04-cv-909-EWN-MJW (D. Colo.) (attached to Qwest's Motion as Exhibit A). Qwest alleged that AT&T improperly avoided interstate access charges by using "Internet protocol" to transport long distance calls over its network. Qwest Motion ¶ 4. As Qwest acknowledges, "[s]hortly after Qwest filed its complaint, AT&T filed an Answer and Counterclaims." *Id.* ¶ 5. In its counterclaims, filed on June 25, 2004, AT&T asserted, among other things, that Qwest had committed various federal and state statutory violations, including violations of state statutory filing and nondiscrimination standards.

7. The district court entered an order granting summary judgment for AT&T on all of Qwest's claims. *Id.* ¶ 6. That interlocutory order has been appealed to the Tenth Circuit. *Id.* ¶¶ 7-8. The district court has taken no action on AT&T's counterclaims and, in fact, has stayed proceedings as to those counterclaims and "administratively close[d]" the case pending the disposition of the appeal. *Id.* ¶ 6; see also Order and Memorandum of Decision, *Qwest Corp. v.*

*AT&T Corp., et al.*, Case No. 04-cv-909-EWN-MJW, at 8-9 (D. Colo. Aug. 5, 2005) (attached as Exhibit 1).

**B. The Litigation in this Commission.**

8. This case has its genesis in Qwest's decision to give certain carriers sizable price discounts on a wide array of products and services that were not available to AT&T and other carriers. *Second Am. Cmplt.* ¶¶ 3, 20-21. On November 4, 2005, AT&T filed a complaint with this Commission. Qwest moved to dismiss AT&T's complaint on November 28, 2005. In the course of briefing that motion, AT&T requested that it be permitted to amend its complaint to assert a breach of contract claim relating to its rights to obtain intrastate services at the same prices that Qwest offers other carriers under the language of AT&T's interconnection agreements with Qwest. *See AT&T and TWTC Opposition to Qwest Motion for Summary Determination and Dismissal* ¶ 36 (Feb. 10, 2006).

9. The ALJ filed an initial order granting Qwest's motion and denying AT&T's request to amend its complaint to state a claim for breach of contract. *Initial Order Granting Qwest's Motion for Summary Determination*, Docket UT-051682, Order ¶¶ 24-25, 36 (Feb. 10, 2006). On June 8, 2006, the Commission issued an order agreeing in part and disagreeing in part with the ALJ's proposed order. *Interlocutory Order Reversing Initial Order; Denying Motion for Summary Determination or Dismissal*, Docket UT-051682, Order at ¶¶ 30-31, (June 8, 2006). The Commission held, in relevant part, that AT&T should be allowed to amend its complaint to assert a breach of contract claim. AT&T's amended complaint contains a single claim for breach of contract. Amended Complaint ¶¶ 27-30. That claim remains pending before the Commission, following the Commission's affirmance of the June 8 interlocutory order and its denial of Qwest's renewed motion for summary determination. *Order Affirming Interlocutory Order;*

*Allowing Amendment of Complaint; Denying Motion for Summary Determination*, Docket UT-051682, Order ¶¶ 50-66, 75-76 (Dec. 22, 2006).

### **III. ARGUMENT**

**A. Qwest’s Lengthy Delay in Waiting to Bring this Motion Until After the Commission Issued Substantive Rulings Constitutes a Waiver of Any Right to Request a Stay.**

10. Qwest argues in its Motion for Stay that this Commission cannot proceed to decision on AT&T’s Complaint at this time because AT&T’s counterclaims in the Colorado federal action involve “substantially identical claims” as the breach of contract claim at issue here. If that contention were true – and it is not, as AT&T demonstrates below – then Qwest should have brought this motion long ago. At the time AT&T filed its Complaint here, Qwest knew precisely what claims and counterclaims were at issue in the federal case. Despite this knowledge, Qwest filed a motion for summary disposition and dismissal of AT&T’s complaint in the Commission, arguing that the action was barred by a statute of limitations. Notably, Qwest did not argue that the “first filed” doctrine prevented the Commission from hearing the case (or considering Qwest’s substantive motion). Only *after* the Commission devoted considerable time and energy to this case and only *after* the Commission in fact issued a 15-page, 76-paragraph order refusing to dismiss AT&T’s Complaint did Qwest surface its priority of action argument.

11. Qwest’s actions over the last year and a half have been inconsistent with Qwest’s new position on the “first filed” doctrine, and Qwest therefore should be deemed to have waived any right to request a stay. While Qwest “was not required to consolidate all of its defenses into its summary judgment motion, it did argue for summary judgment on grounds unrelated to” the priority of action doctrine “without ever mentioning” that doctrine. *King v. Snohomish County*,

146 Wash. 2d 420, 425, 47 P.3d 563, 566 (Wash. 2002) (finding defendant waived affirmative defense by failing to raise it in motion for summary judgment and waiting until days before trial to assert it). Qwest's decision to hold back its priority of action argument until now, after its motion for summary determination and dismissal was denied, is an unreasonable delay tactic. *See id.* at 424, 47 P.3d at 565. The Washington Supreme Court has explained that "the doctrine of waiver is sensible and consistent with . . . our modern day procedural rules, which exist to foster and promote 'the just, speedy, and inexpensive determination of every action.'" *Id.* at 424, 47 P.3d at 565 (internal citations and quotation marks omitted). There is no reason to wait any longer to resolve AT&T's claims. *Cf. Butler v. Joy*, 116 Wash. App. 291, 296, 65 P.3d 671, 674 (Wash. App. 2003) ("If the defendant's assertion of the defense is inconsistent with his or her previous behavior, or if defendant's counsel has been dilatory in asserting the defense, insufficient service may be considered waived as a matter of law"). AT&T therefore requests that the Commission reject Qwest's priority of action argument and proceed with the case under the schedule established just last week. *See Prehearing Conference & Notice of Hearing*, Docket UT-051682, Order No. 07 (Feb. 27, 2007).

**B. Qwest's Request that The Commission Stay this Action in Deference to a Federal Action That is Both Stayed and Administratively Closed is Unreasonable.**

12. Qwest's manifest interest in stalling this case also is evident from the potential consequences of the stay that it has requested. Qwest seeks an open-ended stay or continuance "pending the outcome of the federal court's decision" in the Colorado federal case. *Motion for Stay* ¶ 12. In these circumstances, Qwest's proposal is tantamount to putting this case on a slow road to nowhere for an indefinite period, because the Colorado action not only is itself stayed, but actually has been "administratively close[d]" while the Tenth Circuit considers Qwest's

interlocutory appeal of the dismissal of its claims. Accordingly, if Qwest's motion is granted, resolution of AT&T's claim may be delayed by months or longer beyond the current schedule established last week by the Commission. Contrary to Qwest's assertion (at ¶ 1), AT&T would be "prejudiced" by such a turn of events.

**C. Qwest's Open-Ended Motion Is Inconsistent with the Commission's Rules.**

13. Qwest's request for an open-ended delay also must be rejected because it fails to comply with the Commission's rules. Qwest purports to invoke the Commission's authority under WAC 480-07-385 to grant a "continuance, postponement, or extension of time." But the Commission's rules expressly state that continuances will be granted "only to a specified date." WAC 480-07-385(4). Qwest's motion fails to reference any "specified date," but rather seeks an indefinite delay, in clear disregard of the rule.

**D. The "First Filed Doctrine" Does Not Apply Because AT&T's Breach Of Interconnection Agreement Claim Before This Commission Is Not Identical to AT&T's Statutory Counterclaims In Federal Court.**

14. Qwest's motion also fails on the merits. Under the "first filed" or "priority of action" doctrine, the court or administrative agency "which first gains jurisdiction of a cause retains the exclusive authority to deal with the action until the controversy is resolved." *City of Yakima v. Int'l Ass'n of Fire Fighters*, 117 Wash. 2d 655, 675, 818 P.2d 1076, 1086 (Wash. 1991). The rule applies, however, "only if the two cases involved are identical as to (1) subject matter; (2) parties; and (3) relief." *Id.* Qwest's contention that the "first filed" doctrine requires the Commission to stay consideration of AT&T's complaint until the Colorado federal court has decided AT&T's counterclaims is conspicuously lacking in analysis or legal support.

15. To begin with, the parties in the two cases are *not* identical. Two of the plaintiffs in the case before this Commission – TCG Seattle and TCG Oregon – are not involved in the Colorado litigation at all, and their claims thus cannot be subject to Qwest’s motion.

16. Nor, contrary to Qwest’s contention, are the claims “substantially identical” (*Motion for Stay* ¶ 1) as to any of the plaintiffs (AT&T Communications of the Pacific Northwest or either of the TCG entities). As the Commission has noted, the questions asserted in the operative Amended Complaint are “whether the parties entered a contract governing intrastate services, whether the contract contained a specific term assuring the CLECs that Qwest would offer it the best terms given to other carriers, and whether Qwest failed to meet that obligation.” *Order Affirming Interlocutory Order; Allowing Amendment of Complaint; Denying Motion for Summary Determination* ¶ 66. The dispute before the Commission thus turns on the specific terms of the agreement and whether AT&T or the TCG entities are entitled to damages as a result of Qwest’s failure to honor those terms. The Commission case has no separate claim for violation of any state or federal statute; it is a state contract case, pure and simple. By contrast, in the Colorado litigation, AT&T’s counterclaims have nothing to do with the contracts that are the subject of the litigation before the Commission. Rather, those counterclaims seek damages for violations of unspecified state statutes and federal statutes.

17. Finally, a stay would serve no purpose, because the result in Colorado could not conceivably affect the proper disposition in the Commission. Regardless of the Colorado court’s disposition of whatever state or federal claims ultimately may be litigated there, that disposition would not answer the question of whether Qwest complied with its interconnection agreements. Indeed, even if the Colorado court found that Qwest did not violate state or federal filing requirements or antidiscrimination laws, the Commission obviously still could determine – and



certainly would not be foreclosed from determining – that Qwest violated its interconnection agreements. Accordingly, Qwest cannot meet the prerequisites for the application of the “first filed” or “priority of action” doctrine. See *Order Affirming Interlocutory Order; Allowing Amendment of Complaint; Denying Motion for Summary Determination* ¶ 44 (“federal statutes relating to interconnection agreements preserve independent breach of contract actions under state law”).

#### IV. CONCLUSION

18. For the foregoing reasons, AT&T respectfully requests that the Commission deny Qwest’s Motion for Stay of Proceeding.

DATED this 8th Day of March, 2007.

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