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 QWEST CORPORATION'S REPLY TO AT&T'S ANSWER TO QWEST'S MOTION FOR STAY OF THE PROCEEDING PENDING THE OUTCOME OF CASE NO. 04-CV-909-EWN-MJW (D. COLO.)

I. ARGUMENT

1 Qwest Corporation ("Qwest") hereby submits its reply in this docket. AT&T Communications of the Pacific Northwest, Inc. and TCG Seattle (collectively, "AT&T") filed an answer to Qwest's Motion for Stay of Proceeding on March 8, 2007. Pursuant to WAC 480-07-370(1)(d)(2), Qwest submits this reply along with its motion for leave to file a reply. For the reasons stated below, Qwest's motion for stay should be granted.

2 AT&T presents four bases in its answer to deny Qwest's motion—three of them procedural and without merit, and the fourth substantive and also without merit.

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A. Qwest's motion is timely and Qwest has not waived its right to request a stay.

3 First, AT&T argues that Qwest's motion is untimely. However, AT&T cites no Commission rule that prohibits Qwest's request – indeed, a continuance may be granted at any time under appropriate circumstances. The fact that Qwest first sought to have this matter dismissed on statute of limitations grounds does not now mean that Qwest waived its right to request a stay under the circumstances presented here. Indeed, administrative efficiency dictates that the Commission not undertake a duplicative proceeding. Instead of trying to dictate how Qwest should best defend against the multitude of actions AT&T has filed against it, AT&T should take responsibility for the fact that it has not just duplicate, but triplicate actions against Qwest on the same subject matter, all under Washington law.[1] Just as the King County Superior Court has stayed the proceeding that AT&T filed there, in deference to the pendency of this proceeding, the Commission should stay this action, in deference to the pendency of a prior AT&T-filed case in Colorado that raises claims under the laws of every state in which Qwest operates, including the State of Washington.

4 A judicial body's authority to stay an action before it is part of its inherent powers. *King v. Olympic Pipe Line*, 104 Wash. App. 338, 350, 16 P.3d 45, 51 (2000) ("[T]he power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants. How this can best be done calls for the exercise of judgment, which must weigh competing interests and maintain an even balance," quoting *Landis v. N. Am. Co.*, 299 U.S. 248, 254-55 (1936)). There is no basis in Washington state law for characterizing the right to a stay as an affirmative defense that can be waived.

[1] In addition to its Petition here, AT&T has filed counterclaims addressing the identical "secret agreements" in *Qwest Corp. v. AT&T Corp., et al.*, Case No. 04-cv-909-EWN-MJW (D. Colo.), the case addressed in AT&T's Opposition, as well as in a civil complaint in King County (Washington) Superior Court styled *AT&T Communications of the Pacific Northwest, Inc. et al. v. Qwest Corporation*, 06-2-18625-7SEA.

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B. <u>The stay in the Colorado federal action will be lifted shortly and should not impact a stay of this proceeding by the Commission</u>.

5 AT&T further claims that granting Qwest's motion would lead to further delay in the disposition of AT&T's claim by making much of the fact that the Colorado federal action "*is itself stayed – and, in fact, has been administratively closed.*" AT&T Opposition at 2 (emphasis in original). As AT&T is fully aware, the Colorado action was stayed for the limited purpose of obtaining guidance from the United States Court of Appeals for the Tenth Circuit on a single question of law in an appeal that is fully briefed, was argued September 27, 2006, and has been given expedited status by the Court of Appeals. Moreover, that appeal also concerns an issue that is likely to be dispositive of the bulk of AT&T's claims. The stay will be lifted imminently, as soon as the Tenth Circuit decides the interlocutory appeal. "Administrative closure" is routine in the United States District for the District of Colorado which simply closes cases that have been stayed for administrative purposes, as reflected in the order imposing the stay pending interlocutory appeal:

> 6. All proceedings and deadlines, including discovery, is [sic] hereby STAYED.
>
> 7. The clerk is ordered to ADMINISTRATIVELY CLOSE this case until the Court of Appeals resolves this interlocutory appeal.

Order and Memorandum of Decision, August 5, 2005, attached to AT&T's opposition as Exhibit A (emphasis in original). Thus, the moment the Tenth Circuit decision is issued, the Colorado federal action will spring back to life without further action or motion from any party. AT&T's suggestion that the case is somehow dead and buried is groundless.

C. <u>Qwest's motion is not inconsistent with the Commission's rules.</u>

6 AT&T's third procedural argument is that Qwest's motion is procedurally improper under WAC 480-07-385 because it does not ask for a continuance "to a specified date" under WAC 480-07-385(4), but rather is impermissibly open-ended. However, AT&T misreads the rule – first, Qwest *has* specified a date – the date is the date on which a final order in the Colorado

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federal court proceeding is entered. Second, even if the Commission does not consider that to be a "specified date" under the rule, the Commission can and has taken action of this nature in other proceedings – for example, in *WUTC v. Cougar Ridge Water System*, Docket No. UW-040367; Order No. 06, the Commission suspended the procedural schedule in that case pending Grays Harbor Superior Court's decision on the merits of Cougar Ridge's petition for review of a previous Commission order in that docket. The Commission can and should stay the schedule in this case as well.

D. Qwest's motion is not substantively objectionable because AT&T has itself created the surfeit of litigation that gives rise to Qwest's stay motion by splitting overlapping claims into three different forums.

7 Finally, and most critically, AT&T's argument that the "first filed" doctrine should not be applied here because the claims in the Colorado action are not "substantially similar" is without merit. Indeed, it is AT&T through its filing of three cases based upon the same operative facts that has placed the Commission, the state and federal courts, and Qwest in the position of how to hear this one matter most efficiently.

8 By denying the request for stay here the Commission will reward AT&T for asking three different tribunals to decide in its favor on an identical set of operative facts split into transparently parallel claims in multiple venues. The question is not whether AT&T has brought precisely the same legal claims in each of the lawsuits; the question is whether AT&T's claims in each of these venues are based on a common set of operative facts. There is no question that they are. Granting Qwest's request will avoid duplicative burdens on the Washington and federal judicial systems as well as this Commission.

9 Judge Easterbrook once began an opinion in a claim splitting case with the following comments that could not be more relevant here:

> This court deprecates the practice of filing two suits over one injury—often with an argument based on state law presented to a state court, and an

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> argument arising under federal law presented to a federal court. Multiplication imposes needless costs on one's adversary, on the judicial system, and on other litigants, who must endure a longer queue. Plaintiffs hope that more suits will improve their chances: they seek the better of the outcomes.

Rogers v. Desiderio, 58 F.3d 299, 300 (7th Cir. 1995). The filing of multiple suits over one alleged injury arising from one alleged set of operative facts is *precisely* what AT&T has done over the past two and a half years.

10 In September, 2004, AT&T filed counterclaims in the Colorado federal case alleging, among other things, the following:

> This case involves misconduct by Qwest in entering into "secret agreements" by which Qwest gave certain favored carriers special discounts on monopoly services to buy their silence in state and federal regulatory proceedings.
>
> * * *
>
> Each state where Qwest operates . . . precludes Qwest from providing carriers with preferential treatment [citation omitted]. . . . Qwest violated these requirements by entering into secret agreements that provide certain carriers with preferential treatment.

In this proceeding, AT&T has alleged that *the identical conduct* – Qwest's alleged offering of the very same discounts to very same CLECs that were not offered to AT&T – constitutes a breach of contract. AT&T concedes as much in its Opposition: "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." AT&T Opposition, at 4. Finally, in yet another court action AT&T filed in King County Superior Court, AT&T has alleged breach of contract, fraud and statutory claims against Qwest for arising from "secret interconnection agreements with two telecommunications providers in Washington [that] permitted those providers to purchase certain products and services at discounted rates." Complaint in *AT&T Communications of the Pacific Northwest, Inc. et al. v. Qwest Corporation,* 06-2-18625-7SEA, at 2. Thus, the identical conduct relating

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to the identical agreements is at issue in Colorado, before this Commission, and in Washington state court. A more blatant case of claim splitting could hardly be conceived.

11 The fact that Qwest has long known what claims and counterclaims were at issue in the federal case is irrelevant, as is the fact that Qwest filed a motion to dismiss in this proceeding. Filing a motion to dismiss instead of seeking a stay was simply the most efficient way to proceed, which is the essential point of the "first filed" doctrine. Qwest was well within its procedural and substantive rights to attempt here to obtain *dispositive* relief from yet another manifestation of the same case before seeking to stay it. The fact that this Commission declined to dismiss the case in no way supports AT&T's position that it is entitled to continue imposing burdens on Qwest, other litigants, the courts, this Commission, and, ultimately, the taxpayers of Washington, by simultaneously pursuing multiple lawsuits regarding the same conduct.

12 There is no law supporting AT&T's argument that Qwest has waived its right to seek a stay based on the first-filed doctrine, or even that it is waivable. Indeed, since it goes to a court's jurisdiction over an action, *see Yakima v. Int'l Ass'n of Fire Fighters*, 117 Wash.2d 655, 675, 818 P.2d 1076, 1086-87 (Wash. 1991); *see also State ex rel. Greenberger v. Superior Court*, 134 Wash. 400, 401, 235 P. 957, 958 (Wash. 1925), there are strong reasons why it should not be waivable. Indeed in *Guillen v. Pierce County*, 127 Wash. App. 278, 110 P.3d 1184 (2005), the defendant moved to dismiss a case pursuant to the priority of action doctrine roughly four years after it was commenced in light of an earlier-filed parallel action. *Id*., 127 Wash. App. at 283, 110 P.3d at 1187. The trial court denied the motion to dismiss, and instead transferred the later-filed case to the court hearing the earlier case. *Id*. There was no indication that the court hearing the later-filed case found the argument had been waived and its actions were consistent with the application of the doctrine.

13 Finally, the fact that two of the plaintiffs in the case before this Commission – TCG Seattle and TCG Oregon—are not involved in the Colorado litigation is again irrelevant. The TCG

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entities are wholly-owned subsidiaries of AT&T, and their stake in the outcome of the Commission action is *de minimis* compared to the parent company.[2] These tails should not be allowed to wag the dog.

II. CONCLUSION

14 AT&T's Opposition posits technical and formulaic objections to the stay sought by Qwest and ignores the realities and expense of multiple legal proceedings and the equities that control here. It is painfully clear that AT&T's goal is to "pile on" legal action after legal action over not just similar, but *the same* circumstances and facts in venues across the United States.[3] AT&T will suffer no prejudice whatsoever to await the outcome of its claims in the first of these cases to be filed, the Colorado federal action, before a ruling is made by this Commission. But even setting aside the "first filed" doctrine in this case, this Commission need only exercise its discretion to grant a stay here to avoid the "multiplication [and] needless costs" that AT&T's rampant claim splitting has caused. For the reasons stated herein, Qwest respectfully requests that the Commission grant its Motion for Stay of Proceeding.

DATED this _____ day of March, 2007.

QWEST

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[2] Assuming AT&T's "damage" theory can even be applied here, which Qwest disputes, the TCG entities would stand to recover a fraction of the total amount AT&T is seeking.

[3] In addition to the three cases discussed here, AT&T filed actions against Qwest over the identical unfiled agreements before the utilities commission of Oregon, Iowa and Idaho, and in the state courts of Oregon, Utah, Wyoming, Nebraska, Iowa, Minnesota, and South Dakota; each state court action was removed to the respective federal courts in each jurisdiction. Some of these proceedings have already been dismissed.

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