BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION, Complainant, v. ADVANCED TELCOM GROUP, INC., et al, Respondents.	UT-033011 INTEGRA TELECOM OF WASHINGTON, INC.'S REPLY IN SUPPORT OF MOTION FOR SUMMARY DISPOSITION

COMES NOW Respondent, Integra Telecom of Washington, Inc. ("Integra"), by and through its attorneys of record, Richard A. Finnigan and B. Seth Bailey, attorneys at law, and files this Reply in Support of its Motion for Summary Disposition with the Washington Utilities and Transportation Commission (the "Commission").

INTRODUCTION

The Public Counsel Section of the Office of the Attorney General of Washington ("Public Counsel"), Commission Staff ("Staff"), Qwest Corporation ("Qwest") and Time Warner Telecom of Washington LLC ("Time Warner Telecom") each filed a response in opposition to one or more of the motions to dismiss or motions for summary determination filed by the parties on November 7, 2003. Additionally, AT&T Communications of the Pacific Northwest, Inc. and TCG Seattle

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("AT&T"), Advanced TelCom, Inc., dba Advanced TelCom Group ("Advanced TelCom") and Covad Communications Company ("Covad") each filed an answer in opposition to Staff's Motion for Partial Summary Determination. Of these briefs, Integra concurs in the answers of AT&T, Advanced TelCom and Covad. Additionally, the response of Time Warner Telecom has no bearing on Integra. As a result, this Reply is meant to address the legal arguments posed by the responses of Staff, Public Counsel and Qwest.

CAUSES OF ACTION

In Staff's Amended Complaint, it asserted that causes of action 1, 2 and 4 were applicable against Integra. See, generally, Amended Complaint. In its Response, Staff admitted that cause of action 4, citing violations of RCW 80.36.150, is not well-taken in this matter. See, Staff's Response, at 13, ¶ 25.[1]

Additionally, Staff admits that, with respect to causes of action 1 and 2, involving alleged violations of §§ 252(a) and (e): "A violation of one provision is a violation of the other provision[.]" See, Staff's Response, at 13, ¶ 25. Staff erroneously claims that the Commission should keep both causes of action, even though it admits the duplicative nature of causes of action 1 and 2.[2] Because Section 252(a) does not contain any filing requirement, but merely makes reference to Section 252(e), cause of action 1, concerning Section 252(a), should be dismissed. Thus, only cause of action 2, alleging a violation of 47 U.S.C. § 252(e), could legally be deemed a valid cause of action.

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[1] Despite this admission, Public Counsel still argued that the cause of action for violation of RCW 80.36.150 was valid. See, Public Counsel's Response, at 5. Clearly, Public Counsel's argument concerning the fourth cause of action is in error.

[2] Public Counsel also admits that these two causes of action are duplicative and states: "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, . . . The Commission at a minimum should preserve one or the other claim." See, Public Counsel's Response, at 6.

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However, as demonstrated below, Integra has not violated Section 252(e), and the filing requirements are not applicable to Integra in this matter for numerous reasons.

ARGUMENT

1. The CMDS Agreement is Not the Type of Agreement that Needs to be Filed with the Commission:

a. Staff is Mistaken About the Provisions of the CMDS Agreement:

Of Qwest, Public Counsel and Staff, the only one that addresses the actual facts of the CMDS Agreement[3] is Staff. Even then, Staff only devotes a single paragraph to the topic and only addresses the facts in a cursory manner. The only specific allegation Staff makes in this regard is as follows:

> **Agreement No. 25 (Integra and Qwest):** This agreement provides for facilities decommissioning without charge. Facilities decommissioning relates to collocation of facilities and is a typical subject of interconnection agreements and is the subject of interconnection agreement amendments. The fact that it may occur only one time does not mean that it is not ongoing. It is a provision that should be available to requesting carriers.

See, Staff's Response, at 17, ¶ 35.

Factually speaking, Staff is simply wrong. The CMDS Agreement does not pertain to or involve decommissioning of facilities in any way. It is strictly a form CMDS agreement that is available to any similarly situated CLEC. No one – Staff, Public Counsel or any of the other Respondents – have made any argument that would demonstrate that the CMDS Agreement is an "interconnection" agreement in any way.

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[3] A copy of the "Agreement for CMDS Hosting and Message Distribution for CLECs (In-Region with Operator Services) and Addendum to CMDS Hosting and In-Region Message Distribution Agreement" was attached to Integra's Motion for Summary Disposition at Exhibit 1. That Exhibit 1 will be referred to herein as the "CMDS Agreement."

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b. CMDS agreements are Not "Interconnection Agreements" Because they Predate the Act:

CDMS agreements have existed for many years. They existed prior to the enactment of the Telecommunications Act of 1996 (the "Act") that established the procedure for entering into interconnection agreements and the filing requirements that attend interconnection agreements. Neither Staff nor Public Counsel has claimed that the CMDS Agreement is materially different in any way from the CMDS agreement available on Qwest's web site.

c. The Timing of When Integra Opted Into Qwest's Form CMDS Agreement is Irrelevant:

Public Counsel makes the argument that if Integra opted into the form CMDS agreement prior to the date on which the Commission approved Qwest's SGAT, then Integra should not be allowed to rely on the fact that the CMDS Agreement is a form agreement available on Qwest's web site. See, Public Counsel's Response, at 4. Thus, under Public Counsel's rationale, Integra would not be entitled to rely on the fact that the CMDS Agreement is and was a form agreement available to all similarly situated CLECs because Integra opted into the CMDS Agreement on February 1, 2001, before the Commission approved Qwest's SGAT on July 10, 2002.

However, Public Counsel's argument misses the mark. Further, as demonstrated in Integra's Motion for Summary Judgment, the CMDS Agreement is not part of Qwest's SGAT. It is a separate agreement that is also available on Qwest web site. Thus, regardless of when the Commission approved the SGAT, the CMDS Agreement is not the type of agreement that needed to be filed with the Commission. See, Integra's Motion for Summary Disposition, at 3 (stating that under the SGAT, CMDS services are not "interconnection" services).

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d. Public Counsel's Argument Concerning the Fact that Integra Opted Into the CMDS Agreement is Illogical:

It is illogical to argue that Integra cannot rely on the fact that the CMDS Agreement is a form agreement available to all similarly situated CLECs when Integra was one of the "similarly situated CLECs" that decided to opt into the publicly available CMDS agreement. Likewise, regardless of whether the CMDS Agreement was available through Qwest's web site when Integra opted into it, or through some other means such as fax or mail, it is still a form agreement that Integra (and any other similarly situated CLEC) could (and at least in the case of Integra, did) adopt by "filling in the blanks." See, Declaration of Patti Bowie, accompanying Integra's Motion for Summary Disposition.

Thus, aside from all of the legal arguments in Integra's Motion for Summary Disposition, and those provided below, the facts demonstrate that the CMDS Agreement is not the type of agreement that the Commission, the Federal Communications Commission ("FCC") or Congress intended to be filed with the state commissions.[4] It is the epitome of a "form" agreement that does not involve interconnection services and can be adopted by any CLEC because it is and has been publicly available from at least the time that Integra opted into it. As a result, based solely on the undisputed facts, Integra is entitled to prevail on summary disposition.

[4] 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), Memorandum Opinion and Order, FCC 02-276, 17 FCC Rcd. 19,337, ¶ 8 (Oct. 4, 2002) (the "FCC Filing Requirements Order").

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2. There is No Mandatory Timeframe in Which to File Interconnection Agreements:[5]

Both Staff and Public Counsel admit that neither RCW 80.36.150 nor 47 U.S.C. § 252 contain any explicit timeframe delineating when an interconnection agreement must be filed for approval with the Commission. See, Staff's Response, at 12; Public Counsel's Response, at 7. Indeed, Staff has admitted that RCW 80.36.150 is inapplicable in this case. See, Staff's Response, at 13. However, Staff and Public Counsel argue that the Commission should still find some "implicit" timeframe under which an interconnection agreement must be filed in an effort to preserve a cause of action under either Section 252(a) or Section 252(e).

Even if the Commission has been delegated the legal authority to enforce a violation of 47 U.S.C. § 252,[6] the lack of an established timeframe in which an interconnection agreement must be filed is as fatal to the first and second causes of action (asserting violations of Section 252(a) and Section 252(e)), as it is to the fourth cause of action (asserting a violation of RCW 80.36.150). As Integra demonstrated in its Motion for Summary Disposition, the Commission's Policy Statements[7] are not binding and cannot form the basis of a cause of action against Integra. It is only these Policy Statements that outline a specific timeframe in which an interconnection agreement must be filed

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[5] This argument presupposes that the CMDS Agreement was an "interconnection agreement" that needed to be filed with the Commission. As demonstrated above, it was not an interconnection agreement and did not need to be filed with the Commission. Thus, this argument is made in the alternative to the other arguments presented above and in Integra's Motion for Summary Disposition.

[6] In Integra's Motion for Summary Disposition, Integra argued that the Commission does not have the legal authority to enforce a violation of 47 U.S.C. § 252 – assuming a violation exists in Integra's case (which it does not). See, Integra Motion for Summary Disposition, at 13-14. Even if this position is incorrect, the Commission is still unable to enforce a violation of 47 U.S.C. § 252 because of the lack of a specific timeframe delineating when an agreement must be filed.

[7] See, In the Matter of Implementation of Certain Provisions of the Telecommunications Act of 1996, Interpretive Policy Statement Regarding Negotiation, Mediation, Arbitration, and Approval of Agreements Under the Telecommunications Act, Docket No. UT-960269 (June 28, 1996); 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) (collectively the "Policy Statements").

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with the Commission. Because the Policy Statements are not binding against Integra, RCW 80.36.150 cannot stand as a cause of action in this matter. There is no justifiable reason why Staff should concede that RCW 80.36.150 is inapplicable to this case, and not concede that 47 U.S.C. § 252 is inapplicable for the same reason.

The Commission could have adopted rules requiring interconnection agreements to be filed within a specific timeframe under 47 U.S.C. § 252.[8] The Commission could have made the Policy Statements into binding rules. It did not do so. The Commission cannot now manufacture an "implicit" timeframe and impose sanctions against Integra based on this "implicit" timeframe when the Commission has failed to carry out the necessary steps to impose such timeframes. Although the Commission may attempt to remedy this deficiency by adopting specific rules related to the timeframe in which to file interconnection agreements for the future, it cannot penalize Integra for failing to follow rules that never existed.

3. The ILEC Bears the Sole Responsibility to File Interconnection Agreements:[9]

Staff, Public Counsel and Qwest all assert varying arguments that both CLECs and ILECs have an equal duty to file interconnection agreements under 47 U.S.C. § 252(a) and (e). As demonstrated in this Reply, and in Integra's Motion for Summary Disposition, the Commission need not even reach these arguments as they relate to Integra. However, should the Commission feel the need to address this issue, the applicable law demonstrates that Qwest, and not Integra, had the responsibility to file the Settlement Letter – assuming that it needed to be filed at all.

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[8] This is assuming the Commission's authority exists.

[9] Like the argument above concerning the lack of a specific timeframe in which to file an interconnection agreement under 47 U.S.C. § 252, this argument is made in the alternative because, as demonstrated, the CMDS Agreement was not an "interconnection agreement" that needed to be filed with the Commission.

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Public Counsel states without any authority that it simply "disagrees" with Integra that the ILEC, and not the CLEC, has the responsibility to file an interconnection agreement with the Commission. The Commission cannot rely on this type of an argument to defeat a Motion for Summary Disposition.[10] See, CR 56; WAC 480-09-426.

Staff asserts arguments that fail to make logical sense in an effort to rebut the claims of the Respondents that the ILEC bears the sole burden to file any interconnection agreement. For example, Staff claims that if CLECs are not obligated to file interconnection agreements, then the agreements will not be filed and other competing CLECs will not be able to opt into the provisions of the interconnection agreements because the competing CLECs will not know about the interconnection agreements. See, Staff's Response, at 4-5. This argument illogically assumes that the ILEC does not file the interconnection agreement. Integra has stated that if the Settlement Letter can be considered an interconnection agreement, Qwest should have filed it. Thus, Staff's argument does not actually address whether Integra, as the CLEC, should have filed the Settlement Letter, just that someone should have.

Qwest devotes its entire Response to the single issue of whether both ILECs and CLECs have the responsibility to file interconnection agreements. Qwest claims that requiring both parties to bear the responsibility for filing interconnection agreements is safer because it:

> creates a system of checks and balances that increases the likelihood that the interconnection agreements are filed. If one party fails to file an agreement, it would still be available to other CLECs because the other party to the agreement would be required to file it.

Qwest's Response, at 3. In reality, the opposite of Qwest's claims is true. When both parties share the obligation to file an interconnection agreement, there is a tendency to believe that the other party

[10] Indeed, the vast majority of Public Counsel's Response fails to meet the necessary level of specificity to make it of value to the Commission under the applicable legal standards. CR 56.

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will handle the matter. Conversely, if both parties are overzealous, the Commission runs the risk that both parties will mistakenly assume the responsibility thus burdening the Commission with multiple filings of the same agreement. In other words, the likelihood of error is increased, not decreased, by having both the ILEC and the CLEC responsible for filing interconnection agreements.

Qwest's other arguments do not add up, either. For example, Qwest claims that placing the obligation to file an interconnection agreement on both parties will prevent the CLEC from later claiming that there was a "side" agreement that contradicts some term in the interconnection agreement. See, Qwest's Response, at 7. This argument does not make sense for several reasons. First, each interconnection agreement of which Integra is aware contains a robust "entire agreement" clause making any allegation of a "side" agreement that contradicts the interconnection agreement virtually impossible without evidence of actual fraud. Second, even if "side" agreements were possible, requiring both parties, instead of just the ILEC, to file the interconnection agreement would not make these side agreements any less likely.

In short, there is no rationale or legal basis to claim that the Commission or competing CLECs are any better off if both ILECs and CLECs have the responsibility to file interconnection agreements. To the contrary, from a practical standpoint, this is likely to lead to further confusion and additional errors. The better policy is to require the ILEC to bear the responsibility for filing an interconnection agreement. This will ensure that both parties are neither lax nor overzealous. Likewise, it will make it very clear which company the Commission should approach in the event that there are future failures to file an interconnection agreement.

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CONCLUSION

Both the facts and the law relating to the CMDS Agreement demonstrate that Integra is entitled to summary disposition.

WHEREFORE, Integra prays that the Commission enter an Order granting Integra's Motion for Summary Disposition and dismissing Integra from any further obligations under these proceedings.

RESPECTFULLY SUBMITTED, this 6th day of January, 2004.

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CERTIFICATE OF SERVICE

UT 033011

I hereby certify that the foregoing Integra Telecom of Washington, Inc.'s Reply in Support of Motion for Summary Disposition has been sent to the following parties by e-mail and by US Mail, postage prepaid, except where otherwise noted.

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Dated this 6th day of January, 2004.

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