BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

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

COMES NOW Respondent, SBC Telecom, Inc. ("SBC"), 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, SBC concurs in the answers of AT&T, Advanced TelCom and Covad. Additionally, the response of Time Warner Telecom has no bearing on SBC. 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 SBC. 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, SBC has not violated Section 252(e), and the filing requirements are not applicable to SBC in this matter for numerous reasons.

ARGUMENT

1. The SBC/Qwest Settlement Letter is Not the Type of Agreement that Needs to be Filed with the Commission:

Of Qwest, Public Counsel and Staff, the only one that addresses the actual facts of the SBC/Qwest Settlement Letter[3] is Staff. Even then, Staff only devotes a single paragraph to the topic and only addresses the facts in a cursory manner. Aside from all of the legal arguments in SBC's Motion for Summary Disposition, and those provided below, the facts demonstrate that the Settlement Letter is not the type of agreement that the Commission, the Federal Communications Commission ("FCC") or Congress intended to be filed with the state commissions. As a result, based solely on the undisputed facts recited in SBC's Motion for Summary Disposition and the accompanying Declaration of David Hammock, SBC is entitled to prevail on its Motion for Summary Disposition.

a. An Agreement to Enter Into an Interconnection Agreement is Not an Interconnection Agreement, Itself:

SBC and Qwest agreed in the Settlement Letter to enter into interconnection agreements. An agreement to enter into an interconnection agreement is not an interconnection agreement, itself.[4] The actual interconnection agreement that SBC and Qwest entered into for Washington was

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[3] A copy of the Settlement Letter was attached to SBC's Motion for Summary Disposition at Exhibit 1. That Exhibit 1 will be referred to herein as the "Settlement Letter."

[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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timely filed with the Commission and approved by the Commission. Although certain non-interconnection-type orders could be processed in preparation for Commission approval, all live traffic transport and other interconnection-type orders were explicitly postponed under the Settlement Letter until after Commission approval. It cannot be a violation of the filing requirements to fail to file an agreement to enter into an interconnection agreement.

b. "One-time Obligations Cannot Be "Ongoing" Obligations:

Likewise, the one-time provisioning of one OC 12 so that SBC could comply with the FCC's deadlines imposed as a result of the SBC/Ameritech merger is not the type of agreement that the FCC or Congress contemplated would trigger the filing requirements. See, Declaration of David Hammock. Contrary to Staff's assertions, "one-time" and "ongoing" are antonyms. See, Staff's Response, at 15, ¶ 29 (asserting that "[t]he fact that this will occur only once does not mean that the obligation is not ongoing."). A one-time provisioning of an OC 12 cannot be an "ongoing" interconnection obligation. In short, factually speaking, the Settlement Letter did not need to be filed with the Commission. As a result, summary disposition is appropriately granted to SBC.

2. Public Counsel's Arguments Concerning Public Policy are Wrong:

Of Qwest, Staff and Public Counsel, Public Counsel was the only party to address SBC's public policy arguments concerning the negative impact that an overly broad requirement to file all types of agreements with the Commission would have on companies attempting to resolve disputes in an economical and efficient manner. See, Public Counsel's Response, at 5. Even then, Public Counsel failed to address the legal citations provided in SBC's Motion for Summary Disposition. Instead, Public Counsel merely asserted, without support or legal citation, that if Staff's overly

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broad filing requirements have "a 'chilling effect' on carriers which seek to violate state[5] and federal law in the future, then such a 'chilling' is entirely appropriate." See, Public Counsel's Response, at 5. This argument is erroneous for two reasons.

First, Public Counsel repeatedly makes reference in its Response to "secret" agreements. See, e.g., Public Counsel's Response, at 3, 4. Although SBC cannot speak for each of the other Respondents in this matter, the Settlement Letter was not a "secret" agreement. SBC had no sinister motive in entering into or refraining from filing the Settlement Letter. To the contrary, SBC believed and still believes that the Settlement Letter did not need to be filed and, even if it did, it was not SBC's obligation to do so. Thus, the underlying basis of Staff's overly broad attempt to punish SBC – an effort to prevent future violations of state and federal law – misses the mark. Since there was no sinister motive to keep the Settlement Letter "secret," Public Counsel's criticism of SBC's public policy arguments also misses the mark.

Second, Public Counsel's arguments erroneously presuppose a "violation of state and federal law." See, Public Counsel's Response, at 5. However, it is only through an overly broad application of the filing requirements that the Commission can arrive at the conclusion that the Settlement Letter should have been filed. Thus, Public Counsel's assumption of a "violation of state and federal law" is wrong. As a result, Public Counsel's willingness to accept the "chilling effect" resulting from Staff's interpretation of the filing requirements as "entirely appropriate" is also wrong.

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[5] As mentioned Staff has conceded that the only state law cause of action alleged to be applicable to SBC, RCW 80.36.150, is not appropriately included in this matter. Thus, in reality, there is no "violation of state law" that could be asserted against SBC.

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As cited in SBC's Motion for Summary Disposition, Washington state law and Commission precedent both favor the resolution of disputes through settlement. See, e.g., WAC 480-09-466; State v. Noah, 103 Wn. App. 29, 42, 9 P.3d 858 (2000). See, also, In the Matter of the Investigation Into U S West Communications, Inc.'s Compliance With Section 271 of the Telecommunications Act of 1996, Docket Nos. UT-003022 & UT-003040, 39th Supplemental Order (July 1, 2002). The Commission should not be persuaded to abandon the well-established law designed to foster reasonable settlement agreements, especially of matters such as billing disputes, because of Public Counsel's erroneous assumptions that there were "secret" agreements that "violated state and federal law" when they were not filed.

3. There is No Mandatory Timeframe in Which to File Interconnection Agreements:[6]

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).

[6] This argument presupposes that the Settlement Letter 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 SBC's Motion for Summary Disposition.

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Even if the Commission has been delegated the legal authority to enforce a violation of 47 U.S.C. § 252,[7] 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 SBC demonstrated in its Motion for Summary Disposition, the Commission's Policy Statements[8] are not binding and cannot form the basis of a cause of action against SBC. It is only these Policy Statements that outline a specific timeframe in which an interconnection agreement must be filed with the Commission. Because the Policy Statements are not binding against SBC, 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.[9] 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 SBC based on this "implicit" timeframe when the Commission has failed to carry out the necessary steps to impose such timelines. Although the Commission may attempt to remedy this deficiency by adopting specific rules related to the

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[7] In SBC's Motion for Summary Disposition, SBC 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 SBC's case (which it does not). See, SBC 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.

[8] 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").

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

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timeframe in which to file interconnection agreements for the future, it cannot penalize SBC for failing to follow rules that never existed.

4. The ILEC Bears the Sole Responsibility to File Interconnection Agreements:[10]

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 SBC's Motion for Summary Disposition, the Commission need not even reach these arguments as they relate to SBC. However, should the Commission feel the need to address this issue, the applicable law demonstrates that Qwest, and not SBC, had the responsibility to file the Settlement Letter – assuming that it needed to be filed at all.

Public Counsel states without any authority that it simply "disagrees" with SBC 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.[11] 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

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[10] 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 Settlement Letter was not an "interconnection agreement" that needed to be filed with the Commission.

[11] 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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the ILEC does not file the interconnection agreement. SBC 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 SBC, 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 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 SBC 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

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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.

CONCLUSION

Both the facts and the law relating to the Settlement Letter demonstrate that SBC is entitled to summary disposition.

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

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

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing Reply in Support of SBC's 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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