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 REPLY OF QWEST CORPORATION TO RESPONSES TO MOTIONS TO DISMISS

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I. INTRODUCTION

As Qwest argued in its Motion to Dismiss, the Amended Complaint should be dismissed insofar as it presents duplicative causes of action, fails to adequately plead claims of discrimination, and bases claims on the failure to file agreements that are not subject to the Act's filing requirement. Because other parties have not presented compelling arguments or authority to the contrary, Qwest's Motion should be granted.

II. ARGUMENT

A. The Filing Obligation Applies CLECs and ILECs Equally

In its response, Staff highlights several reasons why any filing requirement under Section 252 of the 1996 Telecommunications Act ("the Act") applies equally to ILECs and CLECs.[1] Two reasons why the filing requirement applies to both ILECs and CLECs bear additional comment.

First, Staff noted that the purpose and structure of the Act is best served by requiring both parties to file interconnection agreements. Imposing the filing requirement on both ILECs and CLECs appropriately recognizes that there were two parties to the agreement – one, the ILEC, granting some set of terms and conditions, and the other, a CLEC, accepting those terms as presumably something the CLEC desired. Indeed, assuming that a CLEC enters into an agreement that provides it with terms or conditions not otherwise contained in another filed and approved interconnection agreement, it is the CLEC, not the ILEC, which is *receiving* additional benefits.[2] As the carrier receiving beneficial treatment, the CLEC should have the concomitant obligation along with the ILEC to ensure that the agreement is filed and approved.

Second, as Qwest pointed out in its response, wherever an obligation or duty under the Act is placed on one particular carrier, the Act explicitly designates that carrier.[3] For example, Section 259 outlines the process for infrastructure sharing and enables the Federal Communications Commission to

[1] See Staff Response at 2-6.

[2] Qwest does not concede that there was any discrimination, and to the extent that this matter proceeds to hearing, Qwest will introduce evidence showing that there was no discrimination as a result of these agreements.

[3] Qwest Response at 2-8.

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promulgate regulations on the subject.[4] In Section 259, Congress explicitly designated duties that apply only to ILECs and defined which carriers were "qualifying carriers" that could request access to the infrastructure.[5] This demonstrates that where Congress intended certain obligations under the Act to apply only to particular carriers, Congress explicitly made such designations. The CLECs advance no sound policy argument why they, along with the ILECs, should not be responsible to ensure that agreements to which they are co-parties are filed in accordance with state and federal law.

B. The Commission Should Dismiss Duplicative Counts

1. Count One Should Be Dismissed Entirely As Duplicative Of Count Two

While Staff does not explicitly concede that Counts One and Two are duplicative of one another, it offers no counter argument to Qwest's and other CLECs' motions to dismiss.[6] On the other hand, Public Counsel correctly concedes that Sections 252(a)(1) and 252(e) refer to the same filing requirement.[7] As Staff has not provided any reason why the Act should be interpreted according to anything other than its plain language (which clearly states that Section 252(a)(1) incorporates the filing requirement of Section 252(e)) nor provided any rebuttal to Qwest's legal arguments regarding the impropriety of duplicative counts, the Commission should dismiss Count One in its entirety.

2. Count Three Should Be Dismissed Entirely As Duplicative of Count Two

Both Staff and Public Counsel assert that Count Three, alleging violations of Section 252(i), is not duplicative of Count Two, alleging violation of the filing requirement under Section 252(e).[8] Yet neither party attempts to explain what facts would be necessary to violate Section 252(i) in this case, in addition to those necessary to violate Section 252(e). As Qwest noted in its Motion to Dismiss,

> 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

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[4] 47 U.S.C. § 259(a) (stating that the FCC shall prescribe "regulations that require incumbent local exchange carriers" to make available certain network infrastructure, technology, information and facilities to "qualifying carriers" to enable the carriers to provide telecommunications services).

[5] See 47 U.S.C. §§ 259(a) and (d) (noting that the duties in Section 259 only applied to ILECs, and defining carriers eligible to request access to infrastructure as "qualifying carriers," respectively).

[6] See Staff Response at 9-10 (asserting that failure to file an interconnection agreement violates both Sections 252(a) and (e) without additional support).

[7] Public Counsel Response at 6.

[8] See Staff Response at 10-11; Public Counsel Response at 7-8.

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> 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).

In noting the duplicative nature of Count Three, Qwest does not argue that Section 252(i) is superfluous, as Public Counsel alleges.[9] Section 252(i) outlines independent processes for CLECs to opt into filed interconnection agreements that are in addition to the filing and approval requirements of Section 252(e). However, where the alleged misconduct is the failure to file interconnection agreements, charging independent counts in a complaint for violations of Section 252(e) and 252(i) contravenes the rule from *Blockburger* because the violations are both based on one single act – failure to file.

The regulatory function of the Commission also does not save Count Three from being duplicative as Staff argues. The *Blockburger* rule applies to both criminal and civil penalties. *See also Washington v. Cole*, 128 Wash.2d 262, 285 n.18 (1995) (noting that the *Blockburger* rule would prohibit application of both a criminal statute and a civil forfeiture statute if the elements of the statutory offenses were identical). Qwest is not arguing that the Commission is prohibited from its regulatory function of ensuring "regulated companies fully comprehend their obligations" under the law or clarifying those obligations. However, in the present case this function cannot extend to imposing independent penalties under Counts Two and Three for violations of Sections 252(e) and 252(i) respectively when the alleged violations arise from a single act.[10] Thus, at minimum, the Commission should dismiss Count Three and incorporate any reference to alleged violations of Section 252(i) into Count Two.

C. The Commission Should Dismiss Count Four Because It Has Not Enacted Any Regulations Requiring Interconnection Agreements To Be Filed Under State Law

Staff concedes that the Commission has not established rules requiring companies to file interconnection agreements under RCW 80.36.150.[11] Because RCW 80.36.150 does not itself create

[9] See Public Counsel Response at 7.

[10] At this stage Qwest has not raised arguments generally challenging the Commission's authority to issue penalties for the violations alleged in the complaint. Qwest does not concede the Commission has such authority and reserves the right to raise such arguments at appropriate times in this docket or other dockets before the Commission.

[11] See Staff Response at 11 n.2, 13.

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a legal obligation to file interconnection agreements, Count Four, which alleges violations of this statutory provision, should be dismissed for failing to state a claim upon which relief can be granted.

D. Counts Three Through Seven Should Be Dismissed As To Agreements Posted On Qwest's Website Because Qwest Has Introduced Unrebutted Evidence That They Did Not Cause Discrimination

Public Counsel and Staff both argue that agreements posted on Qwest's website should be subject to Counts Four through Seven.[12] However, neither Public Counsel nor Staff introduces any evidence, or even any argument, that the agreements in question caused any discrimination. Thus, they have failed to rebut the evidence offered by Qwest with its Motion to Dismiss that the agreements posted on its website did not cause discrimination at any time because they were readily available for over one year, without any CLEC electing to opt into those agreements or even showing any interest in them.[13]

When a party moves for summary determination and introduces evidence showing it is entitled to judgment as a matter of law - in this case evidence that the agreements in question did not cause any discrimination - the opposing parties have the burden to produce evidence rebutting the movant's position. *Bruns v. PACCAR, Inc.*, 77 Wash. App. 201, 208, 890 P.2d 446, 473 (1995). *See also Street v. Boden*, 86 Wash. App. 1116, 1997 WL 428069 at *2 (1997) ("When relying on affidavit testimony, the party opposing summary judgment must 'set forth specific facts showing that there is a genuine issue for trial.'"). Staff argues only that the agreements posted on the website were not timely filed. Public Counsel argues only that the fact that the agreements were posted does not negate any misconduct prior to September 2002, and that Qwest did not proactively file these agreements. Not only do both parties fail to produce any evidence contrary to that presented by Qwest, the arguments they present fail to address the argument offered by Qwest - that no CLEC has sought to opt into the posted agreements in over 15 months means that CLECs are not receiving terms or services inferior to that offered in the posted agreements, and thus, those agreements did not cause any discrimination.

Because Staff and Public Counsel have failed to produce rebuttal evidence or argument that the

[12] See Public Counsel Response at 4; Staff Response at 20-21.

[13] See Qwest Motion to Dismiss at 24; Brotherson Declaration at ¶¶ 7-8.

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agreements posted on Qwest's website did not cause discrimination, the Commission should grant Qwest's motion to summarily dismiss Counts Three through Seven as to those agreements.

E. Counts Four through Seven Should Be Dismissed with Regard to the Exhibit B Agreements

Staff also contends (without citing any legal authority) that the Amended Complaint adequately states a claim of discrimination based on certain settlement agreements and that Qwest's only recourse at this stage is to move for a more definite statement of the allegations.[14] Staff is wrong. "A pleading is insufficient when it does not give the opposing party fair notice of what the claim is and the ground upon which it rests." *Saluteen-Maschersky v. Countrywide Funding Corp.*, 105 Wash. App. 846, 857, 22 P.3d 804, 810 (2001). Furthermore, "where it is clear from the complaint that the allegations set forth do not support a claim, dismissal is proper." *Berge v. Gorton*, 88 Wash. 2d 756, 759, 567 P.2d 187, 190 (1977).

Here, the only conduct alleged in the Amended Complaint to support the claim that the settlement agreements were discriminatory is the fact of the settlements themselves. Not only is this conduct legal, but it also is encouraged by state public policy.[15] Allowing such claims of discrimination on bare allegations of dispute settlement would be equivalent to allowing claims of discrimination based solely on the allegation that an ILEC provided telecommunications services. In both instances the only factual allegations are facially legal conduct – settling historical disputes and providing telecommunications services – followed by a summary allegation – such facially lawful conduct caused discrimination.

The claims of discrimination based on the settlement agreements could only be legally sustained if there were a legal requirement that ILECs must provide the same terms of each settlement of a historic dispute with solely retrospective consideration to all other CLECs. As Qwest explained in its Motion to Dismiss, there is no such legal obligation.[16] Thus, the Amended Complaint fails to state any facts or

[14] Staff Response at 11-12.

[15] Qwest Motion to Dismiss at 8.

[16] Qwest Motion to Dismiss at 7 – 11.

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legal obligation establishing that the agreements created any unreasonable or unlawful preference or advantage and therefore fails to state a claim upon which relief can be granted. Accordingly, the Commission should dismiss the Complaint as to the agreements listed in Exhibit B.

F. Staff Mischaracterizes Numerous Individual Agreements

In its response, Staff addressed several individual agreements.[17] For most of these agreements it is not necessary for Qwest to respond as it stands on its characterization of those agreements made in its Motion to Dismiss. However, Staff mischaracterized numerous agreements, and for these Qwest offers the following reply.

Agreement No. 17 (Qwest and Eschelon): Staff argues that this agreement outlines an implementation plan to improve Eschelon's access to interconnection and unbundled network elements. The agreement by its plain terms does not itself set forth an implementation plan; rather it provides that the parties will develop a plan in the future and states the objectives of such a plan. As Qwest noted in its motion to dismiss, this states an intention to negotiate further and does not create any interconnection obligations. Staff offers arguments only for filing the implementation plan itself. Thus, claims regarding Agreement No. 17 should be dismissed.

Agreement No. 20 (Eschelon and Qwest): Qwest concedes that this agreement is not merely an agreement to agree. Nevertheless, the agreement does not create ongoing obligations related to Section 251(b) or (c) services because it only resolves past billing disputes. Accordingly, claims regarding Agreement No. 20 should also be dismissed.

Agreement No. 23 (Eschelon and Qwest): Staff argues that this contract is an interconnection agreement because it amends an interconnection agreement. Staff ignores the fact that the agreement is a settlement of a historic dispute in exchange for backward-looking consideration coupled with an agreement to later agree to an implementation plan. As such, this contract falls within the exception outlined by the FCC for settlement agreements with backward-looking consideration. Regardless of the title of the agreement, it does not need to be filed under the FCC definition, and

[17] Staff Response at 15-20.

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claims regarding the agreement should be dismissed.

Agreement No. 41 (McLeod and Qwest): This letter specifically states that it only sets forth the terms of a "proposed settlement" and is "expressly contingent upon" several occurrences. Thus, this letter does not set rates or any ongoing 251(b) or (c) obligations as Staff alleges. Additionally, the letter was superceded by a settlement agreement entered three days later.

Agreement No. 47 (Global Crossing and Qwest): Staff alleges that this agreement establishes a going-forward rate for conversions from resale to UNE-P. This is incorrect. This contract provides that Qwest will make a one-time payment to settle a dispute and commits the parties to adhere to their obligations under their existing interconnection agreement.[18] As such it does not itself create any new going-forward terms subject to the Act's filing requirement.

G. Time Warner Impermissibly Seeks Damages In The Present Docket

Intervenor Time Warner Telecom responded to Qwest's Motion to Dismiss and for Summary Determination with a nearly four-page excerpt from the proposed order in an Arizona proceeding. Time Warner's protracted quote is not a substitute for legal arguments and cannot serve as a basis for denying Qwest's Motion. In addition, Time Warner's suggestions for the ultimate findings of fact and remedies in this case should be rejected as premature and not relevant at this stage.

The Amended Complaint opened an adjudicative proceeding expressly for the purpose of addressing whether Qwest and a number of CLECs violated federal and state statutes by not filing certain agreements and, if so, whether monetary penalties should be imposed as a result. Despite Time Warner's protestation that its intervention would not "broaden the issues to be addressed or delay this proceeding," (Time Warner Telecom of Washington LLC's Petition to Intervene at 3), it now alleges "facts" and requests remedies that are outside the scope of the Amended Complaint. If Time Warner, as its Response suggests, desires an adjudication regarding any harm it claims to have suffered and seeks to recover damages as a result, it should file a complaint against the offending parties – and not attempt to expand the scope of this proceeding to focus on issues particular to Time Warner.

[18] See Global Crossing Motion to Dismiss at 3-4.

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Aside from being outside the scope of these proceedings, Time Warner's proposed findings and remedies are premature.[19] Time Warner's recommendations are without the benefit of any fact-finding or investigation by this Commission. Qwest's Motion presented legal arguments mandating dismissal of certain counts of the Amended Complaint. It is these legal arguments – not factual allegations or questions regarding ultimate remedies – that are now before the Commission, and Time Warner's suggestions to the contrary should be disregarded.

III. CONCLUSION

For the foregoing reasons, Qwest respectfully requests that its Motion to Dismiss and Motion for Summary Determination be granted and the following portions of the Complaint be dismissed:

1. All causes of action should be dismissed as to the agreements in Complaint Exhibit B, and other settlement agreements with solely backward looking consideration – Exhibit A, Nos. 22, 23, 46, and 50.
2. All causes of action should be dismissed as to agreements to later reach particular agreements but that do not themselves create binding obligations related providing local telephone services – Exhibit A, Nos. 13, 17, 20, 22, 23, 24, 41, and 51.
3. All causes of action should be dismissed as to agreements pertaining to interstate telephone services that are not within the Commission's jurisdiction – Exhibit A, Nos. 15, 31 and 37.
4. All causes of action should be dismissed as to agreements that do not have effect in Washington – Exhibit A, Nos. 11, 38, 39, 43, 49, and 50; and Ex. A, Nos. 21.
5. The First, Third and Fourth Causes of Action should be dismissed in their entirety as impermissibly duplicative of other causes of action.

[19] Time Warner's proposed remedies are also contrary to the law. The Commission cannot order a refund based on non-Section 251(b) and (c) services without violating the filed rate doctrine, which prevents the Commission from retroactively changing a tariffed service. *See, e.g., Maislin Indus., U.S., Inc. v. Primary Steel, Inc.*, 497 U.S. 116, 132-33 (1990). Rather, the proper remedy under the filed rate doctrine is to require the carriers receiving the different rates to refund the amounts of the alleged discounts. *See County of Stanislaus v. Pac. Gas & Elec. Co.*, 114 F.3d 858, 863 (9th Cir. 1997). The application of the filed rate doctrine to the instant situation presents a complicated issue of law that Qwest will fully brief if an when the issue properly arises.

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6. Summary determination should be granted dismissing the facilities decommissioning agreements – Exhibit A, Nos. 14, 16, 25, and 35 – from the Complaint because their terms and conditions were subsequently filed with and approved by the Commission.

7. Summary determination should be granted dismissing Counts Three through Seven as applied to agreements that did not cause any undue discrimination or prejudice to non-party CLECs because the agreements were available for opt-in on Qwest's website. This includes Exhibit A, Nos. 8, 9, 10, 12, 14, 16, 25, 30, 34, 35, 40, 42, and 47; and Exhibit B, Nos. 6 and 16.

RESPECTFULLY SUBMITTED this _____ day of January 2004.

QWEST

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