[Service Date February 12, 2004]

BEFORE THE WASHINGTON STATE
UTILITIES AND TRANSPORTATION COMMISSION

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION,	)	DOCKET NO. UT-033011
Complainant,	)	ORDER NO. 05
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.	)	
. . . . .	)	

ORDER GRANTING COMMISSION STAFF'S MOTION FOR PARTIAL SUMMARY DETERMINATION; GRANTING IN PART AND DENYING IN PART THE MOTIONS TO DISMISS AND FOR SUMMARY DETERMINATION OF QWEST, ATG, AT&T/TCG, ESCHELON, FAIRPOINT, GLOBAL CROSSING, INTEGRA, MCI, MCLEODUSA, SBC, AND XO

I. SYNOPSIS.

1 *In this Order, the Commission finds that:*

- *Both ILECs and CLECs are required to file interconnection agreements with state commissions under subsection 252(e)(1) of the Telecommunications Act of 1996;*
- *The Commission has statutory authority to enforce the filing obligations of subsection 252(e)(1);*
- *The first and fourth causes of action in the Amended Complaint are dismissed;*
- *There is an implied requirement under subsection 252(e)(1) to file agreements within a reasonable period of time;*
- *The Amended Complaint provides sufficient notice of the facts alleged concerning agreements listed in Exhibits A and B to allow the Amended Complaint to go forward;*
- *The Commission will apply the determinations reached by the FCC in its Declaratory Ruling to the resolution of factual disputes in this proceeding;*
- *There are genuine issues of material fact in dispute concerning many of the Exhibit A agreements;*
- *All causes of action against ATG are dismissed; and*
- *Certain agreements about which all parties concur are dismissed from the Amended Complaint (Exhibit A Agreements No. 11, 13-15, 22, 24, 37-39, 43, 50, and 51).*

Consistent with these findings, the Commission grants Commission Staff's Motion for Partial Summary Determination, and grants in part, and denies in part, the motions of Qwest, ATG, AT&T/TCG, Eschelon, Fairpoint, Global Crossing, Integra, MCI, McLeodUSA, SBC, and XO. The Commission takes no action at this time on Time Warner's request for remedies in its response to Qwest's motion.

II. BACKGROUND

2 **Nature of the Proceeding:** This is a complaint proceeding brought by the Washington Utilities and Transportation Commission (Commission), through its Staff, against Qwest Corporation (Qwest) and 13 other telecommunications companies alleging that the companies entered into certain interconnection agreements and failed to file, or timely file, the agreements with the Commission as required by state and federal law. The complaint also alleges that the companies entered into certain other agreements to resolve disputes, but that the carriers violated federal and state law by failing to make terms and conditions available to other requesting carriers, providing unreasonable preferences, and engaging in rate discrimination.

3 **Procedural History:** On August 14, 2003, the Commission issued a Complaint in this proceeding against Qwest and 13 other telecommunications companies. The Commission issued an Amended Complaint on August 15, 2003, attaching Exhibits A and B, which were omitted from the original complaint. Exhibit A to the Amended Complaint identifies 52 agreements that Qwest and the 13 competitive local exchange carriers (CLECs) allegedly failed to file, or timely file, with the Commission. Exhibit B identifies 25 additional agreements with CLECs that Qwest allegedly failed to file with the Commission, and which allegedly violated federal and state law by failing to make terms and conditions available to other requesting carriers, providing unreasonable preferences, and engaging in rate discrimination.

4 On September 4, 2003, Commission Staff filed a Motion to Dismiss Allegations Against Allegiance Telecom, Inc. (Allegiance), and Motion to Amend Exhibit B to the Complaint. The Commission convened a prehearing conference in this proceeding on September 8, 2003. Staff's motions to dismiss and amend Exhibit B were granted at the conference.

5 The Commission entered Order No. 01, a prehearing conference order, on September 10, 2003, requiring parties to file dispositive motions by November 7, 2003, answers to dispositive motions on December 5, 2003, and replies on December 19, 2003. On September 11, 2003, the Commission entered Order No. 02 in this proceeding, a protective order.

6 On September 18, 2003, Commission Staff filed with the Commission a Motion to Amend Caption to address parties' concerns that party names were misspelled or incorrect. On November 3, 2003, the Commission entered Order No. 03, Order Granting in Part Motion of Commission Staff; Correcting Names of Respondents and Amending Master Service List.

7 On December 3, 2003, Commission Staff filed a motion requesting an extension of time to file answers and replies to dispositive motions. The Commission issued a notice to all parties, requiring responses to Staff's motion on Friday, December 5, 2003.

8 On December 4, 2003, WorldCom, Inc., on behalf of its regulated subsidiaries in Washington State (n/k/a MCI), Time Warner Telecom of Washington, Inc. (Time Warner), and Qwest filed responses to Staff's motion. On December 5, 2003, the Commission entered Order No. 04, Order Granting Motion to Modify Procedural Schedule, extending the time to file answers to motions until December 12, 2003, and replies until January 6, 2004.

9 **Dispositive Motions.** On November 5, 2003, Commission Staff filed a Motion to Dismiss Allegations Relating to December 27, 2001 Agreement Between AT&T and Qwest. On November 7, 2003, Commission Staff filed a Motion to Dismiss Allegations Relating to March 15, 2001 and January 30, 2002 Agreements Between ATG and Qwest. Also on November 7, 2003, Commission Staff filed a Motion for Partial Summary Determination.

10 In addition to Commission Staff, the following parties filed motions on November 7, 2003: Qwest filed a Motion to Dismiss and Motion for Summary Determination and Declaration of Larry Brotherson. MCI filed a Motion to Dismiss or for Summary Determination. XO Washington, Inc. (XO) filed a Motion to Dismiss, or Alternatively, for Summary Determination. Fairpoint Carrier Services, Inc. (Fairpoint) filed a Motion for Summary Disposition and Declaration of John LaPenta. SBC Telecom, Inc. (SBC) filed a Motion for Summary Disposition and Declaration of David Hammock. Integra Telecom of Washington, Inc. (Integra) filed a Motion for Summary Disposition and Declaration of Pattie Bowie. Advanced Telcom, Inc. (ATG) filed a Motion for Summary Determination. McLeodUSA Telecommunications, Inc. (McLeodUSA) filed a Motion to Dismiss and Brief in Support of the Motion to Dismiss. Eschelon Telecom of Washington, Inc. (Eschelon) filed a Motion to Dismiss for Failure to State a Claim and Brief in Support of Motion to Dismiss.

11 On November 10, 2003, Global Crossing Local Services, Inc. (Global Crossing) filed a Motion to Accept Late Filed Motion to Dismiss or for Summary Determination, as well as a Motion to Dismiss or for Summary Determination.

12 On December 12, 2003, Commission Staff filed with the Commission its Response to Motions to Dismiss or for Summary Determination. In addition to Staff, the following parties also filed answers on December 12, 2003: Qwest filed its Response to Motions to Dismiss and Motions for Summary Determination. AT&T Communications of the Pacific Northwest, Inc. (AT&T) and TCG Seattle (TCG) filed an Answer to WUTC Staff's Motion for Summary Determination and Joinder in Respondents McLeodUSA, Global Crossing, XO Communications and MCI's Motions for Summary Determination. ATG filed an Answer to Staff's Motion for Partial Summary Determination. Covad Communications Company Covad) filed an Answer to Staff's Motion for Partial Determination. Public Counsel filed a Response to All Dispositive Motions Pending as of December 5,

2003. Time Warner filed a Response to Qwest's Motion to Dismiss and for Summary Determination.

13 On January 6, 2004, the following parties filed reply briefs with the Commission: Commission Staff, Qwest, AT&T and TCG, MCI, Eschelon, XO, Global Crossing, Fairpoint, SBC, and Integra. On January 7, 2004, ATG filed a Reply to Staff and Public Counsel. On January 8, 2004, the Commission issued a notice accepting late-filed reply briefs and comments as some parties were unable to file paper copies of reply briefs and comments with the Commission due to inclement weather on January 6 and 7, 2004.

14 **Other Background Information.** During the Commission's review of Qwest's compliance with section 271 of the Telecommunications Act of 1996 (the Act)[1] in Docket Nos. UT-003022 and UT-003040, the Minnesota Department of Commerce filed a complaint against Qwest alleging that Qwest had entered into "secret agreements" with certain CLECs to provide those CLECs preferential treatment. AT&T, Public Counsel, and other parties in Docket Nos. UT-003022 and UT-003040 filed testimony and comments with the Commission alleging that Qwest had failed to file certain interconnection agreements with the Washington commission. They alleged that Qwest's failure to file these agreements was a violation of federal and state law, and that Qwest's actions demonstrated a lack of compliance with section 271 requirements.

15 In Bench Request No. 46 in the proceeding, the Commission requested that Qwest file with the Commission copies of "every written contract, agreement, or letter of understanding between Qwest and a competitive local exchange carrier (CLEC) operating in Washington state which was entered into by Qwest since January 1, 2000, but not including any such agreement filed with the Washington

[1] Pub. L. No. 104-104, 100 Stat. 56, *codified at* 47 U.S.C. § 151 *et seq.*

Utilities and Transportation Commission."[2] Qwest filed a total of 77 agreements with the Commission in its initial and supplemental responses to Bench Request No. 46. These 77 agreements form the basis of the Commission's Amended Complaint in this proceeding, and are the agreements listed in Exhibits A and B to the Amended Complaint.

16 In the final order in the section 271 proceeding, the Commission declined to delay or defer the proceeding while waiting for a separate investigation into the issue of the unfiled agreements. *39th Supplemental Order, ¶ 291.* The Commission found that no party had made a sufficient showing or demonstration on the record that the agreements at issue should have been filed or were discriminatory and stated that the Commission would not presume that the agreements were invalid or unlawful. *Id., ¶ 293.* Finally, the Commission invited parties to file a complaint with the Commission to address the issue of the unfiled agreements. *Id., ¶ 295.*

17 At the same time that the Commission was considering the matter, Qwest filed a petition with the Federal Communications Commission (FCC) seeking a declaratory ruling on the scope of the mandatory filing requirements in subsection 252(a)(1) of the Act. The FCC issued a decision on October 2, 2003, determining that, under subsection 252(a)(1), carriers must submit to state commissions only those agreements that create "an ongoing obligation pertaining to resale, number portability, dialing parity, access to rights-of-way, reciprocal compensation, interconnection, unbundled network elements, or

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[2] The Commission became aware of these agreements when it inadvertently received Qwest's response to a data request issued by Public Counsel. In order to review the documents, the Commission issued a bench request seeking the same information as Public Counsel. *In the Matter of the Investigation Into U S WEST Communication's Compliance with Section 271 of the Telecommunications Act of 1996, In the Matter of U S WEST Communication's Statement of Generally Available Terms Pursuant to Section 252(f) of the Telecommunications Act of 1996,* Docket Nos. UT-003022 and UT-003044, 39th Supplemental Order; Commission Order Approving SGAT and QPAP, and Addressing Data Verification, Performance Data, OSS Testing, Change Management, and Public Interest (July 1, 2002) ¶ 289 [Hereinafter "*39th Supplemental Order*"].

collocation."[3] In addition, the FCC provided specific guidance concerning the nature of dispute resolution and escalation provisions, settlement agreements, and interpreted section 252 of the Act as authorizing state commissions to enforce the filing requirements in section 252. *FCC Declaratory Ruling, ¶¶ 9, 10, 12.*

III. MEMORANDUM

18 **A. Global Crossing Motion to Accept Late-Filed Motion.** Global Crossing filed a Motion to Accept Late Filed Motion to Dismiss or for Summary Determination, on November 10, 2003, requesting that the Commission accept its late-filed Motion to Dismiss or for Summary Determination. Counsel for Global Crossing explained that he was out of the office on sabbatical leave when the September 8, 2003, prehearing conference was held in this matter. Based upon a misunderstanding or miscommunication between Global Crossing's counsel and other members of the firm who attended the prehearing conference, counsel did not understand that he was responsible for representing Global Crossing in this proceeding.

19 As soon as he learned of the mistake late on November 7, 2003, the due date for filing dispositive motions, counsel contacted the administrative law judge, who proposed that Global Crossing file the motion. Counsel also contacted counsel for Commission Staff, who apparently informed counsel for Global Crossing that Staff had no objection to the motion. The Commission has received no responses or objections to Global Crossing's Motion to Accept Late-Filed Motion to Dismiss or for Summary Determination.

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[3] *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 Agreements under Section 252(a)(1),* WC Docket No. 02-89, Memorandum Opinion and Order, FCC 02-276, 17 FCC Rcd. 19,337 ¶8; n.26 (October 4, 2002) [Hereinafter "*FCC Declaratory Ruling*"].

20 Based upon the circumstances presented by Global Crossing, as well as the lack of any objection to the motion, Global Crossing's Motion to Accept Late-Filed Motion to Dismiss or for Summary Determination is granted.

21 **B. Dispositive Motions.** The parties raise a number of issues in their dispositive motions, answers and replies. Among other issues, the parties seek to dismiss certain causes of action stated in the Amended Complaint, dispute whether there is a requirement to "timely file" an agreement, and whether certain agreements should be dismissed based upon the FCC's Declaratory Ruling. All of the parties appear to agree, however, that the primary issue the Commission must decide before this proceeding may go forward is whether all carriers, CLECs and incumbent local exchange carriers (ILECs), bear responsibility under section 252 of the Act for filing agreements with state commissions, or whether only the ILEC bears that responsibility. This issue is addressed first, below.

1. Who bears responsibility for filing interconnection agreements?

22 The parties dispute whether both parties to an interconnection agreement, or only the ILEC, bear the responsibility under section 252 of the Act for filing agreements with state commissions. Staff, Public Counsel, and Qwest assert that both parties bear responsibility, while the CLEC respondents argue that filing is solely the ILEC's responsibility.

23 The issue is one of statutory interpretation for the Commission.[4] Following the rule in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984), and related cases, a reviewing court must determine if the statute is silent or ambiguous with respect to the issue in question, and if so, review the statutory language, the legislative history, and the policies involved to determine whether

[4] Fairpoint, Integra, and SBC argue that UCC law governing the course of dealing should apply to this issue. Qwest responds correctly that the Commission should not apply rules of contract interpretation under the UCC to a question of statutory interpretation.

the agency responsible for administering the statute has interpreted the statute reasonably, and whether the agency's construction of the statute is permissible. *467 U.S. at 842-843, 845*; *See also United States v. 313.34 Acres of Land, 923 F.2d 698 (9th Cir. 1991); K Mart Corp. v. Cartier, Inc., 486 U.S. 281, 291 (1988).*

24 Section 252 is silent on the issue of who bears the responsibility for filing agreements with state commissions. Subsection 252(a) provides that "the agreement . . . shall be submitted to the state commission under subsection (e) of this section." Subsection 252(e)(1) states that "Any interconnection agreement adopted by negotiation or arbitration shall be submitted for approval to the State commission." Neither provision assigns responsibility to a class of carriers, creating ambiguity as to who is responsible for filing agreements. Interestingly, the United States Supreme Court has found the Act to be "in many important respects a model of ambiguity or indeed even self-contradiction." *AT&T v. Iowa Utilities Board, 525 U.S. 366, 397 (1999).* Given the ambiguity in the statute, the Commission must consider the statutory language, legislative history and policy considerations in section 252 when reviewing the interpretation of the administrative agency charged with administering the Act – the FCC.

25 **Statutory Language.** The parties argue over the construction of sections 251 and 252, as well as the inferences to be drawn from the lack of specificity in section 252 for who should file agreements.

26 Staff and Qwest argue that, by failing to identify a specific carrier class for the filing obligation, Congress must have intended the obligation to fall on both ILECs and CLECs. They assert that Congress placed specific obligations on particular classes of carriers in both sections 251 and 252 of the Act. Under section 251, all telecommunications carriers have the duty to interconnect under subsection 251(a), all local exchange carriers, CLECs and ILECs, share obligations under subsection 251(b) for resale, number portablity, dialing parity, access to rights-of-way, and reciprocal compensation, and ILECs are required under

subsection 251(c) to negotiate, interconnect, provide unbundled access, offer serves at resale, provide public notice of changes, and to provide physical collocation of equipment.

27 In refuting the CLECs' claim that section 252 applies only to ILECs, Staff argues that under subsection 252(a), a CLEC may request that an ILEC negotiate the rates, terms and conditions of access. In addition, CLECs seeking a state commission to arbitrate an interconnection must submit a petition and all relevant documentation to the commission concerning disputed and resolved issues to the commission. *See 47 U.S.C. § 252(b)(1)(2).* CLECs must also cooperate with the state commission conducting the arbitration. *See 47 U.S.C. § 252(b)(4).*

28 Staff and Qwest also refer to subsection 252(h) to bolster their argument. That section requires:

> A State commission shall make a copy of each agreement approved under subsection (e) and each statement [SGAT] approved under subsection (f) available for public inspection and copying within 10 days after the agreement or statement is approved. *The State commission may charge a reasonable and non-discriminatory fee to the parties to the agreement or to the party filing the statement to cover the costs of approving and filing such agreement or statement*.

29 *[Emphasis added]*. Staff and Qwest argue that the reference to seeking a fee from "the parties to the agreement" implies that both parties bear a responsibility for filing the agreement.

30 The CLEC respondents counter that neither section 251 nor 252, on their face, require CLECs to file agreements with state commissions. They argue that the statutory construction of sections 251 and 252 points only to ILECs' bearing this

responsibility. AT&T and TCG assert that the purpose of section 252 is to carry out an ILEC's obligations under section 251 to provide nondiscriminatory access to network infrastructure, and further, that section 252 "merely clarifies the ILEC's obligations." *AT&T/TCG Response at 4-5.* Specifically, AT&T and TCG argue that subsection 252(a) sets forth the obligations of the ILEC upon receiving a request for interconnection, services or network elements under section 251. Overall, AT&T and TCG assert that sections 251 and 252 are intended to impose burdens on the ILECs for the benefit of CLECs. *AT&T/TCG Reply, citing Covad Comm. Co. v. BellSouth Corp., 299 F. 3d 1272, 1277 (11th Cir. 2002); Cavalier Tel. L.L.C. v. Verizon Virginia, Inc., 330 F.3d 176, 185 (4th Cir. 2003).*

31 Fairpoint, Integra, and SBC assert that other states have focused on *Qwest's* failure to file agreements with the state commission, not CLECs, and sought remedies solely against Qwest. Qwest counters that the prevailing rule among states in Qwest's region is that the filing obligation applies equally to ILECs and CLECs, and cites to state statutes, rules, and orders of Colorado, Iowa, Montana, New Mexico, North Dakota, Oregon, and South Dakota. *See Qwest's Response at 7, n.20.*

32 **Legislative History.** The legislative history of the Act provides little guidance as to the intent of the filing requirement in section 252. The conference report of the Act is silent on who bears the responsibility to file agreements with state commissions. *See H.R. CONF. REP. 104-458, 125-26.* The conference report does, however, describe the overall policy and purpose of the Act: "[T]o provide for a pro-competitive, deregulatory national policy framework designed to accelerate rapidly private sector deployment of advanced telecommunications and information technologies and services to all Americans by opening all telecommunications markets to competition." *Id. at 113.*

33 **Policy Considerations.** As a matter of policy, Staff argues that requiring both parties executing the agreement to file the agreement furthers the non-

discrimination policies underlying subsection 252(i), the pick and choose provision, and that the filing requirement is essential to ensuring that carriers have a meaningful opportunity to take advantage of that provision. Staff asserts that CLECs compete not only with ILECs, but also with each other, making it equally important that CLECs are obligated to file agreements with state commissions and make them available to other CLECs. Staff also asserts that the filing requirement provides state commissions with an opportunity to consider whether negotiated agreements are in the public interest or discriminate against other carriers. Staff asserts that these policy purposes are better served when both parties are required to file agreements with state commissions.

34 Qwest asserts that a joint filing obligation creates a system of checks and balances that increases the likelihood than an interconnection agreement will be filed. Imposing a filing obligation on both ILECs and CLECs recognizes that there are two parties to an agreement. Qwest also asserts that a CLEC benefits when it enters into an agreement that provides it with terms and conditions not otherwise contained in another filed and approved agreement, and thus, the CLEC should also bear the obligation of filing the agreement.

35 AT&T and TCG assert that Staff's interpretation of the Act runs counter to the purpose of the Act, which is to impose duties on ILECs for the benefit of CLECs. Eschelon argues that placing the obligation on the ILEC is consistent with the fundamental public policy underlying the Act, to require ILECs to open their markets to competition and provide non-discriminatory access to services and facilities. AT&T/TCG and McLeodUSA argue that the Commission should not place a burden on and apply enforcement mechanisms to the very carriers the Act is intended to protect or benefit. *AT&T/TCG Reply at 4-5, citing Salute v. Greens, 918 F. Supp 660, 666 (E.D.N.Y. 1996); McLeodUSAd Brief in Support of Motion at 3*.

36 Eschelon argues that the Act focuses on the obligations of ILECs' to act in a non-discriminatory manner, as the ILEC is the party with greater bargaining power and incentives in dealing with competitive carriers. Eschelon asserts that ILECs should logically bear the obligation of filing the agreements to prevent discrimination. *Eschelon Motion at 5-6.* Fairpoint, Integra, and SBC also argue that placing the filing responsibility on both CLECs and ILECs increases the likelihood of errors occurring by neither party or both parties filing the agreement.

37 **FCC Interpretation of Section 252.** The parties also refer to several paragraphs of the FCC's First Report & Order[5] in arguing their respective positions. In that Order, the FCC promulgated rules implementing the interconnection provisions of the Act, sections 251 and 252.

38 Staff points to paragraphs 1320 and 1466 of the First Report & Order, which provide, in relevant part:

> We observe that section 252(h) expressly provides that state commissions maintain for public inspection copies of interconnection agreements approved under section 252(f). . . . However, when the Commission [FCC] performs the state's responsibilities under section 252(e)(5), *parties must file their agreements with the Commission, as well as the state commission*.[6]
>
> Incumbent LECs and new entrants having interconnection agreements that predate the 1996 Act must file such agreements with the state commission for approval under section 252(e).[7]

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[5] *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers*, CC Dockets 96-98, 95-185, First Report and Order, FCC 96-325, 11 FCC Rcd 15499, (1996) [Hereinafter "*First Report & Order*"].

[6] *Id., ¶ 1320 [emphasis added].*

[7] *Id., ¶ 1366.*

39 Paragraph 1320 is not particularly persuasive, as it addresses subsection 252(h), not subsections 252 (a) or (e). While paragraph 1466 appears to imply a filing obligation under section 252 for both carrier classes, it does not address the filing requirements of subsections 252(a) or (e) for agreements entered into *following* the effective date of the Act.

40 The CLECs rely on FCC interpretations in paragraphs 1227, 1230, 1314-15, and 1437 of the First Report & Order to support their position. Paragraph 1227 does not really support the CLECs' position, as it states, in pertinent part, "Section 252 governs procedures for the negotiation, arbitration, and approval of certain agreements between incumbent LECs and telecommunications carriers," contrary to the CLECs' argument that section 252 serves only to carry out the ILECs' section 251 obligations.

41 Paragraph 1230, on which AT&T, Eschelon, and McLeodUSA rely, provides:

> We note that section 252 does not impose any obligations on utilities other than incumbent LECs, and does not grant rights to entities that are not telecommunications providers. Therefore, section 252 may be invoked in lieu of section 224 only by a telecommunications carrier and only if it is seeking access to the facilities or property of an incumbent LEC.

This paragraph appears to distinguish between the obligations of ILECs under the Act, and those of other utilities, such as electric utilities, to enter into interconnection agreements to provide access to poles, ducts, and rights-of-way, and does not discuss obligations to file agreements.

42 Paragraphs 1314 and 1315 clarify how ILECs must permit third parties to obtain access under subsection 252(i) to any individual interconnection, service, or network element arrangements on the same terms and conditions as those

contained in agreements approved under section 252, but do not address filing requirements in anyway.

43 Paragraph 1437 is an interpretation of reporting, recordkeeping and other compliance requirements of subsection 252(i), and provides, in pertinent part, that:

> Our decisions in this section of the Order do not subject any small entities to reporting, recordkeeping or other compliance requirements. Incumbent LECs, including small incumbent LECs, are required to file with state commissions all interconnection agreements entered into with other carriers, including adjacent incumbent LECs.

44 Of all the paragraphs cited by the CLECs, paragraph 1437 is the only one that appears to directly apply. Staff and Qwest argue that it addresses requirements under subsection 252(i), not subsection 252(a), or 252(e), and cannot be seen as an interpretation of the filing requirements under subsections 252(a) and (e).

45 **Discussion and Decision.** The Commission grants Staff's Motion for Partial Summary Determination on the issue of who bears the burden to file agreements, and denies the motions of all other parties on the issue.

46 All of the sources of statutory interpretation cited by the parties - the Act, legislative history, and even the FCC's interpretations in the First Report & Order - are ambiguous as to who bears the burden for filing. There is no direct interpretation in the First Report & Order of the filing requirements in section 252. Paragraphs 1466 and 1437 of the First Report & Order come the closest to FCC interpretation of the section 252 filing requirements. Neither paragraph 1466 nor 1437, however, directly addresses the filing requirements in subsections 252(a) and (e). In fact, the effect of the paragraphs is contradictory.

47 The FCC did not directly address the issue of responsibility for the filing requirement in its declaratory ruling. The FCC did, however, make several references to "carriers" filing agreements:

> Indeed, on its face, section 252(a)(1) does not further limit the types of agreements that *carriers* must submit to state commissions. *FCC Declaratory Ruling, ¶ 8 [emphasis added].*
>
> We encourage state commissions to take action to provide further clarity to *incumbent LECs and requesting carriers* concerning which agreements should be filed for their approval. *Id., ¶ 10 [emphasis added].*
>
> Merely inserting the term "settlement agreement" in a document *does not excuse carriers of their filing obligation* under section 252(a). *Id., ¶ 12 [emphasis added].*

48 Taking into consideration the arguments and policy considerations expressed by all of the parties, as well as the FCC's recent Declaratory Ruling, we find that the filing responsibility under section 252 falls upon both parties to an agreement. The FCC appears to interpret in its Declaratory Ruling that subsection 252(a), and therefore subsection 252(e)(1), require both ILECs and CLECs to file agreements with state commissions. The FCC's interpretation is a permissible reading of the statute, as well as a reasonable one, given the implications of carrier-to-carrier discrimination when a CLEC does not take responsibility to file an agreement it has entered into with an ILEC. If the agreement is not filed, other CLECs would not be able to opt into provisions that one CLEC has negotiated with an ILEC. The purpose of the Act, "a pro-competitive, deregulatory national policy framework," applies not only to ILECs, but also to CLECs in this context, in order to prevent anti-competitive behavior by both carrier classes. *See H.R. CONF. REP. 104-458, 113.*

49 The issue raised by Fairpoint, Integra, and SBC of the potential for error due to multiple filings is small relative to the discriminatory effect of neither party to an agreement filing the agreement with a state commission.

2. Does the Commission have statutory authority to enforce the failure to file interconnection agreements?

50 Fairpoint, Integra, and SBC assert that the Commission lacks authority to impose sanctions against carriers for noncompliance with subsections 252(a) and (e), as Congress made no specific grant of authority to state commissions under the Act to do so. *Fairpoint Motion at 14, Integra Motion at 12-13, SBC Motion at 13.*

51 Staff asserts that the federal courts have recognized the authority of state commissions to enforce interconnection agreements. *Staff Response at 7-8, citing US West Communications, Inc. v. Hix*, 57 F.Supp.2d 1112, 1121 (D. Colo. 1999); *BellSouth Telecommunications, Inc. v. MCIMetro Access Transmission Servs., Inc.*, 317 F.3d 1270, 1276-77 (11th Cir. 2003); *Southwestern Bell Tel. Co. v. Brooks Fiber Communications of Okla., Inc.*, 235 F.3d 493, 497 (10th Cir. 2000); *Southwestern Bell Tel. Co. v. Connect Communications Corp.*, 225 F.3d 942, 946 (8th Cir. 2000); *MCI Telecommunications v. Illinois Bell Tel. Co.*, 222 F.3d 323, 337-38 (7th Cir. 2000); and *Southwestern Bell Tel. Co. v. Public Util. Comm'n of Texas*, 208 F.3d 475, 479-80 (5th Cir. 2000). Staff asserts that theAct plainly contemplates that state commissions will enforce provisions of interconnection agreements, and that enforcing the obligation to file interconnection agreements is no less important than enforcing of the agreements themselves. *Id. at 8*.

52 Public Counsel asserts that Congress delegated to state commissions under sections 251 and 252 the authority to review proposed interconnection agreements and enforce the agreements. *Public Counsel Response at 5.* In addition, Public Counsel asserts that Congress reserved state authority to enforce state law in subsection 252(e)(3). *Id.*

53 Both Staff and Public Counsel assert that the Washington legislature recognized the Congressional delegation of authority in RCW 80.36.610(1), which provides, in part, that "The Commission is authorized to take actions, conduct proceedings, and enter orders as permitted or contemplated for a state commission under the federal telecommunications act of 1996." *Staff Response at 8; Public Counsel Response at 6.* Staff asserts that the Commission is authorized to impose penalties for noncompliance under RCW 80.04.380, -390, -405, and WAC 480-120-530(d). *Staff Response at 8-9.*

54 **Discussion and Decision.** As noted by Staff and Public Counsel, the Commission may "take actions, conduct proceedings, and enter orders as permitted or contemplated for a state commission under the federal telecommunications act of 1996." *RCW 80.36.610(1).* The federal courts have recognized state commission authority to enforce the provisions of interconnection agreements. In its Declaratory Ruling, the FCC states that:

> Based on their statutory role provided by Congress and their experience to date, state commissions are well positioned to decide on a case-by-case basis whether a particular agreement is required to be filed as an 'interconnection agreement' and, if so, whether it should be approved or rejected. … We encourage state commissions to take action to provide further clarity to incumbent LECs and requesting carriers concerning which agreements should be filed for their approval. "

FCC Declaratory Ruling, ¶ 10. Implicit in the FCC's analysis is state commission authority to enforce the failure to file interconnection agreements as required by section 252.

55 The motions of Fairpoint, Integra, and SBC for summary determination on this issue are denied.

3. Is the first cause of action, based upon § 252(a), duplicative of the second cause of action, based upon § 252(e)?

56 The first cause of action in the Amended Complaint alleges failure by Qwest and CLECs to file or to timely file[8] agreements with the Commission as required by subsection 252(a), which provides that negotiated agreements "shall be submitted to the state commission under subsection (e) of this section." The second cause of action alleges failure by Qwest and CLECs to seek Commission approval of the agreement, or seek approval in a timely fashion, as required by subsection 252(e)(1), which provides "Any interconnection agreement adopted by negotiation or arbitration shall be submitted for approval to the State commission."

57 Qwest, AT&T/TCG, Eschelon, Fairpoint, Integra, MCI, and SBC all assert that the first and second causes of action are duplicative. The parties argue that the filing requirement in subsection 252(a), the statute underlying the first cause of action, contains a requirement that agreements be filed under subsection (e), which forms the basis for the second cause of action. The parties argue that there can be only one violation, as both causes of action involve the same requirement for violation – failure to file the agreement. The parties request that the Commission dismiss the first cause of action.

58 Relying on *Blockburger v. U.S.*, 284 U.S. 299, 304 (1932), Qwest alleges that it is impermissible to allege two causes of action for two different statutory provisions that rely on the same act for proof of violation. *Blockburger* is a criminal procedure case that applies the "same evidence" test for determining double jeopardy under the Fifth Amendment to the United States Constitution:

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[8] On August 22, 2002, Qwest filed with the Commission for approval nine of the agreements listed in Exhibit A. The Amended Complaint alleges that these nine agreements were not timely filed.

> 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 determine whether there are two offenses or only one is whether each provision requires proof of an additional fact which the other does not.

284 U.S. at 304. Washington state's same evidence test is very similar to the *Blockburger* test. *See State v. Calle, 125 Wn.2d 769, 777, 888 P.2d 155 (1995).* Qwest asserts that *Blockburger* applies to both civil and criminal penalties, citing to *Washington v. Cole*, 128 Wash. 2d 262, 285 n.18 (1995).

59 Staff argues that a violation of one statute is in fact a violation of the other, and recommends the Commission not dismiss either cause of action. Staff asserts that the Commission may choose to impose penalties for the violation of only one of the provisions. *Staff Response at 10.* Public Counsel agrees that subsections 252(a) and 252(e)(1) refer to the same action - filing the agreement. Public Counsel argues, however, that the two provisions establish independent duties for carriers. Public Counsel asserts that, at a minimum, the Commission should retain one of the causes of action. *Public Counsel Response at 6.*

60 **Discussion and Decision.** A review of Washington and federal cases, including *Washington v. Cole,* indicates that while an administrative penalty may constitute double jeopardy when based upon the same evidence as that supporting a criminal penalty, this does not appear to be true when there is no criminal penalty involved. *See United States v. Halper, 109 S.Ct. 446, 448-449 (1989); see also Ludeman v. Department of Health, 89 Wash. App. 751, 757, 951 P.2d 266 (1997).*

61 Subsection 252(a) addresses only negotiated agreements and requires the filing of negotiated agreements with state commissions under subsection 252(e)(1). Subsection 252(e)(1) requires that an agreement adopted by either negotiation or arbitration must be filed with a state commission for approval. Both contain filing requirements, and subsection 252(a) refers back to subsection 252(e). Since

none of the agreements in question were arbitrated, there is no violation under subsection 252(a) that is not also a violation under subsection 252(e)(1).

62 The *Blockburger* same evidence test does not apply to the causes of action in this proceeding, as the *Blockburger* test appears to apply only in situations where a criminal penalty has already been applied. The circumstances of this case are entirely different. Because there would be no violation under subsection 252(a) that is not a violation under subsection 252(e)(1), it is appropriate, for reasons of judicial economy to dismiss the first cause of action and proceed solely with the second cause of action for violations of subsection 252(e)(1). The motions of Qwest, AT&T/TCG, Eschelon, Fairpoint, Integra, MCI, and SBC are granted as to this issue.

4. Is the third cause of action, based upon § 252(i), duplicative of the second cause of action, based upon § 252(e)(1)?

63 The third cause of action alleges failure by Qwest and CLECs to make agreements available to other carriers, or to do so in a timely manner, as required by subsection 252(i), the pick and choose provision, which provides "A local exchange carrier shall make available any interconnection, service, or network element provided under an agreement approved under this section to which it is a party to any other requesting telecommunications carrier upon the same terms and conditions as those provided in the agreement."

64 For the same reasons asserted above, Qwest moves to dismiss the third cause of action, which is based upon violations of subsection 252(i), as duplicative of the second cause of action, which is based upon violations of subsection 252(e)(1). Qwest asserts that both causes of action are predicated on the same evidence, the failure to file agreements with the Commission.

65 Staff asserts that the failure to file an agreement under subsection 252(e)(1) results in a violation of subsection 252(i), as there is no other way to make agreements readily available to other carriers. *Staff Response at 10.* CLECs only have notice of agreements reached by other carriers if they are publicly filed with state commissions as required by subsection 252(i). *Id.* Public Counsel asserts that, as in many areas of law, a single incident or act may create multiple liabilities. The alleged failure to timely file agreements can be both a violation of the obligation to file and the obligation to make the terms of the agreement available to other carriers. *Public Counsel Response at 7-8.*

66 **Discussion and Decision.** As with the prior issue, the Fifth Amendment "same evidence test" does not apply to this proceeding: A civil penalty may constitute double jeopardy only where a criminal penalty is also applied.

67 In contrast to subsection 252(a), which specifically refers to filing agreements with state commissions and which creates the same obligation as subsection 252(e)(1), subsection 252(i) requires local exchange carriers to make available to other carriers interconnection agreements approved by a state commission. Congress established separate provisions with separate obligations, even though both provisions share an underlying requirement to file agreements with state commissions. The purpose of the subsection 252(e)(1) filing requirement is state commission review and approval, while the purpose of subsection 252(i) is to prevent discrimination between carriers. While the same act, the failure to file agreements, is the basis for both the second and third causes of action, the obligations under subsections 252(e)(1) and 252(i) and the consequences of violation are sufficiently different. Qwest's motion to dismiss the third cause of action is denied.

5. Should the fourth cause of action be dismissed for failure to state a claim, as RCW 80.36.150 does not apply to interconnection agreements and the Commission has not created a binding filing requirement?

68 The fourth cause of action alleges failure by Qwest and CLECs to file agreements listed in Exhibits A and B to the Amended Complaint with the Commission, or to do so in a timely manner, as required by RCW 80.36.150, which requires, in part, that:

> Every telecommunications company shall file with the commission, as and when required by it, a copy of any contract, agreement or arrangement in writing with any other telecommunications company, or with any other corporation, association, or person relating in any way to the construction, maintenance or use of a telecommunications line or service by, or rates and charges over and upon, any such telecommunications line. The commission shall adopt rules that provide for the filing by telecommunications companies on the public record of the essential terms and conditions of every contract for service.

RCW 80.36.510(1).

69 Qwest, AT&T/TCG, Eschelon, Fairpoint, Global Crossing, Integra, MCI, McLeodUSA, and SBC all assert that RCW 80.36.150 does not create a filing requirement, and should be dismissed under WAC 480-09-426(1) and CR 12(b)(6) for failing to state a claim upon which relief can be granted. The parties argue that the statute authorizes the Commission to adopt rules establishing filing requirements, but that the Commission has not done so. In addition, the parties argue that, historically, the Commission has not required wholesale contracts to be filed with the Commission under this provision. *See Qwest Motion at 21, see also AT&T/TCG Response at 6-7; Eschelon Motion at 7-10, Fairpoint Motion at 11-13; Global Crossing Motion at 2; Integra Motion at9-12; MCI Motion at 8; McLeodUSA*

Brief in Support of Motion at 5-6; SBC Motion at 10-12. The parties acknowledge that the Commission has issued an Interpretive and Policy Statement addressing the issue, but argue that such a statement is only advisory, and not binding. *RCW 34.05.230(1).*[9]

70 Staff concedes the issue in its responsive pleading. *Staff Response at 11, 13 n.2.* Public Counsel argues that the statute is applicable to the agreements at issue in this docket and that the penalty provisions of RCW 80.04.380 - .410 apply. *Public Counsel Response at 5.*

71 **Discussion and Decision.** The fourth cause of action is based upon violations of RCW 80.36.150, which requires that "Every telecommunications company shall file with the Commission, *as and when required by it*, a copy of any contract, agreement, or arrangement in writing with any other telecommunications company . . .." As the parties explain in their motions, the Commission has not, until the recently adopted procedural rules in chapter 480-07 WAC, adopted any rules establishing filing requirements for interconnection agreements.[10] While the Interpretive and Policy Statement issued in 1996 provides that interconnection agreements must be filed within 30 days of their execution, the policy statement is advisory, not binding. *See RCW 34.05.230(1).* Without binding rules in place, there can be no violation of RCW 80.36.510.

72 Under WAC 480-09-426, as well as the recently adopted WAC 480-07-380, the Commission will consider the standards applicable to dispositive motions made under the civil rules. Under CR 12(b)(6), a party may move to dismiss a claim or

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[9] *See In the Matter of Implementation of Certain Provisions of the Telecommunications Act of 1996*, Docket No. UT-960269, Interpretive and Policy Statement Regarding Negotiation, Mediation, Arbitration, and Approval of Agreements Under the Telecommunications Act, 170 PUR 367 (June 27, 1996) [Hereinafter "*Interpretive and Policy Statement*"].

[10] WAC 480-70-640, effective on January 1, 2004, requires negotiated interconnection agreements to be filed with the Commission within 30 days of executing an agreement and arbitrated agreements to be filed within 30 days after issuance of the arbitrator's report and decision.

case if the opposing party's pleading fails to state a claim on which a court, or the Commission, may grant relief. Courts will dismiss claims under CR 12(b)(6) "only if it appears beyond a reasonable doubt that no facts exist that would justify recovery," and "only in the unusual case in which plaintiff includes allegations that show on the face of the complaint that there is some insuperable bar to relief." *Cutler v. Phillips Petroleum Co., 124 Wn.2d 749, 755, 881 P.2d 216 (1994), citing Hoffer v. State, 110 Wn.2d 415, 420, 755 P.2d 781 (1988), aff'd on rehearing, 113 Wn.2d 148, 776 P.2d 963 (1989).* "No dismissal for failure to state a claim should be granted unless it appears, beyond doubt, that the plaintiff can prove no set of facts in support of this claim which would entitle him to relief." *Berge v. Gorton, 88 Wn. 2d 756, 759, 567 P.2d 198 (1977).* If "matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment" under CR 56. *See Cutler, 124 Wn.2d at 756, quoting CR 12(b)(6).*

73 Dismissal is appropriate under WAC 480-70-380(a). If there can be no violation of RCW 80.36.510, no facts can support a claim for relief under the statute. The motions of Qwest, Eschelon, Fairpoint, Global Crossing, Integra, MCI, McLeodUSA, and SBC are granted as to this issue.

74 The parties also raise the issue of whether the statute applies to interconnection agreements. Because the Commission dismisses the cause of action for other reasons, the Commission need not reach this issue.

6. Is the fourth cause of action, based upon RCW 80.36.150(5), duplicative of the fifth, sixth and seventh causes of action?

75 Qwest argues that the fourth cause of action should be dismissed as duplicative of the fifth, sixth, and seventh causes of action. Qwest asserts that the portion of the fourth cause of action based upon subsection (5) of RCW 80.36.150 does not require proof of any facts in addition to those necessary to establish a violation of

RCW 80.36.170, RCW 80.36.180, and RCW 80.36.186, the bases for the fifth, sixth, and seventh causes of action. *Qwest Motion at 20.* Qwest argues that RCW 80.36.150(5) requires telecommunications companies to provide the same rates, terms and conditions to similarly situated purchasers of its products and services. *Id.* Qwest states that unreasonable preferences or advantages are prohibited by RCW 80.36.170, and that rate discrimination and unreasonable advantages in pricing or access to non-competitive services are prohibited by RCW 80.36.180 and RCW 80.36.186. *Id.*

76 Staff asserts that the Commission need not reach the merits of Qwest's argument about duplication of the fourth, fifth, sixth, and seventh causes of action, as Staff agrees that the fourth cause of action should be dismissed for other reasons. *Staff Response at 13, n.2.*

77 **Discussion and Decision.** For the reasons discussed above, the Commission dismisses the fourth cause of action in the Amended Complaint. The Commission need not reach the issue of duplication raised in Qwest's motion.

7. Is there a federal or state requirement to file interconnection agreements in a timely manner?

78 Eschelon, Fairpoint, Integra, MCI, McLeodUSA, and SBC assert that there is no federal or state requirement to file agreements in a timely manner, and that the untimely filing allegations in the first, second, and fourth causes of action should be dismissed.[11] *Eschelon Motion at 10-11; Fairpoint Motion at 11-13; Integra Motion at 9-12; MCI Motion at 7; McLeodUSA Brief in Support of Motion at 6; SBC Motion at 6-8.* The first, second, and fourth causes of action of the Amended Complaint allege that the CLEC respondents and Qwest failed to file agreements and to timely file certain agreements with the Commission or seek approval from the

[11] The first and fourth causes of action are dismissed as discussed above, so the discussion here applies only to the second cause of action.

Commission.[12] The parties assert that the lack of a requirement to timely file the agreements is fatal to these causes of action. They assert that the timeframe in the Commission's Interpretive and Policy Statement is only advisory and that the recently effective procedural rule, WAC 480-07-640(2)(a)(i), does not apply in this proceeding.

79 Staff concedes that neither subsection 252(a) nor subsection 252(e)(1) explicitly contains a timeframe for filing agreements. Staff asserts, however, that agreements must be filed in a timely manner in order for the requirements of subsections 252(a), 252(e)(1), and 252(i) to be meaningful. *Staff Response at 12-13.* Without a timely filing requirement, parties could frustrate the non-discrimination provisions of section 252. Staff asserts that the Interpretive and Policy Statement, while only advisory, does establish a reasonable period of time for filing agreements with the Commission.

80 Public Counsel asserts that it is reasonable to infer that the obligation to file arises at the time the agreement is executed. *Public Counsel Response at 7.* Public Counsel asserts that the Commission recognized this in adopting WAC 480-07-640(2)(a)(i).

81 **Discussion and Decision.** The CLEC respondents are correct that the Act specifies no explicit timeframe for filing agreements with state commissions. This does not, however, render the statute meaningless. Under the rules of statutory construction, courts will look to the purpose of the statute if the plain language of a statute produces absurd or meaningless results. *United States v. American Trucking Ass'ns, Inc., 310 U.S. 534, 543-44, 60 S.Ct. 1059 (1940).* If a carrier is required to file the agreement with a state commission, as subsection 252(e)(1) requires, then the carrier is required to do so in a reasonable period of

[12] On August 22, 2002, Qwest filed with the Commission nine of the agreements listed in Exhibit A, Exhibit A Agreements No. 8, 9, 12, 14, 16, 30, 34, 35, and 42. The Amended Complaint alleges that these nine agreements were not timely filed.

time. It is rational to infer that a carrier would need to file an agreement within a reasonable time in order to render the provisions of section 252 meaningful. Although the Commission had not stated a specific timeframe for filing agreements prior to January 1, 2004, it does not follow that until that time there was no requirement to file agreements within a reasonable period of time.

82 Attached to this Order is a chart establishing the status of each agreement at issue in the Amended Complaint, as well as the date the agreement was executed and the name of the CLEC that entered into the agreement. *See Appendix A.* An asterisk indicates the nine agreements that the Amended Complaint alleges were not timely filed. The most recent date of execution among these agreements is March 3, 2002, and the earliest date of execution is April 28, 2000. When these agreements were filed with the Commission on August 22, 2002, seven of the agreements were over one year old, and the remaining two were five and eight months old. These timeframes are way beyond any perception of a reasonable period of time to file interconnection agreements with the Commission. The motions of Eschelon, Fairpoint, Integra, MCI, McLeodUSA, and SBC on this issue are denied.

8. Should the third, fourth, fifth, sixth, and seventh causes of action be dismissed for those agreements that Qwest has posted on its website?

83 Qwest moves for summary determination to dismiss the third, fourth, fifth, sixth, and seventh causes of action as they apply to 15 agreements that Qwest posted on its website beginning in September 2000.[13] *Qwest Motion at 22-25.* Qwest supports its motion with the affidavit of Larry Brotherson.

[13] These agreements are Ex. A Agreements No. 8, 9, 10, 12, 14, 16, 25, 30, 34, 35, 40, 42, and 47, and Ex. B Agreements No. 6 and 16.

84 Qwest asserts that each of these causes of action is dependent on finding that a similarly situated CLEC suffered discrimination as a result of the agreement. *Id. at 23.* Qwest asserts that these agreements had been posted on the website for 14 months before the Commission issued the Amended Complaint, without any CLEC opting into the agreements. Qwest argues that this lack of CLEC interest in the agreements demonstrates that the failure to file the agreements did not cause any undue prejudice or discrimination as alleged in the third, fourth, fifth, sixth, and seventh causes of action. Qwest argues that it is entitled to summary judgment for any agreements that did not cause undue discrimination, prejudice or disadvantage to similarly situated CLECs. *Id.*

85 Qwest asserts in its reply that it is entitled to summary judgment, as neither Staff nor Public Counsel produced any evidence or argument in response that the agreements did not cause discrimination. *Qwest Reply at 4-5.*

86 Fairpoint asserts that an escalation clause in Agreement No. 30 has been readily available as a part of Qwest's Statement of Generally Available Terms (SGAT) on Qwest's website, and that the agreement and Fairpoint should be dismissed from the Amended Complaint. *Fairpoint Motion at 7-11.* Fairpoint also supports it motion with an affidavit, but the affidavit does not address the facts Fairpoint raises about availability of the agreement on Qwest's website.

87 Integra argues that a Centralized Message Data Service (CMDS) agreement entered into between Integra and Qwest is a form agreement available to carriers on Qwest's website, and that the agreement does not meet the FCC's definition of an interconnection agreement. *Integra Motion at 5-9.*[14]

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[14] It appears that Integra bases its arguments on an agreement that is different from the one included in Exhibit A to the Amended Complaint. The CMDS agreement that Integra refers to is dated May 20, 2003, while the agreement at issue in the Amended Complaint is listed in Exhibit A as Agreement No. 25, dated November 20, 2001. In addition, Staff and Qwest refer to the agreement in their pleadings as relating to facilities decommissioning. Given the confusion over this agreement, the Commission does not reach the merits of Integra's argument on this issue.

88 In response, Staff provides a chart showing the date the agreements were executed, and states only that Qwest posted the agreements to its website months, and in some cases years, after the agreements were executed and that the agreements were not timely filed. *Staff Response at 20-21.* In a separate section of its response, Staff addresses specific factual reasons for why certain of the agreements (Nos. 10, 16, 25, 34, and 35) should be filed or may have caused discrimination. *Id. at 15, 17, 19.*

89 Public Counsel argues that Qwest's and Fairpoint's arguments are not supportable, as later posting does not cure earlier violations of federal and state law. *Public Counsel Response at 3-4.* Public Counsel argues that the Commission should reject Qwest's request for dismissal based upon the *post-facto* posting of agreements. Public Counsel also argues that only those provisions of the SGAT or other form contracts entered into after Commission approval of those terms and conditions may be exempt from the filing requirement. *Id. at 4.*

90 **Discussion and Decision.** The Commission's rules governing motions for summary determination, WAC 480-09-426, as well as the recently adopted WAC 480-07-380, provide that in ruling on such motions, the Commission will consider the standards applicable to such motions made under the civil rules. Under CR 56, a party may move for summary determination if the pleadings, together with any properly admissible evidentiary support, show that there is no genuine issue as to any material fact and the party is entitled to judgment as a matter of law. Summary judgment is properly entered if there is no genuine issue as to any material fact, that reasonable persons could reach only one conclusion, and that the moving party is entitled to judgment as a matter of law. *Tanner Electric Coop. v. Puget Sound Power & Light Co., 128 Wn.2d 656, 668 (1996).* In resolving a motion for summary judgment, a court must consider all the facts submitted by the parties and make all reasonable inferences from the facts in the light most favorable to the nonmoving party. *Id.*

91 Once the moving party meets its initial burden of showing the absence of any genuine issues of material fact, the burden then shifts to the non-moving party to set forth specific facts showing there is a genuine issue for trial, not just bare allegations, to avoid summary judgment. *See FRCP 56(e); Kendall v. Public Hospital Dist., 118 Wn. 2d 1, 8-9, 820 P.2d 497 (1991). See also Reed v. Streib, 65 Wn.2d 700, 707 (1965); Saluteen-Maschersky v. Countrywide, 105 Wn. App. 846, 22 P.3d 804 (2001).* A plaintiff makes a prima facie case when the evidence supports a reasonable inference of each element. *See Bruns. v. PACCAR, Inc., 77 Wn. App. 201, 208, 890 P.2d 469 (1995).*

92 Under the rules of summary judgment, the Commission should grant Qwest's and Fairpoint's motions for summary determination only if there is no issue of genuine fact, that reasonable persons could reach only one conclusion, and that the moving party is entitled to summary judgment as a matter of law. *See Tanner, 128 Wn. 2d at 668.* In addition, the Commission must consider all the facts submitted and make all reasonable inferences from the facts in the light most favorable to the nonmoving party, in this case, Staff. *Id*.

93 In its pleadings, Qwest appears to concede that it did not make the agreements publicly available until September 2002. Neither Staff nor Public Counsel deny that the agreements were posted on the website as of September 2002. Staff does address possible discrimination concerning some of the agreements at issue, but did not file any affidavits to counter Qwest's and Fairpoint's submissions. On this point, Qwest argues that it should be granted summary judgment.

94 Looking at all of the facts submitted and making all reasonable inferences in the light most favorable to Staff, the Commission denies Qwest's and Fairpoint's motions to dismiss all causes of action against agreements posted on Qwest's website. All parties appear to agree that the 15 agreements were not publicly available prior to posting on the website, a timeframe ranging from between six months and two years, five months. A key fact that remains in dispute in the

third, fifth, sixth, and seventh causes of action is whether any CLECs suffered undue discrimination, prejudice or disadvantage from Qwest and the respondent CLECs' failure to file the 15 agreements *before* the agreements were posted. Qwest's and Fairpoint's submissions do not address this key fact.

95 Qwest supports its motion for summary judgment with the fact that no CLEC sought to opt into the agreements after they were posted to the website, and then makes the inference that no CLECs were disadvantaged by the earlier failure to file. An inference is not a fact. That Staff did not prove its allegations through affidavits at this stage of the proceeding is irrelevant. Staff did not need to do so, as Qwest did not meet its initial burden under the rules of summary judgment. There remains a genuine issue of material fact on the question of whether any CLEC suffered undue discrimination, prejudice or disadvantage from Qwest and the respondent CLECs' failure to file the 15 agreements prior to the time the agreements were posted to Qwest's website.

9. Should all causes of action be dismissed against Exhibit B agreements and some Exhibit A agreements for the failure to state a valid claim?

96 Qwest asserts that a conclusory allegation that Qwest entered into certain settlement agreements is insufficient to state a claim upon which relief can be granted, and moves to dismiss all agreements listed in Exhibit B, as well as certain agreements listed in Exhibit A. *Qwest Motion at 7-11.* Qwest asserts that the factual allegations in the Amended Complaint are that Qwest entered into agreements to settle outstanding disputes, and that the agreements provide for cash payments by Qwest in exchange for the other carrier's "agreements to forego certain litigation positions, not to pursue complaints, or not to participate in various proceedings against Qwest or an agreement not to oppose positions taken by Qwest." *Id. at 7; See also Amended Complaint, ¶ 17*.

97 Qwest asserts that these allegations describe nearly every settlement agreement entered between companies. *Qwest Motion at 7.* Without additional factual allegations, Qwest asserts that the Amended Complaint appears to offer a legal conclusion that the existence of the settlement agreements violated state statutes. Qwest cites several cases stating state policy in favor of settlements. *Id. at 8.* Qwest further argues that "allowing complaints under state law against settlement agreements with solely retrospective consideration without further factual allegations of how the agreements caused undue preference or prejudice would extend the reach of regulatory control under the Act in a manner inconsistent with the deregulatory purpose of the Act." *Id. at 10.*

98 Staff asserts that the allegations sufficiently notify Qwest that the agreements result in discrimination or prejudice to other carriers, and that is all that is required by the rules of pleading. *Staff Response at 12.* Staff argues that the fact that the agreements are settlements does not insulate them from Commission scrutiny. Staff further argues that while it may be lawful and proper to enter into a settlement agreement, it is not lawful and proper to do so where agreements discriminate against or prejudice other companies. *Id. at 11.*

99 **Discussion and Decision.** Under the rules of notice pleading and the standards for reviewing motions to dismiss discussed above, Commission denies Qwest's motion on this issue. The Commission will "liberally construe pleadings and motions with a view to effect justice among the parties." *WAC 480-07-395(4).* Courts should dismiss claims under CR 12(b)(6) "only if it appears beyond a reasonable doubt that no facts exist that would justify recovery," and "only in the unusual case in which plaintiff includes allegations that show on the face of the complaint that there is some insuperable bar to relief." *Cutler, 124 Wn.2d at 755.* This is not the case here.

100 Attached to the Amended Complaint is a list of 77 agreements, mostly settlement agreements, that Qwest filed with the Commission in the Section 271 proceeding

in response to Bench Request No. 46. The Amended Complaint was filed in the context of the following events: Similar proceedings in Minnesota, Colorado, Arizona, and other states in Qwest's region to address the possible discriminatory effect of the failure to file certain agreements, and Qwest seeking a declaratory ruling from the FCC to determine whether certain agreements, including settlement agreements, must be filed with state commissions. Qwest has had fair notice of what the claims are and the ground upon which they rest. These agreements are not the illusory oral contracts or failures to state claims described in cases cited by Qwest. The Amended Complaint alleges sufficient facts to survive a motion for judgment on the pleadings.

10. Should the Commission dismiss from the Amended Complaint any agreements to agree?

101 Qwest asserts that agreements to later file interconnection agreements or to provide services according to the terms of filed interconnection agreements are not interconnection agreements as defined by the FCC's Declaratory Ruling, because such agreements do not create any ongoing obligations regarding subsection 251(b) or (c) services. *Qwest Motion at 11-15.* Qwest asserts that the fourth through seventh causes of action should be dismissed against certain agreements, Exhibit A Agreements No. 13, 17, 20, 22, 23, 24, 41 and 51, for failure to state a claim upon which relief can be granted, as the agreements are agreements to agree, not interconnection agreements. *Id.*

102 Staff agrees with Qwest that agreements that do not create ongoing obligations regarding subsection 251(b) and (c) services are not interconnection agreements as defined in the FCC's Declaratory Ruling and are not required to be filed with state commissions. *Staff Response at 14.* For this reason, Staff agrees that Exhibit A Agreements No. 22, 24, and 51 should be dismissed, but states facts for why

Exhibit A Agreements No. 17, 20 and 23 do not fall in this category.[15] *Staff Response at 14-17; see also November 7, 2003, Staff Motion to Dismiss.*

103 **Discussion and Decision.** Qwest's motion is framed as a motion to dismiss. Where the reviewing court considers facts outside of the pleadings, however, the issue is considered one of summary determination. *CR 12(b)(6).* The issue posed by Qwest is whether certain agreements are interconnection agreements that are required to be filed under subsections 252(a) and 252(e)(1). In their pleadings, the parties have presented facts about the agreements at issue that are beyond those stated in the Amended Complaint.

104 As a matter of law, the Commission will apply the definition of an interconnection agreement reached by the FCC in its Declaratory Ruling to the resolution of factual disputes in this proceeding. However, the Commission cannot yet determine whether some of these agreements meet the FCC's definition. Looking at all of the facts submitted and making all reasonable inferences in the light most favorable to Staff, there appear to be genuine issues of material fact concerning the terms and conditions contained in Exhibit A Agreements No. 17, 20, and 23. The Commission, therefore, denies Qwest's motion for summary determination as to these agreements, and grants Qwest's and Staff's motions addressing Exhibit A Agreements No. 22, 24, and 51, dismissing these agreements from the Amended Complaint.

11. Should the Commission dismiss from the Amended Complaint any agreements that relate to services that are outside of the Commission's jurisdiction, *e.g.*, interstate services?

105 Qwest argues, following paragraph 8 of the FCC's Declaratory Ruling, that an agreement is an interconnection agreement subject to the section 252 filing

[15] Staff moved to dismiss Agreement No. 13 on September 4, 2003. Staff's motion was granted on September 8, 2003.

requirements only if it creates ongoing obligations relating to subsection 251(b) or (c) services. *Qwest Motion at 15-16.* Qwest argues that Exhibit A Agreements No. 15, 31, and 37 should be dismissed from the Amended Complaint as they relate solely to FCC-tariffed interstate services, services that do not relate to subsections 251(b) and (c), and are within the jurisdiction of the FCC, not state commissions. *Id.*

106 MCI and XO also filed motions to dismiss or for summary determination arguing that Exhibit A Agreements No. 31 (MCI) and 37 (XO) concern services that are outside of the Commission's jurisdiction. *MCI Motion at 6; XO Motion at 3-5.*

107 ATG asserts that Exhibit A Agreement No. 27 includes a provision for reciprocal compensation for ISP-bound traffic, and that the FCC has determined such traffic to be interstate in nature. *ATG Reply at 1-5.* ATG asserts that this provision is the only relevant portion of Agreement No. 27 remaining in effect following its bankruptcy proceeding and that the agreement should be dismissed from the Amended Complaint as not subject to Commission jurisdiction. *ATG Motion at 7-9.*

108 Staff agrees with Qwest's interpretation of the FCC's Declaratory Ruling on this issue, and agrees that Exhibit A Agreements No. 15 and 37 should be dismissed from the Amended Complaint. *Staff Response at 13-14.* Staff disagrees as to the specific terms and conditions of Exhibit A Agreements No. 27 and 31. As to Agreement No. 27, Staff argues that the reciprocal compensation of ISP-bound traffic remains a matter within the Commission's jurisdiction. *Staff Response at 17-18.* Staff appears to agree that Agreement No. 31 relates to interstate services, but alleges that the facilities can also be used for the provision of local telecommunications services, and that it is unclear whether MCI used or intends to use the facilities to provide local service. *Staff Response at 18-19.*

109 **Discussion and Decision.** Similar to the discussion above concerning agreements to agree, there appears to be a genuine dispute of material fact as to the terms and conditions of Agreement No. 31. The Commission, therefore, denies Qwest's motion for summary determination as to Exhibit A Agreement No. 31, and grants those portions of the motions of Qwest and XO concerning Exhibit A Agreements No. 15 and 37, dismissing these agreements from the Amended Complaint.

110 The Commission denies ATG's motion to dismiss Agreement No. 27 for lack of jurisdiction. Staff and ATG agree that a portion of the agreement relates to reciprocal compensation for ISP-bound traffic, but disagree as to the Commission's jurisdiction over such traffic. As a matter of law, state commissions retain jurisdiction to review negotiated agreements and arbitrate disputes under section 252, subject to the FCC's rules for ISP-bound traffic.[16] While the Commission lacks jurisdiction to determine the level of compensation for ISP-bound traffic, the Commission retains jurisdiction to "arbitrate carrier-to-carrier disputes including disputes that involve ISP-bound traffic," as well as enforce any interconnection agreements that might contain provisions concerning ISP-bound traffic.[17]

12. Should the Commission dismiss from the Amended Complaint any agreements for which there is no effect in Washington State?

111 Qwest moves to dismiss Exhibit A Agreements No. 11, 38, 39, 43, 49, 50, and Exhibit B Agreement 21 from the Amended Complaint, asserting that the

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[16] *In the Matter of the Petition for Arbitration of an Interconnection Agreement Between Level 3 Communications, LLC, and CenturyTel of Washington, Inc., Pursuant to 47 U.S.C. Section 252*, Docket No. UT-023043, Seventh Supplemental Order: Affirming Arbitrator's Report and Decision (Feb. 28, 2003), ¶ 20 [Hereinafter "*Seventh Supplemental Order, Docket No. UT-023043*"].
[17] Id. at ¶ 19, citing *Application by Qwest Communications International, Inc. for Authorization To Provide In-Region, InterLATA Services in the States of Colorado, Idaho, Iowa, Montana, Nebraska, North Dakota, Utah, Washington and Wyoming,* Memorandum Opinion and Order, WC Docket No. 02-314, FCC 02-332, ¶ 325 (rel. Dec. 23, 2002) [Hereinafter "*Qwest Section 271 Order*"].

agreements do not apply to provisioning of local telecommunications services in Washington State. *Qwest Motion at 16-17*. Qwest asserts that one state does not have authority to regulate conduct in another state. *Id. at 16, citing BMW v. Gore, 517 U.S. 559, 572 (1996).* Qwest argues that a state commission only has authority to oversee and regulate interconnection agreements as the agreements affect interconnection services in that state. *Id. at 17.*

112 XO moves to dismiss Exhibit A Agreements No. 38 and 39 from the Amended Complaint for reasons similar to those expressed by Qwest. *XO Motion at 3-5.*

113 Staff agrees with Qwest and XO that agreements pertaining to services provided outside of the state are not required to be filed with the Commission. *Staff Response at 13.* Staff agrees that Exhibit A Agreements No. 11, 38, 39, and 43 should be dismissed from the Amended Complaint as relating to services outside of Washington state.[18] *Id. at 13-14.* Staff disagrees with Qwest as to the specific terms and conditions of Exhibit A Agreement No. 49 and Exhibit B Agreement No. 21. *Id. at 20.*

114 **Discussion and Decision.** Looking at all of the facts submitted and making all reasonable inferences in the light most favorable to Staff, there appears to be a genuine dispute of material fact as to the terms and conditions of Exhibit A Agreement No. 49 and Exhibit B Agreement No. 21. Qwest's motion for summary determination concerning these agreements is denied. Qwest's and XO's motion for summary determination concerning Exhibit A Agreements No. 11, 38, 39, and 43 are granted, and these agreements are dismissed from the Amended Complaint.

[18] Staff agrees to dismiss Exhibit A Agreement No. 50 as it is a settlement agreement that is not required to be filed with the Commission. *See discussion in Section III.B.14. below.*

13. Should the Commission dismiss from the Amended Complaint any facilities decommissioning agreements?

115 Qwest moves to dismiss Exhibit A Agreements No. 16, 25, and 35 from the Amended Complaint, asserting that the agreements are facilities decommissioning agreements, the terms and conditions of which were all incorporated into amendments to interconnection agreements filed with and approved by the Commission. *Qwest Motion at 21-22; see also Declaration of Larry Brotherson.* Qwest asserts that these agreements should be treated no differently than Exhibit A Agreement No. 14, which Staff moved to dismiss on November 5, 2003. *Id.*

116 Staff argues that Exhibit A Agreements No. 16 and 25 provide for facilities decommissioning at no charge, a provision that other carriers may have wanted to opt into. *Staff Response at 15, 17.* Further, Staff argues that Agreement No. 35 provided terms and conditions for decommissioning of collocated equipment and is on going in nature. *Id. at 19.* Staff also asserts that these three agreements were not timely filed. *Id. at 15, 17, 19.*

117 **Discussion and Decision.** Staff does not appear to dispute Qwest's assertion that the terms and conditions of Exhibit A Agreements No. 16, 25, and 35 were all subsequently incorporated into amendments to interconnection agreements filed with and approved by the Commission. The only dispute presented concerning these agreements is whether they were timely filed. Based upon our discussion in Sections III.B.7 above, and looking at all of the facts submitted and making all reasonable inferences in the light most favorable to Staff, there appears to be a genuine dispute of material fact as to whether the agreements were timely filed and the discriminatory effect of failing to timely file the agreements. Qwest's motion for summary determination concerning Exhibit A Agreements No. 16, 25, and 35 is denied.

14. Should the first, second and third causes of action be dismissed against all settlement agreements that do not create forward-looking obligations?

118 Qwest and other parties argue that the Commission should dismiss from the Amended Complaint all claims against settlement agreements with solely retrospective consideration and no forward-looking or ongoing terms of interconnection, consistent with the FCC's Declaratory Ruling. *Qwest Motion at 4-6; ATG Motion at 3-9; AT&T/TCG Response at 7-9; Fairpoint Motion at 4-7, 9-10; Global Crossing Motion at 3-4; MCI Motion at 6, 8-9; SBC Motion at 5-9; XO Motion at 3-5.* Qwest argues that the Commission cannot interpret settlement agreements differently than the FCC has in its Declaratory Ruling. *Qwest Motion at 5-6.* Qwest asserts that the FCC's determination applies to all of the Exhibit B agreements and Exhibit A Agreements No. 22, 23, and 50. *Id. at 4.* The respondent CLECs identify a number of Exhibit A agreements (Agreements No. 10, 26, 27, 30, 31, 34, 35, 36, 40, 47, and 52) that they believe are appropriately considered settlement agreements under the FCC's ruling.

119 Staff disagrees with Qwest's and the respondent CLECs' characterization of most of the agreements as purely settlement agreements. *Staff Response at 15-21; Staff Reply at 4.* With the exception of Exhibit A Agreements No. 22 and 50, Staff asserts that these agreements contain ongoing obligations pertaining subsection 251(b) and (c) services. *Staff Response at 14-21.*

120 **Discussion and Decision.** In paragraph 12 of its Declaratory Ruling, the FCC establishes what constitutes a settlement agreement, as well as the circumstances under which a settlement agreement does not need to be filed with state commissions. The FCC's interpretation is applicable to this proceeding. Whether an agreement is a settlement agreement or an interconnection agreement depends upon whether it contains ongoing obligations concerning

subsection 251 (b) and (c) services, not simply whether it is termed a settlement agreement.

121 Aside from Exhibit A Agreements No. 22 and 50, it appears that there are genuine issues of material fact in dispute concerning whether the remainder of the agreements meet the FCC's interpretation of a settlement agreement. Staff's motion to dismiss Exhibit A Agreement No. 50 and Qwest's motion for summary determination concerning Exhibit A Agreements No. 22 and 50 are granted, and these agreements are dismissed from the Amended Complaint. Qwest's motion for summary determination on this issue concerning all Exhibit B Agreements and Exhibit A Agreement No. 23 is denied. Similarly, the motions of the respondent CLECs on this issue are denied.

15. Does bankruptcy discharge claims or monetary penalties against ATG?

122 ATG asserts that the remaining claim against it, relating to Exhibit A Agreement No. 27, should be dismissed. ATG states that the Bankruptcy Court approved ATG's plan of bankruptcy and discharged all prior claims against ATG on May 13, 2003. *ATG Motion at 9-10.* ATG asserts that an action by a state commission, to the extent it seeks payment of damages or fines, is dischargeable under 11 U.S.C. § 1141(d), citing *Ohio v. Kovacs*, 469 U.S. 274, 105 S. Ct 705, 709-10 (1985). *Id.* at 9. ATG asserts that the Commission did not respond to the notice of bankruptcy sent to the Commission or file a proof of claim and that the Commission is now barred from pursuing claims against ATG for failing to file the agreement. *Id. at 10.*

123 Staff and Public Counsel assert that bankruptcy does not relieve ATG of its filing requirement, and that the Commission should not dismiss the claims against ATG even if the Commission cannot assess penalties against ATG. *Staff Response at 17-18; Public Counsel Response at 8-9.* Public Counsel asserts that bankruptcy

may affect the scope of potential remedies available to the Commission. *Public Counsel Response at 9.*

124 **Discussion and Decision.** The Commission's claims against ATG appear to be discharged as ATG suggests. The exceptions to discharge under the bankruptcy code are listed in 11 U.S.C. § 523. The only applicable exception in this proceeding is under subsection 523(a)(7)(B), addressing penalties payable to a government unit imposed for a transaction that occurred prior to three years before the date of the bankruptcy filing. ATG entered into the agreement on June 30, 2000, and filed for bankruptcy on May 2, 2002, so the exception does not apply.

125 In the interest of judicial economy, all causes of action against ATG are dismissed from the Amended Complaint. Any penalty or monetary fine this Commission might assess against ATG for failure to file Exhibit A Agreement No. 27 was discharged in bankruptcy. As Staff notes in its response, the bankruptcy did not discharge this Commission's ability to regulate ATG as a company subject to the Commission's jurisdiction. There is no reason, however, to retain ATG as a respondent in the Amended Complaint if the Commission cannot assess a penalty against ATG for its failure to file the agreement.

16. Should the Commission approve a Confidential Settlement Agreement between Qwest and ATG?

126 On November 7, 2003, ATG filed Exhibit A Agreement No. 27, a June 30, 2000, Settlement Agreement between Qwest and AT&T, with the Commission for approval in Docket No. UT-980390 "[a]s an accommodation in an attempt to foster resolution of the disputed issues in this matter." *ATG Motion at 10.* Although ATG is dismissed from the Amended Complaint because any claim under the Amended Complaint was discharged in bankruptcy, the Commission retains jurisdiction over the agreement. The Commission will consider the

agreement under its usual process of placing the agreement on the consent agenda for an open meeting.

17. Should the Commission grant Time Warner's request for damages?

127 Time Warner's Response to Qwest's Motion to Dismiss and for Summary Determination does not address the arguments Qwest raises in its motion. Instead, Time Warner attaches a copy of an Arizona Commission decision, and quoting extensively from it, asserts that the decision provides evidence of improper actions by Eschelon and McLeodUSA. Time Warner requests that the Commission correct the harm done through discrimination by these carriers "by fashioning a remedy that makes similar discounts on all services purchased from Qwest available to other carriers." *Time Warner Response at 5.*

128 Qwest argues that Time Warner impermissibly expands the scope of the Amended Complaint. *Qwest Reply at 7-8.* Qwest asserts that Time Warner should file its own complaint to address these issues. Finally, Qwest asserts that Time Warner's recommendations are premature as they occur before any fact-finding or investigation by the Commission.

129 **Discussion and Decision.** As Qwest suggests, Time Warner's request is premature, as the issue before the Commission at this stage of the proceeding is the determination of dispositive motions, not a review of evidence or the fashioning of a remedy. We will defer Time Warner's request to the fact-finding portion of the proceeding, when Time Warner will have an opportunity to present any relevant evidence on the issue before the Commission.

18. Staff motions to dismiss.

130 Staff filed motions on November 5 and November 7, 2003, to dismiss Exhibit A Agreements No. 14, 50, and 51 from the Amended Complaint after determining

that the agreements are not interconnection agreements as defined by the FCC, that the agreements were timely incorporated into an interconnection agreement filed with the Commission, or that the agreements address services outside of Washington state. All affected parties concur in Staff's motions to dismiss. Agreements No. 50 and 51 are discussed above in Sections III.B.10 and 14.

131 In its responsive pleading, Staff agrees with Qwest that Exhibit A Agreements No. 11, 15, 22, 24, 37, 38, 39, and 43, should be dismissed from the Amended Complaint. All affected parties agree with Qwest's and Staff's determinations. These agreements are discussed above in Sections III.B.10, 11, and 12.

132 **Discussion and Decision.** Consistent with our determination above, Staff's motions to dismiss Exhibit A Agreements No. 14, 50, and 51, and that portion of Qwest's Motion to Dismiss and Motion for Summary Determination addressing Exhibit A Agreements No. 11, 15, 22, 24, 37, 38, 39, and 43 are granted. Exhibit A Agreements No. 11, 14, 15, 22, 24, 37, 38, 39, 43, 50, and 51 are dismissed from the Amended Complaint. The status of these agreements and all other agreements in Exhibits A and B to the Amended Complaint is identified in Appendix A to this Order.

IV. FINDINGS OF FACT

133 Having discussed above in detail the documentary evidence received in this proceeding concerning all material matters, and having stated findings and conclusions upon issues at impasse among the parties and the reasons and bases for those findings and conclusions, the Commission now makes and enters the following summary of those facts. Those portions of the preceding detailed findings pertaining to the ultimate findings stated below are incorporated into the ultimate findings by reference.

134 (1) Qwest Corporation is a Bell operating company within the definition of 47 U.S.C. § 153(4), and incumbent Local Exchange Company, or ILEC, providing local exchange telecommunications service to the public for compensation within the state of Washington.

135 (2) The respondent competitive local exchange carriers, or CLECs - Allegiance Telecom, Inc. (Allegiance), Advanced Telcom, Inc. (ATG), AT&T Communications of the Pacific Northwest, Inc. (AT&T) and TCG Seattle (TCG), Covad Communications Company (Covad), Electric Lightwave, LLC, Eschelon Telecom of Washington, Inc. (Eschelon), Fairpoint Carrier Services, Inc. (Fairpoint), Global Crossing Local Services, Inc. (Global Crossing), Integra Telecom of Washington, Inc. (Integra), McLeodUSA Telecommunications, Inc. (McLeodUSA), SBC Telecom, Inc. (SBC), Time Warner Telecom of Washington, Inc. (Time Warner), WorldCom, Inc., on behalf of its regulated subsidiaries in Washington State (n/k/a MCI), and XO Washington, Inc. (XO) - are local exchange carriers within the definition of 47 U.S.C. § 153(26), providing local exchange telecommunications service to the public for compensation within the state of Washington, or are classified as competitive telecommunications companies under RCW 80.36.310-.330.

136 (3) The Washington Utilities and Transportation Commission is an agency of the State of Washington vested by statute with the authority to regulate the rates and conditions of service of telecommunications companies within the state, and to take actions, conduct proceedings, and enter orders as permitted or contemplated for a state commission under the Telecommunications Act of 1996.

137 (4) On August 14, 2003, the Commission issued a Complaint in this proceeding against Qwest and 13 other telecommunications companies. The Commission issued an Amended Complaint on August 15, 2003,

attaching Exhibits A and B, omitted from the original complaint, which list 77 agreements allegedly not filed or timely filed with the Commission.

138 (5) In response to a procedural schedule established in Order No. 01 and modified in Order No. 04 in this proceeding, the parties filed dispositive motions with the Commission on November 7, 2003, answers to such motions on December 12, 2003, and replies on January 6, 2004.

139 (6) Staff filed motions on November 5 and November 7, 2003, to dismiss Exhibit A Agreements No. 14, 50, and 51 from the Amended Complaint.

140 (7) Section 252 of the Telecommunications Act of 1996 is silent on the issue of who bears the responsibility for filing agreements with state commissions.

141 (8) The conference report of the Telecommunications Act of 1996 is silent as to who bears the responsibility under section 252 to file agreements with state commissions. *See H.R. CONF. REP. 104-458, 125-26.*

142 (9) Both subsection 252(a) and subsection 252(e)(1) require interconnection agreements to be filed with state commissions, and subsection 252(a) refers to subsection 252(e)(1). Since all of the agreements in Exhibits A and B to the Amended Complaint were negotiated, there is no violation under subsection 252(a) that is not also a violation under subsection 252(e)(1).

143 (10) The Commission has not, until the recently adopted procedural rules in chapter 480-07 WAC, adopted any rules establishing filing requirements for interconnection agreements as required by RCW 80.36.510(1).

144 (11) The Telecommunications Act of 1996 does not specify a timeframe for filing interconnection agreements with state commissions.

145 (12) Qwest posted certain agreements listed in Exhibit A on its website 14 months before the Commission issued the Amended Complaint, without any CLEC requesting to opt into the agreements.

146 (13) Staff agrees with Qwest that Exhibit A Agreements No. 22, 24, and 51 do not create ongoing obligations regarding subsection 251(b) and (c) services and are not interconnection agreements as defined in the FCC's Declaratory Ruling.

147 (14) Staff agrees with Qwest that agreements relating to services outside the Commission's jurisdiction, such as interstate services, do not meet the FCC's definition of an interconnection agreement, and that Exhibit A Agreements No. 15 and 37 should be dismissed from the Amended Complaint.

148 (15) Staff agrees with Qwest that Exhibit A Agreements No. 11, 38, 39, and 43 should be dismissed from the Amended Complaint as relating to services provided outside of Washington state.

149 (16) Staff agrees with Qwest that Exhibit A Agreements No. 22 and 50 do not contain ongoing obligations pertaining subsection 251(b) and (c) services.

150 (17) The United States Bankruptcy Court approved ATG's plan of bankruptcy and discharged all prior claims against ATG on May 13, 2003. The Commission did not respond to the notice of bankruptcy or file a proof of claim with the bankruptcy court.

151 (18) On November 7, 2003, ATG filed Exhibit A Agreement No. 27, a June 30, 2000, Settlement Agreement between Qwest and AT&T, with the Commission for approval in Docket No. UT-980390.

V. CONCLUSIONS OF LAW

152 Having discussed above in detail all matters material to this decision, and having stated general findings and conclusions, the Commission now makes the following summary conclusions of law. Those portions of the preceding detailed discussion that state conclusions pertaining to the ultimate decisions of the Commission are incorporated by this reference.

153 (1) The Commission has jurisdiction over the subject matter of this proceeding and the parties to the proceeding.

154 (2) In a recent declaratory ruling, the Federal Communications Commission (FCC) determined that, under subsection 252(a)(1) of the Act, carriers must submit to state commissions only those agreements that create "an ongoing obligation pertaining to resale, number portability, dialing parity, access to rights-of-way, reciprocal compensation, interconnection, unbundled network elements, or collocation." *FCC Declaratory Ruling, ¶ 8*.

155 (3) A reviewing court must determine if a statute is silent or ambiguous with respect to the issue in question, and if so, review the statutory language, the legislative history, and the policies involved to determine whether the agency responsible for administering the statute has interpreted the statute reasonably, and whether the agency's construction of the statute is permissible. *Chevron, U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837, *842-843, 845* (1984); *See also United States v. 313.34 Acres of Land, 923 F.2d 698 (9th Cir. 1991); K Mart Corp. v. Cartier, Inc., 486 U.S. 281, 291 (1988).*

156 (4) There is no direct interpretation of section 252 in the FCC's First Report & Order as to which class of carriers bears the burden for filing interconnection agreements with state commissions, and the indirect

interpretations in paragraphs 1437 and 1466 of the First Report & Order are contradictory.

157 (5) The FCC appears to interpret in paragraphs 8, 10, and 12 of its Declaratory Ruling that subsection 252(a), and therefore subsection 252(e)(1), require both ILECs and CLECs to file agreements with state commissions. The FCC's interpretation is a permissible reading of the statute, as well as a reasonable one, given the implications of carrier-to-carrier discrimination when a CLEC does not take responsibility to file an agreement it has entered into with an ILEC.

158 (6) Both parties to an interconnection agreement, incumbent local exchange carriers and competitive local exchange carriers, bear the responsibility for filing interconnection agreements with state commissions under subsections 252(a) and 252(e)(1) of the Telecommunications Act of 1996.

159 (7) The Commission has authority under section 252 and RCW 80.36.610(1) to enforce the section 252 requirement that carriers file interconnection agreements with the Commission.

160 (8) An administrative penalty may constitute double jeopardy when based upon the same evidence as that supporting a criminal penalty, but when there is no criminal penalty involved, the rules of double jeopardy do not apply. *See United States v. Halper, 109 S.Ct. 446, 448-449 (1989); see also Ludeman v. Department of Health, 89 Wash. App. 751, 757, 951 P.2d 266 (1997).*

161 (9) It is appropriate, for reasons of judicial economy, to dismiss the first cause of action in the Amended Complaint and proceed solely with the second cause of action for violations of subsection 252(e)(1), as there would be no

violation under subsection 252(a) that is not a violation under subsection 252(e)(1).

162 (10) There is no duplication between the second and third causes of action in the Amended Complaint. While the same act, the failure to file agreements, is a basis for both causes of action, the obligations under subsections 252(e)(1) and 252(i) and the consequences of violation are sufficiently different to avoid duplication.

163 (11) Courts will dismiss claims under CR 12(b)(6) "only if it appears beyond a reasonable doubt that no facts exist that would justify recovery," and "only in the unusual case in which plaintiff includes allegations that show on the face of the complaint that there is some insuperable bar to relief." *Cutler v. Phillips Petroleum Co., 124 Wn.2d 749, 755, 881 P.2d 216 (1994), citing Hoffer v. State, 110 Wn.2d 415, 420, 755 P.2d 781 (1988), aff'd on rehearing, 113 Wn.2d 148, 776 P.2d 963 (1989).*

164 (12) It is appropriate under WAC 480-70-380(a) to dismiss the fourth cause of action in the Amended Complaint: Without rules requiring filing of agreements, there can be no violation of RCW 80.36.510.

165 (13) The Commission need not reach the merits of Qwest's argument that the fourth cause of action is duplicative of the fifth, sixth, and seventh causes of action, as the Commission dismisses the fourth cause of action on other grounds.

166 (14) Under the rules of statutory construction, courts will look to the purpose of the statute if the plain language of a statute produces absurd or meaningless results. *See United States v. American Trucking Ass'ns, Inc., 310 U.S. 534, 543-44, 60 S.Ct. 1059 (1940).*

167 (15) If a carrier is required to file an interconnection agreement with a state commission under subsection 252(e)(1), it is rational to infer that the carrier is required to do so in a reasonable period of time.

168 (16) Summary judgment is properly entered if there is no genuine issue as to any material fact, that reasonable persons could reach only one conclusion, and that the moving party is entitled to judgment as a matter of law. *Tanner Electric Coop. v. Puget Sound Power & Light Co., 128 Wn.2d 656, 668 (1996).* In resolving a motion for summary judgment, a court must consider all the facts submitted by the parties and make all reasonable inferences from the facts in the light most favorable to the nonmoving party. *Id.*

169 (17) Looking at all of the facts submitted and making all reasonable inferences in the light most favorable to Staff, there remains a genuine issue of material fact concerning whether any CLEC suffered undue discrimination, prejudice or disadvantage due to the failure to file the agreements prior to the time the agreements were posted to Qwest's website.

170 (18) Under the rules of notice pleading and the standards for reviewing motions to dismiss, the Amended Complaint alleges sufficient facts to survive a motion for judgment on the pleadings.

171 (19) Where the reviewing court considers facts outside of the pleadings when reviewing a motion to dismiss, the issue is considered one of summary determination. *CR 12(b)(6).*

172 (20) As a matter of law, the Commission will apply the definition of an interconnection agreement that the FCC established in its Declaratory Ruling to the resolution of factual disputes in this proceeding.

173 (21) There are genuine issues of material fact concerning whether the terms and conditions contained in Exhibit A Agreements No. 17, 20, and 23 create ongoing obligations regarding subsection 251 (b) and (c) services.

174 (22) State commissions retain jurisdiction to review negotiated agreements and arbitrate disputes under section 252, subject to the FCC's rules for ISP-bound traffic. While the Commission lacks jurisdiction to determine the level of compensation for ISP-bound traffic, the Commission retains jurisdiction to "arbitrate carrier-to-carrier disputes including disputes that involve ISP-bound traffic," as well as enforce any interconnection agreements that might contain provisions concerning ISP-bound traffic. *Seventh Supplemental Order, Docket No. UT-023043, ¶¶ 19-20; Qwest Section 271 Order, ¶ 325.*

175 (23) Looking at all of the facts submitted and making all reasonable inferences in the light most favorable to Staff, there appears to be a genuine dispute of material fact concerning whether the terms and conditions of Exhibit A Agreements No. 49 and 50 and Exhibit B Agreement No. 21 relate to the provisioning of local telecommunications services in Washington state.

176 (24) Looking at all of the facts submitted and making all reasonable inferences in the light most favorable to Staff, there appears to be a genuine dispute of material fact as to whether Exhibit A Agreements No. 16, 25, and 35 were timely filed, as well as the discriminatory effect of failing to timely file the agreements.

177 (25) The FCC's interpretation in paragraph 12 of its Declaratory Ruling of what constitutes a settlement agreement, as well as the circumstances under which a settlement agreement is not required to be filed with state commissions, is applicable to this proceeding.

178 (26) Looking at all of the facts submitted and making all reasonable inferences in the light most favorable to Staff, there are genuine issues of material fact in dispute concerning whether the Exhibit B agreements and Exhibit A Agreements No. 10, 23, 26, 27, 30, 31, 34, 35, 36, 40, 47, and 52 meet the FCC's interpretation of a settlement agreement.

179 (27) Any penalty or monetary fine this Commission might assess against ATG for failure to file Exhibit A Agreement No. 27 was discharged in bankruptcy. There is no reason to retain ATG as a respondent in the Amended Complaint if the Commission cannot assess a penalty against ATG for its failure to file the agreement.

180 (28) Although ATG is dismissed from the Amended Complaint because any claim under the Amended Complaint has been discharged in bankruptcy, the Commission retains jurisdiction over Exhibit A Agreement No. 27.

181 (29) Time Warner's request for a remedy of similar discounts for services as those received by other carriers under agreements not filed with the Commission is premature, as the issue before the Commission at this stage of the proceeding is the determination of dispositive motions, not a review of evidence or the fashioning of a remedy.

VI. ORDER

THE COMMISSION ORDERS:

182 (1) Global Crossing Local Services, Inc.'s Motion to Accept Late-Filed Motion to Dismiss or for Summary Determination is granted.

183 (2) Commission Staff's Motion for Partial Summary Determination is granted.

184 (3) The motions of Fairpoint, Integra, and SBC for summary determination on the issue of Commission authority to enforce the section 252 filing requirements are denied.

185 (4) The motions of Qwest, AT&T/TCG, Eschelon, Fairpoint, Integra, MCI, and SBC on the issue of the duplication of the first and second causes of action in the Amended Complaint are granted, and the first cause of action is dismissed from the Amended Complaint.

186 (5) Qwest's motion to dismiss the third cause of action in the Amended Complaint is denied.

187 (6) The motions of Qwest, Eschelon, Fairpoint, Global Crossing, Integra, MCI, McLeodUSA, and SBC to dismiss the fourth cause of action in the Amended Complaint are granted, and the fourth cause of action is dismissed from the Amended Complaint.

188 (7) Qwest's motion to dismiss the fourth cause of action in the Amended Complaint as duplicative of the fifth, sixth, and seventh causes of action is denied.

189 (8) The motions of Eschelon, Fairpoint, Integra, MCI, McLeodUSA, and SBC to dismiss the first, second, and fourth causes of action in the Amended Complaint for the lack of a timely filing requirement are denied.

190 (9) The motions of Qwest and Fairpoint to dismiss all causes of action against agreements posted on Qwest's website are denied.

191 (10) Qwest's motion to dismiss all Exhibit B agreements and certain Exhibit A agreements for failure to state a claim under the Amended Complaint is denied.

192 (11) Qwest's and Staff's motions for summary determination concerning Exhibit A Agreements No. 22, 24, and 51 as agreements that do not meet the FCC's definition of an interconnection agreement are granted and the agreements are dismissed from the Amended Complaint.

193 (12) Qwest's motion for summary determination concerning Exhibit A Agreements No. 17, 20, and 23 as agreements that do not meet the FCC's definition of an interconnection agreement is denied.

194 (13) Qwest's and XO's motions for summary determination concerning Exhibit A Agreements No. 15 and 37 for lack of jurisdiction are granted and the agreements are dismissed from the Amended Complaint.

195 (14) Qwest's, ATG's, and MCI's motions for summary determination concerning Exhibit A Agreements No. 27 and 31 for lack of jurisdiction are denied.

196 (15) Qwest's and XO's motions for summary determination concerning Exhibit A Agreements No. 11, 38, 39, and 43, as agreements that do not apply to provisioning local telecommunications services in Washington, are granted, and these agreements are dismissed from the Amended Complaint.

197 (16) Qwest's motion for summary determination concerning Exhibit A Agreements No. 49 and 50 and Exhibit B Agreement No. 21, as agreements that do not apply to provisioning local telecommunications services in Washington, is denied.

198 (17) Qwest's motion for summary determination concerning Exhibit A Agreements No. 16, 25, and 35, as facilities decommissioning agreements

already incorporated into agreements filed with the Commission, is denied.

199 (18) Staff's motion to dismiss Exhibit A Agreements No. 14 and 50 and Qwest's motion for summary determination concerning Exhibit A Agreements No. 22 and 50, as agreements with no ongoing obligations concerning subsection 252(b) and (c) services, are granted, and these agreements are dismissed from the Amended Complaint.

200 (19) Qwest's motion for summary determination on the basis that all Exhibit B Agreements and Exhibit A Agreement No. 23 are purely settlement agreements is denied. Similarly, the motions of ATG, AT&T/TCG, Fairpoint, Global Crossing, MCI, SBC, and XO for summary determination on this issue concerning Exhibit A Agreements No. 10, 26, 27, 30, 31, 34, 35, 36, 40, 47, and 52 are denied.

201 (20) All causes of action against ATG are dismissed from the Amended Complaint.

202 (21) Exhibit A Agreement No. 27 will be considered under the Commission's usual process for reviewing interconnection agreements and amendments of such agreements by placing the agreement on the consent agenda for an open meeting.

203 (22) The Commission will defer Time Warner's request to the fact-finding portion of the proceeding, when Time Warner will have an opportunity to present any relevant evidence on the issue before the Commission

Dated at Olympia, Washington, and effective this 12th day of February, 2004.

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

MARILYN SHOWALTER, Chairwoman

RICHARD HEMSTAD, Commissioner

PATRICK OSHIE, Commissioner

NOTICE TO PARTIES: This is an Interlocutory Order of the Commission. Administrative review may be available through a petition for review, filed within 10 days of the service of this Order pursuant to *WAC 480-07-810(3)*.

STATUS OF AGREEMENTS AT ISSUE
WUTC v. Advanced Telecom Group, Inc., et al.
Docket No. UT-033011

AGREEMENT NO.	CLEC	EXECUTION DATE	STATUS
1A[19]	ATI	2/28/00	
2A	Eschelon, f/k/a ATI	7/21/00	
3A	Eschelon	11/15/00	
4A	Eschelon	11/15/00	
5A	Eschelon	7/3/01	
6A	Eschelon	7/31/01	
7A	Covad	4/19/00	
8A*[20]	McLeod	4/28/00	**Disputed in Dispositive Motions**
9A*	McLeod	10/21/00	**Disputed in Dispositive Motions**
10A	SBC	6/1/00	**Disputed in Dispositive Motions**
11A	ATI	2/29/00	**DISMISSAL GRANTED, Order No. 05**
12A*	Eschelon	3/3/02	**Disputed in Dispositive Motions**
13A	Allegiance	12/24/01	**DISMISSAL GRANTED, Order No. 01**
14A*	AT&T	12/27/01	**DISMISSAL GRANTED, Order No. 05**
15A	Covad	1/99	**DISMISSAL GRANTED, Order No. 05**
16A*	Covad	1/3/02	**Disputed in Dispositive Motions**

[19] Agreements included in Exhibit A to the Amended Complaint are designated by letter A, whereas agreements included in Exhibit B to the Amended Complaint are designated by letter B.
[20] Agreements designated with an asterisk were filed with the Commission on August 22, 2002. The complaint alleges that these nine agreements were not timely filed.

AGREEMENT NO.	CLEC	EXECUTION DATE	STATUS
			Motions
17A	Eschelon	11/14/00	**Disputed in Dispositive Motions**
18A	Eschelon	11/15/00	
19A	Eschelon	11/15/00	
20A	Eschelon	8/1/01	**Disputed in Dispositive Motions**
21A	Eschelon	11/15/00	**Disputed in Dispositive Motions**
22A	Eschelon	11/15/00	**DISMISSAL GRANTED, Order No. 05**
23A	Eschelon	3/31/01	**Disputed in Dispositive Motions**
24A	Eschelon	2/22/02	**DISMISSAL GRANTED, Order No. 05**
25A	Integra	11/20/01	**Disputed in Dispositive Motions**
26A	AT&T	3/13/00	**Disputed in Dispositive Motions**
27A	ATG	6/30/00	**Disputed in Dispositive Motions**
28A	ELI	12/30/99	
29A	ELI	6/12/00	
30A*	Fairpoint	9/4/01	**Disputed in Dispositive Motions**
31A	MCI	11/18/99	**Disputed in Dispositive Motions**
32A	MCI for BFP	12/1/00	
33A	MCI	6/29/01	
34A*	MCI	6/29/01	**Disputed in Dispositive Motions**
35A*	MCI	12/27/01	**Disputed in Dispositive Motions**
36A	NEXTLINK	5/12/00	**Disputed in Dispositive Motions**
37A	XO, f/k/a NEXTLINK	4/17/01	**DISMISSAL GRANTED,**

AGREEMENT NO.	CLEC	EXECUTION DATE	STATUS
	NEXTLINK		**Order No. 05**
38A	XO	12/31/01	**DISMISSAL GRANTED, Order No. 05**
39A	XO	12/31/01	**DISMISSAL GRANTED, Order No. 05**
40A	XO	12/31/01	**Disputed in Dispositive Motions**
41A	McLeod	4/25/00	**Disputed in Dispositive Motions**
42A*	McLeod	5/1/00	**Disputed in Dispositive Motions**
43A	McLeod	9/18/00	**DISMISSAL GRANTED, Order No. 05**
44A	McLeod	10/26/00	
45A	McLeod	10/26/00	
46A	McLeod	10/26/00	**Disputed in Dispositive Motions**
47A	Global Crossing	7/17/01	**Disputed in Dispositive Motions**
48A	ELI	7/19/01	
49A	ELI	7/19/01	**Disputed in Dispositive Motions**
50A	ATG	3/15/01	**DISMISSAL GRANTED, Order No. 05**
51A	ATG	1/30/02	**DISMISSAL GRANTED, Order No. 05**
52A	Global Crossing	9/18/00	**Disputed in Dispositive Motions**
1B	Arch	6/16/00	
2B	CelAir	3/8/01	
3B	Cook	3/1/01	
4B	WorldCom	11/30/00	
5B	WorldCom	4/2/01	
6B	Ernest	9/17/01	**Disputed in Dispositive Motions**

AGREEMENT NO.	CLEC	EXECUTION DATE	STATUS
7B	Eschelon	7/3/01	
8B	Level 3	5/12/00	
9B	MetroNet	5/30/01	
10B	Pagenet	4/23/01	
11B	AT&T	4/24/00	
12B	ELI	4/30/00	
13B	MCI	6/29/01	
14B	Metrocall	12/4/00	
15B	XO	12/31/01	
16B	Z-Tel	5/18/01	**Disputed in Dispositive Motions**
17B	Thrifty Call	3/31/00	
18B	ELI	4/27/01	
19B	McLeod	9/29/00	
20B	McLeod	9/29/00	
21B	McLeod	2/12/01	**Disputed in Dispositive Motions**
22B	McLeod	12/31/01	
23B	ELI	4/26/02	
24B	Nextel	9/01	
25B	Sprint	12/18/00	
26B	Allegiance	12/24/01	**Added to Ex. B in Order No. 01.**