



with the Commission for approval under Section 252.<sup>1</sup> Well over one year after these agreements were executed, Qwest provided them to the Commission as confidential documents in response to the Commission's directive to do so in connection with its review of Qwest's compliance with Section 271 of the Act.<sup>2</sup>

3. AT&T and TWTC became aware of the existence of secret agreements between Qwest and other competitive local exchange companies ("CLECs") in Minnesota when that state commission initiated complaint proceedings against Qwest in March 2002 for failure to file such agreements. AT&T and TWTC (as opposed to their Minnesota affiliates), however, did not have access to these agreements because they were protected from disclosure as confidential or "trade secret" information to be used only for the purpose of the Minnesota proceeding. Accordingly, "AT&T urge[d] the Commission to conduct an investigation into the possibility that Qwest ha[d] similar agreements in Washington" in the context of the Commission's Section 271 review.<sup>3</sup> The Commission refused to conduct such an investigation in that proceeding but "stated that the Commission would establish a docket to allow Qwest to continue to file any unfiled agreements or amendments to interconnection agreements, and would discuss how the Commission would address the agreements within that docket."<sup>4</sup>

4. Commission Staff investigated the confidential agreements that Qwest filed pursuant to the Commission directives and initiated complaint proceedings in Docket No.

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<sup>1</sup> See, e.g., *WUTC v. Advanced TelCom Group, Inc., et al.*, Docket No. UT-033011 ("Unfiled Agreements Docket"), Order No. 21 (Feb. 28, 2005).

<sup>2</sup> *In re Investigation into Qwest's Compliance with Section 271(C)*, Docket No. UT-003022 ("Section 271 Docket"), Bench Request No. 46 & Qwest response to same.

<sup>3</sup> *Id.*, Qwest Supp. Post-Hearing Brief on Public Interest Issues at 11 (filed June 7, 2002).

<sup>4</sup> *Id.*, 40<sup>th</sup> Supp. Order, ¶ 7 (July 15, 2002).

UT-033011 against Qwest and several CLECs in August 2003 for failure to file the agreements with the Commission as required under applicable federal and state law (“Unfiled Agreements Docket”).<sup>5</sup> AT&T was a named defendant and TWTC intervened. Both companies actively participated in that proceeding, and TWTC expressly sought compensation for CLECs for Qwest’s unlawful conduct. In its final order issued February 28, 2005, the Commission approved a settlement between Commission Staff and Qwest that required Qwest to pay fines, but the Commission refused to consider the issue of whether Qwest should be required to pay compensation to CLECs.<sup>6</sup>

5. Less than nine months later, AT&T and TWTC filed their Complaint initiating this docket. The Commission has already determined that Qwest willfully violated federal and state law by failing to file its agreements with Eschelon and McLeodUSA and refusing to make the rates and discounts in those agreements available to other CLECs.<sup>7</sup> AT&T and TWTC allege in their Complaint that they each would have adopted the rates and discounts and any reasonably related terms from those agreements, and accordingly Qwest overcharged AT&T and TWTC for services under their respective interconnection agreements.

### ARGUMENT

6. Qwest contends that the Commission should dismiss the Complaint on two grounds: (1) the causes of action allegedly were not raised within the applicable limitations period; and (2) the Commission purportedly does not have authority to grant the relief requested. Neither of Qwest’s claims has any merit. AT&T and TWTC filed

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<sup>5</sup> Unfiled Agreements Docket, Order No. 21.

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

their Complaint less than two years after the Eschelon and McLeodUSA agreements were publicly disclosed in Washington. Even if the causes of action in the Complaint could be construed as having accrued before that disclosure, the Complaint was timely filed pursuant to the doctrine of equitable tolling. The very statutes that Qwest cites for limitations purposes, moreover, authorize the Commission to grant the relief requested in the Complaint, *i.e.*, to require Qwest to refund the difference between what AT&T and TWTC actually paid Qwest for services and the amounts they would have paid had they been able to take advantage of the rates and discounts in the unfiled Eschelon and McLeodUSA agreements. The Commission, therefore, should deny Qwest's Motion.

**A. The Complaint Is Not Time Barred.**

7. AT&T and TWTC timely pursued the claims raised in their Complaint. Qwest disagrees, contending that the two-year limitation period in RCW 80.04.240 and 4.16.130 began to run as early as March 2002 and expired long before AT&T and TWTC filed their Complaint. "The limitation period commences when a cause of action accrues and tolls when a complaint is filed or a summons served. A cause of action accrues when the party has a 'right to apply to a court for relief.'"<sup>8</sup> More specifically, AT&T and TWTC's claims did not accrue for limitations purposes until they "discovered or reasonably should have discovered all the essential elements of [their] possible cause of action."<sup>9</sup>

8. AT&T and TWTC did not have sufficient information or the ability to file an individual complaint with the Commission with respect to the effect of Qwest's secret agreements with Eschelon and McLeodUSA in Washington until June 8, 2004, the date

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<sup>8</sup> *U.S. Oil & Refining Co. v. Department of Ecology*, 96 Wn.2d 85, 91, 633 P.2d 1329 (1981).

<sup>9</sup> *Ohler v. Tacoma General Hospital*, 92 Wn.2d 507, 514, 598 P.2d 1358 (1979).

the agreements publicly were disclosed as exhibits to Commission Staff testimony in the Unfiled Agreements Docket. Qwest inaccurately imputes prior knowledge to AT&T and TWTC because of the participation of their affiliates in the Minnesota complaint proceeding. AT&T and TWTC knew that there were unfiled agreements proceedings in Minnesota, but AT&T and TWTC did not know whether any Eschelon or McLeodUSA agreements were effective in Washington. Indeed, Qwest conceded as much in June 2002 when it belittled AT&T's inability to demonstrate that the Minnesota agreements had any impact in Washington.<sup>10</sup> Even if such information were discernable from the Minnesota agreements themselves, those agreements were protected from public disclosure as confidential information. To the extent that AT&T's and TWTC's Minnesota affiliates had access to those agreements, AT&T and TWTC could not use any information gained from such access outside of the Minnesota proceeding, including as a basis for filing a complaint in Washington.

9. Similarly in this state, Qwest provided the Eschelon and McLeodUSA agreements to the Commission as confidential documents. To the extent that AT&T and TWTC had access to the agreements that Qwest filed as parties to the Section 271 review proceeding, they could not use that knowledge for any purpose other than in that docket. Not until Commission Staff publicly disclosed the Eschelon and McLeodUSA agreements on June 8, 2004, could AT&T and TWTC file a complaint based on the provisions of those agreements. AT&T and TWTC filed their Complaint in this proceeding on November 4,

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<sup>10</sup> Section 271 Docket, Qwest Supp. Post-Hearing Brief on Public Interest Issues at 11-12.

2005, less than 17 months after that date. The Complaint thus was filed well within the 24 month limitation period.

10. The Complaint should be considered timely filed even if the Commission were to find some basis to conclude that AT&T and TWTC's claims accrued as early as June 2002 when "Qwest provided these agreements to the Commission in Washington in the context of its Section 271 proceeding."<sup>11</sup> Washington and federal "[c]ourts have held that when extraordinary forces, rather than plaintiff's lack of diligence, account for the failure to file a timely claim, equitable tolling is proper."<sup>12</sup>

11. Here, the limitations period should be tolled during the pendency of the Commission's Section 271 Docket and consideration of the Commission's own complaint in the Unfiled Agreements Docket. AT&T made every effort to have the Commission investigate the unfiled agreements in the context of the Section 271 Docket, but the Commission declined to do so, expressly deferring that investigation to a separate docket. Once the Commission initiated the Unfiled Agreements Docket, AT&T and TWTC reasonably believed that its scope included remedies for CLECs who were denied the lower rates and discounts that Qwest provided to Eschelon and McLeodUSA. Other state commissions in similar proceedings provided compensation for damaged CLECs as well as fines, including the Minnesota proceeding that Qwest cites.<sup>13</sup> The Commission

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<sup>11</sup> Motion ¶ 8. As discussed above, no earlier date is even arguably applicable.

<sup>12</sup> *Seattle Audubon Soc'y v. Robertson*, 931 F.2d 590, 596 (9<sup>th</sup> Cir. 1991).

<sup>13</sup> In re Continued Investigation and Penalty Phase Ordered in Utility Case No. 3750 Regarding Unfiled Agreements Between Qwest and CLECs, New Mexico Public Regulatory Commission Case No. 03-00108-UT (providing CLEC recovery in the penalty phase of its proceeding); Arizona Corporation Commission Docket No. RT-00000F-02-0271 (providing CLEC recovery in the settlement proposal accepted by

expressly contemplated addressing such remedies in the Unfiled Agreements Docket,<sup>14</sup> and TWTC vigorously pursued them. The Commission, however, ultimately refused to consider remedies for CLECs.<sup>15</sup> The Commission should not now bar AT&T and TWTC from filing their own complaint because they relied on the Commission's Section 271 Docket and Unfiled Agreements Docket to redress their grievances.

12. AT&T and TWTC filed their Complaint well within a two-year time period that was tolled during the pendency of these related dockets. The Commission issued its final order on reconsideration in the Section 271 Docket on July 15, 2002. Staff filed its complaint in the Unfiled Agreements Docket on August 14, 2003, and the Commission issued its final order on February 28, 2005. If the Commission were to determine that the causes of action in the Complaint accrued in June 2002 – which they did not – tolling the limitations period during those times would mean that effectively only 21 months elapsed before AT&T and TWTC filed the Complaint.<sup>16</sup> That time is reduced to nine months using the more defensible (but nevertheless incorrect) accrual date of September 8, 2003 (the date of the prehearing conference in the Unfiled Agreements Docket) if the limitations period is equitably tolled. AT&T and TWTC, therefore, timely filed their Complaint within the two-year limitation period Qwest cites.

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Qwest); *In re Investigation into Unfiled Agreements Executed by Qwest Corp.*, Colorado PUC Docket No. 021-572T (denying the original settlement proposal offered by Qwest that excluded CLEC recovery and granted the proposal that offered CLEC recovery).

<sup>14</sup> Unfiled Agreements Docket, Order No. 5, ¶ 129.

<sup>15</sup> *Id.*, Order No. 21.

<sup>16</sup> From June 2002 to November 2005 is 41 months. Subtracting approximately six weeks for the Section 271 Docket and 18 and a half months for the Unfiled Agreements Docket leaves 21 months.

13. One other factor the Commission should consider in determining the timeliness of the Complaint is that Washington law provides a period of six years for actions to be brought arising out of a written contract.<sup>17</sup> Qwest's interconnection agreements with both AT&T and TWTC that were effective during the relevant time period include "most favored nation" provisions that require Qwest to make available terms and conditions of other interconnection agreements.<sup>18</sup> The source of this obligation is a written contract, but it is the same obligation imposed by the Act and Washington statutes that the Commission previously determined that Qwest willfully violated. AT&T and TWTC filed their Complaint well within six years from the earliest conceivable date that Qwest could argue that their cause of action arose. Qwest thus cannot reasonably contend that AT&T and TWTC's claims are "stale" or that Qwest would suffer any prejudice because AT&T and TWTC did not file their individual Complaint before now. These circumstances further demonstrate that the Commission should conclude that the Complaint was timely filed.<sup>19</sup>

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<sup>17</sup> RCW 4.16.040(1).

<sup>18</sup> Agreement for Local Wireline Network Interconnection and Service Resale Between AT&T and [Qwest], Section 2.1 (filed July 25, 1997); Interconnection Agreement Between TCG Seattle and [Qwest] Section XXVIII (Dec. 16, 1996); TWTC (as assignee of GST Telecom) and [Qwest] Arbitrated Interconnection Agreement for the State of Washington, Section XXXIV.B.

<sup>19</sup> AT&T and TWTC did not include a breach of contract cause of action in their Complaint. If the Commission were to determine that the statutory causes of action are time barred – which they are not – AT&T and TWTC request leave to amend their Complaint to state a cause of action for breach of contract.



**B. The Commission Has Authority to Grant the Requested Relief.**

14. AT&T and TWTC have requested that the Commission require Qwest to refund the difference between what AT&T and TWTC actually paid Qwest for services under their interconnection agreements and the amounts they would have paid had they been able to take advantage of the rates and discounts in the unfiled Eschelon and McLeodUSA agreements. Qwest contends that the Commission is not authorized to award such relief. Such a limitation would be news to the legislature and the Commission. Indeed, Qwest's position is a bit of a paradox, given that Qwest contends that RCW 80.04.220 through 80.04.240, which authorize the Commission to redress overcharges, apply when determining the appropriate limitations period but do not apply for purposes of determining the Commission's authority to grant AT&T and TWTC's requested relief.

15. The statutes unquestionably authorize the Commission to order the relief sought in the Complaint. The legislature has expressly empowered the Commission to require refunds of overcharges, which is precisely what AT&T and TWTC have requested. Qwest, however, maintains that the rates that AT&T and TWTC paid were not "excessive or exorbitant" or "in excess of the lawful rates" within the meaning of the statutory language because the Commission had approved those rates. The statutes are not susceptible to such a limited interpretation.

16. AT&T and TWTC have alleged that they were entitled to pay the same rates and discounts that Qwest made available to Eschelon and McLeodUSA and that Qwest unlawfully discriminated against AT&T and TWTC by refusing to make those rates available to them. In other words, the "reasonable" and "lawful" rates that Qwest should

have charged AT&T and TWTC were the same rates that Qwest charged Eschelon and McLeodUSA. Accordingly, the rates the Commission had approved generally for Section 251 services were “excessive or exorbitant” and “unlawful” when charged to AT&T and TWTC because those rates exceeded the reasonable and lawful rates that Qwest charged Eschelon and McLeodUSA and should have charged AT&T and TWTC. Indeed, if Qwest were to deny an end user customer the same rates Qwest charges other similarly situated customers, Qwest could not claim that the customer has no recourse simply because the customer is paying the tariff rate. The circumstances here are no different and do not insulate Qwest from its responsibility to charge only those rates that AT&T and TWTC were entitled to pay.

17. Qwest also relies on a Minnesota federal district court’s decision that Minnesota statutes do not authorize that state commission to grant restitutional relief. That decision is simply irrelevant. Minnesota apparently does not have statutes that are equivalent to RCW 80.04.220 through 80.04.240, which renders the Minnesota court’s analysis inapplicable on its face. Even apart from those statutory provisions, Qwest has not demonstrated that the Minnesota statutes at issue before the Minnesota court are the same as other Washington statutes or that Minnesota and Washington courts interpret their respective statutes similarly. Qwest, moreover, fails to cite any Washington court decision that interprets Washington statutes to preclude the Commission from requiring a utility to refund the difference between the discriminatory and unreasonable charges it has imposed on a customer and the lawful amounts that should have been charged. The Minnesota court decision, therefore, has no bearing whatsoever on the Commission’s authority under Washington law.

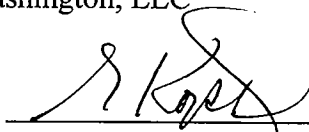
**CONCLUSION**

18. The Motion is yet another attempt by Qwest to evade the consequences of its illegal behavior. AT&T and TWTC timely filed a Complaint alleging that they paid excessive rates for Qwest services because Qwest unlawfully denied them the rates and discounts that Qwest offered to Eschelon and McLeodUSA. The Commission should find that AT&T and TWTC may pursue their Complaint and should deny the Motion.

DATED this 6th day of January, 2006.

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Attorneys for AT&T Communications of the  
Pacific Northwest, Inc., TCG Seattle, and  
TCG Oregon, and Time Warner Telecom of  
Washington, LLC

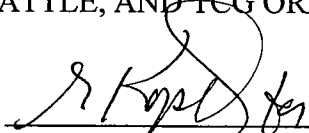
By



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AT&T COMMUNICATIONS OF THE  
PACIFIC NORTHWEST, INC., TCG  
SEATTLE, AND TCG OREGON

By



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Letty S. D. Friesen

**CERTIFICATE OF SERVICE**  
**Docket No. UT-051682**

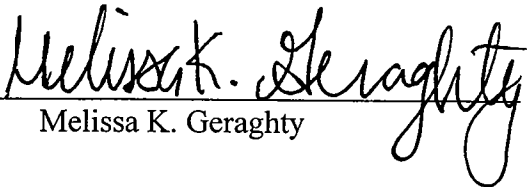
I hereby certify that on the date given below the original and 12 true and correct copies of AT&T and TWTC Opposition to Qwest Motion for Summary Determination and Dismissal., in the above-referenced docket were delivered by Federal Express overnight delivery and email to:

Ms. Carole J. Washburn, Secretary  
Washington Utilities & Transportation Commission  
1300 S. Evergreen Park Drive SW  
Olympia, WA 98504-7250  
E-mail: [records@wutc.wa.gov](mailto:records@wutc.wa.gov)

On the same date, a true and correct copy was sent by email and by regular U.S. Mail, postage prepaid, to:

<p>Lisa Anderl Adam Sherr Qwest Corporation 1600 7<sup>th</sup> Avenue, Room 3206 Seattle, WA 98191 Email: <a href="mailto:Lisa.Anderl@qwest.com">Lisa.Anderl@qwest.com</a></p>	<p>Sally Johnston Attorney General's Office PO Box 40128 Olympia WA 98504 Email: <a href="mailto:sjohnsto@wutc.wa.gov">sjohnsto@wutc.wa.gov</a></p>
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DATED this 5<sup>th</sup> day of January, 2006.

By:   
Melissa K. Geraghty