BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

AT&T COMMUNICATIONS OF THE PACIFIC NORTHWEST, INC., TCG SEATTLE, AND TCG OREGON; AND TIME WARNER TELECOM OF WASHINGTON, LLC, Complainants, v. QWEST CORPORATION, Respondents	Docket No. UT-051682 QWEST CORPORATION'S ANSWER IN OPPOSITION TO AT&T'S MOTION TO AMEND COMPLAINT

I. INTRODUCTION

1. Qwest Corporation submits this answer in opposition to AT&T's Motion to amend its complaint to add claims based on interstate access charges. Not only does the Washington State Utilities Commission ("Commission") lack jurisdiction over such claims, but the claims are also barred by the federal statute of limitations and numerous other defenses. The Commission should summarily deny AT&T's motion.

II. AT&T'S MOTION TO AMEND SHOULD BE DENIED

2. AT&T's motion to amend should be denied. Generally, a tribunal will freely allow parties to amend their pleadings: "leave shall be freely given when justice so requires,"[1]

1 CR 15(a), and WAC 480-07-390(5) (the Commission may allow amendments on such terms as to promote fair and just results.

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unless prejudice to the opposing party would result.[2] In deciding whether to deny or grant a motion to amend, the tribunal should also consider whether pursuit of the new claim would be futile.[3]

3. AT&T's proposed amendment fails all of the tests for a permissible amendment. AT&T's proposed claims based on federal interstate access charges are outside the scope of this Commission's jurisdiction, barred by the federal statute of limitations, barred by the filed-rate doctrine, and released by a settlement agreement between AT&T and Qwest. Judicial estoppel also precludes AT&T from amending its complaint based on an inconsistent position that AT&T successfully advocated and the Commission accepted in earlier briefings. And finally, and in any event, interstate access services are not even covered by AT&T's interconnection agreement, and the most favored nation provision it seeks to enforce. For these reasons, it would be futile and contrary to principles of law, equity and fairness to allow AT&T to amend its complaint, simply to add a time-barred claim over which the Commission lacks jurisdiction.

A. The Commission Lacks Jurisdiction Over AT&T's Proposed Interstate Access Claims

4. In its motion, AT&T seeks leave to file a second amended complaint and to submit revised direct testimony to include claims based on interstate access services. The Commission, however, has repeatedly recognized that it lacks jurisdiction over interstate

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2 *Herron v. Tribune Publ'g Co.*, 108 Wn. 2d 162,736 P.2d 249 (1987).

3 *See Shelton v. Azar*, 90 Wn. App. 932, 954 P.2d 352 (1998) (determining that motion to amend was futile where claim was barred by defense of immunity and finding that trial court abused its discretion in granting motion); *Ino Ino, Inc. v. City of Bellevue*, 132 Wn. 2d 103, 937 P.2d 154 (1997), *amended*, 943 P.2d 1358 (1997) (upholding denial of motion to amend where new claim was both untimely and futile).

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services, and AT&T fails to explain in its motion what legal basis would allow the Commission to exercise jurisdiction over these claims.

5. In the unfiled agreements proceeding that is the genesis of AT&T's action here, the Commission dismissed agreements that related to interstate service because the interconnection agreements were solely within the FCC's jurisdiction.[4] Indeed, the Commission has consistently stated that it lacks jurisdiction over interstate access disputes because they are subject to federal law and FCC jurisdiction.[5]

6. Because there is no jurisdictional basis for the Commission to hear claims predicated on interstate access, AT&T's motion to amend is futile and should be summarily denied.

B. AT&T's Proposed Amended Claims Are Barred By The Federal Two-Year Statute of Limitations and The Filed-Rate Doctrine, and Have Been Released.

7. Even if the Commission believed it had some basis to exercise jurisdiction over AT&T's proposed interstate access claims, the futility in allowing AT&T to amend its amended complaint to add those claims is amplified by the fact that these claims are barred by numerous

4 *See* Order No. 05, *WUTC v. Advanced Telecom Gr.*, Docket No. UT-033011, at ¶¶ 105-9, 147 (WUTC Feb. 12, 2004) (dismissing agreements that relate to interstate services because they are outside the Commission's jurisdiction).

5 *AT&T Commc'ns of Pac. Nw., Inc. v. Verizon Nw., Inc.*, 2003 WL 21961998, No. UT-020406 (WUTC Aug. 12, 2003) (finding that interstate and intrastate services are legally different and that interstate charges are "dictated. . . by federal law;" "Access charges for interstate telecommunications are set under the jurisdiction of the Federal Communications Commission (FCC)."); *AT&T Commc'ns of Nw., Inc. v. U S West Commc'ns, Inc.*, 2000 WL 33125109, NO. UT-991292, at ¶ 28 (WUTC May 18, 2000) ("agree[ing] with the parties that the FCC retains sole jurisdiction over the enforcement of rate terms in tariffs filed pursuant to federal statute"); *see also WUTC v. Olympic Pipe Line Co.*, No. TO-011472 (WUTC Jan 31, 2002) ("We need to make clear that we have no jurisdiction to regulate interstate commerce. We must look at the intrastate portion of the operations as though it were independent.").

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defenses.[6] First and foremost, AT&T claims are barred by the two-year statute of limitations found in 47 U.S.C. § 415.[7] Second, AT&T released its claims pursuant to a Bill Period Closure Agreement between AT&T and Qwest.[8] Finally, AT&T's proposed claims are barred by the filed-rate doctrine.[9] Because these defenses also bar AT&T's pending amended complaint, the defenses are discussed as part of Qwest's Motion for Summary Determination or to Dismiss and only briefly outlined here.

8. AT&T's proposed claims are clearly subject to the federal two-year statute of limitations found in 47 U.S.C. § 415.[10] Interstate access charges are filed with and regulated by the FCC under Title II of the Communications Act. As such, interstate access, and allegations such as AT&T's here, arise under federal law, and the FCC has consistently applied Section 415 to disputes over interstate access.[11] Given the source of AT&T's proposed amended complaint, the Commission should have no doubt that Section 415 bars AT&T's claims and therefore AT&T's motion to amend is futile.

9. Even if this Commission were to allow AT&T to inject interstate access rates into this dispute, the filed rate doctrine bars those claims.[12] The filed rate doctrine holds that a carrier's tariffs "'conclusively and exclusively enumerate the rights and liabilities as between the

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6 *See Shelton*, 90 Wn. App. 932, 954 P.2d 352 (finding futility where claim was barred by defense of immunity).

7 *See* Qwest Motion for Summary Determination or to Dismiss, at 17-25, which Qwest incorporates herein.

8 *See id.*, at 11-13.

9 *See id.*, at 14-16.

10 *See* Qwest Motion for Summary Determination or to Dismiss, at 17-25, which Qwest incorporates herein.

11 *See* 47 U.S.C. §§ 202 (making unjust and unreasonable rates unlawful) and 252 (outlining interconnection requirements and obligations).

12 *See* Qwest Motion for Summary Determination or to Dismiss, at 14-16.

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carrier and the customer"[13] and thus a claim that implicates a tariff is controlled by the terms of the tariff, limiting the available relief or barring the claim completely. AT&T purchased intrastate and interstate access services out of Qwest's filed tariffs. Although AT&T now seeks to obtain the benefits of an alleged 10% discount that Eschelon and McLeod allegedly received on their interstate access purchases, the terms of the federally-filed tariff control and the filed rate doctrine bars such relief.[14] Thus, it would be futile to allow in claims that would not survive summary determination.

10. AT&T's claims for access services are also barred by a release entered into between Qwest and AT&T.[15] This release, known as the Bill Closure Period Agreement ("BPCA"), released all claims for access charges – whether intrastate or interstate in nature – arising from services provided before the date of the release.[16] Recently, the Tenth Circuit and the federal district court of Colorado upheld the validity of the BPCA, finding that the operative language of the agreement is broad and operates to waive any and all claims relating to access services. AT&T's case is predicated on AT&T's allegation that AT&T should have been receiving a 10% discount on its access services from Qwest. But, AT&T explicitly waived any claims that "AT&T has asserted or could have asserted against USWEST Communications, Inc. for access services provided to AT&T by USWEST Communications, Inc. for all periods prior to

13 *Evanns v. AT&T Corp.*, 229 F.3d 837, 840 (9th Cir. 2000) (footnote omitted).

14 *AT&T v. Central Office Tele.*, 524 U.S. 214, 222-3 (1998) ("The rights as defined in the tariff cannot be varied or enlarged by either contract or tort of the carrier.").

15 *See* Qwest Motion for Summary Determination or to Dismiss, at 11-13, which Qwest incorporates herein.

16 *See* Qwest Motion for Summary Determination, Exh 7.

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and including the specific billing period due for closure." Consequently, the BPCA bars AT&T's claims.

11. Finally, and in any event, the most favored nation clause that AT&T seeks to enforce in this proceeding addresses only certain products, none of them interstate access. The MFN provision's plain language makes clear that it only applies to products covered under Section 251, specifically "Interconnection, unbundled Network Elements and resale services." The FCC has made clear that access charges are not part of Section 251,[17] and in this case AT&T purchased the interstate access services out of Tariff FCC QC No. 1. [18] For this reason, and all of the foregoing reasons, AT&T's attempt to insert interstate access into this case fails the test for a permissible amendment to its claim.

C. Judicial Estoppel Bars AT&T's Motion To Amend

12. AT&T's asserted basis for its motion to amend is specious: AT&T contends that it did not previously pursue any claims here based on the provision of interstate access charges "because AT&T's claim to recover such harm was part of a separate federal court proceeding in Colorado, *Qwest Corp. v. AT&T Corp.*, No. 04-cv-0909-EWN-MJW (D. Colo.)."[19] AT&T claims that it is now compelled to seek to amend its complaint to add interstate claims because of a settlement agreement entered into between AT&T and Qwest in that Colorado proceeding.

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17 *See* First Report and Order and Notice of Proposed Rulemaking, *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996,* FCC 96-325, ¶ 1034, (August 1996). ("We note that our conclusion that long distance traffic is not subject to the transport and termination provisions of section 251 does not in any way disrupt the ability of IXCs to terminate their interstate long-distance traffic on LEC networks. Pursuant to section 251(g), LECs must continue to offer tariffed interstate access services just as they did prior to enactment of the 1996 Act. We find that the reciprocal compensation provisions of section 251(b)(5) for transport and termination of traffic do not apply to the transport or termination of interstate or intrastate interexchange traffic.").

18 *See* Qwest Motion for Summary Determination or to Dismiss, at 25-27.

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Specifically, AT&T contends that the settlement agreement requires AT&T to assert its claims here "if it wants to assert and seek recovery on such claims."[20] AT&T further asserts that "[t]he requested amendment will not change the nature of AT&T's claim, the scope of the proceeding, or even the issues in the proceeding."[21]

13. The Commission should not be persuaded by AT&T's after-the-fact rationalization. AT&T's explanation flies in the face of AT&T's prior representations to the Commission. Because AT&T successfully argued before this Commission that its claims here had nothing to do with the Colorado proceeding and were based on different facts, AT&T is estopped from attempting to advance claims based on its inconsistent position. Alternatively, if the Commission decides that AT&T should be allowed to amend, AT&T should be estopped from denying that these claims are subject to federal law – and therefore barred by the statute of limitations in 47 U.S.C. § 415.

14. Under Washington law, courts steadfastly hold that justice, fairness, and respect for judicial proceedings preclude a party, such as AT&T, "from gaining an advantage by asserting one position before a court and then later taking a clearly inconsistent position before the court."[22] Judicial estoppel applies "if a party's prior inconsistent position benefited the party or was adopted by the court" and therefore prevents AT&T from "playing fast and loose" with

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19 *See* AT&T Motion, at ¶ 2.

20 *Id.*, at ¶ 3 (citing Colorado Settlement Agreement ¶ 4(a)).

21 *Id.*, at ¶ 5.

22 *Garrett v. Morgan*, 127 Wn. App. 375, 377, 112 P.3d 531, 533 (2005), *rv'd on other grounds, Arkison v. Ethan Allen, Inc.*, 160 Wash. 2d 535, 160 P.3d. 13 (2007); *Mueller v. Garske*, 1 Wn. App. 406, 407, 461 P.2d 886, 888 (1969).

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the Commission. In deciding whether to apply judicial estoppel, a court considers three factors: (1) whether the party's later position clearly conflicts with its earlier one, (2) whether the party persuaded a court to accept its early position such that its acceptance of an inconsistent position in a later proceeding creates the perception that the party misled either the first or the second court, and (3) whether the party derives an unfair advantage over or imposes an unfair detriment on the opposing party if not estopped.[23] These factors are present here and estop AT&T from injecting claims from the Colorado proceeding into this action.

15. In May of 2004, Qwest filed a complaint against AT&T in the United States District Court for the District of Colorado, *Qwest Corp. v. AT&T Corp.*, et al., Case No. 04-cv-909-EWN-MJW (D. Colo.), to recover unpaid access charges for AT&T's use of Qwest's telephone network to complete certain long distance telephone calls made by AT&T's customers. Shortly after Qwest filed its complaint, AT&T filed an Answer and Counterclaim asserting, among other things, counterclaims arising from the same alleged "secret agreements" that form the basis for AT&T's claims in this proceeding.[24] AT&T's counterclaim alleged that Qwest entered into "secret agreements" that violated state and federal law and harmed "AT&T and other competitors who did not receive the special discounts."[25] AT&T further alleged that Qwest provided those carriers with secret agreements "with more favorable terms and prices for all Qwest services, including exchange access services, than it offered to other carriers. Among the

23 *Garrett*, 127 Wn. App. at 379, 112 P.3d at 533 (citing *New Hampshire v. Maine*, 532 U.S. 742, 750-1 (2001)).

24 AT&T Answer and Counterclaim, attached as Exh. 1.

25 *See* Exh. 1, at ¶ 9 of the Counterclaim.

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favored carriers were Eschelon and McLeod."[26] As a result of this conduct, AT&T alleged that Qwest violated its obligations to provide "just and reasonable" and "nondiscriminatory" services and charges.[27] AT&T asserted that it was damaged by being forced to pay 10% higher prices for exchange access services than its competitors and was consequently placed at a competitive disadvantage.[28]

16. Because of developments in the Colorado proceedings, Qwest filed a Motion for Stay of Proceeding Pending the Outcome of Case No. 04-cv-909-EWN-MJW (D. Colo.) on February 23, 2007. Qwest believed that stay was warranted because the Colorado and Washington cases involved the same issues, the Colorado action was first-filed, and the Colorado action would potentially dispose of both cases thus saving resources in litigating the same claims in two fora.

17. In response, AT&T steadfastly represented to the Commission that this case has nothing to do with the claims pending in Colorado: "The Commission case has no separate claim for violation of any state or federal statute; it is a state contract case, pure and simple. By contrast, in the Colorado litigation, AT&T's counterclaims have *nothing to do* with the contracts that are the subject of the litigation before the Commission. Rather, those counterclaims seek damages *for violations of unspecified state statutes and federal statutes*."[29] AT&T further asserted that "the result in Colorado could not conceivably affect the proper disposition in the

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26 *Id.* at ¶ 18 of the Counterclaim

27 *See, e.g., id.* at ¶ 18, Second and Fourth Claims for Relief (alleging violations of state and federal prohibitions against discriminatory and preferential treatment).

28 *Id.* at ¶ 34 of the Counterclaim

29 AT&T Response to Qwest's Motion for Stay, *AT&T Commc'ns of the Pac. Nw. v. Qwest Corp.*, Docket No. UT-051682, at ¶ 16 (WUTC) (emphases added).

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Commission. Regardless of the Colorado court's disposition of whatever state or federal claims ultimately may be litigated there, that disposition would not answer the question of whether Qwest complied with its interconnection agreements."[30] The Commission agreed and accepted AT&T's representation as the basis for denying Qwest's motion.[31]

18. AT&T's current position clearly contradicts its earlier representations to the Commission. Then, AT&T asserted that "[i]n short, because the two cases raise *different claims* and are premised on *different facts*, Qwest's motion should be denied."[32] The Commission relied on AT&T's representations as a basis for denying Qwest's motion. Now, AT&T asserts that "[i]n short, the only difference will be the amount of money at stake; nothing else will change."[33] AT&T's current position clearly conflicts with its earlier one before the Commission, clearly satisfying the first factor for estoppel.

19. AT&T's representations to the Commission successfully convinced the Commission to deny Qwest's motion to stay. For AT&T to turn around and now contend that "it *must* pursue" the Colorado claims in this proceeding and that the "requested amendments will not change the nature of AT&T's claims, the scope of the proceedings, or even the issues in the proceeding,"[34] if not flatly misleading, certainly "creates the perception" that AT&T misled the Commission in its earlier representations or is currently seeking to mislead the Commission in

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30 *Id.*, at ¶ 17.

31 Order No. 08, *AT&T Commc'ns of the Pac. Nw. v. Qwest Corp.*, Docket No. UT-051682, at ¶¶ 14 and 18 (WUTC Apr. 5, 2007) (denying Qwest's motion for stay based on AT&T's representations of the Colorado proceedings).

32 AT&T Response to Qwest's Motion for Stay, *AT&T Commc'ns of the Pac. Nw. v. Qwest Corp.*, Docket No. UT-051682, at ¶ 5 (WUTC) (emphases added).

33 AT&T Motion, at ¶ 5.

34 *Compare* AT&T Motion, at ¶¶ 3 and 5 *with* AT&T Response to Qwest's Motion for Stay, *AT&T Commc'ns of*

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seeking to amend its complaint. Thus, the circumstances here satisfy the second factor for estoppel as well.

20. Finally, the third consideration also favors estoppel. Having successfully advanced a contrary position that the Commission accepted, it would be unfair and inequitable, and would make a mockery of these proceedings to allow AT&T to make such an abrupt about face simply because the circumstances better suit AT&T to take the completely opposite position now. If the Commission does not deny AT&T's motion as futile, the Commission should alternatively deny AT&T's motion to amend because all justice and equity weigh in favor of estoppel.

III. CONCLUSION

21. AT&T's motion to amend is futile. AT&T's motion to amend its complaint to add claims based on federally-filed interstate tariffs are clearly subject to the to two-year federal statute of limitations found in 47 U.S.C. § 415 and therefore barred. Any claims seeking rates other than those found in the federally-filed tariffs are also barred by the filed-rate doctrine. Any claims for access –whether interstate or intrastate in nature – have been released and waived by AT&T as part of the BPCA between Qwest and AT&T. Finally, the most favored nation clause that AT&T seeks to enforce in this proceeding addresses only certain products, none of them interstate access. In the alternative, AT&T is estopped from seeking to amend its complaint based on its earlier representations that the Colorado proceeding had nothing to do with this case and that the Colorado proceeding involved different claims and different facts. For the reasons

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the Pac. Nw. v. Qwest Corp., Docket No. UT-051682, at ¶¶ 15-16 (WUTC).

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described above, the Commission therefore should deny a motion that would effectively add a barred claim over which the Commission lacks jurisdiction.

DATED this 22nd day of October, 2007.

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