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BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

In the Matter of the Complaint of:
THE LUMMI NATION, Complainant,
v.
VERIZON NORTHWEST;
QWEST CORPORATION, Respondents

DOCKET NO. UT-060147
VERIZON NORTHWEST INC.'S
MOTION FOR SUMMARY
DETERMINATION

I. INTRODUCTION

1. Verizon Northwest Inc. (“Verizon”) respectfully requests that the Commission grant summary determination on all claims stated in the Complaint in this matter for at least three reasons. First, the Lummi Nation has no legal right to a refund of charges for nearly nine years of phone service when Washington law limits its right to a refund to a maximum of two years, and Verizon has already stated that it is willing—and continues to be willing—to settle this disputed claim by refunding to the Lummi Nation two years worth of charges, plus interest. Second, the refund sought is much greater than the Lummi Nation could possibly receive once the Commission applies the requisite statute of limitations pertaining to refunds, which requires the Complaint to be filed within two years of the accrual of the cause of action. Lastly, there is no basis for the Commission to assess penalties against Verizon when Verizon has acted reasonably and has offered to resolve this matter to the full extent required by law.

II. STATEMENT OF UNDISPUTED FACTS

2. For the purposes of this summary determination motion only, and without waiver of taking a different position if this motion is not granted, Verizon accepts the facts as presented in the Complaint. The essential facts are actually quite few.

3. Verizon provided FX Services to the Lummi Nation. (Compl. ¶ 3.36.) From at least January 1998, Verizon billed the Lummi Nation for FX Services, (Compl. ¶ 3.15 & Attachment 1), and Verizon may have billed for such services since prior to 1995. (Compl. ¶¶ 3.5, 3.22.) Verizon continued to bill the Lummi Nation for these services through August (or possibly September) 2004. (Compl. ¶ 3.15 & Attachment 1.)¹ The Lummi Nation was unable to locate any bills in its records for any time period other than 1998 to 2004. (Compl. ¶ 3.22.) The Lummi Nation alleges that Verizon ceased to provide the FX Service for which it was billed sometime prior to January 1995. (Compl. ¶ 3.9.) Thus, the Lummi Nation alleges that Verizon overcharged the Lummi Nation by billing it for a service that Verizon had ceased to provide.

4. Even though it was not allegedly receiving FX Services, the Lummi Nation accepted and paid Verizon's bills for such services. (Compl. ¶¶ 3.22, 3.25 & Attachment 1.)

5. In December 2003, the Lummi Nation hired Northwest Capital Recovery Group ("NWCRG") to audit all its utility bills, including its telecom, power, water, sewer, and gas bills. (Pl. Compl. ¶ 3.27; *see also* Declaration of Cynthia Padgett filed herewith ("Padgett Decl.") ¶ 5 & Exh. 1 (Letter of Authorization).) In February 2004, NWCRG claimed that the Lummi Nation had allegedly paid for FX Services that it did not receive. NWCRG admits that it discovered the alleged overcharges by simply placing calls to each number dedicated to FX Services. (Doughty Affidavit Submitted in Support of Complaint, ¶ 8.)

¹ The Complaint is unclear as to when Verizon actually discontinued billing the Lummi Nation for FX Services. Paragraph 3.15 states that Verizon billed for these services until September 2004. Paragraph 3.36 states the Verizon billed for these services until October 2004. Attachment 1 shows that Verizon billed for these services through August 2004, when it then refunded the Lummi Nation for FX Services back to March 2004, which was the first time the Lummi Nation contacted Verizon regarding the FX Service it had been willingly paying until that time.

1 380(2)(a). In considering a summary determination motion, the Commission is to “consider the
2 standards applicable to a motion made under CR 56 of the Washington superior court’s civil
3 rules.” *Id.* The WAC language on summary determination is drawn virtually verbatim from
4 state and federal summary judgment rules. CR 56(c); Fed. R. Civ. P. 56(c). A defending party
5 may move for summary judgment with or without supporting affidavits. CR 56(b). In this case,
6 Verizon’s motion for summary determination is supported by the declaration of Cynthia Padgett,
7 with Verizon accepting the facts as stated in the Complaint for purposes of this motion only.

8 9. No material facts are in dispute for purposes of this motion, so summary
9 determination can be entered. “Only disputes over facts that might affect the outcome of the suit
10 under the governing law will properly preclude the entry of summary judgment.” *Anderson v.*
11 *Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). Furthermore, summary judgment must be entered
12 against the non-moving party who fails to make a showing sufficient to establish the existence of
13 an element, which is essential to his case and upon which he will bear the burden of proof at
14 trial. *Celotex v. Catrett*, 477 U.S. 317, 322 (1986).

15 10. To withstand a motion for summary determination, the opposing party must set
16 forth specific evidence showing that there is a genuine issue of material fact in dispute. CR
17 56(e); Fed R. Civ. P. 56(e). The opposing party cannot respond with only his conclusions and
18 allegations, but must establish the existence of a fact (“an event, an occurrence, or something that
19 exists in reality”) that would raise a genuine issue for trial. *Grimwood v. Univ. of Puget Sound,*
20 *Inc.*, 110 Wn.2d 355, 359 (1988). If the defendant is the moving party, and the plaintiff fails to
21 establish the existence of a fact that would raise a genuine issue at trial, then the defendant’s
22 motion should be granted. *Young v. Key Pharmaceuticals, Inc.*, 112 Wn.2d 216, 225 (1989).

23 **B. Under No Circumstances Is the Lummi Nation Entitled to a Refund of More than**
24 **the Amount Verizon Has Offered to Refund.**

25 11. Billing practices are regulated by the Commission, *Hopkins v. GTE Northwest,*
26 *Inc.*, 89 Wn.App. 1, 6 (1997), and the Lummi Nation’s claims specifically concern such

1 practices. The Lummi Nation’s request for relief asks for a “refund [of] all the charges paid by
2 Lummi[,]” for FX Services, plus interest. (Compl. at 14 (Request for Relief ¶ 2).) This is
3 similar to the claims in *Hopkins*, where the plaintiff alleged that it had been charged for leasing a
4 telephone from GTE for a period of nine years, when in fact it did not have a telephone provided
5 by GTE. *Hopkins* at 3-4. As here, *Hopkins* also requested a refund of all the charges, plus
6 interest. The Washington Appellate Court rejected *Hopkins*’ argument, and found that such
7 claims are claims for overcharges or unreasonable charges for services not received. *Id.* at 6.

8 12. Only two avenues exist to make such claims. These types of claims must be
9 brought before the Commission either on the basis of RCW 80.04.220, which allows reparations
10 for unreasonable billings, or on the basis of RCW 80.04.230, which allows refunds for billings in
11 excess of lawful rates. *See Hopkins*, 89 Wn.App. at 5-6; *Eschelon Telecom of Wash., Inc. v.*
12 *Qwest Corp*, 2004 Wash. UTC LEXIS 75, at *13 (WUTC, Feb. 6, 2004, Docket No. UT-033039;
13 Order No. 04) (distinguishing the two types of claims). The statute of limitations for both types
14 of claims is established in RCW 80.04.240:

15 All complaints concerning overcharges resulting from collecting
16 unreasonable rates and charges or from collecting amounts in
17 excess of lawful rates shall be filed with the commission within six
18 months in cases involving the collection of unreasonable rates and
two years in cases involving the collection of more than lawful
rates from the time the cause of action accrues

19 RCW 80.04.240. This procedure is “exclusive.” *Id.*

20 13. As set forth in the Complaint, Verizon discontinued billing the Lummi Nation for
21 FX Services in August 2004. (Compl., Attachment 1.) If it is true that the Lummi Nation’s
22 claim is one for reparations for unreasonable billings, based on RCW 80.04.220, then a six-
23 month statute of limitations applies. *See* RCW 80.04.240. In such a case, the Lummi Nation’s
24 claim (which was filed with the Commission on January 20, 2006) is plainly barred by the statute
25 of limitations.

26

1 14. But even giving the Lummi Nation the benefit of the two-year statute of
2 limitations, *see* RCW 80.04.240, Verizon is still entitled to summary determination. To be
3 perfectly clear, Verizon offered—and again renews that offer—to refund the Lummi Nation an
4 additional two years worth of payments for FX Services, plus interest on those payments.
5 Padgett Decl. ¶ 4. Under no scenario does a statute of limitations entitle the Lummi Nation to
6 more than this amount.

7 1. ***WAC 480-120-163 Bars a Refund of Overcharges for any Time Period Beyond***
8 ***Two Years, and Verizon Stands Willing to Refund this Amount.***

9 15. A refund of two years worth of payments, plus interest, is the maximum amount
10 that Verizon could be obligated by law to refund. The Administrative Code is clear on this issue:

11 A company must refund overcharges to the customer with interest,
12 retroactive to the time of the overcharge, ***up to a maximum of two***
 years, as set forth in RCW 80.04.230 and 80.04.240.

13 WAC 480-120-163 (emphasis added). Thus, even under the best case scenario, the most the
14 Lummi Nation could possibly be entitled to is a two-year refund. And Verizon has already
15 offered—and continues to stand willing to pay—that amount.

16 16. In fact, and as discussed below, the statute of limitations actually bars recovery of
17 all but two months of that amount by the Lummi Nation.

18 2. ***Under the Statute of Limitations, the Lummi Nation Is Only Entitled to a***
19 ***Refund of Two Month’s Charges In Addition to Already Given Credits.***

20 17. It is a long-established rule in Washington that “a cause of action accrues and the
21 statute of limitations begins to run when a party has the right to apply to a court for relief.”
22 *Haslund v. City of Seattle*, 86 Wn.2d 607, 619 (1976). A plaintiff does not need to know that it
23 has the right to sue before the limitations period commences. “[A] claim accrues when the harm
24 occurs, regardless of whether the plaintiff had knowledge of [its] rights.” *Unisys Corp. v. Senn*,
25 99 Wn.App. 391, 398 (2000). In short, a cause of action accrues when a party has a right to seek
26 relief in the courts. *Id.*

1 18. Under the “continuing violation doctrine,” the statute of limitations began running
2 each time the monthly bill for FX Services to the Lummi Nation became payable. *See Graves v.*
3 *Cascade Natural Gas Corporation*, 51 Wn.2d 233, 238 (1957) (“holding that the period of
4 limitations began to run from the date that each month’s bill was payable[.]”); *Fradkin v.*
5 *Northshore Utility District*, 96 Wn.App. 118, 125 (Div. 1 1999) (under the continuing violation
6 doctrine, the applicable statute of limitations runs from the date each successive cause of action
7 accrues as manifested by actual damages). The rationale for this rule is simple: “[i]t would be
8 inequitable . . . to expose defendants ‘to claims running back for untold years when the injury
9 many years back may have been inconsequential and the very existence of a cause of action
10 vague and speculative.” *Fradkin*, 96 Wn.App. at 125.

11 19. The Lummi Nation filed this action on January 20, 2006. As a result of the
12 continuing violation doctrine, the Lummi Nation can only recover those payments that accrued in
13 the two-year time period preceding the commencement of this action. The claims are otherwise
14 expired. Verizon has already credited the Lummi Nation for all payments for FX Services back
15 to March 2004. Therefore, at most, the Lummi Nation can only possibly recover two additional
16 months of refund beyond what Verizon has already credited, and Verizon is now offering two
17 years. *See Glick v. Verizon Northwest, Inc.*, 2005 WL 484651, at *3-*5 (WUTC, Jan. 28, 2005,
18 Docket No. UT-040535; Order No. 03) (barring complainant’s claim for a refund under RCW
19 80.04.240 for failure to file within applicable statute of limitations).

20 3. ***The Discovery Rule Does Not Toll the Accrual of the Statute of Limitations.***

21 20. The discovery rule cannot postpone the statute of limitations in this case. The
22 rule in Washington is quite plain:

23 The discovery rule requires a plaintiff to use due diligence in
24 discovering the basis for the cause of action. In other words, the
25 discovery rule will postpone the running of a statute of limitations
26 only until the time when a plaintiff, through the exercise of due
 diligence, should have discovered the basis for the cause of action.

1 A cause of action will accrue on that date even if *actual* discovery
2 did not occur until later.

3 *Allen v. State*, 118 Wn.2d 753, 758 (1992) (internal citation omitted; emphasis in original);
4 *Crisman v. Crisman*, 85 Wn.App. 15, 20 (1997) (“The discovery rule operates to toll the date of
5 accrual until the plaintiff knows or, through the exercise of due diligence, should have known all
6 the facts necessary to establish a legal claim.”).

7 21. The Lummi Nation did not exercise due diligence in discovering its cause of
8 action. The Lummi Nation admits that it paid for FX Services. (Compl. ¶¶ 3.22, 3.24.) But for
9 at least nine years, it never once questioned the bills, even when signing checks for payment of
10 the bills. *Cf. Kinsey v. Bradley*, 53 Wn.App. 167, 171 (Div. 3 1989) (one is presumed to know
11 and understand contents of documents one signs). It also never tested the FX Services to assess
12 whether the service was in fact being provided. (Compl. ¶ 3.24.) It wasn’t until 2004—at least
13 six years (and more likely nine) after it began paying charges for FX Services—that the Lummi
14 Nation saw fit to hire NWCRG to audit its utility bills. (Compl. ¶ 3.27.) Only then did the
15 Complainant “discover” that it had allegedly been paying for a service that it did not receive.
16 NWCRG admits that it first discovered the alleged overcharges by simply placing calls to each
17 number dedicated to FX Services. (Doughty Aff., ¶ 8.) In short, the facts as alleged plainly
18 show that the Lummi Nation could have discovered the basis for its claims with even minimal
19 effort at any time: it merely needed to make a phone call on the service or inquire of Verizon
20 regarding the billing. *Allen*, 118 Wn.2d at 758-60 (discovery rule does not postpone statute
21 when facts clearly show that plaintiff could have discovered facts giving rise to claim with little
22 more than minimal effort). But it made no effort whatsoever.

23 22. Even if the discovery rule did apply, the Complaint is without merit. The Lummi
24 Nation admits that it discovered the alleged overpayments in February 2004 and first contacted
25 Verizon in March 2004. It could have brought its action any time after that. But it did not. In
26 March, 2004 it could have brought an action seeking two years worth of refunds – but Verizon

1 stands ready to issue a refund in that amount today. Having waited to file until January 2006, the
2 Lummi Nation is barred by the continuing violation doctrine from recovering anything more than
3 Verizon is unilaterally willing to refund. The Complaint should be dismissed. *See Glick*, ¶¶ 59-
4 60 (when company's unilateral action makes complainant whole, no further claim is available).

5 **C. Verizon Should Not Be Subject to Penalties When It Has Agreed to Resolve this**
6 **Matter to the Maximum Possible Extent of the Law.**

7 23. In addition to a refund, the Lummi Nation seeks fees and penalties pursuant to
8 RCW 80.04.380, 80.04.440, and 80.04.480. (Compl. ¶¶ 3.37, 3.40 and 3.41.)

9 24. RCW 80.04.440 only permits fees to be awarded if the Commission finds that
10 Verizon's "willfully" overcharged the Lummi Nation for FX Service. RCW 80.04.440 ("if the
11 court shall find that such act or omission was willful, it may, in its discretion, fix a reasonable
12 counsel or attorney's fee"). There is no factual evidence in the record whatsoever that Verizon
13 willfully overcharged the Lummi Nation.

14 25. RCW 80.04.380 permits penalties and RCW 80.04.480 states that such penalties
15 shall be cumulative, but the Lummi Nation's request for penalties is without merit. As soon as
16 reasonably possible after it was made aware of the overcharges, Verizon refunded the Lummi
17 Nation the full amount dating back to the time it was notified of the overcharges. Moreover,
18 Verizon also offered to refund the full amount the Lummi Nation could possibly be entitled to
19 under the law, even under the most favorable application to Lummi Nation of the statute of
20 limitations. The Lummi Nation rejected this offer, which continues to stand today. The Lummi
21 Nation is seeking to advantage itself despite the fact that it failed to bring its claims within the
22 applicable statute of limitations. Verizon has acted in good faith, and has gone beyond what is
23 required in an attempt to settle this matter. Penalties should therefore not be assessed.

24 **IV. CONCLUSION**

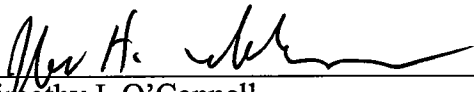
25 26. The Lummi Nation's claims for a refund are barred by the statute of limitations.
26 Even so, Verizon offered to refund the Lummi Nation two years worth of payments, plus

1 interest. This is the maximum amount that the Lummi Nation could conceivably receive even
2 under the most favorable scenario to the Lummi Nation. That offer still stands today. There are
3 no factual disputes for the Commission to decide. For the above-stated reasons, the Commission
4 should grant Verizon's motion for summary determination.

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DATED: April 6, 2006.

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Inc.

1 **CERTIFICATE OF SERVICE**

2 I hereby certify that I have this 6th day of April, 2006, served the true and correct original,
3 along with the correct number of copies, of *Verizon's Motion for Summary Determination* upon
4 the WUTC, via the method(s) noted below, properly addressed as follows:

4 Carole Washburn, Executive Secretary X Hand Delivered
5 Washington Utilities & Transportation U.S. Mail (1st class, postage prepaid)
6 Commission Overnight Mail
1300 S. Evergreen Park Drive SW Facsimile (360) 586-1150
Olympia, WA 98503-7250 Email (records@wutc.wa.gov)

7 I hereby certify that I have this 6th day of April, 2006, served a true and correct copies of the
8 foregoing documents upon parties noted below via E-Mail and U.S. Mail:

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19 I declare under penalty under the laws of the State of Washington that the foregoing is
20 correct and true.

21 DATED this 6th day of April, 2006, at Seattle, Washington.

22 Meghan Wallace
Meghan Wallace
23 Legal Secretary