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 MOTION FOR SUMMARY DETERMINATION OR TO DISMISS

I. INTRODUCTION

1. Qwest Corporation moves the Washington Utilities and Transportation Commission ("Commission") for summary determination or dismissal pursuant to WAC 480-07-380 and CR 12(b)(6) and CR 56 of the Washington Rules of Civil Procedure. Qwest's motion is brought on four separate grounds - release, the filed rate doctrine, statute of limitations, and failure to state a claim - each of which independently mandates dismissal of or summary determination on all or some of the claims in Plaintiff's Amended Complaint, including those claims sought to be added by the most recent motion to amend.

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2. Seven years ago Qwest entered into a series of interconnection agreements with two telecommunications carriers – Eschelon and McLeod. In 2002, those agreements were terminated. That same year, the agreements also became the subject of various state commission dockets investigating whether those agreements should have been filed pursuant to the Telecommunications Act of 1996 ("the Federal Act"). AT&T was an active participant in those dockets.

3. Now, years later, AT&T has brought purported state law claims in several jurisdictions, including this action, requesting the same access rates from Qwest that it alleges Eschelon and McLeod received. AT&T brought this breach of contract claim even though it released Qwest from claims related to access services – and even though it used the same release successfully to defeat another action brought by Qwest. AT&T also ignores the filed rate doctrine, which bars this action in its entirety. The Federal Act's two-year limitation provides yet another independent basis for dismissing AT&T's proposed amended interstate claims.

4. Even if a breach of contract claim were viable under the specific provisions that AT&T cites in the interconnection agreement, Qwest did not breach the agreement, and AT&T categorically cannot demonstrate such a breach. And finally, those claims related to switched access services should be dismissed as the MFN provision AT&T seeks to enforce only addresses "Interconnection, Unbundled Network Elements and resale services" covered under Section 251—not switched access.

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II. BACKGROUND

A. The Federal Act Created the Interconnection Agreements at Issue in this Case

5. In 1996 Congress enacted the Telecommunications Act, which effected a wholesale revision of the telecommunications regulatory structure in the United States. Section 251 created new obligations on "incumbent local exchange carriers" ("ILECs") – long-time local telephone companies such as Qwest – to enter into agreements to provide new competitors with special interconnection features: unbundled access to elements of the ILECs' networks (reducing the need for such competitors to build their own networks), the right to collocate facilities in the ILECs' premises, and many other interconnection rights.[1]

6. These interconnection agreements are not normal private contracts. Rather, Section 252 governs negotiation and arbitration of interconnection agreements. In contrast to voluntarily-negotiated private contracts, interconnection agreements must set forth the "terms and conditions. . . to fulfill the duties" mandated by 47 U.S.C. §§ 251(b) and 252(c). Unlike a private contract that takes effect upon the "meeting of the minds," any interconnection agreement reached by negotiation or arbitration must be reviewed by the state commission.[2] State commissions may approve an agreement only if they find certain conditions met.[3]

7. Since Congress passed the Telecommunications Act, the FCC has issued orders interpreting Section 252(i) and has ruled that Section 252(i) applies whether or not an

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[1] 47 U.S.C § 251(c).

[2] *Id.* § 252(a)(1).

[3] *Id.* § 252(e).

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interconnection agreement incorporates a "most favored nation" provision.[4] The FCC currently maintains what is known as the "all-or-nothing rule," which essentially precludes CLECs from cherry-picking the most desirable terms in an interconnection agreement – such as lower rates.[5] CLECs may then "opt in" to approved interconnection agreements pursuant to the Federal Act and FCC regulations interpreting the Act. "In short, the federal Act imposed a new set of duties and obligations on ILECs that telecommunications carriers did not previously have and would not have had under a free-market regime."[6]

8. The Federal Act makes clear the supremacy of federal law in this field by giving the FCC the responsibility of coordinating the national telecommunications market and the authority to control a significant part of the telecommunications scheme. Indeed, "[i]n furtherance of the new role of the FCC, the Telecommunications Act granted the FCC authority, after notice and comment, to preempt the laws of any States that prohibited competition in local telecommunications services markets, bringing under federal control much of the transition from regulated local monopolies to free-market industry."[7]

B. <u>In 2002 AT&T Becomes Aware of the Existence of the Eschelon and McLeod Agreements and, in Fact, Urges State Commissions to Initiate Investigations</u>

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[4] *See, e.g., First Report and Order, Implementation of Local Competition Provisions in the Telecomms. Act of 1996*, 11 F.C.C.R. 15499, 16139 ¶ 1314 (F.C.C. 1996), *aff'd sub nom, AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 396 (1999).

[5] *See also Review of the Section 251 Obligations of Local Exchange Carriers, Second Report and Order*, 19 FCC Rcd 13494 and n. 6 (2004), *aff'd sub nom, New Edge Network, Inc. v. FCC*, 461 F.3d 1105 (9th Cir., Aug. 29, 2006).

[6] *Cavalier Telephone, LLC. v. Verizon Virginia, Inc.*, 330 F.3d 176, 185 (4th Cir. 2003).

[7] *Id.* at 186 (citing 47 U.S.C. § 253(d)).

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9. AT&T's claims here arise from interconnection agreements Qwest entered into with telecommunications carriers Eschelon and McLeod (the "Eschelon and McLeod Agreements") and which terminated in 2002. Qwest entered into these interconnection agreements pursuant to Sections 251 and 252 of the Federal Act. Starting in early 2002, a number of state utility commissions investigated whether these agreements should have been filed with the commission pursuant to the Federal Act.[8] Indeed, a number of these investigations were initiated at AT&T's request based on a letter that it filed with the respective state commissions.[9] AT&T was actively involved in those public utility commission dockets, including presenting its own witnesses, cross-examining Qwest's witnesses, submitting briefing, appearing at hearings, and advocating for specific penalties and relief. In the end, certain state commissions found that Qwest had entered into agreements with Eschelon and McLeod that constituted interconnection agreements under Sections 251 and 252.

10. In 2002, AT&T argued that Qwest's interconnection agreements were unjust and unreasonable before the FCC.[10] The FCC rejected AT&T's arguments and found that it could grant Qwest's then-pending application to provide long distance service because Qwest had "demonstrated that the agreements mentioned by the parties [including the two at issue here] either were filed, expired, terminated, superseded" or otherwise did not present ongoing issues,

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[8] *See e.g., In re Qwest Corp., An Investigation into the Failure to Interconnection Agreements for Comm'n Approval under Section 252(a)(1) of the Telecommunications Act*, Docket No. UM 1168 (Oregon Pub. Util. Comm'n); *In re Compl. of the Minn. Dep't of Commerce Against Qwest Corp. Regarding Unfiled Agreements*, Docket No. P-421/C-02-197 (Minn. Pub. Util. Comm'n); *In re Application of Qwest Corp., and McLeodUSA Telecommc'ns Servs., Inc. for Approval of An Amendment to An Interconnection Agreement for the State of Idaho Pursuant to 47 U.S.C. § 252(e)*, Case No. QWE-T-02-17 (Idaho Public Utils. Comm'n).

[9] *See,* for example, AT&T's letter to the Iowa Utilities Board attached as Exh. 1.

[10] *See also Application by Qwest Communications Int'l Inc. for Authorization to Provide In-Region, InterLATA Services in the States of Colo., Idaho, Mont., Neb., N.D., Utah, Wash. and Wyo*., 17 FCC Rcd 26,303, ¶¶ 466-91

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and because Qwest's response to AT&T was "persuasive."[11] In fact, the FCC offered AT&T the opportunity to bring any claims, such as for unjust or unreasonable discrimination, in 2002, but AT&T did not pursue that opportunity.[12]

C. AT&T Pursues A Claim Against Qwest Based On The Eschelon and McLeod Agreement in This Commission

11. Beginning in 2005, AT&T attempted to resurrect its stale claims purportedly arising from the McLeod and Eschelon agreements. In November 2005 and January 2006 AT&T filed complaints with this Commission and with the Oregon Commission. Initially, AT&T accurately couched its original allegations primarily as violations of 47 U.S.C. § 252, asserting that its right to opt in derived from Section 252(i), not as a matter of contract.[13] AT&T also alleged violations of state statutes but did not originally assert a breach of contract claim. It was not until AT&T realized that its claims were barred by the federal statute of limitations that AT&T repackaged the same violations of Section 252 as violations of state law.[14]

(2002) ("FCC Section 271 Order").

[11] *Id.* ¶ 491.

[12] *See id.* ¶ 466 (noting that if parties such as AT&T believed that issues relating to these agreements remained, including issues related to the prior period before the agreements were terminated or filed, they could enforce their rights under the Federal Act through a complaint filed with the FCC itself or a state utility commission).

[13] Complaint, *AT&T Comm'cns of the Pac. Nw. v. Qwest Corp.*, Docket UT-051682, at ¶¶ 11-15 (WUTC, Nov. 4, 2005); Complaint, *AT&T Communications of the Northwest, Inc., v. Qwest Corp.*, Docket No. UM-1232, (Nov. 10, 2005), attached as Exh. 2.

[14] *See* 47 U.S.C. § 415; *see also* AT&T Amended Complaint, *AT&T Communications of the Pac. Nw. v. Qwest Corp.*, Docket UT-051682, at ¶¶ 11-15 (WUTC, June 3, 2006). AT&T's attempt to obscure the federal nature of its claims was not lost on the Oregon Commission, which dismissed AT&T's complaint after concluding that AT&T's purported state claims, including an identical breach of contract claim to the one asserted here, rested on alleged violations of the Federal Act. As the Oregon Commission put it, "[t]he alleged violations are 'actions based on [federal law] masquerading as state law claims.'" Oregon Public Utility Commission, Order No. 06-465, Order Denying Petition for Reconsideration, at 3 (August 16, 2006), *aff'g on recon*, attached as Exh. 3. Oregon Public Utility Commission, Order No. 06-230, Order Granting Motion to Dismiss, *AT&T Communications of the Northwest, Inc., et al. v. Qwest Corporation*, Docket No. UM-1232, at 6 (May 11, 2006), attached as Exh. 4. Accordingly, the Oregon Commission held that "[t]hese thinly *veiled* claims of violations of federal law fall under

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12. AT&T initially filed its action here seeking recovery only for alleged overcharges in the provision of local services and intrastate access services. Because AT&T was seeking to recover only for these services, the Commission determined it had "primary jurisdiction to hear and resolve interconnection contract issues relating to *intrastate* services, according to state law."[15] While the Commission acknowledged the contrary Oregon decision, the Commission "respectfully disagree[d] with its reasoning and decline[d] to apply it to *Washington intrastate issues* of contract law."[16] Had AT&T at the time pursued claims based on interstate services, then the Commission's rationale would have resulted in the dismissal of those claims.

13. Now, AT&T has sought to amend its complaint to add claims based on interstate services. Qwest is challenging that motion in a separate brief. Nonetheless, the same reasons that warrant dismissing AT&T's current complaint also justify denying AT&T's motion to amend to add interstate service claims or justify, in the alternative, dismissal of the interstate claims.

D. <u>AT&T and Qwest Enter a Bill Payment Closure Agreement that Released Any and All Access Disputes, Precluding this Action</u>

14. AT&T and Qwest have a long history of selling and purchasing access services to each other. Indeed, processing the billing and payment of access charges is a complex and significant undertaking.

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the federal Communications Act statute of limitations, 47 U.S.C. § 415, of two years from accrual." AT&T unsuccessfully sought reconsideration of that ruling, but the Oregon Commission reaffirmed its decision that AT&T's complaint was time-barred. Exh. 3, at 3.

[15] Order No. 6 Affirming Interlocutory Order, *AT&T Communications of the Pac. Nw. v. Qwest Corp.*, Docket UT-051682, at ¶¶ 50-55 (WUTC, Dec. 22, 2006).

[16] *Id.* at n. 26.

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15. In an effort to resolve frequent disputes over these access charges, AT&T and Qwest's predecessor, U S WEST, entered into an "Operating Agreement" to resolve disputes and allow the parties to close their books.[17] The Operating Agreement contains a "Bill Period Closure Agreement" ("BPCA"). Since 1992, the BPCA has permitted AT&T and Qwest to close a specified billing period by allowing the parties to reach a settlement on their access bills. Section 6 of the Operating Agreement specifically provides that "[i]n all cases, the [BPCA], including the [BPCA] Supplement, found in Attachment 'I' will be used to create settlement agreements."[18] Attachment 'I' provides that the BPCA and Supplement "shall constitute resolution of all payments by AT&T against [U S WEST], and by [U S WEST] against AT&T in connection with interstate and intrastate access services rendered by [U S WEST] to AT&T for the billing period specified in the [BPCA] Supplement." Thus, under the terms of the BPCA, AT&T and Qwest sign a "Supplement," agreeing that each party has waived and released each claim that is not listed on an "Issue Exemption Form."[19] Paragraph five of the BPCA consists of AT&T's waiver and release:

> Except as otherwise provided in Paragraphs 2 and 3 above,[20] AT&T does hereby waive, release acquit, and forever discharge USWEST Communications, Inc. from any and all billing disputes, demands, obligations, and liabilities whatsoever 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

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[17] US West / AT&T Operating Agreement (October 5, 1992) attached as Exh. 5; *see also* Order and Memorandum of Decision, *Qwest Corp. v. AT&T Corp.*, Case No. 04-cv-909-EWN-MJW, at 6 (D. Colo. June 10, 2005), attached as Exh. 6.

[18] Exh. 5; Exh. 6, at 8.

[19] BCPA (January 1, 2001), attached as Exh. 7, at ¶ 4 (permitting AT&T and US West to retain the rights to assert claims, demands or causes of action. . . specifically agreed to exempted issues. . . identified and documents in the [BPCA] Supplement Section B").

[20] Paragraphs 2 and 3 exempts certain claims that are not applicable here.

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prior to and including the specific billing period due for closure, as set forth in the Bill Period Closure Agreement Supplement.

16. Qwest and AT&T regularly entered into these settlements over the course of the relevant period. For example, pursuant to this process, on May 16, 2005, AT&T and Qwest executed the standard one-page billing error release form.[21] In the face of years of actual knowledge by May of 2005 of the Eschelon and McLeod Agreements and their import, AT&T did not list any exceptions in its "Issue Exemption Form" related to the Eschelon and McLeod Agreements.[22] AT&T also did not list an exemption related to the interconnection agreements at issue on the exemption log, which AT&T and Qwest agreed would list all open exemptions.[23] In other words, AT&T failed to identify and preserve the access charges at issue here on any of the exemption forms, up to and including the final signed exemption form.[24] In this proceeding, AT&T's initial complaint sought only the state tariffs and state access charges. Even if the Commission were – over Qwest's objections and the numerous defenses that it discusses later in this pleading – to permit AT&T to inject interstate access into the dispute, the result would be the same – AT&T knowingly and voluntarily released and settled *any and all* access claims under the BPCA.

E. **<u>In Another Case, AT&T Has Successfully Asserted the Validity of the BPCA in Releasing and Waiving Any and All Claims Relating to Access Charges</u>**

[21] *See* Exh. 8, BCPA Supplement (May 3, 2005).

[22] *See* Affidavit of Marni Fetters, Exh. 9, at ¶ 7.

[23] *Id.*

[24] *Id.*

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17. AT&T itself has successfully argued that the BPCA releases and waives claims regarding access charges in a case Qwest filed 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.). In that case, Qwest sought 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. AT&T moved to dismiss Qwest's claims based on the release and waivers in the BPCA.

18. In granting AT&T's motion, the Court found that the BPCA acts as a master agreement and provides for the release of claims related to access services, other than categories of claims identified in the BPCA and issues specified in the exemption form.[25] The Court noted that Qwest and AT&T expressly agreed that the BPCA "'create[d] a settlement.'"[26] It thus found that the broad language of the BPCA "release explicitly waives any claims. . . for 'access services.'"[27]

19. Although Qwest argued that the filed rate doctrine prevented Qwest's release of its switched access claim in the BPCA, the Court rejected Qwest's arguments.[28] In particular, the District Court held that the executed form release affected a release of all claims for access charges arising from services provided before the date of the release.[29] The Tenth Circuit

[25] Exh. 6, at 7-10.

[26] *Id.* at 8 (quoting Operating Agreement § 6).

[27] *Id.* at 27-28.

[28] *Id*. at 33-8.

[29] *Id*. at 38.

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affirmed the District Court's decision that the release was valid and released of any and all claims relating to access charges.[30]

III. SUMMARY DETERMINATION STANDARD

20. Qwest's motion is governed by WAC 480-07-380 and CR 56, which entitle the moving party to summary judgment when there is a clear showing that no genuine issue exists as to any material fact and that the moving party is entitled to judgment as a matter of law. The moving party bears the initial burden of showing the absence of an issue of material fact.[31] "If the moving party is a defendant and meets this initial showing, then the inquiry shifts to the party with the burden of proof at trial, the plaintiff. If, at this point, the plaintiff 'fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial,' then the [tribunal] should grant the motion."[32] A tribunal considering a motion for summary judgment must consider all evidence and reasonable inferences in the light most favorable to the nonmoving party.[33]

IV. AT&T RELEASED ITS CLAIMS FOR ACCESS

[30] *Qwest Corp. v. AT&T Corp.*, 479 F.3d 1206, 1212 (10th Cir. 2007) (stating that "the BPCA is a settlement agreement, created with the express purpose of amicably and efficiently settling access-charge disputes"). Qwest and AT&T entered into a confidential settlement agreement to resolve the dispute. The settlement agreement does not apply to the present action, but the BPCA does.

[31] *See LaPlante v. State*, 85 Wn. 2d 154, 531 P.2d 299 (1975).

[32] *Young v. Key Pharmaceuticals, Inc.*, 112 Wn. 2d 216, 770 P.2d 182 (1989) (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986)).

[33] *Young,* 112 Wn.2d at 225-26, 770 P.2d at 187-88.

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21. The BPCA, to which both AT&T and Qwest were parties, released all claims for access charges – whether intrastate or interstate in nature – arising from services provided before the date of the release.[34]

22. The BPCA clearly bars AT&T's complaint, and thus, summary judgment on this basis is appropriate. Even though Washington law recognizes the validity of releases,[35] the terms of the Operating Agreement provide that it "shall be governed by and construed under the local laws of the State of Colorado."[36] Consequently, the reasoning relied on by AT&T in the recently settled case in Colorado and before the Tenth Circuit applies with equal force here.

23. As the Tenth Circuit and the Federal District Court of Colorado ruled, the BPCA released and waived any and all claims that Qwest had or could have asserted relating to access charges.[37] The same reasoning is fatal to AT&T's claims based on access charges. The operative language is both broad and clear: AT&T "does hereby waive, release, acquit, and forever discharge Qwest from any and all billing disputes, demands, obligations, and liabilities whatsoever that AT&T has asserted or could have asserted against [Qwest] for ***access services*** provided to AT&T by [Qwest] for all periods prior to and including the specific billing period due for closure [through the end of February 2005,]."[38]

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[34] Exh 7. *See* Exh. 9 at ¶ 2.

[35] *See, e.g.*, *Chadwick v. Northwest Airlines, Inc.*, 33 Wn. App. 297, 303-04, 654 P.2d 1215, 1218 (1982) (enforcing validity of release as a matter of contract "unless there is a showing of fraud, deceit, coercion, mutual mistake or mental incompetency at the time the instrument is executed").

[36] Exh. 6 at 8.

[37] *Qwest Corp*., 479 F.3d at 1212 (affirming district court's finding that the BPCA was a valid settlement agreement that resolved "access-charge disputes").

[38] Exh. 7 at ¶ 5 (emphasis added).

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24. The BPCA therefore specifically covers the precise type of claims at issue here. AT&T cannot dispute that its 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 released and 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 and including the specific billing period due for closure. . ."[39]

25. During each month from March 2002 until the last BPCA Supplement was executed on May 16, 2005, AT&T acknowledged that it could not seek to recover on access charges paid in earlier periods because AT&T had specifically waived its right to exempt the claims on the Issue Exemption Form. It is undisputed that AT&T executed the BPCA Supplement, and failed to list exceptions related to the Eschelon and McLeod agreements, with full knowledge of those agreements. This Commission has already found that AT&T knew or should have known of these claims back in 2002[40] – and AT&T not only knew or should have known of its claims, it led the charge against Qwest before the state commissions in 2002. As a result, AT&T has long been aware of the unfiled agreements when it executed releases regarding all past billing periods relating to all access charges; it never exempted these claims despite having a mechanism by which to do so. Thus, both the terms of the BPCA as well as the findings of the Tenth Circuit and the Colorado District Court bar this action.

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[39] Exh. 7, at ¶ 5.

[40] Order 6, at ¶¶ 38-43.

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26. Given its success in advocating this same position in the Colorado federal court proceedings, AT&T is judicially estopped from disputing that the BPCA is a valid settlement agreement that releases and waives any claims AT&T may have had relating to access charges. Under Washington law, courts 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."[41] 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 the Commission. Any argument by AT&T to the contrary would clearly conflict with its victorious position in the Colorado proceedings, which both the federal district court and the Tenth Circuit accepted.[42] Both cases involve access charges, and as AT&T previously argued the settlement agreement releases and waives any claims relating to such charges. AT&T's arguments before the Colorado Court were successful, allowing it to avoid significant liability in the tens of millions. Thus, this Commission is warranted in estopping AT&T so that it does not derive an unfair advantage or unfairly harm Qwest by taking contrary positions dependent only on when AT&T

[41] *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) (judicially estopping party from pursuing claims about which it had knowledge even though changed circumstances turned out less favorable); *Mueller v. Garske*, 1 Wn. App. 406, 407, 461 P.2d 886, 888 (1969).

[42] *Garrett*, 127 Wn. App. at 379, 112 P.3d at 533 (citing *New Hampshire v. Maine*, 532 U.S. 742, 750-1 (2001)) (discussing the three factors to consider, including (1) whether the party's later position clearly conflicts with its earlier one and (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).

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wants to enforce or escape the terms of its' release.[43] The releases are, thus, completely dispositive of all claims for access services.

V. THE FILED RATE DOCTRINE BARS AT&T'S ACTION

27. The filed rate doctrine also bars AT&T's action as a matter of law. Indeed, even if this Commission were to allow AT&T to inject interstate access rates into this dispute, the filed rate doctrine would bar those claims as well. The filed rate doctrine holds that a carrier's tariffs "'conclusively and exclusively enumerate the rights and liabilities' as between the carrier and the customer."[44] Thus, the filed rate doctrine prevents a litigious customer from receiving monetary damages that, like a rebate or refund, effectively grant the customer a lower rate than that approved in the published tariff.[45] The filed rate doctrine applies with equal force to claims based on interconnection agreements.[46]

28. A plaintiff cannot artfully plead its claims so as to circumvent the filed rate doctrine. Indeed, under long-standing Supreme Court precedent, the filed rate doctrine must be

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[43] *Id.* (discussing the third factor – whether the party gains an unfair advantage or causes unfair detriment to the opposing party if not estopped).

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

[45] *See Keogh v. Chicago & Nw. R. Co.*, 260 U.S. 156, 163 (1922) (describing the procedure for approval of carrier tariffs for freight transport).

[46] *E.g. See Verizon Del., Inc. v. Covad Communications Co.*, 377 F.3d 1081, 1082, 1089 (9th Cir. 2004) (agreeing with the district court that the filed rate doctrine applies in the context of interconnection agreements to prevent the recovery of any charge not specified in the relevant tariff); *Goldwasser v. Ameritech Corp.*, 222 F.3d 390, 402 (7th Cir. 2000) (holding that the filed rate doctrine barred a claim for damages where the filed rates in question were those in filed interconnection agreements approved under Section 252); *Union Tel. Co. v. Qwest Corp.*, No. 02-CV-209-D, slip copy, 3-15 (D.Wyo. 2004) (unpublished decision) (holding that because the FCC ordered that wireless traffic contracts be treated as interconnection agreements, and because the local carrier had not complied with the requirements of Section 252, the filed rate doctrine barred the local carrier's equitable claims based on a theory of unjust enrichment). The Ninth Circuit has applied the filed rate doctrine to suits based on agreements subject to other FCC rate-filing requirements. *Davel Commc'ns, Inc. v. Qwest Corp.*, 460 F.3d 1075, 1084-85, (9th Cir. 2006) (holding that the filed rate doctrine applies to public access line rates because the FCC imposed a rate-filing requirement, even though application of the doctrine did not bar the claims before the court due to a supplemental FCC order).

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strictly enforced, notwithstanding other legal theories or equitable defenses.[47] As such, the filed rate doctrine precludes parties, such as AT&T, from obtaining lower rates than the tariffed rate, whether through federal or state law theories of recovery.[48] If the claim implicates a tariff, then the tariff controls according to its terms, limiting the available relief or barring the claim entirely.[49] Here, AT&T complains that it should have received the same rate it alleges Eschelon and McLeod received -- a discount under Qwest's tariffed intrastate access rates (and interstate access rates).[50] AT&T contends that, because Eschelon and McLeod received a 10% discount, it was damaged in the amount it was overcharged—10% of its intrastate (and interstate) access purchases made in 2000 to 2002.[51] During this time period, Qwest had on file with the Commission and the FCC respective tariffs for intrastate and interstate access services.[52] These tariffs contain the approved rates for Qwest's intrastate and interstate access services.[53] AT&T purchased intrastate and interstate access services off of Qwest's filed tariffs.[54] Because AT&T seeks to vary the terms of the applicable tariffs, the filed rate doctrine bars such relief.[55]

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[47] *Louisville & Nashville R.R. Co. v. Maxwell*, 237 U.S. 94, 97 (1915) ("This rule is undeniably strict and it obviously may work hardship in some cases, but it embodies the policy which has been adopted by Congress in the regulation of interstate commerce in order to prevent unjust discrimination.").

[48] *See, e.g., Square D Co. v. Niagara Frontier Tariff Bureau*, 476 U.S. 409 (1986); *AT&T Co. v. Cent. Office Tel., Inc*., 524 U.S. 214 (1998).

[49] *Id.*

[50] *See* Amended Complaint at ¶ 12.

[51] *Id.*

[52] *See* Reynolds affidavit attached as Exh. 10 at ¶ 2 – 3.

[53] *Id.*

[54] *See id.* at ¶ 4.

[55] *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.").

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29. AT&T is well aware of the doctrine's preclusive effect. Indeed, AT&T has been the principal proponent and beneficiary of the strict application of the filed tariff doctrine for the last few decades. In the leading Supreme Court case applying the filed tariff doctrine, *AT&T Co. v. Central Office Telephone*, the plaintiff ("COT") alleged that AT&T promised COT that it would receive (at no extra charge) more valuable services than required by AT&T's tariff or received by other AT&T customers. The jury found that AT&T breached these promises and awarded COT $13 million, reduced by the trial Court to $1.154 million. In seeking reversal, AT&T argued that "the filed tariff doctrine prohibits any form of rate discount or preference not provided by the tariff."[56] The Supreme Court agreed and held that the filed rate doctrine barred claims based on contract and tort theory "even if [the 'special services' sought were provided without charge to other customers] ... the claim for these services would still be pre-empted under the filed rate doctrine."[57] Moreover, the Supreme Court held that "to the extent [the reseller] is claiming that its own claims for special services are not really special because other companies get the same preferences, 'that would only tend to show that the practice was unlawful [with regard to] the others as well.'"[58] The filed rate doctrine bars a claim for damages even where a service is provided to other companies for unlawfully low rates.[59] Thus, the filed rate doctrine bars AT&T's claim even if Eschelon and McLeod received unlawful discounted rates.[60]

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[56] Opening Brief, *Central Office Tele.*, 1998 WL 25498 at *24 (filed Jan. 23, 1998).

[57] *Id.* at 226.

[58] *Id.*

[59] *See id.* at 223-26.

[60] *Central Office Tele.*, 524 U.S. at 226; *see also Viking Communication v. AT&T Corp.*, 2005 WL 2621919

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30. In sum, the filed rate doctrine mandates that the state filed and approved intrastate tariffs (and the FCC filed and approved interstate tariffs) cannot be varied no matter how the claims are cast. The fact that AT&T contends that Eschelon and McLeod received a lower rate in no way dilutes the force of the doctrine, which mandates that AT&T claims be dismissed under both state and federal law.

VI. AT&T'S INTERSTATE CLAIMS, IF ALLOWED, ARE BARRED BY THE STATUTE OF LIMITATIONS

A. Section 415 of the Federal Act Provides the Applicable Statute of Limitation

31. AT&T's claims, specifically those based on interstate access charges if allowed in this case, are also barred by the statute of limitations. In particular, the Federal Act's two-year statute of limitations contained in Section 415 bars those claims. 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, if at all, under the Federal Act,[61] and are subject to the federal two-year limitations period.

32. The plain language of Section 415 reaches "all complaints against carriers for the recovery of damages not based on overcharges." In pertinent part, Section 415 provides:

> (a) All actions at law by carriers for recovery of their lawful charges, or any part thereof, shall be begun, within two years from the time the cause of action accrues, and not after.
>
> (b) All complaints against carriers for the recovery of damages not based on overcharges shall be filed with the Commission within two years

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(D.N.J. Oct. 14, 2005) (also AT&T successfully asserting that Section 415 applies).

[61] *See* 47 U.S.C. ¶ 202 (making unjust and unreasonable rates unlawful) and 252 (outlining interconnection requirements and obligations).

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from the time the cause of action accrues, and not after, subject to subsection (d) of this section.

> (c) For recovery of overcharges action at law shall be begun or complaint filed with the Commission against carriers within two years from the time the cause of action accrues, and not after, subject to subsection (d) of this section, except that if claim for the overcharge has been presented in writing to the carrier within the two-year period of limitation said period shall be extended to include two years from the time notice in writing is given by the carrier to the claimant of disallowance of the claim, or any part or parts thereof, specified in the notice.

33. Section 415 defines the limitations period whether the claims are pending in court, before the FCC, or before a state commission.[62] This broad scope is consistent with Congress's desire to assure national uniformity in the Act's application.[63] To permit varying periods of limitation from state to state would contravene Congress's intent and discriminate against carriers that happen to be sued in states with more generous statutes of limitation.[64]

34. Although the Commission previously determined that the state statute of limitation would apply and that alternatively 28 U.S.C. § 1658 would trump Section 415,[65] this Commission was not deciding issues related to interstate access charges in that determination. The fact that AT&T seeks to link its interstate access allegations back to an interconnection agreement does not change this result in the slightest. Indeed, even if AT&T could establish

[62] *See*, *e.g.*, *Pavlak v. Church*, 727 F.2d 1425, 1427-28 (9th Cir. 1984) (holding that 47 U.S.C. § 415 applies to claims filed in court as well as to complaints filed with the FCC); *A.J. Phillips Co., v. Grand Trunk W. Ry. Co.*, 236 U.S. 662, 667 (1915) (finding that the predecessor provision under the Interstate Commerce Act limits actions "whether complaint is filed with the Commission or suit is brought in a court of competent jurisdiction"). *Petition of SBC Tex. For Post-Interconnection Dispute Resolution with Tex-Link Communications, Inc., under the FTA Relating to Intercarrier Comp., Ruling on Motion to Dismiss*, 2005 WL 2834183, at 7-9 (Tex. P.U.C. Oct. 26, 2005) (finding that the two-year limitation applies to claims that a state commission is authorized to hear) [hereinafter "SBC Tex."].

[63] *See Swarthout v. Mich. Bell Tel. Co.*, 504 F.2d 748, 748 (6th Cir. 1974).

[64] *See A.J. Phillips Co., v. Grand Trunk W. Ry. Co.*, 236 U.S. 662, 667 (1915).

[65] *See e.g.,* Order Affirming Interlocutory Order, *AT&T Comm'cns of the Pac. Nw. v. Qwest Corp.*, Docket UT-051682, at ¶ 49 (WUTC, Dec. 22, 2006).

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such linkage, which it cannot because interconnection agreements do not govern interstate access, Section 415 and the two year statute of limitations still would apply. The FCC has rejected the argument that any other limitations period, whether found in state law or the general four-year federal statute of limitations in 28 U.S.C. § 1658, should apply to interconnection agreements instead of the specific two-year period found under Section 415 of the Federal Act.[66] In *American Cellular*, American Cellular Corporation and Dobson Cellular Systems ("Dobson") had an interconnection agreement with BellSouth Telecommunications.[67] Dobson's complaint asserted three claims against BellSouth. Dobson alleged that BellSouth over-billed and charged excessive rates in violation of various sections of 251 of the Federal Act and FCC rules.[68] In addressing the applicable limitations period to Dobson's claims, the FCC rejected "a variety of lengthy state limitations periods" and refused "to regard Counts 1 and 2 as arising under state contract law."[69] Not only did the FCC reject any other applicable limitations period, it also refused to allow Dobson to repackage clearly federal claims under state law, just as AT&T is attempting to do here: As the FCC stated in that case, "We reject Dobson's suggestion that state statutes of limitation apply to Dobson's Complaint, because Dobson's Complaint does not *(and*

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66 *See In re Am. Cellular Corp.*, 2007 WL 268574, at ¶ 13 (F.C.C. Jan. 31, 2007) (finding Section 1658(a) to be a "'fallback' provision" and "[b]ecause claims (like Dobson's) for recovery of damages from carriers are specifically governed by the limitations period set forth in section 415(b) of the Act, the default statute of limitations set forth in 28 U.S.C. § 1658(a), and cases applying it, are inapposite"). Although Qwest is not specifically asking that the Commission reconsider its decision on the applicable statute of limitations, Qwest submits that this recent decision by the FCC casts doubt on the Commission's decision to proceed under a state statute of limitations with respect to the intrastate aspect of AT&T's claims under a federally-mandated interconnection agreement as well.

67 *Id.*, at ¶¶ 2-4.

68 *Id.* at ¶ 2.

69 *Id.*

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could not here) assert state law claims."[70] The FCC was definitive that claims arising from an interconnection agreement based on federal obligations "*could not*" stand independently as state law claims.[71] Because AT&T is seeking to recover under an interconnection agreement based on federally-filed interstate tariffs, this claim stands and falls under federal law and the two-year statute of limitations provided by Section 415.

35. The FCC disposed of the very same cases that AT&T marshaled before the Commission in its initial ruling on the state of limitations issue. *See In re Am. Cellular Corp.*, 2007 WL 268574, at n. 51 (citing Reply Supplement at 7-8 (citing *E.spire Communications, Inc. v. Baca*, 269 F. Supp. 2d 1310 (D.N.M. 2003); *Verizon Maryland, Inc. v. RCN Telecom Services, Inc.*, 232 F. Supp. 2d 539 (N.D. Md. 2002); *Bell-Atlantic-Pennsylvania v. Pennsylvania Public Utilities Commission*, 107 F. Supp. 2d 653 (E.D. Pa. 2000)). The FCC found these cases distinguishable because they did not "involve[] claims brought against carriers for the recovery of damages," *In re Am. Cellular Corp.*, 2007 WL 268574, at n. 53, for which the Federal Act provided Section 415's two-year limitations period, but instead dealt with appeals seeking injunctive relief against state commission orders under 47 U.S.C. § 252(e)(6). Thus, these cases are inapposite to the extent that AT&T seeks to rely on them again to argue that anything other than Section 415 should apply to its proposed interstate access claims. The soundness of this conclusion is also supported by Ninth Circuit precedent.[72]

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70 *Id.* at n. 54 (emphasis added).

71 *Id.*

72 *See Pavlak*, 727 F.2d at 1427-28. *See Davel Communications v. Qwest Corp*., 451 F.3d 1037 (9th Cir. 2005) (upholding dismissal based on the two-year statute of limitations of 47 U.S.C.§ 415(b)); *Cole v. Kelley*, 438 F.Supp. 129 (C.D. Cal. 1977).

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36. Again, AT&T's proposed interstate access claims relate to services solely covered by federally-filed tariffs. Given the source of AT&T's complaint, AT&T's proposed amended claim is necessarily governed by Section 415. But even if AT&T could link its claim to the terms in any other interconnection agreement, Section 415 would still apply. Thus, the Commission should have no doubt that Section 415 bars AT&T's claim as it relates to interstate access.

37. Since the Commission decided the statute of limitations questions, numerous other courts and commission have also addressed AT&T's claims based on the Eschelon and McLeod Agreements. A number of these courts and commissions have applied Section 415 and dismissed AT&T's claims.[73] While these decisions did not necessarily concern themselves with whether the source of the claim was interstate and intrastate services, the decisions compel applying Section 415 to AT&T's proposed amended claims based on federally-filed tariffs. AT&T cannot deny the federal nature of this type of claim.

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[73] *See* Memorandum Opinion, *AT&T Communications of the Midwest v. Qwest Corp.*, Case No. 8:06CV625 (D. Neb. Feb. 27, 2007) (finding "that AT&T's claims are barred by the two-year statute of limitations contained in 47 U.S.C. § 415" and that "AT&T may not avoid the two-year statute of limitations contained in § 415 simply by characterizing its claims as state law claims), attached as Exh. 11; *See AT&T Communications of the Midwest, Inc. v. Qwest Corp.*, Order Granting Motion to Dismiss, Docket No. FCU-06-51 at 18 (Iowa Utils. Bd., Dec. 4, 2006) (dismissing AT&T's complaint because "this action clearly arise[s] out of the same transaction that was at issue in Docket No. FCU-02-2: Qwest's failure to file with the Board certain interconnection agreements as required by law," and "that *but for "that transaction, Complainants have no claim for breach of contract, no claim for violation of Board rules, and no claim for common law fraud*."), attached as Exh. 12; *See* Memorandum Opinion and Order Addressing Motion to Dismiss, *AT&T Communications of the Mountain States, Inc. v. Qwest Corp.*, Case No. 2:06CV00783 DS (D. Utah May 4, 2007) (dismissing complaint in its entirety under federal law), attached as Exh. 13.

In addition to the numerous courts and commissions to address AT&T's claims in these region-wide cases, courts and commissions have acknowledged these principles previously. *See, e.g., SBC Tex.*, 2005 WL 2834183, at 9 ("Given that the authority to interpret/enforce ICAs [interconnection agreements] and to award any damages comes from the FCA/FTA [Federal Communications Act/Federal Telecommunications Act], the FCA's two-year limitations must apply to a claim for damages in an FTA arbitration. Thus, without that authority, the Commission lacks jurisdiction to interpret or enforce interconnection agreements."); *MFS International,* 50 F. Supp. 2d at 521 (while noting that the complainant's breach of contract and conversion claims appeared on the surface not to implicate the Act, adhering to long-standing precedent and the plain language of the Act to find "that such putative state law claims are in fact governed by the federal statute of limitations set out in § 415(b).").

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38. Two federal Courts have denied Qwest's motion to dismiss, one of which erroneously relied on AT&T's misreading of inapposite cases – cases that did not even address the key issue of the applicable limitations period,[74] and a third federal Court very recently found that it lacked jurisdiction over AT&T's complaint, finding that the federal scheme vested the Wyoming Commission with primary jurisdiction to hear complaints involving the interpretation and enforcement of interconnection agreements.[75] None of these decisions, however, focused on federal interstate access services, as AT&T is now seeking to introduce into this case. AT&T relied exclusively, as it previously did here, on a series of reciprocal compensation cases, such as *Pacific Bell v. Pac-West Telecommunications, Inc.*[76] and *Connect Communications Corp. v. Southwestern Bell Telephone, L.P.*,[77] where the question was whether the parties' agreement treated calls to ISPs as "local".

39. In those cases, the federal statutes gave no guidance on that particular contractual issue at all. Indeed, *Connect*'s tortured procedural history was due in great part to the FCC's lengthy deliberations over whether to treat calls to ISPs as local, and the D.C. Circuit's multiple

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[74] *AT&T Commc'ns of the Midwest, Inc. v. Qwest Corp.*, Case No. 06 CV 3786 (MJD/SRN) (D. Minn. Mar. 28, 2007) (while acknowledging that *Connect* was not dispositive, suggesting that *Connect* might support its analysis), attached as Exh. 14. The United States District Court for the District of South Dakota also denied Qwest's motion to dismiss but erroneously refused to rule on the substantive merits of the arguments because the court did "not wish to in effect nullify South Dakota statutes in connection with dismissing an action in federal court" and felt "[a]s a matter of courtesy and respect, [that] this court would want to allow such parties to be heard before nullifying state laws." *See* Order and Opinion, at 2-3 *AT&T Commc'ns of the Midwest v. Qwest Corp.*, CIV. 07-3004 (D.S.D. Mar. 30, 2007), attached as Exh. 15.

[75] *See* Order, *AT&T Commc'ns. of the Mountain States, Inc. v. Qwest Corp.*, Case No. 06-CV-232-D (D. Wyo. Oct. 16, 2007), attached as Exh. 16. The Wyoming court also remanded one claim alleging a state statutory violation to state court "in an overabundance of caution" even though the court expressed its doubt that it really was, at its core, any different from AT&T's claims based on violations of the interconnection agreement. *Id.* at n. 3.

[76] 325 F.3d 1114, 1127 (9th Cir. 2003).

[77] 467 F.3d 703 (8th Cir. 2006).

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rulings sending the issue back to the FCC for the Commission to consider anew.[78] The end result of that process – at least, at the time *Connect* issued late last year – was an FCC order that treated calls to ISPs as other than local, ***but*** that expressly specified that agreements predating its issuance were not subject to that determination.[79] Indeed, the FCC invited state commissions, pursuant to their authority under the Telecommunications Act, to review particular CLECs' interconnection agreements in accordance with state law to determine whether the parties to those agreements had intended to treat calls to ISPs as "local" calls subject to reciprocal compensation obligations.[80]

AT&T's claim here is different in a critical respect. The conditional rights AT&T claims were thwarted, and the duties AT&T claims Qwest neglected, were established in full by federal law. Unlike the reciprocal compensation cases—where the FCC declined to issue a controlling order that would have bound state commissions under federal law—the FCC has expressly determined that Section 252(i) applies, as a matter of federal law, regardless of whether an interconnection agreement specifically makes provision for "most favored nation" treatment or not.[81] With its motion to amend, AT&T is now clearly and indisputably seeking damages arising from federal law matters. It follows that the federal statute of limitations in section 415 applies and bars this Complaint.

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[78] *See id.* at 704-706.

[79] *Id*. at 707 (FCC order "allowed the payment of reciprocal compensation for ISP-bound traffic to the extent provided for in an existing interconnection agreement").

[80] *Id*. at 707.

[81] *First Report and Order, Implementation of Local Competition Provisions in the Telecomms. Act of 1996*, 11 F.C.C.R. at ¶ 40.

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B. The Commission Has Already Found that AT&T's Claims Accrued More than Two Years Before AT&T Filed its Complaint

40. Under Washington and federal law, the discovery rule provides the applicable rule to determine the running of the statute of limitations.[82] AT&T has long been aware of the alleged "secret agreements." As the Commission well knows, AT&T played a leading role in proceedings relating to the allegedly "secret" agreements before numerous regulatory bodies going back to February 2002. For example in response to a complaint filed with the Minnesota Public Service Commission on February 14, 2002, AT&T accused Qwest of failing to file certain interconnection agreements, including the ones described here.[83] The Minnesota Commission then opened a proceeding on March 12, 2002, and AT&T participated actively thereafter in all of its phases. Even before the Minnesota Commission opened this docket, AT&T filed complaint letters with most of the utility commissions in the 14-state Qwest region.[84] Several of these state commissions, including this one, also conducted proceedings in 2002 and thereafter to determine whether Qwest violated federal law. AT&T participated in all of these proceedings.

41. As the Commission found, AT&T's knowledge of these allegations in 2002 triggered the running of the limitations period. Once AT&T had notice, "it [bore] the responsibility of making diligent inquiries to uncover the remaining facts needed to support the

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[82] *Enterprise Timber Inc. v. Washington Title Ins*., 76 Wn. 2d 479, 457 P.2d 600 (1969); *Spring Communications Co. v. FCC*, 76 F.3d 1221, 1230 (D.C. Cir. 1996); *Davel Communications v. Qwest Corp*., 460 F.3d 1075 (9th Cir. 2006).

[83] *See supra* n. 8.

[84] As an example, a true and correct copy of AT&T's letter to the Iowa Utilities Board, is attached as Exh. 1.

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claim."[85] Knowledge is knowledge, and for these purposes neither requires nor awaits actual adjudication.[86]

42. The law of the case doctrine thus precludes further litigation of the discovery date and, at the very least, compels denial of AT&T's interstate access charges claim, which is governed by the federal two year statue of limitation.[87] Previously, the Commission decided the question of when AT&T knew or should have known in the exercise of reasonable care of its injury to trigger the running of the applicable statute of limitations period. On interlocutory review, the Commission affirmed that AT&T fully and fairly litigated the question before the Commission and that AT&T discovered or should have discovered its alleged injury at least as of July 2002.[88] In fact, AT&T knew of all of its claims in May 2002, after the Minnesota Commission held hearings in April and the Department of Commerce served on all parties, including AT&T, an amended complaint outlining alleged violations resulting from the McLeod agreement.

43. Given that AT&T filed its complaint here in November 4, 2005, the two-year limitations period clearly bars AT&T's claims, particularly any claims based on interstate access services. It follows that AT&T's cause of action accrued well over four years ago, and that its action is barred by Section 415 of the Federal Act.

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85 *Spring Communications Co.*, 76 F.3d at 1230; *Davel Communications*, 460 F.3d 1075 (finding that Sprint was on inquiry notice, triggering the running of the statute of limitations under Section 415, when "it had knowledge suggesting the rates might be improper").

86 *See Communications Vending Corp v. FCC*, 365 F.3d 1064, 1073-74 (D.C. Cir. 2004) (rejecting theory that cause of action did not accrue until an agency ruled on the lawfulness of an issue or uncertain law became settled).

87 47 U.S.C. 415.

88 Order No. 6, at ¶ 43.

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VII. AT&T'S COMPLAINT FAILS TO STATE A BREACH OF CONTRACT CLAIM AS A MATTER OF LAW

44. Even if AT&T's state law breach of contract claim survives the release, the filed rate doctrine and the statute of limitations, AT&T's Complaint must be dismissed because it cannot maintain a viable claim. AT&T's allegations fail to establish a breach of contract claim under the provisions of the interconnection agreement, namely Section 2.1 or Scope of Agreement, Section B. Moreover, those claims seeking "overcharges" for access services must be dismissed because the plain language of the MFN provision, the provision AT&T is seeking to enforce, does not apply to access services. Specifically, for the reasons stated below, Qwest submits that, if the Commission determines to proceed, this Commission must dismiss the complaint, or at the very least all relief for claims based on access charges, for failure to state a breach of contract claim.

A. Intrastate and Interstate Access Services Are Not Covered By the Most Favored Nation Provision So No Contract Claim Related to Them Can Stand

45. The most favored nation clause that AT&T seeks to enforce addresses only certain products. In particular, 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."[89] The AT&T MFN provision provides:

> Until such time as there is a final court determination interpreting Section 252(i) of the Act, US West shall make available to AT&T the terms and conditions of any other agreement for interconnection, unbundled network elements and resale services approved by the Commission under Section 252 of the Act, in that agreements entirety. After there is a final court determination interpreting Section

[89] *See* Exh. 17, Interconnection Agreement between AT&T and US West (July 25, 1997).

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252(i) of the Act, the Parties agree to revise this Section 2.1 to reflect such interpretation.

46. It is logical that the MFN provision does not reference access services, for those services are not the same thing as Section 251 interconnection. Not only are these switched access services beyond the plain language of the contract, the FCC specifically states that access charges are not part of Section 251.[90] Access services are provided under federal tariffs (for interstate access) and state tariffs (for intrastate access) under regulatory policies that predated the 1996 Telecommunications Act and were not modified by the enactment of Section 251 to create entirely different categories of interconnection. As such, access services, both interstate and intrastate switched access service, and private line transportation services offered for the origination and/or termination of interexchange traffic, by definition are not covered by the most favored nation clause because they are not "Interconnection, Unbundled Network Elements and resale services."

47. Consistent with this legal structure, AT&T purchases its switched access services out of access tariffs, not out of its interconnection agreement with Qwest.[91] Between 2000 and 2002, Qwest had the tariff WN U-44 on file with the WUTC for intrastate access services and the tariff FCC QC No., 1 on file with the Federal Communications Commission ("FCC") for interstate switched access services. Those tariffs were approved by the WUTC and the FCC,

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[90] *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.").

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respectively.[92] It is from WN U-44 and FCC QC No. 1 that AT&T orders intrastate and interstate access services from Qwest. Indeed, AT&T's interconnection agreement with Qwest makes absolutely clear that "switched access" is "defined in the Parties' applicable tariffs".[93]

48. Thus, by the express terms of the interconnection agreement, AT&T is not entitled to recover the damages it seeks based on intrastate or interstate access. It has no contract claim because its interconnection agreement did not -- and could not -- apply to access services.

B. By AT&T's Own Admissions, Qwest Acted in Good Faith and Therefore AT&T Cannot State a Breach of the "Scope of Agreement," Section B.

49. To the extent that AT&T seeks to rely on Section B of the "Scope of Agreement" to maintain its breach of contract claim, that attempt also fails. Section B provides that the parties "shall act in good faith and consistently with the intent of the Act" in carrying out their obligations under the Agreement. AT&T's complaint does not allege any lack of good faith on Qwest's part in failing to file or provide the Eschelon and McLeod agreements.

50. Indeed, it is difficult to see how AT&T could allege as much when the issue as to the types of agreements that have to be filed was ambiguous and its terms were being litigated before the FCC. AT&T acknowledged as much for its own failure to file certain agreements that were deemed to be interconnection agreements.[94] Given the uncertainty with the law

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[91] *See* Exh. 10 at ¶ 4.

[92] *See* Exh. 10 at ¶ 3.

[93] *See* Exh. 17. The 1996 TCG and US West Communications Interconnection Agreement (December 16, 1996) contains similar language. *See* the definitions of "Exchange Services" and "Switched Access" attached as Exh. 18.

[94] *See* Order No. 13, *WUTC v. Advanced Telecom Gr.*, Docket No. UT-033011, at ¶¶ 105-9, 147 (WUTC Sept. 9, 2004) ("assert[ing] that at the time the agreement was executed, AT&T believed that the Agreement No. 26A was not required to be filed with the Commission"); Narrative, *WUTC v. Advanced Telecom Gr.*, Docket No. UT-033011, at ¶¶ 105-9, 147 ("emphasiz[ing] that at the time it entered into the Agreement, AT&T believed, based on the law in existence at the time, and the type of agreement at issue, that the Agreement did not require filing with

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surrounding the filing requirement, Qwest sought formal guidance from the FCC regarding which agreements needed to be filed.[95] In such circumstances, AT&T cannot show that Qwest did not act in good faith as a matter of law.[96] To the extent that AT&T couches its breach of contract claim on this provision, AT&T's complaint fails to state a viable breach of contract claim, and therefore, must be dismissed.

C. Federal Law and FCC Regulations Apply to Claims Based on Most Favored Nation Provisions

51. AT&T further alleges that Qwest breached its "obligations under both Agreements to make available. . . the rates, terms and conditions of other interconnection agreements"[97] The Most Favored Nations provision ("MFN"), Section 2.1, makes clear that the Agreement imposes no such obligation. And, AT&T cannot establish a breach of Section 2.1. As a result, AT&T's claim fails as a matter of law.

As described above, Section 2.1 provides:

> Until such time as there is a final court determination interpreting Section 252(i) of the Act, US West shall make available to AT&T the terms and conditions of any other agreement for interconnection, unbundled network elements and resale services approved by the Commission under Section 252 of the Act, in that

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the Commission"); *see also id.* (recognizing that "AT&T may have simply misunderstood its obligation to file Interconnection Agreements").

[95] S*ee Memorandum Opinion and Order, In re Declaratory Ruling on the Scope of the Duty to File and Obtain Prior Approval of Negotiated Contractual Arrangements Under Section 252(a)*, WC 02-89, 17 FCC Rcd 19337 (FCC 2002); *see also New Edge Network, Inc. v. F.C.C.*, 461 F.3d 1105, 1111-13 (9th Cir. 2006) (finding 252(i) to be ambiguous and upholding FCC's construction of 252(i)).

[96] *See Gen. Elec. Co. v. Porter*, 208 F.2d 805, 816-17 (9th Cir. 1954) (finding "[t]he requisite good faith was met when there were substantial unsettled issues of law"); *Brinderson-Newberg v. Pacific Erectors*, 971 F.2d 272, 283 (9th Cir. 1992) (holding that where genuine issue exists regarding contract terms and liability, insurer's refusal to pay claim did not constitute breach of implied covenant of good faith and fair dealing).

[97] Compl. at ¶ 14.

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agreements entirety. After there is a final court determination interpreting Section 252(i) of the Act, the Parties agree to revise this Section 2.1 to reflect such interpretation.

By its very terms, Section 2.1 does not apply after "a final court determination interpreting Section 252(i) of the Act." As previously discussed, the Supreme Court upheld the FCC's interpretations of Section 252(i) in 1999.[98]

52. TCG's claim for relief under its interconnection agreement similarly fails. The TCG Agreement simply states that "The Parties agree that the provisions of Section 252(i) of TA 1996 shall apply, including state and federal interpretive regulations in effect from time to time."[99]

53. Not only do these provisions make clear that federal law is determinative of whether AT&T is entitled to any opt in rights under the most favored nation provisions, but the Commission has also repeatedly recognized that federal law controls the most favored nation provisions, unless a specific, independent contractual provision speaks to the right. When TCG, AT&T's affiliate, was seeking to enter into one of the interconnection agreements with Qwest that is at issue here, it "proposed that the agreement recite the FCC's 'most favored nation' language, interpreting the Act, as a reminder of USWC's obligations under the law."[100] The Commission initially rejected TCG's proposal because it did not want to "impose the meaning set out in the stayed federal rule" and "in a sense usurp[] the authority of the federal court and

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[98] *See Iowa Utils. Bd.*, 525 U.S. at 395-6.

[99] *See* Exh. 18.

[100] *See In re TCG Seattle*, 1997 WL 178654, at *14, No. UT-960326 (WUTC., Jan 29, 1997).

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impos[e] on the parties a federal rule that is not effective."[101] Significantly, the Commission noted that "[e]ven without this provision [in the interconnection agreement], the federal Act will apply and both parties are entitled to an interpretation of the statutory provision from an appropriate federal decision-maker."[102]

54. In the end, the provision provided that "The Parties agree that the provisions of Section 252(i) of TA 1996 shall apply, including state and federal interpretive regulations in effect from time to time."[103] The AT&T agreement stated that "[u]ntil such time as there is a final court determination interpreting Section 252(i) of the Act, [Qwest] shall make available to AT&T the terms and conditions of any other agreement for interconnection, unbundled network element and resale services approved by the Commission under Section 252 of the Act, in that agreement[']s entirety" was included.[104] Of course, the Supreme Court's decision upholding the FCC's interpretations of Section 252(i) in 1999 is "a final court determination interpreting Section 252(i) of the Act."[105] Thus, *before* the relevant time frame of AT&T's complaint, this provision ceased to have any operative effect by its own terms and TCG's agreement already left the most favored nation provision to the operation of federal law.

55. Other CLECs adopted the same terms as those provided in the TCG agreement, including the most favored nation provision. Under one such agreement between US West and Nextlink, Nextlink sought to exercise its 252(i) rights, as provided in the agreement pursuant to

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[101] Id.

[102] Id.

[103] Exh. 18.

[104] Exh. 17.

[105] *See AT & T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 395-6 (1999).

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Article XXVII, or otherwise its contractual rights under a separate provision in the agreement for a reciprocal compensation according to the terms of another interconnection agreement, Article VIII, Section 2.[106] Notably, the Commission recognized that the most favored nation provision encompassed Nextlink's "statutory rights under Section 252(i)."[107] While the Commission assessed Nextlink's contractual right under Article VIII, it evaluated Nextlink's rights under Article XXVII as a matter of federal law and FCC regulations imposing reasonableness requirements on CLECs seeking to opt into the terms of other interconnection agreements.[108] The Commission ultimately determined that the result would be the same under either analysis. Here, however, AT&T cannot point to any substantive provision; AT&T relies solely on the MFN provision.

56. The history of these agreements before the Commission demonstrates that the Commission has always understood that federal law would control the most favored nation provisions and that only independent substantive provisions would be enforced as a matter of contract. Consistent with that historical understanding, it is thus not surprising that—unlike in the reciprocal compensation cases—federal courts have followed the FCC's order and looked to federal law when addressing most favored nation issues such as the one presented in this case.[109]

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[106] *Nextlink v. US West Communications , Inc.*, 1999 WL 1454973, Docket No. UT-990340, at ¶ 2 (WUTC Sept. 9, 1999).

[107] *Id.*

[108] *See id.*, at ¶¶ 38-40.

[109] *See Bellsouth Telecommunications v. Southeast Tele. Inc.*, 462 F.3d 650 (6th Cir. 2006) (looking to Section 252(i) and FCC orders to determine a CLEC's opt-in rights, notwithstanding the specific terms of a "most favored nation" provision in the parties' interconnection agreement); *Global Naps Inc. v. Verizon New England, Inc.*, 396 F.3d 16 (1st Cir. 2005) (addressing the question of a CLEC's opt-in rights after entering into an arbitrated interconnection agreement with a "most favored nation" clause as "an issue of federal statutory interpretation of the [Federal Act]"); *see also U.S. West Communications, Inc. v. Jennings*, 46 F.Supp.2d 1004 (D. Ariz. 1999) (noting that "this requirement is mandated by the plain language of the Act") (citing *Iowa Utils. Bd.*, 525 U.S. 366).

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Any other conclusion disregards the history of these provisions, which were imposed by the Commission as a stop-gap measure while the federal rule was stayed, and the Federal Act's structure of consistent nationwide regulation in the area of interconnection.[110] Consequently, AT&T cannot simply claim that it is entitled to discounts. Rather, it must show that it is entitled to opt in pursuant to existing federal law and FCC regulations.

D. **AT&T Is Not Entitled to Pick and Choose from Provisions in Unapproved and Terminated Interconnection Agreements**

57. Both Section 2.1 and federal law require that Qwest make available interconnection agreements "*approved* by the Commission under Section 252 of the Act."[111] Such approved agreements must be provided in their "entirety."[112] AT&T's complaint fails on both points.

58. AT&T has averred that the agreements upon which it seeks recovery were "secret" and kept hidden from AT&T because Qwest's failed to file them and have them approved in accordance with Section 252.[113] Thus, by AT&T's own reckoning, there can be no breach of Section 2.1 (or Section 252(i)), as a matter of law, when the very agreements were never approved by the Commission under Section 252.

59. Further, AT&T premises its breach of contract claim on Qwest's failure to make only the discounts available to AT&T. Even if the McLeod and Eschelon Agreements fell

[110] *See Verizon Md., Inc. v. Global Naps, Inc.*, 377 F.3d 355, 363-65 (4th Cir. 2004) (finding substantial questions of federal law because the agreement was federally mandated, the key disputed provisions incorporated federal law, and the contractual duty was imposed by federal law).

[111] Section 2.1 (emphasis added).

[112] *Id.*

[113] Compl. at ¶¶ 7, 8, 12.

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within the scope of Section 2.1, the Agreements and FCC regulations do not permit AT&T simply to obtain the benefits of the discounts without assuming all the terms and conditions provided by the agreements in their entirety.[114] Notwithstanding AT&T's unsubstantiated allegations that it would have "availed itself of" the discounts,[115] the Complaint fails to allege that AT&T could or would have chosen to comply with the related terms and preconditions.

60. To do so, AT&T would have to comply with the Federal Act and FCC regulations.[116] Specifically, Section 252(i) provides that "[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." However, 47 C.F.R. § 51.809 exempts incumbents that can prove that providing a particular interconnection agreement to a requesting carrier is either (1) more costly than providing it to the original carrier, or (2) technically infeasible and also imposes reasonable time requirements.

E. <u>AT&T Failed to Make a Good Faith Request and Its Ability to Request Such Terms Is Now Unreasonable</u>

61. As a matter of law, approved interconnection agreements need be available for opt in only for a "reasonable" time and CLECs, such as AT&T, must make a timely, good faith

[114] *See* Section 2.1.

[115] Complaint, ¶ 11.

[116] Order No. 20, *WUTC v. Advanced Telecom Gr.*, Docket No. UT-033011, at ¶ 61 (WUTC Feb. 9, 2005) ("Time Warner and Qwest establish that in order to prove its point of Qwest's economic gain, Time Warner would have to show that the alleged agreements would be approved and subject to a filing requirement, and that all other CLECs would be able to obtain the same discounts as Eschelon and McLeodUSA over Qwest's objections for the need to opt into other legitimate provisions of the agreements. We continue to find Qwest's concerning about the probative value persuasive: There are too many connections to be made in this analysis. . . .").

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request to seek to opt in to any other subsequently approved interconnection agreement.[117] AT&T's conduct after the McLeod and Eschelon agreements became public fails to comply with both requirements. AT&T never requested the terms of either of those agreements and does not allege that it did. Thus, AT&T has known of the alleged "secret agreements" for nearly five years and yet did nothing until 2005 to file this complaint. Under the Commission's previous guidance on reasonableness, AT&T did not act in good faith and utterly failed to seek to opt into the agreements during a reasonable time when they may have been available.

62. Indeed, instead of seeking to opt into the "secret agreements," AT&T entered into negotiations with Qwest in early 2002 and ultimately entered into a new arbitrated interconnection agreement that became effective February 6, 2004. AT&T did not raise the allegedly "secret" agreements during these negotiations and did not mention them during the arbitration proceedings. In similar circumstances, federal courts have found that CLECs have lost their opt-in rights when they have opted to enter into new agreement through negotiation or arbitration.[118] There is no dispute that Qwest sought to resolve unsettled legal issues of law and filed or terminated agreements depending on the FCC guidance and that AT&T entered into a new agreement with Qwest, notwithstanding AT&T's knowledge of the allegedly "secret" McLeod and Eschelon agreements. AT&T has now waived any claim that it may have had under the most favored nation provision and cannot establish a violation of Section 2.1 Given all this, AT&T's complaint warrants dismissal for failure to state a claim.

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[117] 47 C.F.R. § 51.809; *Nextlink*, 1999 WL 1454973, at ¶ 38 (noting that "good faith negotiations" requires CLECs, such as AT&T, to formally notify ILECs, such as Qwest, "of the specific arrangement being requested").

[118] *Global Naps Inc.*, 396 F.3d 16 (denying CLEC opt-in rights after entering into an arbitrated interconnection agreement instead of seeking to use Section 252(i)).

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VIII. CONCLUSION

63. For the reasons described above, Qwest respectfully requests that the Commission grant Qwest's motion and dismiss AT&T's claims.

DATED this 22nd day of October, 2007.

QWEST

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