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'S REPLY TO THE AT&T/TIME WARNER OPPOSITION TO QWEST'S MOTION TO DISMISS

I. INTRODUCTION

1 Qwest Corporation ("Qwest") files this reply to the "Opposition" ("Answer") filed by Complainants on January 6, 2006. This reply addresses the numerous inaccuracies contained in Complainants' Answer and addresses the new matters raised in that filing.

II. ARGUMENT

A. Complainants' Answer Contains Numerous Inaccuracies with Regard to the Availability of the Eschelon and McLeod Agreements

2 As described in the Complaint herein, Complainants take issue only with certain agreements Qwest entered into with McLeod and Eschelon. While Complainants never specifically describe which agreements in particular are the subject of the complaint, it is easy to see from a

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review of the facts that Complainants have had reasonable access to each and every one of those agreements for far longer than the applicable limitations period. Complainants' representations to the contrary are disingenuous at best.

3 Complainants claim, at paragraph 3, that they did not have access to the agreements in the context of the Minnesota case because those agreements were designated as confidential, and because only their Minnesota affiliates were able to review or access those documents. This is simply not the case. Qwest publicly filed eleven agreements with the Minnesota Commission on March 13, 2002. *See* Attachment 1. Even if it were the case that the agreements were filed under seal, there was ample publicly available information in the Minnesota case that any reasonable person would have understood to give rise to a cause of action in Washington.

4 One of the most obvious pieces of evidence that this information was available is contained in Time Warner's comments to the Minnesota Commission, filed January 21, 2003, and included with Qwest's Motion for Summary Determination as Exhibit 3. Those comments are attached again for the Commission's convenience as Attachment 2 to this reply. Even if those comments were informed by a review of confidential material, the comments themselves were publicly available, and Time Warner's Washington affiliate, reading those comments, would have certainly been on notice of the potential for a claim in Washington. Indeed, the January 21, 2003 comments argued specifically that Time Warner should be given the benefit of a 10% discount.[1] As discussed below, many other documents in Minnesota also publicly disclosed allegations regarding discounts to Eschelon and McLeod.

5 Complainants further claim that "Qwest did not file any of these agreements with the Commission for approval under Section 252" and that "Qwest provided them to the Commission as confidential documents." *Answer at ¶ 2.* Complainants rely on these

[1] These comments establish beyond any doubt that Time Warner was, as of the date of filing, and most certainly much earlier than that, in full possession of all of the facts necessary to file a complaint for relief.

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allegations to support their claim that they did not have access to the documents. However, this claim does not bear scrutiny. As to the agreements between Qwest and Eschelon and Qwest and McLeod, it is true that Qwest initially provided a number of those agreements to the Commission on a confidential basis. However, a number of agreements were also provided on a non-confidential basis.

6 In fact, the issue is not whether agreements were filed under seal or publicly available. The very heart of Complainants' case is the claim for a 10% discount off of intrastate services. The issue then is when AT&T and Time Warner had sufficient knowledge of the facts to enable them to file a claim requesting 10% refunds.[2] Based on the information available in the Minnesota proceedings[3] and the Washington 271 proceeding, as well as the letter from AT&T to each of the state commissions in 2002 requesting reopening of the record,[4] there can be no doubt that they had sufficient facts in 2002 to bring a complaint containing the allegations and claims raised in this docket. However, even if the issue of certain evidence being under seal were an issue, Complainants have misstated the facts for the reasons set forth herein.

7 In the Unfiled Agreements case, initiated by Commission complaint in Docket No. UT-033011, Agreements 1-6 on Exhibit A to the Complaint were agreements between Qwest and

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[2] Complainants' claim for reparations accrued when they discovered (or should by exercise of reasonable diligence have discovered) their right to apply for relief. *See, e.g., City of Snohomish v. Seattle-Snohomish Mill Co., Inc.*, 2003 WL 22073066, *4 (Wash. App. Div. 1 Sept. 8, 2003) (citing and quoting *U.S. Oil & Refining Co. v. State Dep't of Ecology*, 96 Wn.2d 85, 91, 633 P.2d 1329 (1981) and *Janicki Logging & Constr. Co. v. Schwabe, Williamson & Wyatt, P.C.*, 109 Wn. App. 655, 659, 37 P.3d 309 (2001)).

[3] The issue of a 10% discount was discussed publicly and at length in the Minnesota proceeding – in parties' comments, on the hearing record, and in the ALJ's initial order, to name just a few examples, all of which occurred in 2002. Qwest is not providing all of these documents so as not to burden this Commission with the hundreds of pages that would entail. However, a summary list is attached as Attachment 3 hereto, and those documents are available if the Commission should wish to see them. It is inconceivable that Complainants herein can legitimately claim that they were precluded from using that public information in another jurisdiction.

[4] *See*, Attachment 4 hereto, AT&T's request to reopen the record filed in Colorado on May 13, 2002. AT&T filed virtually identical motions on May 13, 2002, in Iowa, Montana, Nebraska, New Mexico, South Dakota, Utah, and Wyoming. In its Motion herein, Qwest mistakenly stated that AT&T filed such a motion in Washington as well; however, that statement appears to be in error, as Qwest has been unable to locate that filing. Notwithstanding that, the issue of the unfiled agreements was raised in the Washington 271 proceeding, and AT&T was clearly aware of the agreements, as it filed a brief with the Commission on June 7, 2002, describing certain "secret agreements", and asking the Commission to delay Qwest's 271 application pending an investigation. See, Attachment 5, an excerpt from that brief. This clearly demonstrates AT&T's detailed knowledge of the facts, in 2002, upon which its current claim is based.

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Eschelon. Each of those agreements had previously been provided to the Commission and the parties *on a non-confidential basis* in response to the Commission's Bench Request No. 46 in Docket Nos. UT-003022 and UT-003040, on April 18, 2002. See, Attachment 6 hereto, Qwest's first response to Bench Request No. 46. Agreement 4 on Exhibit A is the only Qwest/Eschelon agreement containing an alleged discount or lower rate. This agreement was thus available to Complainants on a public basis since April 2002 in Washington, and was also included in the group of eleven that were filed publicly in March 2002 in Minnesota.

8 Thus, there is irrefutable proof that Complainants had possession of a number of the "unfiled agreements," including one that contained an alleged discount upon which Complainants base their current action, in Washington, in April 2002. Yet Complainants continue to maintain that the statute of limitations did not begin to run until June of 2004, when Staff filed testimony in Docket No. UT-033011. Complainants claim, in paragraph 9 of the Answer, that they did not have knowledge of the Eschelon and McLeod agreements sufficient to file a complaint until June 8, 2004, when Staff publicly disclosed the agreements in filed testimony. This claim is simply preposterous.

9 As the Commission is well aware, the complaint that initiated Docket No. UT-033011 contained an Exhibit A which listed all of the purported interconnection agreements that were at issue in the case. At the point at which Complainants received the complaint in Docket No. UT-033011, Complainants could have conducted discovery to obtain the referenced agreements, or could have filed a public records request to that same end. As the record in that docket indicates, Complainants did neither. No "extraordinary forces" (*see, Answer at ¶ 10*) existed that prevented such an action, which any exercise of reasonable diligence would have produced. In fact, Qwest merely made an informal request to the Commission Staff for copies of all of the agreements, and they were produced to Qwest immediately. *See*, Attachment 7 to this reply. Complainants apparently made no effort to obtain the agreements, either through

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discovery, informal request, or public records request, even though each avenue would have been open to them. Complainants, instead, sat on their rights during the pendency of the proceeding, and by doing so, saw the applicable limitations period pass them by.

B. The Six-Year Statute of Limitations is not Applicable

10 In a sort of dying gasp, Complainants reach for the lifeline of a six-year statute of limitations, claiming that their action is, or at least could be, based on breach of contract allegations. *Answer at ¶ 13.* This contention is not well taken. The Commission has previously found that its authority to order a refund or reparations is based on RCW 80.04.240.[5] This telecom-specific statute, with a clearly defined limitations period particular to this industry, must prevail over the general six-year statute of limitations on written contracts.[6] Whether the Commission is enforcing a written contract or ordering reparations for matters not governed by contract, the Commission's authority to do so is limited to that authority granted under RCW 80.04.240, and the limitations periods contained therein.

11 Furthermore, though Complainants allege that they could bring a breach of contract claim, and ask leave to do so, Qwest does not believe that Complainants can make a case that Qwest has breached a contract. There was never a request to "opt-in" to any other agreement, nor did Qwest wrongfully refuse such a request. At this point, Complainants could not prove facts establishing a breach of the parties' interconnection agreements – at most they have the claim they have brought, a claim for reparations, which is time barred under the statute of limitations.

12 The Commission should thus conclude that Complainants' claims are barred by operation of

[5] *See, Glick v. Verizon,* Docket No. UT-040535, Order No. 3 (January 28, 2005), ¶ 43. In *Glick,* the Commission affirmed that claims for overcharges or the charging of unreasonable or unlawful rates were governed by the limitations periods in RCW 80.04.240, and that claims not falling under that provision were governed by the general two-year limitation period in RCW 4.16.130.

[6] *Carlton v. Black (in Re Estate of Black)* 155 Wn.2d 152, 164 (2004) ("when more than one statute applies, the specific statute will supercede the general statute") (internal citations omitted).

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the statute of limitations. As a result, the Commission should dismiss the Complaint with prejudice.

III. CONCLUSION

13 As set forth in its Motion, Qwest requests an order of this Commission dismissing Complainants' Complaint as barred by the statute of limitations, or in the alternative, because the Commission does not have the authority to grant Complainants' request for monetary relief.

DATED this 13th day of January, 2006.

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