BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

In the Matter of the Complaint of :	)	
	)	
The Lummi Nation,	)	
Complainant	)	Docket No. UT-060147
	)	
V.	)	RESPONSE TO MOTIONS
	)	FOR
Verizon Northwest	)	SUMMARY DETERMINATION
Qwest Corporation	)	AND DISMISSAL
Respondents	)	
	)	

1. The Lummi Nation ("Lummi") hereby files this Response to Motions for Summary Determination by Verizon Northwest, Inc. ("Verizon") and Qwest Corporation ("Qwest"), and the Motion for Dismissal by Qwest. This Response is supported by the following legal arguments and by the attached Affidavit of Michael R. James.

I. Standard for Summary Determination:

2. As described in ¶8 of the Verizon Motion for Summary Determination:

> Summary determination should be granted if "there is o genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." WAC 480-07-380(2)(a). In considering a summary determination motion, the Commission is to "consider the standards applicable to a motion made under CR 56 of the Washington superior court's civil rules." *Id.* The WAC language on summary determination is drawn virtually verbatim from state and federal summary judgement rules. CR 56(c); Fed. R. Civ. P. 56(c). A defending party may move for summary judgement with or without supporting affidavits. CR 56(b)….

3. In reviewing a summary judgment order, the burden is on the party moving for summary judgment to demonstrate there is no genuine dispute as to any material fact and reasonable inferences from the evidence must be resolved against the moving party. *Lamon v. McDonnell Douglas Corp.*, 91 Wn.2d 345, 349, 588 P.2d 1346 (1979). Facts and reasonable inferences

from the facts are considered in the light most favorable to the nonmoving party, *Mountain Park Homeowners Ass'n v. Tydings*, 125 Wn.2d 337, 883 P.2d 1383 (1994).

II. Issues of material fact remain at issue, precluding summary determination.

4. Verizon and Qwest both request the Commission to grant summary determination based on a statute of limitations argument[1]. Their argument states that there are only two avenues for bringing claims such as ours, a claim for "Reparation" under RCW 80.04.220 or a claim for an "Overcharge" under RCW 80.04.230, and that these two avenues are subject to either a *six month or a two year* statue of limitations in RCW 80.04.240. As is shown below, the legal definition of an "Overcharge" or a claim for "Reparation" both explicitly require that a **service was provided** to Complainant by the companies.

5. There are, in fact, other avenues under the law for bringing claims such as ours that are subject to a *six year* statue of limitation. We have chosen to bring our claim under RCW 80.04.440 and WAC 480-120-161 (See Complaint ¶¶ 2.1-2.8) which *do not* require that a service has been provided to the Complainant by the companies. These code sections clearly provide, under their own language, a basis for a claim against a regulated company. The six year statute of limitations contained in RCW 4.16.040 is the only applicable statute of limitation to our claim.

6. Whether the claim can be brought as is plead in the Complaint and as is subject to a six year statute of limitations, depends on the question whether Foreign Exchange (FX) Service was ever provided to Lummi by Verizon and by Qwest, or whether the service was provided at the time of the billings. This material fact remains in question.

[1] Verizon and Qwest can only seek a summary determination due to their offer to settle for two year's worth of Lummi payments to Verizon. Lummi has sought other remedies in its complaint that are not limited to this remedy. Even if a two year statute of limitations is deemed appropriate by the Commission, any summary determination must be limited to those claims. Lummi has identified problems with Verizon's calculation of its settlement amount. The amount offered by Verizon contains mathematical errors. The offer of settlement also includes amounts billed

7. Verizon and Qwest reference cases regarding "overcharges"[2]. Those cases do not directly address whether a company's charges, when no services were provided, can be an "overcharge" or "reparation" under the law when the code sections regarding "overcharges" and "reparations" clearly require that services must have been provided. Neither do those cases address whether a claim plead under RCW 80.04.440 and WAC 480-120-161 can be deemed to be plead under RCW 80.04.220 or RCW 80.04.230, when the plain language of those code sections do not apply under the factual situation set forth in our Complaint.

8. The regulations referenced by Verizon and Qwest in the Revised Code of Washington, are set forth below:

> RCW 80.04.220 Reparations
> When Complaint has been made to the commission concerning the reasonableness of any rate, toll, rental or charge ***for any service performed by any public service company***, and the same has been investigated by the commission, and the commission has determined that the public service company has charged an excessive or exorbitant amount ***for such service***, and the commission has determined that any party complainant is entitled to an award of damages, the commission shall order that the public service company pay to the complainant the excess amount found to have been charged, whether such excess amount was charged and collected before or after the filing of said complaint, with interest from the date of the collection of said amount. (emphasis added)

> RCW 80.04.230 Overcharges – Refund
> When complaint has been made to the commission that any public service company has charged an amount ***for any service rendered*** in excess of lawful rate in force at the time such charge was made, and the same has been investigated and the commission has determined that the overcharge allegation is true, the commission may order that the public service company pay to the complainant the amount of the overcharge so found, whether such overcharge was made before or after the filing of such complaint, with interest from the date of collection of such overcharge. (emphasis added)

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to Lummi for months after a "disconnection" order was placed, but not acted upon by Verizon. The settlement offer is also subject to objectionable terms and conditions.

[2] Verizon claims that in *Hopkins v. GTE Northwest, Inc*., 89 Wn.App. 1 (1997) "The Washington Appellate Court …found that such claims are claims for overcharges or unreasonable charges for services not received." In Hopkins, however, the issue was whether the jurisdiction over the matter was with the Commission, or in state court as an "unfair and deceptive practice" in violation of other state law; not whether the claim could be brought exclusively as an overcharge, as opposed to being brought under other Commission jurisdictional rules and regulations. Verizon also cites *Eschelon Telecom of Wash, Inc. v. Qwest Corp*, 2004 Wash. UTC LEXIS 75, however, that case does not limit Lummi from bringing their claim as it is plead.

> RCW 80.04.240 Action in court on ***reparations and overcharges***
> …All complaints concerning overcharges resulting from collecting unreasonable rates and charges or from collecting amounts in excess of lawful rates shall be filed with the commission within six 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…. (emphasis added)

9. A review of the Complaint in this action will show that our cause of action was not brought pursuant to either RCW 80.04.220 or RCW 80.04.230. Those sections do not apply to our situation, since it is unclear whether any "service" was ever "performed by any public service company", or whether any service was "rendered" to us, as is required by those code sections. Our cause of action was filed pursuant to the following code sections:

> RCW 80.04.440 Companies liable for damages
> In case any public service company shall do, cause to be done, or permit to be done any act, matter or thing prohibited, forbidden or declared to be unlawful, or shall omit to do any act, matter or thing required to be done, either by any law of this state, by this title or by any order or rule of the commission, such public service company shall be liable to the persons or corporations affected thereby for ***all*** loss, damage or injury caused thereby or resulting therefrom, and in case of recovery if the court shall find that such act or omission was willful, it may in its discretion, fix a reasonable counsel or attorney's fee, which shall be taxed and collected as part of the costs of the case. An action to recover for such loss, damage or injury may be brought in any court of competent jurisdiction by any person or corporation. (emphasis added)

In our case, the "act, matter or thing prohibited, forbidden or declared to be unlawful" by order or rule of the commission" includes:

> WAC 480-120-161 Form of Bills …Bills may only include charges for services that have been requested by the customer or other individuals authorized to request such services on behalf of the customer, ***and that have been provided by the company…***[AND] The bill must include a ***brief, clear, nonmisleading, plain language description of each service*** for which a charge is included. The bill must be sufficiently clear in presentation and specific enough in content so that the customer can determine that the billed charges accurately reflect the service actually requested and received…

10. In our case, Verizon billed Lummi for charges that were not provided by the company, and their bills were unclear, misleading, and without a plain language description of the service that

was specific enough in content so that Lummi could determine what the charges supposedly represented. Attached is the Affidavit of Michael James, and a copy of a Verizon telephone bill.

11. Verizon states in ¶ 3 of its Motion that "Verizon provided FX Services to the Lummi Nation". While they cite ¶ 3.36 of the Complaint as our agreement with their assertion, nowhere do we allege this as a fact in our Complaint. This is a disputed issue of material fact. Our Complaint, in ¶ 3.5 alleges in the alternative that the service in question "never existed". During the informal portion of our complaint before this Commission, we sought technical information sufficient to show whether the service ever existed, and neither Verizon nor Qwest provided such information.

12. In the event the FX Service never existed, or even if it existed at one point and did not exist during the time for which relief is sought, the service does not meet the requirements of the plain language of a "Reparation" under RCW 80.04.220, a claim for an "Overcharge" under RCW 80.04.230, or the matching language of RCW 80.04.240. Therefore, the two year statute of limitations does not apply.

13. Instead, a six year statute of limitation applies under RCW 4.16.040, which states:

> The following actions shall be commenced within six years…
> (2) An action upon an account receivable incurred in the ordinary course of business…

Verizon was kind enough to bring the case of *Glick v. Verizon Northwest, Inc*., WUTC, January 25, 2005, Docket No. UT-040535; Order No. 03, (2005) to our attention at the Prehearing Conference. That Order states, "statutes of limitation set out in Chapter 4.16 REC do apply to bar claims before the Commission *when no specific limitation period for those claims is other set by statute*….a consumer complaint upon the tariff of a regulated utility company is subject to the two-year limitation provided in RCW 4.16.160 *when no other, specific statutory limitation*

applies." (Emphasis added) In that case, they found that "no other statute appears to be applicable." In out case, RCW 4.16.040, which provides for a six year statute of limitations is clearly applicable. The Court, in *Tingey v. Haisch,* 129 Wn. App. 109, 117 P.3d 1189 (2005) clarified the definition of an "account receivable" in the statute. The Court held that "we hold that the term 'account receivable' in RCW 4.16.040(2) refers to an 'open account,' that is '{a}n account that is left open for ongoing debit and credit entries by two parties and that has a fluctuating balance until either party finds it convenient to settle and close." In a review of the bills sent by Verizon, as is represented by the bill included with this filing, it is clear that Lummi had an account, with an account number[3], that new charges were added monthly and that payments were made periodically on those charges, with a notation on the bill for "Previous charges", "past due charges", "Current charges", and "Total amount due". If the Verizon charges were not an "account receivable", then it is unclear what could possibly meet that definition.

14. It is a disputed material issue of fact whether FX Service, as is described in the Complaint, ever existed or existed at the times for which they were billed. If service did not exist, this claim can not be deemed to be brought under the code sections which have a two year statute of limitations, and a six year statute of limitations applies.

15. Verizon also claims in ¶ 1 of their Motion for Summary Determination that "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". It is also a material question of fact whether Verizon billed Lummi for a service that it knew it did not provide or continued to

[3] The account number is 559000391402208601.

bill Lummi for services it knew were not being provided, and if so, if such act or omission was "willful" under RCW 80.04.440. See allegation in ¶ 3.37 of the Complaint[4].

16. Questions of material fact also exist regarding when the statute of limitation began running Verizon claims in ¶ 21 of its Motion that Lummi "never once questioned the bills". In the Affidavit of Michael R. James, Mr. James states that he contacted Verizon about the incomprehensible nature of the bill, and Verizon did not respond to his concerns. The question of when a plaintiff should have discovered the elements of a cause of action so as to begin the running of the statute of limitation is ordinarily a question of fact. *Adcox v. Children's Orthopedic Hosp. & Med. Ctr.*, 123 Wn.2d 15, 34-35, 864 P.2d 921 (1993); *Honcoop v. State*, 111 Wn.2d 182, 194, 759 P.2d 1188 (1988).

17. Questions of material fact also exist regarding whether the statute of limitations was tolled during our initial discussions of this service with Verizon and Qwest and the informal dispute resolution process required by the Commission. In the Affidavit of Richard Doughty, filed with the Complaint, these processes are described.

18. An additional question of fact is whether the Verizon bills to Lummi for FX Service, as is defined in the Complaint, contain "brief, clear, not misleading, plan language description of each service" as is required by WAC 480-120-161. The bill submitted is representative of the Lummi Verizon bills. The bill is 82 pages in length, contains new charges for the month preceding March 19, 2001 of $7,732.19, and contains numerous accounts. FX Service accounts charges

[4] In the Affidavit of Michael R. James, Lummi describes that is not aware that it ever had facilities in Silverdale. Therefore, it is highly unlikely that any FX Service was ever requested by Lummi for this location.

equaled $955.33 for the month depicted. We challenge even the experts reading this brief to locate clear references to FX Service, and a plain language description of that service[5].

III. Multiple Remedies Permissible

19. Even if the Commission determines that our cause of action is an "Overcharge" or a "Reparation, other causes of action still apply that are not limited to a two year statute of limitations. WAC 480-120-163 states,

> Refunding an overcharge. A company must refund overcharges to the customer with interest, 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. **This rule does not limit other remedies available to customers**. (Emphasis added.)

For this additional reason, the Motion for Summary Determination is not appropriate.

IV. The Commission Should Hear This Claim as a Matter of Policy

20. There is no evidence in this claim whether other entities being billed for FX Service are experiencing the same problem with their bills as is Lummi, however Lummi suspects that if they are experiencing difficulty understanding their charges for FX Services, and are being billed for this service either intentionally or by mistake, others may also have the same trouble. The bills language is unclear, and even with a reading of the tariff, which is the only other public description of FX Service, it is impossible to understand what the FX Service is for. As a matter of policy the Commission should consider this matter and order appropriate changes to the way FX Service is billed.

[5] See pages 77-82 for the FX charges.

21. Application of a two year statute of limitations is inappropriate because it will increase the incentive for abuse of FX Service billing, especially in the case of those entities with long and complicated bills like Lummi's. If FX Service is added to the bill, even if it has never been provided, or if it is discontinued and the billing continues, and billing escapes notice for two years, the companies are in the clear for receiving quite a large income (almost $1000 per month in our case) for ay bills beyond the two years. If the customer does notice the charges before the two years expire, and the customer can identify the charges, the companies may simply refund the funds with no consequence. There is therefore an incentive for companies to either intentionally, or unintentionally, abuse this billing opportunity.

V. Qwest's Motion for Dismissal Should Be Denied

22. For the reasons set forth in this Response, Qwest's Motion for Dismissal should be denied. As long as there is a pending cause of action, and it is unknown whether Qwest contributed to the problem, "RCW 80.04.140 Order requiring joint action" requires Qwest to remain a party to this proceeding.

VI. Conclusion

23. Material issues of fact remain which make Verizon and Qwest's Motion for Summary Determination inappropriate.

24. Other claims that are not subject to a two year statute of limitation exist in the Complaint which bar the dismissal of this action.

25. Verizon's offer of settlement contains miscalculations and terms and conditions that are not acceptable to Lummi.

26. For the above stated reasons, the Commission should deny Verizon and Qwest's Motion for Summary Determination.

Dated this 21st day of April, 2006

Respectfully submitted,

_____

By_____

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Attachment #1

BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

In the Matter of the Complaint of :	)	
	)	
The Lummi Nation,	)	
Complainant	)	Docket No. UT-060147
	)	
V.	)	
	)	AFFIDAVIT OF MICHAEL R. JAMES
Verizon Northwest	)	IN SUPPORT OF LUMMI
Qwest Corporation	)	RESPONSE TO MOTIONS FOR
Respondents	)	SUMMARY DETERMINATION
	)	AND DISMISSAL

I, Michael R. James, hereby swear the following is a true and correct statement:

1. I am the Information Systems Department Director for the Lummi Indian Business Council (LIBC), the governing body of the Lummi Nation, a federally recognized Indian Tribe. I have been employed in this department since August 1994, and became the Director approximately four years ago.
2. In 2001, the LIBC asked me to assume responsibility for the LIBC telephone system and to find out why the monthly telephone bills were in excess of $5,000.
3. When I first looked at the monthly Verizon telephone bills in 2001, I discovered that they included approximately 80 to over 120 pages of incomprehensible information. They were unclear, misleading, and without a plain language description of the services that were specific enough in content so that I could determine what the charges represented. Attached as

Exhibit A to this Affidavit is the March 2001 billing which is representative of the monthly statements the LIBC was receiving from Verizon.

4. I called the Verizon representative and asked for assistance from Verizon to break down the bill by types of services or in some way to make it more comprehensible. I was told that was not possible, but that someone could come out to help explain the bills. I waited, but no one ever came in response to my request for assistance.

5. Finally, in desperation, I hired Northwest Capital Recovery Group (NWCRG) to help me understand the monthly bills and recommend ways the LIBC could reduce its monthly telephone service costs.

6. It was NWCRG that explained to me that the LIBC was being charged for FX lines with Silverdale service area numbers and that those numbers were either no longer in service or had been reassigned to others.

7. I have personally interviewed Tribal leaders, Tribal elders, and LIBC department managers and numerous staff members about knowledge of any Lummi Nation services, programs, entities, or relationships located in the Silverdale area and not one has been able to provide any information or knowledge about a connection to the Silverdale area. My informants' collective knowledge spans at least the past 30 years.

8. With the help of NWCRG, we have succeeded in reducing the former 80 to over 120 page monthly bills to less than 20 pages and the monthly basic telephone service charges to less than $2,000. During this time, the LIBC

administration has grown in size and our telephone service needs have been increasing.

VERIFICATION:

I, Michael James, verify under penalty of perjury, that the foregoing Affidavit is true to my best knowledge and belief under the Laws of the State of Washington.

Dated this 20th day of April, 2006.

_____
MICHAEL R. JAMES

State of Washington)
) ss.
County of Whatcom)

On this _____ day of _____, 2006, before me the undersigned, a Notary Public in and for the State of Washington, personally appeared Michael R. James, personally known to me to be the person whose name is subscribed to the within instrument, and acknowledged to me that he executed the same.

Witness my hand and official seal:

Signature:

_____

Notary Public for the State of Washington.
My Commission expires:_____