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BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

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

Docket No. UT-060147
VERIZON NORTHWEST INC.'S REPLY
IN SUPPORT OF ITS MOTION FOR
SUMMARY DETERMINATION

I. INTRODUCTION

1. In an effort to avoid the applicable statute of limitations, the Lummi Nation strains to characterize its claims as being based upon WAC 480-120-161, which regulates the form of a utility's bills. Under controlling law, however, claims for a refund of charges—where a party claims it was billed for services allegedly not provided—are purely claims for “overcharges” or “unreasonable charges” and must be based upon RCW 80.04.220 or RCW 80.04.230. As a result, the statute of limitations set forth in RCW 80.04.240 governs this case. Moreover, even under the theories now presented by the Lummi Nation, a two-year statute of limitations still applies and, in fact, has now run. Verizon Northwest Inc. (“Verizon”) has already offered the Lummi Nation more than it could possibly recover under the applicable limiting statute, thus the Lummi Nation’s claims should be dismissed.

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II. ARGUMENT

A. Regardless of How the Lummi Nation Characterizes Its Claims, the Claims Remain Subject to a Two-Year Statute of Limitations.

1. *The Lummi Nation's Complaint Seeks a Refund of Charges Paid, and Is Thus Subject to the Two-Year Statute of Limitations in RCW 80.04.240.*

2. An examination of the Complaint shows that the Lummi Nation is seeking a refund of charges for FX Services that it asserts were incorrectly placed on its bill. Its Request for Relief plainly states that it seeks a “refund [of] all the charges paid by Lummi for non-existent service[.]” (Compl. at 14 (Request for Relief ¶ 2).) In an effort to avoid the applicable statutes of limitation, the Lummi Nation now argues that its claims are not for a refund. Its claims, it asserts, are based upon WAC 480-120-161, which regulates the “form of bills.” (Response of Lummi Nation (“Response”) ¶¶ 5, 9-10.) Specifically, the Lummi Nation claims that Verizon violated WAC 480-120-161 by:

- “bill[ing] Lummi for charges that were not provided by the company,” and
- submitting “bills [that] 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.”

(Response at ¶ 10.) As a result, the Lummi Nation argues that Verizon is liable under RCW 80.04.440, which holds public service companies liable for damages resulting from acts or omissions in violation of Washington state law and regulations. (*Id.* ¶ 9.)

3. Regardless of how the Lummi Nation now characterizes its claims, the Washington Court of Appeals has previously ruled that such claims are purely claims for “overcharges” and are subject to the statute of limitations in RCW 80.04.240, which sets forth the “exclusive” procedure for bringing such claims. *See D.J. Hopkins, Inc. v. GTE Northwest, Inc.*, 89 Wn.App. 1, 3-7 (Div. 1 1997). In fact, the Appellate Court also ruled that plaintiffs cannot avoid the statute of limitations in RCW 80.04.240 by characterizing overcharge claims as billing format claims, as the Lummi Nation now seeks to do. *Id.*

1 4. The facts of the *Hopkins* case are very similar in key respects to the facts at issue
2 in this matter. D.J. Hopkins, Inc. was a GTE customer that was billed for a telephone lease,
3 although it did not have a telephone provided by GTE. *Id.* at 3. Nine years after continuous
4 billing for the phone, Hopkins inquired about the charge and discovered that it had been paying
5 the lease charge when it in fact did not lease a phone from GTE. *Id.* at 3-4. Hopkins brought the
6 improper charge to GTE's attention and GTE offered a partial refund of the fees charged. *Id.* at
7 4. Hopkins, nevertheless, demanded a full refund. *Id.*

8 5. To avoid the applicable statute of limitations, Hopkins sought to characterize its
9 lawsuit as not seeking to recover overcharges, but seeking damages based upon GTE's deceptive
10 billing practices and the curbing of those practices. *Id.* at 6. The language of GTE's bills,
11 Hopkins asserted, did not disclose to Hopkins that it was being charged for a leased telephone.
12 *Id.* at 4. Hopkins stated that its claims were brought pursuant to the now defunct WAC 480-120-
13 106, which then regulated the "forms of bills." *Id.* at 5-6. WAC 480-120-106 was the precursor
14 to WAC 480-120-161, which currently regulates the forms of bills, and upon which the Lummi
15 Nation similarly asserts its claims are based.

16 6. Contrary to Hopkins' arguments, the Appeals Court held that:

17 Hopkins attempts to claim that its suit is *not* one to recover
18 "overcharges" but one to seek damages and the curbing of GTE's
19 deceptive and illicit billing practices. ***Hopkins' attempt to***
20 ***distinguish its claim as damages for deceptive billing as opposed***
21 ***to seeking recovery of "overcharges" is purely fictional.*** The
22 complaint is premised on the claim that it was not leasing a
23 telephone from GTE but GTE applied a lease charge appearing to
24 be part of its "regulated" telephone service charge. ***Here, even***
25 ***though the complaint is couched in the terms of deceptive***
26 ***practices, what actually is presented is a claim for overcharges,***
or an unreasonable charge for something not received.

...

24 Hopkins' other damage claims amount to little more than a demand
25 for overpayments of unreasonable charges for the lease of a phone
26 which did not exist. No matter how vehemently Hopkins argues
that it is seeking damages for GTE's failure to disclose, and that it

1 is not seeking to be compensated for overcharges, the prayer for
2 relief belies this claim.

3 *Id.* at 6 (emphasis added).

4 7. The Lummi Nation is seeking to do exactly what the Washington Court of
5 Appeals has said it cannot do: avoid the applicable statute of limitations by re-characterizing its
6 claims as being based upon the “form of the bills.” But, as with Hopkins, it is clear that the
7 Lummi Nation is seeking a refund of overcharges or unreasonable charges. As discussed in
8 Verizon’s Motion for Summary Determination, these types of claims must be brought before the
9 Commission under either RCW 80.04.220 or RCW 80.04.230. (Verizon’s Mot. for Summ. Det.
10 ¶ 12.) The statute of limitations for both types of claims is established in RCW 80.04.240:

11 All complaints concerning overcharges resulting from collecting
12 unreasonable rates and charges or from collecting amounts in
13 excess of lawful rates shall be filed with the commission within *six*
14 *months* in cases involving the collection of unreasonable rates and
15 *two years* in cases involving the collection of more than lawful
16 rates from the time the cause of action accrues[.]

17 RCW 80.04.240 (emphasis added). This procedure is “exclusive.” *Id.*

18 8. Notwithstanding the Lummi Nation’s assertions otherwise, it does not matter
19 whether Verizon actually provided FX Services. *Hopkins* is instructive on this point. *Hopkins*
20 was billed for leasing a telephone, which was never actually provided. *Id.* at 3-6. Even so, the
21 Court found that Hopkins’ claims were still claims for overcharges or unreasonable charges. *Id.*
22 at 6.

23 **2. *If the Lummi Nation’s Claims Are Not for Overcharges, a Two-Year Statute of***
24 ***Limitations Still Applies, and the Lummi Nation’s Claims are Time-Barred.***

25 9. Even if the Lummi Nation were permitted to bring a claim for a violation of a
26 WAC provision independent of the overcharge provisions (RCW 80.04.220 and RCW
80.04.230), which it is not, a two-year statute of limitations would still apply. *See Glick v.*
Verizon Northwest Inc., Docket No. UT-040535, Order No. 03 (WUTC, Jan. 28, 2005). The

1 complainant in *Glick* asserted that Verizon violated WAC 480-120-165(2) by failing to
2 “escalate” Mr. Glick’s claim. *Glick*, Order No. 03 ¶ 62. Verizon, on the other hand, argued that
3 it had complied with the WAC requirements and that, even if it had not, Mr. Glick’s claim was
4 time-barred. *Id.* ¶ 33. While ruling that Verizon had fully complied with the applicable WAC
5 provision, the assigned Administrative Law Judge had initially found that “there is no provision
6 in Title 80 RCW limiting the time for private formal complaints of Company violations of
7 Commission rule.” *Id.* ¶ 42. On administrative review, however, the Commission modified its
8 ruling as to the statute of limitations. The Commission ruled that administrative actions asserting
9 violations of WAC provisions for which there is no specific statutory limitation period are
10 subject to the two-year limitation set forth in RCW 4.16.130. *Id.* ¶¶ 44-46. Here, there is no
11 specific statutory limitations period governing either RCW 80.04.440¹ (Companies liable for
12 damages) or WAC 480-120-161 (Form of bills), under which the Lummi Nation asserts its
13 claims are brought. Thus, per this Commission’s ruling, the Lummi Nation’s claims are subject
14 to the two-year limitation set forth in RCW 4.16.130.

15 10. The Lummi Nation admits in its response brief that it first discovered an alleged
16 problem with the form of Verizon’s bills in 2001. (*See* Aff. of Michael R. James in Supp. of
17 Lummi Response to Mot. for Summ. Det. ¶ 3.) The Lummi Nation even attaches a March 2001
18 bill as “representative of the monthly statements the LIBC was receiving from Verizon.” *Id.*
19 This is now an undisputed fact in the record. If the Commission finds that the Lummi Nation has
20 a cause of action for unclear bills, that cause of action plainly accrued in 2001. *Haslund v. City*
21 *of Seattle*, 86 Wn.2d 607, 619 (1976) (cause of action accrues when a party has a right to apply
22 to the court for relief). Thus, under its own theory of the case, by any calculation the Lummi
23

24 ¹ RCW 80.04.440 would not appear to be applicable to an action before the Commission.
25 (“An action to recover for such damage or injury may be brought in any court of competent
26 jurisdiction...”). Regardless, RCW 80.04.440 does not establish any specific statute of
limitations, and thus, under *Glick*, the two-year limitation in RCW 4.16.130 would apply.

1 Nation's claims based on RCW 80.04.440 and WAC 480-120-161 are now time-barred and
2 should be dismissed.

3 **B. Contrary to the Lummi Nation's Arguments, the Statute of Limitations for**
4 **Accounts Receivable Is Not Applicable.**

5 11. The Lummi Nation argues that the six-year statute of limitations under RCW
6 4.16.040(2) applies in this case. (Response ¶ 13.) RCW 4.16.040(2) states that:

7 The following actions shall be commenced within six years:

8 . . .

9 (2) An action upon an *account receivable* incurred in the ordinary
course of business.

10 (Emphasis added). That claim is both disingenuous and inaccurate.

11 12. First, the Lummi Nation's contention that RCW 4.16.040(2) applies in this case is
12 disingenuous. The Lummi Nation goes to great lengths in its response brief to claim that it is
13 suing pursuant to RCW 80.04.440 and WAC 480-120-161, the combination of which the Lummi
14 Nation argues provides for a cause of action based on the "form of the bills." (Response ¶¶ 5-
15 12.) Verizon violated WAC 480-120-161, the Lummi Nation argues, because Verizon "billed
16 Lummi for charges that were not provided by the company, and their bills were unclear,
17 misleading, and without a plain language description of the service that was specific enough in
18 content so that Lummi could determine what the charges supposedly represented." (Id. ¶ 10.)
19 Never once does the Lummi Nation assert that it is suing on the account. Thus, the claim
20 asserting application of the statute of limitations governing "accounts receivable" appears to
21 have been constructed at this juncture to avoid the applicable limitations period.

22 13. Second, even if the Lummi Nation could bring a claim based on the account, the
23 six-year limitation period in RCW 4.16.040(2) would still not apply to its claim. The plain
24 language of the statute applies the six-year limitation only to "accounts *receivable*." The
25 legislative history shows that support for this limitation came from small businesses and
26 collection companies that wanted additional time to collect monies due and owing. *Tingey v.*

1 *Haisch*, 129 Wn.App. 109, 116 (Div. 3 2005). Any claim the Lummi Nation could bring on the
2 account would be based on an “account payable,” not an “account receivable,” because the
3 Lummi Nation is the paying party in this case. *See In re Marriage of Monaghan*, 78 Wn.App.
4 918, 921 (Div. 2 1995) (distinguishing between accounts receivable as monies owed to a party
5 and accounts payable as financial obligations incurred by a party). The Lummi Nation cannot
6 disregard the plain language of the statute to argue otherwise. *Cox v. Helenius*, 103 Wn.2d 383,
7 387-88 (1985) (courts are required to give effect to every word, clause, and sentence of a
8 statute).

9 **C. Verizon Should Not Be Subject to Penalties Because Private Parties Cannot Seek
10 Penalties on Behalf of the State.**

11 14. The Lummi Nation argues that even if the Commission dismisses its claims for
12 overcharges, it still has other pending claims that are not subject to a two-year statute of
13 limitations. (Response ¶ 19.) Verizon has already reimbursed the Lummi Nation for all bills for
14 FX Services back to March 29, 2004, the date the Northwest Capital Recovery Group first
15 contacted Verizon regarding the provision of services. (*See Padgett Decl. filed in Supp. of Mot.*
16 *for Summ. Det. ¶ 2.*) Verizon has offered to reimburse the Lummi Nation for two additional
17 years’ worth of payments, plus interest, which is more than the Lummi Nation could hope to
18 receive even under the most favorable circumstances. (*See Padgett Decl. ¶¶ 3-9.*) The only
19 remaining claims are solely for penalties against Verizon. (*See Compl. ¶¶ 3.40-3.41.*)

20 15. The Commission itself has ruled that private parties may not seek penalties on
21 behalf of the state. In the *Glick* matter, when the complainant sought to have penalties assessed
22 against Verizon Northwest Inc., the Commission ruled that:

23 The imposition of a penalty is an inherent aspect of regulation.
24 The Commission exercises prosecutorial discretion, and
25 determines when to file complaints, what consequences to seek,
26 and what level of penalties to impose. Doing so is an essential
aspect of the Commission’s overall regulatory and enforcement
activity. ***Mr. Glick is entitled to prosecute a complaint for his
own benefit, but not to seek penalties on behalf of the state.***

1 Allowing him and others to take on that role could lead to
2 vigilantism in which private parties file multiple actions not on
3 their own behalf, but as agents of the state. That would ultimately
4 destroy the Commission’s ability to formulate and execute a
 coherent and cohesive enforcement policy and to accomplish
 regulation in the public interest, as the law requires.

5 *See Glick*, Order No. 03 ¶ 62 (emphasis added). As a result, the Commission rejected Mr.
6 Glick’s plea to impose penalties on Verizon pursuant to RCW 80.04.380, the exact provision
7 upon which the Lummi Nation relies. Thus, the Commission should reject the Lummi Nation’s
8 plea as well, a conclusion compounded by Verizon’s standing offer to refund more than the full
9 amount the Lummi Nation could possibly be entitled to under the law.

10 16. This same reasoning also applies to the Lummi Nation’s request to prosecute this
11 case as a matter of public policy. (Response ¶¶ 20-21.) Despite the fact that it admits that
12 “[t]here is no evidence in this claim whether other entities . . . are experiencing the same problem
13 with their bills as is Lummi,” (Response ¶ 20), the Lummi Nation alleges that there is “an
14 incentive for companies to either intentionally, or unintentionally, abuse this billing
15 opportunity.” (Response ¶ 21.) Because “others may also have the same trouble,” the Lummi
16 Nation concludes, the Commission should consider this as a matter of policy. (Response ¶ 20.)
17 The Lummi Nation, however, is not a private attorney general. There is no legal basis for the
18 Lummi Nation to prosecute a case on behalf of the state, especially when it admits that there is
19 no evidence that other entities are experiencing similar alleged billing problems. Further,
20 Verizon takes exception to the admittedly wholly unsupported implication that it is abusing a
21 billing opportunity for financial gain. Rendering such a baseless allegation may reflect the
22 desperation faced by the Lummi Nation in seeking to avoid application of the governing statute
23 of limitations, but it has no place here.

24 17. The Lummi Nation also has a request for attorney’s fees based upon RCW
25 80.04.440. (Compl. ¶ 3.37.) As discussed above, however, the Lummi Nation’s claim is one for
26 overcharges or unreasonable charges based on RCW 80.04.220 or RCW 80.04.230. RCW

1 80.04.440 does not apply in this case. Moreover, even if RCW 80.04.440 did apply, there is no
2 evidence in the record that Verizon “willfully” billed the Lummi Nation for services that it knew
3 it was not providing, which is the standard the Lummi Nation would have to meet to obtain such
4 fees.

5 **D. There Are No Genuine Issues of Material Fact, and Verizon Is Thus Entitled to**
6 **Summary Determination.**

7 18. In a last-ditch effort to avoid summary determination, the Lummi Nation seeks to
8 invent issues of fact. None of the issues raised by the Lummi Nation, however, are material to
9 the outcome, a requirement to avoid summary determination. *See Hisle v. Todd Pacific*
10 *Shipyards Corp.*, 151 Wn.2d 853, 861 (2004) (“A material fact is one upon which the outcome of
11 the litigation depends[.]”). (Internal citation omitted.)

12 19. The Lummi Nation states that there are questions of fact as to when the statute of
13 limitations began running. (Response ¶ 16.) This argument is disingenuous. First, the Lummi
14 Nation admits in its response brief that it found Verizon’s bills confusing in 2001. (*See Aff. Of*
15 *Michael R. James* ¶ 3.) There are no disputed facts on this point. Under Washington law, a
16 cause of action accrues when a party has a right to apply to the court for relief, which in this case
17 is when the Lummi Nation first found the bills confusing. *Haslund*, 86 Wn.2d at 619. The
18 Lummi Nation could have brought their claim for unclear bills anytime afterwards, but failed to
19 do so. Thus, even if the Commission were to find such claims viable, they are now time-barred.

20 20. Second, the Lummi Nation admits that it discovered alleged overpayments in
21 February 2004 and first contacted Verizon in March 2004. (Compl., Attach. 3 (Doughty Aff.) ¶¶
22 3-9.) The Lummi Nation has been reimbursed for alleged overpayments back to March 2004,
23 when it first contacted Verizon. (Padgett Decl. ¶ 2.) Again, the Lummi Nation could have
24 brought claims for additional alleged overcharges any time after that, but it waited until January
25 2006 to do so. Under the continuing violation doctrine, the Lummi Nation’s overcharge claims
26 began running each time a monthly bill became payable. *See Graves v. Cascade Natural Gas*

1 Corp., 51 Wn.2d 233, 238 (1957) (limitation period begins to run from the date each month's bill
2 was payable). Thus, the Lummi Nation is now barred from recovering anything more than two
3 months' worth of payments, which is substantially less than Verizon was and is unilaterally
4 willing to refund.

5 21. Lastly, even if there were disputed facts, they are not material to the outcome of
6 this case and thus would not bar a ruling on summary determination. Under WAC 480-120-163,
7 the Lummi Nation is barred from recovering a refund of more than two years' worth of
8 payments, and Verizon remains willing to provide that amount to resolve this issue.

9 22. The Lummi Nation contends that an issue of fact exists as to whether the statute
10 of limitations was tolled. (Response ¶ 17.) But again, the Lummi Nation cannot receive
11 anything more than Verizon is currently offering, thus the issue is not material to the outcome of
12 this matter.

13 23. The Lummi Nation finally argues cryptically that "Verizon's offer of settlement
14 contains miscalculations and terms and conditions that are not acceptable to Lummi." (Response
15 ¶ 25.) This allegation is baffling. The Lummi Nation has not presented any evidence to support
16 this assertion, while Verizon has presented evidence showing how it calculated the additional
17 two years' worth of payments that it is now offering. (See Padgett Decl. ¶ 6 and Exh. 2.) Such
18 unsubstantiated conclusions cannot defeat a motion for summary determination. *Curran v. City*
19 *of Marysville*, 53 Wn.App. 358, 367 n.7 (Div. 1 1989) (a nonmoving party "does not raise a
20 genuine issue for trial unless it sets forth facts evidentiary in nature, *i.e.*, information as to 'what
21 took place, an act, an incident, a reality as distinguished from supposition or opinion.'...
22 Ultimate facts, conclusions of fact, or conclusory statements of fact are insufficient to raise a
23 question of fact."). (Internal citations omitted.)

24 III. CONCLUSION

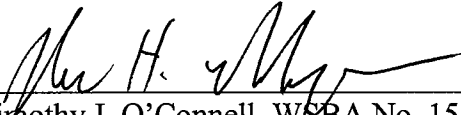
25 24. Verizon has offered, and again renews its offer, to refund the Lummi Nation two
26 years' worth of payments, plus interest. This is more than the Lummi Nation could hope to

1 receive even under the most favorable circumstances. Verizon's Motion for Summary
2 Determination should be granted.

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DATED: May 5th, 2006.

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1 CERTIFICATE OF SERVICE

2 I hereby certify that I have this 5th day of May, 2006, served the true and correct original,
3 along with the correct number of copies, of *Verizon Northwest Inc.'s Reply In Support of Its*
4 *Motion for Summary Determination* upon the WUTC, via the method(s) noted below, properly
5 addressed as follows:

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

8
9 I hereby certify that I have this 5th day of May, 2006, served true and correct copies of the
10 foregoing documents upon parties noted below via E-Mail and U.S. Mail:

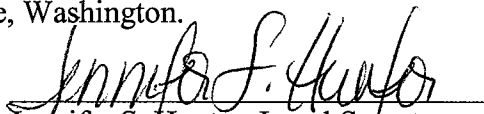
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22 I declare under penalty under the laws of the State of Washington that the foregoing is
23 correct and true.

24 DATED this 5th day of May, 2006, at Seattle, Washington.

25 
26 Jennifer S. Hunter, Legal Secretary