

**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 CORPORATION'S PETITION  
FOR ADMINISTRATIVE REVIEW OF  
INITIAL ORDER GRANTING  
MOTION FOR SUMMARY  
DETERMINATION AND DISMISSAL

**I. INTRODUCTION**

- 1 On February 10, 2006, the Administrative Law Judge in this matter entered an Initial Order granting Qwest's motion for summary determination and dismissing the complaint. The Initial Order determined, among other things, that the applicable statute of limitations was the six-month limitations period contained in RCW 80.04.240, that the Complainants' cause of action accrued on June 8, 2004, and that the limitations period was therefore expired by the time the complaint was filed on November 4, 2005.
- 2 Pursuant to the requirements of WAC 480-07-825, Qwest states that this petition for administrative review challenges only the findings and conclusions regarding the date the cause of action accrued. The challenged findings and conclusions addressing this issue are contained in paragraphs 19, 20, 21 and 43 of the Initial Order.

- 3 Qwest agrees that the six-month statute of limitations is the applicable limitations period. However, Complainants will no doubt petition for review of that issue, contending that the two-year statute applies, and/or that the ALJ erred in not equitably tolling the statutes. The Commission’s review should find that while six months is the correct limitation period, it is actually irrelevant which period applies, because the proper analysis of the date on which the cause of action accrued leads to the conclusion that the cause of action accrued no later than September 2003 – two years and two months before the complaint was filed.
- 4 Although Qwest believes that the Initial Order is correct in applying the six-month period, and that the Commission should affirm that holding, Qwest strongly believes that the Initial Order erred in the application of the law to the facts on the issue of when the cause of action accrued. The cause of action very clearly accrued well before June 8, 2004, and there are no facts in the record supporting a contrary conclusion.
- 5 The Initial Order correctly states that Qwest asserted that the cause of action in this case accrued in March 2002, in connection with the proceedings in Minnesota. *Initial Order at ¶ 15*. The Initial Order also notes that Qwest proposed other, later dates as possible dates that could be recognized as dates for accrual of the cause of action. *Id at ¶ 16*. The latest of these dates was September 8, 2003, the date on which all of the parties, including the Complainants, attended a prehearing conference in Docket No. UT-033011, the Commission’s unfiled agreements case.
- 6 The Initial Order also correctly states the law regarding when the statute of limitations on a cause of action begins to run, noting that the statute of limitations “does not begin to run until the cause of action accrues – that is, when the plaintiff has a right to seek relief in the courts” and that the cause of action accrues “when the client discovers, *or in the exercise of reasonable diligence should have discovered* the facts which give rise to his or her cause of

action (emphasis added).” *Initial Order at ¶ 18*. This statement of the law is absolutely correct, but the Initial Order failed to correctly apply this law to the facts in this case.

7 The Initial Order states, at paragraph 19, that until June 8, 2004 the Complainants did not have available the facts that would have supported a cause of action in Washington. This is incorrect for two reasons. First, Qwest has demonstrated that it provided many of the unfiled agreements in Washington, on a non-confidential basis, as early as 2002. *See, Qwest’s Reply, ¶ 7, and Attachment 6*. Indeed, there is no contention by Complainants in this case that there were any material agreements attached to Staff’s June 8, 2004 testimony that were not previously available, in Washington, on a non-confidential basis. Thus, it is simply incorrect to say that the June 8, 2004 testimony provided Complainants with any facts necessary to support a cause of action that they did not already have many months prior to that date, as a result of their involvement in Washington and Minnesota dockets. Indeed, the finding that June 8, 2004 is the first date on which the Complainants had all the facts necessary is absolutely irreconcilable with the evidence that Qwest provided regarding significantly earlier knowledge in Washington.<sup>1</sup>

8 Second, the finding in paragraph 19 of the Initial Order fails to recognize the full scope of the requirements that the law imposes on Complainants. The statute of limitations starts to run when the Complainants either *had* the facts to support the cause of action, or when the Complainants, *in the exercise of reasonable diligence should have discovered those facts*.<sup>2</sup> The Initial Order does not address this important point. Any exercise of even minimal diligence on Complainants’ part would have given them a copy of each and every agreement

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<sup>1</sup> See e.g., Attachment 5 to Qwest’s Reply, a filing by AT&T in 2002 wherein AT&T argued that the “secret agreements”, including the same 10% discount that is at issue in this docket, operated to prejudice CLECs in Washington.

<sup>2</sup> *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)).

that was the subject of the Commission's complaint in Docket No. UT-033011 well before June 2004.

9 As the Commission is 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. Nothing 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 Qwest's Reply.* The agreements were not confidential, and Staff would have been obligated by law to produce them in 10 business days under the Commission's discovery rule, WAC 480-07-405(7)(b). Furthermore, the Commission itself would have been obligated to produce those agreements in response to a public records request under Chapter 42.17 RCW. RCW 42.17.320 requires an agency to promptly respond to such a request.

10 Thus, the Initial Order is wrong when it states, in paragraph 21, that the agreements were not public in Docket No. UT-033011. The Initial Order is also wrong when it states that although Complainants could have asked for these documents, "it is speculative as to when that request would have been granted." *Id.* The above discussion demonstrates that the request would have been fulfilled immediately, if only it had been made. In order to give effect to the requirement that the Complainants have exercised reasonable diligence to discover facts that support their claim, the Commission should hold that Complainants had those facts, or could have discovered them, in September 2003, if not earlier.

11 For the reasons stated herein, the Commission should affirm the Initial Order's conclusion that the six-month limitations period is applicable to this case, and modify the Initial Order's finding that the cause of action accrued on June 8, 2004. The cause of action accrued no later than September 2003, and the Commission should so find in its final order.

DATED this 28th day of February, 2006.

QWEST

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