

**BEFORE THE WASHINGTON
UTILITIES AND TRANSPORTATION COMMISSION**

AT&T COMMUNICATIONS OF THE)	
PACIFIC NORTHWEST, INC., TCG)	
SEATTLE, AND TCG OREGON; AND)	DOCKET NO. UT-051682
TIME WARNER TELECOM OF)	
WASHINGTON, LLC,)	
)	AT&T AND TWTC PETITION FOR
Complainants,)	ADMINISTRATIVE REVIEW OF
)	ORDER NO. 3
v.)	
)	
QWEST CORPORATION,)	
)	
Respondent.)	
)	

1. Pursuant to WAC 480-07-825, AT&T Communications of the Pacific Northwest, Inc., TCG Seattle, and TCG Oregon (collectively “AT&T”) and Time Warner Telecom of Washington, LLC (“TWTC”), provide the following Petition for Administrative Review of Order No. 3, Initial Order Granting Qwest’s Motion for Summary Determination; Dismissing Complaint (“Initial Order”). AT&T and TWTC respectfully submit that the Initial Order incorrectly applied a six-month, rather than two-year, limitations period for the causes of action raised in the Complaint. The Commission should reverse this aspect of the Initial Order and deny Qwest’s motion to dismiss. The Complainants should be allowed to be heard on their claims that Qwest has engaged in unlawful conduct and that they are entitled to recovery of amounts paid for unlawful rates charged by Qwest.

BACKGROUND

2. Qwest entered into several agreements beginning in 2000 with Eschelon Telecom (“Eschelon”) and McLeodUSA Telecommunications Services, Inc. (“McLeodUSA”) governing Qwest’s provisioning of services pursuant to Section 251 of the

Telecommunications Act of 1996 (“Act”). Qwest did not file any of these agreements with the Commission for approval under Section 252.¹ Those agreements were not publicly available in Washington until Commission Staff disclosed them as exhibits to its June 8, 2004, prefiled direct testimony in the Commission’s complaint proceedings against Qwest for failure to file the agreements with the Commission as required under applicable federal and state law.

3. AT&T and TWTC filed their Complaint initiating this docket on November 4, 2005, less than 17 months after Qwest’s agreements with Eschelon and McLeodUSA became public. The Commission had previously determined that Qwest willfully violated federal and state law by failing to file its agreements with Eschelon and McLeodUSA and refusing to make the rates and discounts in those agreements available to other CLECs.² AT&T and TWTC allege in their Complaint that they each would have adopted the rates and discounts and any reasonably related terms from those agreements, and accordingly Qwest overcharged AT&T and TWTC for services under their respective interconnection agreements.
4. On November 28, 2005, Qwest filed a motion for summary determination seeking dismissal of the Complaint primarily on the grounds that AT&T and TWTC allegedly failed to file it within the applicable limitations period. On February 10, 2006, the Administrative Law Judge issued the Initial Order granting Qwest’s motion and dismissing the Complaint.

¹ See, e.g., *WUTC v. Advanced TelCom Group, Inc., et al.*, Docket No. UT-033011 (“Unfiled Agreements Docket”), Order No. 21 (Feb. 28, 2005).

² *Id.*

ARGUMENT

5. The Initial Order correctly found that AT&T and TWTC's causes of action accrued on June 8, 2004, but erroneously concluded that "complainants should have filed a complaint within six months," rather than two years, of that date.³ According to the Initial Order,

The six-month limitation period applies to claims for overcharges. The two-year limitation period applies to unlawful rates. The rates complainants paid under their interconnection agreements with Qwest were lawful, approved rates. Complainants' cause is more accurately identified as a claim of overcharge, since they point to something outside their interconnection agreements – transactions that were not properly filed and approved by the Commission – as support for what they should have been charged.⁴

This conclusion incorrectly interprets both applicable law and the Complaint.

6. The six-month and two-year limitations periods to which the Initial Order refers are established in RCW 80.04.240, which states in relevant part,

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 action accrues

Both limitation periods apply to complaints concerning overcharges.⁵ The distinction is between overcharges for *unreasonable* rates (to which the six-month limitation period

³ Initial Order, ¶ 24.

⁴ *Id.*

⁵ *See also* RCW 80.04.230 (authorizing the Commission, once it has determined that a company has charged a rate in excess of a lawful rate, to order a company to "pay to the

applies) and overcharges for *unlawful* rates (to which the two-year limitation applies).

The Initial Order thus errs in concluding that the six month limitation period applies to claims for overcharges while the two year limitation applies to unlawful rates.

7. The Initial Order also errs to the extent that it implicitly concludes that AT&T and TWTC's Complaint seeks a refund of overcharges for unreasonable rates. AT&T and TWTC have not alleged that the rates they paid were "unreasonable" within the meaning of RCW 80.04.220. Rather, the Complaint alleges that Qwest charged them rates that were substantially higher than the rates that Qwest charged Eschelon and McLeodUSA in violation of state and federal antidiscrimination and undue preference statutes and that the rates in the Eschelon and McLeodUSA agreements were the lawful rates that Qwest should have charged AT&T and TWTC. The Complaint, therefore, alleges that the rates AT&T and TWTC paid Qwest were unlawful – or in the words of RCW 80.04.230, "in excess of the lawful rate" – which triggers the two-year limitation period.⁶
8. The Initial Order misconstrues the Complaint as raising a different issue because "[t]he rates complainants paid under their interconnection agreement with Qwest were

complainant the amount of the overcharge"); RCW 80.04.220 (same for unreasonable rates).

⁶ As discussed in AT&T and TWTC's Opposition to Qwest's motion to dismiss, moreover, Qwest's conduct in charging undisclosed, discounted rates to two CLECs also raises potential breach of contract claims because the actions constitute violations of the parties' interconnection agreements. The statute of limitations for breach of a written contract is six years. RCW 4.16.040. The Initial Order did not apply the six year statute of limitations because it concludes that the "[c]omplainants offer no authority or support for their contention that the Commission could address a pure breach of contract action which would fall outside the scope of interconnection agreement action." Initial Order, ¶ 36. AT&T and TWTC respectfully disagree with that conclusion, but it is not necessary for the Commission to address the concern because, at a minimum, the Complainants had two years to file their complaint to recover "unlawful rates" under RCW 80.04.240.

lawful, approved rates.”⁷ The Commission, however, has rejected the argument that rates are lawful simply because the Commission has approved them in a prior proceeding. In Docket No. UT-020406, AT&T filed a complaint against Verizon Northwest Inc. (“Verizon”) alleging that Verizon’s intrastate switched access charges violated antidiscrimination and undue preference statutes. Verizon responded, in part, that its charges were lawful because they were included in Verizon’s tariff and had previously been approved by the Commission. The Commission disagreed, concluding that Verizon’s tariffed rates nevertheless were unlawful. As the Commission explained,

Commission orders that find a company’s rates to be fair, just, and reasonable upon a factual record do not bar the Commission from determining on another record, by complaint or on application of the regulated company, that rates are not fair, just, and reasonable and that the rates must change. . . .

A Commission order establishing a rate structure for a regulated company upon a factual record does not bar the Commission from determining on another record that a different structure is required by the application of law to facts found upon a different factual record.⁸

9. Similarly, here, AT&T and TWTC have alleged that the rates that Qwest charged them for services and facilities under their interconnection agreements were unlawful because Qwest provided comparable services and facilities to other similarly situated carriers at substantially lower rates without offering those same rates to AT&T and TWTC. It thus is irrelevant that the Commission approved AT&T’s and TWTC’s interconnection agreements and the rates incorporated into those agreements. Once Qwest agreed to offer lower rates to some CLECs, Qwest was obligated to offer those

⁷ Initial Order, ¶ 24.

⁸ AT&T v. Verizon, Docket No. UT-020406, Eleventh Supp. Order, ¶¶ 176-77 (Aug. 12, 2003).

same rates to all CLECs, and Qwest's refusal to offer the lower rates to AT&T and TWTC rendered the rates in their interconnection agreements unlawful.

10. The Initial Order also erroneously refuses to construe the Complaint as a challenge to the lawfulness of the rates Qwest charged AT&T and TWTC because "they point to something outside their interconnection agreements – transactions that were not properly filed and approved by the Commission – as support for what they should have been charged."⁹ These "extraneous" transactions do not somehow demonstrate that AT&T and TWTC are not alleging that the rates in their interconnection agreements were unlawful. To the contrary, Qwest's agreements to provide lower rates to Eschelon and McLeodUSA gave rise to Qwest's legal obligations to offer those same rates to AT&T and TWTC. The Commission looked beyond Verizon's tariff in Docket No. UT-020406 to determine that Verizon's switched access rates were unlawful as an unreasonable prejudice against unaffiliated interexchange carriers. AT&T and TWTC similarly have asked the Commission to look to circumstances outside the four corners of their interconnection agreements to determine that the rates in those agreements were unlawful as discriminatory and an unreasonable prejudice against AT&T and TWTC. The Initial Order errs in construing the Complaint otherwise.

CONCLUSION

11. The Complaint challenges the lawfulness of the rates Qwest charged AT&T and TWTC and triggers the two-year limitations period, not the six month limitation applied in the Initial Order. The Commission, therefore, should reverse the Initial Order's legal

⁹ *Id.*

conclusion on the applicable limitations period, should conclude that AT&T and TWTC timely filed their Complaint, and should deny Qwest's motion.

DATED this 28th day of February, 2006.

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