

have available the facts that would have supported a cause of action in Washington.”¹

Qwest seeks Commission review of this finding, contending that the relevant agreements either were publicly available or were readily discoverable well before that date. Neither contention has merit.

3. Qwest erroneously states that “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 nonconfidential basis.” That is precisely Complainants’ contention. Qwest provided those agreements to the Commission in 2002 as confidential documents, the Commission considered them as confidential,² and Staff continued to treat the agreements as confidential until Staff filed its June 2004 testimony.³ None of the documents that Qwest provided in this docket contradict the Initial Order’s finding on this point.
4. Qwest, moreover, took advantage of the confidentiality of the agreements to maintain that they were specific to Minnesota and that there was no evidence that these agreements had any applicability to Washington:

¹ Initial Order ¶ 19.

² See Qwest Reply, Attachment 5, at 1 n.1 (Supplemental Brief of AT&T Regarding Public Interest in Qwest 271 proceeding referring to *confidential* “Exhibit 1635-C, containing the available, previously unfiled agreements”). In addition, the listing of documents on the Commission’s website in Docket No. UT-003011 includes Qwest’s Response to Bench Request No. 46 providing the agreements (Qwest Reply, Attachment 6), but the response itself is not available, consistent with the Commission’s treatment of that response (and those agreements) as confidential and not publicly available.

³ See Email from Staff Counsel to Parties in Docket No. UT-033011 (May 25, 2004) (stating Staff’s intention to attach the unfiled agreements to its testimony, including agreements “identified as confidential on the face of the document” and requesting redacted copies of any agreement that any party believed was confidential). Because this information is responsive to Qwest’s Reply and Complainants were unable to provide a contemporaneous response, a copy of this message is attached to this Response.

The Public Counsel and AT&T have also cited a pending complaint filed by the Minnesota Department of Commerce (“Minnesota DOC”) with the Minnesota Commission alleging that Qwest and several CLECs entered into agreements settling wholesale service disputes which, in the Minnesota DOC’s view, should have been filed with the Minnesota Commission pursuant to 47 U.S.C. § 252(a). Public Counsel and AT&T urge the Commission to conduct an investigation into **the possibility that Qwest has similar agreements in Washington** and delay a decision in this docket until that investigation is complete. As noted at the hearing, **AT&T’s supplemental testimony on this point amounts simply to “bringing us information about what’s going on in the Minnesota Commission”** AT&T did not introduce any facts on the matter and did not make any attempt to explain why Qwest was required to file **the Minnesota agreements** under section 252 of the Act, much less how any such requirement is relevant to section 271. Indeed, AT&T’s witness has not even reviewed Qwest’s unfiled **Minnesota agreement** or attempted to determine whether section 252(a) of the 1996 Act actually requires filing of it.⁴

Qwest cannot reasonably contend that the agreements were publicly available in 2002 and that Complainants knew then that they gave rise to a cause of action in Washington when Qwest provided the agreements to the Commission as confidential documents and represented that they were specific to Minnesota.

5. Qwest nevertheless argues that even if AT&T and TWTC did not actually have sufficient facts to be aware of a cause of action, they could have readily obtained such facts because “[a]ny exercise of even minimal diligence on Complainants’ part would have given them a copy of each and every agreement that was the subject of the Commission’s complaint in Docket No. UT-033011 well before June 2004.”⁵ Qwest,

⁴ *In re Investigation Into U S WEST Communications, Inc.’s Compliance With Section 271*, Docket Nos. UT-003022, *et al.*, Qwest Supp. Post-Hearing Brief on Public Interest Issues at 11-12 (emphasis added and footnotes omitted).

⁵ Qwest Petition ¶ 8.

however, bases its argument on the contention that Complainants could have requested copies of the agreements that the Commission listed in the appendices to its August 2003 Complaint in that docket. Qwest's contention has at least three fatal flaws.

6. First, as discussed above, the agreements were marked as confidential, and Commission Staff treated them as such until June 8, 2004. Had Complainants requested copies, Staff presumably would not have provided them except under the restrictions of the Protective Order issued on September 11, 2003, not as public documents as Qwest maintains. Qwest apparently obtained the agreements from Staff prior to that time, but that proves nothing. Qwest is a signatory to – and the ultimate source of – all of the agreements, and thus the confidential information either was Qwest data or data to which Qwest already had access. The fact that Staff provided the agreements to Qwest under these circumstances is entirely consistent with the protections afforded those agreements as confidential information.

7. Second, even if they had requested and received the confidential agreements through discovery in Docket No. UT-033011, AT&T and TWTC could have used them only for purposes of the proceedings in that docket. The Commission's protective orders – including the Protective Order issued in that docket – preclude any party from using confidential information disclosed under their terms for any other purpose. AT&T and TWTC, therefore, could not have relied on the confidential agreements as a basis for their own complaint in a separate docket without violating their obligations under the Protective Order.

8. Finally, Complainants had no reason to request copies of the agreements. The Commission had filed its own Complaint. AT&T and TWTC reasonably believed that

their issues with the agreements would be addressed in that proceeding. It was not until the Commission issued Order No. 15 on October 22, 2004, that the Commission determined that it would address those issues in Docket No. UT-033011. Complainants continue to believe that date is the earliest date on which their statutory causes of actions should be considered to have arisen pursuant to the doctrine of equitable tolling, but in no case could or should the accrual date be established any earlier than the June 8, 2004 date determined by the Initial Order.

CONCLUSION

9. The statutory causes of action in AT&T and TWTC's Complaint did not accrue until June 8, 2004, as the Initial Order correctly finds. Qwest's assertions to the contrary are meritless, and the Commission should deny Qwest's Petition to review that finding.

DATED this 10th day of March, 2006.

DAVIS WRIGHT TREMAINE LLP
Attorneys for AT&T Communications of the
Pacific Northwest, Inc., TCG Seattle, and
TCG Oregon, and Time Warner Telecom of
Washington, LLC

By _____
Gregory J. Kopta
WSBA No. 20519

AT&T COMMUNICATIONS OF THE
PACIFIC NORTHWEST, INC., TCG
SEATTLE, AND TCG OREGON

By _____
Letty S. D. Friesen