



RICHARDSON & O'LEARY
ATTORNEYS AT LAW

Molly O'Leary

Tel: 208-938-7900 Fax: 208-938-7904
molly@richardsonandoleary.com
P.O. Box 7218 Boise ID. 83707 - 515 N. 27th St. Boise, ID. 83702

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IDAHO PUBLIC
UTILITIES COMMISSION

26 October 2006

Ms. Jean Jewell
Commission Secretary
Idaho Public Utilities Commission
P O Box 83720
Boise ID 83720-0074

RE: **Case No. QWE-T-06-17**

Dear Ms. Jewell:

Enclosed please find an original and seven (7) copies of **AT&T COMMUNICATIONS OF THE MOUNTAIN STATES, INC.'S RESPONSE TO QWEST'S MOTION TO DISMISS.**

I have also enclosed an extra copy of each of the foregoing pleadings to be service-dated and returned to us for our files. Thank you.

Sincerely,

Nina Curtis

encl.

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UTILITIES COMMISSION

Molly O'Leary (ISB No. 4996)
RICHARDSON & O'LEARY PLLC
515 North 27th Street
P.O. Box 7218
Boise, Idaho 83707
Telephone: 208.938.7900
Fax: 208.938.7904
E-Mail: molly@richardsonandoleary.com

Theodore A. Livingston
Dennis G. Friedman
MAYER, BROWN, ROWE & MAW LLP
71 South Wacker Drive
Chicago, IL 60606-4637
Telephone: 312.782.0600
Fax: 312.706.8630
E-Mail: dfriedman@mayerbrown.com

Dan Foley
General Attorney & Assistant General Counsel
AT&T WEST
P. O. Box 11010; 645 E. Plumb Lane, B132
Reno, Nevada 89520
Telephone: 775.333.4321
Fax: 775.333.2175
E-Mail: df6929@att.com

Attorneys for Complainant AT&T Communications of the Mountain States, Inc.

BEFORE THE IDAHO PUBLIC UTILITIES COMMISSION

AT&T COMMUNICATIONS OF THE MOUNTAIN)
STATES, INC.,)
)
Complainant)
vs.)
)
QWEST CORPORATION,)
)
Respondent.)

CASE NO. QWE-T-06-17
AT&T's RESPONSE TO
QWEST'S MOTION TO DISMISS

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AT&T Communications of the Mountain states, Inc. (“AT&T”) respectfully submits this response to Qwest Corporation’s (“Qwest”) Motion to Dismiss.

INTRODUCTION

The events giving rise to this case occurred from 2000 to 2002, but were concealed from AT&T. During that period Qwest entered into and provided services under secret agreements with Eschelon Telecom (“Eschelon”) and McLeodUSA Telecommunications Services, Inc. (“McLeod”), pursuant to which Eschelon and McLeod received up to a 10% discount off the price paid by other carriers for all of the services they purchased from Qwest. Cmplt. ¶ 18. Qwest did not notify AT&T of the existence or content of those secret agreements, even though such notice was required by the agreement between Qwest and AT&T that was in effect at the time. *Id.* ¶ 15. Nor did Qwest give AT&T the same discounts it gave to Eschelon and McLeod, even though the parties’ agreement gave AT&T the right to them. AT&T’s Complaint alleges that Qwest’s conduct violated its contract with AT&T.

As demonstrated below, AT&T’s claims arise under state law and were timely filed. Qwest’s arguments to the contrary ignore the well-established law that disputes over the interpretation and enforcement of interconnection agreements arise under state law, not federal law. Furthermore, Qwest’s collateral estoppel theory fails because both the law and fundamental fairness prevent giving collateral estoppel effect to an unreviewed decision by the Oregon Public Utilities Commission – particularly when the Washington Commission ruled the opposite way on precisely the same issues. Qwest’s Motion to Dismiss should therefore be denied.

ARGUMENT

I. AT&T'S BREACH OF CONTRACT CLAIM ARISES UNDER STATE LAW AND IS GOVERNED BY THE STATE STATUTE OF LIMITATIONS.

Qwest contends that AT&T's claim is barred by the statute of limitations. But Qwest does not rely on the state statute of limitations for the state-law breach of contract claim AT&T has actually stated in the Complaint, because that limitations period is five years (Idaho Code § 5-2-16) and Qwest does not contend that AT&T's claims accrued more than five years ago. Qwest Br. at 15-16 (contending claim accrued in 2002). Instead, Qwest asks the Commission to ignore the state limitations period, recharacterize AT&T's claim as arising under federal law, and apply the two-year limitations period found in 47 U.S.C. § 415 ("Section 415"). Qwest Br. at 10-19. The Court should reject Qwest's gambit.

A. The Courts Have Made Clear That Disputes Over the Interpretation and Enforcement of Interconnection Agreements Arise Under State Law.

The law is well established that a plaintiff is master of its own complaint and that courts and agencies cannot treat claims as federal when the complaint asserts a cause of action that arises under state law. *Caterpillar Inc. v. Williams*, 482 U.S. 386, 391 (1987); *The Fair v. Kohler Die & Specialty Co.*, 228 U.S. 22, 25 (1913) (Holmes, J.) ("the party who brings a suit is master to decide what law he will rely upon"). AT&T's Complaint here brings an action for breach of contract – and, specifically, breach of its interconnection agreement with Qwest. Qwest contends that AT&T's breach of contract claim arises under the federal Telecommunications Act of 1996 ("1996 Act") and is governed by the limitations period in Section 415 of the federal Communications Act of 1934 ("1934 Act"). Qwest Br. at 10. Qwest is patently wrong.

Courts across the country – including the Ninth Circuit – have held that disputes over the interpretation and enforcement of interconnection agreements arise under and are governed by state law, just like any other contract dispute. As the Ninth Circuit explained, a central purpose of the 1996 Act is “to replace a state regulated system with a market-driven system that is self-regulated by binding interconnection agreements.” *Pacific Bell v. Pac-West Telecomm, Inc.*, 325 F.3d 1114, 1128 (9th Cir. 2003). Within this new, contract-based system, an interconnection agreement becomes the “binding” statement of the parties’ rights and obligations to one another (47 U.S.C. § 252(a)(1)) and therefore it is “the agreements themselves and state law principles” – not federal law – that “govern the questions of interpretation of the contracts and enforcement of their provisions.” *Pacific Bell*, 325 F.3d at 1128, quoting *Southwestern Bell v. Pub. Util. Comm’n*, 208 F.3d 475, 485 (5th Cir. 2000). Thus, while the 1996 Act provides federal court jurisdiction over claims that an “agency’s decision departs from federal law,” a decision “‘interpreting’ an [interconnection] agreement contrary to its terms creates a different kind of problem – one under the law of contracts, and therefore one for which a state forum can supply a remedy.” *Illinois Bell Tel. Co. v. WorldCom Technologies, Inc.*, 179 F.3d 566, 574 (7th Cir. 1999). Several other appellate courts have reached the same conclusion. *Michigan Bell Tel. Co. v. MCI Metro Access Transmission Servs., Inc.*, 323 F.3d 348, 355-56 (6th Cir. 2003) (“a state commission’s contractual interpretation of an interconnection agreement is governed by state, not federal, law”); *Southwestern Bell Tel. Co. v. Brooks Fiber Comms. Of Oklahoma, Inc.*, 235 F.3d 493, 498 (10th Cir. 2000) (“The [interconnection] Agreement itself and state law principles govern the questions of interpretation of the contract and enforcement of its provisions.”); *Southwestern Bell*, 208 F.3d at 485.¹

¹ At page 16 n.57 Qwest cites *Verizon Md., Inc. v. Global Naps, Inc.*, 377 F.3d 355 (4th Cir. 2004) and

As the foregoing discussion demonstrates, contrary to Qwest's contention (at 10), AT&T's breach of contract claim "represents the quintessential type of claim relating to interconnection agreements" that courts consistently *have* treated as arising under state law. And the state law that governs these interpretation and enforcement disputes, of course, necessarily includes the state-established limitations periods. For example, in addressing a breach-of-contract claim against Qwest arising from an interconnection agreement, the Washington Utilities and Transportation Commission found that the claim arose under state law and that it would therefore "look to the generally applicable limitation period set by state statutes" for breach-of-contract actions. *AT&T Comms. of the Pacific Northwest, Inc. v. Qwest Corp.*, Order No. 04, Docket UT-051682, ¶ 28 (Wash. UTC, June 7, 2006) (Attachment 1 hereto). In Idaho, the state limitations

Southwestern Bell v. Connect Comms, 225 F.3d 942 (8th Cir. 2000). Neither case changes the analysis here. Both cases were split decisions, and only one, *Verizon*, actually found – contrary to all of the decisions cited in the text above – that disputes over the interpretation and enforcement of interconnection agreements are governed by federal law. The dissent in *Verizon*, moreover, presents a comprehensive and compelling case for why the majority should have reached the same result as all the other federal courts of appeals to have addressed the issue. *See id.* at 369-96 (Niemeyer, J., dissenting). In *Connect*, the Eighth Circuit addressed whether it had jurisdiction over an interconnection agreement dispute under Section 252(e)(6) of the 1996 Act, which authorizes federal courts to review state commission determinations approving an interconnection agreement to ensure that the agreement "meets the requirements" of Sections 251 and 252 of the Act. 225 F.3d at 945-46; *see also id.* at 948 (reading Section 252(e)(6) to grant federal courts "jurisdiction to review state commission enforcement proceedings for compliance with federal law"). In upholding federal jurisdiction over the case, the court focused on "[t]he allegations in this case" – in particular, that "the Commission's determination is contrary to federal law," which, the court explained, "demonstrate that a state commission's enforcement proceeding *can* raise federal law claims." *Id.* at 947-48 (emphasis added). In reaching that conclusion, the Eighth Circuit did not take issue with the district court's observation that "[g]enerally, contract interpretation and enforcement is an issue of common law." *Id.* at 947. The court simply concluded that it "cannot agree with the District Court that determinations of state commissions interpreting and enforcing interconnection agreements *necessarily raise only* questions of state contract law" in light of the plaintiff's "federal-law claim" that "the Commission's determination that internet-connecting calls are 'local traffic' is contrary to federal law." *Id.* at 948-49 (emphasis added). Accordingly, all the *Connect* court did was endorse the proposition that a federal court has jurisdiction to hear a claim that a state commission decision violates federal law, while at the same time leaving to "state contract law" the actual interpretation of an interconnection agreement.

period for contract claims is five years (Idaho Code § 5-2-16)), making AT&T's Complaint timely even under Qwest's proposed accrual date.

B. Qwest's Attempt to Recharacterize AT&T's Claims as Federal in Nature Is Without Merit.

The cases cited above foreclose Qwest's attempt to recharacterize AT&T's claim and displace state law by applying the limitations period from the 1934 Act. Qwest, however, completely ignores the line of cases holding that AT&T's contract claim arises under state law. Instead, Qwest tosses out a variety of theories that interconnection agreements are "federal" in nature and therefore all disputes over their interpretation and enforcement arise under federal law. Qwest Br. at 10-16. These arguments not only ignore all the caselaw cited above (which is dispositive), but also are far off base in their own right.

1. The Source of this Commission's Jurisdiction is State, not Federal, Law.

Qwest's lead argument is that "[t]his Commission's jurisdiction to hear actions to enforce the terms of interconnection agreements derives, not from state law, but from the [1996] Act." Qwest Br. at 10. But even if one assumed *arguendo* that that were true, it tells us nothing about what substantive law and what limitations period apply to the actual contract dispute. Indeed, the courts have seen no conflict between interpreting Section 252 of the 1996 Act (47 U.S.C. § 252) to permit state commissions to hear disputes over the interpretation and enforcement of interconnection agreements and then requiring those commissions to resolve those disputes by applying state contract law. See, e.g., *Brooks Fiber*, 235 F.3d at 496-99 (recognizing state commission authority under Section 252, but also holding that "[t]he Agreement itself and state

law principles govern the questions of interpretation of the contract and enforcement of its provisions”²; *Southwestern Bell*, 208 F.3d at 479-80, 485 (same).

In any event, Qwest’s contention that this Commission’s jurisdiction derives from the 1996 Act simply is not true. While Congress may have set outer boundaries on the extent of the states’ participation in the “cooperative federalism” scheme under the Act, the choice whether to participate at all in that scheme belonged to the Idaho Legislature. As Qwest’s own case states, in the 1996 Act, “Congress has *offered* the states . . . a role as . . . a ‘deputized’ federal regulator.” *Id.* (emphasis added), quoting *MCI Telecomms. Corp. v. Illinois Bell Tel. Co.*, 222 F.3d 323, 343-44 (7th Cir. 2000). The states are free to decline that role, as they must be under the Tenth Amendment. See, e.g., *New York v. United States*, 505 U.S. 144, 161 (1992) (explaining that, under the Tenth Amendment, “Congress may not simply ‘commandee[r] the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program’”) (quoting *Hodel v. Virginia Surface Mining & Reclamation Ass’n*, 452 U.S. 264, 288 (1981)). It logically follows from *New York* that even when a state legislature enacts law as part of an interactive/cooperative federalism scheme begun by Congress – as Idaho did in Section 62-615(1), the state law provision that confers jurisdiction on the Commission to hear disputes regarding the interpretation and enforcement of interconnection agreements – that state law cannot itself be deemed “federal.” If Congress may not coerce a state legislature to act, surely it cannot render the state legislature little more than a puppet of Congress by deeming all state statutes enacted as part of the cooperative federal scheme somehow to be federal acts.

² Any suggestion that the Tenth Circuit’s decision in *E.Spire* supports Qwest’s argument that AT&T’s contract claims arise under federal law (*see* Qwest Br. at 13 n.41) is foreclosed by the Tenth Circuit’s on-point determination in *Brooks Fiber* that the federal courts have supplemental, not original, jurisdiction over questions of interpretation and enforcement of interconnection agreements, meaning that those questions of necessity arise under state, and not federal, law. 235 F.3d at 498.

Under *New York*, when a state legislature acts, it does so voluntarily, purely as an organ of the state government, which, in a constitutionally protected federal system, is deserving of as much recognition and respect as is Congress. If Idaho's laws are to be deemed "federalized," as Qwest contends they should be, that central premise of the Supreme Court's Tenth Amendment jurisprudence would be undermined.

2. Qwest's "National Uniformity" Argument Is Inconsistent with the "Cooperative Federalism" Model under the 1996 Act.

Qwest (at 11, 16) also invokes "national uniformity" in support of its contention that this Commission should treat AT&T's claims as arising under federal law and subject to a federal limitations period. But the concept of "national uniformity" in the interpretation and enforcement of interconnection agreements is completely out of step with the 1996 Act. As the Supreme Court has explained, in the 1996 Act, Congress created a "decidedly novel" scheme in which a federal statute is "administered by 50 independent state agencies," each of which plays an important role in both overseeing interconnection agreements within its jurisdiction and enforcing its own state's laws, regulations, and policies. *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 379 n.6, 385 n.10 (1999); see also *Global Naps, Inc. v. Massachusetts Dep't of Telecommunications & Energy*, 427 F.3d 34, 46 (1st Cir. 2005); 47 U.S.C. §§ 251(d)(3), 253(b), 261(c). This includes applying the state legislature's policy decision as to the proper limitations period for breach of contract actions, which Idaho has set at five years. Applying such state-specific limitations periods is fully consistent with the 1996 Act, which established the regime of state-specific contracts overseen by state commissions and did not dictate any limitations period for breach of contract claims (or any other claims).

3. Claims for Interpretation and Enforcement of Contracts That Are Required by, Reference, or Incorporate Federal Law Arise Under State Law.

Contrary to Qwest's contention (at 13-14), the mere fact that a contract exists because of, or grows out of, a federal statutory scheme does not transform a claim for enforcement of the contract into a question of federal law. More than a century ago, the Supreme Court rejected Qwest's theory in *Shoshone Mining Co. v. Rutter*, 177 U.S. 505, 508-09 (1900), holding in that case that a lawsuit to enforce a mining claim under a federally created scheme of land patents did not arise under federal law where the specific substance of the law was to be determined solely by reference to state law. And earlier this year, in *Empire HealthChoice Assurance, Inc. v. McVeigh*, 126 S. Ct. 2121 (2006), the Supreme Court reaffirmed the rule that state contracts growing out of a federal scheme are not themselves part of federal law. In *McVeigh*, the Court specifically held that a complaint seeking to "vindicate a contractual right contemplated by a federal statute" reflected in the terms of a federal health insurance contract implementing a federal health insurance program created by federal statute and covering 8 million federal employees does not present a claim for violation of federal law within the federal courts' original federal question jurisdiction. *Id.* at 2217, 2131, 2137; see also *id.* at 2138 (Breyer, J., dissenting). While acknowledging that the complaint implicated "distinctly federal interests" (*id.* at 2134), the Court found that those interests "do not warrant turning into a discrete and costly 'federal case' an insurer's contract-derived claim to be reimbursed from the proceeds of a federal worker's state-court-initiated tort litigation" and thus found no federal jurisdiction over the complaint. *Id.* at 2137.

Qwest's related contention, that because interconnection agreements reference or incorporate federal law all disputes thereunder are governed exclusively by federal law (Qwest

Br. at 13-15), also is wrong. In *Shoshone Mining*, the Supreme Court stressed that “[t]he fact that the state statute and the mortgage refer to certain acts of Congress as prescribing the rule and measure of the rights granted by the state does not make the determination of such rights a Federal question.” 177 U.S. at 509. Similarly, in *Gully v. First Nat’l Bank of Meridian*, 299 U.S. 109 (1936), the Court held that a lawsuit against a bank to enforce the terms of a contract made under Mississippi law, pursuant to which the bank assumed the liabilities of an insolvent national bank for non-payment of a state tax on bank shares did not arise under federal law, despite the fact that a federal statute was the source of the state’s authority to tax national bank shares. *Id.* at 114-15. Thus, the mere fact that federal law may be “lurking in the background” does not turn a state-law claim into a federal claim. *Id.* at 117. See also *International Armor & Limousine Co. v. Moloney Coachbuilders Inc.*, 272 F.3d 912 (7th Cir. 2001) (holding that claims for breach of contracts involving copyrights, patents, or trademarks arise under state law, “even though the dispute could not exist but for the property right created by” the federal law); *Hunter v. United Van Lines*, 746 F.2d 635, 647 (9th Cir. 1985) (contract claims arose under state law, “without regard to their genesis” in federal law).

More recently, in telecommunications cases that are directly on point, the courts have upheld those same principles. The Seventh Circuit, for example, held that the interpretation and enforcement of contract provisions that “precisely track the [1996] Act” presents only a question of state law for a state forum, not a federal claim under the 1996 Act. *Illinois Bell*, 179 F.3d at 573-74. Similarly, the agreement at issue in *Brooks Fiber* tracked the language of an FCC rule setting forth the scope of the parties’ reciprocal compensation obligations under Section 251(b)(5) of the 1996 Act, yet the Tenth Circuit had no difficulty concluding that “[t]he

Agreement itself and state law principles govern the questions of interpretation of the contract and enforcement of its provisions.” *Brooks Fiber*, 235 F.3d at 495, 499.³

Qwest also errs in asserting that the federal limitations period must apply because of the “nature and purpose of interconnection agreements.” Qwest Br. at 13-14. Qwest’s theory ignores the great leeway parties have to voluntarily agree to include (or exclude) whatever terms they like when negotiating interconnection agreements. Although federal law provides that incumbent carriers must enter into good faith negotiations with new entrants that request interconnection, the precise terms and conditions of interconnection agreements lie within the control of the parties. Congress made this clear by providing that parties can negotiate the terms of agreements “without regard” to the requirements of federal law and that such negotiated terms may be approved by the state commission – and thus become “binding” on the parties – without regard to the requirements of federal law. 47 U.S.C. § 252(a)(1).⁴ Thus, if two carriers agree in their contract to abide by federal law, they do so as a voluntary act of self-government through the contractual process, not under compulsion of federal law. Accordingly, in adjudicating AT&T’s claim for breach of contract, the Commission necessarily will look to the language that

³ In light of *Shoshone Mining, Gully, Illinois Bell*, and *Brooks Fiber*, those portions of AT&T’s contract claims that are based on provisions of the parties’ interconnection agreements that expressly incorporate state law – see Agreement § 24.1 (Complaint Ex. 1) (agreeing to “comply with all applicable federal, state, and local laws, rules and regulations”) and *id.* § 21 (agreeing to abide by state law “insofar as state law may control any aspect of this agreement”) – are, *a fortiori*, state law claims that clearly are *not* subject to a two-year federal limitations period. And that is the case even under Qwest’s and the Oregon Commission’s rationales.

⁴ Thus, Qwest’s recognition of the 9th Circuit’s statement that “interconnection agreements have the binding force of law” (Qwest Br. at 14, citing *Pacific Bell*, 325 F.3d at 1127) merely reflects the language of the 1996 Act itself, and does not turn all disputes over such agreements into federal issues. Indeed, the very case Qwest cites specifically held that disputes over the interpretation and enforcement of interconnection agreements are governed by the language of the contract and state law. *Pacific Bell*, 325 F.3d at 1128.

the parties voluntarily negotiated and to state contract law, not to federal law. *Pacific Bell*, 325 F.3d at 1128; *Brooks Fiber*, 235 F.3d at 499; *Southwestern Bell*, 208 F.3d at 485. Indeed, as the Tenth Circuit explained in a case that is on all fours with this case, “[t]he [interconnection] Agreement itself and state law principles govern the questions of interpretation of the contract and enforcement of its provisions. * * * The [state commission] required reciprocal compensation for calls to ISPs not because federal law requires such compensation, but because the Agreement, as construed under Oklahoma law, requires it.” *Brooks Fiber*, 235 F.3d at 499.⁵

* * *

Because AT&T’s claims arise under state law, Qwest’s claim that the limitations period under 47 U.S.C. § 415 applies here is wrong. The limitations period for AT&T’s breach of contract claim is that established by state law – five years. Because AT&T’s claim is timely even if one accepted, purely *arguendo*, Qwest’s claim that AT&T’s claim accrued in February or

⁵ The cases cited by Qwest in no way support recharacterizing AT&T’s claim as federal or applying the two-year limitations period from the 1934 Act. Qwest Br. at 11-13. To begin with, only two of these decisions deal with interconnection agreements at all and both are facially incorrect. The first of those cases, from the Texas Public Utility Commission, directly conflicts with the controlling law of the Fifth Circuit (of which Texas is part), which reaffirmed earlier this month that “[t]he interconnection agreement and state law principles govern the interpretation and enforcement of agreement provisions.” *Southwestern Bell Tel., L.P. v. Public Util. Comm’n of Texas*, No. 05-50131, slip op. at 7 (5th Cir., Oct. 4, 2006); *Southwestern Bell*, 208 F.3d at 485. Similarly, the Oregon Public Utility Commission decision that applied Section 415 (which AT&T has appealed) is contrary to the Ninth Circuit law established in *Pacific Bell*, 325 F.3d at 1128, which relied on and followed the Fifth Circuit. The other cases that Qwest cites are simply irrelevant to whether a dispute over interpretation and enforcement of an interconnection agreement arises under state law, for none have anything to do with interconnection agreements and all significantly predate the 1996 Act. *Pavlak v. Church* (Qwest Br. at 11) was a civil rights case from 1984. *Cole v. Kelly* (Qwest Br. at 11-12) did not apply Section 415 at all; rather, it held that the plaintiff’s claims were barred by a three-year limitations period from another source, and only then added, in dicta and without explanation, that the plaintiff’s claims also would have been barred under Section 415’s limitations period. 438 F. Supp. at 145. And *MFS International, Inc. v. International Telecom Ltd.* (Qwest Br. at 12-13) involved a federal tariff for international services, not an interconnection agreement. None of these cases addresses, much less overrides, the now well-established principle that disputes over the interpretation and enforcement of interconnection agreements arise under state law like any other contract dispute.

March of 2002 (Qwest Br. at 17-18), there is no limitations issue here, and thus no basis for dismissal.

II. THE OREGON COMMISSION'S DECISION CANNOT BE GIVEN PRECLUSIVE EFFECT.

Qwest's contention that this Commission must give preclusive effect to the Oregon Public Utility Commission's determinations, made in a proceeding examining Oregon interconnection agreements previously approved by the Oregon Commission, is wrong for numerous reasons.⁶ As explained below, Qwest's preclusion argument:

- is contrary to the limitations on the preclusive effect of unreviewed state administrative determinations on questions of law under Full Faith and Credit principles;
- conflicts with the structure of the interconnection agreement regime under the 1996 Act;
- would be fundamentally unfair in light of the contrary result obtained in the Washington Commission and the overwhelming body of precedent that favors AT&T's position that claims based on interpretation or enforcement of an interconnection agreement present issues of and arise under state law; and
- cannot be sustained under the traditional elements of claim preclusion.

A. The Oregon Commission Decision Is Entitled to No Deference Under Full Faith and Credit Principles.

As an initial matter, Qwest's "full faith and credit" argument (Qwest Br. at 20) is misplaced. For purposes of applying issue preclusion, there is a well established distinction between prior judgments in state courts and unreviewed adjudications in state administrative agencies. Where, as here, a party seeks to invoke issue preclusion on the basis of the conclusions

⁶ The Oregon Commission's determinations in question were that a claim that involves the interpretation and enforcement of an interconnection agreement (i) arises under federal law and (ii) is governed by the two-year limitations period in Section 415 of the 1934 Act. AT&T's Oregon affiliate has appealed that decision. As discussed above, the courts are virtually unanimous that the Oregon Commission's decision is dead wrong.

of law – as opposed to factfinding – made in an unreviewed state agency determination, the courts have not hesitated to decline the request. See, e.g., *Edmundson v. Borough of Kennett Square*, 4 F.3d 186, 193 (3d Cir. 1993) (declining to give preclusive effect to legal issues decided in unreviewed state agency decisions); *Gjellum v. City of Birmingham*, 829 F.2d 1056, 1064-65 (11th Cir. 1987) (same); *Peery v. Brakke*, 826 F.2d 740, 746 (8th Cir. 1987) (same). The Idaho case on which Qwest’s full faith and credit argument principally rests (see Qwest Br. at 19, 22 & nn.66, 75) is fully consistent with the prevailing rule, for it establishes that Idaho courts (and agencies) must “give preclusive effect to the *facts* found by an administrative tribunal and court decisions of another state” when the elements of collateral estoppel are satisfied. *Idaho State Bar v. Everard*, 142 Idaho 109, 124 P.3d 985, 990 (Idaho 2005) (emphasis added).⁷ Here, the Oregon Commission decision on which Qwest relies is unreviewed – a petition for review was filed in the Oregon Court of Appeals earlier this month – and Qwest seeks preclusion on certain conclusions of law, including the nature of AT&T’s contract claim (state or federal) and the applicable limitations period. Accordingly, the Oregon decision is not entitled to any deference under full faith and credit principles.

B. According Preclusive Effect to the Oregon Commission Decision Would Be Inconsistent with the 1996 Act’s Interconnection Agreement Scheme.

It is well established that “[a]n adjudicative determination of an issue by an administrative tribunal does not preclude relitigation of that issue in another tribunal if according preclusive effect to determination of the issue would be incompatible with a legislative policy that * * * [t]he tribunal in which the issue subsequently arises be free to make an independent

⁷ Qwest’s reliance (at 19 n.66) on *Baker v. General Motors Corp.*, 522 U.S. 222 (1998), is misplaced. That case involved the preclusive effect that one court must give to the prior determinations of another court, and thus is clearly distinguishable from this case, in which the prior action is an unreviewed state agency determination.

determination of the issue in question.” *Pence v. Idaho State Horse Racing Comm’n*, 109 Idaho 112, 115, 705 P.2d 1067, 1070 (Idaho App. 1985) (quoting RESTATEMENT (SECOND) OF JUDGMENTS § 83(4) (1982)) (declining to give preclusive effect to sanctions imposed by local race track officials where “remedial scheme and legislative policy” reflected in Idaho Code § 54-2509 authorized additional sanctions by State Racing Commission); see also *State v. Gusman*, 125 Idaho 810, 813, 874 P.2d 1117, 1120 (Idaho App. 1993) (“declin[ing] to apply collateral estoppel because to do so would undermine the legislative purpose and effect of the existing statutory scheme”), *aff’d*, 125 Idaho 805, 874 P.2d 1112 (Idaho 1994). Application of that principle forecloses Qwest’s preclusion argument, for Congress itself has allocated jurisdiction over the formation and subsequent interpretation and enforcement of interconnection agreements to each state, not to the first state to consider an issue in the context of the state-specific, carrier-specific agreement before it.

As numerous courts have observed, the 1996 Act creates an unusual model of “cooperative federalism,” whereby both state and federal regulators shape the local telecommunications landscape. See *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 378-84 (1999); *Puerto Rico Tel. Co. v. Telecomms. Regulatory Bd.*, 189 F.3d 1, 8 (1st Cir. 1999). Instead of taking over the regulation of local telecommunications competition altogether, Congress enacted a “decidedly novel” scheme, the result of which is that a federal statute is “administered by 50 independent state agencies.” *AT&T Corp.*, 525 U.S. at 379 n.6 & 381 n.10.

In no respect is the role of state commissions under the 1996 Act more prominent than with respect to interconnection agreements. As noted above, state commissions are empowered with authority to resolve disputed issues as to which the parties are unable to reach agreement (47 U.S.C. § 252(a)(2)) and are obligated to approve agreements before those agreements may

take effect (*id.* § 252(e)). In the course of arbitrating agreements, the commissions may “establish[] or enforc[e] other requirements of State law.” *Id.* § 252(e)(3); see also *id.* § 251(d)(3) (conferring power to enforce “any regulation, order, or policy of a State commission” that is not inconsistent with federal law). And even with respect to negotiated agreements, the commissions must determine whether the parties’ terms are “consistent with the public interest, convenience, and necessity” and ensure that those terms do not “discriminate[] against a telecommunications carrier not a party to the agreement.” *Id.* § 252(e)(2).

As the foregoing discussion demonstrates, the state commissions play a central role in the formation and approval of each individual interconnection agreement and have at their disposal several mechanisms for placing their own state-specific imprimaturs on the terms and conditions of those agreements. While state commission action is bounded by federal limitations in many respects, the states remain free to implement their own policy choices so long as those choices do not impinge on federal prerogatives. As one commentator noted, “Congress enlisted the aid of state public utility commissions to ensure that local competition was implemented fairly and with due regard to the local conditions and the particular historical circumstances of local regulation under the prior regime.” P. Huber, et al., *FEDERAL TELECOMMUNICATIONS LAW* §§ 3.3.4, at 227 (2d ed. 1999). A rule that accords preclusive effect to the decision of the first commission that decides an issue – here, whether a claim based on interpretation of the Oregon AT&T/Qwest interconnection agreement arises under state or federal law – would upset the state-by-state allocation of authority that is plainly evident from the text and structure of the statutory scheme. See *University of Tennessee v. Elliott*, 478 U.S. 788, 796 (1986) (declining to apply collateral estoppel where doing so would disrupt or interfere with a Congressional scheme); see also 18B C. Wright, A. Miller & E. Cooper, *FEDERAL PRACTICE AND PROCEDURE* § 4475, at 474-75 (2d

ed. 2002) (“Preclusion is much less likely to attach when a proceeding in one agency is followed by a proceeding in another agency. * * * When the agencies are creatures of different governments, all of the principles that generally prevent one government from precluding another are at work.”).

Moreover, the First Circuit flatly held – in a case that is on all fours with this case – that its “examination of the [1996 Act] leads us to conclude that to apply principles of issue preclusion * * * would contravene the intent of Congress.” *Global Naps, Inc. v. Massachusetts Dep’t of Telecommunications & Energy*, 427 F.3d 34, 46 (1st Cir. 2005). The question presented in *Global Naps* was “whether the doctrine of issue preclusion applies so as to bind one state’s commission to apply the findings and conclusions of another state’s commission in disputes between the same parties about the interpretation of identical contract language contained in different state interconnection agreements.” *Id.* at 35. In particular, the plaintiff in *Global Naps* sought to bind the defendant in a proceeding in the Massachusetts Commission on the basis of a prior determination by the Rhode Island Commission. Here, the same scenario is presented; one need only substitute Idaho and Oregon in place of Massachusetts and Rhode Island. In rejecting issue preclusion, the court explained that “the allocation among the commissions of each state” under the Act had “the intended effect of leaving state commissions free, where warranted, to reflect the policy choices made by their states,” including “with respect to interconnection agreements.” *Id.* at 46-47. “[T]o step in and shift the state-by-state decision-making authority from the Massachusetts DTE to the RIPUC” through the application of issue preclusion “would

upset the allocations of authority made out under the [1996 Act].” *Id.* at 48.⁸ Here, too, “the text and structure” of the 1996 Act (*id.*) reflect “a legislative policy that * * * [t]he tribunal in which the issue subsequently arises be free to make an independent determination of the issue in question” (*Kjos*, 346 N.W.2d at 28; see *Grant*, 2006 WL 1965675, at *4), and thus mandate that this Commission reject Qwest’s issue preclusion argument and render its own independent judgment on the merits of AT&T’s claims.⁹

The Eighth Circuit also has held that unreviewed agency determinations like the Oregon decision on which Qwest relies do not bind other bodies when giving preclusive effect to such decisions would be inconsistent with the federal scheme as set out in the 1996 Act. *Iowa Network Services, Inc. v. Qwest Corp.*, 363 F.3d 683, 689-94 (8th Cir. 2004). In particular, the court held that its “review of the 1996 Act convinces us that Congress intended to supplant the common law principles of claim preclusion” with respect to a claim that a state agency erred in construing an issue of federal law underlying an aspect of the plaintiff’s claim. *Id.* at 690. The court thus declined to give preclusive effect to the Iowa Utilities Board’s unreviewed determination that wireless telecommunications traffic is “local traffic” subject to reciprocal compensation under Section 251(b)(5) of the 1996 Act. As the court explained, the Board “was indisputably interpreting federal law” in reaching that determination. *Id.* at 693. And giving

⁸ Tellingly, Qwest cites to no prior decision in which a decision by a state commission interpreting the terms of an interconnection agreement was given preclusive effect in a subsequent proceeding, whether in federal or state court or in another public utility commission.

⁹ It is clear that the Oregon decision in question did involve the interpretation of the terms of an interconnection agreement. As a necessary predicate for its conclusion that the interpretation and enforcement claim arose under federal law, the Oregon Commission had to first determine that the contract provision in question incorporated the requirements of the federal 1996 Act. The Commission’s conclusion that because the contract did in fact track federal law, AT&T raised a federal claim is erroneous and in direct conflict with the Supreme Court’s decisions in *Shoshone Mining* and *Gully* and the courts of appeals’ decisions in, among others, *Illinois Bell* and *Brooks Fiber* cited above, see part I.B.3, *supra*.

preclusive effect to the Board's determination, in which it purported to apply federal law, would be inconsistent with Congress' scheme, pursuant to which "[f]ederal courts have the ultimate power to interpret provisions of the 1996 Act." *Id.* at 692.

Like *Iowa Network Services*, this case presents the question of whether this Commission should give preclusive effect to an unreviewed state commission determination. Specifically, AT&T argues that the Oregon Commission's conclusion that under the 1996 Act claims seeking interpretation and enforcement of interconnection agreements arise under federal law is contrary to the overwhelming body of relevant precedent, in which the courts consistently have held that claims of that nature arise under state contract law. Based on that, AT&T contends that the Oregon Commission erred in its rejection of AT&T's argument that claims seeking interpretation and enforcement of interconnection agreements arise under state rather than federal law. Accordingly, there is no basis for deference to the Oregon Commission's unreviewed determination that, under the 1996 Act, claims for interpretation and enforcement of interconnection agreements arise under federal rather than state law. See *Iowa Network Services*, 363 F.3d at 693 ("we hold that the district court erred in giving preclusive effect to the IUB's determination that the traffic at issue here was subject to reciprocal compensation pursuant to § 251(b)(5)").

C. Applying Preclusion Would Be Fundamentally Unfair.

1. Preclusion Does Not Apply Where There Are Inconsistent Decisions.

Even if preclusion were not foreclosed by Congress's decision to give each state a vital role in its interconnection agreement scheme, it is well settled that principles of res judicata "are not to be applied in the abstract; they have validity only if their application will carry out the policies which these principles were designed to express." *Gusman*, 125 Idaho at 813, 874 P.2d

at 1120 (quoting *Griffin v. City of Roseburg*, 255 Or. 103, 464 P.2d 691, 693 (Or. 1970)). Consistent with that principle, the courts frequently have remarked that “the determination of an issue of law should not be accorded preclusive effect if such effect would result in ‘inequitable administration of the law.’” *Clark-Cowlitz Joint Operating Agency v. F.E.R.C.*, 826 F.2d 1074, 1081 (D.C. Cir. 1987); see also *Bear, Stearns & Co. v. 1109580 Ontario, Inc.*, 409 F.3d 87, 91-92 (2nd Cir. 2005) (holding that, in addition to finding that the standard res judicata requirements are met, “a court must satisfy itself that application of the doctrine is fair” to the parties); *Acevedo-Garcia v. Monroig*, 351 F.3d 547, 574 (1st Cir. 2003) (same); *Iowa Network Services*, 363 F.3d at 693-94 (refusing to give preclusive effect to state agency decision where companion case remained pending in state commission and noting that “[t]o hold that the district court was bound by the IUB’s determination in this case, but allow the district court in the companion case to reach the federal issues, could result in an inconsistency we cannot condone”). This case presents such circumstances.

As Qwest has noted (at 7), this is one of many cases between Qwest and AT&T – at least seven now pending in federal courts or state courts or commissions – that involve disputes over the interpretation of the parties’ interconnection agreements in several states. In asking the Court to give preclusive effect to the Oregon Commission decision, Qwest omits to inform the Court that the Washington State Utilities and Transportation Commission has reached the opposite conclusion, treating AT&T’s breach of contract claim against Qwest as a state law claim subject to “the generally applicable limitation period set by state statutes,” pursuant to which “[a]ctions on a written contract must be filed within six years after they accrue.” *AT&T Communications of the Pacific Northwest, Inc. v. Qwest Corp.*, Order 04, Interlocutory Order Reversing Initial Order; Denying Motion for Summary Determination or Dismissal, Docket UT-051682, ¶ 28, slip

op. at 7 (Wash. UTC Jun. 7, 2006) (Att. 1 hereto). The Washington Commission also reached a contrary conclusion with respect to its determination of the date on which AT&T's claims accrued. Unlike the Oregon Commission, which found an accrual date of March 2002 for AT&T's claims in Oregon, the Washington Commission deemed AT&T's claims to have accrued on "July 15, 2002, when the [Washington] Commission rejected pleas to pursue the asserted violations in the 271 docket." *Id.* at 5.

Rather than applying preclusion on the basis of a choice between inconsistent determinations, courts generally refuse to accord preclusive effect to either one. For example, in *Joslyn Mfg. Co. v. Liberty Mut. Ins. Co.*, 939 F. Supp. 603 (N.D. Ill. 1996), the court was faced with two prior decisions that reached opposite results with respect to the existence of coverage on certain insurance policies. In rejecting both parties' requests to apply issue preclusion, the court noted that "the doctrine of collateral estoppel does not apply when the determination relied on as preclusive is inconsistent with another determination of the same issue." *Id.* at 611. Similarly, in *Western Group Nurseries, Inc. v. Pomeranz*, 867 P.2d 12 (Colo. App. 1993), the court refused to invoke collateral estoppel on the issue of the liability of limited partners in an action to enforce a promissory note, noting the "inconsistent results" in prior litigation, where at least one court "decided the issues in favor of the limited partners," while another ruled "against the limited partners." *Id.* at 15.

Here, too, Qwest's attempt to pick and choose among inconsistent results on the same issue should be rejected. In the words of the Oregon Supreme Court, "where there are extant determinations that are inconsistent on the matter in issue, it is a strong indication that the application of collateral estoppel would work an injustice. There seems to be something fundamentally offensive about depriving a party of the opportunity to litigate the issue again

when he has shown beyond a doubt that on another day he prevailed.” *State Farm Fire & Cas. Co. v. Century Home Components, Inc.*, 550 P.2d 1185, 1191 (Or. 1976). And the injustice of collateral estoppel on the basis of the anomalous result in a single state commission would be even more pronounced here, because there are at least seven cases now pending between AT&T and Qwest – some in federal courts, others in state courts or state utilities commissions – in which AT&T seeks to enforce its rights under its interconnection agreements and/or applicable state statutes. Cf. *Manufactured Home Communities, Inc. v. San Jose*, 420 F.3d 1022, 1031 (9th Cir. 2005) (noting that the main purpose of res judicata is to “prevent” (not reward) “inconsistent rulings”).

2. Claim Preclusion Also Would Be Unfair in Light of the Overwhelming Body of Relevant Precedent.

Application of preclusion principles in this case also would be unfair in light of the overwhelming body of precedent that favors AT&T’s position that claims based on interpretation, and seeking enforcement, of an interconnection agreement provision that tracks federal law (specifically, a provision of the 1996 Act) present issues of state law. As the cases cited above make clear, that legal issue has been raised, litigated and decided in numerous cases.

Virtually all of the decisions in those cases were issued long before the Oregon Commission issued the ruling as to which Qwest seeks preclusive effect. And as demonstrated in part I above, virtually all of these decisions answered the question in the same way: the state law of contracts controls. *Pacific Bell*, 325 F.3d at 1128 (stating that “the agreements themselves and state law principles govern the questions of interpretation of the contracts and enforcement of their provisions”); *Michigan Bell*, 323 F.3d at 355 (noting that “a state commission’s contractual interpretation of an interconnection agreement is governed by state,

not federal, law” and applying Michigan contract law in analyzing the alleged breach of the agreement); *Brooks Fiber*, 235 F.3d at 499 (“The Agreement itself and state law principles govern the questions of interpretation of the contract and enforcement of its provisions”); *Southwestern Bell*, 208 F.3d at 485 (“[S]tate law principles govern the questions of interpretation of the [interconnection] contracts and enforcement of their provisions”); *Illinois Bell*, 179 F.3d at 574 (“A decision ‘interpreting an agreement contrary to its terms creates a * * * problem * * * under the law of contracts’ for which a ‘state forum’ could ‘supply a remedy’”). That body of precedent provides a good deal of empirical evidence that AT&T’s position is correct and that the Oregon Commission reached an aberrational and incorrect result. Under these circumstances, it would be patently unfair to foreclose AT&T from litigating the issue.

D. The Traditional Elements of Issue Preclusion Are Not Satisfied.

Finally, Qwest cannot satisfy the traditional elements of issue preclusion in any event. The Idaho Supreme Court has observed that “[c]ollateral estoppel . . . works to prevent the relitigation of issues of ultimate fact.” *State v. Gusman*, 125 Idaho 805, 808, 874 P.2d 1112, 1115 (Idaho 1994). Idaho courts (and agencies) must apply a five-factor test in determining whether collateral estoppel applies: “(1) the party against whom the earlier decision is asserted had a full and fair opportunity to litigate the issue decided in the earlier case; (2) the issue decided in the prior litigation was identical to the issue presented in the present action; (3) the issue sought to be precluded was actually decided in the prior litigation; (4) there was a final judgment on the merits in the prior litigation; and (5) the party against whom the issue is asserted was the party or in privity with the party in the prior litigation.” *Id.* (citing *Anderson v. City of Pocatello*, 112 Idaho 176, 183-84, 731 P.2d 171, 178-79 (Idaho 1987)). Because all of those elements are not satisfied here, there is no issue preclusion.

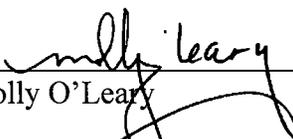
To begin with, the claims in this litigation are not identical to the claims that were at issue in the Oregon Commission. Although AT&T did raise breach of contract claims in Oregon, those claims rested on different contracts, that contain different terms, were approved at different times, by different state commissions, under different state and local conditions, and may be subject to different accrual dates (as was the case in Oregon and Washington). For example, the contracts at issue in Idaho contain provisions that expressly incorporate obligations to comply with state law. See Agreement §§ 21, 24.1, quoted at 9 n.3, *supra*. Those Idaho-specific obligations plainly could not have been litigated in the Oregon proceedings. In sum, given the myriad differences noted above, it cannot be said AT&T's claims based on the relevant contracts are "identical" in the two states, as they must be for preclusion to apply under Idaho law. *Gusman*, 125 Idaho at 808, 874 P.2d at 1115; see *Oregon RSA No. 6, Inc. v. Castle Rock Cellular of Oregon Ltd. P'ship*, 840 F. Supp. 770, 782 (D. Or. 1993) (applying the same "identity" of issue requirement under the Wisconsin law of preclusion and declining to give preclusive effect to a prior decision that involved a different transaction and a different partnership agreement with different contractual language that was entered into by different parties on a different date and was construed under the laws of a different state, notwithstanding the fact that the sister company of the party against whom preclusion was sought was involved in the prior lawsuit).

CONCLUSION

For the reasons stated herein, the Commission should deny Qwest's Motion to Dismiss.

DATED this 26th day of October, 2006.

RICHARDSON & O'LEARY, P.L.L.C.

By  _____
Molly O'Leary

Attorneys for AT&T COMMUNICATIONS OF
THE MOUNTAIN STATES, INC.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 26th day of October, 2006 a true and correct copy of the within and foregoing AT&T'S RESPONSE TO QWEST'S MOTION TO DISMISS was filed with the Idaho Public Utilities Commission and parties as indicated below:

Ms. Jean Jewell

Commission Secretary
Idaho Public Utilities Commission
P O Box 83720
Boise ID 83720-0074

Hand Delivery
 U.S. Mail, postage pre-paid
 Facsimile
 Electronic Mail

Theodore A. Livingston
Dennis G. Friedman
Mayer, Brown, Rowe & Maw LLP
71 South Wacker Drive
Chicago, IL 60606
E-mail: dfriedman@mayerbrown.com

Hand Delivery
 U.S. Mail, postage pre-paid
 Facsimile
 Electronic Mail

Mary S. Hobson
999 Main, Suite 1103
Boise, ID 83702
E-mail: mary.hobson@qwest.com

Hand Delivery
 U.S. Mail, postage pre-paid
 Facsimile
 Electronic Mail

Adam L. Sherr
Corporate Counsel, Qwest
1600 7th Avenue, Room 3206
Seattle, WA 98191
E-mail: adam.sherr@qwest.com

Hand Delivery
 U.S. Mail, postage pre-paid
 Facsimile
 Electronic Mail



Molly O'Leary