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IDAHO PUBLIC
UTILITIES COMMISSION

16 February 2007

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

Hand Delivered

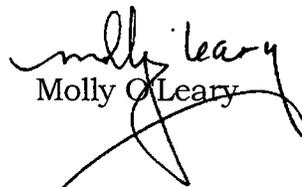
RE: Case No. QWE-T-06-17

Dear Ms. Jewell:

Enclosed please find an original and seven (7) copies of the AT&T'S RESPONSE TO QWEST'S SUPPLEMETNAL AUTHORITY in the above referenced case.

I have also enclosed an extra copy to be service-dated and returned to us for our files.

Sincerely,


Molly O'Leary

encl.

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IDAHO PUBLIC UTILITIES COMMISSION

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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,)	Case No. QWE-T-06-17
vs.)	AT&T'S RESPONSE TO QWEST'S
QWEST CORPORATION,)	SUPPLEMENTAL AUTHORITY
)	
Respondent.)	

Complainant AT&T Communications of the Mountain States, Inc. (“AT&T”) respectfully submits this response to Qwest Corporation’s Supplemental Authority in Support of Motion to Dismiss. Contrary to Qwest’s assertion, the Utah decision Qwest submits does not support its motion to dismiss.

As the Commission knows, AT&T has sued Qwest for breach of the parties’ interconnection agreement, and Qwest has moved to dismiss by arguing that this claim must be treated as federal in nature and thus subject to a two-year limitations period under 47 U.S.C. 415, making it time-barred. Qwest now submits a decision by the Utah federal district court that denied AT&T’s motion for remand to state court in *AT&T Communications of the Mountain States, Inc. v. Qwest Corporation*, Case No. 2:06CV00783 DS (D. Utah, Feb. 13, 2007) (“Utah Remand Order”), another case in which an AT&T affiliate has sued Qwest for breach of an interconnection agreement. Qwest contends that the Utah decision is “directly relevant to Qwest’s pending Motion to Dismiss” and “confirms . . . that federal law governs AT&T’s claims here.” Qwest Supp. Auth. at 1-2. Qwest is incorrect for three main reasons.

1. Qwest’s argument in this case is that AT&T’s breach of contract claim is a claim for violation of federal law and thus governed by a federal statute of limitations. The Utah court, however, did not have to reach that issue in order to decide whether it had jurisdiction over AT&T’s breach of contract claims, and thus did not do so. Federal question jurisdiction can exist if the complaint “establishes either that [1] federal law creates a cause of action or that [2] the plaintiff’s right to relief necessarily depends on resolution of a substantial question of federal law.” Utah Remand Order at 4, quoting *Nicodemus v. Union Pacific Corp.*, 440 F.3d 1227, 1232 (10th Cir. 2006). The Utah decision relied on the latter

ground, finding that the “resolution” of AT&T’s breach of contract claim “depends on the application and interpretation of federal law” and that “AT&T’s right to relief necessarily depends on resolution of substantial questions of federal law.” Utah Remand Order at 10. Although AT&T disagrees with that conclusion it does not matter here, for a determination that jurisdiction exists due to a substantial question of federal law is *not* a finding that the cause of action itself is federal. Rather, the question of what law ultimately governs the disposition of AT&T’s contract cause of action on the merits is entirely separate.¹

The Ninth Circuit and several others have already answered the question of what law ultimately governs claims for breach of an interconnection agreement. In *Pacific Bell v. Pac-West Telecomm, Inc.*, 325 F.3d 1114 (9th Cir. 2003), the Ninth Circuit stated that “the [interconnection] agreements themselves and state law principles govern the questions of interpretation of the contracts and enforcement of their provisions.” 325 F.3d at 1128, quoting *Southwestern Bell v. Public Utils. Comm’n*, 208 F.3d 475, 485 (5th Cir. 2000). As AT&T has explained in its prior briefs, the Fifth through Tenth Circuits are in accord on this point, with only the Fourth Circuit (over a strong and persuasive dissent) reaching a different result. Moreover, state law principles govern such contract disputes despite the fact that, as the Utah court found, federal law may play some role in analyzing the contract dispute. As the Eighth Circuit concluded in *Connect Communications Corp. v. Southwestern Bell Telephone*, 467 F.3d 703 (8th Cir. 2006), which involved a claim for breach of an interconnection agreement just like AT&T’s claim here, “[a]lthough federal law may play a

¹ For example, where, as here, one is dealing with contract provisions that track and incorporate federal requirements, in determining what the contract means and what rights it creates, one must of course determine what those federal requirements are. But the basic cause of action still could be (and the overwhelming weight of authority holds that AT&T’s contract action here *is*) created by state law.

large role in this dispute, the ultimate issue in this case – interpretation of the Interconnection Agreement – is a state law issue.” *Id.* at 708.

2. Even if the Utah court actually had found that AT&T’s breach of contract claim in Utah was a federal claim, as opposed to merely involving a substantial federal question, it would have to be rejected under Ninth Circuit law. As just noted, *Pacific Bell* found that a claim for breach of an interconnection agreement is governed by state law, as did a recent decision by the Washington Utilities and Transportation Commission (which AT&T has already submitted and discussed in prior briefs, including its response to the Commission’s notice of oral argument (at 6-9 and Att. 1 thereto)). The only reason these state law contract issues have been before the federal appellate courts at all was that the district courts had “supplemental jurisdiction” over the contract claim under 28 U.S.C. § 1367. *Connect Communications*, 467 F.3d at 708; *Southwestern Bell Tel. v. Brooks Fiber Communications of Oklahoma, Inc.*, 235 F.3d 493, 494 (10th Cir. 2000). Indeed, the Utah court seemed to recognize this point, thus reinforcing that it based its jurisdictional determination on a finding of a federal issue rather than a federal claim, by noting that although it would “[e]xercise[e] original jurisdiction to determine issues of federal law,” it needed “supplemental jurisdiction pursuant to 28 U.S.C. § 1367(a)” in order to “proceed with state law determinations,’ such as “questions of interpretation of the contract and enforcement of its provisions.” Utah Remand Order at 9 n. 4.

3. Finally, the Utah court also seems to have made the same error as the Wyoming district court by failing to follow the binding Tenth Circuit law. *See* AT&T’s Response to Commission’s Notice of Oral Argument, at 10-12. As in Wyoming, the Utah court was bound by the Tenth Circuit’s holding in *Brooks Fiber* that disputes over

interconnection agreements are governed by state law. Like the Wyoming court, however, the Utah court instead elected to follow an outlier decision by the Fourth Circuit, the only circuit to have found that federal law governs claims for breach of interconnection agreements. Utah Remand Order at 9-10, citing *Verizon Maryland, Inc. v. Global NAPs, Inc.*, 377 F.3d 355 (4th Cir. 2004). As AT&T explained in its response to the Commission's notice of oral argument (at 10-12), the fact patterns in *Verizon Maryland* and *Brooks Fiber* are indistinguishable; both cases involved claims for breach of interconnection agreement terms that tracked or incorporated federal law. The only difference is that the Tenth Circuit (like the Fifth through Ninth) held that such claims nevertheless are normal contract claims governed by state law, whereas the Fourth Circuit applied federal law. Because the cases are identical except for the legal conclusions drawn by the two circuits, the Utah court erred in failing to follow *Brooks Fiber*.

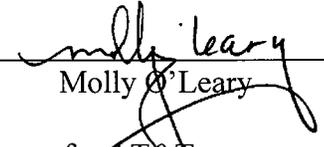
* * *

In sum, the Utah decision does not in any way support Qwest's motion to dismiss.

DATED this 16th day of February, 2007.

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 16th day of February, 2007 a true and correct copy of the within and foregoing AT&T'S RESPONSE TO QWEST'S SUPPLEMENTAL AUTHORITY 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

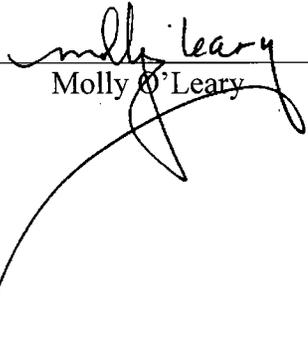
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