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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 COMMISSION'S QUESTIONS IN ORDER 30247

INTRODUCTION

As directed by Commission Order 30247 ("Feb. 16 Order"), AT&T Communications of the Mountain States, Inc. ("AT&T") addresses the Commission's questions regarding the applicable statute of limitations and the accrual date for AT&T's claim. As explained below, the gravamen of AT&T's claim is breach of contract and that claim is therefore governed by Idaho's state statute of limitations for actions on a written contract, which is five years. Idaho Code § 5-216.

As the Commission already determined, the viability of AT&T's breach of contract claim turns on interpretation of the terms in the parties' agreement. The Commission further recognized the "substantial body of cases" in which courts have held that "state law governs the interpretation and enforcement of interconnection agreements." As those courts have explained, interconnection agreement disputes are governed by state law even where the terms at issue track or incorporate federal law. *A fortiori*, state law should control where, as here, the contract terms at issue deviate in some respect from federal law and in other respects impose duties that are not addressed at all by federal law. The meaning and enforcement of those disputed terms can only be determined under the state law of contracts.

Relying on the "substantial body of cases" developed in the federal courts of appeals, the Commission previously concluded that "state law governs this dispute." As a matter of both law and logic, a state statute of limitations should apply to claims that are governed by state law – particularly where, as here, the *sole* claim in the case is a state contract claim. The Supreme Court has long held that the time for bringing state law actions is dictated by state law. Other courts likewise have consistently applied state statutes of limitations to state law claims. And just recently, in a nearly identical case, the Washington Commission saw "no reason why the state statute of limitations would not likewise be the controlling authority" after having determined that AT&T's breach of contract claim raised "fundamental issues of state, not federal, law."[1]

Consistent with those decisions, AT&T respectfully urges this Commission to apply the five-year Idaho statute of limitations for contract actions in this case. Under that limitations period, AT&T's claims, filed on August 21, 2006, are timely under any conceivable accrual date, including Qwest's proposed accrual date of March 2002.

ARGUMENT

I. BECAUSE THE GRAVAMEN OF AT&T'S CLAIM IS BREACH OF CONTRACT, THE CLAIM IS GOVERNED BY IDAHO'S FIVE-YEAR STATUTE OF LIMITATIONS.

The February 16 Order notes that the "gravamen" of a complaint determines the applicable statue of limitations in Idaho. The Order therefore asks the parties to address the gravamen of AT&T's complaint here. The question is whether AT&T's claim and right to relief are actually based on a breach of contract or whether AT&T is really suing over something else. As demonstrated below, the gravamen of the complaint is breach of contract, a claim that undeniably is governed by state law in every respect.

A. AT&T's Claim Turns on the Interpretation of the Terms of its Interconnection Agreement with Qwest.

AT&T's complaint consists of a single count alleging that Qwest has breached the parties' interconnection agreement. Specifically, AT&T contends that the interconnection agreement with Qwest required Qwest to make available to AT&T the same pricing discounts that it secretly provided to Eschelon and McLeod from 2000-2002, and that Qwest breached that requirement. Thus, the validity of AT&T's claim turns on the terms of the parties' agreement,

[1] Order 06, *AT&T Comms. of the Pacific Northwest, Inc. v. Qwest Corp.*, Docket UT-051682 (Wash. Utils. And Transp. Comm'n, Dec. 21, 2006) ("Washington Order") (attached as Ex. 1).

for the ultimate questions are whether the agreement included such a requirement and whether Qwest failed to meet it.

As the Commission recognized, this claim does not assert a violation of the federal Telecommunications Act of 1996 ("1996 Act" or "federal Act"). Rather, it will require the Commission to "interpret [the contract's] provisions" and "explore how to enforce the provisions." Feb. 16 Order at 4. As the Commission concluded, that means that "*state law governs this dispute*." *Id.* (emphasis added). That conclusion undercuts the central premise of Qwest's arguments for dismissal of AT&T's complaint. According to Qwest, the contract terms at issue here simply implement the 1996 Act, so any dispute over such terms is, in effect, a suit under the federal Act itself. That argument fails on both the law and the facts.

B. A "Substantial Body" of Case Law Holds that State Law Governs the Interpretation and Enforcement of Interconnection Agreements, Even Where the Pertinent Terms Track or Incorporate Federal Law.

1. Consistent with this Commission's assessment, the federal courts of appeals almost uniformly have held that "state law governs the question of interpretation and enforcement of interconnection agreements." Feb. 16 Order at 4. And the "substantial body of cases" to which the Commission alluded (*id.*) in which courts have upheld that rule involved contract terms that merely track or incorporate the 1996 Act.

- The Seventh Circuit, for example, held that the interpretation and enforcement of contract provisions that "precisely track the [1996] Act" (by stating that reciprocal compensation will be provided "as described in the Act") presented only a question of state law for a state forum, not a federal claim under the 1996 Act. *Illinois Bell Tel. Co. v. WorldCom Technologies, Inc.*, 179 F.3d 566, 573-74 (7th Cir. 1999).

- Similarly even where "the language in the [interconnection] agreements parallel[ed] the reciprocal compensation requirements in section 251(b)(5) of the Act," the Fifth Circuit "decline[d] * * * to determine the contractual issues as a facet of federal law," and instead held that "the agreements themselves and state law principles govern the questions of interpretation of the contracts and enforcement of their provisions." *Southwestern Bell v. Pub. Util. Comm'n*, 208 F.3d 475, 484-85 (5th Cir. 2000). The court added that "[a]lthough we may refer to FCC pronouncements as part of our consideration of what is usage or custom in the telecommunications industry, *we do so only as the contracts and state law might require*." *Id.* at 485 n.15 (emphasis added).

- In a Tenth Circuit case, the agreement at issue likewise 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 court 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." *Southwestern Bell Tel. Co. v. Brooks Fiber Communications of Oklahoma, Inc.*, 235 F.3d 493, 495, 499 (10th Cir. 2000).

- The Eighth Circuit recently addressed an agreement that was "identical" to the agreement in *Brooks Fiber*, reaching precisely the same conclusion as to the nature of the claim for interpretation and enforcement of the agreement: notwithstanding the "large role" played by federal law in a dispute over the meaning of terms in an interconnection agreement, the interpretation of the interconnection agreement "is a state law issue." *Connect Communications Co. v. Southwestern Bell Tel. Co.*, 467 F.3d 703, 708, 713 (8th Cir. 2006).

- And the Washington Commission has reached the same conclusion. Washington Order, ¶¶ 62, 66 ("although the application of federal law may have a role in resolving the issues," the 1996 Act does not "transform[] clearly state law issues relating to negotiated provisions of interconnection agreements into federal issues").

Those decisions are consistent with decisions in other contexts holding that state claims do not become federal claims merely because federal law is lurking in the background or may play some role in the analysis. In *Shoshone Mining Co. v. Rutter*, 177 U.S. 505, 509 (1900), for example, the Supreme Court of the United States 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." 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; see also *Mabe v. G.C. Servs. Ltd. P'ship,* 32 F.3d 86, 88 n.2 (4th Cir. 1994) ("A private contract cannot create federal question jurisdiction simply by reciting a federal statutory standard").

2. The overwhelming consensus of the courts that a claim for breach of an interconnection agreement is governed by state law also comports with the settled law that once an interconnection agreement is approved, it is the agreement alone – not the 1996 Act – that governs the parties' relationship. In the 1996 Act, Congress chose "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). Among other things, parties are free to negotiate terms of interconnection agreements "without regard to" the rest of the 1996 Act. 47 U.S.C. § 252(a)(1). Thus, as the courts consistently have recognized, state commission-approved interconnection agreements are the exclusive and binding statements of the rights and obligations of the parties to such agreements. See *Law Offices of Curtis V. Trinko LLP v. Bell Atlantic Corp.*, 305 F.3d 89, 104 (2d Cir. 2002), *rev'd in part on other grounds sub. nom. Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398 (2004). Because the parties to an interconnection agreement have no independent rights under the 1996 Act vis-à-vis each other, disputes over the interpretation and enforcement of interconnection agreements *can only* raise state law questions: "Once the ILEC 'fulfill[s] the duties' enumerated in subsection (b) and (c) by entering into an interconnection agreement in accordance with section 252, 47 U.S.C. § 251(c)(1), *it is then regulated directly by the interconnection agreement.*" *Id.* (emphasis added); *Michigan Bell Tel. Co. v. MCImetro Access Transmission Servs., Inc.*, 323 F.3d 348, 359 (6th Cir. 2003) (explaining that "once an

agreement is approved," parties are "governed by the interconnection agreement" rather than the general duties in the 1996 Act).

Consequently, a carrier with an approved interconnection agreement may not sue for a stand-alone violation of the 1996 Act. *Trinko*, 305 F.3d at 104 (holding that "conduct that breaches" an interconnection agreement cannot "also be considered a violation of [Sections 251(b) and (c)]" of the 1996 Act); January 24, 2007 Oral Argument Transcript at 14-16 ("[O]nce there's an interconnection agreement, the Act has no stand-alone significance. The Act itself demands that conclusion because that's the only way interconnection agreements can be binding and that's the only way parties could have a meaningful right to negotiate without regard to the requirements of the Act."). Any other result would undermine the entire interconnection agreement regime: "If ILECs were governed by the abstract duties described in section 251 despite the existence of a particular interconnection agreement that was approved by the state commission after an extensive process of negotiation and arbitration, they would have diminished incentive to enter into such agreements," for a carrier could "end-run" the process and circumvent the "binding" agreement "by bringing a lawsuit based on the generic language of section 251." *Trinko*, 305 F.3d at 104-05 (emphasis added).

3. The federal case law also is consistent with Idaho law. As the February 16 Order notes, Idaho law looks to the gravamen of a complaint, rather than its form alone, to determine the applicable statute of limitations. Feb. 16 Order at 4, citing *Hayden Lake Fire Protection District v. Alcorn*, 111 P.3d 73, 89 (Idaho 2005). In *Hayden Lake*, for example, the court applied a limitations period for statutory claims even though the plaintiff had, in form, alleged only a breach of contract. Qwest may contend that this supports its argument that AT&T's claim is actually federal, but that is not correct.

Hayden Lake involved a suit by a town's Fire Protection District against the Idaho State Insurance Fund and the State of Idaho. The plaintiff had a workers' compensation insurance contract with the State Insurance Fund, and the Idaho Supreme Court has previously held that the statues governing the State Insurance Fund were automatically "incorporated into its contracts with its policyholders" as a matter of law. 111 P.2d at 89. In other words, the terms of the contract were mandated and imposed by state law and were not the product of voluntary, private negotiations. Not surprisingly, then, when the Fire Protection District asserted that the State had breached this contract by actions that violated the relevant state statutes, the court found that the gravamen of the claim was actually "based on alleged statutory violations," since the claim "depend[ed] for its existence on the enactment of the statute, and not on the contract of the parties." *Id.* (internal quotation marks omitted).

The situation here is entirely different. The contract provisions at issue here (discussed in more detail below) are ones that the parties voluntarily negotiated and agreed to put in their contract. The 1996 Act did not require these terms to be included, for it allows interconnection agreement to be reached and approved "without regard to" other provisions of the Act. 47 U.S.C. § 252(a). When a provision in a contract exists because the parties *agreed* to it via private negotiation, rather than because it was imposed as a matter of law, a violation of that provision is a breach of contract – even if it merely tracks or incorporates statutory provisions. An action for breach of a term that was agreed to is, at its core, a breach of contract claim, and therefore governed by the limitations period for contract actions.

C. The Rule that State Contract Law Governs Interpretation of Interconnection Agreements Applies, *A Fortiori*, Where the Terms at Issue Deviate From or Are Not Addressed by Federal Law.

As the foregoing discussion demonstrates, in almost every federal circuit in which the issue has been litigated, AT&T's claim would be governed by state law, and its gravamen would be breach of contract, even if the interconnection agreement merely incorporated or tracked the 1996 Act. The facts of this case present an even stronger case for application of state law, including the state law statute of limitations for state law contract actions, for the key contract provisions at issue include obligations that deviate from the 1996 Act or address matters not covered by the 1996 Act, the interpretation of which has nothing to do with federal law.

As indicated in the amended complaint, AT&T alleges that Qwest violated three provisions of the parties' interconnection agreement – section 2.1, section 24.1, and section B of the "Scope of Agreement" portion. Section 2.1 provides that:

> Until such time as there is a final court determination interpreting Section 252(i) of the Act, [Qwest] shall make available to AT&T the terms and conditions of any other agreement for interconnection, unbundled network elements and resale services approved by the Commission under Section 252 of the Act, in that agreement[']s entirety.

That section imposes duties that are materially different from the FCC's interpretation of Section 252(i) at the time the agreement was entered (July 27, 1998). At that time the FCC rule interpreting Section 252(i) of the 1996 Act required incumbent LECs to make any individual terms of an interconnection agreement available to all CLECs (as long as they took all related terms). 47 C.F.R. § 51.809 (1996) (superseded). This was known as the "pick and choose" rule. Because that rule was being challenged in court at the time, however, the parties agreed in section 2.1 that Qwest only had to make interconnection agreements with other CLECs available to AT&T "in that agreement[']s entirety." This is known as the "all or nothing" approach, which at that point in time the FCC had rejected.[2] The FCC's "pick and choose" rule was upheld by the Supreme Court in *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 395-96 (1999), and remained in effect until replaced by the FCC in 2004. Qwest and AT&T, however, never amended their agreement to reflect the pick and choose rule, meaning that throughout the damages period at issue here from 2000-2002, Section 2.1 provided AT&T with fewer rights than if the parties had merely tracked federal law.

Section 2.1 also differs from Section 252(i) of the 1996 Act and the FCC rule at the time because it requires Qwest to make available terms from other agreements regarding "resale services," a term that does not appear in Section 252(i). The question here – that is, the gravamen of AT&T's complaint – is whether Qwest violated the specific negotiated terms of section 2.1, not whether it violated Section 252(i) of the 1996 Act.

In resolving that question, the Commission will have to interpret section 2.1. For example: (i) What did the parties intend to encompass within the term "interconnection"? (ii) What did the parties intend to encompass within the term "resale services"? Did they intend to include intrastate switched access, which Idaho Code § 62-609 defines to be a "resale service"? (iii) By use of the phrase "in that agreement[']s entirety" did the parties intend that to mean that Qwest was required to make available and AT&T was required to accept each and every term and provision in the other agreement, including terms and provisions unrelated to "interconnection, unbundled network elements and resale services"? These interpretation questions will require the application of state law.

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[2] *First Report and Order*, 11 FCC Rcd. 15499, ¶ 1310 (1996) (subsequent history omitted). The FCC has since adopted the all-or-nothing approach in a new rule, but the new rule was not adopted until 2004, well after the conduct at issue here and creation of the interconnection agreement at issue here. *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 19 FCC Rcd. 13494 (2004).

AT&T also contends that Qwest breached section 24.1 of the parties' agreement. Section 24.1 provides that "[e]ach Party shall comply with all applicable federal, state, and local laws, rules and regulations applicable to its performance under this Agreement." Notably, the requirement to comply with state and local laws is not one imposed by Section 252(i) or any other provisions of the 1996 Act. The interpretation issues that may have to be resolved in the case of this provision include: (i) What did the parties intend in terms of this provision's scope and meaning? For example, is Idaho Code § 62-609, which prohibits rate discrimination in the provision of intrastate access services, "applicable" to Qwest's "performance" under the interconnection agreement? Does the answer to that depend on whether the term "resale services" in section 2.1 includes such services? (ii) To what extent does the provision's scope and meaning depend on the scope of the interconnection agreements which, pursuant to section 2.1, must be made available "in [their] entirety"? For example, if an interconnection agreement with another carrier covers and includes intrastate access services, did the parties intend that fact to make compliance with Idaho Code § 62-609 "applicable" to Qwest's "performance under this Agreement"?

AT&T further contends that Qwest breached its obligations under section B of the "Scope of Agreement" portion of their contract, which provides that "[i]n the performance of their obligations under this Agreement, the Parties shall act in good faith and consistently with the intent of the Act." Once again, this section includes requirements not derived from the 1996 Act. The Act requires parties to negotiate in good faith, but not specifically to perform in good faith. Thus, the interpretation questions that must be resolved here include: What did the parties intend to be the standard by which the Commission or court is to determine whether or not an action complies with the obligation to "act in good faith"? Is it the common law parameters that have been established by state courts in delineating and enforcing the "implied covenant of good faith and fair dealing"? Did Qwest violate its duty of good faith by frustrating the purpose of Section 2.1 of the agreement when it failed to have the Eschelon and McLeod agreements approved by the Commission? *See Jenkins v. Boise Cascade Corp.*, 108 P.3d 380, 389 (Idaho 2005) ("Idaho law recognizes a cause of action for breach of an implied covenant of good faith and fair dealing."); *Hayden Lake Fire Protection District*, 111 P.2d at 84.

* * *

The foregoing demonstrates that AT&T's complaint raises quintessential issues of *state* contract law. Thus, the gravamen of the complaint is a state law breach of contract claim – meaning of course that the applicable statute of limitations is the five-year period prescribed by Idaho Code § 5-216.[3]

II. AT&T'S CLAIM ACCRUED WITHIN THE LIMITATIONS PERIOD.

As just discussed, Idaho's five-year statute of limitations applies to AT&T's claim. Accordingly, AT&T's claim, filed in August 2006, is timely even if one were to accept Qwest's proposed accrual date of March 2002. Because that is so, the Commission need not even

[3] AT&T respectfully submits that, under the overwhelming weight of relevant authority, it is abundantly clear that the Commission should apply the state substantive law of contracts and the state statute of limitations for contract actions to AT&T's claim in this case. But if there were doubt as to the proper characterization of AT&T's claim or the applicable limitations period, the general rule is that the Commission (i) follow the longer limitations period rather than the shorter, and (ii) follow a specifically prescribed limitations period rather than a default period. See *Gillette Dairy, Inc. v. Mallard Mfg. Corp.*, 707 F.2d 351, 353 (8th Cir. 1983) ("if two conflicting statutes of limitations are equally applicable, the longer period should govern"); *Browning v. Clinton*, 292 F.3d 235, 244 (D.C. Cir. 2002); *Fernandes v. Portwine*, 56 P.3d 1, 6 (Alaska 2002) ("the rule of construction provide[s] that where two statutes might reasonably apply to a claim, the statute that provides for the longer period is to be preferred"); *Thiel v. Taurus Drilling Ltd.*, 710 P.2d 33, 40 (Mont. 1985) (same). Here, the Idaho limitations period for actions on a written contract is both (i) longer than either proposed federal limitations period and (ii) prescribed for breach of contract actions specifically, whereas the two- and four-year federal periods are at best fallbacks that are not specifically linked to claims for violation of the 1996 Act. Accordingly, under the general principles discussed above, if the Commission were to resort to a "tiebreaker" in resolving the questions that it has posed, it is the state limitations period that should apply.

determine a precise accrual date, for it is enough to know that the claim is timely under any approach and there is no need to address and resolve unnecessary issues.

If, however, the Commission were to find that the five-year state statute of limitations does not apply, the only possible limitations period under federal law is the four-year period under 28 U.S.C. § 1658. To the extent that AT&T's contract claim could be said to arise under federal law, it would arise under the 1996 Act, not the 1934 Act (of which Section 415 and its two-year limitations period are part). It is the 1996 Act that created interconnection agreements and established the states' role in approving and overseeing them, and it is the 1996 Act that includes the "most-favored nation" provision in Section 252(i). Interconnection agreements as we know them today did not previously exist. Yet, while the 1996 Act established a number of specific deadlines for arbitration and approval of interconnection agreements, it says nothing about any limitations period for claims arising under the 1996 Act, much less for claims of a breach of an interconnection agreement. Federal law (28 U.S.C. § 1658(a)) provides a catch-all limitations period for just such a situation: "Except as otherwise provided by law, a civil action arising under an Act of Congress enacted after the date of the enactment of this section [in 1990] may not be commenced later than 4 years after the cause of action accrues."[4] Recognizing that the 1996 Act was enacted after 1990 and contains no limitations period of its own, several courts have held that the four-year catch-all period applies to all actions involving the 1996 Act.[5]

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[4] *Verizon New England, Inc. v. New Hampshire Public Utils. Comm'n*, 2005 WL 1984452, *5 n.5 (D.N.H. 2005), citing *Pepepscot Indus. Park, Inc. v. Maine Cent. R.R. Co.*, 215 F.3d 195, 203 n.5 (1st Cir. 2000) ("Absent the existence of an explicit limitations period, civil claims that arise under federal statutes enacted after December 1, 1990 are subject to 28 U.S.C. § 1658(a) which imposes a four-year limitations period on such actions").

[5] *Id.*; *City of Rancho Palos Verdes v. Abrams*, 544 U.S. 113, 124 n.5 (2005) ("Since the claim here rests upon violation of the post-1990 TCA [the 1996 Act], § 1658 would seem to apply."); *e.spire Comms. Co., inc. v. Baca*, 269 F. Supp. 2d 1310, 1320 (D.N.M. 2003) ("Because the Telecommunications Act was enacted after December 1, 1990, the four-year statute of limitations applies to the claims under the federal

Moreover, the Washington Commission also found that AT&T's breach of contract claim against Qwest, if it were treated as a federal claim, could only be subject to this four-year statute of limitations. Washington Order ¶¶ 68-70.[6]

Assuming, purely *arguendo*, that the federal four-year period applied, the Commission would next have to determine whether AT&T's claim accrued within four years of filing its complaint, *i.e.*, before or after August 21, 2002. To conduct this analysis the Commission would need only determine whether AT&T became aware of its potential claims regarding either the Eschelon or McLeod agreement within four years before filing its complaint. It did.

The discounts that Qwest provided to McLeod (but not AT&T) were the product of a secret oral agreement between Qwest and McLeod in October 2000. No one besides Qwest and McLeod had any inkling that this contract existed until at least June of 2002, when a retired McLeod employee mentioned the arrangement in a Minnesota proceeding. See Findings of Fact, Conclusions, Recommendation and Memorandum, *In the matter of the Complaint of the Minnesota Department of Commerce Against Qwest Corporation Regarding Unfiled Agreements*, 2002 WL 32129264, at ¶ 317 (ALJ, Minn. Pub. Utils. Comm'n, Sept, 20, 2002) ("Minnesota ALJ Order"). Even then, however, AT&T would have had no ability to bring a claim regarding that oral agreement in Idaho. First, many details of the oral agreement were kept confidential in the Minnesota proceeding, subject to a confidentiality agreement, and thus were

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Telecommunications Act."); *Verizon Maryland Inc. v. RCN Telecom Servs., Inc.*, 232 F. Supp. 2d 539, 552-54 (D. Md. 2002); *Bell Atlantic-Pennsylvania, Inc. v. Pennsylvania Pub. Utils. Comm'n*, 107 F. Supp. 2d 653, 668 (E.D. Pa. 2000); *MCI Telecomms. Corp. v. Illinois Bell Tel. Co.*, 1998 WL 156674, *3-*5 (N.D. Ill. 1998). None of these cases has ever even considered Section 415 as a potential limitations period for claims arising under the 1996 Act.

[6] Qwest cannot avoid the four-year limitations period of § 1658 by arguing that the 1996 Act is merely an amendment to the 1934 Act. Courts have already analyzed and rejected that argument, pointing out that the 1996 Act radically restructured and significantly added to telecommunications law, including by creating the entire interconnection-agreement regime in 47 U.S.C. §§ 251-52. *Verizon Maryland*, 232 F. Supp. 2d at 553-54; *Illinois Bell*, 1998 WL 156674, at *4-5.

not known to the AT&T entity in Idaho and could not have been used for a case in Idaho. Among other things, the public parts of the testimony in Minnesota did not demonstrate whether the oral agreement also applied in other states, such as Idaho. Second, when Qwest was purporting to "come clean" and file previously secret interconnection agreements with various state commissions in 2002, it never included anything regarding the McLeod oral discount agreement. Third, even during the Minnesota proceeding, Qwest continued to deny, under oath, that the oral agreement with McLeod even existed. Those denials continued at least into August of 2002, when Qwest submitted sworn testimony in Minnesota that no such contract existed. Qwest Corporation's Written Rebuttal Testimony of Audrey McKenney at 6-17, *In the Matter of the Complaint of the Minnesota Department of Commerce Against Qwest Corporation Regarding Unfiled Agreements* (attached as Ex. 2). Given that the agreement was oral, Qwest's denials created substantial uncertainty and a "he said/she said" situation that AT&T could not have resolved through any level of diligence. Accordingly, it was not until September 20, 2002, when the Administrative Law Judge in the Minnesota case rejected Qwest's denials and found that the oral agreement with McLeod did in fact exist, that AT&T could have proceeded with claims regarding that contract in other states. Minnesota ALJ Order, ¶¶ 321, 336. Even under a conservative view, AT&T's cause of action related to the McLeod oral agreement could have accrued no earlier than September 20, 2002. Because AT&T filed its complaint here in August 2002, its action with respect to the McLeod agreement is timely even if one applied the federal four-year limitations period under 28 U.S.C. § 1658.

CONCLUSION

For the reasons stated above and in AT&T's prior briefs, AT&T respectfully submits that the Commission should find that AT&T's complaint is timely and allow this case to proceed.

Dated this 9th day of March, 2007

AT&T COMMUNICATIONS OF THE MOUNTAIN STATES, INC.

By Molly O'Leary

Molly O'Leary
Richardson & O'Leary, PLLC
Attorneys for AT&T COMMUNICATIONS OF THE MOUNTAIN STATES, INC.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 9th day of March, 2007 a true and correct copy of the within and foregoing AT&T'S RESPONSE TO COMMISSION ORDER 30247 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	X_ 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 X U.S. Mail, postage pre-paid __ Facsimile X_ Electronic Mail
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Molly O'Leary

Molly O'Leary

Exhibit 1

[Service Date December 22, 2006]

BEFORE THE WASHINGTON STATE UTILITIES AND TRANSPORTATION COMMISSION

AT&T COMMUNICATIONS OF THE PACIFIC NORTHWEST, INC., TCG SEATTLE, AND TCG OREGON; AND TIME WARNER TELECOM OF WASHINGTON, LLC,	)	DOCKET UT-051682
	)	ORDER 06
Complainants,	)	
v.	)	ORDER AFFIRMING INTERLOCUTORY ORDER; ALLOWING AMENDMENT OF COMPLAINT; DENYING MOTION FOR SUMMARY DETERMINATION
QWEST CORPORATION,	)	
Respondent.	)	
. . . .	)	

1 ***Synopsis:*** *This order reaffirms an interlocutory order allowing a complaint to go forward. It accepts Qwest's and AT&T's*[1] *requested review of the interlocutory order, rejects the parties' arguments opposing the order, and allows amendment of the complaint to allege breach of complainants' contracts with Qwest as the basis of their cause of action.*

I. INTRODUCTION

2 **Nature of Proceeding.** This docket involves a complaint filed by competitive local exchange carriers AT&T Communications of the Pacific Northwest, Inc., TCG Seattle and TCG Oregon (collectively, AT&T) and Time Warner Telecom of Washington, LLC (Time Warner or TWTC) against Qwest Corporation (Qwest). The complaint alleges that Qwest charged the complainants more for certain facilities and services than Qwest charged other competitive local exchange carriers (CLECs) under unfiled agreements with them, that this practice violated federal and state laws and that complainants are entitled to compensation for the difference between the actual charges and the lower, unfiled rates.

3 **Procedural history.** Qwest moved for summary determination and dismissal of the complaint under WAC 480-07-380(1) and (2),[2] arguing that the pertinent statute of

[1]Time Warner Telecom of Washington is not participating in the motion to amend the complaint, but otherwise remains a party. For convenience, as AT&T is participating in all arguments, we will use the term AT&T to include all of the allied parties that are involved in the issue under discussion.

[2] The initial order treated the motion as one for summary determination, rather than dismissal. The motion does not seek determination of any substantive issues in the complaint, but instead seeks dismissal based on

limitations would operate to bar the complaint. Complainants opposed the motion. The initial order proposed to grant the motion and dismiss the complaint, finding that the complaint accrued on June 8, 2004, and that the six-month limitation period of RCW 80.04.240 applied to bar the complaint.

4 Qwest and AT&T each challenged portions of the initial order. On review, we entered an interlocutory order modifying the initial order. Our order found that a complaint for breach of contract accrued on July 15, 2002, but that a six-year statute of limitations (RCW 4.16.040(1)) applies, and the action for breach survives. The order authorized AT&T to modify the complaint to allege breach of contract.

5 Both Qwest and AT&T now challenge the interlocutory order, and each answers in support of the order against the other's challenge. AT&T and TCG seek to modify the complaint, as contemplated in the interlocutory order. Qwest again moves for summary determination and dismissal of the complaint.

6 **Appearances.** Gregory J. Kopta, attorney, Seattle, Washington, represents complainants AT&T and Time Warner. Lisa A. Anderl and Adam Sherr, attorneys, Seattle, Washington, represent Qwest.

7 **Decision on review.** We deny the challenges to the interlocutory order, finding it legally sound; we grant AT&T's request to modify the complaint; and we deny Qwest's motion for summary determination and dismissal.

II. BACKGROUND[3]

8 The original complaint seeks reimbursement for alleged Qwest overcharges. The parties agree in most respects – for purposes of this motion – about the relevant facts leading to the complaint, but disagree about the interpretation of some of those facts.

9 Under section 251 of the Telecommunications Act of 1996,[4] competitive local exchange carriers ("CLECs," such as the complainants) may enter interconnection agreements with incumbent local exchange companies ("ILECs" such as the respondent) to receive services from the incumbents that enable them to serve their own customers. Other competitive carriers in similar situations may "opt into" terms of filed, approved agreements.

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complainants' asserted procedural failure to file within the statutory time frame. The intention of the motion is clear, irrespective of the label applied to it.

[3] The initial and interlocutory orders contain a more comprehensive explication of relevant facts. We here recite only the necessary information for understanding of this order, in context.

[4] The Telecommunications Act of 1996 is referred to in this order, for ease in reference, as "the Telecom Act."

10 Qwest failed to file with the Commission certain agreements between Qwest and Eschelon Telecom (Eschelon) and between Qwest and McLeodUSA Telecommunications Services, Inc. (McLeodUSA). Among other terms, these agreements granted the contracting CLECs a 10% discount on certain services. These agreements were not initially filed and were not disclosed to other companies who might have received similar services under agreements entitling them to the same rate.

11 In March, 2002, Minnesota regulators filed an administrative complaint against Qwest regarding unfiled agreements in that state.[5] In May, 2002, AT&T brought the Minnesota proceeding to this Commission's attention in Qwest's then-pending request to provide long distance service under 47 U.S.C. 271 (271 proceeding).[6] The Commission declined to consider the unfiled agreements allegations in the 271 proceeding, both in the final order and in an order entered July 15, 2002, deferring the issue to some indefinite later time.[7]

12 Qwest "willfully and intentionally violated" both state and federal law "by not filing, in a timely manner, its transactions with Eschelon and McLeodUSA relating to rates and discounts off of rates for intrastate wholesale services."[8] Qwest accepted responsibility for the omission and paid a penalty of $7.8 million for the violations.[9]

13 AT&T and Time Warner filed this complaint on November 4, 2005. Qwest moved for summary determination and dismissal, contending that the complaint is barred by the pertinent statute of limitations.

14 The initial order determined that complainants' cause of action accrued on June 8, 2004, when the Commission Staff served an amended Commission complaint in the unfiled Washington interconnection agreements proceeding. The initial order also found applicable the six-month limitation period in RCW 80.04.220. Since the complaint was not filed within that period, the initial order concluded that Qwest's motion should be granted.

15 Both parties challenged the initial order. On review, the Commission ruled that the initial order correctly found the six-month statute to apply to the cause of action pleaded, and affirmed the initial order's use of the "discovery rule" to find the accrual date.

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[5] *In the Matter of the Complaint of the Minnesota Department of Commerce Against Qwest Corporation Regarding Unfiled Agreements*, Docket No. P-421/C-02-197.
[6] *In re Investigation into Qwest's Compliance with Section 271(C)*, Docket UT-003022. This proceeding commenced on March 30, 2000.
[7] Docket UT-003022, 40th Supp. Order, ¶ 7 (July 15, 2002).
[8] *WUTC v. Advanced Telecom Group, et al.*, Docket No. UT-033011, Order No. 21 (Feb. 28, 2005).
[9] *Id.*

16 The Commission disagreed with the initial order as to the point of accrual. The Commission, however, found that the complainants' inquiry accrued on entry of the Commission order in July, 2002 that declined to pursue the issue of hidden agreements in the 271 docket. At that point, the order noted, no definite agency action was planned, the complainants were aware of the existence of the Minnesota agreements and the possibility of secret Washington agreements (a claim that they brought to the Commission), and are charged with knowledge that a statute of limitations as short as six months could be running.

17 The order on review reversed the initial order's decision that Washington's six-year statute would not apply to a claim for breach of the interconnection agreement. We found that the contract theory was viable, that the accrual date fell within the state's six-year statute of limitations, for actions on written contracts that the complainants could amend the complaint and that the matter could proceed.

18 Both parties seek interlocutory review. Qwest challenges consideration and acceptance of the breach of contract cause of action; AT&T challenges the order's acceptance of the proposed accrual date. AT&T also petitions to amend the complaint to allege breach of contract under state law as a basis for the action, and Qwest again moves for summary determination.

II. DISCUSSION AND ANALYSIS

A. When did complainants' cause of action accrue?

19 The responsibility to use reasonable diligence to discover facts leading to injury is called the "discovery rule." The parties agree to application of the "discovery rule" to determine the accrual date of AT&T's cause of action. A person who has notice of facts sufficient to prompt a person of reasonable prudence to inquire is deemed to have notice of all the facts that a reasonable inquiry would disclose. The parties do disagree about when to find accrual on the facts presented.

20 The interlocutory order determined that the cause of action accrued on July 15, 2002. That was when the Commission entered the 40th Supplemental Order in the 271 docket, UT-003022, reaffirming a decision that the Commission would not explore the issue of unfiled agreements at all in that docket. The order did not establish a docket or process to follow up on the issues, and it committed only to the imposition of penalties as warranted.[10]

[10] "If after considering a complaint by a third-party or upon the Commission's own motion concerning these agreements, the Commission determines that Qwest has violated federal or state law, then the Commission can and will impose appropriate penalties." *Paragraph 8, 40th Supplemental Order, UT-003022.*

1. Did the Commission err in making any factual determination in an order on summary determination?

21 AT&T argues that the interlocutory order was wrong to make any factual determinations about accrual, because the initial and interlocutory orders were styled as orders on summary determination. It argues that it is improper to resolve factual matters in such a proceeding. It points out that in the order the Commission resolved the disagreed fact, date of accrual.[11] Qwest responds that the order correctly found the proper accrual date.

22 We think that AT&T too restrictively views the administrative process. It is true that the parties, the administrative law judge (ALJ) and the Commission's order used the term "summary determination," although WAC 480-07-380[12] states that such a proceeding is characterized by a lack of factual disputes. The name applied to a process should not exclude a reasonable determination of matters offered by the parties for resolution, as it does not affect the parties' right to a considered decision on matters the parties brought forward.[13]

23 This is particularly true in an administrative hearing process where the "trier of fact" and "decider of law" are one and the same and sufficient evidence is already in the record. In the context of this case, a further fact-finding hearing is unnecessary and inefficient.

24 Moreover, AT&T and Qwest each presented factual assertions inconsistent from the assertions of the other, and all parties asked both the administrative law judge and the Commission to resolve the disputed facts. The result is a waiver of any error associated with labeling the motion as one for summary determination.

25 We find AT&T's contention without merit.

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[11] *Inter alia,* whether a plaintiff exercised reasonable diligence to discover a cause of action is a question of fact (*Virgil v. Spokane County*, 42 Wn.2d 796, 714 P.2d 692 (1986)).

[12] WAC 480-07-380(2) **Motion for summary determination.** (a) *General.* A party may move for summary determination of one or more issues if the pleadings filed in the proceeding, together with any properly admissible evidentiary support (e.g., affidavits, fact stipulations, matters of which official notice may be taken), show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. * * *.
Compare, WAC 480-07-380(1), regarding motions for dismissal, which directs that the matter be considered as summary determination if a party presents factual material in support of the motion.

[13] *See,* WAC 480-07-395(4), noting the Commission's policy of liberal construction to disregard errors not affecting the substantial rights of the parties.

2. Was it wrong to make a factual determination on an assertedly-inadequate record?

26 AT&T also contends that the Commission erred in making factual determinations on an inadequate record. AT&T argues that it had no opportunity to present witnesses or to cross-examine others' witnesses on the topic of accrual.

27 Each party had the opportunity to present any written information and could have requested the opportunity to make an oral presentation or reserve the issue until trial and call witnesses. The parties could have objected to the presentations of the other party or to the process implemented by the administrative law judge, but did not. Instead, both parties repeatedly asked her for a decision on contested matters and affirmatively agreed with the process being used. Although they disagreed with her decision, they made no objection to process at the review level. They obtained a decision on the issues they raised, based on the paper record that was totally under their control, either by presentation or by right to object. Preparing and accepting the process, the parties waived objections to findings of fact or mixed findings of fact and law that were inherent in their presentations. We find this contention also without merit.

3. Is the accrual date immaterial and therefore inappropriate for resolution?

28 AT&T contends that because the final order finds applicable a statutory limitation period that includes the asserted accrual date, the accrual date thus becomes immaterial and should not be the subject of a finding or conclusion.

29 It bases its argument on RCW 34.05.461(3), which requires initial and final orders to explain the reasoning for resolving certain matters:

> (3) Initial and final orders shall include a statement of findings and conclusions, and the reasons and basis therefor, on all the **material** issues of fact, law, or discretion presented on the record, . . . *(Emphasis added.)*

30 AT&T's narrow view of materiality is inappropriate in application to administrative proceedings.

31 "Material" in this context may be defined as "both relevant and consequential,"[14] or "Of such a nature that knowledge of the item would affect a person's decision-making process; significant; essential."[15]

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[14] *American Heritage Dictionary of the English Language, Third Edition* (Houghton Mifflin Co., 1996, page 1109).

32 The parties argued strenuously before the administrative law judge and the Commission that the accrual date was material, by urging the adoption of their own proposal and the rejection of their opponent's proposal. The accrual date is material to determining whether a cause of action remains, under any determination of facts and law. That all proposed accrual dates occur within a six-year limitation period does not lessen need to resolve matters material to each party's case, nor does it lessen the legal need to determine that the actual accrual date occurred at a point within an appropriate limitation period.

33 Moreover, the parties remain in disagreement about factual and legal issues, and if the matter is appealed, the accrual date may become crucial to the final result. The statute requires a determination of the accrual date, which is relevant and consequential.

34 We reject this contention.

4. Is the accrual date in the interlocutory order correct?

35 Finally, AT&T challenges the selected accrual date as improperly early in the process. It argues that the initial order was correct, in that only after release in Washington in the Staff amendment to the Washington complaint were the documents in the public domain and only then did complainants know of their injury. Qwest responds that the accrual date is too late, and should be set at the earlier point when Minnesota regulators first complained against Qwest for failure to file the agreements.

36 We reject these claims.

37 The discovery rule is limited to claims in which the plaintiffs could not have immediately known of their injuries due to such factors as concealment by the defendant,[16] as Qwest admittedly did. One who has notice of facts sufficient to prompt a person of reasonable prudence to inquire is deemed to have notice of all the facts that a reasonable inquiry would disclose.[17]

38 We found that the correct date was July 15, 2002, when the Commission rejected urgings by AT&T and others to explore and resolve issues in the 271 docket that related to unfiled agreements. At that point, AT&T knew that the Minnesota agreements existed (including Minnesota counterparts of the relevant Washington agreements) and knew that there were similar agreements in Washington (as they had been filed in the 271 docket).

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[15] Garner, Bryan (Ed.), *Black's Law Dictionary, Seventh Edition,* (West Group, St. Paul, MN, 1999, page 991)
[16] *In re Estates of Hibbard*, 118 Wn.2d 737, 826 P.2d 690 (1992).
[17] *Enterprise Timber Inc. v. Washington Title Ins. Co.*, 79 Wn.2d 479, 457 P.2d 600 (1969).

39 AT&T's action in bringing the matter forward for a Commission investigation could be construed as reasonable under the circumstances, not occasioning accrual of its own cause.[18] However, when the Commission entered the order declining to explore the issue, a person of reasonable prudence would realize that a six-month limitations period for possible damages might apply and that steps should be taken immediately to pursue an individual remedy for possible financial harm. However, AT&T failed to act in 2002. That was not reasonable under the circumstances, for purposes of finding the accrual date.

40 AT&T also challenges as without factual basis the statement in our interlocutory order (assuming the contracts were in fact designated as confidential documents and that AT&T did not have actual or constructive knowledge of their contents) that refusal to release the relevant contracts at that point was not conceivable. That is not a factual determination but a legal determination.

41 Given the existence of the Minnesota and Washington contracts and the questions surrounding them, we believe it would be clear error in a properly pleaded docket for the Commission to refuse enforcement of an adequately worded data request for a copy of a properly described unfiled agreement. WAC 480-07-400(3) provides an entitlement (subject to exceptions not here relevant) in an adjudicative proceeding to:

> Information that is relevant to the issues in the adjudicative proceeding or that may lead to the production of information that is relevant.

42 Similarly, in the context of this dispute, we believe that a court would be very unlikely to bar the release of information, even if confidential under RCW 80.04.095, when withholding the information in question could lead to, rather than prevent commercial harm.

43 In summary, we reject the parties' contentions that the interlocutory order erred in determining that the cause of action accrued on July 15, 2002.

B. What limitation period applies?

44 The initial order ruled at paragraphs 32-36 (incorrectly, we found in the interlocutory order) that the six-year limitation statute for actions for breach of contract was inapplicable because AT&T offered no legal support for its contention that the Commission had jurisdiction to hear "a pure breach of contract action which would

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[18] As discovery is an affirmative defense, the party claiming the defense has the burden of proof. However, in a motion for summary determination, we resolve contested factual issues relating to the defense against the movant, Qwest.

fall outside the scope of an interconnection agreement enforcement action."[19] The interlocutory order determined that federal statutes relating to interconnection agreements preserve independent breach of contract actions under state law.

45 Qwest vociferously challenges the Commission's decision to reverse the initial order, alleging several procedural and legal grounds in support of its arguments.

1. Did the interlocutory order err in authorizing amendment of the complaint?

46 Qwest contends that the Commission prematurely authorized the amendment, inasmuch as AT&T had merely indicated a desire to offer the amendment in the future if the Commission found against it on claims otherwise argued against the initial order.

47 We reject the contention. The issue was adequately posed, the Commission has plenary authority to review an initial order,[20] the Commission corrected the initial order's rejection of this theory, AT&T's offer to amend was clear in its pleadings, and the parties have had ample opportunity to argue the point in response to the interlocutory order. There is no harm to Qwest and no error.

2. Does the Commission have jurisdiction under state law to hear a dispute involving breach of an interconnection agreement?

48 Qwest asserts that the Commission has no jurisdiction to hear and resolve disputes involving breach of contract. We disagree.

49 A Washington statute, RCW 80.36.610,[21] authorizes us to hear matters arising under the Telecom Act, including the enforcement of interconnection agreements. While the parties have not argued this matter extensively, we believe that this grant of jurisdiction, coupled with the federal preservation of state remedies, allows us to proceed.

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[19] Order No. 3, paragraph 36.

[20] RCW 34.05.464(4) reads in part, "The reviewing officer [here, the Commissioners] shall exercise all the decision-making power that the reviewing officer would have had to decide and enter the final order had the reviewing officer presided over the hearing, except to the extent that the issues subject to review are limited by a provision of law or by the reviewing officer upon notice to all the parties.

[21] RCW 80.36.610 provides, in part, "(1) The Commission is authorized to take actions, conduct proceedings, and enter orders as permitted or contemplated for a state commission under the federal telecommunications act of 1996, P.L. 104-104 (110 Stat. 56), . . ."

3. Does federal or state law determine principles relating to the establishment and enforcement of interconnection agreements governing intrastate services?

50 This is the principal issue presented for decision. We have found the parties' briefing to be helpful and have considered numerous federal, state and commission decisions. We recognize that the decisions reflect apparent and in some instances actual differences in their conclusions. We determine that the Telecom Act in particular, sections 251 and 252, delegates to states the primary jurisdiction to hear and resolve interconnection contract issues relating to intrastate services, according to state law.[22]

51 Qwest argues that the dispute arises under and must be resolved according to federal law, and therefore a two-year federal communications statute of limitations must apply. Qwest cites state commission decisions in Oregon and Minnesota, and federal judicial decisions that federal law applies to resolve disputes.

52 AT&T, on the other hand, argues that the decision is proper, that the enforcement of ICAs has been delegated to the states, and that federal Courts of Appeal decisions support its position that state law – and thus the state statute of limitations – controls on enforcement issues.

53 We have reviewed the cited decisions and find AT&T's analysis to be persuasive. The Act requires state commissions to apply state law when resolving disputes about interconnection agreements governing intrastate services.[23]

54 Section 252(a)(1) of the Act speaks clearly to the matters at issue in providing that parties may negotiate terms of their interconnection agreements on a voluntary basis "without regard" to the requirements set forth in section 251.[24]

55 AT&T argues that language in the complainants' agreements with Qwest give them the right to the lowest prices at which Qwest contracts with other carriers for substantially the same products and services as a matter of state contract law, irrespective of – that is, "without regard to" – whatever rights AT&T might have under federal law.

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[22] The parties tacitly acknowledged this in earlier phases of the proceeding when they were arguing whether RCW 80.04.220 or 80.04.230 would apply, not whether either was barred because of federal preemption. *See, Order 03* (initial order), paragraph 14, page 6.
[23] *See*, the careful analysis in Judge Niemeyer's dissenting opinion in *Verizon Maryland v. Global Naps*, 377 F.3d 355, 369ff (2004).
[24] *See, AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 371-73 (1999); *Verizon Maryland v. Pub. Serv. Comm'n of Md.*, 535 U.S. 635, 638 (2002)

56 Supporting AT&T's argument, the Ninth Circuit has held:

> [T]he [interconnection] Agreements themselves and state law principles govern the questions of interpretation of the contracts and enforcement of their provisions.

57 Other courts are in accord. [25]

58 Qwest argues strenuously to the contrary. It urges creatively that AT&T's cited authority is distinguishable because the FCC in its 271 docket order found Qwest's arguments "persuasive" that the specific contracts at issue here (but not those at issue in the judicial decisions we cite) did not present ongoing issues that would cause the agency to reject Qwest's bid to provide long distance service. We understand that order to mean that the underlying behavior – *i.e.*, hiding interconnection agreements – was no longer of a continuing nature, not that all issues relating to prior misdeeds were resolved as a matter of law. The FCC did not specifically address the question we face here – potential remedies for violations of interconnection agreements.

59 Qwest argues that the Commission cannot consider the violations because the agreements were filed more than four years ago, and the federal statute of limitations has expired. That appears to be a bootstrap argument that does not address the courts' determinations that state law applies. If state law applies, the federal statute of limitations would not apply and the distinction makes no difference.

60 Qwest disputes the relevance of the *Connect* decision, arguing that here it has had no obligation to have on file interconnection agreements that are terminated and not in existence. Qwest states that this is not a matter where state law is necessary to "interpret" an interconnection agreement. Again, we find no relevance in the argument. The relevant issue is whether or not state law applies to the resolution of interconnection contract disputes, and we believe that it does.

61 Qwest disputes application of the decision in *Connect* because the Oregon commission found that the CLECs' claims must be resolved under federal law. Here, however, we determine that the amended complaint presents an action on a contract for performance within the state, which is not a federal matter. [26] Qwest also urges

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[25] *Pacific Bell v. Pac-West Telecomm, Inc.*, 325 F.3d 1114, 1128 (9th Cir. 2003). *Connect Communications Corp. v. Southwestern Bell Tel. L.P.*, 467 F.3d 703, 2006 WL 3040611 (8th Cir. Oct. 27, 2006), *Southwestern Bell Tel. Co. v. Brooks Fiber Communications of Oklahoma, Inc.*, 235 F.3d 493, 495, 499 (10th Cir. 2000), *Southwestern Bell Tel. Co. v. Public Utilities Comm'n*, 208 F.3d 475, 485 (5th Circuit, 2003); *Michigan Bell Tel. Co. v. MCIMetro Access Transmission servs., Inc.*, 323 F.3d 348, 355-6 (6th Cir., 2003); *Illinois Bell Tel. Co. v. Worldcom Technologies, Inc.*, 179 F.3d 574 (7th Cir., 1999); *Global NAPS, Inc., v. Verizon New England Inc.*, 332 F. Supp.2d 341, 360 (D. Mass., 2004).

[26] We acknowledge the decision of the Oregon Public Utilities Commission accepting Qwest's views, *AT&T, et al., v. Qwest Corporation*, Order No. 06-230 (May 11, 2006), but respectfully disagree with its reasoning and decline to apply it to Washington intrastate issues of contract law.

that the *Connect* decision's deference to a state law on interconnection contract interpretation has no applicability to contract claims based on different interconnection disputes. We believe that is a distinction without a difference.

62 Qwest's contention that the Telecom Act transforms clearly state law issues relating to negotiated provisions of interconnection contracts into federal issues is incorrect. Even if an interconnection provision tracks or incorporates provisions of the Act or FCC rules state law governs the interpretation and enforcement of the provision. .[27]

63 In sum, we find the appropriate interpretation to be that state law, including state statutes of limitation, apply to this dispute.

4. If interconnection agreement enforcement is a matter generally of state law, should a federal statute of limitations nonetheless apply?

64 Qwest argues that a federal statute of limitations should apply because complex issues of responsibilities and rights under federal telecommunications statutes and rules will apply to govern the result. AT&T responds that interconnection agreements are contracts, and enforcement of intrastate contracts is subject to contractual principles in the state in which they apply. AT&T notes that courts have affirmed the application of state law in other, similar proceedings.

65 We note that both parties argued for the application of state law (albeit different provisions) at the outset of this dispute. Only now – unhappy with the outcome – does Qwest argue that state law cannot or should not apply. Further, over the years the parties have joined in many interconnection disputes before the Commission where state law has been applied to decide the matters. No persuasive argument has been advanced as to why the state statutes of limitations are somehow different.

66 The amended complaint involves fundamental issues of state, not federal, law although the application of a federal law may have a role in resolving the issues. The questions are whether the parties entered a contract governing intrastate services, whether the contract contained a specific term assuring the CLECs that Qwest would offer it the best terms given to other carriers, and whether Qwest failed to meet that obligation.

67 We see no reason why the state statute of limitations would not likewise be the controlling authority.

[27] *See*, the *Brooks Fiber* decision, above at footnote 25, where a disputed contract provision tracked FCC regulations defining the requirements of Section 251(b)(5) of the Act. The court concluded that "[t]he Agreement itself and state law principles govern," nonetheless, to the interpretation and enforcement of the provision.

5. If interconnection agreement enforcement *is* subject to a federal limitation period, should a two-year or a four-year statute apply?

68 Qwest argues that the Telecom Act's original 2-year limitation statute,[28] Section 415, should apply to bar a lawsuit here. Qwest notes that the 1996 Telecom Act did not amend the 1934 provision, and therefore the 2-year statute should control.

69 AT&T responds that even if the dispute is governed by federal law, or by a federal statute of limitations, Section 415's limitation period does not apply to the 1996 Telecom Act, which did not specify a limitation period for its provisions, because the latter is governed by a 1990 statute. Federal law (28 U.S.C. § 1658(a)) provides a new limitations period for later laws: "Except as otherwise provided by law, a civil action arising under an Act of Congress enacted after the date of the enactment of this section may not be commenced later than 4 years after the cause of action accrues."[29]

70 AT&T's argument is supported by several federal court decisions that the 1934 2-year limitation statute does not apply to the 1996 Telecom Act amendments.[30] Because AT&T's complaint was filed within four years of the accrual date of July 15, 2002, its contract claim would be timely even it arose under federal law.

6. Should a more specific statute of limitations apply in lieu of a more general statute?

71 Qwest urges, particularly under the specialized and complex law in question, that a statute of limitations that specifically applies to that field of law should take precedence over a general statute of limitations.

72 As AT&T points out, there are two persuasive flaws that prevent application of this principle in the manner Qwest suggests.

73 First, specificity is in the eye of the lawyer. In this application, the fundamental issue is not the application of telecommunications law, but the application of the state principles of contract law that apply specifically to issues of this type. We find in this instance that the state statute is the more specific.

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[28] The original 1934 statute was enacted as a one-year limitation. Congress extended the period to two years in 1974.

[29] *Verizon New England, Inc. v. New Hampshire Public Utils. Comm'n*, 2005 WL 1984452, *5 n.5 (D.N.H. 2005), citing *Pepepscot Indus. Park, Inc. v. Maine Cent. R.R. Co.*, 215 F.3d 195, 203 n.5 (1st Cir. 2000).

[30] *City of Rancho Palos Verdes v. Abrams*, 544 U.S. 113, 124 n.5 (2005; *e.spire Comms. Co., inc. v. Baca*, 269 F. Supp. 2d 1310, 1320 (D.N.M. 2003) ("Because the Telecommunications Act was enacted after December 1, 1990, the four-year statute of limitations applies to the claims under the federal Telecommunications Act."); *Verizon Maryland Inc. v. RCN Telecom Servs., Inc.*, 232 F. Supp. 2d 539, 552-54 (D. Md. 2002); *Bell Atlantic-Pennsylvania, Inc. v. Pennsylvania Pub. Utils. Comm'n*, 107 F. Supp. 2d 653, 668 (E.D. Pa. 2000); *MCI Telecomms. Corp. v. Illinois Bell Tel. Co.*, 1998 WL 156674, *3-*5 (N.D. Ill. 1998).

74 A second and equally valid reason to reject Qwest's argument is that – as we determined above – the federal statute is no more applicable here than an Arkansas rule or a Wyoming statute even one specifically governing remedies for breaches of written interconnection contracts in those jurisdictions. Under its delegated authority, Washington State law applies as a matter of law, not the law of another jurisdiction.

III. Conclusion

75 The Commission rejects both parties' challenges to the interlocutory order and directs the administrative law judge to convene a prehearing conference for the purpose of determining a schedule to proceed on the amended complaint.

IV. ORDER

76 On review of the interlocutory order, the Commission denies challenges to the order and the renewed motion for summary determination. The Commission authorizes amendment of the complaint.

Dated at Olympia, Washington, and effective December 21, 2006.

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

MARK H. SIDRAN, Chairman

PATRICK J. OSHIE, Commissioner

PHILIP B. JONES, Commissioner

NOTICE TO PARTIES: This is an order on review of an Interlocutory Order of the Commission that governs the remainder of the proceeding. Further administrative review of this order is not available.

GLOSSARY

TERM	DESCRIPTION
CLEC	Competitive local exchange company. Not an ILEC, and generally subject to limited regulation.
ILEC	Incumbent local exchange company; a company in operation at the time the Act was enacted (August 1996).
Interconnection	Connection between facilities or equipment of a telecommunications carrier with a local exchange carrier's network under Section 251(c)(2).
Interconnection Agreement	An agreement between an ILEC and requesting telecommunications carrier (which may be a CLEC) addressing terms, conditions and prices for interconnection, services or network elements pursuant to Section 251.
Section 251(c)(3)	The section of the Act that requires ILECs to provide unbundled access to network elements, or UNEs.
Section 271	The portion of the Act under which Bell Operating Companies, or BOCs, could obtain authority from the FCC to provide long distance service in addition to service within their in-state service areas.
Telecom Act or "Act"	Telecommunications Act of 1996, 110 Stat. 56, Public Law 104-104, Feb. 8, 1996.

Exhibit 2

BEFORE THE OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE MINNESOTA PUBLIC UTILITIES COMMISSION
121 SEVENTH PLACE EAST, SUITE 350
ST. PAUL, MINNESOTA 55101-2147

Gregory Scott	**Chair**
Edward A. Garvey	**Commissioner**
R. Marshall Johnson	**Commissioner**
LeRoy Koppendrayer	**Commissioner**
Phyllis Reha	**Commissioner**

In the Matter of the Complaint of the Minnesota Department of Commerce Against Qwest Corporation	**MPUC Docket No. P-421/C-02-197** **OAH Docket No. 6-2500-14782-2** **MPUC Docket No. P-421/CI-01-1371** **OAH Docket No. 7-2500-14486-2**

QWEST CORPORATION'S WRITTEN REBUTTAL TESTIMONY

OF AUDREY MCKENNEY

PUBLIC DOCUMENT

TRADE SECRET DATA
HAS BEEN EXCISED

commissions, this made UNE-Star more expensive than UNE-P. Again, the UNE-Star pricing that I am describing was filed and approved by the Commission.

Q: IN ADDITION TO THE HIGHER PURCHASE PRICE FOR UNE-STAR, DID QC IMPOSE ANY OTHER CONDITIONS ON CLECS PURCHASING UNE-STAR?

A: Yes. Because UNE-Star entailed significant development and implementation costs, QC required CLECs wishing to purchase the UNE-Star platform to make total and annual minimum purchase commitments over a multi-year minimum term, which, conceptually, is very similar to our private line services tariff. Other requirements included imposing a short-fall penalty if the CLEC did not meet those minimum commitments; "bill and keep" for reciprocal compensation, including Internet-bound traffic ("ISP traffic"); a one-time, lump sum conversion charge to convert the embedded base; and restricting the offering to business customers (recently, we removed this restriction from the UNE- Star product offering). Lastly, QC requested the CLEC to provide an ongoing, updated, geographic end-user customer volume and loop distribution forecast for purposes of adjusting price points.

Q: MR. DEANHARDT TESTIFIED THAT QC ORALLY AGREED TO GIVE MCLEOD A VOLUME PURCHASE DISCOUNT OF UP TO 10%. IS THAT CORRECT?

A: No. During the negotiations of the UNE-Star platform, McLeod repeatedly requested that, because McLeod was one of our biggest customers, it should receive a volume term discount from all of its services. We discussed McLeod's request with them, including purchases made by McLeod from both QC and QCC, but Qwest never agreed to provide such a discount. To the contrary, we told McLeod that we would neither provide nor agree to provide, either orally or in writing, a volume discount plan as they proposed.

In addition, the idea that McLeod would accept an oral agreement with Qwest for a term of such significance simply does not make sense, in my experienced business judgment. McLeod and U S WEST had an acrimonious relationship, and McLeod was still dealing with many of the same people when Qwest took over U S WEST. As evidence of this point, Blake Fisher repeatedly insisted that all agreements between McLeod and Qwest that we were negotiating at this time be in writing in case, in Mr. Fisher's words, Greg Casey or I "got hit by a bus." Also in Exhibit 451, an e-mail from Stacey Stewart dated July 20, 2000, to Blake Fisher, under the assessment section, McLeod states "we need to be sure we ask for exactly what we want, because we may just get it, and then we have nobody else to blame but us." I believe that this shows that McLeod was aware of the need to document any agreements because they were still cautious about the relationship.

Q: COULD YOU DESCRIBE THE NEGOTIATION PROCESS THAT LED TO THE EXECUTION OF THE PURCHASE AGREEMENTS ON OCTOBER 26, 2000?

A: As I mentioned previously, the most predominant issue between the companies was McLeod's desire for QC, U S WEST at the time, to make UNE-P available under their proposed terms and conditions, without the associated full nonrecurring charges. Through February 19, 2000, ILECs had no obligation to provide UNE-P to customers. Once it became clear that QC was required to offer UNE-P, McLeod began requesting to move away from resale and onto an unbundled platform. In addition to the UNE-P issue, both parties were working to improve the relationship after the Qwest / U S WEST merger.

QC would have preferred at that time to have McLeod continue operating as a reseller, primarily because of the product profitability and issues related to a massive conversion to UNE-P Centrex. In particular, McLeod resold mostly QC's Centrex services, and we were in the early stages of deploying of UNE-P Centrex. Also, McLeod wanted to maintain as much status quo as possible in terms of features (including voice messaging) and processes for order entry and provisioning that they had become accustomed to over the last several years. Therefore, the parties initially discussed deeper discounts off of resale scenarios in the hopes of keeping McLeod on resale.

Several of the documents attached as exhibits to Mr. Deanhardt's supplemental testimony from the initial period of the negotiations in July , August, and September 2000, and which he mistakenly describes as relating to a global volume discount, reflect these discussions about various attempts to develop deeper discounts off resale prices. Exhibit 414, which was created in July and August 2000, contains some of QC's internal financial worksheets regarding the impact of a deeper resale discount through a growth commitment plan. Again, most of this analysis was done in response to McLeod's desire for a deeper discount from then current resale prices and a volume term commitment related only to resold lines. Consistent with our volume term commitments offered through tariff for private line services, we felt that the type of proposals in Exhibit 414 might be a good solution for the customer, especially because they were mainly buying resold lines from us.

As demonstrated in Exhibit 456, in July 2000, we determined that McLeod was primarily buying in-region services by contacting our out of region sales group. Also, since we had just merged with Qwest, I called our out of region pricing team to understand typical industry pricing arrangement that CLECs and IXCs, companies like McLeod, were experiencing in the market place out of region. The notes on page two of that document explains the typical pricing for out of region services.

This concept was further supported by the letter from Blake Fisher to Greg Casey dated August 15, 2000 (Exhibit 415), which I considered as the "wish list" from McLeod. The first paragraph makes it clear that at that time we were discussing a "reduction in rates associated with resale". The presentations and documents contained in Exhibit 417 were QC's attempts to offer McLeod a discount plan limited to resale of finished services, which would have resulted in a deeper resale discount if accepted, instead of the standard unbundled platform.

At some point not long after that, it became clear that our discussions regarding a deeper resale discount through a volume incentive limited to resale services were not be satisfactory to McLeod. We ultimately discovered that the primary reason was that our resale discount proposals could not off-set the potential amount of switched access revenues that McLeod believed they could charge, using their interstate and intrastate rates, to Inter Exchange Carriers ("IXCs"), if they were able to use a UNE-P platform. At this time, many of the CLECs' interstate and intrastate switched access rates were significantly higher than QC's tariff rates. In fact at the time, some of the CLEC's interstate rates were above \$0.05, while QC was in the process of lowering the same rate to \$0.0055.

Q: WHAT HAPPENED AFTER THAT?

A: We continued negotiating and working to understanding what McLeod wanted from QC. . The Outline of Major Terms dated September 19, 2000 (Exhibit 416) was created jointly by QC and McLeod and reflects the high level terms that the parties were discussing. This Outline does not reflect the final terms of the agreement between the parties. The sixth item states, "Q will propose volume and term discounts based on quarterly revenue targets, to be paid back to M by Q on a quarterly basis." McLeod repeatedly asked us for a discount, and at that point, we had not yet ruled out the possibility of offering one. The Outline of Major Terms was not a commitment by either party and was simply a tool for the parties to articulate their goals for the negotiations.

McLeod and QC then exchanged proposals and counterproposals regarding primarily related to state specific UNE-Star pricing. However, McLeod continued to provide their wish list with regards to an overall discount. After reaching some major closure on the UNE-Star prices, which was around mid-October, we began the financial analysis to determine the economic results of McLeod's discount concept.

Exhibits 419 and 422 are several of McLeod's proposals to us. In Exhibit 419, my notes in the margin reflect McLeod's comments from our conversations on this particular request, including their proposed commitment to us to enter into a take or pay agreement with us for **[TRADE SECRET BEGINS]** **[TRADE SECRET ENDS]**, in which I believe that they had included an assumption that there would be **[TRADE SECRET BEGINS]** **[TRADE SECRET ENDS]** market decline every year. Under the take or pay agreement concept, McLeod would be obligated to purchase a set minimum dollar amount of services from Qwest. If McLeod failed to meet its minimum purchase requirements on an annual basis, it would be required to pay Qwest the difference between its actual purchases and the minimum purchase commitment.

Our responses to the various McLeod's proposals were based on our calculations of the financial impact of those proposals. In particular, because McLeod's proposals involved financial outlays by us, we were calculating what the "break even" point for each of McLeod's scenarios. The last page of Exhibit 420, titled "McLeod Growth & Discount Scenario," is one of those numerous calculations. McLeod was asking for discounts and predicting annual revenue to us as high as **[TRADE SECRET BEGINS]** **[TRADE SECRET ENDS]** We ran these calculations based on McLeod's proposals simply to determine if there was a way to reach a value with McLeod that would make financial sense to us.

Exhibit 423 is a collection of additional financial calculations of proposals made by McLeod. The 30th page of that exhibit contains more growth and discount scenarios based on McLeod's predicted annual revenue and the volume term discount rates requested by McLeod. We ran calculations in the form of the customer's proposals (here, volume term discounts) to determine the total value the customer was proposing as part of the deal.. Once we knew that value, we could then determine if there was any type of business opportunity that may result in this type of value that was agreeable to both parties. Qwest's main goal was to reach overall incremental annual value of **[TRADE SECRET BEGINS]** **[TRADE SECRET ENDS]**

In addition, McLeod continued to make statements that their proposals were bringing over **[TRADE SECRET BEGINS]** **[TRADE SECRET ENDS]** of incremental cumulative value to us. We stated to them that was not a complete picture based on their discount concept, and that the true value about **[TRADE SECRET BEGINS]** **[TRADE SECRET ENDS]** The fourth from the last page of Exhibit 423 shows our computations of the portion of McLeod's annual revenue growth that we would retain and the portion that would be refunded to McLeod under the discount proposals made by McLeod. The

"Net Growth" line on each of the tables on that page of Exhibit 423 is the "math" to demonstrate the net revenue to us based on various total revenue and discount rate assumptions under McLeod's, not Qwest's, proposals. As demonstrated in the documentation, McLeod's proposal yielded about **[TRADE SECRET BEGINS]** **[TRADE SECRET ENDS]** of incremental new revenue being returned to back to them. As a result, their concept of a discount proposal was clearly not an attractive term to us.

Exhibit 421 - Arturo Ibarra's e-mail dated October 20, 2000 in which he stated that **[TRADE SECRET BEGINS]** **[TRADE SECRET ENDS]** was the result of Qwest's reviewing these calculations. We were still running scenarios at that time and had not yet reached a final agreement, but we informed McLeod through that e-mail that we could not accept its proposal for a financial outlay greater than **[TRADE SECRET BEGINS]** **[TRADE SECRET ENDS]** of McLeod's anticipated purchases from Qwest. Consistent with this position, I sent a fax to Greg Casey saying **[TRADE SECRET BEGINS]** **[TRADE SECRET ENDS]** because that would result in negative value for us. *See* Exhibit 424. Through our calculations, we realized what financial outlay we could commit to. The underlying value in McLeod's proposed discount plans exceeded those amounts.

For example, Exhibit 3 to Blake Fisher deposition (Exhibit 402) contains an e-mail from me to Randy Rings, Blake Fisher, and Jim Balvanz of McLeod attaching a counterproposal. First, I'd like to note that the date at the bottom of the Counterproposal is the date of printing, not the date of creation or the date that it was originally sent. Second, our primary focus during the negotiations was on the top portion of the document regarding the take or pay commitment ranges, and we focused on reaching numbers that would be financially beneficial to both companies. At that stage in the negotiations, we were not concerned about the labels in the document, but were focusing on the financials. Again, our first goal was to bring closure on the per line pricing, thus the vast majority of our time was spent on calculating UNE-Star pricing. Again, McLeod had nearly **[TRADE SECRET BEGINS]** **[TRADE SECRET ENDS]** lines that we were trying to price out based on state, product mix, features, zone and type of customer. Up to this point in time, we were just beginning to consider whether it made financial sense for us to have a take or pay with McLeod.

The negotiations reached a breaking point with when McLeod sent us Exhibit 422, especially the terms under items 3, 4, and 5. In particular in item 4 of that October 20, 2000 Counter Proposal, McLeod suggested that the discount schedule be capped at **[TRADE SECRET BEGINS]** **[TRADE SECRET ENDS]** As we had communicated to McLeod, it simply would not have been economical for Qwest to agree to a financial outlay of **[TRADE SECRET BEGINS]** **[TRADE SECRET ENDS]** I contacted Greg Casey, who said he would talk to Blake Fisher and that we would try to work it out over the weekend.

On October 21, 2000, we shifted our attention away from the final pricing of UNE Star and toward this potential business opportunity with McLeod. During various calls on Saturday, October 21, with Mr. Fisher and others from McLeod, Mr. Casey was very clear that we could not do any type of discount plan and that, as an alternative, we would be interested in QCC doing a take or pay agreement for services from McLeod. This approach supported the common goal between the parties to grow the business relationship between them. Mr. Casey briefly mentioned that, with McLeod's recent and pending acquisitions of Split Rock and Cap Rock, coupled with their out of region business, there might be some opportunities between us.

Q: HOW DID THE NEGOTIATIONS PROGRESS AFTER QWEST TOLD MCLEOD IT COULD NOT OFFER A DISCOUNT?

A: McLeod was still interested in reaching an agreement with us and agreed that a mutual preferred vendor plan was acceptable. I became less involved in the negotiations on drafting the final documents at that point, because I left for vacation on the afternoon of Saturday, October 21. By the time I left, we were in agreement on the concept of a mutual take or pay arrangement. At that time (Saturday afternoon), the tentative agreement was that our take or pay obligations to McLeod would float based on the level of McLeod's aggregate purchases from Qwest. We also told McLeod that we were obtaining internal approval on the various agreements. In addition, McLeod had indicated that some of these agreements might have to be approved by its Board of Directors. The 15th page of Exhibit 426, on which I have a note saying "final Saturday 2:47 pm" was the last document I reviewed that was sent to McLeod before I left for vacation. Again, both Parties were seeking internal approval of these terms.

Randy Rings, McLeod's General Counsel, took responsibility for preparing the first draft of the take or pay agreements and provided a draft Service and Billing Agreement to Qwest on October 23, 2000. *See* Exhibit 463. Exhibit 463 reaffirms that McLeod was in agreement with the take or pay agreement, and that the agreement was not for a discount. Jim Gallegos, my attorney at Qwest, faxed Exhibit 463 to me on October 23, 2000. An attachment to that draft contains **[TRADE SECRET BEGINS]**

[TRADE SECRET ENDS]

Based on this attachment, it was clear to me that McLeod accepted having a take-or-pay and rejected a discount. This proposal from McLeod indicated to me that McLeod understood that we were not offering it a discount and that McLeod was primarily interested in receiving a revenue stream from QCC. However, McLeod had inserted a new term that had not been discussed before and we could not agree to this structure for a couple of reasons. First, McLeod added the term **[TRADE SECRET BEGINS]**

[TRADE SECRET ENDS] so this form of the agreements was unworkable. Second, QCC wanted the agreement to state a fixed amount of purchases so it would be clear that it was not a discount.

I understood that McLeod needed to resolve this issue before its Board of Directors meeting. Between October 23 and October 25, the parties reached agreement on the terms and conditions of the final Purchase Agreement.

Q: WAS QWEST INTERESTED IN PURCHASING SERVICES FROM MCLEOD?

A: Yes. Even very early in the negotiations, Qwest was interested in purchasing services from McLeod. For example, on the last page of Exhibit 451, McLeod notes that as early as July 23, 2000 Qwest and McLeod were discussing network sharing and opportunities for Qwest to purchase out-of-region services from McLeod. At the time of the final agreements, there were various telecommunications services that Qwest might have been interested in purchasing from McLeod, including terminating access, fiber rings, private line services, and data and PRI-type services. As mentioned earlier, McLeod was expanding its out-of-region business and had also recently acquired Splitrock, which offered data and Internet services, and it was also looking to acquire Caprock. Qwest and McLeod were both eager to reach an agreement and improve our business relationship. Although we did not reach any agreement regarding what types of services Qwest would purchase from McLeod. With McLeod being a growing company there would be opportunities to purchase products and services from them. Also, Qwest purchases annually on average **[TRADE SECRET BEGINS]** **[TRADE SECRET ENDS]** of services from other carriers, thus clearly indicating that there might be some opportunity to shift some of our purchases from other carriers to McLeod.

McLeod and QC continued to explore these opportunities after entering into the take or pay agreements. For example, on the second page of Exhibit 434, McLeod suggests a meeting for the parties to discuss "Network we sell to you." Exhibit 430 also shows that Qwest and McLeod continued to explore buying opportunities on each other's networks for private line and local access in May 2001.

Q: WHAT WAS THE FINAL AGREEMENT REACHED BY MCLEOD AND QWEST IN OCTOBER 2000?

McLeod and Qwest entered into two Purchase Agreements. Under the terms of the McLeod Purchase Agreement (Exhibit 403), McLeod agreed to purchase from Qwest Communications Corporation and its subsidiaries a minimum amount of "telecommunications, enhanced or information services, network elements, interconnection or collocation services or elements, capacity, termination or origination services, switching or fiber rights." The total value of McLeod's commitment to Qwest is **[TRADE SECRET BEGINS]** . **[TRADE SECRET ENDS]** Under the terms of the Qwest Purchase Agreement (Exhibit 404), QCC agreed to purchase quarterly between January 1, 2001 and December 31, 2003 a set minimum amount of products from McLeod. The total value of QCC's commitment to McLeod is **[TRADE SECRET BEGINS]** **[TRADE SECRET ENDS]** Both the McLeod Purchase Agreement and the QCC Purchase Agreement are take or pays, meaning that in the event the purchaser failed to meet the minimum, it agreed to pay the vendor the difference between the amount of actual purchases and the amount of the minimum.

Q: DID THE PARTIES DISCUSS MCLEOD'S PARTICIPATION IN THE 271 PROCESS DURING THIS TIME PERIOD?

A: Yes. We were trying to address all of McLeod's issues with QC's service, provisioning and pricing through the business-to-business escalation process and interconnection agreements that we were negotiating in the fall of 2000. From our perspective, we felt that if we addressed all CLECs' issues, including McLeod's, carriers would have no reason to oppose QCC's 271 efforts. In the event that Qwest did not comply with its contractual or other legal obligations, McLeod could certainly have raised those issues in a regulatory forum.

Q: HAS QCC MADE SHORTFALL PAYMENTS TO MCLEOD PURSUANT TO THE QWEST PURCHASE AGREEMENT?

A: Yes. QCC paid McLeod **[TRADE SECRET BEGINS]** **[TRADE SECRET ENDS]** on June 22, 2001. QCC's next payment to McLeod pursuant to the Qwest Purchase Agreement was made on October 2, 2001 in the amount of **[TRADE SECRET BEGINS]** **[TRADE SECRET ENDS]** The total payments made in 2001 were approximately **[TRADE SECRET BEGINS]**