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IDAHO PUBLIC
UTILITIES COMMISSION

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Attorneys for Plaintiff 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 OPPOSITION TO QWEST'S MOTION FOR STAY
QWEST CORPORATION,	)	
Respondent.	)	

AT&T Communications of the Mountain States, Inc. ("AT&T") hereby submits its opposition to Qwest Corporation's ("Qwest") motion to stay this proceeding pending a decision by the federal district court on Qwest's motion to dismiss AT&T's protective suit there. Qwest's motion should be denied for several reasons, primarily because there is no good reason why this case, which was filed first and is substantially farther along than the federal case, should be stayed in favor of the federal case, which AT&T filed purely as a protective measure.

BACKGROUND

Nearly a year ago, on August 21, 2006, AT&T filed its complaint against Qwest here at the Commission. That complaint contained a single count alleging a breach of contract by Qwest.

Qwest filed a motion to dismiss AT&T's complaint. After full briefing on that motion, supplemental briefing on questions raised by the Commission, and oral argument, the Commission denied Qwest's motion on February 16, 2007. Att. 1 hereto. The Commission also directed AT&T to amend its complaint to provide more detail and ordered AT&T and Qwest to file supplemental briefs addressing specific questions "to determine the complaint's gravamen and address the statute of limitations issue." *Id.*

AT&T filed its amended complaint and AT&T and Qwest filed briefs addressing the Commission's questions. On April 12, 2007, the Commission, standing by its prior denial of Qwest's motion to dismiss, ordered the parties to develop a schedule for the full case. Att. 2 hereto. The parties then did so, developing a schedule for settlement discussions, discovery, three rounds of written testimony, evidentiary hearings, and post-hearings briefs.

The case has proceeded on that schedule, with a few agreed extensions along the way. Settlement discussions have been held. AT&T has served a first round of discovery and Qwest

has responded. The parties have entered a protective agreement. AT&T filed its direct testimony on August 16.

During briefing on Qwest's motion to dismiss, Qwest raised an issue regarding whether the Commission has authority to grant the full relief requested by AT&T. The Commission has not addressed that issue. Out of an abundance of caution and to avoid any possible future problems under the Idaho statute of limitations, AT&T filed a materially identical complaint in Idaho state court on January 31, 2007, while Qwest's motion to dismiss was pending. That complaint was filed purely as a protective measure in case the Commission was ultimately to find it could not grant all the relief to which AT&T is entitled. AT&T served that complaint on Qwest on May 30, 2007, to preserve its protective court case, if such proves necessary to pursue, and to comply with I.R.C.P. Rule 4(a)(2).

AT&T asked Qwest to agree to stay the state court proceeding pending the outcome of the ongoing case here, but Qwest refused. Instead, Qwest removed the case to federal court and filed a motion to dismiss that is in substance nearly identical to the motion to dismiss that the Commission already fully considered and denied. AT&T has moved to stay the federal court case pending the outcome of this proceeding. Att. 3 hereto.

ARGUMENT

The Commission should deny Qwest's motion for stay. Qwest admits that the Commission has jurisdiction over AT&T's claim. Qwest Motion at 2, 7. Qwest admits that this Commission did not grant its motion to dismiss (*id.* at 3), which was based on the same theory Qwest is now pursuing in federal court. And Qwest does not (and could not) deny that this case is substantially ahead of the federal proceeding. The Commission already has ruled on Qwest's motion to dismiss and AT&T has filed its direct testimony. Qwest is preparing its reply

testimony and the parties are engaged in discovery. Given these undisputed facts, there is no legitimate basis for staying this case in favor of a purely protective suit that AT&T filed only out of an abundance of caution.

The *only* purpose behind Qwest's motion for stay is to get a second bite at the apple – a de facto interlocutory appeal on its failed motion to dismiss. Qwest's lone argument is that the federal district court has jurisdiction to "review" or take "appeals" from state commission decisions interpreting interconnection agreements and that, because the court review of legal issues is *de novo*, it should be allowed to relitigate its motion to dismiss now. Qwest Motion at 4, 6-8. Qwest has cited no authority for its contention that federal courts have exclusive jurisdiction to review state commission decisions interpreting interconnection agreements,[1] but even if Qwest were correct it would not matter. The mere fact that a federal court could have jurisdiction to review a state commission's decision on claims for breach of an interconnection agreement does not mean Qwest has any right to insist on a stay of state commission proceedings and an immediate "appeal" to federal court on every lost issue. Indeed, permitting such instant interlocutory review throughout any state commission proceeding on an interconnection agreement would be procedural nightmare.

Moreover, Qwest's argument about a federal court's power to hear "appeals" of state commission decisions that interpret interconnection agreement ignores that state commissions

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[1] The federal Telecommunications Act does not say that federal district courts have exclusive jurisdiction to review decisions that interpret and enforce interconnection agreements after they have been approved. The bar on state court jurisdiction in Section 252(e)(4) of the federal Telecommunications Act extends only to "the action of a State commission in *approving or rejecting* an agreement under this section." 47 U.S.C. § 252(e)(4) (emphasis added). Indeed, some federal courts have taken jurisdiction over breach of interconnection agreement claims pursuant to their supplemental jurisdiction under 28 U.S.C. § 1367(a), indicating that such claims could (and would) be litigated in state court absent another claim in the case that gives rise to original federal court jurisdiction. See *Southwestern Bell Tel. Co. v. Brooks Fiber Comms. Of Okla., Inc.*, 235 F.3d 493, 498 (10th Cir. 2000); *Connect Comms. Corp. v. Southwestern bell Tel.*, 467 F.3d 703, 708 (8th Cir. 2006). AT&T's breach of contract claim has nothing to do with the Commission's order originally approving the Qwest-AT&T interconnection agreement.

frequently interpret and enforce such agreements in the first instance. This Commission is in the midst of doing precisely that, and it should be permitted to complete the job before Qwest is allowed to begin seeking second opinions on its failed motion to dismiss. All Qwest is doing now is trying to hijack AT&T's protective court case and turn it into a vehicle for such an unauthorized "appeal."

Qwest also continues to misrepresent AT&T's claim in hopes of making it appear so "federal" that Qwest should be allowed to skip ahead to an interlocutory review. Specifically, Qwest asserts that AT&T's claim "flow[s] from Qwest' alleged failure to follow *federal* law." Qwest Motion at 6. It does not. AT&T's claim flows from Qwest's failure to follow its *interconnection agreement* with AT&T. And that claim, as the Commission already held, is governed by state law. Att. 1.[2]

Qwest's claim that "judicial and agency economy are served" by a stay is baseless. To the contrary, economy has been undermined by Qwest refusing to agree to a stay of this case and forcing AT&T to fully brief Qwest's same motion to dismiss all over again. See *Roberts v. Hollandsworth*, 616 P.2d 1058, 1061 (Idaho 1980) (cited in Qwest Motion at 5) (where first forum had ruled against party on summary judgment and no party denied that that forum had jurisdiction to rule on the merits, addressing same issues in later-filed case in second forum would "needlessly and substantially increase[] costs to the [party that prevailed in first forum], is a waste of judicial resources, and conjures up the possibility of conflicting judgments by state and federal courts").

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[2] Of course, it would not matter even if AT&T's claim were "federal," for, as explained above, nothing gives Qwest the right to have this case stayed in the middle of testimony so it can ask the court for a different decision on its motion to dismiss.

CONCLUSION

In sum, Qwest's motion for stay would irrationally prevent the first-filed, more advanced Commission case from proceeding and force AT&T to start all over again in federal court, creating waste, inefficiency, and the risk of inconsistent decisions. Regardless of whether Qwest ultimately could "appeal" the Commission's denial of its motion to dismiss to federal court at the end of this case, it has no right to demand that this case stop for an instant interlocutory appeal now. Rather, the Commission should have the first opportunity to interpret the interconnection agreement that it originally approved and should reject Qwest's attempt at forum-jumping.

DATED this 30th day of August, 2007.

RICHARDSON & O'LEARY, PLLC

By: _____
Molly O'Leary

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

ATTACHMENT 1

Office of the Secretary
Service Date
February 16, 2007

BEFORE THE IDAHO PUBLIC UTILITIES COMMISSION

Attachment 1

AT&T COMMUNICATIONS OF THE MOUNTAIN STATES, INC.,	)	**CASE NO. QWE-T-06-17**
COMPLAINANT,	)	
vs.	)	
QWEST CORPORATION,	)	
RESPONDENT.	)	**ORDER NO. 30247**

On August 21, 2006, AT&T Communications of the Mountain States filed a complaint against Qwest Corporation, alleging that Qwest entered into "secret" interconnection agreements with Eschelon Telecom and McLeodUSA Telecommunications Services. The complaint alleged a single claim of breach of contract, stating that Qwest violated unspecified terms of an interconnection agreement between AT&T and Qwest (the "Interconnection Agreement") by not disclosing these "secret" agreements. Complaint at 7-8.

On September 6, 2006, the Commission issued a summons to Qwest to answer the complaint. The Commission also granted the Motions for Limited Admission filed by AT&T's out-of-state counsel. Order No. 30125. Qwest timely filed its answer to the complaint as a Motion to Dismiss on September 27, 2006. AT&T then filed a response to Qwest's Motion to Dismiss on October 26, 2006.

On November 7, 2006, Qwest filed a Motion for Oral Argument with respect to the issues presented in the Motion to Dismiss. AT&T filed its response joining in Qwest's request. The Commission granted the Motion, and set the oral argument for January 24, 2007. Order No. 30195. The Commission also directed the parties to file briefs addressing certain issues about which the Commission required further information. *Id.*

POSITION OF THE PARTIES

Qwest asked the Commission to dismiss AT&T's complaint on two grounds. First, Qwest asserted that AT&T's claim is actually a "federal claim masked in state law clothes." Motion to Dismiss at 2. Given the federal claim, Qwest insisted the federal statute of limitations of two years applies to any claim brought under the federal Telecommunications Act of 1996

(the "1996 Act"). Qwest argued that the only reason AT&T is bringing this complaint as a breach of state contract law is to avoid the operation of the two-year limitations period that applies to these claims under 47 U.S.C. § 415.[1] Tr. at 4. Second, the Oregon Public Utility Commission's recent decision to dismiss a similar complaint against Qwest under the two-year statute of limitations should collaterally estop AT&T from filing this complaint. At oral argument, counsel for Qwest conceded that the second ground should be stricken in light of the Washington Utilities and Transportation Commission's contrary decision. Thus, we will not consider the second ground. Tr. at 7.

AT&T asserted that "all claims seeking interpretation and enforcement of interconnection agreements are governed by state law." Tr. at 19. At oral argument AT&T's counsel explained that the interconnection agreement included "an obligation on the part of Qwest to make available the terms and conditions of any other agreement for interconnection, unbundled network elements and resale services in those agreements' entirety." *Id.* at 17. AT&T concedes this "obligation" is based upon Section 252(i)[2] of the 1996 Act but insisted that their interconnection agreement deviates from or "doesn't precisely track the language of 252(i)" and it is this deviation or difference that requires interpretation of the agreement by the Commission. *Id.* at 24, 20.

DISCUSSION AND FINDINGS

At the outset, we first address our jurisdiction. In its Motion to Dismiss, Qwest stated that "[t]his Commission's jurisdiction to hear actions to enforce the terms of interconnection agreements derives, not from state law, but from the Federal Act. ... Thus without delegated authority, the Commission lacks jurisdiction to act." Motion to Dismiss at 10. We are puzzled that Qwest declares this, even after our Supreme Court has clearly stated that the Commission <u>does</u> have the authority to interpret and enforce an interconnection agreement. *McNeal v. Idaho Public Util. Comm'n*, 142 Idaho 685, 132 P.3d 442 (Idaho 2006). In *McNeal*, the Court held that "Federal law indicates that a Commission does have the authority to interpret

[1] "There is no question that AT&T has known about these [undisclosed] agreements, the McLeod and Eschelon agreements, ... since at least the summer of 2002." Tr. at 4.

[2] 47. U.S.C. § 252(i) provides in pertinent part: A local exchange carrier shall make available any interconnection, service, or network element provided under an agreement approved under this section to which it is a party to any other requesting telecommunications carrier upon the same terms and conditions as those provided in the agreement.

and enforce an interconnection agreement." *Id.* at 689, 132 P.2d at 446. In light of this ruling, we find that we have jurisdiction to hear this matter.

It is axiomatic that the interpretation of a contract begins with the language of the contract itself. *Albee v. Judy*, 136 Idaho 226, 31 P.3d 248, 252 (2001). If the contract terms are clear and unambiguous, the meaning and effect of the contract are questions of law to be determined from the plain meaning of its words. *Id.* If the contract terms are ambiguous, then the interpretation of those provisions is a question of fact which focuses upon the intent of the parties. *Bream v. Benscoter*, 139 Idaho 364, 79 P.3d 723 (2003).

Turning to the Agreement to see what its terms provide regarding a choice of law, we look at Section 21.1 (Governing Law). This provision states:

> This Agreement shall be governed by and construed in accordance with the Act and the FCC's rules and regulations, except insofar as state law may control any part of this Agreement, in which case the domestic laws of the State of Idaho, without regard to its conflicts of law principles, shall govern.

(Emphasis added). Like the 1996 Act, the section quoted above "is not a model of clarity" upon first reading. *AT&T v. Iowa Utilities Board*, 525 U.S. 366, 397, 19 S.Ct.721, 738 (1999). When we asked the parties to address the effect and meaning of this provision with respect to the complaint, the parties offered little illumination. Qwest asserted that state law would "come into play in the relatively rare instances ... where federal law and/or FCC rulings leave a role for state law," and otherwise reiterated its argument that AT&T's claim was federal in nature and federal law would apply to its claim. Qwest Brief at 11. AT&T stated that this section "confirm[s] that state law governs the interpretation and enforcement of interconnection agreements," and noted that there is a role for state law, such as when a breach of contract occurs, and that "state law has a key role in enforcing interconnection agreements." AT&T Brief at 14, 15.

Fortunately, there are other contract terms that, when read together, clarify the point. Throughout the Agreement there are provisions that require compliance with various requirements of federal and state law. As the parties state themselves,

> This Agreement is a combination of agreed terms and terms imposed by the [Commission's] arbitration under Section 252 of the Communications Act of 1934, as modified by the Telecommunications Act of 1996, the rules and regulations of the Federal Communications Commission and the orders, rules and regulations of the Idaho Public Utilities Commission ... .

Agreement (Recitals) at 4 (emphasis added). Thus, it is no surprise that the Agreement addresses requirements of both federal and state law.

We also turn to Section 27.1, Dispute Resolution, in the Agreement. This provision provides that a dispute regarding the Agreement may be resolved by arbitration. When coupled with Section 27.3, it states a fairly detailed set of instructions for how such arbitration should be conducted. Pertaining to our examination here is the Parties' agreement that "[t]he laws of Idaho shall govern the construction and interpretation of this Agreement." (Emphasis added). If the matter were submitted to arbitration, there is no question as to what law would be applied to the dispute. Based upon these provisions together, we find that the Governing Law provision is unambiguous, and that the parties intended that the Agreement be construed under state law while recognizing that the parties must also comply with various federal requirements.

There is also a substantial body of cases supporting our finding that state law governs the question of interpretation and enforcement of interconnection agreements. *See, e.g.*, *Pacific Bell v. Pac-West Telecomm*, 325 F.3d 1114, 1128 (9th Cir. 2003). In order to determine whether Qwest violated the Interconnection Agreement as alleged by AT&T, we will have to interpret its provisions. If a violation is found, we will need to explore how to enforce the provisions. Thus, we conclude that state law governs this dispute.

Having found that state law applies, we must next decide whether the statute of limitations would put an end to this complaint. As noted above, Qwest argued that the federal two-year statute of limitations found at 47 U.S.C. § 415 should be applied because AT&T is actually hiding a federal law matter in state law clothes and federal law should govern. AT&T argued that the five-year statute of limitations provided by *Idaho Code* § 5-2-16 for a breach of contract action should apply because the matter is governed by state law. In the alternative, AT&T argued that if federal law is applied, the four-year statute of limitations provided by 28 U.S.C. § 1658(a) should apply.

In answering this question, we note that the Idaho Supreme Court has recently held that "the true *gravamen* of the plaintiffs' claims should control the question of which statute of limitations is applicable, rather than the manner in which the claims are actually pled." *Hayden Lake Fire Protection District v. Alcorn*, 141 Idaho 388, 111 P.3d 73 (Idaho 2005) (emphasis in original). Thus, if the gravamen of the complaint is a breach of contract, the five-year statute of

limitations would likely apply. If the gravamen of the complaint is a violation of the federal statute, a federal statute of limitations might apply.

To muddy the water even more, more than one federal statute of limitations might apply to this complaint: Either the two-year statute of limitations provided under 47 U.S.C. § 415 or the four-year statute of limitations under 28 U.S.C. § 1658(a) might apply, if we were to find that the gravamen of AT&T's claim is federal in nature. The 1996 Act merely amended the federal Act of 1934, and thus the two-year statute of limitations provided by the 1934 Act seems the logical statute to apply. *See AT&T v. Iowa Utilities Board*, 525 U.S. at 377; Pub. L. 104-104, 110 Stat. 56, § 1(b). However, certain case law indicates that the catch-all statute of limitations under 28 U.S.C. § 1658(a) may be the applicable law for a breach of a provision in the 1996 Act.[3]

Turning back to AT&T's complaint, we find that additional briefing is necessary to determine the complaint's gravamen and address the statute of limitation issue. Therefore, we direct AT&T to amend its complaint by March 9, 2007 to state with particularity the provisions of the Interconnection Agreement that were allegedly breached and the timeframe applicable for calculating damages. We further direct AT&T to concurrently file a brief that addresses the following issues:

1. When did AT&T have notice of the "secret" agreements such that the Idaho statute of limitations would start to run?

2. Three statutes of limitations have been proposed by the parties as potentially applying to this matter: (1) a two-year statute of limitations provided by 47 U.S.C. § 415; (2) a four-year statute of limitations provided by 28 U.S.C. § 1658(a); and (3) a five-year statute of limitations provided by *Idaho Code* § 5-2-16. Which statute of limitations applies to this matter?

In addition, we direct Qwest to file a brief by March 23, 2007 that addresses the two issues set forth above.

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[3] *See City of Rancho Palos Verdes, California v. Abrams*, 544 U.S. 113, 125 S.Ct. 1453, 1460 fn. 5 (2005) ("[s]ince the claim here rests upon violation of the post-1990 [1996 Act], § 1658(a) would seem to apply."); *E.Spire Communications, Inc. v. Baca*, 269 F.Supp.2d 1310, 1320 (D. N.M., 2003); *Verizon Maryland Inc. f/k/a/ Bell Atlantic-Maryland, Inc. v. RCN Telecom Services, Inc. f/k/a RCN Telecom Services of Maryland Inc.*, 232 F.Supp.2d 539, 554 (D. Md., 2002) ("When the amendment [to the act] itself creates the cause of action upon which the plaintiff sues, without reference to the preexisting act, the cause of action clearly aris[es] under the post-1990 amendment, and the general four-year statute of limitations applies."); *Bell Atlantic-Pennsylvania v. Pennsylvania Public Utility Commission*, 107 F.Supp.2d 653 (E.D.Pa., 2000).

ORDER

IT IS HEREBY ORDERED that Qwest's Motion to Dismiss is denied at this time.

IT IS FURTHER ORDERED that AT&T shall amend its complaint by March 9, 2007 to state with particularity which provisions of the Interconnection Agreement between AT&T and Qwest were allegedly breached by Qwest, and what is the timeframe for which it seeks damages.

IT IS FURTHER ORDERED that AT&T shall submit a brief by March 9, 2007 addressing the two issues set forth above, and that Qwest shall submit a brief by March 23, 2007 addressing the two issues set forth above.

DONE by Order of the Idaho Public Utilities Commission at Boise, Idaho this 16th day of February 2007.

PAUL KJELLANDER, PRESIDENT

MARSHA H. SMITH, COMMISSIONER

DENNIS S. HANSEN, COMMISSIONER

ATTEST:

Jean D. Jewell
Commission Secretary

O:QWE-T-06-17_cg4

ATTACHMENT 2

Office of the Secretary
Service Date
May 22, 2007

BEFORE THE IDAHO PUBLIC UTILITIES COMMISSION

AT&T COMMUNICATIONS OF THE MOUNTAIN STATES, INC.,	**CASE NO. QWE-T-06-17**
COMPLAINANT,	
vs.	**NOTICE OF CASE SCHEDULING**
QWEST CORPORATION,	**ORDER NO. 30319**
RESPONDENT.	

On August 21, 2006, AT&T Communications of the Mountain States filed a complaint against Qwest Corporation, alleging that Qwest entered into "secret" interconnection agreements with Eschelon Telecom and McLeodUSA Telecommunications Services. The complaint alleged a single claim of breach of contract, stating that Qwest violated unspecified terms of an interconnection agreement between AT&T and Qwest (the "Interconnection Agreement") by not disclosing these "secret" agreements. Complaint at 7-8.

In Order No. 30297 issued April 12, 2007, the Commission directed the parties to convene a telephonic prehearing conference within 28 days for the purpose of developing a schedule to process this case. The parties convened their scheduling conference on May 2, 2007. The parties proposed the following schedule, which we hereby adopt.

CASE SCHEDULE

DATE	**ACTION**
May 14, 2007	Qwest Answer *
May 15, 2007	Discovery begins
Week of June 4, 2007	Initial settlement conference – to be conducted between the parties
July 9, 2007	AT&T's Direct Prefiled Testimony
September 10, 2007	Qwest's Reply Prefiled Testimony
November 9, 2007	AT&T's Rebuttal Prefiled Testimony
November 30, 2007	Summary judgment motions and discovery cut-off date

1. When did AT&T have notice of the "secret" agreements such that the Idaho statute of limitations would start to run?

2. Three statutes of limitations have been proposed by the parties as potentially applying to this matter: (1) a two-year statute of limitations provided by 47 U.S.C. § 415; (2) a four-year statute of limitations provided by 28 U.S.C. § 1658(a); and (3) a five-year statute of limitations provided by *Idaho Code* § 5-216. Which statute of limitations applies to this matter?

Id. The parties timely filed their responses (Qwest requested and was granted a slight extension of time to file its brief).

DISCUSSION AND FINDINGS

We direct the parties to convene a telephonic prehearing conference within twenty-eight (28) days of the service date of this Order with the Staff Attorney assigned to this matter for the purpose of developing a schedule to process this case.

ORDER

IT IS HEREBY ORDERED that the parties shall convene a telephonic prehearing conference within twenty-eight (28) days of the service date of this Order for the purpose of developing a schedule to process this case as set forth above.

DONE by Order of the Idaho Public Utilities Commission at Boise, Idaho this 22nd day of May 2007.

PAUL KJELLANDER, PRESIDENT

MARSHA H. SMITH, COMMISSIONER

MACK A. REDFORD, COMMISSIONER

ATTEST:

Jean D. Jewell
Commission Secretary

O:QWE-T-06-17_dh2

Office of the Secretary
Service Date
April 12, 2007

BEFORE THE IDAHO PUBLIC UTILITIES COMMISSION

Attachment 2

AT&T COMMUNICATIONS OF THE MOUNTAIN STATES, INC.,	)	CASE NO. QWE-T-06-17
COMPLAINANT,	)	
vs.	)	
QWEST CORPORATION,	)	
RESPONDENT.	)	ORDER NO. 30297

On August 21, 2006, AT&T Communications of the Mountain States filed a complaint against Qwest Corporation, alleging that Qwest entered into "secret" interconnection agreements with Eschelon Telecom and McLeodUSA Telecommunications Services. The complaint alleged a single claim of breach of contract, stating that Qwest violated unspecified terms of an interconnection agreement between AT&T and Qwest (the "Interconnection Agreement") by not disclosing these "secret" agreements. Complaint at 7-8.

On September 6, 2006, the Commission issued a summons to Qwest to answer the complaint. The Commission also granted the Motions for Limited Admission filed by AT&T's out-of-state counsel. Order No. 30125. Qwest timely filed its answer to the complaint as a Motion to Dismiss on September 27, 2006. AT&T then filed a response to Qwest's Motion to Dismiss on October 26, 2006.

On November 7, 2006, Qwest filed a Motion for Oral Argument with respect to the issues presented in the Motion to Dismiss. AT&T filed its response joining in Qwest's request. The Commission granted the Motion, and set the oral argument for January 24, 2007. Order No. 30195. The Commission also directed the parties to file briefs addressing certain issues about which the Commission required further information. *Id.*

After considering the arguments presented and the information supplied in the parties' attendant briefs, the Commission denied Qwest's Motion to Dismiss at that time. Order No. 30247. Instead, the Commission ordered AT&T to amend its complaint to supply more detail with regards to its claim and ordered each party to file a brief answering the following questions:

1. When did AT&T have notice of the "secret" agreements such that the Idaho statute of limitations would start to run?

2. Three statutes of limitations have been proposed by the parties as potentially applying to this matter: (1) a two-year statute of limitations provided by 47 U.S.C. § 415; (2) a four-year statute of limitations provided by 28 U.S.C. § 1658(a); and (3) a five-year statute of limitations provided by *Idaho Code* § 5-216. Which statute of limitations applies to this matter?

Id. The parties timely filed their responses (Qwest requested and was granted a slight extension of time to file its brief).

DISCUSSION AND FINDINGS

We direct the parties to convene a telephonic prehearing conference within twenty-eight (28) days of the service date of this Order with the Staff Attorney assigned to this matter for the purpose of developing a schedule to process this case.

ORDER

IT IS HEREBY ORDERED that the parties shall convene a telephonic prehearing conference within twenty-eight (28) days of the service date of this Order for the purpose of developing a schedule to process this case as set forth above.

ATTACHMENT 3

Attachment 3

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

AT&T COMMUNICATIONS OF THE MOUNTAIN STATES, INC.,	)	
Plaintiff,	)	Case No. 07-CV-272-mhw
vs.	)	
QWEST CORPORATION,	)	
Defendant.	)	

AT&T'S MOTION TO STAY PROCEEDINGS PENDING OUTCOME OF PRIOR PROCEEDING ON IDENTICAL CLAIM AT IDAHO PUBLIC UTILITIES COMMISSION

AT&T Communications of the Mountain States, Inc. ("AT&T") respectfully submits its motion to stay this proceeding pending the outcome of a prior proceeding on the identical claim that is currently pending before the Idaho Public Utilities Commission ("Idaho PUC"). That case has been underway for nearly a year and is well ahead of this one. Addressing the identical issues and claims here would merely create a risk of inconsistency and conflict and needlessly waste the Court's and parties' resources. In support of this motion, AT&T states as follows:

BACKGROUND

1. Nearly a year ago, on August 21, 2006, AT&T filed a complaint against Qwest Corporation ("Qwest") at the Idaho Public Utilities Commission. Att. 1 hereto. That complaint contains a single count, which alleged breach of contract by Qwest. That claim is identical to the sole claim in AT&T's complaint here, which alleges the same breach of contract by Qwest. *Compare* Cmplt. ¶¶ 11-12 *with* Att. 2 hereto (Amended Cmplt. at Idaho PUC), ¶¶ 13-14.

2. Qwest filed a motion to dismiss AT&T's complaint in the Idaho PUC case. After full briefing on that motion, supplemental briefing on questions raised by the PUC, and oral argument, the PUC denied Qwest's motion on February 16, 2007. Att. 3 hereto. The PUC also directed AT&T to amend its complaint to provide more detail and ordered AT&T and Qwest to file supplemental briefs addressing specific questions. *Id.*

3. AT&T filed its amended complaint (Att. 2) and AT&T and Qwest filed briefs addressing the PUC's questions. On April 12, 2007, the PUC, standing by its prior denial of Qwest's motion to dismiss, ordered the parties to develop a schedule to process the full case. Att. 4 hereto. The parties then did so, developing a schedule for settlement discussions, discovery, three rounds of written testimony, evidentiary hearings, and post-hearings briefs. Att. 5 hereto.

4. The PUC case has proceeded on that schedule, with a few agreed extensions along the way. Settlement discussions have been held. AT&T has served a first round of discovery and Qwest has responded. The parties have entered a protective agreement. AT&T's first round of written testimony is now due at the end of July.

5. During briefing on Qwest's motion to dismiss at the PUC, Qwest raised an issue regarding whether the PUC has authority to grant to full relief requested by AT&T. The PUC has not addressed that issue. Out of an abundance of caution, however, and to avoid any possible future problems under the Idaho statute of limitations, AT&T filed a materially identical complaint in Idaho state court on January 31, 2007. This was filed purely as a protective measure in case the Idaho PUC were ultimately to find it could not grant all the relief to which AT&T is entitled (particularly money damages). AT&T served that complaint on Qwest on May 30, 2007.

6. AT&T asked Qwest to agree to stay the state court proceeding pending the outcome of the ongoing case at the Idaho PUC, but Qwest refused. Instead, Qwest removed the case to federal court and filed a motion to dismiss that is in substance nearly identical to the motion to dismiss that the Idaho PUC already fully considered and denied.

7. AT&T is today filing its response to that motion to dismiss as well as its own motion to remand. It is critical to note, however, that AT&T is making these filings *only* to meet filing deadlines and avoid waiving any rights while there is not yet a stay in place, and believes that no further action should be taken on them at this time. Rather, the Court should decide AT&T's motion to stay before doing anything else, for if granted that will remove any present need to review or require further briefing on the motions to dismiss and remand.

Pub. Util. Comm'n, 208 F.3d 475, 485 (5th Cir. 2000).[1] Relying on these cases, the Idaho PUC likewise held that "state law governs this dispute." Att. 3 at 4.

13. Finally, issuing a stay in these circumstances will help prevent forum shopping. *See American Int'l Underwriters*, 843 F.2d at 1259. AT&T promptly asked Qwest to agree to a stay after AT&T served its complaint in this purely protective case. Qwest refused, even though proceeding on the same claim in both forums is plainly inefficient and would cause the parties to spend money on duplicate proceedings. The only possible motivation for this refusal is that Qwest seeks a different result on its motion to dismiss here, having already lost at the PUC. While Qwest may be willing to waste resources in hopes of getting inconsistent decisions, the Court does not have to play along.[2]

14. Qwest will not be prejudiced by a stay. Qwest has already had its chance to present its motion to dismiss to a qualified decisionmaker. It also will have a complete opportunity to present its case before the Idaho PUC and pursue any appeal, if necessary, in court. In addition, this case concerns past events and does not affect Qwest's current business or conduct. AT&T, by contrast, would be prejudiced by a stay, by having to expend resources on

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[1] The Fifth, Sixth, Seventh, Eighth, and Tenth Circuits agree. *Connect Comms. Corp. v. Southwestern Bell Tel.*, 467 F.3d 703, 707-09 (8th Cir. 2006) (applying "Arkansas contract law" to resolve dispute over enforcement of interconnection agreement, because "the ultimate issue is this case – interpretation of the Interconnection Agreement – is a state law issue"); *Michigan Bell Tel. Co. v. MCImetro Access Transmission Servs., Inc.*, 323 F.3d 348, 355-56 (6th Cir. 2003) ("a state commission's contractual interpretation of an interconnection agreement is governed by state, not federal, law"); *Southwestern Bell Tel. Co. v. Brooks Fiber Comms. of Oklahoma, Inc.*, 235 F.3d 493, 498 (10th Cir. 2000) ("The [interconnection] Agreement itself and state law principles govern the questions of interpretation of the contract and enforcement of its provisions"); *Southwestern Bell*, 208 F.3d at 485; *Illinois Bell Tel. Co. v. WorldCom Technologies, Inc.*, 179 F.3d 566, 574 (7th Cir. 1999) (a decision "'interpreting' an [interconnection] agreement contrary to its terms creates a different kind of problem – one under the law of contracts, and therefore one for which a state forum can supply a remedy"). Only the Fourth Circuit has reached a contrary result, in a decision with a well-reasoned and persuasive dissent. *Verizon Maryland, Inc. v. Global Naps, Inc.*, 377 F.3d 355 (4th Cir. 2004).

[2] Notably, Qwest has never argued that the PUC lacks jurisdiction over AT&T's claim (and the Idaho Supreme Court has held the PUC has such jurisdiction, *McNeal v. Idaho Pub. Utils. Comm'n*, 132 P.3d 442, 446 (Idaho 2006)), nor has Qwest contended that this Court has exclusive jurisdiction.

what everyone recognizes is a placeholder/protective case and having to defend against Qwest taking two bites at every apple.

15. For these reasons, the Court should stay this case pending the final outcome of the already pending proceeding at the Idaho PUC, and take no further action, including on AT&T's motion to remand (which it must file soon to meet the statutory deadline, unless the court were to stay this case immediately) or on Qwest's motion to dismiss. AT&T would be happy to provide the Court with periodic status reports on the PUC proceeding and to notify the Court when that proceeding is complete. In the meantime, however, any further proceedings here will only serve to needlessly waste the resources of both the Court and the parties and pose the risk of inconsistency, conflict, and duplication of effort between the Court and the Idaho PUC.

16. If for any reason the Court were not to stay the case entirely, it should at a minimum defer any action on Qwest's motion to dismiss until it rules on AT&T's motion for remand, which is being filed today in order to meet statutory deadlines in the absence of a current stay. Putting first things first, the Court should not rule on Qwest's substantive motion to dismiss until it first decides whether it even has jurisdiction.

WHEREFORE, AT&T respectfully requests that the Court stay this proceeding and take no further action until the prior proceeding on the identical claim at the Idaho PUC is completed. If no stay is issued, the Court should at a minimum defer action on the motion to dismiss until first addressing the jurisdictional issue raised in AT&T's motion to remand.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 16th day of July, 2007, I served a copy of the foregoing on CM/ECF Registered Participants as reflected on the Notice of Electronic Filing.

Molly O'Leary

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 30th day of August, 2007 a true and correct copy of the within and foregoing AT&T'S OPPOSITION TO QWEST'S MOTION FOR STAY was filed with the Idaho Public Utilities Commission and parties as indicated below:

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Commission Secretary
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