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IDAHO PUBLIC  
UTILITIES COMMISSION

September 27, 2006

**VIA HAND DELIVERY**

Jean D. Jewell, Secretary  
Idaho Public Utilities Commission  
472 West Washington  
Boise, ID 83702-5983

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

Dear Ms. Jewell:

Enclosed for filing with this Commission are an original and seven (7) copies of **QWEST CORPORATION'S MOTION TO DISMISS** in the above referenced matter.

If you have any questions, please contact me. Thank you for your cooperation in this matter.

Very truly yours,

  
Mary S. Hobson

Enclosures

cc: Service List

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UTILITIES COMMISSION

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Attorneys for Qwest Corporation

**BEFORE THE IDAHO PUBLIC UTILITIES COMMISSION**

<p><b>AT&amp;T COMMUNICATIONS OF THE MOUNTAIN STATES, INC.,</b></p> <p><b>Complainant,</b></p> <p>v.</p> <p><b>QWEST CORPORATION,</b></p> <p><b>Respondent.</b></p>	<p><b>Case No. QWE-T-06-17</b></p> <p><b>QWEST CORPORATION'S MOTION TO DISMISS</b></p>

Qwest Corporation ("Qwest") files this Motion to Dismiss the Complaint of AT&T Communications of the Mountain States, Inc. ("AT&T"). In this Complaint<sup>1</sup> AT&T is raising

<sup>1</sup> Complaint, *AT&T Commc'ns of the Mountain States, Inc., v. Qwest Corp.*, Case No. QWE-T-06-17 (hereinafter, "Complaint").

matters clearly barred by the statute of limitations of the Federal Telecommunications Act (“Federal Act”), as well as by fundamental principles of collateral estoppel and res judicata. Pursuant to Idaho Civ. Proc. R. 12(b)(6), Qwest submits this Motion to Dismiss and respectfully requests that the Idaho Public Utilities Commission (“Commission”) promptly reject AT&T’s Complaint, thereby sparing the Commission itself and the parties from expending further time and expense associated with this matter.

## I. Summary of Argument

As recently determined by the Oregon Commission when it addressed materially the same Complaint that is before the Idaho Commission here, AT&T’s claim is barred by the federal two-year statute of limitations. The Oregon Commission found that AT&T’s allegations in fact are premised upon the Telecommunications Act of 1996 and are “masquerading” as state law claims.<sup>2</sup>

AT&T has an obvious reason to disguise its alleged federal claim in state law clothes: here, as in Oregon, Section 415 of the Federal Act clearly would bar the claim if accurately pled. Through this Motion, Qwest requests that the Commission dismiss AT&T’s Complaint because the doctrine of collateral estoppel bars AT&T from attempting to re-litigate the rulings of the Oregon Commission that: (1) the federal two-year statute of limitations applies to these claims; and, (2) AT&T knew of the facts underlying its claim as far back as March 2002. Moreover, even if the Commission decides not to apply collateral estoppel and considers the issues afresh,

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<sup>2</sup> Oregon Public Utility Commission, Order No. 06-465, Order Denying Petition for Reconsideration, *AT&T Commc’ns of the Northwest, Inc., v. Qwest Corp.*, Docket No. UM-1232, at 3 (August 16, 2006) (quoting *MFS Int’l, Inc. v. Int’l Telecom Ltd.*, 50 F. Supp. 2d 517, 520 (E.D. Va. 1999)) (“OPUC Reconsideration Order”), *aff’g* Order No. 06-230, Order Granting Motion to Dismiss, *AT&T Commc’ns of the Northwest, Inc., v. Qwest Corp.*, Docket No. UM-1232 (May 11, 2006) (“OPUC Complaint Order”). Copies of these two orders are provided here as Exhibits A and B.

the governing federal statute of limitations still results in dismissal because it denies the Commission jurisdiction to hear this Complaint.

This Motion first will describe the proceedings before the Commission and other state commissions and then turn to the specific findings of the Oregon Commission, and the law supporting dismissal of this complaint. Qwest respectfully requests that the Commission promptly dismiss this Complaint, thereby avoiding wasted time and resources for itself and the parties arising from AT&T's untimely filing.

## II. Background

AT&T's Complaint relates to events that ended over four years ago. Specifically, AT&T references an interconnection agreement between Qwest and Eschelon Telecom ("Eschelon"), and another between Qwest and McLeodUSA Telecommunications Services, Inc. ("McLeod"). Those agreements both terminated in 2002 and have not been in effect since, so by definition AT&T's alleged harm, if any, only would relate to prior periods.

The two interconnection agreements were well known to AT&T in 2002. That year AT&T played an active leading role in a proceeding before the Minnesota Public Utilities Commission in which both agreements were at issue.<sup>3</sup> Indeed, on February 27, 2002, AT&T raised the subject in a complaint letter filed with utility commissions across the 14-state Qwest

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<sup>3</sup> Based on a complaint filed in February 2002, the Minnesota Commission published public notice of its decision to proceed with the unfiled agreements case on March 12, 2002. *See* Notice and Order for Hearing, *In re Compl. of the Minn. Dep't of Commerce Against Qwest Corp. Regarding Unfiled Agreements*, Docket No. P-421/C-02-197 (Minn. Public Utils. Comm'n 2002). The Eschelon agreement was referenced in that initial complaint and in the public notice; the McLeod agreement was referenced in an amendment to the complaint filed on May 2, 2002. AT&T was an active party in the Minnesota proceedings both before and after the March 12 public notice and therefore had actual knowledge of the circumstances underlying these two agreements. AT&T participated by propounding discovery, filing pleadings, presenting evidence, cross-examining Qwest witnesses, and seeking monetary relief from the Minnesota Commission.

region.<sup>4</sup> In that letter, AT&T complained about alleged “secret” interconnection agreements that Qwest purportedly failed to file in compliance with 47 U.S.C. §§ 251 and 252 of the Federal Telecommunications Act (the “Act”). This was the beginning of AT&T-led litigation on the “unfiled agreements” issue before multiple state commissions and at the FCC.

Here in Idaho Qwest made a compliance filing of six negotiated agreements with this Commission on August 21, 2002, including its agreements with McLeodUSA.<sup>5</sup> Qwest submitted an additional amendment to its interconnection agreement with McLeodUSA on September 19, 2002. The Commission determined that a formal hearing in the matter was not required but provided notice of the filings and an opportunity to intervene within twenty-one days of the service date of the order.<sup>6</sup>

AT&T did not seek to intervene and did not file any comments concerning Qwest’s submission of the six interconnection agreements or the September 19, 2002 amendment. But that does not mean that AT&T has ignored the issue. As the Commission knows, in 2002 AT&T made the “unfiled agreements” issue one of its central grounds for urging the FCC to deny Qwest Section 271 authority, including such authority in Idaho.<sup>7</sup> AT&T’s FCC comments raised similar arguments to what AT&T had made to state commissions: that Qwest should not be granted 271 authority based on the unfiled agreement issue, including the McLeod and Eschelon

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<sup>4</sup> As an example, a copy of AT&T’s letter to the Iowa Utilities Board. This filing is attached as Exhibit C.

<sup>5</sup> See *In re Application of Qwest Corp., and McLeodUSA Telecommc’ns Servs., Inc. for Approval of An Amendment to An Interconnection Agreement for the State of Idaho Pursuant to 47 U.S.C. § 252(e)*, at 1, Case No. QWE-T-02-17, Order No. 29116 (Idaho Public Utils. Comm’n Sept. 19, 2002).

<sup>6</sup> *Id.*, at 2-4.

<sup>7</sup> See Comments of AT&T Corp., *In re Qwest Commc’ns Int’l Inc., Consol. Application for Auth. to Provide In-Region, InterLATA Servs. in Colo., Idaho, Iowa, Neb. and N.D.*, WC Docket No. 02-148 (July 3, 2002).

agreements.<sup>8</sup> The FCC rejected these arguments, but not without first considering them.<sup>9</sup>

Meanwhile, although AT&T chose not to comment before this Commission on Qwest's interconnection agreement filings, another party did, making AT&T's arguments. Pagedata, submitted comments relying on an affidavit of an AT&T witness, Kenneth Wilson, which AT&T previously had filed with the FCC in connection with Qwest's contemporaneous application for section 271 authority. AT&T's FCC affidavit alleged that "[t]he agreements at issue with McLeod, Covad, and Eschelon are not all of the unfiled interconnection agreements that Qwest had with McLeod, Covad, and Eschelon including oral, expired, and cancelled agreements."<sup>10</sup>

AT&T subsequently raised the "unfiled agreements" issue directly in a complaint it filed before this Commission. On August 6, 2004, AT&T filed a complaint against Qwest alleging that Qwest overcharged AT&T for use of conduit facilities in Idaho under its interconnection agreement.<sup>11</sup> AT&T asserted that its injuries resulted from "a pattern of the deceptive and anti-competitive practices that Qwest had engaged in across the multi-state service areas, including, specifically, Idaho."<sup>12</sup> AT&T pointed to actions related to the unfiled interconnection agreements before the FCC and in numerous states, including one decision dating back to at least June 2002 in Iowa where AT&T was the plaintiff.<sup>13</sup> However, AT&T did not pursue its breach

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<sup>8</sup> See e.g., Order Establishing Time for Responses, *In re: US W E S T Commc'ns, Inc., n/k/a Qwest Corp.*, Docket Nos. INU-00-2, SPU-00-11 (May 17, 2002).

<sup>9</sup> See *In re Application by Qwest Communications International Inc for Authorization to Provide In-Region, InterLATA Services in the States of Colorado, Idaho, Montana, Nebraska, North Dakota, Utah, Washington and Wyoming*, 17 FCC Rcd 26,303, at 26,570 ¶¶ 466-491 (2002).

<sup>10</sup> *In re Application of Qwest Corp., and McLeodUSA Telecomm'ns Servs., Inc. for Approval of An Amendment to An Interconnection Agreement for the State of Idaho Pursuant to 47 U.S.C. § 252(e)*, Comments by Pagedata, at 2, Case No. QWE-T-02-17 (Idaho Public Utils. Comm'n Oct. 25, 2002).

<sup>11</sup> Complaint, *AT&T Corp. v. Qwest Corp.*, Case No. ATT-T-04-1 (Idaho Public Utils. Comm'n, filed Aug. 6, 2004), attached as Exhibit D.

<sup>12</sup> *Id.* at ¶ 22.

<sup>13</sup> See *id.* at ¶ 22 n. 1.

of contract claim in this complaint even though that claim related to the same interconnection agreements. On July 12, 2005, AT&T and Qwest filed a Stipulation and Joint Motion to Dismiss the Complaint with Prejudice, and the Commission summarily accepted the settlement and granted the Motion to Dismiss.<sup>14</sup>

As noted, the Eschelon and McLeod agreements were both terminated in 2002, so they are ancient history. But Qwest provides this background because, notwithstanding AT&T's artful pleading, it underscores both that: (1) AT&T's claims here arise under the Federal Act, and (2) AT&T knew of the unfiled agreements matter long ago and did not pursue its claims on a timely basis.

After a lengthy hiatus, AT&T recently has attempted to resurrect its stale claims purportedly arising from the McLeod and Eschelon agreements. These efforts began in November 2005 and January 2006, when AT&T filed complaints with the Washington Utilities and Transportation Commission and Oregon Commission asserting substantively identical claims to those presented here. In each case, as here, AT&T attempted to portray its damages claims as violations of state law rather than of the Federal Telecommunications Act, undoubtedly to avoid the shorter federal limitations period.<sup>15</sup>

However, the Oregon Commission dismissed the AT&T complaint on May 11, 2006,<sup>16</sup> concluding that AT&T's purported state contract claims in fact rested on alleged violations of the Federal Act. The Oregon Commission firmly stated that "[t]he alleged violations are 'actions

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<sup>14</sup> See *AT&T Corp. v. Qwest Corp.*, Case No. ATT-T-04-1, Order No. 29832 (Idaho Public Utils. Comm'n July 22, 2005).

<sup>15</sup> See 47 U.S.C. § 415.

<sup>16</sup> See OPUC Complaint Order.

based on [federal law] masquerading as state law claims.”<sup>17</sup> Accordingly, the Oregon Commission held that “[t]hese thinly veiled claims of violations of federal law fall under the federal Communications Act statute of limitations, 47 U.S.C. § 415, of two years from accrual.”<sup>18</sup> The Oregon Commission also found that AT&T was aware of the two agreements at least as early as the spring of 2002, and that therefore the time for seeking damages based on any violations arising from those agreements had long passed. AT&T unsuccessfully sought reconsideration of that ruling. On August 16, 2006, the Oregon Commission reaffirmed its decision that AT&T’s complaint was time-barred.<sup>19</sup>

After the Oregon Commission ruled against it, AT&T filed new complaints with the state courts in both Oregon and Washington, asserting the same claims yet again. The Oregon state court is currently considering Qwest’s motion to dismiss based on this same statute of limitations issue, as well as collateral estoppel arising from the decision of the Oregon Commission. Similar motions are pending in Washington.

Then, within days after losing its bid for reconsideration by the Oregon Commission, AT&T filed similar complaints before other state utility commissions and state courts, including this case.<sup>20</sup> In effect, AT&T is shotgunning complaints at as many courts and commissions as possible, hoping for a different answer than the one it received in Oregon. This Commission

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<sup>17</sup> See OPUC Reconsideration Order.

<sup>18</sup> OPUC Complaint Order at 6.

<sup>19</sup> OPUC Reconsideration Order.

<sup>20</sup> All of the state court cases have been, or soon will be, removed to federal court. See, e.g., *AT&T Commc’ns of the Midwest, Inc. v. Qwest Corp.*, Case No. CL103091 (Iowa Dist. Ct., Polk County, filed Aug. 31, 2006); *AT&T Commc’ns of the Midwest, Inc. v. Qwest Corp.*, Case No. \_\_\_\_\_ (Minn. Dist. Ct., Fourth Dist., Hennepin County, filed Sept. 1, 2006); *AT&T Commc’ns of the Midwest, Inc. v. Qwest Corp.*, Case No. \_\_\_\_\_ (Neb. Dist. Ct., Lancaster County, filed Sept. 1, 2006); *AT&T Commc’ns of the Mountain States, Inc. v. Qwest Corp.*, Docket No. 060913848 (Utah Dist. Ct. filed Aug. 22, 2006); *AT&T Commc’ns of the Mountain States, Inc. v. Qwest Corp.*, Civil Action No. 168-538 (Wyo. Dist. Ct. filed Aug. 28, 2006).

should not indulge AT&T's search. For the reasons discussed below, the Commission should promptly dismiss this Complaint, filed long after the expiration of the applicable federal two year statute of limitations. Qwest requests that the Commission take administrative notice of the previous proceedings held regarding these Qwest agreements to the extent necessary to conclude that federal issues form the basis of AT&T's allegations, and that a motion to dismiss may be granted now, notwithstanding AT&T's artful attempt to try and suggest that its claim arises under state law.

The Oregon Commission decision is more than just persuasive authority. The Oregon Commission decision directly bars the AT&T complaint on collateral estoppel grounds. AT&T already fully litigated the question of whether the statute of limitations in Section 415 of the Federal Act bars its damages claims. The Oregon Commission correctly rejected AT&T's position. As a matter of law, AT&T is therefore barred from re-litigating that question here in Idaho, or in the multiple other fora from which it seeks a different answer. The Commission should apply the ruling of the Oregon Commission on this narrow but dispositive issue.

By acting upon Qwest's motion to dismiss this case on one or more of these grounds, the Commission will spare Qwest, the Commission, and other parties unnecessary time and expense associated with this improper Complaint. These matters are discussed further below.

### **III. Argument**

#### ***A. Legal Standards for Motions to Dismiss***

Idaho Civ. Proc. R. 12(b)(6) provides dismissal for "failure to state a claim upon which relief can be granted." Under Idaho law, a court will dismiss pursuant to Rule 12(b)(6) only

“when it appears beyond doubt that the plaintiff can prove no set of facts in support of [the] claim which would entitle [plaintiff] to relief.”<sup>21</sup> The movant admits the well-pleaded facts in the complaint, and all inferences are construed in the non-movant’s favor.<sup>22</sup> On a motion to dismiss, the court may properly consider those facts appearing in the complaint, supplemented by those facts of which the court may properly take judicial notice.<sup>23</sup>

***B. AT&T’s Complaint Is Barred By The Two Year Federal Statute Of Limitations.***

*1. Section 415 of the Federal Act Provides the Applicable Statute of Limitations for AT&T’s Claims.*

Although AT&T attempts to frame its breach of contract claim under state law, the allegations themselves demonstrate that the claims arise under federal law and thus are governed by the Federal Act’s statute of limitations in section 415. In its opening allegations, AT&T acknowledges that “[p]ursuant to the federal Telecommunications Act of 1996,” Qwest was “required to enter into interconnection agreements with other telecommunications carriers that request access to the incumbent carrier’s network, facilities and services.”<sup>24</sup> The complaint then asserts that “Qwest did not file these secret Agreements with the PUC as required by law, and, because they were not filed and remained undisclosed, AT&T did not know about them and therefore could not demand the same discounted rates in a timely manner, as it was entitled to do.”<sup>25</sup>

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<sup>21</sup> *Wackerli v. Martindate*, 353 P.2d 782, 787 (Idaho 1960).

<sup>22</sup> *Walenta v. Mark Means Co.*, 394 P.2d 329, 331 (Idaho 1964).

<sup>23</sup> *See Wackerli*, 353 P.2d at 787; *Roberts v. Hollandsworth*, 616 P.2d 1058, 1060-61 (Idaho 1980) (taking judicial notice of a Ninth Circuit action and dismissing state court action on ground of another pending action).

<sup>24</sup> Complaint, at ¶ 1 (citing 47 U.S.C. §§ 251-52).

<sup>25</sup> *Id.*, at ¶ 3.

This Commission's jurisdiction to hear actions to enforce the terms of interconnection agreements derives, not from state law, but from the Federal Act.<sup>26</sup> AT&T acknowledges as much, relying on Idaho Code § 62-615(1) for the Commission's jurisdiction.<sup>27</sup> Section 62-615 provides that "[t]he Commission shall have full power and authority to implement the federal telecommunications act of 1996. . . ." This jurisdictional structure is consistent with Congress' intent regarding the limits of authority delegated to state commissions. "[W]ith the 1996 Telecommunications Act, Congress has offered the states, not federal funds, but a role as what the carriers have called a 'deputized' federal regulator."<sup>28</sup> The Federal Act limits the scope of a state commission's authority to regulate local telecommunication competition.<sup>29</sup> Thus, without delegated authority, the Commission lacks jurisdiction to act.

AT&T's breach of contract claim represents the quintessential type of claim relating to interconnection agreements that courts have refused to allow to proceed on state law grounds. AT&T's claim is dependent on and intertwined with the Federal Act, and thus the Commission must look to section 415 of the Federal Act to determine whether it has jurisdiction to hear this action. Section 415 provides an express two-year statute of limitations within which the

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<sup>26</sup> See *Pac. Bell v. Pac-West Telecomm, Inc.*, 325 F.3d 1114, 1126 (9th Cir. 2003) ("It is clear from the structure of the Act, however, that the authority granted to state regulatory commissions is confined to the role described in § 252 -- that of arbitrating, approving, and enforcing interconnection agreements."); *Southwestern Bell Tel. Co. v. Connect Commc'ns Corp.*, 225 F.3d 942, 946 (8th Cir. 2000) ("[T]he state commission's power to enforce a federally-mandated interconnection agreement arises from § 252, and thus a state commission's decision enforcing the agreement is a 'determination' under that section."). See also *Petition of SBC Tex. For Post-Interconnection Dispute Resolution with Tex-Link Commc'ns, Inc., under the FTA Relating to Intercarrier Comp.*, Ruling on Motion to Dismiss, 2005 WL 2834183, at 2 (Tex. P.U.C. Oct. 26, 2005) ("Enforcement of ICAs does not rely on state law. Rather, the authority to enforce ICAs comes from federal law.") [hereinafter "*SBC Tex.*"].

<sup>27</sup> See Complaint at ¶ 8.

<sup>28</sup> *MCI Telecomms. Corp. v. Ill. Bell Tel. Co.*, 222 F.3d 323, 343-44 (7th Cir. 2000); *Connect Commc'ns Corp.*, 225 F.3d 942, 946 (8th Cir. 2002) (The new regime for regulating competition in this industry is federal in nature, and while Congress has chosen to retain a significant role for the state commissions, the scope of that role is measured by federal, not state law.").

<sup>29</sup> *Pac. Bell*, 325 F.3d at 1126-27 (discussing *AT&T v. Iowa Utils.Bd.*, 525 U.S. 366, 378 & n. 6, 385 & n. 10 (1999)).

Commission may exercise such authority. In pertinent part, 47 U.S.C. § 415 provides:

(a) All actions at law by carriers for recovery of their lawful charges, or any part thereof, shall be begun, within two years from the time the cause of action accrues, **and not after**.

(b) All complaints against carriers for the recovery of damages not based on overcharges shall be filed with the Commission within two years from the time the cause of action accrues, **and not after**, subject to subsection (d) of this section.

(c) For recovery of overcharges action at law shall be begun or complaint filed with the Commission against carriers within two years from the time the cause of action accrues, **and not after**, subject to subsection (d) of this section, except that if claim for the overcharge has been presented in writing to the carrier within the two-year period of limitation said period shall be extended to include two years from the time notice in writing is given by the carrier to the claimant of disallowance of the claim, or any part or parts thereof, specified in the notice.

(Emphasis added.)

Section 415 applies to proceedings in federal court, the FCC, or before a state commission.<sup>30</sup> This broad scope is consistent with Congress' desire to assure national uniformity in the Federal Act's application.<sup>31</sup> To permit varying periods of limitation from state to state would contravene Congress's intent and discriminate against carriers that happen to be sued in states with more generous statutes of limitation.<sup>32</sup>

Recognizing the breadth of Section 415, courts in the Ninth Circuit have applied Section 415 in actions involving telecommunications carriers, irrespective of whether the claims were state or federal. In *Pavlak*, the Ninth Circuit applied the two-year limitation to a plaintiff's civil rights claims against a carrier.<sup>33</sup> In *Cole v. Kelley*,<sup>34</sup> plaintiffs brought an action against a number of defendants, including Pacific Telephone, asserting constitutional and federal statutory

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<sup>30</sup> See, e.g., *Pavlak v. Church*, 727 F.2d 1425, 1426-27 (9th Cir. 1984) (holding that 47 U.S.C. § 415 applies to claims filed in district court as well as to complaints filed with the FCC); *SBC Tex.*, at 7-9 (finding that the two-year limitation applies to claims that a state commission is authorized to hear).

<sup>31</sup> See *Swarthout v. Mich. Bell Tel. Co.*, 504 F.2d 748, 748 (6th Cir. 1974).

<sup>32</sup> See *A.J. Phillips Co., v. Grand Trunk W. Ry. Co.*, 236 U.S. 662, 667 (1915).

<sup>33</sup> See *Pavlak*, 727 F.2d at 1427-28.

<sup>34</sup> 438 F.Supp. 129 (C.D. Cal. 1977).

violations in addition to a number of state law claims. As to Pacific Telephone, the *Cole* court held that the limitations period provided by Section 415(b), which at the time was one year, barred all of plaintiffs' claims, including the state claims: "The statute applies to civil actions brought against a federally regulated communications utility in federal court, as well as those filed with the regulatory agency."<sup>35</sup> Following this precedent, the Oregon Public Utility Commission has found that Section 415 bars the very same AT&T claims that are presented here. The Oregon Commission decision is discussed in more detail in Section C below for its relevance to collateral estoppel.

But the Commission also should be guided by other precedent on this point. For example, the Texas Public Utility Commission has found that the Federal Act granted that Commission its authority to interpret and enforce interconnection agreements, and therefore the Commission had to look to Section 415 as a limitation on its jurisdiction: "Given that the authority to interpret/enforce ICAs [interconnection agreements] and to award any damages comes from the FCA/FTA,<sup>36</sup> the FCA's two-year limitations must apply to a claim for damages in an FTA arbitration. Thus, without that authority, the Commission lacks jurisdiction to interpret or enforce interconnection agreements."<sup>37</sup>

Similarly, the court in *MFS International, Inc., v. International Telecom Ltd.*<sup>38</sup> found that the fact that the complainant attempted to allege state law claims did not override the sweeping language of Section 415(b), and thus those claims were precluded. While noting that the complainant's breach of contract and conversion claims appeared on the surface not to implicate

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<sup>35</sup> *Id.* at 145 (citing *Ward v. Northern Ohio Tele. Co.*, 251 F.Supp. 606 (N.D. Oh. 1966)).

<sup>36</sup> Federal Communications Act/Federal Telecommunications Act.

<sup>37</sup> *SBC Tex.*, at 9.

<sup>38</sup> 50 F. Supp. 2d 517, 520 (E.D.Va. 1999).

the Federal Act, the court adhered to long-standing precedent and the plain language of the Federal Act to find “that such putative state law claims are in fact governed by the federal statute of limitations set out in § 415(b).”<sup>39</sup> Although the *MFS International* court dealt with a federally-filed tariff, rather than an interconnection agreement, the difference is immaterial. The Ninth Circuit has held that “interconnection agreements have the binding force of law.”<sup>40</sup> Thus, notwithstanding AT&T’s attempt to cloak its claims under state law, it nevertheless remains evident that the Commission must look to Section 415 to determine whether it has jurisdiction to hear AT&T’s Amended Complaint.

The need to apply Section 415 is made more compelling in this case given the nature and purpose of interconnection agreements, and the likelihood that if this case is not dismissed, the Commission would have to turn to federal law in resolving AT&T’s breach of contract claim. Interconnection agreements are not ordinary contracts.<sup>41</sup> The very existence of interconnection agreements was created by virtue of the Federal Act.<sup>42</sup> Interconnection agreements set forth the “terms and conditions. . . to fulfill the duties” mandated by 47 U.S.C. §§ 251(b) and 252(c),<sup>43</sup> and many of the provisions of interconnection agreements “represent nothing more than an attempt to comply with the requirements of the 1996 Act.”<sup>44</sup> Agreements are “cabined by the

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<sup>39</sup> *Id.*

<sup>40</sup> *Pac. Bell*, 325 F.3d at 1127; *Verizon Md, Inc. v. RCN Telecom Servs., Inc.*, 232 F.Supp.2d 539, 552 n. 5 (D. Md. 2002) (noting that an interconnection agreement “is functionally no different from a federal tariff.”); *see also Goldwasser v. Ameritech Corp.*, 222 F.3d 390, 402 (7th Cir. 2000).

<sup>41</sup> *RCN Telcom Servs., Inc.*, 232 F. Supp.2d at 552 n. 5 (“[A]n interconnection agreement is part and parcel of the federal regulatory scheme and bears no resemblance to an ordinary, run-of-the-mill private contract.”); *SBC Tex.*, at 4 (“An interconnection agreement is not an ordinary private contract.”); *E.Spire Commc’ns, Inc. v. N.M. Pub. Regulation Comm’n*, 392 F.3d 1204, 1207 (10th Cir. 2004) (noting that interconnection agreements are “instrument[s] arising within the context of ongoing federal and state regulation”).

<sup>42</sup> OPUC Complaint Order at 4.

<sup>43</sup> 47 U.S.C. § 251(c)(1).

<sup>44</sup> *AT&T Commc’ns of the S. States, Inc. v. BellSouth Telecom., Inc.*, 229 F.3d 457, 465 (4th Cir. 2000).

obvious recognition that the parties to the agreement had to agree within the parameters fixed by the federal standards set out in 47 U.S.C. §§ 251 and 252.”<sup>45</sup> Given this context, the Ninth Circuit has held that “interconnection agreements have the binding force of law.”<sup>46</sup>

Furthermore, in evaluating AT&T’s complaint, the Commission necessarily would have to apply the rules and policies created by the FCC to implement the interconnection provisions of the Federal Act. The interconnection agreements specify that “[t]his agreement shall be governed by and construed in accordance with the [Federal] Act and the FCC’s rules and regulations, except insofar as state law may control any aspect of this Agreement. . . .”<sup>47</sup> Moreover, AT&T’s breach of contract claim is premised on the allegation that Qwest breached its obligations under the interconnection agreements.<sup>48</sup> Yet, this language is informed by and essentially mirrors the express requirements of the Federal Act. Section 251(c) obligates a local exchange carrier to provide interconnection “on rates, terms, and conditions that are just, reasonable, and nondiscriminatory, in accordance with the terms and conditions of the agreement and the requirements of this section and section 252 of this title.” Similarly, AT&T’s breach of contract claim asserts that Qwest did not “act in good faith and consistently with the intent of the 1996 Act.”<sup>49</sup>

To evaluate AT&T’s claim then, the Commission would need to apply federal law establishing the scope of Qwest’s duty as defined by Congress and the FCC. The mere fact that

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<sup>45</sup> *BellSouth Telecom., Inc. v. MCI Metro Access Transmission Servs., Inc.*, 317 F.3d 1270, 1281 (11th Cir. 2003).

<sup>46</sup> *Pac. Bell*, 325 F.3d at 1127.

<sup>47</sup> See Complaint at Exh. 1, § 21 (“Governing Law”).

<sup>48</sup> See, e.g., *id.* at ¶¶ 4, 16, 20-22 (alleging that Qwest breached duties under the Federal Act and interconnection agreement).

<sup>49</sup> *Id.* at ¶¶ 4, 16.

ILECs charge different companies different rates for the same services is not a facial violation of the Federal Act.<sup>50</sup> Under Section 252(i), ILECs are required, albeit only in appropriate circumstances and subject to the rules of the FCC, to make interconnection services available to other carriers on request on the same terms and conditions as are contained in such individually negotiated interconnection agreements.<sup>51</sup> The FCC, not state commissions, establishes the policies and rules addressing how section 252(i) is to be applied,<sup>52</sup> and also whether a contract qualifies as an interconnection agreement that must be filed in the first place.<sup>53</sup>

Thus, the Commission unavoidably would have to address issues of federal law arising under the Federal Act in adjudicating AT&T's breach of contract claim. For example, the Federal Act requires that a carrier must be willing and able to accept all legitimately related terms in an existing agreement.<sup>54</sup> Notwithstanding AT&T's unsubstantiated allegations that it would have "availed itself of the discounts in the Eschelon and McLeodUSA Agreements,"<sup>55</sup> the Complaint fails to allege that AT&T could or would have chosen to comply with the related terms and conditions. Similarly, FCC rules exempt incumbents that can prove that providing a

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<sup>50</sup> "If the 1996 Act is read to allow no price distinctions between companies that impose very different interconnection costs on LECs, competition for all competitors, including small companies, could be impaired. Thus, we find that price differences, such as volume and term discounts, when based upon legitimate variations in costs are permissible under the 1996 Act, if justified." *In re Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 1996 WL 452885, at \*251, 11 F.C.C.R. 15,499, 15928 (FCC Aug. 8, 1996).

<sup>51</sup> 47 U.S.C. §252(i).

<sup>52</sup> The FCC has established detailed policies and rules governing the scope of Section 251(i), including when another carrier may request access to the terms of another party's interconnection agreement, and when they may not. *See, e.g., Review of the Section 251 Obligations of Local Exch. Carriers*, Second Report and Order, 19 FCC Rcd 13494 and n. 6 (2004), *aff'd sub nom. New Edge Network, Inc. v. FCC*, 2006 WL 2473472 (9th Cir., Aug. 29, 2006).

<sup>53</sup> *See Memorandum Opinion and Order, Petition for Declaratory Ruling on the Scope of the Duty to File and Obtain Prior Approval of Negotiated Contractual Arrangements Under Section 252(a)*, WC-02 89, 17 FCC Rcd 19337 (2002); *see also* Complaint, Exh. 1, § 21.

<sup>54</sup> *Iowa Utils. Bd.*, 525 U.S. at 398.

<sup>55</sup> Complaint at ¶ 17.

particular interconnection agreement to a requesting carrier is either (1) more costly than providing it to the original carrier, or (2) technically infeasible.<sup>56</sup> If one of these federally described exemptions applied, AT&T's breach of contract claim would fail based on application of federal law.

In sum, notwithstanding its artful attempt to frame its complaint under state law, AT&T is seeking damages arising from federal law matters. Any other conclusion would upset the Federal Act's structure of consistent nation-wide regulation in the area of interconnection.<sup>57</sup> It follows that the federal statute of limitations in section 415 of the Federal Act applies to this Complaint.

2. *AT&T's Claim Accrued Much More than Two Years Before it Filed this Complaint.*

Under Section 415 a claim accrues when the aggrieved party in the exercise of reasonable diligence should have discovered the injury.<sup>58</sup> Once the time to bring suit under the Federal Act has lapsed, the Commission no longer has jurisdiction to hear the action. The United States Supreme Court has made clear that the "and not after" language found in Section 415 means that "the lapse of time not only bars the remedy but destroys the liability."<sup>59</sup> A cause of action cannot be revived after the limitations period passes.

As the Oregon Commission has already determined, AT&T's claims accrued more than

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<sup>56</sup> 47 C.F.R. § 51.809.

<sup>57</sup> See *Verizon Md., Inc. v. Global Naps, Inc.*, 377 F.3d 355, 363-65 (4th Cir. 2004) (finding substantial questions of federal law because the agreement was federally mandated, the key disputed provisions incorporated federal law, and the contractual duty was imposed by federal law); *Connect Commc'ns Corp.*, 225 F.3d at 947-48 (finding "substantial federal-law questions underlying the dispute in this case" and that the "Commission's argument now that this case is simply a matter of state contract law does not ring true").

<sup>58</sup> *Pavlak*, 727 F.2d at 1426-27; *MFS Int'l, Inc.*, 50 F. Supp.2d at 524.

<sup>59</sup> *A.J. Phillips Co.*, 236 U.S. at 667.

two years before it filed this complaint.<sup>60</sup> AT&T's claims accrued when it discovered, or by exercise of reasonable diligence should have discovered, its right to apply for relief. In this case, AT&T filed letters with state commissions in the Qwest region requesting an investigation into the agreements at issue here on February 27, 2002.<sup>61</sup> In describing this letter, the Iowa Commission stated that "AT&T alleged that Qwest had entered into a series of secret agreements granting preferential treatment to some CLECs. AT&T noted a similar complaint before the Minnesota Public Utilities Commission where agreements had not been filed with the state commission as required by 47 U.S.C §§ 251 and 252."<sup>62</sup> Thus, AT&T was not only on actual notice of the facts underlying its claims as of that time, it was seeking state commission investigations with regard to those facts.

Moreover, this is not a situation in which AT&T was a mere passive spectator in the complaint proceedings brought by various state commissions. AT&T and its affiliated companies pursued a strategy of intervention and active participation in the "unfiled agreement" dockets opened in Arizona, Colorado, Iowa, Minnesota, New Mexico, and Washington. At the least, AT&T knew—or should have been aware with the exercise of minimal diligence—of the operative allegations at least as early as March 12, 2002, the date on which the Minnesota Commission published public notice of its decision to proceed with the unfiled agreements case.<sup>63</sup>

It follows that AT&T's cause of action here accrued well over four years ago, and that its

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<sup>60</sup> OPUC Complaint Order at 7-8.

<sup>61</sup> See Exhibit C.

<sup>62</sup> Written Consultation and Evaluation, *Qwest Commc'ns Int'l, Inc.*, WC Docket No. 02-148 (Iowa Utilities Commission, July 3, 2002), at 72.

<sup>63</sup> See Notice and Order for Hearing, *In re Complaint of the Minn. Dep't of Commerce Against Qwest Corp. Regarding Unfiled Agreements*, Docket No. P-421/C-02-197 (Minn. Public Utils. Comm'n, Mar. 12, 2002), attached as Exhibit E to this motion.

action is barred by Section 415 of the Federal Act.

***C. AT&T is Attempting to Relitigate An Issue that it Already Has Litigated and Lost.***

**1. The Elements of Collateral Estoppel**

As discussed in the Introduction to this Motion, after losing the decision before the Oregon Commission, AT&T has now decided to file the same basic claim in multiple states, thus raising in multiple places the fundamental legal question of whether its complaint is time-barred by Section 415 in multiple places. This type of litigation strategy is exactly what the doctrine of collateral estoppel is intended to prevent.

It is well-established that the Full Faith and Credit Clause compels Idaho courts and agencies to give preclusive effect to the decisions and findings of administrative tribunals and courts of other states.<sup>64</sup> If ever collateral estoppel should be applied by a state commission, this is the case: it involves the identical agreements as in Oregon, the same legal issue of whether the Federal Act applies notwithstanding the attempt to plead state law, and the same triggering event for the running of the statute of limitations. Indeed, the failure to apply collateral estoppel here would reward AT&T for filing multiple cases in an attempt to forum-shop for an answer that it likes.

“Collateral estoppel serves the purpose of protecting litigants from the burden of re-litigating an identical issue with the same party or his privy, of promoting judicial economy by preventing needless litigation, of preventing inconsistent decisions and of encouraging reliance

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<sup>64</sup> *Idaho St. Bar v. Everard*, 124 P.3d 985, 990 (Idaho 2005) (giving preclusive effect to findings made in Washington); *J&J Contractors/O.T. Davis Const., A.J.V. v. State by Idaho Transp. Bd.*, 797 P.2d 1383, 1385 (Idaho 1990) (“The doctrine of claim preclusion, or res judicata, applies to the effect of administrative decisions.”).

on adjudications.”<sup>65</sup> The full faith and credit clause renders the doctrines of res judicata and collateral estoppel compulsory as between the states and precludes AT&T’s action.<sup>66</sup>

To bar re-litigation of an issue determined in a prior proceeding, a party seeking dismissal based on issue preclusion must establish that: (1) the party against whom the earlier decision was asserted had a full and fair opportunity to litigate the issue decided in the earlier case; (2) the issue decided in the prior litigation was identical to the issue presented in the present action; (3) the issue sought to be precluded was actually decided in the prior litigation; (4) there was a final judgment on the merits in the prior litigation; and (5) the party against whom the issue is asserted was a party or in privity with a party to the litigation.<sup>67</sup>

Applied here, AT&T is estopped from relitigating both the federal basis of its claim, and the discovery date for its claim under the applicable statute of limitations in the Federal Act.

**2. The Oregon Commission Has Ruled (Twice) on the Central Issues of AT&T’s Claim**

***a. AT&T Is Estopped from Relitigating the Issue of Whether Its Claims Fall under Federal Law.***

The Oregon Commission found that “[AT&T’s] claims squarely fall under federal law and the kinds of harms contemplated by the federal telecommunications framework, so the breach of contract claims may not be made separately from the violations of federal law.”<sup>68</sup> The issue decided by the Oregon Commission is identical to the jurisdictional issue in this case—whether AT&T’s attempt to plead state law claims is just an artful attempt to bring otherwise

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<sup>65</sup> *Anderson v. City of Pocatello*, 731 P.2d 171, 183 (1986) (citations omitted).

<sup>66</sup> *Everard*, 124 P.3d at 990; *Baker v. Gen. Motors Corp.*, 522 U.S. 222, (1998) (“For claim and issue preclusion (res judicata) purposes, in other words, the judgment of the rendering State gains nationwide force.”) (citation omitted).

<sup>67</sup> *Rodriguez v. Dep’t of Corr.*, 29 P.3d 401, 404 (Idaho 2001) (finding full and fair opportunity as to whether limitations period was tolled).

<sup>68</sup> OPUC Complaint Order at 6.

time-barred federal law allegations.

The Oregon Commission decision is directly on point here. In Oregon, AT&T filed an amended complaint alleging, among other claims, a state law breach of contract claim. Qwest opposed the amended complaint primarily on the ground that the two-year statute of limitations under 47 U.S.C. § 415 barred the entire action, including the breach of contract claim. AT&T responded to Qwest's motion, stating that it was not asserting any independent violations under federal law and were merely pursuing state law claims.<sup>69</sup>

In what is now a final order, the Oregon Commission granted Qwest's motion to dismiss. The Oregon Commission agreed with Qwest that 47 U.S.C. § 415, the statute of limitations under the Federal Act, applied to AT&T's breach of contract claims. The Commission refused to give any credence to AT&T's obvious attempts to circumvent federal law. The Oregon Commission's decision is squarely on point and collaterally estops AT&T from trying to assert a breach of contract claim here:

The interconnection agreements are required under the Telecommunications Act, 47 USC § 252, and the provisions cited by AT&T directly implicate federal law. Even Complainants [AT&T] state, "regardless of whether the Commission finds that AT&T have brought, or could bring, an independent action for violation of Section 252(i), the Amended Complaint states a cause of action for breach of contract that incorporates Qwest's obligations under Section 252(i)." Complainants' Response, 10. These thinly veiled claims of violations of federal law fall under the federal Communications Act statute of limitations, 47 USC § 415, of two years from accrual.<sup>70</sup>

Specifically, the Oregon Commission found that AT&T's claims were based on the allegation that "Qwest violated section 252(i), thereby depriving [the company] of the opportunity to opt into more favorable contracts. *These claims squarely fall under federal law and the kinds of harms contemplated by the federal telecommunications framework*, so the breach of contract

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<sup>69</sup> See *id.* at 3.

<sup>70</sup> OPUC Complaint Order at 6.

claims may not be made separately from the violations of federal law.”<sup>71</sup> The Commission consequently found that the statute of limitations in section 415 of the Federal Act governed all of AT&T’s claims.

Here collateral estoppel principles require this Commission to apply the Oregon Commission’s holding that AT&T’s breach of contract allegations depend on federal law.<sup>72</sup>

**First**, AT&T had an opportunity to assert this claim and fully and fairly adjudicate it before the Oregon Commission. The Oregon Commission considered documentary evidence submitted as exhibits with the pleadings, and then dismissed AT&T’s claim based on a well-reasoned order.<sup>73</sup> Indeed, AT&T then filed a petition seeking reconsideration of the decision. The Oregon Commission denied AT&T’s petition, finding that the “violations are predicated on rights conferred by 47 USC § 252(i), which requires filing of interconnection agreements with state commissions.” The Oregon Commission added that the alleged violations were actions based on federal law ““masquerading as state law claims.””<sup>74</sup>

**Second**, there is no material difference between the breach of contract claim raised in this action and the breach of contract claim adjudicated by the Oregon Commission. Both actions involve the same interconnection agreements, and AT&T’s claim necessarily depends on federal law and, in particular, Qwest’s obligations under 47 U.S.C. §§ 251 and 252. Consequently, the Oregon Commission’s decision precludes AT&T from relitigating that its claims are nothing more than poorly disguised violations of federal law.

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<sup>71</sup> *Id.* (emphasis added).

<sup>72</sup> *See e.g.*, Complaint at ¶ 17 (“If AT&T had known about Qwest’s secret agreements with Eschelon and McLeodUSA in a timely manner, AT&T would have availed itself of the discounts in the Eschelon and McLeod Agreements.”).

<sup>73</sup> *See* OPUC Reconsideration Order.

<sup>74</sup> *Id.* at 3 (discussing the Complaint Order and quoting *MFS Int’l*, 50 F. Supp. 2d at 520).

Presumably mindful of the Oregon Commission's decision, this time AT&T artfully does not assert a direct violation of section 252(i) in its present Complaint. Nevertheless, the allegations in the complaint make clear that AT&T's injuries, if any, arise from AT&T's complaint that it did not enjoy the benefit of the terms of the Eschelon and McLeod interconnection agreements, rights that arise, if at all pursuant to section 252(i) and other provisions of federal law. Qwest's alleged deprivation of those rights was exactly the issue that was before the Oregon Commission. Thus, the issue in both actions is identical.

**Third**, AT&T raised and "actually litigated" the issue before the Oregon Commission, and it was essential to a final decision on the merits. The central dispute was whether AT&T stated a claim under federal or state law. AT&T argued that an independent state law violation, arose from its not receiving the same terms as were included in the McLeod and Eschelon interconnection agreements. The Oregon Commission disagreed and decided (correctly) that AT&T only was presenting federal law claims "masquerading" as state law claims.

**Fourth**, the Oregon Commission's decision is a final, valid judgment on the merits.

**Fifth**, AT&T brought both the action in Oregon and the present action against Qwest. These can be no dispute that the parties are the same.

In sum, giving preclusive effect to the Oregon Commission decisions furthers the purpose of the doctrine of issue preclusion. It protects this Commission and respondents from the "vexation of relitigating identical issues with identical parties," and preventing "unnecessary litigation" and "thereby furthering the interest of judicial economy and efficiency."<sup>75</sup> AT&T already litigated and lost the same set of operative facts before the Oregon Commission. AT&T should not now be allowed to file in another forum and get another bite at the apple.

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<sup>75</sup> *Everard*, 124 P.3d at 990.

***b. AT&T Is Estopped from Relitigating the Discovery Date For Its Claim***

The Commission also should find that AT&T may not reargue the discovery date litigated before the Oregon Commission. The Oregon Commission determined that Section 415's two-year limitation began to run in March 2002 when the Minnesota Commission opened a docket on the unfilled agreements issue to which AT&T was an active party. The Oregon Commission also noted that "AT&T had raised the issue in Section 271 proceedings before the FCC and the states and filed its first complaint in Iowa in February 2002."<sup>76</sup> Based on these facts, the Oregon Commission determined that AT&T "had 'reason to know of the harm' that provided the basis of their claims beginning in March 2002" and therefore its claims were barred.<sup>77</sup>

AT&T is precluded from mounting another challenge to the discovery date under Section 415. The Commission would be dealing with the same question—when AT&T knew or should have known in the exercise of reasonable care of its injury to trigger the running of the applicable statute of limitations period. Determination of the applicable discovery date would be a necessary and essential question to any claim arising from the same injury. The facts and legal issue underlying AT&T's claim in this case are indistinguishable from those at issue in the Oregon Commission adjudication. AT&T had the opportunity to litigate the discovery date before the Oregon Commission, and this determination was a necessary element to the Commission's conclusion that AT&T's action was barred by section 415. This Commission should enforce the same conclusion under principles of collateral estoppel.

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<sup>76</sup> *Id.* at 7.

<sup>77</sup> *Id.*

### III. Conclusion

For all the above reasons, Qwest requests an order of this Commission dismissing AT&T's Complaint with prejudice.

DATED this 27th day of September, 2006.

Respectfully submitted,



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**CERTIFICATE OF SERVICE**

I do hereby certify that a true and correct copy of the foregoing **QWEST CORPORATION'S MOTION TO DISMISS** was served on the 27<sup>th</sup> day of September, 2006 on the following individuals:

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**BEFORE THE PUBLIC UTILITY COMMISSION  
OF OREGON**

UM 1232

AT&T COMMUNICATIONS OF THE )  
PACIFIC NORTHWEST, INC., and TCG )  
OREGON, TIME WARNER TELECOM )  
OF OREGON, LLC, and INTEGRA )  
TELECOM OF OREGON, INC., )  
Complainants, )  
v. )  
QWEST CORPORATION, )  
Defendant. )

ORDER

**DISPOSITION: PETITION FOR RECONSIDERATION DENIED**

On July 10, 2006, AT&T Communications of the Pacific Northwest, Inc. (AT&T), and TCG Oregon (Complainants) filed a petition for reconsideration, arguing that the six year statute of limitations under state law governing contracts should apply to violations of the interconnection agreements between the parties by Qwest Corporation (Qwest). On July 25, 2006, Qwest filed its response, arguing that because the Telecommunications Act gives the Commission the authority to enforce the interconnection agreements, its statute of limitations should apply. The petition is denied.

**Applicable Law**

An application for reconsideration may be made within 60 days of the service of an order. *See* ORS 756.561. The Commission may grant an application for reconsideration if there is new evidence which had been previously unavailable, a change in law or policy since the original order was issued, an error of law or fact which was essential to the decision, or other "good cause." OAR 860-014-0095(3).

**Parties' Arguments**

AT&T argues that the Commission erred when it "reformulate[d] AT&T's breach of contract claims" and

disregard[ed] (i) the actual allegations set forth in the amended complaint, (ii) the nature of the interconnection agreement regime under the federal Telecommunications Act of 1996 ("1996 Act"), and (iii) the body of case law holding that matters concerning the construction or interpretation of interconnection agreements entered into pursuant to Section 252 of the 1996 Act present issues of state contract law.

Petition, 4-5. Because this Commission applied federal law to the claims, it held that the two year statute of limitations set forth in 47 USC § 415 applied to the claims, not the six year statute of limitations applicable under state contract law, as set forth in ORS 12.080. *See* Order No. 06-230.

AT&T asserts that the Commission should not have analogized AT&T's claims to those in *Marcus v. AT&T Corp.*, 138 F3d 46, 54 (2<sup>nd</sup> Cir 1998), and *MFS International, Inc., v. International Telecom Ltd.*, 50 F Supp 2d 517, 520 (ED Va 1999), because those involved violations of federal tariffs, which have the force of law. On the other hand, AT&T argues, its complaint claimed a breach of contract, which should be governed by state law. To its petition for reconsideration, AT&T attached a recent decision by the Washington State Utilities and Transportation Commission, which agreed that a breach of contract claim should be subject to the statute of limitations under state contract law, six years. *See AT&T v. Qwest*, Docket UT-051682; Order 04, 2006 Wash. UTC Lexis 266 (June 7, 2006).

As further support, AT&T cites a recent United States Supreme Court case for the proposition that breach of contract claims should be subject to state contract law. *See Empire HealthChoice Assur., Inc. v. McVeigh*, 547 US \_\_\_, 126 S Ct 2121 (2006). In that case, a health insurance company sought repayment of funds from the estate of a claimant, arguing that the decedent was "in breach of the reimbursement provision of the Plan." *See* slip op at 7 (126 S Ct at 2129). The Court held that Congress had preempted state law for certain aspects of the health insurance contract, which was negotiated by the federal government on behalf of its employees pursuant to federal law. However, the reimbursement provision at issue in *Empire HealthChoice* was not preempted and did not implicate an identifiable conflict between federal policy and the operation of state law. *See* slip op at 12 (126 S Ct at 2132). The Court also held that "Empire's contract-derived claim for reimbursement is not a 'creature[] of federal law,'" and that "the reimbursement right in question \* \* \* is not a prescription of federal law." Slip op at 15 (126 S Ct at 1234). Finally, the Court concluded, "This case \* \* \* involves no right created by federal statute. \* \* \* While the [Master Contract] provides for reimbursement, [the federal statute's] text itself contains no provision addressing the reimbursement or subrogation rights of carriers." Slip op at 16 (126 S Ct at 2135).

In opposition, Qwest argues that because the Commission gets its authority to review and enforce interconnection agreements from the Telecommunications Act, the statute of limitations found therein must apply to any

disputes related to the agreements. See *Pacific Bell v. Pac West Telecomm, Inc.*, 325 F3d 1114, 1126 (9<sup>th</sup> Cir 2003); *Petition of SBC Tex*, Ruling on Motion to Dismiss, 2005 WL 2834183, at 2 (Tex PUC, Oct 26, 2005). Similar to arguments made in the initial proceeding, Qwest cited a Ninth Circuit case from 1984 in which the court held that the two year statute of limitations should apply to a civil rights claim involving a telecommunications carrier. See *Pavlak v. Church*, 727 F2d 1425, 1426-27 (9<sup>th</sup> Cir 1984). Qwest also challenges AT&T's interpretation of *Empire HealthChoice*, arguing (1) that the Supreme Court was not deciding how the contract language should be interpreted, but whether a contract-derived claim should be subject to federal law, and (2) that the statutory framework in *Empire HealthChoice* was more narrowly circumscribed than the Telecommunications Act of 1996.

### Conclusions

It is not easy to determine when state law applies and when federal law applies to interconnection agreements. As the Seventh Circuit observed, in attempting to sort through the apparently overlapping state and federal jurisdiction:

This allocation of authority has a potential to cause problems. Federal jurisdiction under § 252(e)(6) is exclusive when it exists. Thus every time a carrier complains about a state agency's action concerning an agreement, it must start in federal court (to find out whether there has been a violation of federal law) and then may move to state court if the first suit yields the answer 'no.' This system may not have much to recommend it, but, as the Supreme Court observed in *Iowa Utilities Board*, the 1996 Act has its share of glitches, and if this is another, then the legislature can provide a repair.

*Illinois Bell Tel. Co. v. WorldCom Tech., Inc.*, 1999 U.S. App. LEXIS 20828, \*25-26; 16 Comm. Reg. (P & F) 232 (1999) (amending original order at 179 F3d 566 (7<sup>th</sup> Cir 1999)), *cert den* 535 US 1107 (2002). The parties have not cited, and we could not find, a court which has definitively decided which statute of limitations should apply to violations of an interconnection agreement.

We are not persuaded that the violations alleged by AT&T are strictly breaches of a privately negotiated contract. The violations are predicated on rights conferred by 47 USC § 252(i), which requires filing of interconnection agreements with state commissions. The alleged violations are “actions based on [federal law] masquerading as state law claims.” Order No. 06-230, 6 (quoting *MFS International, Inc.*, 50 F Supp 2d at 520). Interconnection agreements are entered into pursuant to federal law, and have the force of federal law. See *Pacific Bell*, 325 F3d at 1127 (the Telecommunications Act mandates that “inter-connection agreements have the binding force of law.”)

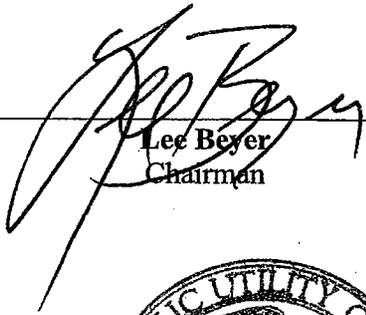
AT&T's citation to *Empire HealthChoice* is not to the contrary. In that case, the underlying provision, the reimbursement provision, was not derived from federal law, so resolution of any conflicts regarding that provision was properly placed in state court. In this case, AT&T is asserting a violation of Section 36 of the interconnection agreement between AT&T and Qwest, which states that Qwest will offer Network Elements to CLEC on an unbundled basis in accordance with the terms of the contract, Oregon law, and "the requirements of Section 251 and Section 252 of the Federal Act." By not filing interconnection agreements with the Commission, Qwest prevented AT&T from opting into those agreements, in violation of Section 252(i).

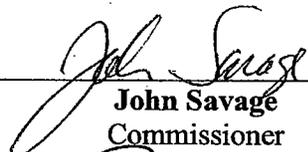
Based on this analysis, we find that there was no error in our conclusions of law in applying the statute of limitations from the Telecommunications Act to AT&T's claim against Qwest for a violation of Section 252(i), nor is there good cause to reconsider our earlier order.

**ORDER**

IT IS ORDERED that the Petition for Rehearing and Reconsideration of Order No. 06-230 is denied.

Made, entered, and effective           AUG 16 2006          

  
\_\_\_\_\_  
**Lee Beyer**  
Chairman

  
\_\_\_\_\_  
**John Savage**  
Commissioner

  
\_\_\_\_\_  
**Ray Baum**  
Commissioner



A party may appeal this order by filing a petition for review with the Court of Appeals in compliance with ORS 183.480-183.484.

**BEFORE THE PUBLIC UTILITY COMMISSION**

**OF OREGON**

UM 1232

AT&T COMMUNICATIONS OF THE )  
 PACIFIC NORTHWEST, INC., and TCG )  
 OREGON, TIME WARNER TELECOM )  
 OF OREGON, LLC, and INTEGRA )  
 TELECOM OF OREGON, INC., )  
 )  
 Complainants, )  
 v. )  
 )  
 QWEST CORPORATION, )  
 )  
 Defendant. )

ORDER

**DISPOSITION: MOTION TO DISMISS GRANTED**

This case is the second part of our review of Qwest Corporation's (Qwest) failure to file certain interconnection agreements with the Commission, in violation of state and federal law. In reviewing this motion, we first discuss our investigation and resolution of docket UM 1168, then address the issues raised in this docket.

**Staff Investigation and Resolution of UM 1168**

On September 7, 2004, the Commission adopted Staff's recommendation to formally open docket UM 1168 to investigate allegations that Qwest had failed to file certain interconnection agreements for Commission approval. In its recommendation, Staff reported that the allegations first arose in Minnesota in 2002. *See* September 7, 2004 Public Meeting Regular Agenda, Item 3, Staff Memorandum ("Staff Report"). In response, Qwest petitioned the Federal Communications Commission (FCC) for a declaratory ruling that the contracts did not need to be filed with state commissions because they were not interconnection agreements under the statute; the FCC ruled against Qwest's interpretation of the law. *See id.* Subsequently, several other states initiated investigations against Qwest, including Oregon, which began an informal investigation in March 2002. *See id.* at 4-5. Staff speculated that, in the unfiled agreements, Qwest gave preferential treatment to some competitive local exchange carriers (CLECs) in exchange for those CLECs declining to oppose the Qwest/ U S West merger and Qwest's Section 271 application at the FCC. *See id.*

at 3-4. According to the Staff report, the issue of unfiled contracts was raised by AT&T in the Section 271 process before the FCC:

AT&T argued that Qwest's secret agreements with competitors were evidence of Qwest discriminatory practices, and that such practices were not consistent with the requirement that Qwest irreversibly open its local service markets to competition.

AT&T pointed to provisions in some agreements where the CLEC agreed not to oppose Qwest's Section 271 application in exchange for more favorable treatment.

*See id.*

In the course of the informal investigation, Staff obtained advice from the Attorney General that ORS 759.990 did not allow the Commission to award refunds to CLECs harmed by Qwest's failure to file contracts. A meeting was held on September 30, 2004, between Qwest, Staff, and CLECs, many of whom became intervenors, to discuss the impact of the investigation.

A prehearing conference was held October 26, 2004, and a schedule was set to allow for submission of an issues list and testimony. Time Warner Telecom of Oregon LLC, Covad Communications Company, Integra Telecom of Oregon, Inc., Rio Communications, Inc., and Universal Telecom, Inc., intervened in the proceeding. The schedule was suspended while Qwest and Staff worked out a stipulation, which was submitted on February 4, 2005. The intervenors neither supported nor opposed the stipulation, and the stipulation between Qwest and Staff was ultimately adopted. *See* Order No. 05-783.

In that order, the Commission found that Qwest violated Oregon Administrative Rule (OAR) 860-016-0020(3) in failing to file 29 agreements, including three closely related pairs of agreements. Staff determined that failure to file 13 of the agreements constituted major violations, because there was discriminatory treatment of CLECs as a result. Sixteen of the violations were considered minor, because there was no discriminatory treatment. Consequently, the parties agreed to a penalty of \$50,000 for 13 agreements, and \$25,000 for 16 other agreements, resulting in a final settlement of \$1,050,000, which was subsequently paid pursuant to a judgment entered by Marion County Circuit Court.

The stipulation and order did not compensate for any harm that may have been done to CLECs. The Commission stated:

This settlement does not preclude the CLECs from pursuing other litigation. The Attorney General advised Staff that, under the applicable penalty provision, ORS 759.990, the Commission does not have the authority to award reparations for injuries suffered by CLECs due to Qwest's failure to file

the agreements. *See* Staff/3. Intervenors did not provide any testimony regarding the impact of Qwest's failure to file certain contracts or opposing the settlement.

Order No. 05-783 at 3.

## Complaint

### *Procedural History*

On January 13, 2006, AT&T Communications of the Pacific Northwest, Inc., et al. (Complainants) filed a complaint against Qwest Corporation (Qwest). Complainants assert economic injury arising from Qwest Corporation's failure to provide nondiscriminatory access to terms and provisions in interconnection agreements that Qwest unlawfully did not file with the Commission. Specifically, Complainants premise their request for relief on four bases: (1) violation of federal law, 47 USC § 251, 252; (2) unjust discrimination in rates, ORS 759.260; (3) undue preferences and prejudices, ORS 759.275; and (4) breach of contract. *See* Amended Complaint, 7-10.

On February 2, 2006, Qwest filed a motion to dismiss on four grounds: (1) the Commission does not have jurisdiction to award the relief requested by Complainants; (2) the complaint is barred by the federal statute of limitations; (3) federal law does not provide any cause of action for which Complainants may sue; and (4) the filed rate doctrine prohibits the Commission from awarding damages.

On February 17, 2006, Complainants filed a response to Qwest's motion.<sup>1</sup> In its response, Complainants clarify that they are not seeking reparations based on Qwest's violation of federal law, *per se*, but only to the extent that federal provisions have been incorporated into their contracts. *See* Complainants' Response, 10. Based on this clarification, we conclude that no independent violations under federal law are asserted as grounds for relief in this docket.

### *Legal Standard*

In reviewing Qwest's motion to dismiss, "we assume the truth of all allegations, as well as any inferences that may be drawn, and view them in the light most favorable to the nonmoving party. Our review of a motion to dismiss based on the expiration of the statute of limitations, ORCP 21A(9), is limited to what appears on the face of the

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<sup>1</sup> Qwest also filed a Reply to Complainants' Response to Motion to Dismiss (Feb 24, 2006); Complainants filed a Supplemental Authority and Request to Supplement Record (Feb 28, 2006); and Qwest filed a Response to Complainants' Notice of Supplemental Authority (Mar 3, 2006). OAR 860-013-0050(3)(d) provides for a response to a motion, but no rule provides for a third, fourth, or even a fifth round of briefing, nor did the parties provide a reason why the extra filings should be taken into account. The additional filings are not considered in this ruling.

pleading.” *Dauven v. St. Vincent Hospital and Medical Center*, 130 Or App 584, 586 (1994) (citations omitted). “To survive a motion to dismiss on limitations grounds, a complaint does not have to show that the action *is* timely; it suffices if the complaint does not reveal on its face that the action is *not* timely.” *Munsey v. Plumbers' Local #51*, 85 Or App 396, 399 (1987) (citing ORCP 21A(9)). With these standards in mind, we address the motion to dismiss by each remaining claim: violation of state law and breach of contract.

### ORS 759.260 and ORS 759.275

First, Qwest argues that the Commission does not have the jurisdiction to award private refunds for violations of ORS 759.260 and ORS 759.275. *See* Qwest Motion to Dismiss, 3. Further, Qwest asserts that any injury to Complainants is speculative at best, and cannot be quantified, in contrast to previous Commission orders awarding damages to private parties. *See id.* at 6-7. Qwest also argues that the federal statute of limitations bars Complainants’ state claims. *See id.* at 12-13.

Complainants respond that this complaint is not governed by the specific statutes in chapter 759, but the more general complaint statutes in chapter 756. *See* Complainants’ Response, 6. In particular, Complainants argue that ORS 756.500(2) contemplates that the Commission may grant an order of reparation to a party to a complaint proceeding. *See id.* Complainants also cite several cases in which the Commission has awarded refunds. *See id.* at 7-9 (citing *In re Metro One*, IC 1, Order No. 00-623 (OPUC Oct 6, 2000), and *Pacific Northwest Bell v. Katz*, 116 Or App 302 (1992), *rev den* 316 Or 528 (1993)).

ORS 759.990 sets forth the Commission’s jurisdiction to set penalties for certain actions by a telecommunications carrier. The statute sets out the penalties for both ORS 759.260 and 759.275, a fine of not less than one hundred dollars. *See* ORS 759.990(1), (2). To impose the fine, the Commission must make proper findings in an order; then, the Attorney General takes the order to Marion County Circuit Court to obtain a judgment against the offending carrier. *See generally* ORS 756.160(4). Where the Oregon legislature establishes a statutory right that did not exist at common law, it also establishes the exclusive remedy. *See Gilbertson v. McLean et al*, 216 Or 629, 635-36 (1959). This doctrine was confirmed by the Court of Appeals, which held that a common law remedy may remain if its purpose is to provide relief for a different sort of harm than that contemplated by the statutory remedy. *See Carsner v. Freightliner Corporation*, 69 Or App 666, 673-74, *rev den* 298 Or 334 (1984).

This case more closely resembles *Gilbertson* than *Carsner*. In this case, the legislature established a statutory right that did not exist at common law, and also set forth the remedy to any violations of that right. Specifically, the law that put into place the unjust discrimination statutes, *see* Or L 1987, ch 447, §§ 46, 49, also purposely stated the remedies for violations of those statutes, *see id.* at § 52. For this reason, the Commission does not have the jurisdiction to award the relief that Complainants seek for Qwest’s alleged

violations of ORS 759.260 and 759.275.<sup>2</sup> Complainants' claims for damages based on violations of ORS 759.260 and 759.275 are dismissed.

### **Breach of Contract**

Complainants contend that Qwest violated the terms of existing interconnection agreements by not offering them similar terms and conditions contained in the unfiled contracts. Complainants set forth similar provisions in four contracts to show how Qwest breached the contract. For example, Sections 36 of the AT&T/Qwest Agreement, ARB 3, and the Integra/Qwest Agreement, ARB 216, provide:

ILEC will offer Network Elements to CLEC on an unbundled basis on rates, terms and conditions that are just, reasonable and non-discriminatory in accordance with the terms and conditions of this Agreement, the Oregon Statutes and Regulations and the requirements of Section 251 and Section 252 of the Federal Act.

Qwest argues that, to the extent violations of federal law give rise to Complainants' breach of contract claims, the federal statute of limitations of two years applies under 47 USC § 415. *See* Qwest Motion to Dismiss, 2 n 2. In support of its argument, Qwest cites *Pavlak v. Church*, 727 F2d 1425 (9<sup>th</sup> Cir 1984), in which the court held that a civil rights claim that had no statute of limitations could import the nearest applicable limit, in that case, the statute of limitations for violations of the Telecommunications Act. Because the Commission is regulating telecommunications on behalf of Congress under federal law, Qwest maintains that the federal statute of limitations should apply. *See* Qwest Motion to Dismiss, 9-10. Qwest asserts that the statute of limitations began running when the Complainants found out about the unfiled contracts in Minnesota in March 2002. *See id.* at 11.

Complainants respond that they are asserting a breach of contract, and that the interconnection agreements between them and Qwest integrated provisions of state and federal law requiring the filing of contracts and opportunity to opt in to those contracts. *See* Complainants' Response, 11. They argue that the applicable statute of limitations is found in Oregon law and provides a six-year limitation on actions "upon a contract" or "upon a liability created by statute." *See* ORS 12.080(1), (2). Even if the federal statute of limitations is found to apply, Complainants argue that the time of discovery was the date on which the protective order in the unfiled contracts docket was issued, October 25, 2004. *See* Complainants' Response, 11-12. Further, Complainants state that any statute of limitations should be tolled for the duration of the unfiled contracts case, in which they were pursuing their rights through that case. *See id.* at 12.

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<sup>2</sup> Because private claims for refunds are not permitted under the statutory framework, there is no need to decide at this time whether the Commission may award refunds under ORS 756.500.

First, although Complainants attempt to posit their claims as breach of contract claims, the violations they assert are actually of federal law. The interconnection agreements are required under the Telecommunications Act, 47 USC § 252, and the provisions cited by Complainants directly implicate federal law. Even Complainants state, “regardless of whether the Commission finds that Complainants have brought, or could bring, an independent action for violation of Section 252(i), the Amended Complaint states a cause of action for breach of contract that incorporates Qwest’s obligations under Section 252(i).” Complainants’ Response, 10. These thinly veiled claims of violations of federal law fall under the federal Communications Act statute of limitations, 47 USC § 415, of two years from accrual.

Support for this characterization of Complainants’ breach of contract claims can be found in federal case law, which has more often dealt with the question of whether state law breach of contract claims should be heard in federal court because they were really claims under federal law. In *Marcus v. AT&T*, 138 F3d 46, 54 (2nd Cir 1998), a federal court stated that an adjudicator must carefully examine a telecommunications claim under state law to determine whether it “actually arose under federal law,” or arose under state law, although the question in that case was whether the case should be removed to federal court. *See id.* at 55. In that case, a breach of warranty claim that arose under a tariff required by the Federal Communications Act was considered a matter of federal law, and not strictly within the bounds of state law. *See id.* at 55-56. Similarly, in *MFS International, Inc. v. International Telecom Ltd.*, 50 F Supp 2d 517, 520 (ED Va 1999), the court stated that “state law claims themselves will be preempted if, on close scrutiny, they are revealed to be actions based on the MFS tariff masquerading as state law claims.” In that case, the court found that the breach of contract claims were actually actions under the federally filed tariff, which arise under the federal telecommunications act, and are therefore subject to the federal statute of limitations. *See id.* at 521. Where the action “is necessarily based on [federal law] rather than on any contract,” the federal statute of limitations under section 415(a) applied. *See id.* at 524.

The Telecommunications Act does not preempt all claims related to violations of its provisions. In fact, the Act provides a savings clause: “Nothing in this Act contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this Act are in addition to such remedies.” 47 USC § 414. This statute has been held to permit state law actions barring fraudulent and deceptive advertisement and billing practices and to preserve state laws protecting privacy. *See Higgins v. AT&T*, 697 F Supp 220, 222-23 (ED Va 1988). In the present case, Complainants’ allege Qwest violated section 252(i), thereby depriving them of the opportunity to opt into more favorable contracts. These claims squarely fall under federal law and the kinds of harms contemplated by the federal telecommunications framework, so the breach of contract claims may not be made separately from the violations of federal law and are not otherwise preserved by 47 USC § 414.<sup>3</sup>

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<sup>3</sup> Under the analysis found in *Marcus*, it is unclear whether Complainants may even have a separate claim for breach of contract for the alleged violations of federal law. Qwest makes no such argument, and there is no

For these reasons, we conclude the Act's statute of limitations applies to Complainants' breach of contract claims. That provision states: "All complaints against carriers for the recovery of damages not based on overcharges shall be filed with the Commission within two years from the time the cause of action accrues, and not after." 47 USC § 415(b). The remaining question is when that two-year limitation began. Complainants argue that the clock should begin running from the time the Complainants had access to the unfiled contracts in Oregon, when the protective order was issued in UM 1168 on October 25, 2004. Qwest argues that the time begins to run at the time of the unfiled contracts dispute in Minnesota, in March 2002.

"The general rule is that a cause of action accrues when a plaintiff knows or has reason to know of the harm or injury that is the basis of the cause of action." *See MFS International, Inc.*, 50 F Supp 2d at 524. Qwest notes, and Complainants do not dispute, that Minnesota began its investigation in March 2002. *See* Qwest Motion to Dismiss, 11. AT&T and Time Warner were parties to the Minnesota case in 2002, and AT&T and Integra were named defendants in a similar case before the Washington Utilities and Transportation Commission in 2003. "Based on the Minnesota complaint, Oregon and many of the Qwest states soon started investigations of Qwest's secret contracts. Oregon staff began an informal investigation in March 2002." *See* Staff Report, 2. In fact, AT&T initially raised the issue in Section 271 proceedings before the FCC and the states and filed its first complaint in Iowa in February 2002. *See id.* at 4-5. Based on Complainants' awareness of unfiled contracts in other states, they had "reason to know of the harm" that provided the basis of their claims beginning in March 2002.

Complainants assert that if the clock begins to run in March 2002, then the time should be tolled while they were pursuing their rights through the Staff investigation in UM 1168. While Complainants participated in that case, they did not preserve their rights to pursue a private cause of action. Equitable tolling will only be allowed in extraordinary circumstances: "Meant to 'ensure that the plaintiff is not, by dint of circumstances beyond his control, deprived of a reasonable time in which to file suit,' equitable tolling is unwarranted where a litigant has 'failed to exercise due diligence in preserving his legal rights.'" *See Communs Vending Corp of Ariz., Inc. v. FCC*, 365 F3d 1064, 1075 (DC Cir 2004) (citations omitted) (federal court reviewing Federal Communications Commission interpretation of 47 USC § 415). That court specifically rejected the plaintiffs' industry trade association filing of a petition for a declaratory ruling as evidence that plaintiffs had exercised due diligence in preserving their rights. *See id.* at 1076.

That situation is analogous to this one, in which Time Warner Telecom of Oregon, LLC, and Integra Telecom of Oregon, Inc., were intervenors in UM 1168, the Staff investigation into Qwest's failure to file interconnection agreements for Commission approval under Section 252(a)(1) of the Telecommunications Act. In response to a suggestion by Staff, the schedule in that case was suspended pending a stipulation, but there

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need to decide whether Complainants make the separate claim, because in this instance, it is barred by the federal statute of limitations.

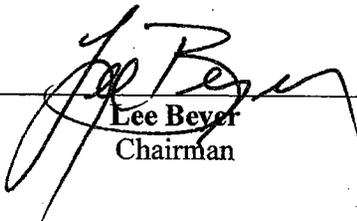
was no intervenor response requesting further proceedings. *See* UM 1168, Ruling (Dec 9, 2004). A testimony schedule was later set, but no intervenor submitted testimony. *See* UM 1168, Ruling (Mar 23, 2005). Given the lack of intervenor activity in that case, and the Complainant's failure to file a placeholder complaint at that time, it cannot be fairly said that Complainants diligently pursued their claims so that the statute of limitations should be tolled. Therefore, the breach of contract claims, which are based on federal law, are barred by the statute of limitations under 47 USC § 415.

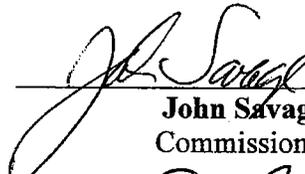
Because the Commission does not have jurisdiction over the claims raised by Complainants, either because the requested relief is not available or the claim is time barred, the motion to dismiss the complaint in its entirety is granted.

**ORDER**

IT IS ORDERED that the motion to dismiss the complaint is granted.

Made, entered, and effective           MAY 11 2006          

  
\_\_\_\_\_  
**Lee Beyer**  
Chairman

  
\_\_\_\_\_  
**John Savage**  
Commissioner

  
\_\_\_\_\_  
**Ray Baum**  
Commissioner



A party may request rehearing or reconsideration of this order pursuant to ORS 756.561. A request for rehearing or reconsideration must be filed with the Commission within 60 days of the date of service of this order. The request must comply with the requirements in OAR 860-014-0095. A copy of any such request must also be served on each party to the proceeding as provided by OAR 860-013-0070(2). A party may appeal this order by filing a petition for review with the Court of Appeals in compliance with ORS 183.480-183.484.

QWEST COPY

This will probably be assigned FCC-02-2.



AT&T

Gary B. Witt  
Senior Attorney

Room 1575  
1875 Lawrence Street  
Denver, CO 80202  
303 298-6163

February 27, 2001

Judi K. Cooper  
Executive Secretary  
Iowa Utilities Board  
350 Maple Avenue  
Des Moines, IA 50319

Dear Ms. Cooper:

AT&T is extremely concerned with recent revelations that Qwest may have entered into a series of secret agreements granting preferential treatment to some CLECs in Minnesota.<sup>1</sup> In this regard, AT&T would like to take this opportunity to request that the Iowa Utilities Board initiate an investigation into Qwest's business practices in Iowa to determine whether the same or a similar practice is occurring here.

Following a six month investigation into potential anticompetitive behavior by Qwest, the Minnesota Department of Commerce on February 14, 2002, filed a complaint against Qwest alleging it has entered into a series of secret agreements with various CLECs to provide preferential treatment for those CLECs with respect to interconnection, access to network elements, resale, number portability, dialing parity, access to rights-of way, reciprocal compensation, and collocation.<sup>2</sup> These agreements have been characterized as being amendments to existing interconnection agreements. As the Board is well aware, Qwest is under a legal obligation to submit agreements of this nature to the state commission for approval, to make all such agreements public, and to provide the same services to other CLECs on a non-discriminatory basis.<sup>3</sup> The Minnesota Department of Commerce asserts in its complaint that Qwest did not obtain the required commission approval for these agreements, that Qwest has not made the agreements public as required, and that Qwest is not providing the same terms and conditions to other CLECs on a non-discriminatory basis.

<sup>1</sup> See attached newspaper articles (Attachment A).

<sup>2</sup> *In the Matter of the Complaint of the Minnesota Department of Commerce against Qwest Corporation*, before the Minnesota Public Utilities Commission, Docket No. P-421/DI-01-814, filed February 14, 2002. See Complaint, at paras. 17-25 (Attachment B).

<sup>3</sup> See 47 U.S.C. §252(a)-(i). See also 47 U.S.C. §251(c).

03/01 FAX: DSS

Joe

✓ CC: MAP

MR

MAS

RLH

WMT

FELW

✓ FAX: C. Wan

S. Davis

The Minnesota Department of Commerce is seeking civil penalties of between \$50 million and \$200 million.

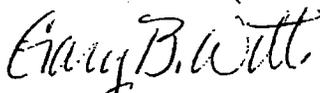
Qwest may be entering into these agreements to silence opposition to its §271 application there.

If the existence of these secret Minnesota agreements is established, it will demonstrate a pattern of behavior on Qwest's part, in that Qwest will have been shown to have entered a series of such agreements, and these agreements are therefore not merely an isolated instance. In addition, because of the multi-state operations of Qwest and the various CLECs involved, it appears likely at this point that the practice potentially crosses state boundaries.

AT&T urges the Board to take a close look at the attached Minnesota complaint, and to initiate a comprehensive investigation of Qwest's business practices, in order to expose any secret agreements which may have been executed in a similar fashion to those alleged to have occurred in Minnesota.

AT&T believes that the practices alleged in the Minnesota complaint may not be limited solely to Minnesota, and that they are serious enough to merit, at a minimum, further investigation into Qwest's business practices in Iowa. Indeed, these allegations—which have resulted from a long and careful examination of Qwest's business practices by an independent regulatory body—show clearly that there is good cause to believe that similar agreements exist here, and must be examined more closely.

Very truly yours,



Gary B. Witt

Attachments (2)

cc: OCA - Alice Hyde

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Subject: FW: Big news in MN

**State regulators say Qwest made secret agreements with competitors**  
**Steve Alexander**

Star Tribune

Published Feb 15, 2002

State regulators Thursday accused Qwest Communications of breaking state and federal laws by restricting competition in the local telephone market. They sought civil penalties against Qwest that could range from \$50 million to \$200 million.

In a filing with the Minnesota Public Utilities Commission (PUC), the Minnesota Department of Commerce accused Qwest of restricting competition by secretly making agreements with some companies that worked to the disadvantage of others. Qwest is the largest phone company in Minnesota, controlling 2 million of the 2.7 million telephone lines in the state.

If true, such secret agreements would violate state and federal laws that require Qwest to be reasonable and non-discriminatory in agreements with other local phone competitors. Filing the agreements with the PUC is supposed to ensure that fairness.

The agreements in question cover the way competitors pay Qwest, connect to Qwest's network, resell Qwest telephone lines to customers and enable customers to keep their old telephone numbers when they switch local phone companies.

Qwest officials denied any wrongdoing. Chuck Ward, Qwest's vice president for policy and law in Denver, said Qwest has negotiated more than 150 agreements with competitors in Minnesota, and "our belief is that the interconnection agreements have been filed with the PUC in Minnesota."

However, after an investigation of more than six months, the Commerce Department said it had learned that "the secret agreements either change or add to the approved agreements" and that they have not been submitted to the PUC for approval.

Tony Mendoza, Commerce Department deputy commissioner for telecommunications, said that "Qwest played favorites with some competitors in the market, leaving others out in the cold."

Qwest "entered into legal contracts with these [competing] companies to provide certain interconnection-type services that are better than what was available to other carriers," Mendoza said.

Because of confidentiality rules governing Qwest trade secrets, Mendoza said he could not reveal the names of the companies with which Qwest is alleged to have made secret agreements, or the terms of those agreements. He said the Commerce Department is asking the PUC to make that information public and to hold a hearing on the allegations within 30 days.

If the PUC finds that violations occurred, it could fine Qwest based on the number of offenses and the time period during which they happened, Mendoza said. The maximum amount the PUC could fine Qwest is \$56.2 million to \$102.5 million. If Qwest were fined by the PUC, it would be the first time any penalties have been assessed under the 1999 state law that prohibits anticompetitive conduct by Qwest.

Under state law, only Qwest would be financially liable for not disclosing the agreements because it is the only company that is required to disclose them to the PUC, Mendoza said. Companies that made the agreements with Qwest would not face any penalties, he said.

In an interview, Mendoza questioned whether Qwest was trying to use sweetheart agreements with some local telephone competitors to silence its critics at state regulatory hearings.

He noticed conspicuous behavior. Some of the competitors that had been critics of Qwest were no longer willing to talk about Qwest service quality at PUC hearings, Mendoza said.

Mendoza said that if competing telephone companies don't have any complaints about Qwest, "then I think we're doing a good job."

The allegation about silencing critics also comes at a time when Qwest is trying to win PUC approval to enter the long-distance telephone market in Minnesota. Qwest has been barred by law from offering long-distance in the 14-state region where it offers local telephone service. But it can petition those individual states and the Federal Communications Commission to let it offer long-distance if it can show that it has competition for local service and meets some other conditions.

Ward said Qwest is not as far along in its efforts to enter the long-distance business in Minnesota as it is in other states, largely because regulatory review here has been slower.

But AT&T, a Qwest competitor in the local business telephone market, drew a connection between the Commerce Department allegations and Qwest's bid to enter the long-distance market in its 14-state local-service territory.

"We've had the sense, based on our conversations with other competitors, that Qwest may be entering into agreements with other carriers that contain terms that prefer one carrier over another," said Mary Tribby, Denver-based chief regulatory counsel for AT&T's western region that includes Minnesota. "We're also concerned that companies entering into these agreements are being silenced in regulatory proceedings as part of the agreements."

Bill Myers, a Qwest spokesman in Denver, said AT&T "has an interest in frustrating our efforts to get into the long-distance business."

In an unrelated development, Qwest's commercial paper rating was cut one level by Standard & Poor's, which cited debt of \$25 billion at the phone company. S&P cut its short-term rating to "A3" from "A2," while dropping the long-term credit rating to "BBB," two levels above junk, from "BBB+." S&P has a negative outlook.

"The downgrade is based on Qwest's more limited financial flexibility and near-term liquidity concerns," S&P analyst Greg Zappin said in a prepared statement. The loss of access to the commercial-paper market was also a factor, he said.

*- Bloomberg News contributed to this report.*

*- Steve Alexander is at [alex@startribune.com](mailto:alex@startribune.com).*

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Subject: FW: Article from deseretnews.com

The following story appeared on deseretnews.com on February 19, 2002.

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headline: Minnesota accuses Qwest of secret deals

subhead: Communications firm could face \$200 million fine

author: Associated Press

T. PAUL, Minn. -- The Minnesota Department of Commerce has accused Qwest Communications International Inc. of violating state and federal law by entering into secret agreements with competitors.

If the state Public Utilities Commission finds that Qwest broke the law, the Denver-based company could face civil penalties of up to \$202.5 million depending on the number of claims.

Qwest vice president Chuck Ward said the company is reviewing the complaint.

"To assert there's secret things going on I don't think is productive," Ward said.

Commerce Department investigation found that Qwest entered into numerous secret agreements with rival local phone companies that violate Qwest's obligations under the law. The agreements include issues of interconnection, access to network elements, resale, number portability, access to rights-of-way and compensation.

Qwest, as the local exchange carrier in Minnesota, is required by federal law to provide other carriers reasonable access to its network.

Many interconnection agreements between Qwest and the other carriers have previously been approved by state regulators. But the alleged secret agreements either change or add to those were not submitted for state approval.

Qwest has provided details of the agreements to commerce officials, but the company has designated each agreement as a "trade secret," which prevents public disclosure.

"Qwest's behavior is blatantly anticompetitive," commerce commissioner Jim Minstein said. "Qwest has entered into these secret agreements repeatedly and they are in force today. There is zero benefit to Minnesota telephone customers in Qwest is in the business of limiting competition."

Ward said the company has made 150 interconnection agreements with competitors in Minnesota.

Commerce officials also have asked the Public Utilities Commission to require Qwest to make the terms and conditions of the agreements publicly available to other local competitors.

Qwest controls about 2 million of the 2.7 million telephone lines in Minnesota.

The company likewise controls about 90 percent of the lines in Utah, and when the Legislature reconvenes next week it may take up a bill aimed at keeping Qwest from shutting out competition in the Utah local-service market.

The bill, yet to be discussed by the House Public Utilities and Technology Standing

Committee, would impose stronger fines on Qwest for anticompetitive behavior. A third violation would start a process that could lead to a separation of the company's retail and wholesale operations.

Proponents, including AT&T and the bill's sponsor, House Majority Leader Kevin Carnahan, R-Layton, say 1995 state and 1996 federal telecommunication measures have failed to provide a framework for local-service competition.

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Subject: FW: Qwest secret deals

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## Qwest accused of secret deals

By The Associated Press

The Associated Press

**Saturday, February 16, 2002** - The Minnesota Department of Commerce has accused Qwest Communications International Inc. of violating state and federal law by entering into secret agreements with competitors.

The agency filed a complaint Thursday with the Minnesota Public Utilities Commission.

If the PUC finds Qwest broke the law, the Denver-based company could face civil penalties of between \$56.2 million and \$202.5 million, based on the number of claims.

Chuck Ward, vice president of policy and law for Qwest, said the company is reviewing the complaint and will file an answer soon. "To assert there's secret things going on I don't think is productive," Ward said.

A Department of Commerce investigation determined Qwest entered into numerous secret agreements with rival local phone companies that violate Qwest's obligations under the law. The agreements include issues of interconnection, access to network elements, resale, number portability, access to rights-of-way and compensation.

Qwest, as the incumbent local exchange carrier in Minnesota, is required by federal law to provide other carriers with the ability to connect to its network based on agreements that are reasonable and non-discriminatory.

Any interconnection agreements between Qwest and the other carriers have previously been approved by the PUC. But the secret agreements either change or add to those and weren't submitted to the PUC for approval.

Qwest has provided details of the agreements to commerce officials, but the company has designated each agreement as "trade secret," which prevents public disclosure.

"Qwest's behavior is blatantly anti-competitive," said Commerce Commissioner Jim Bernstein. "Qwest has entered into these secret agreements repeatedly and they are in force today. There is no benefit to Minnesota telephone customers when Qwest is in the business of limiting competition." Qwest's Ward said the company has made 150 interconnection agreements with competitors in Minnesota.

Commerce officials also have asked the PUC to require Qwest to make the terms and conditions of agreements publicly available to other local competitors.

Qwest controls about 2 million of the 2.7 million telephone lines in Minnesota.

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Sunday, February 17, 2002

7A

# Qwest deals with rivals scrutinized

By Kris Hudson  
Denver Post Business Writer

The Minnesota Department of Commerce has accused Qwest of breaking state and federal law by cutting secret deals with some of its competitors to the detriment of others.

In a complaint filed with the state's Public Utilities Commission, the state commerce department alleges Qwest acted in an anti-competitive manner by cinching the deals without gaining the PUC's approval. Federal law requires Baby Bells such as Qwest to provide all competitors equal access to its phone lines on public terms.

The complaint demands that Qwest make the secret deals public and allow any competitor to take advantage of their terms. It also seeks civil penalties of \$50 million to \$200 million, The Associated Press reported.

The deals, called interconnection agreements, set the prices and terms for the two companies to connect their communications networks and hand off calls. All are required to be approved by the PUC so Qwest's competitors can ensure others aren't getting favorable terms.

"By entering into the secret agreements, Qwest is providing discriminatory treatment in favor of the (competitors) that are party to those agreements and to the detriment of (competitors) that are not," the complaint reads.

Qwest is looking into the complaint.

"We're just in the process of looking at what they've filed," said Steve Davis, Qwest's senior vice president of policy and law. "We

have filed literally hundreds of interconnection agreements across the region since 1996. We're looking at the ones they think we should have filed and figuring out if there's merit to what they said. And if they need to be filed, we'll file them."

Colorado utilities officials and consumer advocates on Friday declined to comment on the Minnesota complaint before learning more about it.

Qwest's Davis said the complaint should have no effect on Qwest's push to gain federal and state approval to sell long-distance service in the former U S West's 14-state territory. Qwest's archrival, AT&T Corp., wasn't so sure.

"We have been suspicious for quite some time that Qwest has been entering into sweetheart deals with carriers that prefer one carrier over another," said Mary Tribby, AT&T's chief regulatory counsel. "That's a violation of their obligations to treat all carriers equally."

Tribby said AT&T intends to urge utilities commissions in each of the 13 other U S West states to look into the Minnesota allegations. "I don't think it's isolated to Minnesota," she said.

The Telecom Act of 1996 mandates that Baby Bells must prove they allow competitors easy and efficient access to their phone lines so the competitors can deliver services over them. Once a Baby Bell proves it allows competition, state and federal regulators may grant it permission to sell long-distance in a given state.

Qwest cannot sell long distance in any of the 14 U S West states, but it is nearing the end of its testing and review process to do so.

**Burrelle's NewsExpress**

Page 1 of 1 (RMRM11DH)

Wed February 20, 2002  
Appears On Page 4B  
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**Rocky Mountain News**  
Denver, CO

# AT&T wants state PUC to scrutinize Qwest deals for possible wrongdoing

## Allegations of secret, improper agreements in Minnesota spur call

By Jeff Smith  
News Staff Writer

AT&T said it plans to ask regulators in Colorado to investigate whether Qwest Communications International Inc. has made agreements with local phone wholesalers that illegally restrict competition.

The issue came up last week when Minnesota regulators accused Qwest of secretly making such agreements with wholesalers that connect to Qwest's network to resell local phone service.

"We are going to talk to regulators in all of Qwest's states including Colorado to encourage them to look into similar allegations," said Mary Tribby, AT&T chief regulatory counsel in Denver. "We have

no reason to believe that this is limited to Minnesota. Companies suspected to have entered into secret deals likely operate in other states as well."

State regulators and watchdogs said Tuesday that they don't have any evidence of such deals.

Tribby said Qwest is required by the Telecommunications Act of 1996 to treat all carriers in a non-discriminatory fashion. She said she is worried the alleged deals might "silence those partners from participating in regulatory hearings" concerning Qwest's effort to re-enter long-distance in its 14-state Western region.

Terry Bote, spokesman of the Colorado Public Utilities Commission, said Tuesday the state hasn't uncovered similar evidence and hasn't yet been contacted by AT&T.

Hearings on Qwest's re-entry into long-distance in Colorado take place next week.

Ken Reif, director of the Colorado Office of Consumer Counsel, a utility watchdog, said Tuesday that he also isn't aware of improper deals by Qwest. But he said that "we wouldn't know," since details of those agreements aren't public.

Steve Davis, Qwest's senior vice president of policy and law, said Tuesday that Qwest has entered into hundreds of interconnection agreements across the region and that it is common for such agreements, or at least portions, to be confidential.

"There aren't any allegations that the deals are illegal, just they should have been publicly filed," Davis said. "We're looking at that. If something should be filed, we'll file . . . The only question here is whether we need to file some portion of those agreements."

Davis said he also considers it interesting that AT&T is so concerned about deals that much smaller companies have signed.



## AT&T TO ASK QWEST STATES TO INVESTIGATE DEALS WITH CLECS

23:00:57, 20 February 2002

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AT&T said it planned to ask Colo. PUC and regulators in other Qwest states to investigate whether Qwest had made illegal secret agreements with selected CLECs that provided favored carriers with rates and terms not available to other competitors. Colo. is Qwest's hq state. AT&T was reacting to complaint against Qwest filed with Minn. PUC last week by Telecom Div. of Minn. Dept. of Commerce on behalf of state's retail telecom ratepayers. Minn. complaint alleged Qwest made secret amendments to interconnection contracts with selected CLECs to mute their opposition to Qwest long distance entry and other Qwest regulatory initiatives. It charged that Qwest and "partner" CLECs might be concealing favorable terms so other CLECs couldn't opt into them. Minn. complaint didn't name specific CLECs or deals. Qwest has denied Minn. charges.

AT&T said it had "no reason to believe that this is limited" to Minn., and Qwest might seek to make secret deals with selected CLECs throughout its 14-state region to "silence those partners from participating in regulatory hearings" on its Sec. 271 petitions. Colo. PUC hasn't received petition from AT&T, but spokesman said agency hadn't seen any evidence of secret Qwest dealmaking to unlawfully influence CLEC opponents of its regulatory initiatives. Similarly, Colo. Office of Consumer Counsel, state's utility watchdog agency, isn't aware of any improper deals between Qwest and CLECs, but spokesman said agency might not know of such dealings because details wouldn't be public. Consumer advocacy agencies in some other Qwest states were either unaware of Minn. complaint against Qwest or didn't know enough about situation to comment.

Qwest said it had entered into hundreds of interconnection agreements with CLECs across its region and it was common for proprietary information in some portions of interconnection contracts to be kept confidential. It also denied allegations that its interconnection deals with CLECs in Colo. or other states of its region were illegal. Only question, Qwest said, is whether some contract terms should have been filed publicly. Spokesman said his company was looking into that question and if something should be filed publicly, it would do so. — Herb Kirchhoff

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**PUBLIC DOCUMENT - Trade Secret Data Has Been Excised**

**FOR THE MINNESOTA PUBLIC UTILITIES COMMISSION  
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**Greg Scott  
Edward Garvey  
Marshall Johnson  
LeRoy Koppendrayer  
Phyllis A. Reha**

**Chair  
Commissioner  
Commissioner  
Commissioner  
Commissioner**

In the Matter of the Complaint of the )  
Minnesota Department of Commerce )  
Against Qwest Corporation )

Docket No. P-421/DI-01-814

**VERIFIED COMPLAINT**

**Expedited Proceeding Requested**

**Temporary Relief Requested**

The Minnesota Department of Commerce ("Department") brings this Verified Complaint before the Minnesota Public Utilities Commission (the "Commission") against Qwest Corporation ("Qwest"), seeking relief for Qwest's violation of its obligations under state and federal law. Qwest's unlawful conduct has hindered and continues to hinder competition in the local exchange markets in Minnesota. In support of this Complaint, the Department alleges:

**PARTIES**

1. Under Minn. Stat. § 216A.07, the Department is charged with investigating and enforcing Chapter 237 and Commission orders made pursuant to that chapter. The Department's local address in Minnesota is Golden Rule Building, 85 East 7th Place, Suite 500, St. Paul, MN 55155.

2. The Department is represented in this proceeding by its attorneys:

Mike Hatch  
Attorney General  
State of Minnesota

Steven H. Alpert  
Assistant Attorney General  
525 Park Street, #200  
St. Paul, Minnesota 55103-2106  
(651) 296-3258 (telephone)  
(651) 282-2525 (TTY)

3. Respondent Qwest is a Delaware corporation with its principal place of business in Denver, Colorado, with offices in Minnesota at 200 South Fifth Street, Minneapolis, Minnesota. Qwest provides switched local exchange service in a number of Minnesota exchanges, and is regulated by the Commission under Minn. Stat. ch. 237 as a "telephone company." Minn. Stat. § 237.01, subd. 2. As a major provider of local exchange service in Minnesota, Qwest controls approximately two million out of the approximately two million seven hundred thousand telephone lines in Minnesota.

4. The Department believes that Qwest is represented in Minnesota by its attorney:

Jason Topp  
Qwest Corporation  
Law Department  
200 South 5th Street, Room 395  
Minneapolis, MN 55402  
(612) 672-8905 (telephone)  
(612) 672-8911 (facsimile)

#### **JURISDICTION**

5. The Department's investigation into certain agreements entered into by Qwest, and described more particularly below, establishes that Qwest's behavior violates federal and state law.

6. The Commission has jurisdiction over this Complaint pursuant to 47 U.S.C. §§ 252(e) (authority of state commissions to enforce interconnection agreements), 251(c)(2) (duty of incumbent carriers to interconnect with CLECs); Minn. Stat. §§ 237.081 (Commission investigations); and, 237.462 (competitive enforcement).

## OVERVIEW

### Qwest's Legal Obligations

7. Qwest is the successor in interest to U S WEST Communications, Inc. ("U S WEST") At all times relevant to this complaint, either U S WEST or its successor Qwest operated as an incumbent local exchange carrier in Minnesota.

8. The Department is informed and believes and on this basis alleges that, upon its merger with U S WEST, Qwest assumed the obligations and the benefits of every agreement described in this complaint to which U S WEST was a party. For purposes of this complaint, both Qwest and U S WEST are referred to as Qwest.

9. As an incumbent local exchange carrier, Qwest has a number of legal duties set forth in 47 U.S.C. § 251(c). Among those duties are:

- a. The duty to negotiate in good faith the particular terms and conditions of agreements for interconnection, access to network elements, resale, number portability, dialing parity, access to rights-of-way, reciprocal compensation, and collocation. 47 U.S.C. § 252(c)(1).
- b. The duty to provide interconnection with Qwest's network on rates, terms and conditions that are just, reasonable and non-discriminatory. 47 U.S.C. § 251(c)(2)(D).

c. The duty to provide nondiscriminatory access to network elements on an unbundled basis on rates, terms and conditions that are just, reasonable and nondiscriminatory. 47 U.S.C. § 251(c)(3).

10. Pursuant to 47 U.S.C. § 252(a), Qwest may negotiate the terms of any agreement to provide interconnection, access to network elements, resale, number portability, dialing parity, access to rights-of-way, reciprocal compensation, and collocation with the CLEC requesting such items or services. The agreement entered into by Qwest "shall be submitted to the State commission under subsection (e) of this section." 47 U.S.C. § 252(a)(1).

11. Qwest and numerous CLECs are parties to Interconnection Agreements ("ICAs") which have been approved at various times by this Commission pursuant to 47 U.S.C. § 252(e).

12. Qwest is required to make available any interconnection, service, or network element provided under an agreement approved by this Commission pursuant to 47 U.S.C. § 252(e) to which Qwest is a party to any other requesting telecommunications carrier upon the same terms and conditions as those provided in the agreement. 47 U.S.C. § 252(i). This requirement is also known as the "most favored nation" or "pick and choose" rule.

13. In the *Local Competition First Report and Order*, the FCC explained the importance of the filing requirement in 47 U.S.C. § 252(a)(1) and its relation with 47 U.S.C. § 252(i):

As a matter of policy, moreover, we believe that requiring filing of all interconnection agreements best promotes Congress's stated goals of opening up local markets to competition, and permitting interconnection on just, reasonable, and nondiscriminatory terms. State commissions should have the opportunity to review *all* agreements, including those that were

negotiated before the new law was enacted, to ensure that such agreements do not discriminate against third parties, and are not contrary to the public interest. In particular, preexisting agreements may include provisions that violate or are inconsistent with the pro-competitive goals of the 1996 Act, and states may elect to reject such agreements under section 252(e)(2)(A). Requiring all contracts to be filed also limits an incumbent LEC's ability to discriminate among carriers, for at least two reasons. First, requiring public filing of agreements enables carriers to have information about rates, terms, and conditions that an incumbent LEC makes available to others. Second, any interconnection, service or network element provided under an agreement approved by the state commission under section 252 must be made available to any other requesting telecommunications carrier upon the same terms and conditions, in accordance with section 252(i). In addition, we believe that having the opportunity to review existing agreements may provide state commissions and potential competitors with a starting point for determining what is "technically feasible" for interconnection.

*Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, CC Docket No. 96-98, First Report and Order, para. 167 (1996) (emphasis in original).*

#### **The Secret Agreements**

14. The Department is conducting an investigation into potential anti-competitive conduct by Qwest, in part to determine whether Qwest has engaged in a practice of entering into secret agreements with some CLECs that violate Qwest's obligations under 47 U.S.C. § 251(c) and/or 47 U.S.C. § 252(a)(1).

15. On June 20, 2001 the Department sent an information request to Qwest asking it to produce every agreement with a CLEC not filed with the Commission entered into by Qwest over the last five years. After discussions with Qwest, the scope of Qwest's production was narrowed to agreements entered into on or after January 1, 2000.

16. The facts set forth below have been determined by the Department based on the agreements and information provided by Qwest in Docket P421/DI-01-814.

17. The Department's investigation revealed that Qwest has entered into numerous secret agreements with CLECs to provide interconnection, access to network elements, resale, number portability, dialing parity, access to rights-of-way, reciprocal compensation and/or collocation to the CLEC (the "Secret Agreements"). The Secret Agreements are discussed in more detail below and attached as exhibits to this complaint.

18. The Secret Agreements either modify or augment the terms and conditions set forth in the ICAs between Qwest and the CLECs that are party to them.

19. 47 U.S.C. § 242(a)(1) requires that these Secret Agreements be submitted for Commission approval pursuant to 47 U.S.C. § 252(e).

20. Qwest has not submitted the Secret Agreements for Commission approval pursuant to 47 U.S.C. § 252(e).

21. In addition to failing to submit the Secret Agreements to this Commission for approval, Qwest included confidentiality provisions in the agreements that, in many cases, precluded access to the Secret Agreements by other CLECs, the Department, or this Commission to the Secret Agreements.

22. The Department is informed and believes and on this basis alleges that the terms of these Secret Agreements described below do not appear in any ICAs approved by the Commission under 47 U.S.C. § 252(e), to which Qwest is a party.

23. As a result, the terms of these Secret Agreements described below remain unknown to the CLECs that are not party to these agreements and are not available for adoption by other CLECs pursuant to 47 U.S.C. § 252(i).

24. By entering into the Secret Agreements, Qwest is providing discriminatory treatment in favor of the CLECs that are party to these agreements and to the detriment of CLECs that are not.

25. Because these Secret Agreements either modify or create entirely new terms and conditions of interconnection, access to network elements, resale, number portability, dialing parity, access to rights-of-way, reciprocal compensation and/or collocation, Qwest's failure to make these terms generally available to all CLECs violates 47 U.S.C. § 251(c).

26. As set forth in greater detail below, the ongoing and repeated behavior of Qwest in entering into these secret agreements was, and is, anti-competitive and in violation of federal and state law.

#### **SPECIFIC FACTUAL ALLEGATIONS**

#### **[TRADE SECRET MATERIAL BEGINS**

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**TRADE SECRET DATA ENDS]**

**REQUEST FOR EXPEDITED PROCEEDINGS**

252. Qwest's continuing failure to comply with its obligations under state and federal law warrants expedited proceedings, temporary relief and penalties available pursuant to Minn. Stat. § 237.462, which authorizes the Commission to conduct expedited proceedings, impose temporary relief and impose penalties to remedy violations of interconnection agreements and incumbent local exchange carrier obligations under Section 251 of the Act and Minnesota law.

253. Pursuant to Minn. Stat. § 237.462 subd. 6, the Department requests that the Commission conduct an expedited proceeding to resolve this Complaint.

254. Qwest's conduct has inhibited and/or limited CLECs in their ability to compete effectively in Minnesota markets, including the ability to compete in the Minnesota local exchange markets.

255. As a result of Qwest's conduct, Minnesota's end user customers have been denied the benefits of potentially increased competition.

256. Qwest's conduct, as described above, is harmful to the public interest and the public is being denied the benefits of competition, including lower prices and diversity of telecommunications services, contrary to public policy favoring competition. Expedited resolution of this matter will advance the development of competition and, therefore, advance the public interest.

257. Carriers have been hindered in their ability to compete in the local exchange market in Minnesota as a result of Qwest's unlawful behavior.

258. Through such behavior, Qwest benefits by the retention of its dominance over the local exchange markets in Minnesota.

259. Accordingly, the Department requests that the Commission resolve this Complaint as soon as possible, and in no event, no more than 60 days from today.

#### **REQUEST FOR TEMPORARY RELIEF**

260. Minn. Stat. § 237.462, subd. 7 provides for temporary relief pending dispute resolution.

261. Based on the facts as pleaded, the Department is likely to succeed on the merits. State and federal law requires Qwest to submit agreements setting forth terms and conditions of

interconnection to this Commission for review and approval and/or to refrain from offering terms and conditions of interconnection in a discriminatory manner.

262. An order for temporary relief is necessary to protect the public's interest in fair and reasonable competition. Despite clear legal obligations to provide non-discriminatory service, and to do so expeditiously, Qwest has refused to comply with the law. Unless the Commission orders Qwest immediately to submit to the Commission for approval those portions of the Secret Agreements that relate to terms and conditions of interconnection, Qwest will continue to provide access to its network and services in a discriminatory and unlawful manner.

263. Without immediate relief, Qwest's secretive tactics will achieve Qwest's goal of limiting competition to itself and, to a lesser degree, some of its wholesale customers of choice. Thus the Act's and this Commission's goal of bringing local exchange competition to the consumers of Minnesota will be further hindered.

264. The Department's proposal to make all terms and conditions of interconnection available to all CLECs in a non-discriminatory manner is technically feasible. Qwest has provided the Department with no evidence to the contrary.

265. Accordingly, under Minn. Stat. § 237.462, subd. 7, the Department hereby requests that the Commission order Qwest immediately to make any and all of the specified terms or conditions of interconnection or service public, and immediately available to any other CLEC who wishes to adopt said provision(s).

#### **REQUEST FOR PENALTIES**

266. Through its conduct as described above, Qwest has willfully refused to comply with its obligations under state and federal law.

267. By its delay in submitting these agreements to this Commission for approval and its refusal to provide non-discriminatory access to services, Qwest has willfully hindered competition in Minnesota.

268. According to Qwest's website, Qwest Communications International, Inc., Qwest Corporation's parent, reported annual revenues of over \$20 billion and assets of over \$74 billion for the year 2001. With these revenues and assets, Qwest Corporation and its parent have the financial ability to pay any penalty this Commission may impose in this proceeding. The Department asks the Commission to impose the maximum penalty for each violation under the statute.

#### **RELIEF REQUESTED**

Wherefore, the Department requests that the Commission:

269. Pursuant to Minn. Stat. § 237.462, order an expedited hearing to be held before this Commission.

270. Grant the Department temporary relief by making the relevant portions of the contracts public and directing Qwest to immediately provide all requesting carriers the opportunity to pick and choose any of the terms and conditions contained therein.

271. Pursuant to Minn. Stat. § 237.462, make a finding that for each of the contracts described in the Complaint, that Qwest acted in violation of state and/or federal law;

272. Declare that each of Qwest's violations of law were in bad faith and anti-competitive;

273. Pursuant to Minn. Stat. § 237.462, subd. 2, impose penalties on Qwest in the amount of \$10,000 per day for each of Qwest's prior failure, and for each day of its continuing failure to comply with the requirements of state or federal law.

274. Grant such other and further relief as the Commission may deem just and reasonable.

Dated: February \_\_, 2002

Respectfully submitted,

**MIKE HATCH**  
Attorney General  
State of Minnesota

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**STEVEN H. ALPERT**  
Assistant Attorney General  
Attorney Registration No. 1351

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IDAHO PUBLIC  
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**BEFORE THE IDAHO PUBLIC UTILITIES COMMISSION**

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AT&T CORP., a New York Corporation;  
AT&T COMMUNICATIONS OF THE  
MOUNTAIN STATES, INC., a Colorado  
Corporation,

Complainants,

vs.

QWEST CORPORATION, a Colorado  
Corporation,

Respondent.

Case No. ATT-T-04-1

**COMPLAINT**

---

**AT&T COMPLAINT - 1**

Qwest Motion to Dismiss  
Exhibit D

AT&T Corp., and AT&T Communications of the Mountain States, Inc. (collectively "AT&T"), by and through its attorneys, Holland & Hart, hereby complains against Qwest Corporation ("Qwest"), as follows:

### **PARTIES**

1. Claimant AT&T Corp. is a public utility that provides telecommunications services in the State of Idaho and other states by and through its affiliate AT&T Communications of the Mountain States, Inc. The Idaho Public Utilities Commission ("Commission") has granted AT&T certification to provide long distance and local exchange telecommunication service in Idaho. AT&T's principal place of business is One AT&T Way, Bedminster, New Jersey 07921.

2. Respondent Qwest is a public utility and a certified provider of long distance and local exchange telecommunications services in the State of Idaho and other states. Qwest's principal place of business is 1801 California Street, Denver, Colorado 80202.

### **JURISDICTION AND VENUE**

3. Jurisdiction over this dispute is properly held by the Commission pursuant to Idaho Code §§ 61-315, 61-501, 61-502, 61-503, 61-514, and 61-641, *et. seq.* The State of Idaho has certified to the Federal Communications Commission ("FCC") that it regulates the rates, terms and conditions for pole attachments, which includes conduits. *See Public Notice, States That Have Certified That They Regulate Pole Attachments*, 7 FCC Rcd. 1498 (1992), attached hereto as Exhibit 1.

4. Qwest is a certified long distance and local exchange carrier that owns or controls conduit in the State of Idaho and elsewhere. Such conduits are used for purposes of wire communications.

5. AT&T owns communications facilities that occupy Qwest's conduit.

6. Qwest and AT&T are direct competitors in local and long distance telecommunications service.

7. AT&T has the right of access to Qwest conduit on just, reasonable and non-discriminatory rates, terms and conditions. *See* 47 U.S.C. § 224; Idaho Code §§ 61-301, 61-315.

8. AT&T occupies Qwest-owned conduit in Idaho pursuant to "General License Agreement for Conduit Occupancy Between The Mountain States Telephone and Telegraph Company and The American Telephone and Telegraph Company for the State of Idaho, dated May 28, 1988" ("Conduit License Agreement") and Licenses executed pursuant thereto. *See* Conduit License Agreement attached hereto as Exhibit 2; Licenses attached hereto as Exhibit 3.

9. AT&T also occupies Qwest-owned conduit pursuant to an "Agreement for Terms and Conditions for Interconnection, Unbundled Network Elements, Ancillary Services, and Resale of Telecommunication Services Between Qwest Corporation and AT&T Communications of the Mountain States, Inc. in the State of Idaho" ("Interconnection Agreement" or "Agreement") dated May 4, 2004 and approved by the Commission on June 22, 2004. *See* Interconnection Agreement attached hereto as Exhibit 4. *See also In the Matter of the Joint Application of Qwest Corporation and AT&T Communications of the Mountain States, Inc. for Approval of an*

*Interconnection Agreement Pursuant to 47 U.S.C. § 252(e), Case No. QWE-T-04-9, Order No. 29530 (June 22, 2004). Prior to the adoption of this Agreement, the parties had operated under an alternative Interconnection Agreement adopted September 15, 1998. See Agreement for Local and Wireline Network Interconnection and Service Resale ("1998 Interconnection Agreement"), attached hereto as Exhibit 5. See also In the Matter of AT&T Communications of the Mountain States, Inc. Petition for Arbitration Pursuant to Section 252(b) of the Telecommunications Act of 1996 of the Rates, Terms and Conditions of Interconnection with US West, Case No. USW-T-96-15, ATT-T-96-2, Order No 27738 (Sept. 15, 1998).*

### **GENERAL ALLEGATIONS**

10. AT&T currently occupies approximately 138,607 feet of Qwest's conduit in the State of Idaho. See Qwest Conduit Licenses, attached hereto as Exhibit 3; Qwest Conduit Invoices, attached hereto as Exhibit 6.

11. The Conduit License Agreement does not establish rates. Rather, the individual Licenses issued pursuant to the Agreement set forth the rates. See Qwest Conduit Licenses (Exh. 3).

12. Similarly, the 1998 Interconnection Agreement between the parties does not set forth a specific rate for conduit rental. Instead, the Agreement requires Qwest to provide AT&T "equal and non-discriminatory access to poles, ducts, conduit and ROW and any other pathways on terms and conditions equal to that provided by [Qwest] to itself or to any other Person." Interconnection Agreement at § 47.4.5 (Exh. 5).

13. Qwest makes its conduit rental rate publicly available in its Statement of Generally Available Terms and Conditions ("SGAT") on file at the Idaho Public Utilities Commission. See Idaho SGAT § 10.7.12, attached hereto as Exhibit 7. See also *In the Matter of Determining*

*Prices for Unbundled Network Elements (UNE) in Qwest Corporation's Statement of Generally Available Terms (SGAT), Case No. QWE-T-01-11, Order No. 29408 (Jan. 2, 2004).*

14. Qwest's published SGAT conduit rate set forth below is "just, reasonable and nondiscriminatory" and consistent with 47 U.S.C. § 224 and Idaho Code § 61-301. *Id.*

15. The current Interconnection Agreement between the parties states that Qwest's conduit rental fees "are in accordance with Section 224 of the Act and FCC orders, rules and regulations promulgated thereunder, as well as the rates established by the Commission . . . ." The Agreement sets forth the conduit occupancy rate by attaching a copy of Qwest's January 2004 SGAT as an Exhibit to the Agreement. *See* Interconnection Agreement at 10.8.3 and Exhibit A (Exh. 4 attached hereto).

16. However, Qwest currently charges AT&T rates ranging from \$2.75 to \$3.25 per foot per year to occupy its conduit in Idaho. *See* Conduit Invoices attached hereto as Exhibit 6.

17. Qwest's publicly available SGAT identifies Qwest's conduit rental rate as \$0.31. *See* Idaho SGAT Spreadsheet § 10.7.12 (Exh. 7). Upon information and belief, this is a just and reasonable rate for conduit occupancy. Although this is the publicly filed rate and approximates levels that AT&T believes would be generated under the FCC's conduit formula, Qwest continues to charge AT&T the higher \$2.75 to \$3.25 per foot rates.

18. Beginning in February, 2000 and continuing through December, 2003, AT&T attempted to re-negotiate Qwest's conduit rental rates to be consistent with the rates that would be produced under the FCC's formula and/or the rates at which Qwest offers conduit to other telecommunications companies. AT&T's attempts have not been successful.

## REQUEST FOR RELIEF

19. This Commission is charged with ensuring that the rates, terms and conditions of attachment are just and reasonable. *See* Idaho Code § 61-514; *see also* Idaho Code § 61-502. In addition, the Commission holds broad authority to supervise and regulate every public utility within the State. *See* Idaho Code § 61-501. Upon a finding that a public utility has charged unjust and discriminatory rates, the Commission is empowered to adjust the rates and award reparations, with interest, to the affected party from the date of the collection of the unlawful amount. *See* Idaho Code §§ 61-502, 61-503, 61-641.

20. The conduit occupancy rates that Qwest charges AT&T are eight to 10 times higher than the rates in Qwest's SGAT on file with the Commission. The rates that Qwest charges AT&T, therefore, are not just, reasonable, and non-discriminatory, in violation of Idaho Code §§ 61-502 and 61-514.

21. Qwest competes directly with AT&T in providing local exchange and long distance telecommunications service in the state of Idaho. Qwest has granted itself an undue preference and has subjected AT&T to undue and unreasonable prejudice and competitive disadvantage by forcing AT&T to pay conduit occupancy rates well above the SGAT rate on file with the Commission, in violation of Idaho Code §§ 61-301 and 61-315. *See also* Idaho Code §§ 61-502 and 61-514.

22. Furthermore, Qwest's practice of offering its facilities to other telecommunications carriers at the SGAT rate, while charging AT&T conduit rates in excess of the SGAT rate is discriminatory and prohibited by law. *See* Idaho Code § 61-315. *See also* Idaho Code §§

61-301, 61-502. It is also part of a pattern of the deceptive and anti-competitive practices that Qwest has engaged in across its multi-state service areas,<sup>1</sup> including, specifically, Idaho.

23. Finally, Qwest's authority to provide long-distance telecommunications service in Idaho is conditioned on Qwest affording competitors non-discriminatory access to Qwest's network, including non-discriminatory access to its "poles, ducts, conduits and rights-of-way." 47 U.S.C. § 271(c)(2)(B)(iii). By refusing to provide AT&T with conduit at the publicly available SGAT rates, Qwest is not providing non-discriminatory access to its "poles, ducts, conduits and rights-of-way," in violation of federal law. *See, e.g.*, 47 U.S.C. §§ 224 and 271(c).

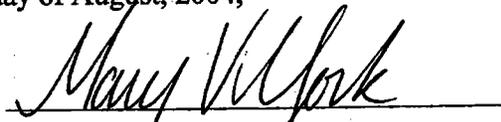
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<sup>1</sup> *See, e.g., In re Qwest Corp Apparent Liability for Forfeiture*, Notice of Apparent Liability for Forfeiture, FCC 04-57, File No. EB-03-IH-0263 (Mar. 12, 2004) (imposing \$9 million forfeiture and finding that "Qwest's cavalier attitude toward the Act's filing requirements shows a disregard for Congress's goals of opening local markets to competition and permitting interconnection on just, reasonable, and nondiscriminatory terms"); Letter from Hillary S. DeNigro, Deputy Chief, Investigations and Hearings Division, Enforcement Bureau to Melissa Newman, Vice President-Federal Regulatory, Qwest Communications International, Inc. re: Section 271 Compliance Review Program for Arizona (dated Mar. 26, 2004) (establishing Section 271 compliance monitoring program for Qwest and reserving Commission's authority to investigate and monitor other subjects not expressly noted in prior orders or correspondence); Letter from William Davenport, Deputy Chief, Investigations and Hearings Division, Enforcement Bureau to Melissa Newman, Vice President-Federal Regulatory, Qwest Communications International, Inc. re: Section 271 Compliance Review Program for Minnesota (dated July 23, 2003) (same); Letter from William Davenport, Deputy Chief, Investigations and Hearings Division, Enforcement Bureau to Melissa Newman, Vice President-Federal Regulatory, Qwest Communications International, Inc. re: Section 271 Compliance Review Program for New Mexico, Oregon and South Dakota (dated June 4, 2003) (same). *See also* State Telecom Activities, Communications Daily (Apr. 23, 2004) (announcing Arizona Corporation Commission's assessment of nearly \$21 million in penalties on Qwest for its "willful and intentional" violations of state and federal laws for failing to file interconnection agreements); *In the Matter of the Investigation into Unfiled Agreements Executed by Qwest Corporation*, Docket No. 02I-572T, Colo. PUC (Feb. 27, 2004) (Colorado PUC staff recommending a hearing regarding willful and intentional violations of state and federal law by Qwest); *Order Assessing Penalties*, Docket No. P-421/C-02-197, Minn. PUC, (Feb. 28, 2003) (Minnesota agency ordering Qwest to pay \$26 million fine and engage in steps toward compliance), *Order after Reconsideration on Own Motion*, Minn. Docket No. P-421/C-02-197 (Apr. 30, 2003) and *Order Adopting ALJ's Report and Establishing Comment Period Regarding Remedies*, Minnesota Docket No. P-421/C-02-197, at 5 (Nov. 1, 2002), *Qwest Corporation v. Minnesota Public Utilities Commission, et al., Complaint for Declaratory Judgment and Injunctive Relief to Prevent Enforcement of Public Utilities Commission Orders*, Civ. File No. 03-3476, D. Minn. (filed June 19, 2003) (Qwest complaint challenging PUC's authority to impose penalty); *AT&T Corp. v. Qwest Corp., Order Making Tentative Findings, Giving Notice for Purposes of Civil Penalties, and Granting Opportunity to Request Hearing*, Iowa Utils. Bd. Docket No. FCU-02-2 (June 18, 2002) (finding that Qwest's failure to file interconnection agreements at issue violated Section 252 of the Act).

WHEREFORE, in accordance with the Commission's broad authority to regulate public utilities and protect the public interest, as well as its authority over conduit under state and federal law, AT&T respectfully request this Commission to enter an Order:

- a. declaring unlawful Qwest's Idaho conduit rates of \$2.75 to \$3.25 per foot innerduct per year, and terminate the \$2.75 to \$3.25 rates;
- b. ordering Qwest to charge AT&T an annual conduit rental rate equal to the SGAT rate of \$0.31 per foot of duct;
- c. ordering Qwest to refund to AT&T all amounts paid in excess of rates charged to other telecommunications carriers dating back to September 15, 1998, when Qwest committed to providing AT&T with non-discriminatory rates;
- d. awarding attorneys fees to AT&T dating back to February 2000, when AT&T notified Qwest of the discrepancy between the rates that Qwest is currently charging AT&T and the rates Qwest charges other telecommunications carriers, to the extent authorized under applicable law;
- e. granting AT&T such other relief the Commission deems just, reasonable and proper.

Respectfully submitted, this 6th day of August, 2004,



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(908) 532-1850

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

**CERTIFICATE OF SERVICE**

1. I hereby certify that on this 6th day of August 2004, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

Donald L. Howell II, Director  
Idaho Public Utilities Commission  
472 West Washington Street  
Boise, Idaho 83720-0074  
Facsimile: (208) 334-3762

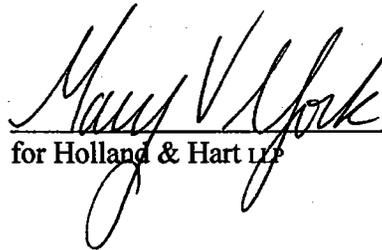
U.S. Mail  
 Hand Delivered  
 Overnight Mail  
 Telecopy (Fax)

Jim Schmit  
Vice President,  
QWest Corporation  
999 Main Street  
Boise, Idaho 83702

U.S. Mail  
 Hand Delivered  
 Overnight Mail  
 Telecopy (Fax)

Mary Hobson, Esq.  
Stoel Rives  
101 S. Capitol Blvd.  
Suite 1900  
Boise, Idaho 83702  
Facsimile: (208) 389-9040

U.S. Mail  
 Hand Delivered  
 Overnight Mail  
 Telecopy (Fax)

  
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for Holland & Hart LLP

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# EXHIBIT 1

STATES THAT HAVE CERTIFIED THAT THEY REGULATE POLE ATTACHMENTS

DA 92-201

Before the  
Federal Communications Commission  
Washington, DC 20554

PUBLIC NOTICE

Released: February 21, 1992

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This is an unofficial announcement of Commission action. Release of the full text of a Commission order constitutes official action. See MCI v. FCC. 515 F 2d 385 (D.C. Circ 1974).

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STATES THAT HAVE CERTIFIED THAT THEY REGULATE POLE ATTACHMENTS

Pursuant to Section 1.1414(b) of the Commission's Rules on cable pole attachments, the following states\* have certified that they regulate rates, terms, and conditions for pole attachments, and, in so regulating, have the authority to consider and do consider the interests of subscribers of cable television services, as well as the interests of the consumers of utility services. Moreover, these states have certified that they have issued and made effective rules and regulations implementing their regulatory authority over pole attachments, including a specific methodology for such regulation which has been made publicly available in the state.

Certification by a state preempts the FCC from accepting pole attachment complaints under Subpart J of Part 1 of the Rules.

Alaska	Massachusetts
California	Michigan
Connecticut	New Jersey
Delaware	New York
District of Columbia	Ohio
Idaho	Oregon
Illinois	Utah
Kentucky	Vermont
Louisiana	Washington
Maine	

\* "state" by Section 1.1402(g) of the Rules, means any state, territory, or possession of the United States, the District of Columbia, or any political subdivision, agency, or instrumentality thereof.

This Public Notice supersedes the Public Notice of December 30, 1987, DA No. 87-1862.

FEDERAL COMMUNICATIONS COMMISSION

Exhibit I  
Case # ATT-T-04-1  
AT&T Complaint, Page 1 of 1

# EXHIBIT 2

IDCOND 22862600

Agreement No. I-001C.  
04/87 Issue 1

**GENERAL LICENSE AGREEMENT**

**FOR**

**CONDUIT OCCUPANCY**

**BETWEEN**

**THE MOUNTAIN STATES TELEPHONE AND TELEGRAPH COMPANY**

**AND**

**THE AMERICAN TELEPHONE AND TELEGRAPH COMPANY**

**for the State of Idaho**

**Dated**

**May 28, 1988**

Exhibit 2  
Case # ATT-T-04-1  
AT&T Complaint, Page 1 of 16

**NOTICE**

The information contained herein should not be disclosed to unauthorized persons. It is meant for use only by authorized representatives of the parties hereto.

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PREAMBLE

THIS AGREEMENT, executed this 28th day of May, 1988, between THE MOUNTAIN STATES TELEPHONE AND TELEGRAPH COMPANY, a corporation organized and existing under the laws of the State of Colorado, having its principal office in the City and County of Denver (hereinafter called "Licensor"), and THE AMERICAN TELEPHONE AND TELEGRAPH COMPANY, a corporation, organized and existing under the laws of the State of New York, having its principal office in the city of New York (hereinafter called "Licensee").

WITNESSETH:

WHEREAS, Licensor proposes to provide access to its conduit system in certain areas of Idaho; and

WHEREAS, Licensee desires to place and maintain underground communications facilities within the area described above and desires to place such communications facilities in the conduit system of Licensor; and

WHEREAS, Licensor is willing to permit, under certain conditions on a nonexclusive license basis, the placement of said communications facilities on or within Licensor's facilities where reasonably available in the area described above and where such use will not interfere with Licensor's service requirements or the use of its facilities by others;

NOW THEREFORE, in consideration of the mutual covenants, terms and conditions herein contained, the parties do hereby mutually covenant and agree as follows:

**Article I**  
**DEFINITIONS**

As used in this Agreement:

**A) Conduit Occupancy**

Occupancy of a conduit system by any item of Licensee's communications facilities.

**B) Conduit System**

Any combination of ducts, manholes, handholes, and vaults joined to form an integrated whole, which is owned solely or in part by the Licensor.

**C) Duct**

A single enclosed raceway for wire conductors, cables or innerducts.

**D) Innerduct**

One of the single enclosed raceways located within a duct, the interior diameter of which raceway shall in no event be less than one inch.

**E) Joint User**

A party which may occupy a duct either solely or partially owned by the Licensor, in return for granting the Licensor equivalent rights of occupancy of duct which it owns, either solely or partially.

**F) Licensee's Communications Facilities**

All facilities, including but not limited to cables, equipment and associated hardware, owned and utilized by the Licensee which occupy a conduit system.

**G) Make-Ready Work**

All work, including but not limited to rearrangement or transfer of existing facilities or other changes required to accommodate the Licensee's communications facilities in a conduit system.

**H) Manhole**

A subsurface enclosure which personnel may enter and use for the purpose of installing, operating and maintaining communications facilities.

**I) Prelicense Survey**

All work required, including field inspection and administrative processing, to determine the make-ready work necessary to accommodate Licensee's communications facilities in Licensor's conduit system.

**Article 2**  
**SCOPE OF AGREEMENT**

- A) Subject to the provisions of this Agreement, Licensor agrees to issue to Licensee for any lawful communications purpose, nonexclusive, revocable license(s) authorizing the placement of Licensee's communications facilities in those portions of Licensor's conduit system within the State of Idaho, which Licensee elects to use.
- B) Nothing contained in this Agreement shall be construed to compel Licensor to construct, extend, or place any duct or other facility for use by the Licensee.
- C) Nothing contained in this Agreement shall be construed as a limitation, restriction, or prohibition against Licensor with respect to any agreement or arrangement which Licensor has heretofore entered into, with others not parties to this Agreement regarding the conduit systems covered by this Agreement. The rights of Licensee shall at all times be subject to any such existing agreement or arrangement.

**Article 3**  
**FEES AND CHARGES**

- A) Licensee shall pay all applicable fees and charges specified in the license(s) granted hereunder within forty-five (45) days after receipt of the bill. Failure to pay all fees and charges on the specified payment date, shall constitute a default of this Agreement, unless the parties hereto agree that unusual circumstances prevented receipt of payment by Licensor. In event that such unusual circumstances occurred, the parties hereto shall mutually agree on a new payment date. In addition, all fees not paid on the specified payment date shall result in a late payment charge of one and one-half (1+1/2) percent per month of the unpaid balance or the highest lawful rate, whichever is less, to Licensor.
- B) Fees and charges for each conduit system occupancy shall be computed on an individual case basis.
- C) Licensor reserves the right to revise the fees and charges specified in any or all license(s) granted hereunder by providing written notice to Licensee sixty (60) days prior to the end of any term of such license(s).

**Article 4**  
**TERM OF AGREEMENT AND LICENSE(S)**

- A) This Agreement shall continue during such time Licensor is providing conduit system occupancy under any one or more licenses pursuant to this Agreement. In the event that all licenses granted hereunder expire or are terminated, then this Agreement may be terminated by either party with thirty (30) days prior written notice to the other party.
- B) Any license(s) issued hereunder shall continue in effect for an initial term of five (5) years from the date such license(s) is issued unless otherwise specified in such license.

- C) Any license issued hereunder shall be extended for successive terms of five (5) years unless otherwise specified in such license and unless either party provides written notice sixty (60) days prior to the expiration date of such term of its election to terminate such license.
- D) Termination of this Agreement or any license(s) issued hereunder shall not affect Licensee's liabilities and obligations incurred hereunder prior to the effective date of such termination.

**Article 5**

**TERMINATION OF AGREEMENT AND LICENSE(S)**

- A) Licenser shall have the right to terminate this entire Agreement or any license issued hereunder with thirty (30) days prior written notice to Licensee whenever Licensee is in default of any term of this Agreement. Default shall include, but not be limited to, the following conditions:
  - (1) If Licensee knowingly uses its communications facilities or maintains same in violation of any law or in aid of any unlawful act or undertaking; or
  - (2) If Licensee occupies any portion of a conduit system owned by Licenser without having first been issued a license therefore; or
  - (3) If any authorization which may be required of the Licensee by any governmental or private authority for the construction, operations, and maintenance of the Licensee's communications facilities within Licenser's conduit system is permanently denied or revoked; or
  - (4) If the insurance carrier shall at any time notify Licenser or Licensee that the policy or policies of insurance, required under Article 14 hereof, will be cancelled or changed and if in the sole reasonable judgment of Licenser the requirements of Article 14 will no longer be satisfied by policies with other insurance carriers, this Agreement shall terminate upon the effective date of such cancellation or change.
  - (5) Nonpayment as described in Article 3 herein.
- B) Licenser will promptly notify the Licensee in writing of any condition(s) of default by Licensee including those set forth in A) above. Licensee shall take immediate corrective action to eliminate any such condition(s) and shall confirm in writing to Licenser within thirty (30) days following receipt of such written notice that the cited condition(s) has ceased or been corrected. If Licensee fails to discontinue or correct such condition(s) and fails to give the required confirmation, Licenser may immediately terminate any or all license(s) granted hereunder and this Agreement. Licensee shall then have sixty (60) days to remove its facilities from Licenser's conduit system.

- C) In the event of early termination by Licensee or default of this Agreement or any license(s) issued hereunder, the Licensee shall be liable to pay to Licensor a termination liability amount whether or not Licensee has placed its communication facilities in Licensor's facilities. Such early termination charges shall be in accordance with the following schedule:

<u>Years Remaining in License(s)</u>	<u>Percent of Total Fees and Charges Remaining in License(s)</u>
16+	100%
11-15	75%
6-10	50%
1-5	25%
0	0%

- D) If this Agreement or any license(s) granted hereunder is terminated for reasons other than default or early termination, then Licensee shall remove its communications facilities from Licensor's conduit system within twelve months (12) from the date of termination; provided, however, that Licensee shall be liable for and pay all fees and charges provided for in this Agreement to Licensor until Licensee's communication facilities are physically removed.
- E) If Licensee does not remove its communications facilities from Licensor's conduit system within the applicable time periods specified in this Agreement, Licensor shall have the option to; (i) remove such facilities at the expense of Licensee and without any liability on the part of Licensor to Licensee therefore; or (ii) assess a charge not to exceed forty percent (40%) of the fees and charges specified in the license(s) so terminated. Such charge is in addition to the fees and charges specified in the terminated license(s) and shall be calculated on a daily basis for each day that Licensee's communication facilities remain in Licensor's conduit system.

**Article 6**  
**SPECIFICATIONS**

- A) Licensee's communications facilities shall be placed and maintained in accordance with the requirements and specifications of current applicable Mountain Bell Practices and the current editions of the National Electrical Code (NEC) and the National Electrical Safety Code (NEC) and the rules and regulations of the Occupational Safety and Health Act (OSHA), all of which are incorporated by reference in this Agreement, and any governing authority having jurisdiction over the subject matter. Where a difference in specifications exists, the more stringent shall apply.
- B) If any part of Licensee's communications facilities is not placed and maintained in accordance with A) preceding, and Licensee has not corrected the violation within thirty (30) days from receipt of written notice thereof from Licensor, Licensor may at its option correct said condition. Licensor will attempt to notify Licensee in writing prior to performing such work whenever practicable. However, when such conditions pose an immediate threat to the safety of the Licensor's employees or the public, interfere with the performance of the Licensor's service obligations, or

(Article 6 continued)

pose an immediate threat to the physical integrity of the Licensor's facilities, the Licensor may perform such work and take such action that it deems necessary without first giving written notice to the Licensee by giving telephone notice to Licensee. As soon as practicable thereafter, Licensor will advise Licensee in writing of the work performed and the action taken and will endeavor to arrange for reaccommodation of Licensee's facilities so affected. The Licensee shall be responsible for paying the Licensor for all reasonable costs incurred by the Licensor for all work, action, and reaccommodation performed by Licensor under this subsection.

**Article 7**  
**LEGAL REQUIREMENTS**

Licensor shall be responsible for obtaining from appropriate public and private authority any required authorization to construct, operate and maintain its conduit facilities on public and private property. Licensee shall be responsible for obtaining from the appropriate public and private authority any required authorization to place, operate and maintain its communications facilities on public and private property before it occupies conduit system located on such public and private property.

**Article 8**  
**ISSUANCE OF LICENSES**

Before Licensee may occupy any portion of a conduit system, Licensee must make written application for and have received a written license from the Licensor. Such application(s) and license(s) shall be in the form attached hereto as Appendix 1, Forms A-1 through A-5. Such license(s) shall state the time needed to accomplish any make-ready work necessary to accommodate Licensee's facilities. License applications shall be submitted to the Licensor at the address set forth in Article 20 herein.

**Article 9**  
**PRELICENSE SURVEY AND MAKE-READY WORK**

- A. When an application for conduit system occupancy is submitted by the Licensee, a prelicense survey by the Licensor will be required to determine the availability of the conduit system to accommodate Licensee's communications facilities. A representative of the Licensee may accompany the Licensor's representative on the field inspection portion of such prelicense survey.
- B. The Licensor retains the right, in its sole judgment, to determine the availability of space in a conduit system. In the event the Licensor determines that rearrangement of the existing facilities in the conduit system is required before Licensee's communications facilities can be accommodated, the make-ready charges that will apply for such rearrangement work will be specified as nonrecurring charges on the associated license. Such charges will be due and payable in accordance with Article 3 herein.
- C. In performing all make-ready work to accommodate Licensee's communications facilities, Licensor will endeavor to include such work in its normal work load schedule.

Article 10

**CONSTRUCTION, MAINTENANCE AND REMOVAL OF COMMUNICATIONS FACILITIES**

- A) Licensee shall, at its own expense, construct and maintain its communications facilities in conduit systems covered by this Agreement and all license(s) issued hereunder in a safe condition and in a manner acceptable to Licensor, so as not to physically conflict or electrically interfere with the facilities attached thereon or placed therein by the Licensor, joint users, or other authorized licensees. Licensee shall place its communication facilities in accordance with Licensor's work diagram, incorporated herein by reference, which will be provided to Licensee upon execution of the license(s) hereunder.
- B) The Licensee must obtain prior written authorization from the Licensor, approving of the work and the party performing such work, before the Licensee shall install, remove, or provide maintenance of its communications facilities in any of Licensor's conduit systems. If Licensor does not provide such written notification to Licensee within seven (7) days, authorization shall be granted. Licensor shall not withhold such authorization without good cause.
- C) Licensee shall notify Licensor of any removal(s) or modification(s) of Licensee's communications facilities from any of Licensor's conduit systems. Removal notification shall be in the form provided in Appendix 1, Form A-6. If Licensee desires to modify its facilities that are located in Licensor's conduit system, Licensee shall first notify Licensor of such intent. Such notification shall be in the forms provided in Appendix 1, Forms A-4, A-5 and A-6. Licensor reserves the right to refuse such request if the modifications would create any problems to Licensor's facilities.
- D) For each license issued hereunder, Licensor shall designate the particular duct(s) or innerduct(s) to be occupied, the location and manner in which Licensee's communications facilities will enter and exit Licensor's conduit system and the specific location for any associated equipment which is permitted by Licensor to occupy the conduit system. Such specifications will be provided by Licensor to Licensee on Licensor's work diagram incorporated herein by reference.
- E) Licensee shall be responsible for obtaining any necessary authorization from appropriate authorities to open manholes and conduct work operations therein. Licensee's employees, agents or contractors will be permitted to enter or work in Licensor's manholes only when an authorized employee or agent of Licensor is present or if prior authorization waiving this requirement is granted by the Licensor. If Licensor's employee or agent observes any unsafe practices or hazardous conditions occurring as a result of the work being performed by Licensee's employees or agents, Licensor shall contact Licensee's authorized representative for resolution of the problem. Licensee agrees to pay Licensor for having Licensor's employee or agent present when Licensee's work is being done in and around Licensor's conduit system. Such charges shall be the Licensor's fully loaded labor rates then in effect.

- F) In the event of any service outage affecting both Licensor's and Licensee's facilities, both parties shall mutually agree on reasonable restoral plans.
- G) With Licensor's prior concurrence, Licensee, without charge and where available, may temporarily use spare duct or innerduct for emergency maintenance purposes. Such Licensee emergency facilities shall be removed within ninety (90) days after the date Licensee replaces its existing facilities in one duct with the placement of substitute facilities in another duct unless Licensee applies for and Licensor grants a license for such conduit system occupancy. In cases where an emergency exists that effects both parties, and where only one spare innerduct or duct is present, Licensor has maintenance priority.
- H) If Licensee fails to remove its facilities within the specified period, Licensor shall have the right to remove such facilities at Licensee's expense and without any liability on the part of the Licensor for damage to such facilities or without any liability for any interruption of Licensee's services, or may, at its option, take over said facilities at a price to be negotiated between the parties. Should Licensor under the provisions of this Article or any other applicable Article of this Agreement remove Licensee's facilities from the conduit systems covered by this Agreement, Licensor will deliver to Licensee the facilities so removed upon payment by Licensee of the cost of removal, storage and delivery, and all other amounts due Licensor. Nothing in this Article shall operate to prevent Licensor from pursuing, at its option, any other remedies under this Agreement or at law or in equity.
- I) Licensee shall advise Licensor in writing as to the date on which the removal of its communications facilities from each portion of conduit system has been completed. Such notification shall be in the form provided in Appendix 1, Form A-6.

**Article 11**  
**INSPECTION OF LICENSEE'S COMMUNICATIONS FACILITIES**

- A) Licensor reserves the right to make periodic inspections of any part of Licensee's communications facilities occupying Licensor's conduit system.
- B) The frequency and extent of such inspection by Licensor will depend upon Licensee's performance hereunder.
- C) Licensor will give Licensee advance written notice of such inspections, except in those instances where, in the sole judgment of Licensor, safety considerations justify the need for such an inspection without the delay of waiting until a written notice has been forwarded to Licensee. A representative of the Licensee may accompany the Licensor's representative on such field inspections.
- D) The making of periodic inspections or the failure to do so shall not operate to impose upon Licensor any liability of any kind whatsoever nor relieve Licensee of any responsibility, obligations or liability assumed under this Agreement.

**Article 12**  
**UNAUTHORIZED UTILIZATION OR OCCUPANCY**

- A) If any of Licensee's communications facilities shall be found occupying conduit systems for which no license is outstanding, Licensor, without prejudice to its other rights or remedies under this Agreement, may impose a charge of ten dollars (\$10.00) per duct foot and five hundred dollars (\$500.00) for each item of unauthorized equipment within a manhole, and require Licensee to submit in writing, within 15 days after receipt of written notification from Licensor of the unauthorized utilization, or occupancy, a conduit system occupancy license application. If such application is not received by the Licensor within the specified time period, Licensee may be required at Licensor's option to remove its unauthorized occupancy or cease its unauthorized utilization within sixty (60) days of the final date of submitting the required application, or Licensor may at Licensor's option remove Licensee's unauthorized facilities without liability, and the expense of such removal shall be borne by Licensee.
- B) No act or failure to act by Licensor with regard to said unlicensed use shall be deemed as a ratification of the unlicensed use; and if any license should be subsequently issued, said license shall not operate retroactively or constitute a waiver by Licensor of any of its rights or privileges under this Agreement or otherwise; provided, however, that Licensee shall be subject to all liabilities, obligations and responsibilities of this Agreement in regards to said unauthorized use from its inception.

**Article 13**  
**LIABILITY AND DAMAGES**

- A) Licensor shall exercise precaution to avoid damaging the communications facilities of the Licensee and shall make an immediate report to the Licensee of the occurrence of any such damage caused by its employees, agents or contractors. Licensor agrees to reimburse the Licensee for all reasonable direct costs incurred by the Licensee for the physical repair of such facilities damaged by the negligence of Licensor. Licensor shall not, however, be liable to Licensee for any interruption of Licensee's service or for interference with the operation of Licensee's communications facilities, or for any special, indirect, or consequential damages arising in any manner, including Licensor's negligence, out of the use of conduit systems or Licensor's actions or omissions in regards thereto and Licensee shall indemnify and save harmless Licensor from and against any and all claims, demands, or causes of action by Licensee's customers, and costs and attorney's fees resulting from damaging the communications facilities.
- B) Licensee shall exercise precaution to avoid damaging the facilities of Licensor and of other occupants of the conduit system at any time and shall make an immediate report to the owner of facilities so damaged and Licensee assumes all responsibility for any and all direct loss from such damage caused by Licensee's employees, agents or contractors. Licensee shall have no responsibility for any indirect, special, or consequential damages. This paragraph B shall survive the termination of this Agreement and any license issued hereunder.

- C) Licensee shall indemnify, protect and save harmless the Licensor from any and all damages and costs, including attorney's fees, incurred by the Licensor arising as a result of Licensee's breach of Article 7 hereof.
- D) Licensee shall indemnify, protect and save harmless the Licensor and joint user from and against any and all claims, demands, causes of actions and costs, including attorney's fees, for damages to property and injury or death to persons, including but not limited to payments under any Workmen's Compensation Law or under any plan for employee's disability and death benefits, which may arise out of or be caused by the placement, maintenance, presence, use or removal of Licensee's facilities, or by any act or omission of the Licensee's employees, agents or contractors.
- E) Licensee shall promptly advise the Licensor of all claims relating to damage of property or injury or death of persons, arising or alleged to have arisen in any manner, directly or indirectly, by the placement, maintenance, repair, replacement, presence, use or removal of the Licensee's facilities. Copies of all accident reports and statements made to Licensee's insurer by the Licensee or others shall be furnished promptly to the Licensor.
- F) In the event that Licensor issues a license to Licensee for conduit system occupancy and Licensee is unable to use Licensor's duct or innerduct due to previous damage to such duct or innerduct, Licensor shall incur the cost to repair such facilities. However, in no event shall Licensor be liable to Licensee for any lost time or any other indirect damages or charges incurred by Licensee as a result of such damaged facilities.

**Article 14**  
**INSURANCE**

- A) Licensee shall obtain and maintain insurance, including endorsements insuring the indemnification provisions of this Agreement, issued by an insurance carrier mutually satisfactory to Licensor and Licensee to protect the Licensor from and against all claims, demands, causes of actions, judgments, costs, including attorney's fees, expenses and liabilities of insurable kind and nature which may arise or result, directly or indirectly from or by reason of such loss, injury or damage as covered in this Agreement including Article 13 preceding.
- B) The amounts of such insurance:
  - 1) against liability due to damage to property shall be not less than \$500,000 as to any one occurrence and \$1,000,000 aggregate, and;
  - 2) against liability due to injury or death of persons shall be not less than \$500,000 as to any one person and \$1,000,000 as to any one occurrence.
- C) Licensee shall submit to Licensor certificates by each company insuring Licensee to the effect that it has insured Licensee for all liabilities of Licensee covered by this Agreement and that it will not cancel or change any such policy of insurance issued to Licensee except after thirty (30) days written notice to Licensor. Such certificates shall be in a form mutually satisfactory to Licensor and Licensee.  
Notwithstanding the foregoing, Licensee may self-insure for any insurance coverage required hereunder.



- D) All insurance required in accordance with B) and C) preceding must be effective before Licensor will authorize occupancy of a conduit system and shall remain in force until such Licensee's facilities have been removed from all such conduit systems. In the event that the Licensee shall fail to maintain the required insurance coverage, Licensor may pay any premium thereon falling due, and the Licensee shall forthwith reimburse the Licensor for any such premium paid.

**Article 15**  
**COMPLIANCE WITH LAWS**

Both parties hereunder shall comply with all applicable provisions of workmen's compensation laws, unemployment compensation laws, the Federal Social Security Law, the Fair Labor Standards Act and all other applicable federal, state and local laws and regulations.

**Article 16**  
**CONFIDENTIALITY**

Both Licensor and Licensee agree to treat this Agreement and any other related information whether in tangible form or obtained from the use of Licensor's conduit system, as proprietary, and said information shall not be reproduced, published, or disclosed to any third party without the prior written consent of the other party. All copies of information provided to either party shall be returned to disclosing party upon request or termination of this Agreement. Each party shall take all necessary precautions, including, but not limited to, informing its employees of the proprietary nature of any information provided by the disclosing party and the need to guard the secrecy of such information, and limit access to such information to employees of recipient party who have a need for such information to perform its obligations hereunder.

**Article 17**  
**AUTHORIZATION NOT EXCLUSIVE**

Nothing herein contained shall be construed as a grant of any exclusive authorization, right or privilege to Licensee. Licensor shall have the right to grant, renew and extend rights and privileges to others not parties to this Agreement, by contract or otherwise, to use any conduit system covered by this Agreement.

**Article 18**  
**ASSIGNMENT OF RIGHTS**

- A) Licensee shall not assign, transfer, or sublicense this Agreement or any license or any authorization granted under this Agreement and this Agreement shall not inure to the benefit of Licensee's successors or assigns, without the prior written consent of Licensor. Licensor may withhold such consent in its sole discretion. Licensee shall pay \$100 administrative processing fee to Licensor prior to consent being granted.
- B) In the event such consent or consents are granted by Licensor, then the provisions of this Agreement shall apply to and bind the successors and assigns of the Licensee.

**Article 19**  
**FAILURE TO ENFORCE**

Failure of Licensor to enforce or insist upon compliance with any of the terms or conditions of this Agreement or to give notice or declare this Agreement or any authorization granted hereunder terminated shall not constitute a general waiver or relinquishment of any term or condition of this Agreement, but the same shall be and remain at all times in full force and effect. Any waiver must be in writing and signed by both parties.

**Article 20**  
**NOTICES AND DEMANDS**

All demands and requests given by one party to the other party shall be in writing and shall be deemed to be duly given on the date delivered in person, by telex, cablegram, United States mail or deposited, postage prepaid, in the United States mail, addressed as follows:

To Licensee:

The American Telephone and Telegraph Company  
Attention: Chuck Meier  
(Address) 5925 West Las Positas Blvd., Room 1026  
(City, State, Zip Code) Pleasanton, California, 94566

To Licensor:

The Mountain States Telephone and Telegraph Company  
Attention: Rick A. Rosillo  
(Address) 5820 Stoneridge Mall Road, Suite 100  
(City, State, Zip Code) Pleasanton, California, 94566

or to such address as the parties hereto may from time to time specify in writing.

**Article 21**  
**MISCELLANEOUS**

- A) In any action brought pursuant to the terms of this Agreement, the prevailing party in such action shall be entitled to recover from the other party any and all reasonable attorneys' fees incurred by such party in connection with such action.
- B) This Agreement shall be construed in accordance with the laws of the State where the licensed conduit system is located.
- C) Any modification of any terms and conditions of this Agreement, shall be set forth in writing and signed by the parties hereto.

Article 22  
ENTIRE AGREEMENT

- A) This Agreement, together with all Appendices attached hereto, executed during the term of this Agreement, shall constitute the entire Agreement between the parties with respect to the subject matter hereof.
- B) This Agreement supersedes all previous agreements, whether written or oral, between Licensor and Licensee for attachment and maintenance of Licensee's communications facilities in conduit systems within the geographical area covered by this Agreement except as expressed herein. All currently effective licenses heretofore granted pursuant to such previous agreements shall be subject to the terms and conditions of this Agreement.
- C) Both parties hereto represent they have read this Agreement, understand it, agree to be bound by all terms and conditions stated herein and acknowledge a receipt of a signed, true and exact copy of this Agreement.

IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be executed by their duly authorized officers as of the day and year first written above.

Licensee:

The American Telephone and  
Telegraph Company

Signed: Chuck Meier

Name: Chuck Meier

Title: District Manager

Date Signed: 6/25/88 JUN 22 1988

Licensor:

The Mountain States Telephone  
and Telegraph Company

Signed: Henry L. Moschetti

Name: Henry L. Moschetti

Title: Executive Director  
Network Facilities

Date Signed: 5/18/88

APPROVED  
AS TO FORM

Att - 6/24/88  
Attorney

Concurred by:  
U S WEST Carrier Marketing

Signed: Rick A. Rosillo

Name: Rick A. Rosillo

Title: Regional Account Manager - West

Date Signed: 5/25/88

Appendix 1

ADMINISTRATIVE FORMS

THIS Appendix 1 is an integral part of the License Agreement No. I-001C dated May 28, 1988 and contains the administrative forms governing the use of Licensor's conduit system by Licensee's communications facilities.

INDEX OF ADMINISTRATIVE FORMS

Application for Conduit Occupancy Licenses	A-1
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