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IDAHO PUBLIC  
UTILITIES COMMISSION

March 27, 2007

**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 RESPONSE TO COMMISSIONS QUESTIONS IN ORDER NO. 30241** 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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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 RESPONSE TO COMMISSION'S QUESTIONS IN ORDER NO. 30247</b></p>
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**INTRODUCTION**

Qwest Corporation ("Qwest") files this Response pursuant to the Commission's February 16, 2007 Order directing AT&T and Qwest to file briefs addressing two questions concerning the applicable limitations period and the discovery date on which AT&T's claims began to run.

Despite their nominal state law labels, the gravamen of AT&T's claims is federal – federal because the Commission's authority to regulate interconnection relationships among carriers arises under federal law, and federal because the obligations supposedly begetting

AT&T's rights arise under federal law. Accordingly, the Commission should apply 47 U.S.C. § 415's two-year limitations to AT&T's claims and dismiss them; any other result would violate not only the structure of the Act but also the federalism concerns for state sovereignty embodied in the Tenth Amendment. AT&T's claims are barred because they accrued no later than mid-2002, as both the record and the decisions of other tribunals establish beyond any dispute. For these reasons, and those set forth in Qwest's prior filings, Qwest respectfully requests that Commission dismiss AT&T's Complaint.

### ARGUMENT

Courts and utility commissions across the Qwest region have ruled – most recently, the United States District Court for the District of Nebraska – that AT&T's substantively identical claims are federal in nature and subject to dismissal pursuant to section 415's two-year limitations period. *See, e.g.*, Memorandum Opinion, *AT&T Commc'ns of the Midwest v. Qwest Corp.*, Case No. 8:06CV625 (D. Neb. Feb. 27, 2007) ("Nebraska Dismissal"), attached as Ex. 1. Additionally, as the Idaho Supreme Court recognized in *McNeal v. Idaho Pub. Util. Comm'n*, 132 P.3d 442 (Idaho 2006), the Commission's authority to hear claims based on breaches of interconnection agreements arises not under state law, but federal. The Telecommunications Act (the "Federal Act") authorizes state commissions to hear telecommunications cases involving disputes arising under interconnection agreements pursuant to federal law and limits that authority to effectuate nationwide objectives. To permit varying periods of limitation from state to state based on state limitations periods would contravene Congress's intent and discriminate against carriers that happen to be sued in states with more generous statutes of limitation. *See A.J. Phillips Co., v. Grand Trunk W. Ry. Co.*, 236 U.S. 662, 667 (1915). For these reasons, and

as discussed below, the Commission's responsibilities under the Federal Act do not permit application of a state law limitations period to these claims. Instead, the Commission should recognize the quintessentially federal gravamen of AT&T's claims, apply section 415's two-year limitations period, and dismiss them.

***I. The Gravamen of AT&T's Breach of an Interconnection Agreement Is Indisputably Federal in Nature and Therefore Governed by Section 415***

**A. AT&T'S OWN RESPONSE MAKES CLEAR THAT THE GRAVAMEN OF ITS CLAIM IS FEDERAL IN NATURE.**

By AT&T's own reckoning, it is clear that the gravamen of its claims in this Commission is federal in nature. *Hayden v. Lake Fire Protection Dist. v. Alcorn*, 111 P.3d 73 (Idaho 2005). AT&T's Complaint relates to events that ended over four years ago. It involves matters and allegations that AT&T has actively pursued, in various courts and regulatory agencies, since early 2002. AT&T does not dispute that it is attempting to enforce Section 252(i) through its interconnection agreement. AT&T concedes that the interconnection agreement at issue arose as a result of a federal mandate imposed by the Federal Act. Nor can AT&T dispute that its rights to opt into the terms of Qwest's agreements with other carriers, whatever they may be, arise under federal law, as did any obligation Qwest had to file those agreements for approval by the Commission in the first place.

Courts and commissions across the region have agreed with these fundamental principles,<sup>1</sup> most recently (and significantly) the United States District Court for the District of

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<sup>1</sup> See Order Granting Motion to Dismiss, *AT&T Comm'ns of the Midwest, Inc. v. Qwest Corp.*, Docket No. FCU-061-51 (Iowa Utils. Bd. Dec. 4, 2006) [IUB Dismissal Order], *rehearing denied*, Docket No. FCU-061-51 (Iowa Utils. Bd. Jan. 12, 2007) [IUB Rehearing Order]; Order No. 06-230, *AT&T Comm'ns of the Pac. Nw., Inc., v. Qwest Corp.*, UM 1232 (Or. P.U.C. May 11, 2006) [OPUC Dismissal Order], *reconsideration denied*, Order No. 06-465 (Or. P.U.C. Aug.

Nebraska, which granted Qwest's motion to dismiss these same claims. After this Commission issued its February 16 order requesting further briefing, the United States District Court in Nebraska on February 27 rejected AT&T's argument that it could avoid application of the federal statute of limitations by pleading nominal state law claims: "The Court finds that AT&T's claims are barred by the two-year statute of limitations contained in 47 U.S.C. § 415 and will grant Qwest's motion to dismiss." Nebraska Dismissal, at 7. The court held that "AT&T may not avoid the two-year statute of limitations contained in § 415 simply by characterizing its claims as state law claims." *Id.* at 6. The Nebraska federal district court agreed with Qwest that "[n]otwithstanding AT&T's characterization of its claims. . . . [a]ny duty on the part of Qwest to file its interconnection agreements with the NPSC [Nebraska Public Service Commission] and to make the terms available to other CLECs arose under §§ 252(e) and (i)." *Id.* As such, the court concluded that "[t]he claims in this case necessarily require the Court to determine whether Qwest complied with the Telecommunications Act," and that "the ultimate issue in this case is an interpretation of federal law." *Id.* Thus, just as the Oregon Commission had decided before it, the Nebraska federal district court dismissed AT&T's complaint in its entirety based on the application of Section 415. There, as here, the state law labels did not matter: the actual substance of AT&T's claims there and here is federal and compels the application of the Federal Act's two-year limitations period.

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16, 2006) [OPUC Reconsideration Order]; Memorandum and Order Addressing Motion to Remand, *AT&T Commc'ns of the Mountain States, Inc. v. Qwest Corp.*, Case No. 2:06CV000783 DS, at 9-10 (D. Utah Feb. 13, 2007); Order Denying Motion to Remand, *AT&T Commc'ns. of the Mountain States, Inc. v. Qwest Corp.*, Case No. 06-CV-232-D (D. Wyo. Dec. 12, 2006) [Wyoming Remand Order].

AT&T presented the Nebraska federal district court with all of the same substantive arguments that it has made here, including AT&T's attempt to construe this case as one of mere contract interpretation and its misinterpretation of *Pacific Bell v. Pac-West Telecomm, Inc.*, 325 F.3d 1114, 1128 (9th Cir. 2003), and other similar cases. *See* AT&T Response, at 4-5. But in granting Qwest's motion, the Nebraska federal district court looked to federal first, appreciating that AT&T's claims did not require it to interpret an interconnection agreement to dispose of the case. The essential right that AT&T claimed had been breached was the right to "opt in" under other interconnection agreements as provided by federal law. As the Nebraska federal district court implicitly recognized, trying to frame that claim as a contractual obligation or a common law claim is immaterial; where the statute creating that duty is federal, the claims are federal and the federal limitations period governs.

This position has been recognized in another similar case by the United States District Court for the District of Wyoming. The Wyoming federal district court, ruling on AT&T's motion for remand to the state court, rejected AT&T's argument that federal jurisdiction does not apply because AT&T had pled its claims only under state law. *See* Wyoming Remand Order at 9. The Wyoming federal district court agreed with Qwest that federal question jurisdiction exists because "[AT&T]'s Complaint clearly asserts violations of [Qwest]'s obligations under the Telecommunications Act." *See id.* at 8. The Wyoming federal district court held that "[a]lthough Plaintiff characterizes its claims as state law claims and insists that it is merely seeking to enforce the terms of its agreement with Qwest," the underlying predicate acts "all arise out of purported violations of Qwest's obligations under the Act." *Id.* at 8-9.

The Iowa Utilities Board (“IUB”) also recently examined similar claims by AT&T, cloaked in state law, against the backdrop of the 2002 proceedings, and dismissed the complaint. In dismissing AT&T’s claim there, the IUB reached two important conclusions: (1) that “this action clearly arise[s] out of the same transaction that was at issue in Docket No. FCU-02-2 [the 2002 IUB enforcement docket opened as a result of AT&T’s letter to the IUB]: Qwest’s failure to file with the Board certain interconnection agreements as required by law,” and (2) that *but for “that transaction, Complainants have no claim for breach of contract, no claim for violation of Board rules, and no claim for common law fraud.”* IUB Dismissal Order at 18 (emphasis added). The Iowa Board subsequently denied AT&T’s Petition for Rehearing on January 12, 2007, dismissing AT&T’s claims – including a similarly-styled breach of contract claim under Iowa law. *See* IUB Rehearing Order.

In the course of reaffirming its prior Dismissal Order, the Iowa Board specifically characterized AT&T’s claims as having “state law elements but . . . ultimately [being] based on federal law (Qwest’s obligation to file interconnection agreements with the Board pursuant to 47 U.S.C. § 252(e)).” *See id.* at 4. The reasoning of these decisions supports a finding that the gravamen of AT&T’s complaint is federal in nature.

The federal nature of AT&T’s complaint is made even more abundantly clear considering the interconnection provisions on which AT&T relies; they all are round-about ways of trying to enforce federal obligations and to circumvent the limitations period found under the Federal Act, rather than central, substantive provisions of the agreement.<sup>2</sup> AT&T’s reliance on section B of

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<sup>2</sup> Of course, AT&T’s reliance on Section 2.1 does not state a breach of contract claim as a matter of law. Section 2.1 requires Qwest to make available those terms and conditions “*approved* by the Commission under Section 252 of the Act.” Section 2.1 (emphasis added).

the “Scope of Agreement,” which provides that the parties “shall act in good faith and consistently with the intent of the Act” in carrying out their obligations under the Agreement, cannot end-run the investigations that AT&T initiated years ago and the requirements imposed by federal law. The only basis suggested by AT&T for Qwest’s alleged lack of good faith is its failure to file the Eschelon and McLeod agreements. *See* AT&T Response, at 11-12. But AT&T admits that there was uncertainty regarding the provisions identified in Section 2.1 and that “the rule was being challenged in court at the time.” *Id.* at 9. And given the uncertainty with the law surrounding the filing requirement, Qwest sought formal guidance from the FCC regarding which agreements needed to be filed. *See* Memorandum Opinion and Order, *In re 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 (FCC 2002); *see also Gen. Elec. Co. v. Porter*, 208 F.2d 805, 816-17 (9th Cir. 1954) (finding “[t]he requisite good faith was met when there were substantial unsettled issues of law”); *Brinderson-Newberg v. Pacific Erectors*, 971 F.2d 272, 283 (9th Cir. 1992) (holding that where genuine issue exists regarding contract terms and liability, insurer’s refusal to pay claim did not constitute breach of implied covenant of good faith and fair dealing). However AT&T couches them, the gravamen of AT&T’s complaint arises entirely from rights and obligations created and defined by federal law.

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Yet, AT&T has averred that the agreements upon which it seeks recovery were “secret” and kept hidden from AT&T by Qwest’s failure to file them and have them approved in accordance with Section 252. Thus, by AT&T’s own reckoning, there can be no breach of Section 2.1, as a matter of law, when the very agreements were never approved by the Commission under Section 252. Qwest respectfully requests the Commission dismiss any claim based on this provision if the Commission determines to proceed under a state law statute of limitations.

**B. THE NATURE OF THE CLAIMS AND THE NATURE OF THE COMMISSION'S JURISDICTION REQUIRES APPLICATION OF SECTION 415**

The cases cited for the proposition that “state law governs the question of interpretation and enforcement of interconnection agreements,” *see* Order No. 30247 at 4 and AT&T Response, at 4-5,<sup>3</sup> leave open the question of the applicable limitations period. These cases recognized a specific role for state law in borrowing principles of contract interpretation, but also the primacy of federal law; indeed, the Ninth Circuit specifically admonished state commissions to be aware of their “weighty responsibilities of contract interpretation under § 252.” *See e.g., Pac. Bell*, 325 F.3d at 1128 (9th Cir. 2003).<sup>4</sup> In the first instance, a state commission “has an obligation to interpret the Agreement within the bounds of existing federal law.” *See, e.g., Southwestern Bell Tel. Co. v. Brooks Fiber Commc'ns of Okla., Inc.*, 235 F.3d 493, 499 (10th Cir. 2000).

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<sup>3</sup> AT&T cites and discusses *Illinois Bell Tel. Co. v. Worldcom Techs. Inc.*, 179 F.3d 566, 573-74 (7th Cir. 1999), for the proposition that the interpretation and enforcement of an interconnection agreement “present[s] *only* a question of state law” to which only a state forum may supply the remedy. *See* AT&T Response, at 4. It does so notwithstanding that it is bad law. The Supreme Court has rejected such a narrow reading of a federal court’s jurisdiction under the Federal Act and under federal law to review actions involving enforcement of interconnection agreements. Although the Supreme Court withdrew certiorari as improvidently granted, it heard the “same questions, arising in the same factual context” in *Verizon Maryland, Inc. v. Public Service Commission of Maryland*, 535 U.S. 635, 643-44 (2002). *See Mathias v. Worldcom Techs.*, 535 U.S. 682, 683-84 (2002) (withdrawing certiorari). Contrary to AT&T’s arguments, the Supreme Court emphatically came to the opposite conclusion. While the Supreme Court found that 47 U.S.C. § 252(e)(6) did not strip federal courts of their general federal jurisdiction under 28 U.S.C. § 1331, the Supreme Court stated that the Federal Act expressly precluded state law review. The Supreme Court noted that “where otherwise applicable [state] jurisdiction was meant to be excluded, it was excluded expressly.” *Verizon Md., Inc.*, 535 U.S. at 644.

<sup>4</sup> Notably, *Pacific Bell* never held that federal law does not apply. The Ninth Circuit merely pointed out that at least one court had noted that courts borrow state law contract principles when interpreting and enforcing interconnection agreements. *Pac. Bell*, 325 F.3d at 1128.

In this regard, AT&T misapprehends the interplay the Federal Act intends for federal and state law in this context when it argues that “the agreement alone – not the 1996 Act – [] governs the parties’ relationship” and that “parties to an interconnection agreement have no independent rights under the 1996 Act vis-a-vis each other.” See AT&T Response, at 6.<sup>5</sup> First, AT&T’s argument does not square with the terms of the Federal Act. The Federal Act permits some flexible negotiation, but is limited in that parties may negotiate only “without regard to the standards set forth in subsections (b) and (c) of section 251.” Compare 47 U.S.C. 252(a)(1) with AT&T Response, at 6 (“Among other things, parties are free to negotiate terms of interconnection agreements ‘without regard to’ *the rest of the 1996 Act*”) (citing 47 U.S.C. 252(a)(1)) (emphasis added); see also AT&T Response, at 8 (while citing to Section 251, claiming that “[t]he 1996 Act did not require these terms [at issue in the complaint] to be included, for it allows interconnection agreement to be reach and approved ‘without regard to’ *other provisions of the Act*”) (emphasis added). Because the other sections found in Title 47 remain in force, approval of an interconnection agreement does not and cannot remove the parties from further regulation under that Chapter. For example, even an interconnection agreement that is voluntarily negotiated between an ILEC and a CLEC must still be submitted to the relevant state commission(s) for approval, and the relevant state commission(s) can reject the

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<sup>5</sup> AT&T’s argument is curious in the first place given that the Agreement recites that it “is a combination of agreed terms and terms *imposed by arbitration* under Section 252 of the Communications Act of 1934, as modified by the Telecommunications Act of 1996, the rules and regulations of the Federal Communications Commission,, and the orders, rules, and regulations of the Idaho Public Utilities Commission; and as such *does not necessarily represent the position of either Party on any given issue.*” AT&T Amended Complaint, Ex. 1 (Recitals) (emphasis added). Parties to contracts formed under state law cannot compel arbitration to force a meeting of the minds that otherwise is not present, and the agreement itself dispels any claim that this interconnection agreement was “freely negotiated.”

agreement based on factors set out in 47 U.S.C. § 252(e) – a feature that distinguishes interconnection agreements from purely private contracts. *See* 47 U.S.C. § 252(e). Thus, the courts counsel that a state agency may not appropriately look to an interconnection agreement to attempt to ascertain whether state or federal law should apply to a claim without first ascertaining applicable federal law. *See, e.g., Pac. Bell*, 325 F.3d at 1128; *Brooks Fiber Commc'ns of Okla., Inc.*, 235 F.3d at 499. Otherwise, under AT&T's specious theory, parties to an interconnection agreement could completely write out a state commission's jurisdiction pursuant to Section 252 to interpret and enforce interconnection agreements by "negotiating" such a provision "without regard to" the Federal Act.

AT&T's reliance on *Law Offices of Curtis V. Trinko LLP v. Bell Atlantic Corp.*, 305 F.3d 89, 104 (2d Cir. 2002), to claim that "a carrier with an approved interconnection agreement may not sue for a stand-alone violation of the 1996 Act," does not support its theory and is undermined by AT&T's own conduct.<sup>6</sup> *See* AT&T Response, at 7. *Trinko* involved alleged violations of Sections 251(b) and (c), even though the parties had negotiated the terms of their interconnection relationship in their agreement, and did not address the question whether a claim under an interconnection agreement was federal in nature. Here, AT&T's claims flow not from Qwest's compliance with negotiated terms, but from AT&T's rights (or not) to opt into

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<sup>6</sup> AT&T has not hesitated trying to pursue "stand-alone violation[s] of the 1996 Act," notwithstanding the existence of an interconnection agreement, in other venues. For example, AT&T's complaints in Oregon included alleged violations of federal law, specifically Sections 251(e) and 252(i), as well as breach of contract claims predicated on the same violations. *See* Exh. 2. Given AT&T's insistence that it may only seek recovery based on the terms of its interconnection agreement, it is puzzling that AT&T has also asserted these federal law violations and is continuing to pursue them. That said, the Second Circuit was careful to note in *Trinko* the unique circumstances and "emphasize[d] that our analysis is limited to section 251 of the Telecommunications Act and does not address other provisions of that Act." *Id.*, at n. 10.

agreements with other carriers that Qwest failed to file and make available under Section 252(i). Parties are not permitted to negotiate “without regard to” these provisions. Under Section 252(i), CLECs may opt into approved interconnection agreements only if they meet certain conditions. These rights are wholly created by the Federal Act and are not available under state contract law principles.

In sum, as the Nebraska federal court held in dismissing these same claims, AT&T’s claims arise from duties created by the Federal Act and the FCC rules. Moreover, those provisions speak directly to the rights and obligations of the parties here, making AT&T’s claims subject to 47 U.S.C. § 415. For these reasons, even if the Commission is directed to borrow state law principles to interpret provisions of the agreement, it must apply Section 415 to AT&T’s claim in the first instance pursuant to its exercise of federal authority.

**C. APPLICATION OF STATE LAW – SPECIFICALLY A STATE LIMITATIONS PERIOD – WOULD VIOLATE THE TENTH AMENDMENT**

The primacy of federal law, and specifically Section 415, is made even more compelling because of the potential Tenth Amendment issues that arise when state commissions hear state law breach of contract claims using a state limitations period under the guise of federal authority.

State commissions exercise the authority granted by their respective legislatures. Many state commissions, including this Commission, lack the authority under state law to hear breach of contract claims.<sup>7</sup> Federal courts recognize, however, that state commissions have the

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<sup>7</sup> *McNeal*, 132 P.3d 442 (stating that generally, the construction and enforcement of contract rights lies with the courts and not the Commission); *see also Ethyl Corp. v. Gulf States Utils., Inc.*, 836 So.2d 172, 176 (La.Ct.App.2002) (stating that Louisiana PUC has no jurisdiction under

authority to interpret and enforce interconnection agreements under federal law and direct state commissions to borrow state law contract interpretive principles in carrying out those federal responsibilities. To that end, the Federal Act contemplates a nationwide scheme where state commissions are the first to hear disputes involving interconnection agreements with appeal available to federal district court. “While the state utility commissions were given a role in carrying out the Act, Congress ‘unquestionably’ took ‘regulation of local telecommunications competition away from the State’ on all ‘matters addressed by the 1996 Act;’ it required that the participation of the state commissions in the new federal regime be guided by federal-agency regulations.” *Indiana Bell Tel. Co. v. Indiana Util. Reg. Comm’n*, 359 F.3d 493, 494 (7th Cir.

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state law over tort actions or contract disputes involving a utility); *Wilshire Constr. Co. v. Union Elec. Co.*, 463 S.W.2d 903, 905 (Mo.1971) (While the “Commission does have exclusive jurisdiction of all utility rates,” “when a controversy arises over the construction of a contract or of a rate schedule upon which a contract is based, and a claim of an overcharge is made, only the courts can require an accounting or render a judgment for the overcharge.”); *accord State ex rel. GS Techs. Operating Co. v. Pub. Serv. Comm’n*, 116 S.W.3d 680, 696 (Mo.Ct.App.2003) (determining that controversies over contracts are enforceable by courts, not the commission, because courts can enforce contract and enter judgment); *Southwestern Pub. Serv. Co. v. Artesia Alfalfa Growers’ Ass’n*, 353 P.2d 62, 68-69 (N.M. 1960) (noting that New Mexico law allows PUC to hear question of whether a public utility could enter into a contract but prohibits a PUC constructing or interpreting the contract or determining rights and liabilities arising out of the contract); *accord Summit Props., Inc. v. Pub. Serv. Co. of N.M.*, 118 P.3d 716, 722 (N.M. App. Ct. 2005) (same); *T.W. Phillips Gas and Oil Co. v. Peoples Natural Gas Co.*, 492 A.2d 776, 779 (Pa. Cmwlth Ct. 1985) (stating that PUC does not have jurisdiction over private contractual disputes or the authority to award damages in negligence or contract actions); *Hi-Country Estates Homeowners Ass’n v. Bagley & Co.*, 901 P.2d 1017, 1023 (Utah 1995) (citing *Kearns-Tribune Corp. v. Public Serv. Comm’n*, 682 P.2d 858, 860 (Utah 1984)) (“Although the PSC has power to construe contracts affecting matters within its jurisdiction such as rate-making, ordinary contracts unrelated to such matters are outside of the purview of PSC jurisdiction.”); *Green Mountain Power Corp. v. Sprint Commn’cns*, 779 A.2d 687, 690 (Vt. 2001) (stating that “[o]rdinarily, public service boards and commissions do not have the authority to rule on claims for damages alleged to have been caused by negligence or breach of contractual obligations”); *Benwood-McMechen Water Co. v. City of Wheeling*, 4 S.E.2d 300, 303 (W. Va. 1939) (finding that the power to pass on the validity of a private contract or enforce its provisions is entrusted exclusively to the courts).

2004) (citing *AT & T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 378 n. 6 (1999)); *see also Wisconsin Bell, Inc. v. Bie*, 340 F.3d 441, 444 (7th Cir. 2003) (noting that the Federal Act “explicitly excluded the state courts from getting involved”); *Verizon North Inc. v. Strand*, 367 F.3d 577, 584 (6th Cir. 2004) (discussing the Federal Act’s structure of review and approval by state commissions with FCC oversight and *federal* review). Yet, the Commission’s Order No. 30247, and AT&T’s reading of those cases and the Federal Act, takes that analysis a step further and implicitly assumes that the Federal Act has authorized state commissions, notwithstanding sovereign state legislative decisions to the contrary, to hear state law breach of contract claims.

Congress cannot bestow on a state commission authority *under state law* that it does not already have under state law – that would put Congress in a position of attempting to regulate an essential state function – the states’ prerogative to delegate authority to state agencies – in violation of the Tenth Amendment.<sup>8</sup> *Coyle v. Smith*, 221 U.S. 559, 565 (1911) (finding that Congress exceeded its authority in legislating the location of Oklahoma’s state because the power to locate its own seat of government is a “peculiarly state power[.]”). But there is no dispute that Congress may grant authority to hear claims that derive from federal law. *MCI*

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<sup>8</sup> While Courts have upheld the Federal Act against challenges on sovereign immunity grounds because states voluntarily authorized state commissions to “regulat[e] on behalf of Congress” and waived their sovereign immunity in return, *MCI Telecomm’n Corp. v. Ill. Bell Tel. Co.*, 222 F.3d 323, 343 (7th Cir. 2000) (emphasis added), the voluntariness of that waiver is only limited to suit in court, however. No court has gone so far as to find that a state’s authorization allowing state commissions to exercise federal authority pursuant to the Federal Act also constitutes authorization for Congress to take over a state’s legislative functions with respect to state agencies and enlarge their authority under state law. *New York v. United States*, 505 U.S. 144, 112 (1992) (holding that state legislatures are *not* subject to federal direction). AT&T’s position asks this Court to simply gloss over these tensions and disregard an appropriate construction of the Federal Act, one that is consistent with the findings in Nebraska, Iowa, Utah, and Wyoming, in favor of a reading that raises grave constitutional questions.

*Telecommn'cns Corp*, 222 F.3d at 343 (noting that “state commissions have conducted arbitrations for interconnection agreements, have approved and enforced those agreements, and have acted on an SGAT under a federal grant of power. Their authority to act was derived from provisions of the Act and not from their own sovereign authority”).

Although state law may provide the relevant principles of contract interpretation for the Commission to apply in interpreting interconnection agreements, it does not follow that the Commission may disregard Section 415 of the Act and attempt to proceed under a state statute of limitations for contract actions in exercising its federal authority.<sup>9</sup> In the first instance, the Commission’s power derives from the Act, not state law and not all Commissions have the authority under their respective authorizing statutes to hear breach of contract claims. These

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<sup>9</sup> See e.g., *Masoner v. First Community Ins. Co.*, 81 F.Supp.2d 1052, 1055-56 (D. Idaho 2000) (holding that federal law applies to disputes arising under “standard” insurance policy issued pursuant to National Insurance Act of 1968 and noting any differences between the policy and Act to be “of little consequence” because Congress intended to establish policies national in scope) (citing *Spence v. Omaha Indemnity Insurance Company*, 996 F.2d 793, 795 (5th Cir.1993) (holding that breach of contract claim brought by insureds against WYO company was governed by procedural requirements of § 4072) and *Froehlich v. Catawba Insurance Company*, 10 F.Supp.2d 597, (W.D.Va.1998) (holding that § 4072 vests federal courts with exclusive original jurisdiction over claims arising out of policy issued by WYO company pursuant to the National Flood Insurance Act)).

In this regard, Section 415 is more closely analogous to the statutory scheme embodied in the Federal Tort Claims Act (“FTCA”). While the FTCA looks to state law for the applicable substantive tort law, “Congress has specifically provided a federal limitations period in 28 U.S.C. §§ 2675(a) and 2401(b), and the interpretation of that limitation is a matter of federal law.” *Bailey v. United States*, 642 F.2d 344, n.1 (9th Cir. 1981) (adding that “Appellants are mistaken in arguing that state law governs the jurisdictional question in this case”). Similarly here, Congress enacted a clear limitations period in Section 415 of the Act, and its two-year limitation period controls the Commission’s jurisdiction and the timing of Complainants’ action. Complainants erroneously conflate application of state law contract principles with application of jurisdictional limits, yet provide no legal authority. Given the similarities, it is appropriate for the Commission to follow the Ninth Circuit in *Bailey* and find that AT&T is “mistaken in arguing that state law governs the jurisdictional question in this case.” *Id.*

competing interests can be reconciled if, as the Nebraska federal court held, the Commission holds that AT&T's claim arises under federal law, subject to the limitations period defined in Section 415. *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Building & Constr. Trades Council*, 485 U.S. 568, 575 (1988) ("where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress.").

Second, Congress enacted a jurisdictional limit on the Commission's authority, and this limitation period controls the Commission's jurisdiction and the timing of AT&T's action. *Sw. Bell Tel. Co. v. Connect Commc'ns Corp.*, 225 F.3d 942, 947 (8th Cir. 2000) ("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"). A state commission exercising federal power under the guise of state law would conflict with the federal control that Congress envisioned under the Federal Act<sup>10</sup> while also allowing state commissions to usurp state power under the guise of exercising federal law. In contrast, a state commission can readily borrow state law contract principles consistently with the Rules Enabling Act<sup>11</sup> and without running afoul of the Tenth Amendment. Thus, where federal law grants commissions authority over interconnection

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<sup>10</sup> See 47 U.S.C. §§ 252(e)(5) & (e)(6) (respectively providing for FCC preemption of state commission inaction and federal court review of state commission determinations involving interconnection agreements).

<sup>11</sup> The Rules Enabling Act states: "The laws of the several states, *except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide*, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply. The Rules of Decision Act, 28 U.S.C. § 1652, enacted as part of the Judiciary Act of 1789 (emphasis added).

disputes, it also contemplates that those disputes are federal in nature subject to the federal limitations period.

**D. SECTION 415 APPLIES TO AT&T'S CLAIMS**

For all the reasons previously raised by Qwest and those discussed above, AT&T's claim is governed by Section 415. There is no legal basis to apply any other limitation period, including the fall-back provision provided by 28 U.S.C. § 1658 or any proposed state-law limitations period. Indeed, the FCC has rejected AT&T's argument that the general four-year federal statute of limitations in 28 U.S.C. § 1658 or any state limitation period should apply instead of the specific two-year period found under Section 415 of the Federal Act. *See* Memorandum and Opinion Order, *In re Am. Cellular Corp.*, 2007 WL 268574, at ¶ 13 (F.C.C. Jan. 31, 2007) (finding Section 1658(a) to be a "fallback" provision and "[b]ecause claims (like Dobson's) for recovery of damages from carriers are specifically governed by the limitations period set forth in section 415(b) of the Act, the default statute of limitations set forth in 28 U.S.C. § 1658(a), and cases applying it, are inapposite"). And perhaps presaging this decision, the Ninth Circuit has applied Section 415 to claims arising under the Federal Act. *See Davel Comm'n's v. Qwest Corp.*, 451 F.3d 1037 (9th Cir. 2005) (upholding dismissal based on the two-year statute of limitations of 47 U.S.C. § 415(b)). Thus, AT&T's argument concerning the applicability of Section 1658 simply highlights the numerous deficiencies in its arguments and its reliance on the WUTC decision.

The FCC rejected the very same cases that AT&T has proffered here and that the WUTC accepted. *Compare* AT&T Response at nn. 4-5 with *In re Am. Cellular Corp.*, 2007 WL 268574, at n. 51 (citing Reply Supplement at 7-8 (citing *E.spire Communications, Inc. v. Baca*, 269 F.

Supp. 2d 1310 (D.N.M. 2003); *Verizon Maryland, Inc. v. RCN Telecom Services, Inc.*, 232 F. Supp. 2d 539 (N.D. Md. 2002); *Bell-Atlantic-Pennsylvania v. Pennsylvania Public Utilities Commission*, 107 F. Supp. 2d 653 (E.D. Pa. 2000)). The FCC found these cases distinguishable because they did not “involve[] claims brought against carriers for the recovery of damages,” *In re Am. Cellular Corp.*, 2007 WL 268574, at n. 53, for which the Federal Act provided Section 415’s two-year limitations period, but dealt instead with appeals seeking injunctive relief against state commission orders under 47 U.S.C. § 252(e)(6). To reach its conclusion that Section 1658 trumped Section 415 – even though none of the cases addressed Section 415 – the Washington Commission stretched to find that Congress repealed section 415 by implication and ignored well-accepted principles of statutory construction and interpretation, without addressing any of Qwest’s arguments in this regard.

The FCC thus disposed of the same facial argument that AT&T attempts to make here and clearly answers the Commission’s question concerning the applicable limitations period: “We reject Dobson’s suggestion that state statutes of limitation apply to Dobson’s Complaint, because Dobson’s Complaint does not (*and could not here*) assert state law claims.” *Id.* at n. 54 (emphasis added). In doing so, the FCC rejected “a variety of lengthy state limitations periods” and refused “to regard Counts 1 and 2 as arising under state contract law.” *Id.* Not only did the FCC reject any other applicable limitations period, it also refused to allow the petitioner to attempt to repackage clearly federal claims under state law. In arriving at its decision then, the WUTC again disregarded Ninth Circuit precedent and its “weighty responsibilities” under the Federal Act. Thus, there can be little doubt that the Commission is faced with only one properly applicable limitations period – Section 415 of the Federal Act.

***II. AT&T Had Access to the Agreements as early as March 13, 2002 and Therefore Knew or Should Have Known of the Basis for Any Causes of Action.***

Any potential argument concerning AT&T's awareness of the circumstances providing the basis for its claims has been put to rest, not only by the facts, but also by the decisions of at least three state commissions that have refused to accept AT&T's revisionist history. AT&T was aware of its potential claims as early as February 2002, and by no later than mid-2002. Under Section 415's two-year limitations period (or even the four year limitations period), AT&T's claims are barred.

**A. AT&T'S ACCRUAL DATE CONFLICTS WITH THE FACTS**

AT&T does not dispute that it had knowledge of the Qwest interconnection agreements at issue in this case more than four years before it filed this complaint. In its response, AT&T does not deny that it was aware of and actively involved in the Minnesota complaint proceedings against Qwest for unfiled interconnection agreements with Eschelon and McLeodUSA initiated in February 2002. AT&T claims instead that "many details of the oral agreement were kept confidential in the Minnesota proceeding, subject to a confidentiality agreement, and thus were not known to the AT&T entity in Idaho and could not have been used for a case in Idaho." AT&T Resp. at 14-15. AT&T asks the Commission to believe that AT&T could not have any knowledge until September 20, 2002, "when the Administrative Law Judge in the Minnesota case rejected Qwest's denials and found that the oral agreement with McLeod did in fact exist, that AT&T could have proceeded with claims regarding that contract in other states." Id. at 15.

Of course, AT&T concedes that it knew of the agreements no later than June 2002.<sup>12</sup> But in any case, the paper trail of AT&T's knowledge and usage of this "agreement" dates back well before September:

- On June 12, 2002, AT&T (and others) were served with the public versions of the affidavits of W. Clay Deanhardt, Blake Fisher and Lori Deutmeyer that were filed in the Minnesota proceeding to determine whether Qwest's application for long distance authority was in the public interest. These affidavits served as the key "evidence" of the alleged Qwest/McLeod oral agreement in the Minnesota cases and elsewhere.<sup>13</sup> As the cover e-mail indicates, counsel for AT&T was served along with the other parties.<sup>14</sup>
- On June 14, 2002, the Minnesota Department of Commerce served its Second Amended Complaint in the Minnesota unfiled agreements proceeding.<sup>15</sup> That complaint specifically alleged the existence of the Qwest/McLeod oral discount agreement.<sup>16</sup> As the cover e-mail indicates, counsel for AT&T was served along with the other parties.<sup>17</sup>
- On July 3, 2002, AT&T filed comments with the Federal Communications Commission in opposition to Qwest's application for long distance authority in

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<sup>12</sup> See AT&T Response, at 14. In addition to admitting that AT&T was aware of the proceedings and the existence of the agreement, there is no merit to any purported attempts by AT&T to distance itself from its "affiliates." AT&T's representatives in this action *were themselves also on the service lists in other earlier state proceedings involving Qwest*. For example, Mary B. Tribby of AT&T Communications of the Mountain States is listed as a party representative before the FCC in opposition to Qwest's application for long distance authority in several states, including Idaho. See Exh. 3.

<sup>13</sup> Exh. 4.

<sup>14</sup> See *id.* (noting service to AT&T counsel [lsfriesen@att.com](mailto:lsfriesen@att.com), [shoffstetter@att.com](mailto:shoffstetter@att.com), [weigler@att.com](mailto:weigler@att.com), and [jbrowne@lga.att.com](mailto:jbrowne@lga.att.com)).

<sup>15</sup> A copy of this complaint is attached as Exh. 5 to this Response.

<sup>16</sup> *Id.* at ¶¶ 239-247.

<sup>17</sup> See *id.* (noting service to AT&T counsel [gwitt@att.com](mailto:gwitt@att.com) and Janet Browne).

several states.<sup>18</sup> These comments cite to and attach the Second Amended Complaint from the Minnesota unfiled agreements proceeding.<sup>19</sup>

AT&T's knowledge and affirmative use of these allegations during the summer of 2002 renders disingenuous, if not actively misleading, any suggestion that AT&T sat in the dark until later that year, when the Minnesota ALJ enlightened it.

AT&T's knowledge of these allegations in 2002 began the limitations period and required AT&T to raise its allegations then. Once AT&T had notice, "it [bore] the responsibility of making diligent inquiries to uncover the remaining facts needed to support the claim." *Spring Commc'ns Co. v. FCC*, 76 F.3d 1221, 1230 (D.C. Cir. 1996); *Davel Commc'ns v. Qwest Corp.*, 460 F.3d 1075 (9th Cir. 2006) (finding that Sprint was on inquiry notice, triggering the running of the statute of limitations under Section 415, when "it had knowledge suggesting the rates might be improper"). Knowledge is knowledge, and for these purposes neither requires nor awaits actual adjudication. *See Commc'ns Vending Corp v. FCC*, 365 F.3d 1064, 1073-74 (D.C. Cir. 2004) (rejecting theory that cause of action did not accrue until an agency ruled on the lawfulness of an issue or uncertain law became settled).

**B. AT&T'S PROPOSED ACCRUAL DATES HAVE BEEN REJECTED BY THREE STATE COMMISSIONS**

In addition to lacking a factual or legal basis for its proposed accrual date, AT&T's arguments have been denied by the Oregon, Iowa, and Washington Commissions. Thus, every state commission to address the issue has found that AT&T's claims accrued no later than July

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<sup>18</sup> Exh. 3.

<sup>19</sup> *See id.* at 18 n.15.

2002. Given that AT&T filed its complaint in August 2006, the two-year limitations period (and even the four-year limitations period) clearly bars AT&T's claims here.

First, the Oregon Commission dismissed AT&T's complaint on May 11, 2006, noting that AT&T's affiliated company had been a party to the commission docket in Minnesota, and "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." OPUC Dismissal Order, at 7. The Commission determined that AT&T's active participation and encouragement evinced AT&T's awareness of the "secret" agreements and the alleged harm that provided the basis of its present claims. 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 their claims for seeking damages based on any violations arising from those interconnection agreements had long passed. *Id.* AT&T unsuccessfully sought reconsideration of that ruling, and on August 16, 2006, the Oregon Commission reaffirmed its decision that AT&T's complaint was time-barred. OPUC Reconsideration Order, at 3.

Second, the Iowa Utilities Board also examined similar claims by AT&T, cloaked in state law, against the backdrop of a 2002 proceeding and dismissed the complaint. In February 2002, AT&T filed a letter with the Iowa Board complaining that Qwest had not filed certain interconnection agreements with AT&T's competitors and alleging a violation of Section 252 of the Federal Act. In response, the Board conducted an investigation, agreed with AT&T that violations existed, and invited further proceedings. AT&T failed to pursue that invitation. Attempting to file more than four years later, the Board found – correctly – that AT&T's new Board-level complaint should be dismissed. In dismissing, the Iowa Board reached two

important conclusions: (1) that “this action clearly arise[s] out of the same transaction that was at issue in Docket No. FCU-02-2: Qwest’s failure to file with the Board certain interconnection agreements as required by law,” and (2) that *but for “that transaction, Complainants have no claim for breach of contract, no claim for violation of Board rules, and no claim for common law fraud.”* See Iowa Dismissal Order, at 18. Docket No. FCU-02-02 was the earlier 2002 proceeding that the Iowa Board held in response to AT&T’s request. The Iowa Board subsequently denied AT&T’s Petition for Rehearing on January 12, 2007, dismissing AT&T’s claims – including a similar claim under Iowa law to the claim AT&T seeks to pursue in this Commission. See IUB Rehearing Order. The Iowa Board decision reinforces the conclusion that AT&T was active in the proceedings as early as February 2002 and therefore is now barred from pursuing its claims.

Finally, in addition to the Oregon Commission and Iowa Board decisions, the Washington Utilities and Transportation Commission (in which AT&T has placed so much stock ) rejected AT&T’s argument that it lacked knowledge of these claims in 2002. To the contrary, the WUTC affirmed an interlocutory order finding that AT&T’s claims began to run on July 15, 2002. By that date, the Commission determined that “AT&T knew that the Minnesota agreements existed (including Minnesota counterparts of the relevant Washington agreements) and knew that there were similar agreements in Washington (as they had been filed in the 271 docket).” WUTC Order, at ¶ 38. Thus, with regard to the discovery date, every court or agency has now unanimously rejected AT&T’s argument as a matter of law, and AT&T has provided no reason to reconsider these determinations anew in Idaho.

## CONCLUSION

For the foregoing reasons, the Commission should grant Qwest's motion to dismiss and dismiss AT&T's claims with prejudice based on the application of Section 415.

DATED this 27th day of March, 2007.

Respectfully submitted,

  
Mary S. Hobson (ISB. No. 2142)  
999 Main- Suite 1103  
Boise, ID 83702

Douglas R. M. Nazarian  
Hogan & Hartson  
111 South Calvert Street  
Baltimore, MD 21202

Attorneys for Qwest Corporation

**CERTIFICATE OF SERVICE**

I do hereby certify that a true and correct copy of the foregoing **QWEST CORPORATION'S RESPONSE TO COMMISSION'S QUESTIONS IN ORDER NO. 30247** was served on the 27<sup>th</sup> day of March, 2007 on the following individuals:

Jean D. Jewell	<u>  X  </u>	Hand Delivery
Idaho Public Utilities Commission	<u>      </u>	U. S. Mail
472 West Washington Street	<u>      </u>	Overnight Delivery
P.O. Box 83720	<u>      </u>	Facsimile
Boise, ID 83702	<u>      </u>	Email
Telephone (208) 334-0300		
Facsimile: (208) 334-3762		
<u>jjewell@puc.state.id.us</u>		

Molly O'Leary	<u>      </u>	Hand Delivery
Richardson & O'Leary	<u>  X  </u>	U. S. Mail
515 North 27 <sup>th</sup> Street	<u>      </u>	Overnight Delivery
P.O. Box 7218	<u>      </u>	Facsimile
Boise, Idaho 83707	<u>  X  </u>	Email
<u>molly@richardsonandoleary.com</u>		

Theodore A. Livingston	<u>      </u>	Hand Delivery
Dennis G. Friedman	<u>  X  </u>	U. S. Mail
Mayer, Brown, Rowe & Maw LLP	<u>      </u>	Overnight Delivery
71 South Wacker Drive	<u>      </u>	Facsimile
Chicago, IL 60606-4637	<u>  X  </u>	Email
<u>dfriedman@mayerbrown.com</u>		

Dan Foley	<u>      </u>	Hand Delivery
General Attorney & Assistant General Counsel	<u>  X  </u>	U. S. Mail
AT&T West	<u>      </u>	Overnight Delivery
P.O. Box 11010	<u>      </u>	Facsimile
Reno, Nevada	<u>  X  </u>	Email
<u>df6929@att.com</u>		

  
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Mary S. Hobson  
Attorney for Qwest Corporation

# EXHIBIT 1

IN THE UNITED STATES DISTRICT COURT FOR THE  
DISTRICT OF NEBRASKA

AT&T COMMUNICATIONS OF THE	)	
MIDWEST and TCG OMAHA, INC.,	)	
	)	
Plaintiffs,	)	8:06CV625
	)	
v.	)	
	)	
QWEST CORPORATION,	)	MEMORANDUM OPINION
	)	
Defendant.	)	
_____	)	

This matter is before the Court on Qwest Corporation's motion to dismiss (Filing No. 12). Having reviewed the motion, the parties' submissions,<sup>1</sup> and the applicable law, the Court finds that defendant's motion should be granted.

**STANDARD OF REVIEW**

In considering a motion to dismiss a complaint under Rule 12(b)(6), the Court must assume all the facts alleged in the complaint are true and must liberally construe the complaint in the light most favorable to the plaintiff. *Young v. City of St. Charles*, 244 F.3d 623, 627 (8th Cir. 2001); *Schmedding v. Tnemec Co.*, 187 F.3d 862, 864 (8th Cir. 1999). A Rule 12(b)(6) motion to dismiss a complaint should not be granted unless it appears beyond a doubt that the plaintiff can prove no set of facts which would entitle him to relief. *Young*, 244 F.3d at 627. Thus, as a practical matter, a dismissal under Rule 12(b)(6) should be granted only in the unusual case in which a plaintiff includes

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<sup>1</sup> The Court will grant AT&T's motions for leave to file supplemental authority (Filing Nos. 23 and 24). Qwest's motion for leave to file supplemental authority (Filing No. 25) will be denied as moot.

allegations that show on the face of the complaint that there is some insuperable bar to relief. *Schmedding*, 187 F.3d at 864.

## BACKGROUND

### I. Telecommunications Act of 1996

The Telecommunications Act of 1996 ("the Telecommunications Act") encourages competition among telecommunication providers by *inter alia* obligating telecommunications companies to interconnect with one another. Sections 251 and 252 of the Telecommunications Act require incumbent local exchange carriers ("ILECs") to lease their networks to requesting competitive local exchange carriers ("CLECs").<sup>2</sup> 47 U.S.C. §§ 251(c), 252(b). Under the Telecommunications Act, ILECs must submit any interconnection agreements they form with CLECs to the relevant state public utilities commission for approval. *Id.* at §§ 252(a), (e). The Telecommunications Act requires ILECs to make the terms of any approved interconnection agreements to which they are parties available to requesting non-party CLECs upon "the same terms and conditions, in addition to rates, as those provided in the agreement." See 47 U.S.C. § 252(i); 47 C.F.R. § 51.809(a).

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<sup>2</sup> Local exchange carriers ("LECs") are defined as "any person that is engaged in the provision of telephone exchange service or exchange access." 47 U.S.C. § 153(24). Incumbent local exchange carriers ("ILECS") refer to any LEC, with respect to an area, that provided telephone exchange service on February 8, 1996, and was deemed to be a member of the exchange carrier association on that date pursuant to 47 C.F.R. 69.601(b), or its successor or assignee. 47 U.S.C. § 251(1).

## **II. Factual Background**

Pursuant to the Telecommunications Act, plaintiffs, AT&T Communications of the Midwest ("AT&T") and TCG Omaha, Inc. ("TCG") (collectively, "AT&T"), entered into interconnection agreements with Qwest Corporation ("Qwest"). The complaint alleges Qwest agreed to act in accordance with the Telecommunications Act and make products and services available to AT&T on nondiscriminatory rates, terms and conditions. The complaint further alleges that Qwest breached its agreements with AT&T when Qwest entered into secret interconnection agreements with Eschelon Telecom ("Eschelon") and McLeodUSA Telecommunications Services, Inc. ("McLeodUSA") from 2000 until 2002 and failed to file these interconnection agreements with the Nebraska Public Service Commission ("NPSC") as required by the Telecommunications Act (Complaint ¶¶ 2, 3). AT&T alleges that its interconnection agreement with Qwest obligated Qwest to notify AT&T of these interconnection agreements. The complaint alleges that Eschelon and McLeodUSA received up to a ten percent discount on Qwest's products and services, which AT&T was entitled to receive under the terms of its interconnection agreement with Qwest.

AT&T alleges that Qwest is liable under theories of: (1) breach of contract; (2) fraud; and (3) Nebraska antitrust provisions. Qwest argues that AT&T's claims should be dismissed because they are barred by: (1) the two-year statute of limitations established by § 415 of the Telecommunications Act;

and (2) the principles of collateral estoppel based on a decision of the Oregon Public Utility commission.

**III. Related Decisions**

The subject of this controversy has been litigated and argued in other forums. On February 14, 2002, a complaint was filed with the Minnesota Public Service Commission ("MPSC"), accusing Qwest of failing to file certain interconnection agreements as required by the Telecommunications Act. The MPSC opened an investigation on March 12, 2002, and AT&T participated in this proceeding. On September 20, 2002, an Administrative Law Judge in Minnesota found that Qwest had violated the Telecommunications Act by failing to file certain interconnection agreements with the MPSC and recommended that the MPSC take action against Qwest. Findings of Fact, Conclusions, Recommendation and Memorandum, *In re Complaint of the Minnesota Department of Commerce Against Qwest Corporation Regarding Unfiled Agreements*, 2002 WL 32129264, ¶¶ 341, 344.

The Oregon Public Utility Commission ("OPUC") determined on May 11, 2006, that 47 U.S.C. § 415(b) proscribed a two-year statute of limitations for AT&T's breach of contract claim against Qwest based on Qwest's failure to file various interconnection agreements with the OPUC. In so deciding, the OPUC determined AT&T's claims were essentially federal in character. See Oregon Public Utility Commission, Order No. 06-230, Order Granting Motion to Dismiss, *AT&T Communications of the Northwest, Inc., et al. v. Qwest Corporation*, Docket No. UM-1232

(May 11, 2006), *aff'd on reconsideration*, Order No. 06-465, Order Denying Petition for Reconsideration (August 16, 2006).

In contrast, the Washington State Utilities and Transportation Commission ("WSUTC") recently reaffirmed its decision that AT&T's breach of contract claims against Qwest for failure to file various interconnection agreements with the WUTC were based on state law and, therefore, the state law statute of limitations for breach of contract was the applicable statute of limitations for these claims. See Washington State Utilities and Transportation Commission, Order No. 04, Interlocutory Order Reversing Initial Order, Denying Motion for Summary Determination or Dismissal, *AT&T Communications of the Pacific Northwest, Inc. v. Qwest Corporation*, Docket No. UT-051682 (June 7, 2006); *aff'd*, Order No. 06, Order Affirming Interlocutory Order; Allowing Amendment of Complaint; Denying Motion for Summary Determination (Dec. 21, 2006).

#### **DISCUSSION**

Qwest argues that AT&T's claims are federal claims masquerading as state law claims and are, therefore, barred by the two-year statute of limitations set forth in 47 U.S.C. § 415. AT&T disagrees, arguing its claims are based on Nebraska law and Nebraska's four-year state statute of limitations should apply. Notwithstanding AT&T's characterization of its claims, the relationship between ILECs and CLECs is heavily regulated by the Telecommunications Act. Any duty on the part of Qwest to file its interconnection agreements with the NPSC and to make the

terms available to other CLECs arose under §§ 252(e) and (i). The claims in this case necessarily require the Court to determine whether Qwest complied with the Telecommunications Act. In other words, the ultimate issue in this case is an interpretation of federal law. Section 415(b) 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. . . ." 47 U.S.C. § 415(b). AT&T seeks damages for Qwest's alleged failure to comply with the requirements of the Telecommunications Act pursuant to AT&T's and Qwest's interconnection agreements, and AT&T may not avoid the two-year statute of limitations contained in § 415 simply by characterizing its claims as state law claims.

While the accrual date for AT&T's claims is a factual determination, the Court finds AT&T's claims clearly accrued more than two years prior to the filing of its complaint on September 1, 2006. AT&T concedes in its opposition brief that, "at the earliest it was not until September 20, 2002, when the ALJ in the Minnesota proceeding rejected Qwest's sworn testimony and found that there was in fact a secret oral agreement with McLeod, that AT&T could have had any confidence in proceeding on a claim that there was a secret oral agreement and that, assuming such agreement applied or had a counterpart in Nebraska, it might have a cause of action here" (Filing No. 19 at 30-31). At this time, AT&T was on notice that it may have claims against Qwest in other states, including Nebraska.

The Court finds that AT&T's claims are barred by the two-year statute of limitations contained in 47 U.S.C. § 415 and will grant Qwest's motion to dismiss. For this reason, the Court need not address Qwest's collateral estoppel argument. A separate order will be entered in accordance with this memorandum opinion.

DATED this 27th day of February, 2007.

BY THE COURT:

/s/ Lyle E. Strom

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LYLE E. STROM, Senior Judge  
United States District Court

## EXHIBIT 2

**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,

Respondent.

AMENDED COMPLAINT

Pursuant to ORS 756.500 and OAR 860-013-0015, AT&T Communications of the Pacific Northwest, Inc., and TCG Oregon (collectively "AT&T"), Time Warner Telecom of Oregon, LLC ("TWTC"), and Integra Telecom of Oregon, Inc. ("Integra") bring the following Amended Complaint against Qwest Corporation ("Qwest"). In support of their Amended Complaint, AT&T, TWTC, and Integra allege as follows:

**PARTIES**

1. Complainant AT&T. AT&T provides switched and non-switched local exchange and long distance services in Oregon as a competitive telecommunications service provider pursuant to a certificate of authority issued by the Commission. AT&T's contact information for purposes of this Amended Complaint is:

Sarah K. Wallace  
Davis Wright Tremaine LLP  
1300 SW Fifth Avenue, Suite 2300  
Portland, OR 97201-5630  
Phone: (503) 778-5249  
Fax: (503) 778-5299  
Email: [sarahwallace@dwt.com](mailto:sarahwallace@dwt.com)

Letty S. D. Friesen  
AT&T  
1875 Lawrence Street, Suite 1575  
Denver, CO 80202  
Phone: (303) 298-6475  
Fax: (303) 298-6301  
Email: [lsfriesen@att.com](mailto:lsfriesen@att.com)

2. Complainant TWTC. TWTC provides switched and non-switched local exchange and long distance services in Oregon as a competitive telecommunications service provider pursuant to a certificate of authority issued by the Commission. TWTC's contact information for purposes of this Amended Complaint is:

Sarah K. Wallace  
Davis Wright Tremaine LLP  
1300 SW Fifth Avenue, Suite 2300  
Portland, OR 97201-5630  
Phone: (503) 778-5249  
Fax: (503) 778-5299  
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Brian Thomas  
Time Warner Telecom  
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Seattle, WA 98109  
Phone: (206) 676-8090  
Fax: (206) 676-8001  
Email: [Brian.Thomas@twtelecom.com](mailto:Brian.Thomas@twtelecom.com)

3. Complainant Integra. Integra provides switched and non-switched local exchange and long distance services in Oregon as a competitive telecommunications service provider pursuant to a certificate of authority issued by the Commission. Integra's contact information for purposes of this Amended Complaint is:

Sarah K. Wallace  
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1300 SW Fifth Avenue, Suite 2300  
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Phone: (503) 778-5249  
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Karen Johnson  
Integra Telecom of Oregon, Inc.  
1201 NE Lloyd Blvd, Suite 500  
Portland, OR 97232  
Phone: (503) 453-8119  
Fax: (503) 453-8221  
Email: [karen.johnson@integratelecom.com](mailto:karen.johnson@integratelecom.com)

4. Respondent. Qwest is an incumbent local exchange company ("ILEC"), as defined in 47 U.S.C. § 251(h) and provides local exchange and other telecommunications

services throughout the State of Oregon. On information and belief, Qwest's contact information for purposes of this Amended Complaint is:

Alex M. Duarte  
Qwest Corporation  
421 SW Oak Street, Suite 810  
Portland, OR 97204  
Phone: (503) 242-5623  
Fax: (503) 242-8589  
Email: [alex.duarte@qwest.com](mailto:alex.duarte@qwest.com)

### JURISDICTION

5. Commission Jurisdiction. The Commission has jurisdiction over this Amended Complaint and Respondent Qwest pursuant to ORS 756.500, ORS 759.260, ORS 759.275, 47 U.S.C. § 252(a), 47 U.S.C. § 252(e)(1), and 47 U.S.C. § 252(i).

### FACTS

6. Eschelon Agreements. Beginning in or about February 2000, Qwest entered into a series of interconnection agreements with Eschelon Telecom ("Eschelon"). Those agreements established rates, terms and conditions for telecommunications services and facilities that Qwest provided, or agreed to provide, to Eschelon, including rates, terms, and conditions that were not contained in any agreement with any other similarly situated company ("Eschelon Agreements"). Qwest did not file these agreements with the Commission. The Eschelon Agreements were not publicly available, and Qwest did not provide AT&T, TWTC or Integra with a copy of these agreements or otherwise notify AT&T, TWTC or Integra of the existence or contents of these agreements.

7. McLeodUSA Agreements. Beginning in or about April 2000, Qwest entered into a series of interconnection agreements with McLeodUSA Telecommunications Services, Inc. ("McLeodUSA"). Those agreements established rates, terms and conditions for

telecommunications services and facilities that Qwest provided, or agreed to provide, to McLeodUSA, including rates, terms, and conditions that were not contained in any agreement with any other similarly situated company (“McLeodUSA Agreements”). Qwest did not file these agreements with the Commission. The McLeodUSA Agreements were not publicly available, and Qwest did not provide AT&T, TWTC or Integra with a copy of these agreements or otherwise notify AT&T, TWTC or Integra of the existence or contents of these agreements.

8. Same or Comparable Services. AT&T, TWTC or Integra each obtained telecommunications facilities and services from Qwest that were the same as, or comparable to, the telecommunications facilities and services that Qwest provided, or agreed to provide, to Eschelon under the Eschelon Agreements during the time frame in which those agreements were in effect. AT&T, TWTC and Integra each obtained telecommunications facilities and services from Qwest that were the same as, or comparable to, the telecommunications facilities and services that Qwest provided, or agreed to provide, to McLeodUSA under the McLeodUSA Agreements during the time frame in which those agreements were in effect.

9. Adoption. AT&T, TWTC and Integra each would have adopted, or otherwise would have agreed to, the rates and reasonably related and legitimate terms and conditions in the Eschelon and/or McLeodUSA Agreements if AT&T, TWTC and Integra had known of the existence of those agreements or the rates and reasonably related and legitimate terms and conditions contained in those agreements and if Qwest had made those agreements or rates and reasonably related and legitimate terms and conditions available to AT&T, TWTC and Integra.

10. Damages. The amounts that AT&T, TWTC and Integra each paid Qwest for telecommunications facilities and services during the time period in which the Eschelon and McLeodUSA Agreements were in effect were significantly higher than the amounts that

Eschelon and McLeodUSA paid, or agreed to pay, Qwest for the same or comparable telecommunications facilities and services. Qwest concealed the existence of the Eschelon and McLeodUSA Agreements and the rates and reasonably related and legitimate terms and conditions in those agreements and did not make available to AT&T, TWTC, or Integra the rates and reasonably related and legitimate terms and conditions contained in those agreements. Qwest, therefore, overcharged AT&T, TWTC and Integra the difference between the amounts that AT&T, TWTC and Integra each paid to Qwest and the amounts that AT&T, TWTC and Integra each would have paid had AT&T, TWTC and Integra adopted or otherwise accepted the rates and reasonably related and legitimate terms and conditions in the Eschelon and/or McLeodUSA Agreements.

11. Interconnection Agreements. AT&T, TCG Oregon, TWTC, and Integra each separately entered into interconnection agreements with Qwest.

a. *AT&T and Qwest.* The Commission approved the original interconnection agreement between AT&T and U S West Communications, Inc. (Qwest's predecessor in interest) on September 5, 1997 in docket ARB 3 ("AT&T/Qwest Agreement"). The AT&T/Qwest Agreement was in effect when Qwest entered into the Eschelon and McLeodUSA Agreements.

Section 36 of the AT&T/Qwest Agreement provides:

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.

b. *TCG Oregon and Qwest.* The Commission approved the original interconnection agreement between TCG Oregon and U S West Communications, Inc. (Qwest's predecessor in interest) on May 19, 1997 in docket ARB 2 ("TCG/Qwest Agreement"). The

TCG/Qwest Agreement was in effect when Qwest entered into the Eschelon and McLeodUSA Agreements. Section XVI of the TCG/Qwest Agreement provides: "The Parties agree that the provisions of Section 252(i) of the Act shall apply, including state and federal interpretive regulations in effect from time to time."

c. *TWTC and Qwest.* On May 8, 1997, the Commission approved the interconnection agreement between GST Telecom of Oregon, Inc. (TWTC's predecessor in interest) and U S West Communications, Inc. (Qwest's predecessor in interest) ("First TWTC/Qwest Agreement"). The First TWTC/Qwest Agreement was in effect when Qwest entered into the Eschelon and McLeodUSA Agreements, although the parties were negotiating a new interconnection agreement during that time. Section AA of the First TWTC/Qwest Agreement provides:

**Most Favored Nation Terms and Treatment:** The parties agree that the provision of Section 252(i) of the Act shall apply, including state and federal interpretive regulations in effect from time to time.

The Commission approved a new interconnection agreement between TWTC and Qwest on August 8, 2000, in docket ARB 235 ("Second TWTC/Qwest Agreement"). Although this agreement was being negotiated during the time that Qwest entered into the Eschelon and McLeodUSA Agreements, TWTC did not know of the existence of those agreements and was not given the opportunity to opt into any provisions in those agreements. Section (A)3.36 of the Second TWTC/Qwest Agreement provides:

**Availability of Other Agreements.** With regard to the availability of other agreements, the Parties agree that the provisions of Section 252(i) of the Act shall apply, including Commission, FCC and court interpretive regulations and decisions in effect from time to time.

d. *Integra and Qwest*. On May 12, 2000, Integra opted in to the interconnection agreement between AT&T and U S West Communications, Inc. (Qwest's predecessor in interest) ("Integra/Qwest Agreement"). See OPUC Docket No. ARB 219. This agreement was in effect at the time Qwest entered into the Eschelon and McLeodUSA Agreements. Section 36 of the Integra/Qwest Agreement provides:

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.

#### **CLAIMS FOR RELIEF**

##### **A. Violation of Federal Law**

12. AT&T, TWTC, and Integra reallege and incorporate by reference the allegations in paragraphs 1-11 above as if fully set forth herein.

13. 47 U.S.C. § 251(b) and (c) requires Qwest to provide access to, and interconnection with, its network to AT&T, TWTC, Integra, and other competing telecommunications service providers "on rates, terms, and conditions that are just, reasonable, and nondiscriminatory."

14. 47 U.S.C. § 251(e) provides "Any interconnection agreement adopted by negotiation or arbitration shall be submitted for approval to the State commission," and subsection 252(i) provides,

A local exchange carrier shall make available any interconnection, service, or network element provided under an agreement approved under this section to which it is a party to any other requesting telecommunications carrier upon the same terms and conditions as those provided in the agreement.

15. By providing facilities and services to Eschelon and McLeodUSA at rates or discounts off of rates that were lower than the rates and/or discounts that Qwest made available to AT&T, TWTC, Integra, and other similarly situated competing telecommunications service providers, Qwest violated 47 U.S.C. §§ 251 and 252.

**B. Violation of ORS 759.260 (Unjust discrimination in rates)**

16. AT&T, TWTC, and Integra reallege and incorporate by reference the allegations in paragraphs 1-16 above as if fully set forth herein.

17. ORS 759.260 provides in relevant part:

[N]o telecommunications utility . . . shall, directly or indirectly, by any device, charge, demand, collect or receive from any person a greater or less compensation for any service rendered or to be rendered by it than:

- (a) That prescribed in the public schedules or tariffs then in force or established; or
- (b) It charges, demands, collects or receives from any other person for a like and contemporaneous service under substantially similar circumstances.

18. By providing facilities and services to Eschelon and McLeodUSA at rates or discounts off of rates that were lower than the rates and/or discounts that Qwest made available to AT&T, TWTC, Integra, and other similarly situated competing telecommunications service providers, Qwest demanded, collected, or received greater compensation from AT&T, TWTC and Integra than Qwest demanded, collected, or received from Eschelon and McLeodUSA for a like and contemporaneous service under substantially similar circumstances in violation of ORS 759.260.

**C. Violation of ORS 759.275 (Undue preferences and prejudices)**

19. AT&T, TWTC, and Integra reallege and incorporate by reference the allegations in paragraphs 1-19 above as if fully set forth herein.

20. ORS 759.275 provides in relevant part:

No telecommunications utility shall make or give undue or unreasonable preference or advantage to any particular person or locality, or subject any particular person or locality to any undue or unreasonable prejudice or disadvantage in any respect.

21. By providing facilities and services to Eschelon and McLeodUSA at rates or discounts off of rates that were lower than the rates and/or discounts that Qwest made available to AT&T, TWTC, Integra, and other similarly situated competing telecommunications service providers, Qwest granted an undue preference to Eschelon and McLeodUSA and subjected AT&T, TWTC, and Integra to undue prejudice or disadvantage in violation of ORS 759.275.

**D. Breach of Contract**

22. AT&T, TWTC, and Integra reallege and incorporate by reference the allegations in paragraphs 1-22 above as if fully set forth herein.

23. By providing facilities and services to Eschelon and McLeodUSA at rates or discounts off of rates that were lower than the rates and/or discounts that Qwest made available to AT&T, Qwest breached section 36 of the AT&T/Qwest Agreement.

24. By providing facilities and services to Eschelon and McLeodUSA at rates or discounts off of rates that were lower than the rates and/or discounts that Qwest made available to TCG Oregon, Qwest breached section XVI of the TCG/Qwest Agreement.

25. By providing facilities and services to Eschelon and McLeodUSA at rates or discounts off of rates that were lower than the rates and/or discounts that Qwest made available

to TWTC, Qwest breached section AA of the First TWTC/Qwest Agreement and section (A)3.36 of the Second TWTC/Qwest Agreement.

26. By providing facilities and services to Eschelon and McLeodUSA at rates or discounts off of rates that were lower than the rates and/or discounts that Qwest made available to Integra, Qwest breached section 36 of the Integra/Qwest Agreement.

### PRAYER FOR RELIEF

WHEREFORE, AT&T, TWTC, and Integra pray for the following relief:

A. An order from the Commission requiring Qwest to provide refunds or damages to AT&T, TWTC, and Integra based on overcharges for the intrastate telecommunications services and facilities they each obtained from Qwest, specifically the difference between the amounts that AT&T, TWTC, and Integra each paid to Qwest and the amounts that AT&T, TWTC, and Integra each would have paid had Qwest charged AT&T, TWTC, and Integra the rates and applied the discounts in the Eschelon and/or McLeodUSA Agreements while those agreements were in effect, plus interest; and

B. Such other or further relief as the Commission finds fair, just, reasonable, and sufficient.

DATED this 13<sup>th</sup> day of January, 2006.

DAVIS WRIGHT TREMAINE LLP  
Attorneys for AT&T Communications  
of the Pacific Northwest, Inc., and  
TCG Oregon, Time Warner Telecom  
of Oregon, LLC, and Integra Telecom of  
Oregon, Inc.

AT&T COMMUNICATIONS OF THE  
PACIFIC NORTHWEST, INC. AND TCG  
OREGON

By: *Sarah K. Wallace*  
Sarah K. Wallace, OSB No. 00292  
Gregory J. Kopta, WSB No. 20519

By: *Sarah K. Wallace for*  
Lety S.D. Friesen

# EXHIBIT 3



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**Before the  
Federal Communications Commission  
Washington, DC 20554**

In the Matter of	)	
Qwest Communications International Inc.,	)	
Consolidated Application for Authority to	)	
Provide In-Region, InterLATA Services in	)	WC Docket No. 02-148
Colorado, Idaho, Iowa, Nebraska and North	)	
Dakota	)	

**COMMENTS OF AT&T CORP.**

Pursuant to the Commission’s Public Notice, AT&T Corp. (“AT&T”) respectfully submits these comments in opposition to the joint application of Qwest for authorization to provide in-region, interLATA services in Colorado, Idaho, Iowa, Nebraska, and North Dakota.

**INTRODUCTION AND SUMMARY**

Process, not substance, is the central theme of Qwest’s unprecedented 5-state section 271 application. The message behind this application is unmistakably clear: accept at face value Qwest’s claims of compliance with the federal law requirements of section 271, defer entirely to state commission recommendations, and, whatever you do, please don’t look behind the curtain. Abdication, not independent review, is called for, Qwest contends, because the “new” Qwest is different from all prior section 271 applicants (and from its predecessor US West) and, unlike prior applicants, can be trusted to do the right thing for competition and consumers.

The new Qwest *is* different from prior applicants, but only in ways that demand more, not less, Commission scrutiny. No prior section 271 applicant can match Qwest’s long and shameful record of blatant section 271 violations – violations that defy Qwest’s express representations to the Commission, that began the minute Qwest swallowed US West, and that continue unabated

the Commission can be sure that Qwest has fully opened its markets to competition and has met its checklist burden is to allow state commissions to conduct comprehensive investigations regarding Qwest's secret deals, to force Qwest to come clean about all of its secret deals and to reform its discriminatory practices, and then to restart the section 271 process with full participation by all interested parties.

The Commission cannot ignore these fundamental violations of the Act's core market opening provisions on the grounds that Qwest has filed a petition seeking a Commission declaration that Qwest's failure to file its secret interconnection agreements with state commissions did not violate section 252. Assuming Qwest had a colorable claim that section 252 could be read, as Qwest argues, to allow Qwest to file only selected passages of negotiated interconnection agreements – and the plain language of section 252 makes plain that this contention is frivolous<sup>14</sup> – the declaratory order proceeding provides no lawful basis for ignoring the mounting secret deals evidence here. Even if the Act could be read as not requiring Qwest to *file* its secret, discriminatory agreements, that would not make Qwest's practice of favoring some CLECs with rate and non-rate terms that are not available to (or even known by) other CLECs any less discriminatory. The secret deals provide dispositive evidence that Qwest does not provide access to network elements (and other checklist items) on nondiscriminatory terms, and there is no possible basis for the Commission to ignore that evidence in this proceeding.

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<sup>13</sup> The fact that Qwest provided certain carriers sweetheart deals is also highly probative of whether the rates, terms and conditions it has imposed on the disfavored carriers comply with the Act's *substantive* standards of Checklist Item 2.

<sup>14</sup> Section 252(a)(1) allows Qwest and other incumbent LECs to negotiate agreements for "interconnection, services, or network elements pursuant to section 251," but provides that "[t]he agreement . . . shall be submitted to the State commission under subsection (e) of this section." 47 U.S.C. § 252(a)(1). Section 252(e) provides that "[a]ny interconnection agreement adopted by negotiation or arbitration shall be submitted for approval to the State commission." 47 U.S.C. § 252(e)(1). See *Opposition of AT&T Corp. To Petition For Declaratory Ruling Of Qwest Communications International Inc.*, WC Docket No. 02-89, at 6-10 (filed May 29, 2002).

**A. The Secret Deals Discrimination Is Undisputed.**

It is now beyond dispute that Qwest has entered into blatantly discriminatory agreements with favored CLECs and has kept those agreements secret from state regulators and competitors by failing to file them with state commissions, as required by law. Further, it is beyond dispute that in some cases, the favored CLECs agreed in return to acquiesce in major Qwest regulatory initiatives, including Qwest's instant section 271 application.

As a result of a six-month investigation into potential anticompetitive conduct, the State of Minnesota Department of Commerce filed a complaint against Qwest with the Minnesota Public Utilities Commission on February 14, 2002.<sup>15</sup> That complaint alleges that Qwest entered into a series of secret, discriminatory agreements with various competitive LECs to provide preferential treatment for those competitive LECs with respect to access to rights of way, reciprocal compensation, and collocation.<sup>16</sup> The Department of Commerce Complaint included as exhibit 11 written agreements between Qwest and various CLECs that Qwest had never filed with the Minnesota Public Utilities Commission pursuant to Section 252(a)(1). The Minnesota Department of Commerce is seeking civil penalties in excess of \$50 million against Qwest.<sup>17</sup> The Minnesota PUC has already held one hearing before an ALJ and will conduct further proceedings, scheduled for August 6-8, on additional, newly discovered agreements between Qwest and McLeod before issuing a decision.<sup>18</sup>

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<sup>15</sup> See, e.g., *Second Amended Verified Complaint, In the Matter of the Complaint of the Minnesota Department of Commerce Against Qwest Corporation Regarding Unfiled Agreements, Minnesota Public Utilities Commission, Docket No. P-421/C-02-197* (Attachment 2 hereto).

<sup>16</sup> See *Second Amended Verified Complaint* ¶ 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”); *id.* at ¶ 26 (“[T]he ongoing and repeated behavior of Qwest in entering into these secret agreements was, and is, anticompetitive and in violation of federal and state law”).

<sup>17</sup> See *Second Amended Verified Complaint* ¶¶ 275-77, 282.

<sup>18</sup> Favoring selected CLECs held little risk for Qwest, because if any carrier began to grow beyond “acceptable” boundaries, Qwest could neutralize that carrier's opposition by a pretense of cooperation, holding the carrier to its

Significantly, the Minnesota Department of Commerce has uncovered evidence demonstrating that five of the agreements identified in its Complaint “were the direct result of efforts by Qwest to prevent Eschelon and McLeodUSA – two of Qwest’s largest wholesale customers – from participating in consideration of Qwest’s application to provide in-region, interLATA long-distance services by the state commissions and the FCC.”<sup>19</sup> As a result of these secret agreements to silence Eschelon and McLeodUSA, the Minnesota Department of Commerce noted that “14 states, including Minnesota, have been reviewing Qwest’s Section 271 application without the participation of two of Qwest’s largest wholesale customers in most of their workshops or adjudicative proceedings.”<sup>20</sup> While “[t]he extent of the damage that these agreements have caused with respect to 271 proceedings across Qwest’s territory is still unknown,” the Minnesota Department of Commerce recently “uncovered information that Qwest has not provided accurate billing or access information for the UNE platform products ordered by Eschelon from Qwest at any time from 2000 through the present.”<sup>21</sup> The Department’s investigation is continuing.<sup>22</sup>

Upon learning of the Minnesota complaint, several other state commissions in the Qwest region commenced similar investigations of their own. The New Mexico Public Regulatory Commission, for example, has issued over 80 subpoenas to competitive LECs

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promise not to oppose Qwest’s section 271 proceedings, but paying only lip service to its own promises of “favorable” treatment.

<sup>19</sup> See Comments Of The Minnesota Department of Commerce In Opposition To Qwest’s Petition For Declaratory Ruling, WC Docket No. 02-89, at p. 18 (filed May 29, 2002). See also *id.* (“Qwest granted Eschelon various preferences “in exchange for Eschelon agreeing not to participate in consideration of Qwest’s Section 271 application before any state commission or the FCC”); *id.* at 20 (“Qwest entered into a similar arrangement with McLeodUSA in exchange for an oral agreement to stay out of the Section 271 proceedings”; noting that McLeodUSA confirmed this in response to a discovery request).

<sup>20</sup> *Id.* at 22.

<sup>21</sup> *Id.* at 22-23.

<sup>22</sup> AT&T is aware, for example, that – prior to their defections from the workshops – Eschelon raised serious problems with Qwest’s UNE-P offering and McLeod raised issues with respect to access to poles/duct/conduits and rights of way.

# EXHIBIT 4

**Nazarian, Douglas R.M.**

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Subject: Docket P421/CI-01-1371

Enclosed please find a public version of the affidavit of W. Clay Deanhardt on behalf of the Minnesota Department of Commerce.

Public copies of the affidavits of Lori Deutmeyer, Todd McNally, Lynn Powers, and Ellen Copley and Blake Fisher which are attached as exhibits to the Affidavit of Mr. Deanhardt are also attached to this email.

Should you have any questions, please contact me at 651/296-0399.

Sue Peirce  
MN Department of Commerce

(See attached file: Deutmeyer Public Aff.pdf) (See attached file: McNally Public Aff.pdf)  
(See attached file: Powersaffred.pdf) (See attached file: CopleyAff.pdf) (See attached  
file: Fisher PUBLIC 6-12 (358pm).doc) (See attached file: WCD Public Affidavit.pdf)

BEFORE THE MINNESOTA PUBLIC UTILITIES COMMISSION

Gregory Scott  
Edward A. Garvey  
Marshall Johnson  
LeRoy Koppendrayer  
Phyllis Reha

Chair  
Commissioner  
Commissioner  
Commissioner  
Commissioner

In the Matter of a Commission Investigation  
Into Qwest's Compliance with Section 271(c)(2)(B)  
Of the Telecommunications Act of 1996;  
Checklist Items 1, 2, 3, 4, 5, 6, 11, 13 and 14

MPUC Docket No.  
P-421/CI-01-1371  
OAH Docket No.  
7-2500-14486-2

**AFFIDAVIT OF W. CLAY DEANHARDT**

1 My name is Clay Deanhardt. My business address is 161 Otsego Ave., San  
2 Francisco, California, 94112. I am self-employed. I am working with the Minnesota  
3 Department of Commerce (the "Department") to evaluate Qwest Corporation's  
4 ("Qwest's") ability to comply with Sections 251 and 252 as well as Section 271 of the  
5 Telecommunications Act of 1996 (the "Act").  
6 From January 1999 through September 2000 I was Senior Counsel for Covad  
7 Communications Company ("Covad") and responsible for Covad's legal relationship  
8 with Qwest and its predecessor U S WEST (referred to collectively throughout my  
9 affidavit as Qwest). As a result, I dealt with Qwest on an almost daily basis on issues  
10 ranging from simple provisioning issues to interconnection negotiations and all  
11 regulatory matters. I also managed various business aspects of Covad's relationship with  
12 Qwest. While at Covad, I led the operational and business team that determined, for the

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Lori Deutmeyer

Signed before me this 11<sup>th</sup> day of June, 2002.

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Notary Public

## EXHIBIT 5

**Nazarian, Douglas R.M.**

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**From:** Alpert, Steve [Steve.Alpert@state.mn.us]  
**Sent:** Friday, June 14, 2002 10:07 AM  
**To:** Greg Merz; g Witt@att.com; Janet Browne; Janet Shaddix; Joy Gullikson; Lesley Lehr; Mark J. Ayotte; Michael Hoff; PeterMarker; Sandy Hofstetter; Steve Weigler; Tom Koutsky; Ogrady, Kevin; Klein, Allan; Tony Mendoza; Clay Deanhardt; JuliaAnderson; Michelle Rebholz; RiddhiJani; 'tlundy@qwest.com'; Jason Topp; Mitchell, Cynthia; Nazarian, Douglas R.M.; Rohrbach, Peter A.; Spivack, Peter S.  
**Subject:** Second Amended Complaint  
**Attachments:** AGO\_DOCS-#680958-v1-Untitled\_P-421\_Filing\_Ltr\_Svs\_Lst\_6\_14\_02.DOC; AGO\_DOCS-#680158-v1-P-421\_(unfiled\_agts)\_2nd\_amended\_complaint.DOC



AGO\_DOCS-#6809 AGO\_DOCS-#6801  
58-v1-Untitled\_P... 58-v1-P-421\_(unf...

Second Amended Complaint and cover letter

\*\*\*\*\*  
This e-mail message and any attachments are confidential and may be privileged. If you are not the intended recipient, or the person responsible for delivering it to the addressee, please notify the sender immediately by replying to this message and destroy all copies of this message and any attachments. Thank you.  
\*\*\*\*\*

<<AGO\_DOCS-#680958-v1-Untitled\_P-421\_Filing\_Ltr\_Svs\_Lst\_6\_14\_02.DOC>>  
<<AGO\_DOCS-#680158-v1-P-421\_(unfiled\_agts)\_2nd\_amended\_complaint.DOC>>

**FOR THE MINNESOTA PUBLIC UTILITIES COMMISSION**  
SUITE 350  
121 SEVENTH PLACE EAST  
ST. PAUL, MINNESOTA 55101-2147

**Greg Scott**  
**Edward Garvey**  
**Marshall Johnson**  
**LeRoy Koppendrayner**  
**Phyllis A. Reha**

**Chair**  
**Commissioner**  
**Commissioner**  
**Commissioner**  
**Commissioner**

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

Docket No. P-421/C-02-197

**SECOND AMENDED 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.

mitigate damages; and the Interconnection Agreements are hereby amended accordingly.

236. The Department is informed and believes and on this basis alleges that there are no provisions in any McLeodUSA ICA that set forth the waiver provisions described in Section 3 of McLeod Agreement II.

237. The Department is informed and believes and on this basis alleges that no ICA approved by the Commission under 47 U.S.C. § 252(e) with Qwest as a party contains the same waiver provisions as this term of McLeod Agreement II.

238. By providing this term to McLeodUSA and to no other CLEC, Qwest discriminated and continues to discriminate against other CLECs in violation of 47 U.S.C. § 251(c).

### **McLeod Agreement III**

239. On October 26, 2000 Qwest entered into an oral agreement to provide McLeodUSA with an 8% to 10% discount on all purchases made by McLeodUSA from Qwest between October 2, 2000 and December 31, 2003 ("McLeod Agreement III").

240. As set forth more specifically below, McLeod Agreement III sets the rates that McLeodUSA pays for interconnection and access to unbundled network elements. As such, 47 U.S.C. § 252(a)(1) requires Qwest to submit McLeod Agreement III to the Commission for approval under 47 U.S.C. § 252(e).

241. To date, Qwest has not submitted McLeod Agreement III to the Commission for approval under 47 U.S.C. § 252(e).

242. Qwest therefore violated and remains in violation of 47 U.S.C. § 252(a)(1).

243. McLeod Agreement III is an oral agreement pursuant to which Qwest agreed to provide McLeodUSA with an 8% to 10% discount on all purchases made by McLeodUSA from Qwest.

244. The discount applies to all products and services purchased by McLeodUSA from Qwest, including interconnection, access, unbundled network elements, collocation, resale services, and tariffed products and services. The discount applies for all purchases made by McLeodUSA from Qwest inside and outside of Qwest's 14-state territory. The term of the agreement is October 2, 2000 through December 31, 2003.

245. The effect of the discount is to reduce the rates that McLeodUSA pays for, among other things, interconnection, access to network elements, collocation, services for resale and reciprocal compensation by 8% to 10%.

246. No ICA approved by the Commission under 47 U.S.C. § 252(e) with Qwest as a party contains the same terms as McLeod Agreement III.

247. By providing this rate discount to McLeodUSA and to no other CLEC, Qwest discriminated and continues to discriminate against other CLECs in violation of 47 U.S.C. §§ 251(b) and (c).

#### **THE USLINK / INFOTEL AGREEMENT**

248. Today and at all times described below, USLink, Inc. and InfoTel Communications, LLC are and were licensed and certificated to operate as a CLEC in Minnesota.

249. Today and at all times described below, USLink and InfoTel are and were parties to ICAs with Qwest that were approved by the Commission under 47 U.S.C. § 252(e).

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

Dated: March \_\_\_, 2002

Respectfully submitted,

MIKE HATCH  
Attorney General  
State of Minnesota

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

525 Park Street, #200  
St. Paul, Minnesota 55103-2106  
(651) 296-3258 (Voice)  
(651) 282-2525 (TTY)

ATTORNEYS FOR MINNESOTA  
DEPARTMENT OF COMMERCE

AG: #680158-v1