Office of the Secretary
Service Date
February 16, 2007

BEFORE THE IDAHO PUBLIC UTILITIES COMMISSION

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

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

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

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

POSITION OF THE PARTIES

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

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

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

DISCUSSION AND FINDINGS

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

ORDER

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

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

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

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

PAUL KJELLANDER, PRESIDENT

MARSHA H. SMITH, COMMISSIONER

DENNIS S. HANSEN, COMMISSIONER

ATTEST:

Jean D. Jewell
Commission Secretary

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