

**BEFORE THE IDAHO PUBLIC UTILITIES COMMISSION**

<b>AT&amp;T COMMUNICATIONS OF THE</b>	)	
<b>MOUNTAIN STATES, INC.,</b>	)	<b>CASE NO. QWE-T-06-17</b>
	)	
<b>COMPLAINANT,</b>	)	
	)	
<b>vs.</b>	)	
	)	
<b>QWEST CORPORATION,</b>	)	<b>ORDER NO. 30407</b>
	)	
<b>RESPONDENT.</b>	)	
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In this Order the Commission takes up four motions filed by Qwest Corporation in the above referenced case. In the first three motions Qwest moved and we grant the limited admission Pro Hac Vice of three out-of-state counsels under our procedural Rule 43, IDAPA 31.01.01.043.05. In the last motion filed on August 10, 2007, Qwest moved for a stay of the Commission's proceeding in this case. On August 30, 2007, AT&T Communications of the Mountain States filed an answer opposing Qwest's Motion to Stay. Qwest then filed a timely reply to AT&T's opposition. After reviewing the pleadings of the parties, we grant Qwest's Motion to Stay.

**BACKGROUND**

In August 2006 AT&T filed a complaint against Qwest alleging that Qwest entered into "secret" interconnection agreements with two other telecommunications carriers. AT&T alleged a breach of contract stating that Qwest violated terms of an interconnection agreement between AT&T and Qwest by not disclosing the "secret" agreements. Section 252(e)(1) of the federal Telecommunications Act of 1996 provides that "[a]ny interconnection agreement adopted by negotiation or arbitration shall be submitted for approval to the State [regulatory] commission." *See also* 47 U.S.C. § 252(a)(1). AT&T claimed that the secret agreements provided lower rates for certain telecommunication services, and, had these other agreements been disclosed, AT&T would have had an opportunity to also seek the lower rates. 47 U.S.C. § 252(i).

On September 6, 2006, the Commission issued a Summons requiring Qwest to answer the complaint. On September 27, Qwest timely filed its answer to the complaint as a Motion to Dismiss. AT&T then filed a response to Qwest's Motion on October 26, 2006.

On November 7, 2006, Qwest filed a Motion for Oral Argument with respect to the issues presented in its Motion to Dismiss. AT&T joined in Qwest's request and the Commission granted the Motion by setting oral argument in January 2007. Order No. 30195. Qwest asked the Commission to dismiss AT&T's complaint because the complaint is actually a "federal claim masked in state law." Motion to Dismiss at 2. Given the federal claim, Qwest insisted that the federal statute of limitations of two years (47 U.S.C. § 415) applies to any claim brought under the federal Telecommunications Act of 1996.<sup>1</sup>

The Commission found that it has the authority to interpret and enforce the AT&T-Qwest Interconnection Agreement. Order No. 30247 *citing McNeal v. Idaho PUC*, 142 Idaho 685, 132 P.3d 442 (2006). Having found jurisdiction, the Commission directed AT&T to amend its complaint "to state with particularity the provisions of the Interconnection Agreement [with Qwest] that were allegedly breached and the timeframe applicable for calculating damages." Order No. 30247 at 5. The Commission also directed that both parties file additional briefing to address two questions: (1) when did AT&T have notice of the "secret" agreements; and (2) which one of the three statutes of limitations applies here? *Id.* at 2. AT&T amended its complaint and the parties filed their supplemental briefs.

Without addressing the two questions, the Commission subsequently directed the parties to develop a schedule to process this case. *Id.* The schedule proposed by the parties provided them with an opportunity to file prehearing motions. The Commission adopted the proposed schedule. Order No. 30319 at 1-2. Consistent with the modified schedule,<sup>2</sup> AT&T filed its direct testimony on August 16, 2007.

While the Commission was considering Qwest's Motion to Dismiss, AT&T filed "a materially identical complaint" in Idaho State Court on January 31, 2007. AT&T Opposition at 3. AT&T states it filed the state Court action "purely as a protective measure" in the event the Commission was unable to grant all the relief that AT&T sought in the Commission proceeding.

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<sup>1</sup> Qwest initially made two arguments for dismissal. At oral argument Qwest's counsel conceded that the second ground should be withdrawn. Order No. 30247 at 2.

<sup>2</sup> Joint Motion for Procedural Schedule Modification filed July 30, 2007.

*Id.* AT&T served its state Court complaint on Qwest on May 30, 2007. *Id.* On June 19, 2007, Qwest removed the state Court complaint to federal Court and subsequently filed a Motion to Dismiss the action arguing that the two-year statute of limitations contained in the federal Telecommunications Act barred AT&T's complaint. Qwest Motion to Stay at 3.

On July 16, 2007, AT&T filed a Motion to Stay the federal proceedings and a Motion to Remand the federal complaint back to state Court. *Id.* at 3-4. The federal Court has scheduled oral argument on the various federal motions for November 27, 2007.

### **THE STAY MOTION BEFORE THE COMMISSION**

1. Qwest Motion. In its Motion to Stay the Commission's proceeding, Qwest asserted that granting a stay will conserve resources "while the federal Court considers the dispositive federal question of whether, as Qwest contends, AT&T's complaint is barred by the two-year statute of limitations in Section 415 of the federal Communications Act." Qwest Motion at 1 *citing* 47 U.S.C. § 415. Qwest maintains that while the Commission and the federal Court have concurrent jurisdiction, the "federal Court is the final arbiter on this dispositive question of federal law." *Id.* at 1-2. Not only does the federal Court have concurrent jurisdiction, but Qwest asserts the Court also has jurisdiction over any direct appeal from the Commission's decision in this matter. *Id. citing* 47 U.S.C. § 252(e)(6). Qwest argues that a stay will promote judicial and agency economy and not prejudice the rights of either AT&T or Qwest. *Id.* at 9-10.

2. AT&T Opposition. On August 30, 2007, AT&T filed its answer opposing Qwest's Motion. AT&T urges the Commission to deny the stay "primarily because there is no good reason why this case, which was filed first and is substantially farther along than the federal case, should be stayed in favor of the federal case, which AT&T filed purely as a protective measure." AT&T Opposition at 2. AT&T argues that "the *only* purpose behind Qwest's Motion to Stay is to get a second bite at the apple." *Id.* at 4 (emphasis original). In essence, AT&T characterizes Qwest's Motion to Dismiss as a "de facto interlocutory appeal" of the Commission's decision to deny Qwest's Motion to Dismiss. *Id.*

AT&T also insists that judicial economy will not be served because the Commission's proceeding is farther along than the federal complaint. *Id.* at 5. AT&T notes that the parties have engaged in extensive discovery and AT&T's direct testimony has already been prefiled. AT&T concludes that Qwest's Motion would prevent "the first-filed, more advanced

Commission case from proceeding and force AT&T to start all over again in federal Court.” *Id.* at 6.

3. Qwest Reply. Qwest filed its reply on September 7, 2007. Qwest asserts that the Commission should pay no heed to AT&T’s “second bite at the apple” argument because it is AT&T that has filed this second action, which is currently before the federal Court. Qwest Reply at 2. Qwest reiterates that the federal statute of limitations is a dispositive issue of federal law and should it prevail, AT&T’s complaint will be dismissed. *Id.* Qwest insists that the Commission should hold its proceeding in abeyance pending action on the potentially dispositive question of federal law. *Id.* at 3.

### DISCUSSION AND FINDINGS

After reviewing the pleadings and the arguments of the parties, we find it reasonable to grant Qwest’s Motion to Stay our proceedings. Notwithstanding the fact that the Commission’s proceeding was initiated first and is under way, a stay is reasonable so that the federal Court can consider the motions. If the Court grants affirmative relief on Qwest’s dispositive motion – that the two-year statute of limitations in 47 U.S.C. § 415 bars AT&T’s complaint – then both cases may be resolved. As we were advised at our decision meeting on September 10, 2007, the Court has scheduled oral argument on Qwest’s Motion for November 27, 2007.

In its Motion, Qwest argues that Subsections 252(e)(4) and 252(e)(6) of the federal Telecommunications Act create a “unique system of judicial review that directs appeals of Commission orders . . . involving interconnection agreements to federal court.” Qwest Motion at 4. AT&T argues that Qwest has cited no authority for its contention that federal Courts have exclusive jurisdiction to review Commission decisions interpreting interconnection agreements and that Qwest’s Motion to Dismiss before the federal Court now is merely “a de facto interlocutory appeal.” AT&T Opposition at 4. The Commission does not need to decide whether these two subsections of 47 U.S.C. § 252(e) provide “exclusive jurisdiction to the federal Court.” As the United States Supreme Court has observed, federal district courts have authority under 28 U.S.C. § 1331 to review the Commission’s Order for compliance with federal law. *Verizon Maryland v. Public Service Commission of Maryland*, 535 U.S. 635, 642, 122 S.Ct. 1753, 1758 (2002).

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The Commission also anticipated that the parties might revisit this subject prior to our evidentiary hearing. As noted above, our schedule allows the parties to file prehearing motions. In this instance, granting a stay of our proceeding will allow Qwest to pursue its dispositive motion with the federal Court – the same Court that would exercise judicial review over our final decision in this case. If the Court does not grant Qwest affirmative relief, then the Commission stands ready to continue with our proceeding and reset the evidentiary hearing.

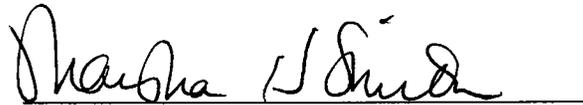
**ORDER**

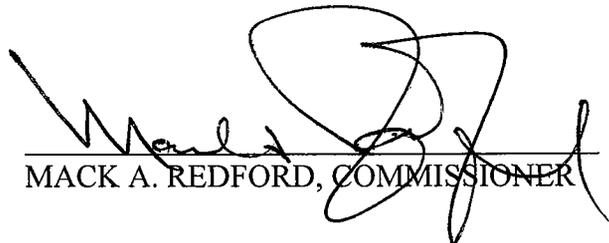
IT IS HEREBY ORDERED that Qwest's Motions for Admission Pro Hac Vice are granted.

IT IS FURTHER ORDERED that Qwest's Motion to Stay our proceeding is granted. The parties shall advise the Commission of the outcome of the motions currently before the federal Court.

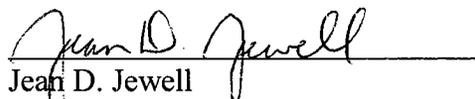
DONE by Order of the Idaho Public Utilities Commission at Boise, Idaho this 24<sup>th</sup> day of September 2007.

  
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PAUL KJELLANDER, PRESIDENT

  
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MARSHA H. SMITH, COMMISSIONER

  
\_\_\_\_\_  
MACK A. REDFORD, COMMISSIONER

ATTEST:

  
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Jean D. Jewell  
Commission Secretary

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