

**BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION**

AT&T COMMUNICATIONS OF  
THE PACIFIC NORTHWEST, INC.,  
TCG SEATTLE, AND TCG OREGON;  
AND TIME WARNER TELECOM OF  
WASHINGTON, LLC,

Complainants,

v.

QWEST CORPORATION,

Respondent.

Docket No. UT-051682

QWEST CORPORATION'S PETITION  
FOR INTERLOCUTORY REVIEW OF  
THE COMMISSION'S ORDER NO. 04

**I. INTRODUCTION**

*I* Pursuant to WAC 480-07-810, respondent Qwest Corporation (“Qwest”) hereby requests that the Washington Utilities and Transportation Commission (“the Commission”) grant review of its Interlocutory Order No. 04 (“Order”) in this case and reverse the finding in the Order that the dispute “falls within the six-year statute of limitations for contracts.” Order at ¶ 1. Qwest asks that the Commission either deny Complainants’ request to amend their complaint and find

that there is no legal basis upon which to assert a statute of limitations longer than that contained in the Communications Act, or allow the amendment in order to fully join the issues, but to nevertheless hold that the Commission has no authority to grant relief on a claim under the Act that accrued more than two years prior to the filing of the complaint.

2 While Qwest understands that the practical effect of the Order is simply to allow the Complainants to amend their complaint, Qwest takes issue with the Order to the extent that it makes findings regarding statute of limitations issues beyond those necessary to make a decision to allow the filing of an amended complaint. Qwest agrees that the Commission has authority under WAC 480-07-395 to allow the filing of an amended complaint, and will address the allegations in that complaint by filing an answer, as well as an additional motion for summary determination. However, to the extent that the Order prejudices the issue regarding the proper statute of limitations, as this order may, Qwest asks for review and reversal as set forth herein.

3 Specifically, the Order errs in accepting that there is a blanket six-year statute of limitations on breach of contract actions, without regard to the specific limitations period that is applicable under federal law.

4 On this same day, Qwest is filing a motion for summary determination on the statute of limitations issue pursuant to WAC 480-07-380. Qwest incorporates herein by reference the arguments and authority set forth in support of that motion. However, for ease of reading, some of the most pertinent points are highlighted in the discussion below.

## II. ARGUMENT

### A. Complainants' Claims Depend on Federal Law so that Section 415's Limitations Period Precludes the Action

5 The Order finds that Complainants' cause of action arose on July 15, 2002. While Qwest

believes it offered persuasive evidence to suggest that the cause of action actually accrued earlier than that, in March 2002, this difference is not material for purposes of the applicability of the appropriate statute of limitations for a claim based on the Telecommunications Act, and that limitations period is two years. Complainants are now barred under 47 U.S.C. § 415 from bringing these claims.

**1. Complainants' action involves questions of federal law that require application of Section 415.**

6 Section 415 provides the applicable limitation period here. Section 415(b) provides, in pertinent part, as follows: “All complaints against carriers for the recovery of damages not based on overcharges shall be filed with the Commission within two years from the time the cause of action accrues, and not after, subject to subsection (d) of this section.” This provision makes it very clear that an action to enforce rights under an interconnection agreement is governed by a two-year statute of limitations.

7 Interconnection agreements are not ordinary state law contracts as Complainants would lead the Commission to believe, and the general state statute of limitations that pertains to written contracts must give way to the more specific statute under the Communications Act – the very law that grants Complainants the rights they would seek to enforce under a breach of contract action. Rather, interconnection agreements are “instrument[s] arising within the context of ongoing federal and state regulation.” *E.Spire Commc'ns, Inc. v. N.M. Pub. Regulation Comm'n*, 392 F.3d 1204, 1207 (10th Cir. 2004). Enforcement and interpretation of interconnection agreements, particularly the sections at issue here, involves questions of federal law. *See Verizon Md., Inc. v. Global Naps, Inc.*, 377 F.3d 355, 363-65 (4th Cir. 2004); *ICG Telecom Group, Inc. v. Qwest Corp.*, 375 F.Supp.2d 1084 (D. Colo. 2005) (finding the reasoning persuasive in *Global Naps* and concluding that resolution of the case requires interpretation of a section of an interconnection agreement under federal law); *Petition of SBC*

*Tex. For Post-Interconnection Dispute Resolution with Tex-Link Commc 'ns., Inc., under the FTA Relating to Inter-carrier Comp.*, Ruling on Motion to Dismiss, 2005 WL 2834183, at 7-9 (Tex. P.U.C., Oct. 26, 2005); *but see Mich. Bell Tel. Co. v. MCImetro Access Transmission Svcs., Inc.*, 323 F.3d 348, 355-56 (6th Cir. 2003) (concluding that state law governs interpretation of an interconnection agreement); *Global Naps, Inc. v. Verizon N. England Inc.*, 332 F. Supp.2d 341 (D. Mass. 2004) (same).<sup>1</sup> The face of Complainants' complaint makes clear that the alleged breach of contract claims would require the Commission to interpret and enforce Qwest's obligations under federal law and in particular Section 252(i) and consequently to apply 47 U.S.C. § 415 limitations period.

8 Complainants cannot seriously dispute that the gravamen of their complaint requires interpretation of federal law. The Commission recognizes this as well, stating at ¶ 27 that “the Complainants seek to enforce the most favored nation provision [Section 252(i) of the Act] in their interconnection agreements (contracts) by achieving the benefit of the bargain for which they contracted.” The interconnection agreements at issue here exist because of the requirements of the Act, which in turn inform the duties and obligations of both Complainants and Qwest.

9 Assuming their breach of contract claims were even viable, the Commission would have to consider whether the Act necessitated a showing that Complainants requested to opt into the non-filed interconnection agreements “upon the same terms and conditions as those provided in the agreement.” 47 U.S.C. § 252(i); 47 CFR § 51.809(b). The Act would also require the Commission to determine whether Complainants could adopt prospective terms for any alleged

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<sup>1</sup> Even if the Commission were to apply state law, Washington law would still direct the Commission to choose Section 415, with a specific, clearly defined limitations period particular to the telecom industry, over the general six-year statute of limitations contained in RCW 4.16.040(1). *See In re Estate of Black*, 102 P.3d 796, 802 (Wash. 2004) (“when more than one statute applies, the specific statute will supersede the general statute”) (internal citations omitted).

discount in either the Eschelon or the McLeod agreements, notwithstanding that those agreements terminated years ago and are not prospective in nature. Furthermore, the Commission would have to establish what terms in either of the agreements were legitimately related under the Act and whether the Complainants were willing and able to accept all those terms. In short, Complainants' alleged breach of contract claims would involve substantial issues of federal law. *See Global Naps*, 377 F.3d at 366 (finding substantial questions of federal law because the agreement was federally mandated, the key disputed provisions incorporated federal law, and the contractual duty was imposed by federal law).

10 The Commission further recognized in the Order that this “is an action within the terms of RCW 80.36.610. Enforcement of interconnection agreements is a specific remedy afforded by statute in limited circumstances *involving telecommunications act matters*” (emphasis added). Thus, it is beyond any reasonable dispute that the Commission would be acting to enforce federal law if it were to allow a breach of contract claim. And, it is consequently also beyond reasonable dispute that the two-year statute of limitations in Section 415 operates to bar any such claims in this case. Complainants cannot escape the limitations period imposed by Section 415 by attempting to frame their claim as a mere breach of contract.

### III. CONCLUSION

11 For the foregoing reasons, Qwest respectfully submits that the Commission had insufficient information upon which to base a finding or conclusion that a six-year limitation period applies to any claims for relief in this matter. Indeed, the Commission has sufficient information to find that there is a two-year limitations period applicable under the Act. Even though Complainants might try to characterize their claim as one not involving federal law, it is clear that any claim for breach of contract would involve claims for enforcement of the provisions of Telecom Act, and would be barred by Section 415. Thus, the Commission

should grant review of its interlocutory order and reverse those portions of the Order that find or hold that Complainants may avail themselves of a longer statute of limitations than is contained in Section 415 of the Act.

DATED this 21st day of July, 2006.

QWEST

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