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,	)	DOCKET NO. UT-051682
Complainants,	)	AT&T'S OPPOSITION TO QWEST'S PETITION FOR REVIEW OF INTERLOCUTORY ORDER NO. 4
v.	)	
QWEST CORPORATION,	)	
Respondent.	)	

1. AT&T Communications of the Pacific Northwest, Inc., TCG Seattle, and TCG Oregon (collectively, "AT&T"), provide the following opposition to Qwest Corporation's ("Qwest") Petition for Interlocutory Review of the Commission Order No. 04.[1] Qwest's Petition should be denied.

2. In Interlocutory Order No. 04, the Commission held that AT&T's statutory claims against Qwest are barred under the state six-month limitations period.[2] The Commission also held, however, that AT&T could amend its complaint to pursue its breach of contract claim against Qwest and that the contract claim was subject to Washington's six-year statute of

[1] Because Qwest chose to include its substantive arguments in its Motion for Summary Determination and Dismissal of AT&T's Amended Complaint ("Motion"), AT&T will include its responses to the substantive arguments in that Motion here. As explained in AT&T's separate response to that Motion, the Motion is barred by Order No. 04, and thus the only way the Motion could even be considered would be if Qwest were first to prevail in its Petition for interlocutory review of Order No. 04.

[2] Interlocutory Order No. 04, ¶ 22.

limitations.[3] Desperate to avoid any ruling on the merits, Qwest now asks the Commission to reverse itself and instead apply a federal two-year limitations period from 47 U.S.C. § 415, which is part of the Communications Act of 1934 ("1934 Act"). The Commission should stand its ground.

3. It is well established that issues regarding the interpretation and enforcement of interconnection agreement terms and conditions, like AT&T's breach of contract claim, are governed by state contract law. This state law necessarily includes the state limitations period for breach of contract claims, just as it did when the Commission applied a state limitations period – at Qwest's insistence – to bar AT&T's other state-law claims.[4] That is sufficient reason to deny Qwest's Petition, but Qwest's argument also would fail even if one were to accept its theory that the breach of contract claim arises under federal law. The federal law under which the contract action purportedly would arise is the federal Telecommunications Act of 1996 ("1996 Act"), and the limitations period for claims arising under the 1996 Act is four years. Thus, AT&T's contract claim either arises under state law, as the Commission concluded, and a six-year limitations period applies, or else it arises under federal law, in which case a four-year limitations period applies. In either case AT&T's claim is timely, and Qwest's Petition must be rejected.

ARGUMENT

I. State Law Governs the Interpretation and Enforcement of Interconnection Agreements.

4. Qwest's main argument is that the Commission's authority to interpret and enforce interconnection agreements "derives" from the 1996 Act, and that the Commission must

[3] *Id.*, ¶¶ 27-28. AT&T has now filed an Amended Complaint alleging breach of contract.

[4] *See* Interlocutory Order No. 04, ¶ 22 (applying state six-month limitations period to state overcharge claims).

therefore look to the 1934 Act, specifically 47 U.S.C. § 415, to determine the limitations period for the breach of contract claim.[5] Qwest relies on the language in Section 415(b), which applies a two-year limitations period to "[all] complaints against carriers for the recovery of damages not based on overcharges."[6] Qwest also contends that ruling on the breach of contract claim will inevitably require the Commission to interpret federal law, thus supporting use of the federal limitations period.[7] These arguments fail for several reasons.

5. Most fundamentally, Qwest mischaracterizes the claim and the issue here. Yes, Qwest's conduct in failing to file interconnection agreements that gave discounts to favored CLECs violated the 1996 Act, specifically 47 U.S.C. § 252. Indeed, it is already settled that Qwest "willfully and intentionally violated" both state and federal law "by not filing, in a timely manner, its transactions with Eschelon and McLeodUSA relating to rates and discounts off of rates for intrastate wholesale services."[8] The issue raised by AT&T's Amended Complaint, however, is whether Qwest's conduct also breached its interconnection agreements with AT&T. As the Commission observed, "Complainants seek to enforce the most favored nation provision in their interconnection agreements (contracts) by achieving the benefit of the bargain for which they contracted."[9]

6. The Ninth Circuit and other courts have made clear that the enforcement and interpretation of interconnection agreements is a matter for state law, noting that "'the [interconnection] agreements themselves and state-law principles govern the questions of

[5] Qwest Motion, ¶¶ 6-7.

[6] *Id.*, ¶¶ 7, 9.

[7] *Id.*, ¶¶ 13-20.

[8] Order No. 21, Docket No. UT-033011, ¶ 29 (Feb. 28, 2005).

[9] Interlocutory Order No. 04, ¶ 27.

interpretation of the contracts and enforcement of their provisions.'"[10] These courts were well aware that interconnection agreements are entered into as a result of federal law and that state commission jurisdiction to interpret and enforce them arguably derives from the 1996 Act. Even so, however, they agreed that when it comes to interpreting and enforcing interconnection agreements (as opposed to evaluating an alleged violation of federal law itself), state contract law applies. As the Seventh Circuit put it, claims for actual violations of the 1996 Act or FCC rules and claims for breaches of interconnection agreements present "different kind[s] of problem[s]," with state law governing the latter.[11] In fact, Qwest agrees that "state law . . . provide[s] the relevant principles of contract interpretation."[12] As a result, cases like this one are state-law breach of contract cases, which do not implicate Section 415's limitations period for federal claims. Rather, as state-law claims, they naturally must be governed by the limitations period that Washington has established for breaches of contract.

7. This use of state law for basic contract enforcement makes perfect sense in the scheme of the 1996 Act. As many courts have recognized, the 1996 Act seeks to "replace a state regulated system with a market-driven system that is self-regulated by binding interconnection agreements."[13] This new, contract-based regime is consistent with the unique form of

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[10] *Pacific Bell v. Pac-West Telecomm, Inc.*, 325 F.3d 1114, 1128 (9th Cir. 2003) (quoting *Southwestern Bell Tel. Co. v. Public Utils. Comm'n*, 208 F.3d 475, 485 (5th Cir. 2000)). *See also Michigan Bell Tel. Co. v. MCImetro Access Transmission Servs., Inc.*, 323 F,3d 348, 355-56 (6th Cir. 2003) ("interpretation of an [interconnection] agreement is an authorized state commission determination under Section 252 . . . [and] federal courts have jurisdiction under Section 252 to review state commission interpretations for compliance with state law."); *Illinois Bell Tel. Co. v. Worldcom Technologies, Inc.*, 179 F.3d 566, 574 (7th Cir. 1999) ("A decision 'interpreting' an [interconnection] agreement contrary to its terms creates a different kind of problem – one under the law of contracts, and therefore one for which a state forum can supply a remedy."); *Global NAPS, Inc. v. Verizon New England Inc.*, 332 F. Supp. 2d 341, 360 (D. Mass. 2004) ("privately negotiated interconnection agreements are state-law contracts and a claim that an ICA has been violated or misinterpreted is a claim under state law.")

[11] *Illinois Bell*, 179 F.3d at 574; *see also Southwestern Bell*, 208 F.3d at 485 (declining "to determine contractual issues as a facet of federal law").

[12] Qwest Motion, ¶ 20.

[13] *Pacific Bell*, 325 F.3d at 1128.

cooperative federalism that Congress created in the 1996 Act, in which state commissions play a distinct role in the arbitration, approval, and interpretation and enforcement of interconnection agreements. The FCC itself has found that "a dispute arising from interconnection agreements and seeking interpretation and enforcement of those agreements is within the states' 'responsibility' under Section 252" of the 1996 Act.[14] The states fulfill that responsibility within the framework of state law, which necessarily must include the state limitations period.

8. Finally, Qwest's argument, that the genesis of the interconnection agreements in federal law makes them special and requires use of the federal limitations period, cannot be squared with the court decisions.[15] The mere fact that contracts may have been entered into as a result of federal law does not mean that every subsequent dispute about interpretation and enforcement of those contracts arises under that federal law. Indeed, the United States Supreme Court recently rejected a very similar argument. In *Empire HealthChoice Assurance, Inc. v. McVeigh*, 126 S. Ct. 2121, 2127, 2137 (2006), the Court held that a dispute over a federal health insurance contract that set forth details of a federal health insurance program created by federal statute and covering eight million federal employees was not a claim for violation of federal law. Similarly, the Seventh Circuit held that interpretation of specific interconnection agreement terms and conditions, even those designed to implement requirements of the 1996 Act, presented only a question of state contract law.[16]

[14] *Starpower Comms., LLC*, 15 FCC Rcd. 11277, ¶¶ 5-6 (rel. June 14, 2000).

[15] Qwest Motion, ¶¶ 15-16.

[16] *Illinois Bell*, 179 F.3d at 574.

II. Even if AT&T's Breach of Contract Claim Did Arise Under Federal Law, the Two-Year Limitations Period of Section 415 Would Not Apply.

9. Even if one assumed, *arguendo*, that claims for breach of interconnection agreements arise under federal law, Section 415 still would not apply. To the extent AT&T's contract claim could be said to arise under federal law, it would arise under the 1996 Act, not the 1934 Act (of which Section 415 is part). It is the 1996 Act that created interconnection agreements and established the states' role in approving and overseeing them, and the 1996 Act that includes the "most-favored nation" duty in Section 252(i). Interconnection agreements as we know them today did not previously exist. Yet, while the 1996 Act established a number of specific deadlines for arbitration and approval of interconnection agreements, it says nothing about any limitations period for claims arising under the 1996 Act, much less for claims of a breach of an interconnection agreement. Federal law (28 U.S.C. § 1658(a)) provides a catch-all limitations period for just such a situation: "Except as otherwise provided by law, a civil action arising under an Act of Congress enacted after the date of the enactment of this section may not be commenced later than 4 years after the cause of action accrues."[17] Recognizing that the 1996 Act contains no limitations period of its own, several courts have held that this four-year catch-all period applies to actions arising under the 1996 Act.[18] Because AT&T's complaint was filed

[17] *Verizon New England, Inc. v. New Hampshire Public Utils. Comm'n*, 2005 WL 1984452, *5 n.5 (D.N.H. 2005), citing *Pepepscot Indus. Park, Inc. v. Maine Cent. R.R. Co.*, 215 F.3d 195, 203 n.5 (1st Cir. 2000) ("Absent the existence of an explicit limitations period, civil claims that arise under federal statutes enacted after December 1, 1990 are subject to 28 U.S.C. § 1658(a) which imposes a four-year limitations period on such actions.").

[18] *Id.*; *City of Rancho Palos Verdes v. Abrams*, 544 U.S. 113, 124 n.5 (2005) ("Since the claim here rests upon violation of the post-1990 TCA [the 1996 Act], § 1658 would seem to apply."); *e.spire Comms. Co., inc. v. Baca*, 269 F. Supp. 2d 1310, 1320 (D.N.M. 2003) ("Because the Telecommunications Act was enacted after December 1, 1990, the four-year statute of limitations applies to the claims under the federal Telecommunications Act."); *Verizon Maryland Inc. v. RCN Telecom Servs., Inc.*, 232 F. Supp. 2d 539, 552-54 (D. Md. 2002); *Bell Atlantic-Pennsylvania, Inc. v. Pennsylvania Pub. Utils. Comm'n*, 107 F. Supp. 2d 653, 668 (E.D. Pa. 2000); *MCI Telecomms. Corp. v. Illinois Bell Tel. Co.*, 1998 WL 156674, *3-*5 (N.D. Ill. 1998). None of these cases has ever even considered Section 415 as a potential limitations period for claims arising under the 1996 Act.

within four years of the Commission-determined accrual date of July 15, 2002,[19] its contract claim would be timely even it arose under federal law.[20]

III. Qwest's Attempts to Justify the Use of Section 415 Fail.

10. Qwest argues that even if both the state six-year limitations period and Section 415's two-year period could apply, the latter would take precedence because it is more specific.[21] But that is not so. Section 415 is just a generic provision for certain claims arising under the 1934 Act, whereas the six-year period comes from a Washington statute that is specific to breach of contract actions, reflecting the state's policy that such actions should have a longer limitations period that almost all other types of claims. Thus, the state limitations period is the more specific and tailored to the specific type of claim at issue here.

11. Furthermore, Qwest's claim that Section 415 is designed to ensure national uniformity[22] is inapposite here, for such uniformity is only for actions to enforce the 1934 Act, not state-law actions under the new regime created by the 1996 Act. Congress did not purport to (and could not) use Section 415 to establish a limitations period that applies to any and all claims against telecommunications providers at both the state and federal levels. In addition, the 1996 Act is based on a model of cooperative federalism, with Congress authorizing significant action by the different state commissions and thus necessarily recognizing that the implementation of the 1996 Act, and the interpretation of interconnection agreements, would vary from state to

[19] Interlocutory Order No. 04, ¶ 20. AT&T filed its complaint in this case on November 4, 2005. AT&T maintains that its claims all accrued later than July 15, 2002, but will assume, *arguendo*, that the Commission's finding of that accrual date is correct, for purposes of this pleading only.

[20] Qwest cannot avoid the four-year limitations period of § 1658 by arguing that the 1996 Act is merely an amendment to the 1934 Act. Courts have already analyzed and rejected that argument, pointing out that the 1996 Act radically restructured and significantly added to telecommunications law, including by creating the entire interconnection-agreement regime in 47 U.S.C. §§ 251-52. *Verizon Maryland*, 232 F. Supp. 2d at 553-54; *Illinois Bell*, 1998 WL 156674, at *4-5.

[21] Qwest Motion, ¶ 8.

[22] *Id.*, ¶ 9.

state. And, of course, to the extent national uniformity of limitations periods is a concern, the four-year catch-all provision establishes such uniformity for cases under the 1996 Act.

12. None of the cases Qwest cites help its cause, either. Qwest first cites *Pavlak v. Church*, 727 F.2d 1425 (9th Cir. 1984) as applying Section 415's two-year limitation to a civil rights claim.[23] *Pavlak* is irrelevant here, for it involved a federal civil rights claim "arising from the same facts" as another federal claim under the 1934 Act.[24] The court thus borrowed the Section 415 limitations period, because there is no such period for federal civil rights claims. Here, by contrast, there is no basis to even consider borrowing a federal limitations period, because the cause of action arises under state contract law and state law already provides a directly applicable limitations period. And if a federal limitations period did have to be borrowed, it would be the four-year period in 28 U.S.C. § 1658(a).

13. Qwest also relies on *Cole v. Kelley*, 438 F. Supp. 129 (C. D. Cal. 1977),[25] but *Cole* held that the plaintiff's claims were barred by a three-year limitations period from another source, and only then added, in dicta and without explanation, that the plaintiff's claims also would be barred under Section 415's limitations period.[26] And while *Cole* also states that the Section 415 limitations period applies to actions "filed with the regulatory agency," that refers to the FCC, not state commissions.[27] Thus, *Cole* sheds no light on any of the considerations here.

[23] *Id.*, ¶ 10.

[24] 727 F.2d at 1427.

[25] Qwest Motion, ¶ 10.

[26] 438 F. Supp. at 145.

[27] *Id.* (citing *Ward v. Northern Ohio Tel. Co.*, 251 F. Supp. 6060 (N.D. Ohio 1966) (holding that Section 415 applied to actions in court as well as at the FCC)).

14. Qwest also cites *MFS International, Inc. v. International Telcom Ltd.*, 50 F. Supp. 2d 517 (E.D. Va. 1999).[28] That decision found state breach of contract and conversion claims to be barred by Section 415's limitations period. The case has no bearing here, however, for the basis for this ruling was the court's finding that the purported state-law claims were actually "based on the MFS [international] tariff," a tariff filed with and enforced by the FCC under the 1934 Act, and were merely "masquerading as state law claims."[29] Accordingly, the court found that the claims were in truth federal claims that did "arise under the [1934 Act]" and federal tariffing rules, and therefore were subject to Section 415. AT&T's breach of contract claim, by contrast, does not implicate any federal tariff or any contract that is filed with or overseen by the FCC. Furthermore, the *MFS* court's statement that Section 415(b) necessarily applies to state-law claims because it covers "all complaints against carriers for the recovery of damages not based on overcharges" is overly broad. For example, if AT&T were suing Qwest for a violation of state securities laws, no one would argue that Section 415(b) applies, despite its reference to "all complaints against carriers." Indeed, Qwest itself argued that the *state* limitations period applied to the state-law claims in AT&T's original Complaint, and the Commission agreed.[30]

15. Qwest's reliance on two state commission decisions is similarly misplaced. The Texas decision mistakenly assumes that since the authority to enforce interconnection agreements comes from federal law, so too must the limitations period.[31] As noted above, several federal courts have disagreed, finding that contract-interpretation disputes are questions for state law. Just as state law provided the limitations period for AT&T's other causes of action

[28] Qwest Motion, ¶ 11.

[29] 50 F. Supp. 2d at 520.

[30] *See* Interlocutory Order No. 04, ¶ 22 (applying six-month state limitations period). Notably, Qwest did not argue for Section 415's two-year period when it would have meant AT&T's claims would be timely.

[31] Qwest Motion, ¶ 11.

(which the Commission found to be barred), so too must it provide the period for the breach of contract claim.

16. In the Oregon decision that Qwest cites, the PUC found that AT&T's breach of contract claims regarding Qwest's unfiled interconnection agreements were barred by Section 415(b)'s two-year limitations period. The Oregon PUC found that the most-favored-nation provision in AT&T's agreements with Qwest "directly implicate[d] federal law."[32] That ruling misses the distinction between a claim for breach of contract and a claim for violation of the 1996 Act. While it is true, as Qwest has admitted, that it violated the 1996 Act, AT&T's claim here is that Qwest also violated its contractual obligations to AT&T. Regardless of whether the contract tracks or implements federal law, the fact is that it is a stand-alone, commercially negotiated document that serves as an independent source of AT&T's and Qwest's rights and obligations to one another. Parties memorialize these rights and obligations in a contract so they will have a sure means of enforcing them later – a breach of contract action. As demonstrated above, the courts have held that such actions are governed by state contract law, which logically must include its limitations period.[33]

17. Qwest also contends that the Commission will have to address numerous questions of federal law to resolve the breach of contract claim.[34] That misses the point. The ultimate question here is whether Qwest breached the terms of its negotiated interconnection agreements with AT&T, and Qwest has conceded that state law provides the rules of contract interpretation.[35] The Commission may (or may not) consult federal law in resolving that issue,

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[32] *Id.*, ¶ 12.

[33] Another reason to discount the Texas and Oregon decisions is that neither considered the federal four-year limitations period under 28 U.S.C. § 1658(a).

[34] Qwest Motion, ¶¶ 17-18.

[35] *Id.*, ¶ 20.

but that does not turn AT&T's claim into a federal claim or justify importation of a federal limitations period. Moreover, to the extent they apply at all under the terms of the interconnection agreements, the issues that Qwest claims are "federal" – whether AT&T "could comply with the terms and conditions and would have chosen to accept the terms and conditions" of the Eschelon and McLeodUSA secret discounts, and whether Qwest could show that providing the Eschelon and McLeodUSA secret discounts to AT&T would be either "technically infeasible" or "more costly" than providing them to Eschelon and McLeodUSA[36] – are mere factual issues; they do not present any special federal questions.[37]

CONCLUSION

18. The cases are clear, and Qwest concedes, that state contract law governs the interpretation and enforcement of interconnection agreements. This Commission has already held, in this case, at Qwest's urging, that state limitations periods apply to AT&T's state-law claims against Qwest. Qwest provides no basis to back up and change course now by importing a two-year limitations for federal claims to AT&T's straightforward breach of contract claim. Moreover, and even under Qwest's own theory that the claim is actually federal, a four-year

[36] *Id.*, ¶¶ 18-19.

[37] Qwest also argues that AT&T "do[es] not have any" claim for breach of contract because the Commission does not have general authority to award damages. Qwest Motion, ¶ 5. That argument fails because even if the Commission could not grant monetary relief (which AT&T does not concede, but which the Commission need not decide in order to deny Qwest's Motion), it still can determine that Qwest has breached its interconnection agreements, allowing AT&T to recover the overcharges in court. This falls within the "other or further relief" requested in the Amended Complaint.

limitations period would apply. Accordingly, the Commission should deny Qwest's Petition and Motion and allow AT&T to proceed on its Amended Complaint.

DATED this 8th day of August, 2006.

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