ORDER NO. 06-465

ENTERED 08/16/06

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,	)	ORDER
v.	)	
QWEST CORPORATION,	)	
Defendant.	)	

DISPOSITION: PETITION FOR RECONSIDERATION DENIED

On July 10, 2006, AT&T Communications of the Pacific Northwest, Inc. (AT&T), and TCG Oregon (Complainants) filed a petition for reconsideration, arguing that the six year statute of limitations under state law governing contracts should apply to violations of the interconnection agreements between the parties by Qwest Corporation (Qwest). On July 25, 2006, Qwest filed its response, arguing that because the Telecommunications Act gives the Commission the authority to enforce the interconnection agreements, its statute of limitations should apply. The petition is denied.

Applicable Law

An application for reconsideration may be made within 60 days of the service of an order. *See* ORS 756.561. The Commission may grant an application for reconsideration if there is new evidence which had been previously unavailable, a change in law or policy since the original order was issued, an error of law or fact which was essential to the decision, or other "good cause." OAR 860-014-0095(3).

Parties' Arguments

AT&T argues that the Commission erred when it "reformulate[d] AT&T's breach of contract claims" and

> disregard[ed] (i) the actual allegations set forth in the amended complaint, (ii) the nature of the interconnection agreement regime under the federal Telecommunications Act of 1996 ("1996 Act"), and (iii) the body of case law holding that matters concerning the construction or interpretation of interconnection agreements entered into pursuant to Section 252 of the 1996 Act present issues of state contract law.

Petition, 4-5. Because this Commission applied federal law to the claims, it held that the two year statute of limitations set forth in 47 USC § 415 applied to the claims, not the six year statute of limitations applicable under state contract law, as set forth in ORS 12.080. *See* Order No. 06-230.

AT&T asserts that the Commission should not have analogized AT&T's claims to those in *Marcus v. AT&T Corp.*, 138 F3d 46, 54 (2nd Cir 1998), and *MFS International, Inc., v. International Telecom Ltd.*, 50 F Supp 2d 517, 520 (ED Va 1999), because those involved violations of federal tariffs, which have the force of law. On the other hand, AT&T argues, its complaint claimed a breach of contract, which should be governed by state law. To its petition for reconsideration, AT&T attached a recent decision by the Washington State Utilities and Transportation Commission, which agreed that a breach of contract claim should be subject to the statute of limitations under state contract law, six years. *See AT&T v. Qwest*, Docket UT-051682; Order 04, 2006 Wash. UTC Lexis 266 (June 7, 2006).

As further support, AT&T cites a recent United States Supreme Court case for the proposition that breach of contract claims should be subject to state contract law. *See Empire HealthChoice Assur., Inc. v. McVeigh*, 547 US __, 126 S Ct 2121 (2006). In that case, a health insurance company sought repayment of funds from the estate of a claimant, arguing that the decedent was "in breach of the reimbursement provision of the Plan." *See* slip op at 7 (126 S Ct at 2129). The Court held that Congress had preempted state law for certain aspects of the health insurance contract, which was negotiated by the federal government on behalf of its employees pursuant to federal law. However, the reimbursement provision at issue in *Empire HealthChoice* was not preempted and did not implicate an identifiable conflict between federal policy and the operation of state law. *See* slip op at 12 (126 S Ct at 2132). The Court also held that "Empire's contract-derived claim for reimbursement is not a 'creature[] of federal law,'" and that "the reimbursement right in question * * * is not a prescription of federal law." Slip op at 15 (126 S Ct at 1234). Finally, the Court concluded, "This case * * * involves no right created by federal statute. * * * While the [Master Contract] provides for reimbursement, [the federal statute's] text itself contains no provision addressing the reimbursement or subrogation rights of carriers." Slip op at 16 (126 S Ct at 2135).

In opposition, Qwest argues that because the Commission gets its authority to review and enforce interconnection agreements from the Telecommunications Act, the statute of limitations found therein must apply to any

disputes related to the agreements. *See Pacific Bell v. Pac West Telecomm, Inc*., 325 F3d 1114, 1126 (9th Cir 2003); *Petition of SBC Tex*, Ruling on Motion to Dismiss, 2005 WL 2834183, at 2 (Tex PUC, Oct 26, 2005). Similar to arguments made in the initial proceeding, Qwest cited a Ninth Circuit case from 1984 in which the court held that the two year statute of limitations should apply to a civil rights claim involving a telecommunications carrier. *See Pavlak v. Church*, 727 F2d 1425, 1426-27 (9th Cir 1984). Qwest also challenges AT&T's interpretation of *Empire HealthChoice*, arguing (1) that the Supreme Court was not deciding how the contract language should be interpreted, but whether a contract-derived claim should be subject to federal law, and (2) that the statutory framework in *Empire HealthChoice* was more narrowly circumscribed than the Telecommunications Act of 1996.

Conclusions

It is not easy to determine when state law applies and when federal law applies to interconnection agreements. As the Seventh Circuit observed, in attempting to sort through the apparently overlapping state and federal jurisdiction:

> This allocation of authority has a potential to cause problems. Federal jurisdiction under § 252(e)(6) is exclusive when it exists. Thus every time a carrier complains about a state agency's action concerning an agreement, it must start in federal court (to find out whether there has been a violation of federal law) and then may move to state court if the first suit yields the answer 'no.' This system may not have much to recommend it, but, as the Supreme Court observed in *Iowa Utilities Board*, the 1996 Act has its share of glitches, and if this is another, then the legislature can provide a repair.

Illinois Bell Tel. Co. v. WorldCom Tech., Inc., 1999 U.S. App. LEXIS 20828, *25-26; 16 Comm. Reg. (P & F) 232 (1999) (amending original order at 179 F3d 566 (7th Cir 1999)), *cert den* 535 US 1107 (2002). The parties have not cited, and we could not find, a court which has definitively decided which statute of limitations should apply to violations of an interconnection agreement.

We are not persuaded that the violations alleged by AT&T are strictly breaches of a privately negotiated contract. The violations are predicated on rights conferred by 47 USC § 252(i), which requires filing of interconnection agreements with state commissions. The alleged violations are "'actions based on [federal law] masquerading as state law claims.'" Order No. 06-230, 6 (quoting *MFS International, Inc.*, 50 F Supp 2d at 520). Interconnection agreements are entered into pursuant to federal law, and have the force of federal law. *See Pacific Bell*, 325 F3d at 1127 (the Telecommunications Act mandates that "inter-connection agreements have the binding force of law.")

AT&T's citation to *Empire HealthChoice* is not to the contrary. In that case, the underlying provision, the reimbursement provision, was not derived from federal law, so resolution of any conflicts regarding that provision was properly placed in state court. In this case, AT&T is asserting a violation of Section 36 of the interconnection agreement between AT&T and Qwest, which states that Qwest will offer Network Elements to CLEC on an unbundled basis in accordance with the terms of the contract, Oregon law, and "the requirements of Section 251 and Section 252 of the Federal Act." By not filing interconnection agreements with the Commission, Qwest prevented AT&T from opting into those agreements, in violation of Section 252(i).

Based on this analysis, we find that there was no error in our conclusions of law in applying the statute of limitations from the Telecommunications Act to AT&T's claim against Qwest for a violation of Section 252(i), nor is there good cause to reconsider our earlier order.

ORDER

IT IS ORDERED that the Petition for Rehearing and Reconsideration of Order No. 06-230 is denied.

Made, entered, and effective AUG 16 2006.

Lee Beyer
Chairman

John Savage
Commissioner

Ray Baum
Commissioner

A party may appeal this order by filing a petition for review with the Court of Appeals in compliance with ORS 183.480-183.484.