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, Respondents	Docket No. UT-051682 QWEST CORPORATION'S REPLY TO AT&T'S OPPOSITION TO MOTION FOR SUMMARY DETERMINATION AND DISMISSAL, AND TO AT&T'S OPPOSITION TO QWEST'S PETITION FOR INTERLOCUTORY REVIEW OF ORDER NO. 04

I. INTRODUCTION

1 Pursuant to the procedural schedule in this case, Qwest Corporation ("Qwest") filed both a Motion for Summary Determination on the Amended Complaint and a Petition for Interlocutory Review of Order No. 04 on July 21, 2006. AT&T Communications of the Pacific Northwest, Inc., TCG Seattle, and TCG Oregon, (collectively, "AT&T" or "Complainants") filed a Petition for Review of Order No. 04 that same day. The parties answered, opposing each other's filings on August 8, 2006. The parties are also permitted to file replies.

2 Because the issues are so closely related, Qwest is filing this reply as a combined reply to the answers ("Oppositions") filed by AT&T on August 8, 2006. Qwest asks the

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Washington Utilities and Transportation Commission ("Commission") to dismiss the Amended Complaint on the basis of the applicable statute of limitations. The question of the limitations period applicable to a purported breach of contract claim was not appropriately before the Commission when it entered Order No. 04 because it was neither asserted in Complainants' complaint nor adequately raised or briefed by Complainants.

3 Now that issue has been raised and briefed in connection with Qwest's Motion for Summary Determination of the Amended Complaint, the Commission should apply the two-year limitation period in Section 415.[1] Section 415 is a specific limitations provision that applies to Complainants' alleged breach of contract claims based on violations of interconnection agreements. Based on the accrual date of Complainants' cause of action, those claims are barred.

4 Indeed, when it addressed the same claims in Oregon, the Oregon Public Utility Commission found that Section 415 applied to bar Complainants' claims based on the identical facts. Complainants' contentions concerning 28 U.S.C. § 1658 and the applicability of state law contract principles do not undermine the same conclusion that Section 415 applies here.

II. ARGUMENT

A. The Commission Should Find that Section 415 Applies as a Matter of Law

5 AT&T's argument in opposition to Qwest's Motion for Summary Determination is that:

> 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 limitations. That is now the law that governs this proceeding. Thus, unless and until the Commission reverses its Order No. 04 and holds that a different limitations period applies to AT&T's contract claim (which it should not,

[1] To the extent that such a result requires partial reversal of Order No. 04 with regard to that Order's discussion of the applicable limitations period, Qwest asks for that relief as well.

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for reasons discussed in AT&T's response to Qwest's petition for review of Order No. 04), Qwest cannot show that it "is entitled to judgment as a matter of law," and its motion for summary determination should be summarily denied.[2]

6 AT&T has failed to provide legal or factual support for its allegations. Where a party is asserting a defense, such as the "law of the case" doctrine, as AT&T appears to be here, that party bears the burden of establishing the necessary elements.[3] Complainants fail to establish the necessary elements of the defense.

7 Of course, as Complainants recognize, Qwest has asked the Commission to reverse Order No. 04 – should the Commission do so, any arguments regarding the "law of the case" will not apply. Indeed, even if the Commission simply clarifies that the language in Order No. 04 upon which Complainants rely was dicta, language unnecessary to granting AT&T permission to amend its complaint, that clarification alone would defeat any "law of the case" arguments.

8 Even if Complainants properly presented a defense based upon the law of the case doctrine, the doctrine would not apply. The law of the case doctrine generally refers to the binding effect that decisions have on further proceedings or to the principle that an appellate court will generally not re-decide the same legal issues in a later appeal of the same case.[4] The law of the case doctrine applies only to issues necessarily and actually decided.[5] The law of the case should not be applied "if it lays down or tacitly applies a

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2 AT&T Opposition to Qwest Motion for Summary Determination, ¶2.

3 *See e.g., Beagles v. Seattle-First Nat'l Bank*, 25 Wash. App. 925, 929 (1980) (stating that party asserting doctrine of collateral estoppel bears the burden of proving its elements); *Millar Dollarhide, P.C. v. Tal*, 2006 WL 1148158, at ¶ 15 (Okla. May 2, 2006) (stating that the party asserting the law of the case doctrine as a defense must establish its applicability).

4 *State v. Harrison*, 148 Wn. 2d 550, 562 (2003) (citing *Lutheran Day Care v. Snohomish County*, 119 Wn.2d 91, 113 (1992)).

5 18B Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 4478, at 664-67 (2d ed. 1984) (citing cases for the proposition that "[t]he actual-decision requirement means that dictum is not the law of the case, just as actual decision does not support issue preclusion unless decision was necessary to support the judgment.").

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rule of law which is clearly erroneous, and if to apply the doctrine would work a manifest injustice to one party, whereas no corresponding injustice would result to the other party if the erroneous decision should be set aside."[6]

9 The law of the case doctrine cannot apply here for the following reasons: *First*, the applicable limitations period for this breach of contract was not an issue that was necessary to the Commission's decision in Order No. 04, especially considering that Complainants had not even asserted it yet in a complaint. *Second*, as described in Qwest's Motion for Summary Determination and Dismissal and herein, application of a state law limitations period to a breach of contract claim arising under an interconnection agreement would be clearly erroneous as a matter of law.

10 When Complainants responded to Qwest's original motion for summary determination, Complainants had not even asserted a breach of contract claim, and only made a passing reference in a footnote that, "[i]f the Commission were to determine that the statutory causes of action are time barred – which they are not – AT&T and TWTC request leave to amend their Complaint to state a cause of action for breach of contract."[7] Complainants provided no legal authority to support their contention that they could bring a breach of contract claim for an alleged violation of an interconnection agreement. Complainants also did not contend that they asserted a breach of contract claim, and, indeed, in the footnote admitted that "AT&T and TWTC did not include a breach of contract cause of action in their Complaint."[8] Given this acknowledgement, Qwest briefly addressed the argument that the six-year statute of limitation applies to statutory claims for reparations based on RCW 80.04.240.[9] Although Qwest also asserted that

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6 *Folsom v. Cty of Spokane*, 111 Wash.2d 256, 264 (1988).

7 AT&T and TWTC Opposition to Qwest Motion for Summary Determination and Dismissal, at n. 19.

8 *Id.*

9 Qwest's Reply to the AT&T/Time Warner Opposition to Qwest's Motion to Dismiss, at ¶ 10.

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Complainants would be unable to establish a breach of contract claim if given leave to amend, Qwest emphasized that "[a]t this point. . . at most they have the claim they have brought, a claim for reparations, which is time barred under the statute of limitations."[10] Because the purported breach of contract claim was not properly presented by the Complainants in their Complaint or their pleadings, neither the Commission nor Qwest had reason to entertain hypothetical questions or issues raised in a footnote.

11 The Administrative Law Judge appropriately dismissed the applicability of the "six-year statute of limitations in RCW 4.16.040 [] to the *complaint*."[11] The Initial Order stated that it "would reject complainants' argument that the six-year statute of limitations for breach of contract *might apply to their cause of action*,"[12] which at the time consisted only of statutory claims. The Administrative Law Judge then turned to Complainants' request to amend the complaint: "Complainants offer no authority or support for their contention that the Commission could address a pure breach of contract action which would fall outside the scope of an interconnection agreement action. Allowing amendment of the complaint on that basis would be inappropriate without such support."[13]

12 When AT&T and TWTC petitioned the Commission for review of the Initial Order, Complainants did not ask the Commission to consider whether the Administrative Law Judge erred in declining to apply the *six-year* statute of limitations provided by RCW 4.16.040 to their statutory claims or to their hypothetical breach of contract claims.[14]

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[10] *Id.* at ¶ 11.

[11] Initial Order Granting Qwest's Motion for Summary Determination; Dismissing Complaint, Docket No. UT-051682, Order No. 3 at 12 (heading number 4) (emphasis added).

[12] *Id.* at ¶ 36 (emphasis added).

[13] *Id*.

[14] *See* AT&T and TWTC Petition for Administrative Review of Order No. 3.

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The substance of their argument was that the Initial Order erred because the "Complaint challenges the lawfulness of the rates Qwest charged AT&T and TWTC and triggers the two-year limitations period, not the six month limitation applied in the Initial Order."[15]

13 Only in a footnote did Complainants mention that Qwest's alleged conduct "also raises *potential* breach of contract claims."[16] Complainants did not otherwise make any argument or provide any support to substantiate this assertion on appeal; Complainants certainly made no argument in the body of their petition. To the contrary, Complainants informed the Commission that "it is not necessary for the Commission to address the concern because, at a minimum, the Complainants had two years to file their complaint to recover 'unlawful rates' under RCW 80.04.240."[17] This issue was simply not before the Commission for decision in Order No. 04. Thus, the Commission should clarify that it did not decide that issue in that order, and that reference to a six-year statute was merely dicta.

14 Even if the Commission may have been correct to allow Complainants the opportunity to amend their Complaint based on this analysis and to "pursue enforcement of their interconnection agreement as a contract claim," the Commission had no basis to then determine the applicable limitations period to a contract claim that had yet to be asserted. Statute of limitations is an affirmative defense that is required to be raised in response to claims asserted in a complaint.[18] The limitations question therefore was not necessary to allowing Complainants to amend their Complaint and therefore cannot be the law of the

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[15] *Id*. at ¶ 11.

[16] *Id*. at n.6 (emphasis added).

[17] *Id*.

[18] *Shoop v. Kittitas County*, 108 Wash. App. 388, n.7 (2001) ("It is well established that the running of a statute of limitations does not affect the court's jurisdiction; it is simply an affirmative defense that can be waived."); *see also* Wash. Sup. Ct. Civil R. 8(b),(c) (requiring that a party state "defenses *to each claim asserted*" and to "set forth affirmatively. . . statute of limitation).

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case based on the amended complaint.

15 Additionally, it would be erroneous as a matter of law to apply the six-year limitations period provided by Washington law for breach of contract claims to an action involving breach of an interconnection agreement arising under federal law. Federal, not state, law provides the Commission with jurisdiction to hear actions involving interconnection agreements and therefore it is Section 415, rather than a state law limitation period, that applies to Complainants' breach of contract action under an interconnection agreement.

16 For many of the reasons articulated in Qwest's Motion and herein, the Oregon Commission denied AT&T's motion for reconsideration and rejected AT&T's arguments that it should have applied a state law limitations period to its purported breach of contract claim based on alleged violations of an interconnection agreement.[19] Citing *Pacific Bell v. Pac West Telecomm, Inc.*, 325 F.3d 1114, 1126 (9th Cir. 2003), the Commission found that the alleged breach of contract violations were predicated on rights conferred by 47 U.S.C. § 252(i), and the Ninth Circuit held that "[i]nterconnection agreements are entered into pursuant to federal law, and have the force of law."[20] Thus, under Ninth Circuit precedent, the Commission was compelled to apply Section 415 to claims arising under an interconnection agreement because the claims were not "strictly breaches of a privately negotiated contract."[21] The Oregon Commission's analysis of precedential Ninth Circuit law squarely applies to the very same claims AT&T is attempting to bring before this Commission in Washington and similarly requires dismissal based on application of Section 415.

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[19] *AT&T Commc'ns of the Pac. NW, Inc. v. Qwest Corp.*, UM 1232, Order No. 06-465 (O.P.U.C. Aug. 16, 2006) (Attached as Exh. 1).

[20] *Id*. at 3.

[21] *Id.*

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B. Section 252(e)(6) has no bearing on the action before the Commission

17 Complainants attempt to find some basis to extend the limitations period beyond that afforded by Section 415, and in doing so they erroneously rely on a body of cases concerning the applicable limitations period to appeal state commission decisions to federal court pursuant to 47 U.S.C. § 253(e)(6). Based on these cases, they try to persuade the Commission that it should apply 28 U.S.C. § 1658 instead.[22]

18 Not only are these cases distinguishable, but they are also simply inapplicable given the procedural context here. Complainants would require the Commission to find that Congress repealed Section 415 by implication and to ignore well-accepted principles of statutory construction and interpretation.

19 Section 253(e)(6) states:

> In a case in which a State fails to act as described in paragraph (5), the proceeding by the Commission under such paragraph and any judicial review of the Commission's actions shall be the exclusive remedies for a State commission's failure to act. In any case in which a State commission makes a determination under this section, any party aggrieved by such determination may bring an action in an appropriate Federal district court to determine whether the agreement or statement meets the requirements of section 251 of this title and this section.

Importantly, Section 253(e)(6) permits "any party aggrieved" by a State commission determination to bring an action in federal court "to determine whether the agreement or statement meets the requirements of section[s] 251" or 252. Section 253(e)(6) does not provide an express time limitation within which appeals of commission decisions must be brought to federal court, and does not apply to claims being asserted in an original action, such as here.

20 Because Section 253(e)(6) lacks an express time limit, appeals of commission decisions

[22] *See* AT&T Opposition to Qwest's Petition for Review of Interlocutory Order No. 4, at ¶9 & n. 18.

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have raised questions concerning the applicable limitation period. Although Complainants represent that these cases stand for the proposition that a four-year limitation period applies to any actions or claim arising under the 1996 Act, that conclusion cannot be supported by a plain reading of any of the cases, and it cannot be harmonized with the Act.

21 In fact, each of the cases cited by Complainants is distinguishable because each involves the appeal of a commission action, rather than the commencement of an action. As a result, each of these cases is relevant only to the applicable limitation period for appeals under 253(e)(6), to which Section 415 clearly does not apply.

22 Thus, for example, the court in *Bell Atlantic-Pennsylvania, Inv. v. Pennsylvania Public Utility Commission*, 107 F. Supp.2d 653, 657, 668 (E.D. Pa. 2000), declined to apply Pennsylvania's rules of appellate procedure and dismiss WorldCom and AT&T's crossclaims against the Pennsylvania PUC, which were asserted pursuant to 47 U.S.C. § 252(e)(6). Because Section 252(e)(6) did not provide an express limitation and nothing else in the Act appeared to specify an appropriate limitation period, the court turned to "the federal default statute of limitations of four years" pursuant to 28 U.S.C. § 1658.[23]

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[23] The remaining cases cited by complainants are essentially the same. *e.Spire Communications, Inc v. Baca*, 269 F. Supp. 2d 1310, 1319 (D.N.M. 2003), similarly dealt with whether the New Mexico limitation, which provided a time limit for appeals from action under the state telecommunication, would apply to an appeal brought under 47 U.S.C. § 252(e)(6). Noting that the district court decisions in *Bell Atlantic-Pennsylvania* and *Verizon Maryland* applied Section 1658 to the appeal under Section 252(e)(6), the district court in *e.Spire* did so as well. *Verizon New England, Inc. v. New Hampshire Public Utils. Comm'n*, 2005 WL 1984452, *5 n. 5 (D.N.H. 2005), cited by Complainants, did nothing more. The New Hampshire PUC argued that Verizon's appeal of the PUC's order was not timely filed. Noting that the provision did not provide an explicit limitations period, the Court applied the four-year limitations provided by 28 U.S.C. § 1658(a).

While *MCI Telecommunications Corporation v. Illinois Bell Telephone Company*, 1998 WL 156674, at *3-*5 (N.D. Ill. Mar. 31, 1998) and *Verizon Maryland Inc. v. RCN Telecom Services, Inc.*, 232 F.Supp.2d 539, 553-54 (D.Md. 2002), attempted to articulate standards for applying Section 1658, neither of those standards has been adopted by the Ninth Circuit. Indeed, at least one district court in the Circuit held that Section 1658 would apply to "an act of Congress enacted" after 1990 but not to "an act of Congress amended after 1990." *See Davis v. State of Cal. Dep't of Corr.*, 1996 WL 271001, at *19-*20 (E.D.Cal. 1996). Under any of these analyses, however, the Commission would still be compelled to apply Section 415.

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23 Where a more specific statute exists, and applies by its exact terms to the action at issue, the more specific statute must be applied.[24] Even if the Commission wanted to entertain the applicability of Section 1658, as Complainants advocate, the Commission would necessarily be directed back to Section 415, with a specific, clearly defined limitations period particular to the telecom industry, over the general four-year statute of limitations contained in Section 1658.

24 The federal courts discussed above described Section 1658 as being the "default" or "general" statute of limitations. The plain language of Section 1658 makes that clear. Section 1658 provides that "[e]xcept 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." Section 415 provides the exception and applies to this action.

25 In this case, Section 415 is more specific that Section 1658, and it applies by its exact terms to the action brought by AT&T - an action involving claims under the Act.[25] In pertinent part, 47 U.S.C. § 415 provides:

> (a) All actions at law by carriers for recovery of their lawful charges, or any part thereof, shall be begun, within two years from the time the cause of action accrues, and not after.
>
> (b) All complaints against carriers for the recovery of damages not based on overcharges shall be filed with the

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[24] *See Guidry v. Sheet Metal Workers Nat'l Pension Fund*, 494 U.S. 365, 375 (1990) ("[I]t is an elementary tenet of statutory construction that '[w]here there is no clear indication otherwise, a specific statute will not be controlled or nullified by a general one. . . ."); *In re Price*, 353 F.3d 1135, 1139 (9th Cir. 2004) ("Generalized expressions of federal policy contained in other federal statutes do not take precedence over specific provisions of the Bankruptcy Code"); *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).

[25] 47 U.S.C. § 415; *see Pavlak v. Church*, 727 F.2d 1425, 1426-27 (9th Cir. 1984). Section 415 applies to proceedings in federal court, the FCC, or before a state commission. *See, e.g., Pavlak*, 727 F.2d at 1426-27 (holding that 47 U.S.C. § 415 applies to claims filed in district court as well as to complaints filed with the FCC); *SBC Tex.*, at 7-9 (finding that the two-year limitation applies to claims that a state commission is authorized to hear).

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> Commission within two years from the time the cause of action accrues, and not after, subject to subsection (d) of this section.
>
> (c) For recovery of overcharges action at law shall be begun or complaint filed with the Commission against carriers within two years from the time the cause of action accrues, and not after, subject to subsection (d) of this section, except that if claim for the overcharge has been presented in writing to the carrier within the two-year period of limitation said period shall be extended to include two years from the time notice in writing is given by the carrier to the claimant of disallowance of the claim, or any part or parts thereof, specified in the notice.

26 Section 415 does not deal with *appeals* of commission orders, and Complainants cannot seriously argue that their action would arise under Section 252(e)(6). As discussed in Qwest's Motion, the plain language of Section 415 reaches "all complaints against carriers for the recovery of damages not based on overcharges." That is the claim made by AT&T in this case, and the applicability of Section 415 is inescapable.

27 Complainants also cite to *City of Ranch Palos Verdes v. Abrams*, 544 U.S. 113, 124 n.5 (2005). In *Abrams*, the Supreme Court rejected a plaintiff's effort to evade the 30-day limitations period provided under 47 U.S.C. § 332(c)(7)(B)(v) by also alleging an essentially identical claim under 28 U.S.C. § 1983. The Supreme Court held "that the TCA – by providing a judicial remedy different from § 1983 in § 332(c)(7) itself – precluded resort to § 1983."[26]

28 Ignoring this holding and discussion, Complainants take the following quote out of context: "Since the claim here rests upon violation of the post-1990 TCA [the 1996 Act], § 1658 would seem to apply." This quote is mere dicta and inapposite for the Commission's purposes here. The Supreme Court was speculating about the potential limitations period for a § 1983 claim (if it were viable – which the Supreme Court

[26] *Id.* at 127.

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deemed it was not), given that Plaintiff trying to bring a § 1983 claim because Plaintiff's Telecommunications Act claim was already barred.

29 None of the courts considered the applicability of Section 415 to a Section 253(e)(6) appeal or otherwise. That makes sense, given that it would be difficult to fit an appeal of a commission order within the language of Section 415 – which relates to the commencement of actions, not the appeal of commission determinations. The lack of any discussion concerning Section 415 should also be unsurprising because none of those cases concerned claims solely amongst carriers, but rather challenges involving state commission orders.

30 A more analogous case then is *US West Inc. v. Business Discount Plan*, 196 F.R.D. 576, 588 (D. Colo. 2000), where the Court dismissed one of plaintiff's claims, alleging violation of 47 U.S.C. § 258 (a provision created by the 1996 Act), because plaintiffs' slamming claim sought recovery of damages not based on overcharges and therefore Section 415(b) applied to preclude the claim. In sum, Complainants' assertion is untenable. Section 415, not Section 1658, provides the applicable limitation period to Complainants' breach of contract claims.

31 Complainants' position that Section 415 does not apply disregards numerous tenets of statutory interpretation and construction and the savings clause provided by Congress. When interpreting a statute, "[a] court must endeavor to see a statute as a whole, not to construe statutory sections or phrases in isolation."[27] Without "a clearly expressed congressional intention," a court should not find a "repeal[] by implication."[28] The court may not read an amendment to one section of a statute as an amendment to an entirely

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[27] *GTE NW., Inc. v. Nelson*, 969 F. Supp. 654, 656 (W.D. Wash. 1997).

[28] *Branch v. Smith*, 538 U.S. 254, 273 (2003).

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different section of the statute in the absence of any statutory justification.[29] When Congress repeatedly amends only some portions of a statute, one must infer that it intends no change to the law of unamended portions.[30]

32 Congress clearly directed that the Telecommunications Act of 1996 be an amendment to the Communications Act of 1934.[31] And it is indisputable that the Telecommunications Act refers to Title 47, Chapter 5 of which Section 415 is a part.[32] If Congress wanted to amend, repeal, or limit Section 415, it could have easily done so. Instead, Congress provided a savings clause stating "[t]his Act and the amendments made by this Act shall not be construed to modify, impair, or supersede Federal, State, or local law unless expressly so provided in such Act or amendments." Complainants' argument fails to read the Act as a whole and requires repeal or amendment by implication, without any statutory justification. Complainants point to no express provisions and otherwise provide no explanation how to reconcile their arguments with these well-accepted commands of statutory interpretation or construction or the 1996 Act's Savings Clause. For all these reasons, Complainants' effort to convince the Commission that Section 1658 applies must fail.

C. Complainants Misstate the Applicability of State Law

33 Contrary to Complainants' assertions, it does not at all follow that application of state law contract principles "necessarily includes the state limitations period for breach of contract

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[29] *Rotec Indus., Inc. v. Mitsubishi Corp.*, 215 F.3d 1246, 1258 (Fed. Ct. 2000) ("If Congress wanted to amend [35 U.S.C.] § 271(f)(2), as it amended § 271(a), it could have easily done so.").

[30] *Chelette v. Harris*, 229 F.3d 684, 686 (8th Cir. 2000); *Am. Cas. Co. of Reading, Pa. v. Nordic Leasing, Inc.*, 42 F.3d 725, 732, n.7 (2d Cir.1994) ("Where sections of a statute have been amended but certain provisions have been left unchanged, we must generally assume that the legislature intended to leave the untouched provisions' original meaning intact.")

[31] *See Iowa Utils. Bd.*, 525 U.S. at 377.

[32] *Metrophones Telecommunications, Inc. v. Global Crossing*, 423 F.3d 1056, 1061 n.1 (9th Cir. 2005).

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claims."[33] Complainants' arguments about the applicability of state law contract principles are wrong. While state law may provide the relevant principles of contract interpretation for the Commission to apply in interpreting interconnection agreements,[34] it does not follow that the Commission may disregard Section 415 of the Act and attempt to proceed under a state statute of limitations for contract actions when enforcing an interconnection agreement.

34 In the first instance, the Commission's power derives from the Act, not state law. As the Commission made clear and as developed in Qwest's Motion for Summary Determination, the Commission's authority to hear disputes involving interconnection arguments derives from RCW 80.36.610, which expressly authorizes the Commission to take action "as permitted or contemplated for a state commission under the federal telecommunications act of 1996, P.L. 104-104 (110 Stat. 56)."

35 Second, based on a straightforward application of the Rules Enabling Act, the courts and Commissions properly borrow contract principles from state law but apply Section 415 as the appropriate limitation period when exercising authority under the Act. The Rules Enabling Act states: "The laws of the several states, *except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide*, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases

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[33] AT&T's Opposition to Qwest's Petition for Interlocutory Review of Order No. 4 at ¶ 3.

[34] Complainants misstate applicable legal precedent and fail to point the Commission to contrary language in the very cases Complainants cite. *See* Reply, at ¶ 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 interpretation of the contracts and enforcement of their provisions.'"). Although *Pacific Bell* noted that at least one court stated that state law principles apply, the Ninth Circuit did not expressly adopt those decisions or that principle, emphasizing instead that the Commission's action, as characterized by the lower court, was "inconsistent with the CPUC's weighty responsibilities of contract interpretation *under § 252*." *Pac. Bell*, 325 F.3d at 1128. Notwithstanding this language that shows that the court proceeded under federal law, Complainants represent to the Commission in their opposition that the Ninth Circuit in *Pacific Bell* "made clear" that the issue is a matter of state law, which is plainly wrong.

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where they apply.[35] Congress clearly provided that Section 415 provide the rule of decision concerning the Commission's jurisdiction and the timing of Complainants' action.[36]

36 Complainants' reliance on *Empire Healthchoice Assurance, Inc. v. McVeigh*, 126 S. Ct. 2121 (2006), in support of their arguments is unavailing. *McVeigh* involved construction of the Federal Employees Health Benefits Act ("FEHBA"), and is inapposite to this case in two ways. First, contrary to Complainants' interpretation, the Supreme Court in *McVeigh* did not hold "that a dispute over a federal health insurance contact that set forth details of a federal insurance program created by federal statute. . . was not a claim for violation of federal law."[37] Second, the jurisdictional statute under FEHBA was far more circumscribed than Section 415 of the Act.

37 Although FEHBA authorized the Office of Personnel Management ("OPM") to contract with Blue Cross Blue Shield ("Blue Cross") to provide health insurance to federal employees, the terms of the master contract were not at issue.[38] Rather, the issue was whether Blue Cross could bring suit in federal court to recover from a beneficiary under the terms of an ordinary health insurance contract between Blue Cross and the beneficiary.[39] The Supreme Court found that the "contract-derived claim for reimbursement is not a 'creature of federal law,'" and never stated, as Complainants insist, that the contract between the insurance carrier and the beneficiary was a "federal health insurance contract."[40] These contracts certainly did not "set forth details of a

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35 The Rules of Decision Act, 28 U.S.C. § 1652, enacted as part of the Judiciary Act of 1789 (emphasis added).

36 *SW. Bell Tel. Co. v. Connect Commc'ns Corp.*, 225 F.3d 942, 947 (8th Cir. 2000) ("while Congress has chosen to retain a significant role for the state commissions, the scope of that role is measured by federal, not state law.").

37 *See* AT&T's Opposition to Qwest's Petition for Interlocutory Review of Order No. 4, at ¶ 8.

38 *See McVeigh,* 126 S. Ct. at 2126-27, and 2133-34.

39 *Id.* at 2133-34.

40 *Id.* at 2134.

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federal health insurance program" but rather contained common provisions found in typical health insurance contracts.

38 In contrast here, as Qwest made clear in its motion, interconnection agreements are mandated by federal law, are not the product of ordinary contract negotiations, and are not treated as ordinary private contracts arising under state law.[41]

39 The second key distinction in *McVeigh* on which the Supreme Court placed great weight was the fact that FEHBA's jurisdictional provision, 5 U.S.C. § 8912, extended federal jurisdiction to civil actions only against the United States and that Congress had "considered jurisdictional issues in enacting FEHBA [,] . . confer[ring] jurisdiction where it found it necessary to do so."[42] As the Court commented, "[h]ad Congress found it necessary or proper to extend federal jurisdiction further, in particular, to encompass contract-derived reimbursement claims between carriers and insured workers, it would have been easy enough to say so."[43]

40 In contrast, Congress expressly considered the jurisdictional issues when enacting the Act. Congress intended that Section 415 reach "all complaints against carriers for the recovery of damages not based on overcharges," whether in federal court, before the FCC, or in front of a state commission.[44] Rather than being comparable to FEHBA, Section 415 is more closely analogous to the statutory scheme embodied in the Federal Tort Claims Act ("FTCA"). While the FTCA looks to state law for the applicable substantive tort law, "Congress has specifically provided a federal limitations period in 28 U.S.C. §§ 2675(a) and 2401(b), and the interpretation of that limitation is a matter of

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41 *See* Qwest's Motion for Summary Determination and Dismissal, at ¶¶ 12-19.

42 *McVeigh,* 126 S. Ct. at 2134.

43 *Id.* at 2134-35.

44 *See* Motion at ¶ 8.

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federal law."[45] *Bailey v. United States*, 642 F.2d 344, n.1 (9th Cir. 1981). Similarly here, Congress enacted a clear limitations period in Section 415 of the Act, and its two-year limitation period controls the Commission's jurisdiction and the timing of Complainants' action. Complainants erroneously conflate application of state law contract principles with application of jurisdictional limits, yet provide no legal authority. Given the similarities, it is appropriate for the Commission to follow the Ninth Circuit in *Bailey* and find that Complainants "are mistaken in arguing that state law governs the jurisdictional question in this case."[46]

41 In sum, Complainants misunderstand the relevance of state law. Complainants claims are not mere state law claims, as illustrated by Judge Johnson's discussion in *Contact Communications v. Qwest Corporation*, 246 F. Supp.2d 1184, 1189-90 (D. Wyo. 2003), where the Court refused to allow the plaintiff to "avoid dismissal simply by characterizing its TCA claims as state law violations":

> The TCA requires that the parties provide for reciprocal compensation in the Interconnection Agreements. Thus, the predicate acts underlying the state breach of contract claims all arise out of purported violations of Qwest's obligations under the TCA.

Although Judge Johnson dealt with the court's appellate jurisdiction to review state commission decisions under 47 U.S.C. § 252(e)(6), the same reasoning applies to the Commission's original jurisdiction to hear claims for damages against a carrier under Section 415. The Commission's jurisdiction does not change whether Complainants attempt to cast their claims as violations of federal law or state law.[47] To the extent that Complainants' claims rely on alleged breaches of interconnection agreements, the Commission is compelled to apply Section 415 to these claims.

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45 *Bailey v. United States*, 642 F.2d 344, n.1 (9th Cir. 1981)

46 *Id.*

47 *Contact*, 246 F. Supp.2d at 1189-90.

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III. CONCLUSION

42 For all the above reasons, Qwest requests an order of this Commission reversing or clarifying Order No. 04 with regard to the applicability of a six-year statute of limitations and granting Qwest's Motion for Summary Determination and Dismissal based on the application of 47 U.S.C. § 415 to Complainants' Amended Complaint.

DATED this 22nd day of August, 2006.

QWEST

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