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November 8, 2006

VIA EMAIL & FEDERAL EXPRESS

Ms. Carole J. Washburn, Executive Secretary
Washington Utilities & Transportation Commission
1300 S. Evergreen Park Drive SW
P.O. Box 47250
Olympia, WA 98504-7250

Re: *AT&T v. Qwest*, Docket No. UT-051682

Dear Ms. Washburn:

On October 30, 2006, AT&T filed a straightforward notice of supplemental authority in which it drew to the Commission's attention, without extensive argument, a recent decision from the United States Court of Appeals for the Eighth Circuit, *Connect Communications Corp. v. Southwestern Bell Tel. L.P.*, ___ F.3d ___, 2006 WL 3040611 (8th Cir. Oct. 27, 2006), that bears on significant issues in this case. On November 3, 2006, Qwest responded to AT&T's notice with what amounts to a three-page, single-spaced supplemental brief in which it argues in detail why it believes that the Eighth Circuit decision does not apply. In the interest of fairness and to avoid a situation in which the Commission has the benefit of argument on an issue only from one side in the case, AT&T respectfully submits for the Commission's consideration the following response to Qwest's November 3 submission.

In endeavoring to distinguish *Connect*, Qwest contends that "[f]ederal law speaks clearly" to the issues in this case. 11/3/06 letter at 2. But Qwest is wrong about what federal law says. AT&T's claim in this case seeks interpretation and enforcement of interconnection agreements. The federal law that "speaks clearly" to the matters at issue here is Section 252(a)(1) of the 1996 Act. As Section 252(a)(1) itself states – and as every court to have construed that provision has recognized (see, *e.g.*, *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 371-73 (1999); *Verizon Maryland v. Pub. Serv. Comm'n of Md.*, 535 U.S. 635, 638 (2002)) – parties may negotiate terms and conditions of their interconnection agreements "without regard"

to the requirements of the Act. AT&T claims that its agreements with Qwest give AT&T rights to the same prices as other carriers for substantially the same products and services as a matter of state contract law, irrespective of – that is, "without regard to" – whatever rights AT&T might have under federal law. Contrary to Qwest's assertion (and the Oregon Commission's conclusion), the Eighth Circuit (in *Connect*), the Ninth Circuit (in *Pacific Bell*), the Tenth Circuit (in *Brooks Fiber*), and several other circuits (including the Fifth, Sixth, and Seventh Circuits) have held that as to interconnection agreements, "the Agreements themselves and state law principles govern the questions of interpretation of the contracts and enforcement of their provisions." *Pacific Bell v. Pac-West Telecomm, Inc.*, 325 F.3d 1114, 1128 (9th Cir. 2003). Qwest's contention that federal law somehow transforms clearly state law issues relating to negotiated provisions of interconnection agreements into federal issues is incorrect, for Congress clearly intended to permit parties to structure the terms of their interconnection relationships "without regard" to the Act, including Sections 251 and 252. The Eighth Circuit in *Connect* has joined the virtually unanimous chorus that recognizes this and holds as a consequence that claims, like AT&T's here, that seek the interpretation and enforcement of interconnection agreements arise under and raise issues under state contract law.

Qwest appears to suggest that there is a different rule for interconnection provisions that track or incorporate provisions of the federal Act or FCC rules implementing the Act. If that is in fact what Qwest is suggesting, it is dead wrong. In the *Brooks Fiber* case (*Southwestern Bell Tel. Co. v. Brooks Fiber Communications of Oklahoma, Inc.*, 235 F.3d 493, 495, 499 (10th Cir. 2000)), the contract provision in question tracked the language of the FCC that spelled out the requirements of Section 251(b)(5) of the 1996 Act. The court nevertheless had no difficulty concluding that "[t]he Agreement itself and state law principles govern" the interpretation and enforcement of that provision. The Eighth Circuit in *Connect* confronted the identical provision and like the Tenth Circuit had no difficulty concluding that "the Agreement[] [itself] and state law principles" govern the provision's interpretation and enforcement. These courts thus join the Seventh Circuit's express holding that the interpretation and enforcement of provisions of interconnection agreements that "precisely track the [1996] Act" present a question of state contract law, not a federal claim under the 1996 Act. *Illinois Bell Tel. Co. v. WorldCom Technologies, Inc.*, 179 F.3d 566, 573-74 (7th Cir. 1999).

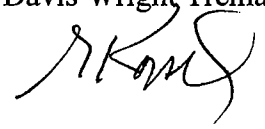
AT&T also calls to the Commission's attention the status of an Oregon state court proceeding, *AT&T Communications of the Pacific Northwest, Inc. v. Qwest Corp.*, No. 0607-07247 (Or. Cir. Ct.), in which AT&T has filed a complaint seeking relief under state-law created causes of action for Qwest's misconduct in charging certain carriers significantly less than it charged AT&T for certain telecommunications products and services. Qwest moved to dismiss that complaint, asserting that AT&T's state law claims should be viewed as federal claims; that the Court should then apply the federal Communications Act two-year statute of limitations to these claims and find them time-barred; and that, in the alternative, the court should find AT&T collaterally estopped by a decision of the Oregon Public Utilities Commission to deny that its state law claims should be viewed as federal claims and therefore time-barred. See Qwest Memorandum in Support of Its Motion to Dismiss at i (Table of Contents) (attached as Exhibit

1). On October 27, 2006, the Oregon court heard argument, and on November 2 it issued a written order (attached as Exhibit 2) denying Qwest's motion to dismiss in its entirety, thereby necessarily rejecting all of Qwest's arguments. At the same time, the court allowed AT&T to amend its complaint going forward. Qwest's attempt to prevail here on the very same arguments likewise should be rejected.

Please contact me if you have any questions regarding this submission.

Very truly yours,

Davis Wright Tremaine LLP



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