STATE OF IOWA

DEPARTMENT OF COMMERCE

UTILITIES BOARD

IN RE: AT&T COMMUNICATIONS OF THE MIDWEST, INC., AND TCG IOWA, INC., Complainants, v. QWEST CORPORATION, Respondent.	DOCKET NO. FCU-06-51

ORDER GRANTING MOTION TO DISMISS

(Issued December 4, 2006)

INTRODUCTION AND SUMMARY

On August 28, 2006, AT&T Communications of the Midwest, Inc., and TCG Iowa, Inc. (collectively, Complainants), filed a complaint against Qwest Corporation (Qwest). Complainants allege that Qwest entered into interconnection agreements prior to 2002 that should have been filed with the Board and made available to all competitive local exchange carriers (CLECs), but were not. Complainants allege that Qwest's actions were a breach of the contracts (interconnection agreements) between Complainants and Qwest; that the failure to file the agreements was a violation of the Board's rules, specifically 199 IAC 38.7(4); and that Qwest's actions amounted to common law fraud. Complainants allege jurisdiction based on various

state statutes and ask the Board to set the matter for hearing; find that Qwest's interconnection rates charged to Complainants were unlawful and discriminatory; order Qwest to pay damages to Complainants; order Qwest to refund all overcharges to Complainants, plus interest; and for such other relief as the Board may find appropriate.

On September 18, 2006, Qwest filed a motion to dismiss the complaint, arguing the complaint is grounded in federal law and therefore the two-year federal statute of limitations (47 U.S.C. § 415) applies. Qwest also argues that collateral estoppel (based on a decision by the Oregon Public Utility Commission (PUC)) and res judicata (based on the Board's actions in 2002 with respect to these same agreements) both require that the complaint be dismissed.

On October 16, 2006, Complainants filed a pleading suggesting that this matter should be stayed because they have filed the same claims and issues in state court (removed by Qwest to federal court) and there is no need for the Board to expend resources on this docket at this time. In the alternative, Complainants opposed Qwest's motion to dismiss, arguing that § 415 does not apply to the state law claims presented in the complaint, that the Oregon PUC's decision is not entitled to preclusive effect, and that res judicata does not apply because the scope of the Board's 2002 investigation was narrow and AT&T could not have presented its current claims in that docket.

On October 30, 2006, Qwest filed an opposition to the suggested stay and a reply to the response to its motion to dismiss. With respect to the stay, Qwest argues that it is entitled to dismissal at this time. Qwest also points out that AT&T can dismiss the Board proceedings on its own if it does not want to proceed with the case.

In its reply in support of the motion to dismiss, Qwest argues that the federal statute of limitations applies because the operative facts in this matter are governed by federal law. Qwest repeats its arguments that the Oregon PUC decision is preclusive and that res judicata applies, noting that AT&T could have raised these issues in the Board's 2002 proceeding, but did not.

On November 7, 2006, Complainants filed a response to Qwest's reply, including new authority in the form of a decision issued October 27, 2006, by the Eighth Circuit Court of Appeals. Complainants argue the new authority supports their position that the federal statute of limitations does not apply.

The various arguments and authorities will be described in greater detail below. The Board will grant the motion to dismiss on the basis of res judicata. There is nothing in this case that could not have been presented in the Board's 2002 docket dealing with the same facts. AT&T should not be permitted to split its claim in this manner.

BACKGROUND FACTS FROM 2002 PROCEEDING

On February 27, 2002, AT&T Corporation (AT&T) filed a letter with the Board alleging that Qwest had entered into a series of secret agreements granting preferential treatment to some CLECs, specifically Covad Communications Company (Covad) and McLeodUSA Incorporated (McLeodUSA). After considering various filings by Qwest, on April 1, 2002, the Board issued an order docketing AT&T's complaint as AT&T Corporation vs. Qwest Corporation, Docket No. FCU-02-2. The Board found it would be most efficient to address the legal issues first, before investigating any fact issues, and established a briefing schedule to let the parties address the scope of the obligation to file interconnection agreements pursuant to federal law.

On May 29, 2002, the Board issued an order defining the scope of the filing obligations. The Board tentatively found that Qwest had violated 47 U.S.C. §§ 251(c) and 252(a) through (i) and 199 IAC 38.7(4) by failing to file certain interconnection agreements with the Board. The Board gave the parties 20 days to file a request for hearing if any party disagreed with the Board's tentative findings; if no request for hearing was filed, the tentative findings would become the final, binding decision of the Board.

No request for hearing was filed and the tentative findings became final.

The unfiled agreements were separate agreements that Qwest entered into with Covad and McLeodUSA. In each case, Qwest offered the CLEC certain terms

and conditions that were more favorable than it offered to other CLECs. In return for its special agreement, Covad agreed to withdraw its opposition to the proposed merger between US WEST Communications, Inc., and Qwest. The Board's order does not say what McLeodUSA exchanged in return for favorable treatment in two separate unfiled agreements.

AT&T's status in Docket No. FCU-02-2 was different in some respects. AT&T did not file a normal complaint against Qwest, but instead filed a letter asking the Board to initiate a complaint. While the docket was pending, it appears AT&T may not have conducted any discovery of its own; instead, it filed a motion asking the Board to issue subpoenas to Qwest in the Board's own name, rather than a subpoena that would permit AT&T to conduct its own discovery. In other words, AT&T tried to participate in the docket in an indirect manner, although it did file a brief and other pleadings as a party and it was named as a party in the caption of the docket.

THE 2006 COMPLAINT

As noted above, Complainants filed a new complaint on August 28, 2006, seeking refunds and damages associated with the unfiled agreements. Briefly, Complainants say they had a contractual right to opt into the same terms and conditions that Qwest was offering to Covad and McLeodUSA, but because the agreements were not filed with the Board as required, they were unable to opt into the more favorable terms. Complainants say the difference between what they paid

to Qwest and what they would have paid Qwest under the more favorable terms is in excess of $1,675,000.

The first count of the complaint is for breach of contract. At least one of Complainants' contracts with Qwest included a clause that required Qwest to make available to TCG the rates, terms, and conditions of any other interconnection agreements to which Qwest was a party. Both agreements included a warranty from Qwest that it would provide Complainants with nondiscriminatory access to unbundled network elements. Complainants allege Qwest has violated these clauses and others.

The second count of the complaint is for a violation of 199 IAC 38.7(4), which requires that all interconnection agreements be filed with the Board. The Board has already found that Qwest violated this rule. Complainants allege that as a result of Qwest's violations they were injured in their ability to compete profitably in Iowa markets, so they have lost profits in addition to increased costs.

Count three of the complaint alleges common law fraud. Complainants assert Qwest had an affirmative duty to apprise them of the existence of the unfiled agreements by filing them as required by law and that the existence and content of the agreements were material facts.

Complainants ask that the Board grant them the following relief:

1. Initiate a formal proceeding;
2. Investigate the complaint;

3. Set the case for hearing;

4. Give notice as appropriate;

5. Find Qwest's rates and charges to Complainants to be discriminatory and in violation of law;

6. Award Complainants damages no less then the difference between what they paid and what they should have paid to Qwest;

7. Order a refund plus interest of all of Qwest's overcharges to Complainants; and

8. For such other relief as the Board deems just.

QWEST'S MOTION TO DISMISS

On September 18, 2006, Qwest filed a motion to dismiss the complaint. Qwest says the complaint is barred by the federal statute of limitations, collateral estoppel, and res judicata.

According to Qwest, the relevant federal statute of limitations is 47 U.S.C. § 415, which sets a two-year limit. Here, the issue was first raised by AT&T in its February 27, 2002, letter to the Board. That resulted in an order on May 29, 2002, defining the interconnection agreements that must be filed with the Board, notifying Qwest that it had violated state and federal law, and giving Qwest 60 days to file any additional unfiled agreements. The parties, including AT&T, were also given 20 days to request a hearing if they thought one was required for any reason.

On July 29, 2002, Qwest filed 11 agreements that it believed fit within the new definition, along with 19 more agreements that Qwest thought were not within the

new definition, but arguably could be. Comments on the filing were due August 19, 2002; AT&T filed a statement indicating it did not have time to review the agreements but had no objection to the filing. On August 26, 2002, the Board found the 19 extra agreements were not interconnection agreements and did not have to be filed with the Board.

Now, over four years later, Complainants seek to pursue claims arising from the same facts as the Board considered in Docket No. FCU-02-2 in 2002. Qwest claims this action is barred by § 415.

In support of its collateral estoppel claim, Qwest points out that the Oregon PUC recently issued an order (May 11, 2006) in a similar matter finding that Complainant's claims rested on alleged violations of federal law and are therefore barred by § 415. This order was affirmed on rehearing on August 16, 2006. Qwest says the Complainants chose to file in Oregon first, received an adverse ruling there, and are now forum-shopping in hopes of receiving a more favorable ruling.

In support of its res judicata claim, Qwest argues that AT&T initiated the Board's review of the unfiled agreements in 2002, based on the same operative facts as are presented in the 2006 complaint. Claim preclusion under the doctrine of res judicata prohibits parties from splitting or trying claims in a piecemeal fashion. A party must litigate all matters arising out of a single transaction at one time and not in separate actions. Tigges v. City of Ames, 356 N.W.2d 503, 509 (Iowa 1984). In order to invoke claim preclusion, Qwest must show that (1) the parties in the first and

second action are the same, (2) the claim in the second suit could have been fully and fairly adjudicated in the first action, and (3) there was a final judgment on the merits in the first action. Iowa Elec. Light & Power Co. v. Lagle, 430 N.W.2d 393, 397 (Iowa 1987); Penn v. Iowa State Bd. of Regents, 577 N.W.2d 393, 398 (Iowa 1998) (claim preclusion bars all matters actually determined in the first action and all relevant matters that could have been determined).

Here, Qwest says that all three elements are satisfied. AT&T and Qwest were parties to the first action; the Complainants' current claims could have been fully and fairly adjudicated in the first docket; and the Board issued a final order on the merits.

AT&T'S SUGGESTION THAT MATTER BE STAYED AND ALTERNATIVE RESISTANCE TO MOTION TO DISMISS

On October 16, 2006, Complainants filed a "suggestion" that the Board should stay this proceeding because they have filed the same claims and issues in a parallel court case. Specifically, Complainants state that they have filed the same complaint in state district court. Qwest subsequently had the case removed to federal court on the basis of diversity of citizenship and alleged federal question jurisdiction. Complainants did not contest removal based on diversity, but they dispute the claim of federal question jurisdiction.

Complainants say they sued in court because they can be awarded damages there, "but it is unclear whether the Board has the authority to adjudicate AT&T's claims and award such damages." (Suggestion at page 1.) They say they filed the

complaint only as a protective measure, in case the court were to require that some of the claims to be presented to the Board in the first instance. They argue that the Board should stay this docket to see what action the court takes.

In the alternative, Complainants filed their opposition to the motion to dismiss. They argue that each count of the complaint (for breach of contract, violation of Board rule, and fraud) clearly arises under state law, not federal law, so the federal statute of limitations does not apply. They argue collateral estoppel does not apply to the Oregon PUC decision because it is only an unreviewed decision by another state's public utility commission. Moreover, they note that the Washington Utilities and Transportation Commission recently ruled the opposite way. Finally, they argue Qwest's res judicata argument fails because the Board limited the scope of the investigation in Docket No. FCU-02-2.

The state-vs.-federal law and collateral estoppel issues will be discussed in greater detail below, in connection with some more recent authority included in a subsequent filing. At this point, the Board will focus on the res judicata issue.

Complainants argue that they could not have brought their current claims in Docket No. FCU-02-2 because that docket "was a Board-initiated investigation." (Suggestion at page 20.) As such, "it was therefore the Board, not AT&T, that determined the scope of the proceeding. And that scope was narrow." (Id.) Complainants say the earlier docket was "confined to the legal issue of what type of agreement is required to be filed, and did not consider, or leave room for considering,

the anticompetitive harms or discrimination against other carriers resulting from Qwest's actions, much less whether those actions violated the terms of Qwest's contracts with other carriers." (Suggestion at pp. 20-21.)

Complainants say that the Board has the authority to limit the scope of an investigation, pursuant to 199 IAC 6.5(3), and that the Board exercised that authority when it limited the investigation to the legal question of what types of contracts must be filed. Accordingly, Complainants argue they did not have a full and fair opportunity to litigate the breach of contract claim in 2002.

Complainants also allege the Board "expressly deferred any consideration of specific carrier-to-carrier disputes" (Suggestion at page 21), but they provide no citation to any Board order as support for this statement and the Board is unable to confirm it. The closest statement appears to be in the April 1, 2002, docketing order, when the Board said it would consider the legal issue first "and will consider a more complete procedural schedule at a later date." (Order at page 3.) In the Board's final order issued on May 29, 2002, the Board made it clear that it was making tentative findings based upon adjudicative facts that appeared to be undisputed. The Board further stated that "any party" could request a hearing to further explore the facts if it so desired and gave 20 days for parties to file such a request. Finally, the Board made it clear that "if no request for hearing is filed within 20 days of the date of this order, then the tentative findings set forth above will become the final, binding decision of the Board." ("Order Making Tentative Findings, Giving Notice for

Purposes of Civil Penalties, and Granting Opportunity to Request Hearing," issued in Docket No. FCU-02-2 on May 29, 2002.) The Board is unable to find an express deferral of carrier-to-carrier disputes in any of these Board statements.

Finally, Complainants argue that res judicata could apply in this case only if the Board first determined that it now has, and had in 2002, the authority to address Complainants' claims and to award the monetary damages they seek. Complainants say their "research has not revealed a definitive answer regarding whether the Commission [sic] has such authority." (Suggestion at page 23.)

QWEST'S OPPOSITION TO STAY AND REPLY

On October 30, 2006, Qwest filed an opposition to the suggestion that this matter should be stayed and a reply in support of its motion to dismiss.

With regard to the proposed stay, Qwest points out that the Board reviewed this matter four years ago in Docket No. FCU-02-2; AT&T raised these issues again in proceedings that year in § 271 proceedings before the Board and the FCC; and it is time to bring this matter to a conclusion. Qwest also points out that the Complainants are free to dismiss their complaint if they do not wish to pursue the matter before the Board.

In its reply to the resistance to its motion to dismiss, Qwest says that the operative facts underlying the complaint are governed by federal law and the specific claims being asserted are based on federal law, so the federal statute of limitations should apply. Qwest asserts that Complainants should not be permitted to sidestep

§ 415 by disguising a complaint based on federal law as a state law breach of contract claim. Complainants also assert that Count II of the complaint, alleging a violation of a Board rule, is also federal at heart, because the rule in question was adopted in order to implement federal law. Finally, Qwest says Count III, the fraud count, is based on an alleged duty to file the interconnection agreements "as required by law," and the relevant law is federal (specifically, § 252(a)(1) and (e)).

Next, Qwest argues that the Oregon PUC's decision is preclusive, relying on its earlier arguments to that effect.

Finally, Qwest argues that res judicata applies, noting that AT&T prompted the Board's 2002 docket with a letter and AT&T participated actively in that docket. AT&T could have sought the relief it now seeks in the 2002 docket, but it did not even ask, according to Qwest. Thus, Qwest says, Complainants cannot credibly argue that the Board limited the 2002 proceedings in a manner that precluded consideration of these issues. Qwest says that AT&T sought similar damages in a proceeding pending before the Minnesota Commission at the same time, so it was AT&T's choice not to pursue the issue in the Iowa proceedings.

COMPLAINANTS' RESPONSE TO QWEST'S REPLY

On November 7, 2006, Complainants filed a response to Qwest's reply. The filing included a copy of a very recent decision that is relevant to this matter, Connect Comms. Corp. v. Southwestern Bell Tel., L.P., No. 05-3698, 2006 WL 3040611 (8th Cir., October 27, 2006). In that decision, according to Complainants, the Eighth

Circuit found that disputes over the interpretation and enforcement of interconnection agreements are governed by state law, even if the contract dispute otherwise may implicate or require consideration of federal law. Thus, Complainants argue, it is clear that Count I of the complaint is a state law claim that is not barred by the federal statute of limitations.

Complainants also assert that the new decision forecloses Qwest's collateral estoppel theory, as the Court expressly held that "state commissions are not bound by decisions reached by other state commissions, even in construing similar or identical terms." Connect, 2006 WL 3040611, at *9.

Complainants also provided a copy of a recent Oregon state court decision denying a motion to dismiss filed in that case by Qwest. AT&T Communications of the Pacific Northwest, Inc., v. Qwest Corp., No. 0607-07247 (Or. Cir. Ct. Nov. 2, 2006). The order does not include much discussion, but Complainants assert that by denying Qwest's motion in its entirety, the court necessarily rejected all of Qwest's arguments.

Finally, Complainants reiterate their earlier arguments regarding res judicata.

ANALYSIS AND DECISION

The Board will dismiss the complaint on the basis of res judicata. All of the issues related to the unfiled agreements could have been, and should have been, litigated in 2002; it would be an inefficient use of the Board's and the parties'

resources to open another docket now to resolve matters that could have, and should have, been raised in 2002.

Because it is ruling on the basis of res judicata, the Board will not address the claims regarding the federal statute of limitations and the legal effect of the Oregon PUC's decision.

It is clear that AT&T could have brought the claims it is bringing now as a part of the Board proceedings in 2002. At the very least, AT&T could have tried to pursue them in that docket, but for whatever reason it chose not to. There is simply no reason to let AT&T bring its case twice.

It is true that AT&T took an unusually reticent approach to the 2002 case. The company started the case with a letter to the Board asking the agency to initiate an investigation, rather than a standard complaint. The company sought to have the Board conduct discovery from Qwest, rather than doing it for itself. In these ways, AT&T apparently tried to limit its involvement in Docket No. FCU-02-2 to an indirect mode. However, the fact remains that it was AT&T's letter that initiated the proceeding, and the Board docketed the matter as Re: AT&T Corporation vs. Qwest Corporation, so there can be no doubt that AT&T was aware of the matter and was a party to the case. Moreover, AT&T participated vigorously and effectively in the proceedings.

Res judicata, or claim preclusion, requires that four factors be shown before the doctrine will apply to preclude an action. First, the parties in the first and

second actions must be the same. Second, the claim in the second suit must be something that could have been fully and fairly adjudicated in the prior case. Third, there must have been a final judgment on the merits in the first case. Finally, the two claims must arise from the same transaction. Arnevik v. Univ. of Minn. Bd. of Regents, 642 N.W.2d 315, 319 (Iowa 2002); Tigges v. City of Ames, 356 N.W.2d 503, 508-09 (Iowa 1984); Riley v. Maloney, 499 N.W.2d 18, 20 (Iowa 1993) ("A second claim is likely to be considered precluded if the acts complained of, and the recovery demanded, are the same or when the same evidence will support both actions.")

Each of these factors is present in this case. Clearly, AT&T and Qwest were parties to the 2002 action and they are parties to this docket. The Complainants have not argued that the presence of TCG Iowa, Inc., a corporate affiliate of AT&T, makes any difference, and the Board cannot see any reason why it should. The first factor is not disputed.

The second factor requires that the claims in this docket could have been fully and fairly adjudicated in the prior proceeding. Complainants claim that they were foreclosed from bringing their claims in 2002 because the Board initiated the docket and chose to limit the scope of the proceeding. However, the Board initiated the docket at the request of AT&T and included AT&T as a named party, so AT&T's claim that "Docket No. FCU-02-2 was a Board-initiated investigation" is not strictly correct; the Board acted in response to AT&T's letter. (Quote taken from page 20

of the Complainants' "Suggestion That This Matter Be Stayed, And, In The Alternative, Opposition to Qwest's Motion to Dismiss" at page 20.)

The Board did not limit the scope of the proceeding in the manner described by Complainants, either. They state "that [2002] Docket was confined to the legal issue of what type of agreement is required to be filed, and did not in any way consider, **or leave room for considering**, the anticompetitive harms to or discrimination against other carriers resulting from Qwest's actions, much less whether those actions violated the terms of Qwest's contracts with other carriers." (Id., emphasis added.) This is not an accurate description of Docket No. FCU-02-2. The Board addressed the legal issue (that is, the definition of the interconnection agreements that have to be filed with the Board) first, but it then offered both of the parties the opportunity to ask for a hearing if they believed there were any material issues of adjudicative fact to be decided. AT&T had the opportunity to raise any and all claims at that time. It chose not to. It should not be permitted to change its corporate mind and initiate a new docket four years later to re-hash matters that could have been raised when they were already before the Board and fresh.

Complainants argue that the second element may not be satisfied because it is not clear that the Board has the authority to grant them the relief they seek. Thus, they argue, the Board could not have fully and fairly adjudicated their claims in 2002. (Suggestion at page 23.) This argument is without merit. If the Board could not have awarded damages in 2002, then it cannot award damages now.

The idea that the Board should hear this case now because it may not be able to award the requested relief is rejected.

Third, the Board issued a final order on the merits. The May 29, 2002, order made tentative findings of fact, but it also gave the parties 20 days to file a request for hearing if they wanted one, and then provided that "if no request for hearing is filed within 20 days of the date of this order, then the tentative findings set forth above will become the final, binding decision of the Board." (Order at page 21, Ordering Clause No. 1.) There can be no doubt that this was a final order on the merits.

Finally, the claims in this action clearly arise out of the same transaction that was at issue in Docket No. FCU-02-2: Qwest's failure to file with the Board certain interconnection agreements as required by law. In the absence of that transaction, Complainants have no claim for breach of contract, no claim for violation of Board rules, and no claim for common law fraud. The fourth element is satisfied.

For all of these reasons, the Board finds that res judicata bars the Complainants from bringing this action before the Board. The motion to dismiss will be granted.

ORDERING CLAUSE

IT IS THEREFORE ORDERED:

The motion to dismiss filed in this docket on September 18, 2006, by Qwest Corporation is granted on the basis of res judicata, as described in the body of this order.

UTILITIES BOARD

/s/ John R. Norris

/s/ Diane Munns

ATTEST:

/s/ Judi K. Cooper
Executive Secretary

/s/ Curtis W. Stamp

Dated at Des Moines, Iowa, this 4th day of December, 2006.