

United States District Court
For The District of Wyoming

AT&T COMMUNICATIONS OF THE)
MOUNTAIN STATES, INC.,)

Plaintiff,)

vs.)

QWEST CORPORATION,)

Defendant.)

Case No. 06-CV-232-D

Order

This case comes before the Court on Defendant Qwest Communication's ("Qwest") Motion to Dismiss. The Court, having considered the briefs and materials submitted in support of the motion and Plaintiff's opposition thereto, having heard oral argument of counsel and being otherwise fully advised, FINDS and ORDERS as follows:

Background

Plaintiff AT&T Communication of the Mountain States ("AT&T") alleges claims against Qwest for breach of contract, breach of covenant of good faith and fair dealing, violation of Wyo. Stat. § 37-15-404 (prohibiting telecommunications corporations from discriminating as to different customers), and fraud. (Comp. ¶¶ 24-43.) As discussed in the Complaint, the impetus behind the agreement between AT&T and Qwest is the

federal Telecommunications Act of 1996 ("TCA") 47 U.S.C. § 151 *et seq.*, which requires incumbent telecommunications carriers such as Qwest to enter into contracts with other telecommunications carriers that request access to the incumbent carrier's network facilities and services. These contracts, called "interconnection agreements," set out the incumbent carrier's obligations to provide interconnection, services, and/or network elements to competing carriers and the rates at which they are to be provided. All agreements must be filed with the appropriate State public utilities commission for approval—in this case, the Wyoming Public Services Commission ("WPSC"). Once approved, the incumbent carrier must make available any interconnection, service, or network element provided under the agreement to any other requesting carrier at the same rates and on the same terms and conditions as those provided in the approved interconnection agreement. The agreements must be available to public inspection to effectuate the requirement.

AT&T and Qwest were party to two interconnection agreements. (Comp. ¶¶ 19-20.) Qwest, however, formed secret agreements with two telecommunications providers in Wyoming. (Comp. ¶ 3.) Because the secret agreements were not filed with the WPSC, AT&T failed to demand the same discounted rates that the local telecommunications providers enjoyed. (Comp. ¶ 3.) AT&T alleged that the secret agreements violated the TCA and therefore breached the interconnection agreements with AT&T. (Comp. ¶ 4.)

AT&T filed its Complaint on August 28, 2006, in the District Court for the First Judicial District, State of Wyoming. Qwest then removed the case to federal district court. Upon removal to federal court, AT&T moved this Court to remand the case back to state court. The Court denied AT&T's Motion to Remand on December 12, 2006, and that Order is incorporated herein by reference.

Qwest now moves to dismiss AT&T's Complaint as barred by the Federal Communication Act's statute of limitations.¹ In response, AT&T renews its request for this Court to remand the case to state court. (Response 3.) AT&T argues that the issues put forth in the Complaint arise under basic issues of state law that are governed by state law and subject to a ten year statute of limitations. (Response 2.) Further, AT&T argues that even if the Court found that the breach of contract claims did arise under federal law, the state statutory violation claim as well as the common law fraud claim arise exclusively under state law. (Response 3.) Having determined that the issues raised in AT&T's Complaint justified federal question jurisdiction (Order Denying Motion to Dismiss), this Court now finds that the jurisdictional scheme provided in the TCA prevents a district court from exercising primary jurisdiction over a dispute arising from an interconnection agreement. The TCA designates the WPSC as the proper forum to hear complaints in the first instance arising from violations of an

¹Qwest's Motion to Dismiss also alleges that AT&T's Complaint is barred by the principles of collateral estoppel and res judicata. Qwest conceded these arguments at oral argument, and the Court will no longer entertain them.

interconnection agreement. Counts I, II, and IV are therefore DISMISSED. Count III is remanded to the appropriate state court.

Standard of Review

In a motion to dismiss, all well pleaded factual allegations in the complaint are accepted as true and construed in favor of the non-moving party. *Sutton v. Utah State School for Deaf and Blind*, 173 F.3d 1226, 1236 (10th Cir. 1999). A complaint should not be dismissed “unless it appears beyond doubt that the plaintiff can prove no sets of facts in support of [the] claim which would entitle [it] to relief.” *Gallery v. U.S. Life Ins. Co.*, 392 F.3d 401, 404 (10th Cir. 2004) (citing *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957)).

Discussion

The jurisdictional provisions of the TCA and the public service commission’s (“PSC”) recognized interpretation and enforcement powers require that disputes arising from interconnection agreements first be adjudicated before the state commission. Section 252(e)(6) provides that “[i]n any case in which a State commission makes a determination . . . 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. . . .” 47 U.S.C. § 252(e)(6). Though not explicitly provided in the statute, § 252(e)(6) authorizes PSCs to interpret and enforce the provisions of the interconnection agreements it approves. *Sw. Bell Tel Co. v.*

Brooks Fiber Commc'ns, 235 F.3d 493, 497 (10th Cir. 2000); *Sw. Bell Tel. Co. v. Public Util. Commc'n*, 208 F.3d 475, 479-80 (5th Cir. 2000) ([W]e are satisfied that the Act's grant to the state commissions of plenary authority to approve or disapprove those interconnection agreements necessarily carries with it the authority to interpret and enforce the provisions of the agreements that state commissions have approved. We believe that the FCC plainly expects state commissions to decide intermediation and enforcement disputes that arise after the approval procedures are complete.") (Internal cites omitted.) Accordingly, the TCA vests the WPSC with the authority to interpret and enforce the terms contained in the interconnection agreement formed by AT&T and Qwest.

AT&T filed its original Complaint in state district court rather than the with WPSC, and Qwest then removed the case to federal court. To be sure, this Court has jurisdiction to review the WPSC's decision approving the interconnections agreements. *Brooks Fiber*, 235 F.3d at 497. ("Federal district court's jurisdiction to review a state commissions approval or rejection of an interconnection agreement is explicit.")² However, the Complaint poses a post-formation dispute regarding the interconnection agreements, and neither party asks the Court to review the WPSC's approval of the

²Further, § 252(e)(6) does not limit the federal district court's review of a state commission determination: "[§ 252(e)(6)] does not divest the district courts of their authority under 28 U.S.C. § 1331 to review the Commission's order for compliance with federal law." *Verizon Md., Inc. v. Pub. Serv. Comm'n*, 535 U.S. 635, 642 (2002).

interconnection agreement.

The Court adopts the reasoning of a recent Third Circuit decision and a 2003 decision from the District Court in the District of Wyoming that the WPSC is the appropriate forum to adjudicate post-formation disputes arising from interconnection agreements in the first instance. In *Core Commc'ns v. Verizon*, the Third Circuit ruled that a party could not proceed directly to the federal district court to litigate enforcement or interpretation claims of interconnection agreements. 493 F.3d 333, 342-43 (3rd Cir. 2007). Rather, a party must first present the interconnection agreement claims to the state commission that approved the agreement. *Id.* at 339. The court ruled that allowing a party to circumvent the state commissions in post-formation disputes would be contrary to the TCA's cooperative-federalism structure. *Core*, 493 F.3d at 343 (citing *BellSouth Telecomms., Inc. v. MCImetro Access Transmission Servs., Inc.*, 317 F.3d 1270, 1278 n. 9 (11th Cir. 2003)). *Core* held that the TCA does not vest the entire regulatory authority in the federal government. Instead, the act relies on state commissions to ensure that local competition was implemented fairly and consistently. *Core*, 493 F.3d at 343. Because the TCA does not contain procedures for post-formation disputes, the court granted *Chevron* deference to the FCC's decision in *In re Starpower*, which held that state commissions were responsible for interpretation and enforcement of interconnection agreements. *Id.* at 341; *In re Starpower Commc'ns*, 15 F.C.C.R. 11277 (2000). Accordingly, the Third Circuit ruled that "interpretation and

enforcement actions that arise after a state commission has approved an interconnection agreement must be litigated in the first instance before the relevant state commission. A party may then proceed to federal court to seek review of the commission's decision or move on to the appropriate trial court to seek damages for a breach, if the commission finds one." *Id.* at 344.

Similarly, the District Court in the District of Wyoming ruled that it lacked the primary jurisdiction to hear a post-formation interconnection agreement dispute because the WPSC had not initially heard the dispute. *Contact Commc'n v. Qwest Corp.*, 246 F. Supp. 2d 1184, 1188 (D. Wyo. 2003). In *Contact*, there was an action for money damages from an alleged breach of two interconnection agreements by Contact and Qwest that had been approved by the WPSC. *Id.* at 1185. Contact filed a breach of contract claim in federal district court based on diversity under § 1332 without seeking review from the WPSC. The District Court was not asked to review PSC's approval of the interconnection agreement. *Id.* The court found that the predicate acts of Contact's breach of contract claims arose out of the requirements of the TCA, and jurisdiction did not change whether the parties characterized the claims as state or federal. *Id.* at 1190. Though the WPSC had approved the interconnection agreements, Contact's claims did not involve that determination or any other determination by the WPSC. *Id.* at 1191. The court concluded that the statutory scheme provided in the TCA prevents the district court from hearing disputes arising from interconnection agreements that have not been

first presented to a PSC: “in order to be ripe for review for this court, the plaintiff must be aggrieved by the state commission’s determination.” *Id.*

The procedural posture of the present case is virtually identical to the circumstances presented in *Core* and *Contact*. Here, AT&T filed its original Complaint in state district court, and Qwest then removed the case to federal district court. AT&T did not present its claims to the WPSC nor does either party challenge the WPSC’s approval of the interconnection agreements. This Court adopts the procedural requirements put forth in the Third Circuit and the District of Wyoming decisions and holds that the WPSC, not this Court, is the proper forum for AT&T and Qwest to adjudicate their post-formation dispute arising from the interconnection agreements.

AT&T’s Complaint turns on Qwest’s failure to disclose secret agreements it formed with local telecommunication providers in violation of federal and state law. The interconnection agreements formed between AT&T and Qwest demonstrate that both parties agreed to abide by the terms of the TCA and act in good faith and consistently with the act. (Comp. ¶¶ 19-20.) Counts I, II, and IV present predicate issues arising directly from violations of the interconnection agreement. Count I alleges a breach of contract of the two interconnection agreements formed between AT&T and Qwest. (Comp. ¶ 25.) Count II alleges that Qwest breached the covenant of good faith and fair dealing provision in the interconnection agreement. (Comp. ¶ 29.) Count IV alleges a fraud claim. Though AT&T characterizes the claim as arising out of state common law

that should be remanded to state court, (Response 2), Count IV alleges violations of specific provisions of the TCA contained in the interconnection agreements: "Qwest had an affirmative duty to apprise AT&T of the existence of the secret agreements by filing them as required by law." (Comp. ¶ 38.) The WPSC is the proper forum to hear violations of the interconnection agreement whether AT&T characterizes the issues as arising under state or federal law. See *Contact Commc'n*, 264 F. Supp. 2d at 1190. Count III, however, appears to arise out an independent state claim. AT&T alleges that Qwest violated Wyo. Stat. § 37-15-404 by charging it more than it charged the local telecommunication provider who were parties to the secret agreements. (Comp. ¶ 35.) Unlike the other counts, this complaint does not allege a violation of a provision in the interconnection agreements and therefore does not fall under the jurisdiction of the WPSC. Thus, Count III is remanded to the appropriate state district court.³

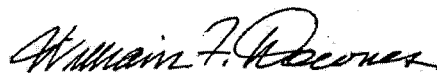
Conclusion

The Court's decision makes it unnecessary to reach Qwest's argument concerning the appropriate statute of limitations or its Motion to Strike AT&T's Supplemental Brief. The statutory scheme of the TCA provides for initial review of

³Remanding Count III could be construed as an inefficient use of judicial resources and a reward for artful pleading. At its core, Count III is very similar to the other counts alleging violations of the interconnection agreements. But in light of the absence of guidance in the TCA and paucity of case law defining the outer limits of the WPSC's jurisdiction under § 256(e)(6), and perhaps in an overabundance of caution, the Court believes its interpretation of Wyo. Stat. § 37-15-404 as a distinct cause of action requiring remand is appropriate.

disputes arising from interconnection agreements by the WPSC. Accordingly, Counts I, II, and IV, which allege violations of the interconnection agreements, are dismissed because the WPSC is the proper forum to litigate the interconnection agreement disputes in the first instance. Count III is remanded back to the First Judicial District Court of Laramie County because it alleges an independent cause of action that is distinct from the terms of the interconnection agreements.

DATED this 16th day of October, 2007.



UNITED STATES DISTRICT JUDGE