IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Judge Edward W. Nottingham

FILED
UNITED STATES DISTRICT COURT
DENVER, COLORADO

JUN 10 2005

GREGORY C. LANGHAM
CLERK

Civil Action No. 04–cv–909-EWN-MJW

QWEST CORPORATION,

Plaintiff/Counterclaim Defendant,

v.

AT&T CORPORATION,
AT&T COMMUNICATIONS, INC.;
AT&T COMMUNICATIONS OF THE PACIFIC NORTHWEST, INC.;
AT&T COMMUNICATIONS OF THE MIDWEST, INC.;
AT&T COMMUNICATIONS OF THE MOUNTAIN STATES, INC.; and
AT&T COMMUNICATIONS OF THE SOUTHWEST, INC.;

Defendants/Counterclaim Plaintiffs.

ORDER AND MEMORANDUM OF DECISION

This is a telecommunications case. Plaintiff and Counterclaim Defendant Qwest Corporation (hereinafter "Qwest") alleges that Defendants and Counterclaim Plaintiffs, AT&T Corporation and its various subsidiaries (hereinafter "AT&T" in the singular), violated Qwest's tariffs and fraudulently concealed or misrepresented the nature of some of the long-distance telephone calls terminated by AT&T on Qwest's network. AT&T allegedly did this in order to avoid paying access charges. AT&T alleges in its counterclaims that Qwest entered into unlawful secret agreements with other carriers to give the other carriers special discounts on telecommunications services. Qwest's claims are the only relevant claims to this order and

memorandum of decision. This matter is before the court on (1) "Defendants' Motion to Dismiss the Fourth Claim for Relief in the First Amended Complaint Pursuant to Rules 12(b)(6) and 9(b)," filed August 31, 2004, (2) "Plaintiff's Motion for Leave to Supplement Its Response to Defendants' Motion to Dismiss Plaintiff's Fraud Claim," filed November 16, 2004, (3) "Defendants' Motion for Partial Summary Judgment on All of Plaintiff's Claims Prior to March 2004," filed January 5, 2005, (4) "Defendants' Motion for Summary Judgment on Qwest's Third Claim for Relief," filed January 5, 2005, (5) "Defendants' Motion for Summary Judgment on Qwest's Fourth Claim for Relief," filed January 5, 2005, (6) "Defendants' Motion for Summary Judgment on Qwest's Fifth Claim for Relief," filed January 5, 2005, and (7) "Motion for Leave to file Supplemental Plaintiff's Response to Defendants' Motion for Summary Judgment on Qwest's Fourth Claim for Relief," filed March 30, 2005. Jurisdiction is premised upon 28 U.S.C. §§ 1331 and 1337 (2004), and 47 U.S.C. § 207 (2004).

FACTS

I. Factual Background

In the fact section of this order and memorandum of decision, I first set forth the general factual and regulatory background relevant to this case. With this background in place, I then address in chronological order the specific factual averments of the parties.[1]

[1]Due to the fact that AT&T chose to file four different motions for summary judgment, there is a large amount of needless overlap of factual contentions. Although many of the parties' factual averments are set forth in multiple briefs, I generally only cite to one set of briefs for any particular averment.

a. General Background

When a person places a long distance telephone call, this call usually goes through the networks of several telephone companies. The call generally begins (originates) on a Local Exchange Carrier's ("LEC") network, then switches onto the network of an interexchange carrier ("IXC"), i.e. a long distance telephone carrier, who transports the call to the network of a different LEC, who completes (terminates) the call on its network. *See, e.g., Level 3 Communications, LLC v. Colorado Public Utils. Comm'n*, 300 F. Supp. 2d 1069, 1072 (D. Colo. 2003); *Newton's Telecom Dictionary* 115, 436 (21st ed. 2005).

> For example, if a customer in Washington, D.C., who subscribes to Verizon[, a LEC,] for local service and AT&T[, an IXC,] for long-distance service, calls a relative in Florida, who subscribes to Bellsouth[, a LEC,] for local service, the call initially will travel over Verizon's facilities. Verizon will hand off the call to AT&T's facilities, which will carry the call to Florida before handing it off to Bellsouth's facilities for delivery to the caller's relative.

AT&T Corp. v. FCC, 292 F.3d 808, 809 (D.C. Cir. 2002). In this example, AT&T, the IXC, will charge the originating caller in Washington D.C. for the telephone call, and will then pay "access charges" to the two LECs, Verizon and Bellsouth, who originated and terminated the call over their respective networks. *Id.* The rates of these access charges are set forth in tariffs that the LECs must file with either a state public utility commission or the Federal Communications Commission ("FCC"), depending upon the nature of the call. *Newton's Telecom Dictionary* 40–41, 826 (21st ed. 2005). This tariff shows all charges for each telephone service the carrier provides, as well as all classifications, practices, and regulations affecting such charges. *Fax Telecommunicäciones Inc. v. AT&T*, 138 F.3d 479, 482 (2d Cir. 1998).

In this case, for all pertinent purposes, Qwest is a LEC and AT&T is an IXC.[2] AT&T's treatment of certain long-distance telephone calls that AT&T terminated on Qwest's network forms the center of the dispute between the parties.

Qwest, as a LEC, offers several call termination services to other carriers, pursuant to its various tariffs. The three call termination services relevant to the present dispute are: (1) interstate and intrastate access services, (2) primary rate interface ("PRI") "business line" services, and (3) local interconnection services and reciprocal compensation arrangements. (Defs.' Mot. for Partial Summ. J. on All of Pl.'s Claims Prior to March 2004, Statement of Undisputed Facts ¶¶ 2–3 [filed Jan. 5, 2005] [hereinafter "AT&T's Partial Summ. J. Br."]; *admitted at* Pl.'s Resp. To Defs.' Mot. for Summ. J. On Claims Pre-Dating March 2004, Resp. to Undisputed Facts ¶¶ 2–3 [filed Feb. 28, 2005] [hereinafter "Qwest's Partial Summ. J. Resp."].) The first of these three call termination services, access services, is the type of call termination service described in the example above. For the purposes of this order and memorandum of decision, carriers use the latter two call termination services, PRI business line services and local interconnection services, primarily for local telephone traffic. The mechanics behind these latter two call termination services are not germane to this Order and Memorandum of Decision.

Each of these three call termination services have different prices. (AT&T's Partial Summ. J. Br., Statement of Undisputed Facts ¶ 7; *admitted at* Qwest's Partial Summ. J. Resp., Resp. to Undisputed Facts ¶ 7.) Qwest's tariff rates were significantly higher for access services than for PRI business line services or local interconnection services. *In the matter of Petition for*

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[2]There is one exception to this statement. With regards to Qwest's Q.talk program, discussed below, Qwest acted as an IXC.

Declaratory Ruling that AT&T's Phone-to-Phone IP Telephony Services are Exempt from Access Charges, 19 F.C.C. Rcd. 7457, 7464 n.48 (Apr. 21, 2004) (hereinafter "*FCC Order*").

Most long distance calls go through an IXC's long distance network, the service for which the LEC assesses the more expensive access charges. In the matter at hand, however, AT&T did not always do this with its long distance traffic. Rather, AT&T routed a significant portion of its long distance calls terminated on Qwest's network over AT&T's internet backbone. *Id.* at 7464. This method of routing voice telephone traffic over an internet backbone is called phone-to-phone Internet Protocol ("IP") telephony. The result of AT&T's use of phone-to-phone IP telephony is that its calls entered Qwest's network using PRI business line services or local interconnection services as opposed to Qwest's access services. (AT&T's Partial Summ. J. Br., Statement of Undisputed Facts ¶ 8; *admitted at* Qwest's Partial Summ. J. Resp., Resp. to Undisputed Facts ¶ 8.) Since AT&T's long distance calls entered Qwest's network in this manner, AT&T paid Qwest a lesser amount to terminate these calls that it would have paid Qwest under the access services regime.

The FCC described the details of AT&T's system of phone-to-phone IP telephony as follows:

> AT&T's specific service consists of a portion of its interexchange voice traffic routed over AT&T's Internet backbone. Customers using this service place and receive calls with the same telephones they use for all other circuit-switched calls. The initiating caller dials 1 plus the called party's number, just as in any other circuit-switched long distance call. These calls are routed over Feature Group D trunks, and AT&T pays originating interstate access charges to the calling party's LEC. Once the call gets to AT&T's network, AT&T routes it through a gateway where it is converted to IP format, then AT&T transports the call over its Internet backbone. This is the only portion of the call that differs

> in any technical way from a traditional circuit-switched interexchange call, which AT&T would route over its circuit-switched long distance network. To get the call to the called party's LEC, AT&T changes the traffic back from IP format and terminates the call to the LEC's switch through local business lines, rather than through Feature Group D trunks. Therefore, AT&T does not pay terminating interstate access charges on these calls.

FCC Order, 19 F.C.C. Rcd. at 7464 (footnotes omitted). In other words, AT&T sent some of its voice interexchange telephone calls through its internet backbone, the process called phone-to-phone IP telephony. The effect of this process is that AT&T avoided payment of access charges to Qwest, who terminated these calls. *Id.* In light of AT&T's actions, Qwest has sued AT&T claiming AT&T's action of terminating its calls without paying the more expensive access charges breached Qwest's state and federal tariffs, and constituted unjust enrichment, fraud, and breach of contract. (First Am. Compl. [filed Aug. 27, 2004] [hereinafter "First Am. Compl."].)

b. The Operating Agreement and BPCA

With the foregoing regulatory and technical background in place, I address the details of the parties' factual averments. Prior to the early 1990s, US West Communications Inc. ("US West"), Qwest's predecessor, and AT&T had frequent disputes over US West's access charges. (AT&T's Partial Summ. J. Br., Statement of Undisputed Facts ¶ 34; *admitted at* Qwest's Partial Summ. J. Resp., Resp. to Undisputed Facts ¶ 34.) These disputes created a contentious environment between the two carriers and created great uncertainties that made it difficult for the carriers to close their books on past billing periods. (*Id.*)

In order to ameliorate these problems, AT&T and US West, in October 1992, entered into two agreements, an access billing supplier quality certification operating agreement ("operating

agreement") and a bill period closure agreement ("BPCA"). (*Id.*, Statement of Undisputed Facts ¶ 35; *admitted at* Qwest's Partial Summ. J. Resp., Resp. to Undisputed Facts ¶ 35.) US West and AT&T intended that these agreements establish access charge bill verification procedures, establish dispute resolution procedures, and set forth a system to close past billing periods from further transactions and analysis. (Qwest's Partial Summ. J. Resp., Statement of Additional Facts ¶ 20; *admitted in pertinent part at* Defs.' Reply Br. in Supp. of the Mot. for Partial Summ. J. on All of Qwest's Claims Prior to March 2004, Resp. to Additional Facts ¶ 20 [filed Apr. 14, 2005] [hereinafter "AT&T's Partial Summ. J. Reply"].)

Thus, the operating agreement's stated goal was to "move from the current post-receipt access bill analysis and verification process to one ensuring that US [West] implements the control mechanisms and procedures to render an error-free bill that accurately reflects the services that AT&T ordered and used." (*Id.*, Statement of Additional Facts ¶ 21; *admitted at* AT&T's Partial Summ. J. Reply, Resp. to Additional Facts ¶ 21.) Section 1 of the operating agreement establishes a procedure to resolve any disputes in the billing for access charges, and states that "[t]his process will be referred to as Bill Period Closure and is intended to be the methodology by which AT&T and US [West] will jointly close a specified billing period from further financial transactions and analysis." (AT&T's Partial Summ. J. Br., Statement of Undisputed Facts ¶ 40; *admitted at* Qwest's Partial Summ. J. Resp., Resp. to Undisputed Facts ¶ 40.)

The operating agreement also provides that "[i]f any provision of this Agreement conflicts with [US West] tariffs concerning access billing, the terms of the tariffs shall govern." (Qwest's Partial Summ. J. Resp., Statement of Additional Facts ¶ 22; *admitted at* AT&T's Partial

Summ. J. Reply, Resp. to Additional Facts ¶ 22.) Along the same lines, the operating agreement requires the parties to "comply with all applicable federal, state and local laws, rules, regulations, court orders and governmental agency orders." (*Id.*, Statement of Additional Facts ¶ 28; *admitted at* AT&T's Partial Summ. J. Reply, Resp. to Additional Facts ¶ 28.) The operating agreement further states that it "shall be governed by and construed under the local laws of the State of Colorado." (AT&T's Partial Summ. J. Br., Statement of Undisputed Facts ¶ 36; *admitted at* Qwest's Partial Summ. J. Resp., Resp. to Undisputed Facts ¶ 36.)

Section 6 of the operating agreement provides that "[i]n all cases, the [BPCA], including the [BPCA] Supplement, found in Attachment 'I' will be used to create settlement agreements." (*Id.*, Statement of Undisputed Facts ¶ 41; *admitted at* Qwest's Partial Summ. J. Resp., Resp. to Undisputed Facts ¶ 41.) Attachment I, the BPCA, provides in its first paragraph that

> [e]xcept as otherwise provided in Paragraphs 2, and 3 below, this [BPCA], together with the attached [BPCA] Supplement, which forms a part of and is incorporated in this Agreement, shall constitute resolution of all payments by AT&T against [US West], and by [US West] against AT&T in connection with interstate and intrastate access services rendered by [US West] to AT&T for the billing period specified in the [BPCA] Supplement.

(Defs.' AT&T Corp., et al., App. to Mots. for Summ. J., Ex. A–2 at 258 [01/01/01 BPCA] [filed Jan. 5, 2005] [hereinafter "AT&T's App."].)[3]

Paragraph two of the BPCA provides the rights of AT&T to retain certain claims. (AT&T's App., Ex. A–2 at 258–59 [01/01/01 BPCA].) These rights include claims that "may arise as a result of . . . a finding of the unlawfulness, as determined by [a court or an agency such

[3]All pinpoint page citations with regards to AT&T's appendix refer to the page in the appendix, not the page in the document or affidavit.

as the FCC] of any rate, charge, classification, regulation or practice (whether tariffed or otherwise), applied to access services in the billing period specified in the [BPCA] Supplement."

(*Id.*, Ex. A–2 at 258 [01/01/01 BPCA].)

Paragraph three states that

> [n]otwithstanding other provisions in this Agreement, [US West] retains the right to assert claims, demands or causes of action, separate and apart from the Agreement which may arise as a result from any retroactive Access service rate increase or surcharge ordered or approved by any state Public Utilities Commission or the [FCC].

(*Id.*, Ex. A–2 at 259 [01/01/01 BPCA].)

Paragraph four provides that

> [n]otwithstanding other provisions in this Agreement, AT&T and [US West] retain the right to assert claims, demands or causes of action, separate and apart from this Agreement, which may arise as a result of:
> (a) Errors or omissions in the provision of access services and/or End User billing processes which cause AT&T End User messages to be unbillable.
> (b) *Specific[ly] agreed to exempted issues. These specific issues (as necessary) will be identified and documented in the [BPCA] Supplement* Section B. . . .

(*Id.* [emphasis added].)

Paragraph five consists of AT&T's waiver and release. (*Id.*) Paragraph six is US West's waiver and release, which states that

> [e]xcept as otherwise provided in Paragraph 2 and 3 above, [US West] does hereby waive, release, acquit, and forever discharge AT&T from any and all billing disputes, demands, obligations, and liabilities whatsoever that [US West] has asserted or could have asserted against AT&T for access services provided to AT&T by [US West] for all periods prior to and including the specific billing period due for closure, as set forth in the [BPCA] Supplement.

(*Id.*, Ex. A–2 at 259–60 [01/01/01 BPCA].)

The BPCA Supplement sets forth the specific bill closure form for the parties to execute monthly, and states in its paragraph on exemptions that

> [b]oth parties agree that issues stated in Paragraphs 2, 3 and 4 of the [BPCA] will be exempted from this Agreement. In addition, the parties may exempt other issues. The category checked below indicates the presence of any additional issues to be exempted from this agreement as well as any previous exempted issues that are now to be closed.

(*Id.*, Ex. A–2 at 261 [01/01/01 BPCA Supplement].)[4] As addressed in greater detail below, the parties executed the BPCA Supplements for each relevant monthly billing period to the present time. (AT&T's Partial Summ. J. Br., Statement of Undisputed Facts ¶ 50; *admitted at* Qwest's Partial Summ. J. Resp., Resp. to Undisputed Facts ¶ 50.)

c. AT&T and Qwest's Introduction of Phone-to-Phone IP Telephony Services

On November 5, 1998, AT&T introduced a phone-to-phone IP telephony service called "Connect 'n Save" in Phoenix, Arizona, through a press release that described the phone-to-phone IP telephony service and the lower rate AT&T would charge to its customers. (*Id.*, Statement of Undisputed Facts ¶ 30; *admitted at* Qwest's Partial Summ. J. Resp., Resp. to Undisputed Facts ¶ 30; Qwest's Partial Summ. J. Resp., Ex. 2 [AT&T 11/5/98 Press Release].) US West's service area included Arizona. (*Id.*) Under the Connect 'n Save service, AT&T's customers signed up for the service, dialed a number associated with the service, and paid less for the long distance telephone call than they would typically pay. (Pl.'s Resp. To Defs.' Mot.

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[4]The foregoing is the current version, drafted in 2001. The 1992 version of the BCPA Supplement also states that "Any Access Billing liabilities not known at this time are exempted." (AT&T's App., Ex. A–1 at 69 [09/16/92 BPCA Supplement].)

for Summ. J. On Qwest's Fourth Claim for Relief, Statement of Additional Facts ¶¶ 4–6 [filed Feb. 28, 2005] [hereinafter "Qwest's Fourth Claim Resp."]; *admitted in pertinent part at* Defs.' Reply Br. in Supp. of the Mot. for Summ. J. on Qwest's Fourth Claim for Relief, Resp. to Statement of Additional Facts ¶¶ 4–6 [filed Apr. 14, 2005] [hereinafter "AT&T's Fourth Claim Reply".)

Around the same time, Qwest also introduced a phone-to-phone IP telephony service called "Q.talk." (Defs.' Mot. for Summ. J. on Qwest's Fourth Claim for Relief, Statement of Undisputed Facts ¶ 20 [filed Jan. 5, 2005] [hereinafter "AT&T's Fourth Claim Br."]; *deemed admitted at* Qwest's Fourth Claim Resp., Resp. to Undisputed Facts ¶ 20.)[5] Qwest publicly promoted its Q.talk program, and its customers were required to subscribe to the service in exchange for lower long distant rates. (Qwest's Fourth Claim Resp., Statement of Additional Facts ¶¶ 10–11; *denied at* AT&T's Fourth Claim Reply, Resp. to Statement of Additional Facts ¶¶ 10–11.) During the time Qwest had its Q.talk program, Qwest maintained that it did not need to pay access charges on its phone-to-phone IP telephony calls. (AT&T's Fourth Claim Br., Statement of Undisputed Facts ¶ 23; *deemed admitted at* Qwest's Fourth Claim Resp., Resp. to

[5]Qwest denies this averment, but it does not provide any citation to the record in support of its denial, which violates my procedural rules. (*See* Practice Standards — Civil, Special Instructions Concerning Motions for Summary Judgment ¶ 4 [explaining that any denial in a response "shall be accompanied by a *brief* factual explanation of the reason(s) for the denial and a *specific reference* to material in the record supporting the denial] [emphasis in original].) More important, Qwest repeatedly admits to having the Q.talk phone-to-phone IP telephony service in other parts of its briefs. (*See, e.g.,* Qwest's Fourth Claim Resp., Resp. to Undisputed Facts ¶¶ 21, 23, 25–26; Qwest's Partial Summ. J. Resp., Resp. to Undisputed Facts ¶ 15.) Despite Qwest's inexplicable denial, I deem this fact admitted.

Undisputed Facts ¶ 23.)[6] Indeed, during this time, Qwest was the primary provider of phone-to-phone IP telephony services. (*Id.*, Statement of Undisputed Facts ¶ 26; *admitted at* Qwest's Fourth Claim Resp., Resp. to Undisputed Facts ¶ 26.) Qwest ended its Q.talk program in 1999 or 2000. (Qwest's Fourth Claim Resp., Statement of Additional Facts ¶ 12; *denied at* AT&T's Fourth Claim Reply, Resp. to Statement of Additional Facts ¶ 12.)

In 1999, US West filed a petition with the FCC requesting that the FCC "resolve the growing controversy over whether [the FCC's] access charge regime applies to IP [t]elephony services." (AT&T's Partial Summ. J. Br., Statement of Undisputed Facts ¶ 14 [brackets in original]; *admitted at* Qwest's Partial Summ. J. Resp., Resp. to Undisputed Facts ¶ 14.) US West told the FCC that a number of carriers, including AT&T and Qwest, were "using US [West]'s local phone exchange facilities to originate and terminate interstate voice calls through phone-to-phone IP [t]elephony," but that these carriers had refused to pay access charges. (*Id.*, Statement of Undisputed Facts ¶ 15; *admitted at* Qwest's Partial Summ. J. Resp., Resp. to Undisputed Facts ¶ 15.)

In dealing with AT&T, US West submitted BPCA supplement issue exemption forms from February 1999 through June 2000 related to AT&T's Connect 'n Save service in Arizona. (*Id.*, Statement of Undisputed Facts ¶¶ 54–59; *admitted at* Qwest's Partial Summ. J. Resp., Resp. to Undisputed Facts ¶¶ 54–59; AT&T's App., Ex. A–3 at 277 [BPCA Supplement], Ex. A–4 at 281, 283, 285, 287, 290, 293, 296, 301, 304, 307, 310, 318 [BPCA Supplement Issue Exemption Forms].) On these forms, US West explained that it believed it was entitled to access charges for

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[6]Although Qwest denies this averment, its proffered facts specifically support AT&T's averment as to this point. I therefore deem this fact admitted.

AT&T's phone-to-phone IP telephony services, and that it had filed complaints — in Colorado, Nebraska, and with the FCC — with regards to the issue. (*Id.*) US West also stated in its BPCA supplement issue exemption forms that since it

> considers this regular access service the . . . [billing] totals from October 199[8] through January 1999 are not eligible to bill since the February bill dates have already been closed by [US West] and AT&T. Usage however from February 1999 going forward is still eligible to bill and collect pending rulings from the state utilities board and/or the FCC.

(*Id.*)

d. ***Qwest and US West's Merger, and AT&T's Expansion of Its Phone-to-Phone IP Telephony Services***

On June 30, 2000, US West and Qwest merged. (AT&T's Partial Summ. J. Br., Statement of Undisputed Facts ¶ 17; *admitted at* Qwest's Partial Summ. J. Resp., Resp. to Undisputed Facts ¶ 17; AT&T's Fourth Claim Br., Statement of Undisputed Facts ¶ 3; *admitted at* Qwest's Fourth Claim Resp., Resp. to Undisputed Facts ¶ 3.) As the successor of US West, Qwest assumed US West's rights and obligations under the operating agreement and the BPCA. (AT&T's Partial Summ. J. Br., Statement of Undisputed Facts ¶ 37; *admitted at* Qwest's Partial Summ. J. Resp., Resp. to Undisputed Facts ¶ 37.)

Also in 2000, AT&T stopped offering its Connect 'n Save service in Arizona. (AT&T's App., Ex. B at 361 [Spudic Aff.].) Around the same time, AT&T began providing phone-to-phone IP telephony services to places other than Phoenix, Arizona within Qwest's service area. (AT&T's Partial Summ. J. Br., Statement of Undisputed Facts ¶ 31; *admitted at* Qwest's Partial

Summ. J. Resp., Resp. to Undisputed Facts ¶ 31.)[7] Eventually, AT&T's phone-to-phone IP telephony reached six states in Qwest's service area, Arizona, Colorado, Minnesota, New Mexico, North Dakota, and South Dakota. (*Id.*)[8] However, at issue in the present case with regards to Qwest's fraud claim is AT&T's phone-to-phone IP telephony service in Colorado, which AT&T initiated in September 2000. (Qwest's Fourth Claim Resp., Statement of Additional Facts ¶ 1; *admitted in pertinent part at* AT&T's Fourth Claim Reply, Resp. to Statement of Additional Facts ¶ 1.)

With regards to the technical set-up, AT&T's phone-to-phone IP telephony service in Colorado was similar to its Connect 'n Save program. (AT&T's App., Ex. B at 361–62 [Spudic Aff.].) AT&T's phone-to-phone IP telephony service in Colorado, however, was significantly different in its appearance to AT&T's customers. (Qwest's Fourth Claim Resp., Statement of Additional Facts ¶¶ 4–7; *denied at* AT&T's Fourth Claim Reply, Resp. to Statement of Additional Facts ¶¶ 4–7.)[9] Under the Connect 'n Save program, AT&T's customers would have

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[7]This averment does not appear to comport with the fact that US West previously filed complaints in Nebraska and Colorado over AT&T's use of phone-to-phone IP telephony. (AT&T's Partial Summ. J. Br., Statement of Undisputed Facts ¶¶ 54–59; *admitted at* Qwest's Partial Summ. J. Resp., Resp. to Undisputed Facts ¶¶ 54–59; AT&T's App., Ex. A–3 at 277 [BPCA Supplement], Ex. A–4 at 281, 283, 285, 287, 290, 293, 296, 301, 304, 307, 310, 318 [BPCA Supplement Issue Exemption Forms].) The parties have not explained this discrepancy.

[8]The parties, especially Qwest, appear to be quite confused about geography. While they agree that AT&T had this program in six states, Qwest is suing over this program in fourteen states (*see, e.g.*, Second Am. Compl. ¶ 34, 48), yet expressly limits its fraud claim only to Colorado, *Analysis* § 4.a., *infra*, even though it originally asserted fraud in fourteen states. (Second Am. Compl. ¶ 48.) The result of this confusion, apparent below, is that the parties' factual averments and legal analysis oscillate between Colorado based facts and arguments, and broader facts and arguments.

[9]AT&T contends that it disputes this and many other points. Ironically, many of Qwest's statements rely upon an affidavit generated by AT&T. In any event, since AT&T is the moving

to sign up for the service, would prepay for the service, and would receive a lower long distance rate. (*Id.*, Statement of Additional Facts ¶¶ 4–6; *denied at* AT&T's Fourth Claim Reply, Resp. to Statement of Additional Facts ¶¶ 4–6.) Under AT&T's phone-to-phone IP telephony service in Colorado, however, AT&T's customers were unaware that their calls were being routed through AT&T's internet backbone, and the customers received no discount. (*Id.*, Statement of Additional Facts ¶¶ 7, 14; *denied at* AT&T's Fourth Claim Reply, Resp. to Statement of Additional Facts ¶¶ 7, 14.) According to Qwest, and disputed by AT&T, Qwest was unaware of AT&T's new phone-to-phone IP telephony service. (*Id.*, Statement of Additional Facts ¶ 34; *denied at* AT&T's Fourth Claim Reply, Resp. to Statement of Additional Facts ¶ 34.)

As it did with regards to the Connect 'n Save service, AT&T did not pay Qwest access charges for the termination of its new phone-to-phone IP telephony service in Colorado. (AT&T's Partial Summ. J. Br., Statement of Undisputed Facts ¶ 32; *admitted in pertinent part at* Qwest's Partial Summ. J. Resp., Resp. to Undisputed Facts ¶ 32.) Rather, AT&T paid Qwest (1) PRI business line services charges and (2) local interconnection service charges. (*Id.*)

During this time, Qwest's access services tariff filed with the FCC contained the "regulations, rates and charges" that applied to Qwest's provision of interstate access services for IXCs. (Qwest's Partial Summ. J. Resp., Statement of Additional Facts ¶ 6; *admitted at* AT&T's Partial Summ. J. Reply, Resp. to Additional Facts ¶ 6.) Qwest's state tariffs contained the rates, terms, and conditions for intrastate switched access services which required customers to purchase intrastate switched access services from the applicable tariffs. (*Id.*, Statement of

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party, it is immaterial whether or not AT&T disputes Qwest's factual averments that are well-supported by the record.

Additional Facts ¶¶ 7–9; *admitted at* AT&T's Partial Summ. J. Reply, Resp. to Additional Facts ¶¶ 7–9.) Qwest's tariffs expressly bar IXC's from using its PRI business line services "in the provision of services to their customers." (*Id.*, Statement of Additional Facts ¶ 13; *admitted at* AT&T's Partial Summ. J. Reply, Resp. to Additional Facts ¶ 13; Qwest's Fourth Claim Resp., Statement of Additional Facts ¶ 17; *admitted at* AT&T's Fourth Claim Reply, Resp. to Statement of Additional Facts ¶ 17.) AT&T, however, acquired these PRI business line services to provide phone-to-phone IP telephony services to its customers. (Qwest's Partial Summ. J. Resp., Statement of Additional Facts ¶ 15; *admitted in pertinent part at* AT&T's Partial Summ. J. Reply, Resp. to Additional Facts ¶ 15.) As discussed above, AT&T also terminated some of its phone-to-phone IP telephony calls on Qwest's local interconnection service facilities. (*Id.*, Statement of Additional Facts ¶ 17; *admitted at* AT&T's Partial Summ. J. Reply, Resp. to Additional Facts ¶ 17.) Carriers use these facilities, also called reciprocal compensation trunks, for local and other exempt traffic. (*Id.*, Statement of Additional Facts ¶ 18; *admitted in pertinent part at* AT&T's Partial Summ. J. Reply, Resp. to Additional Facts ¶ 18.)

On October 12, 2000, Qwest stated in its BPCA supplement that it was withdrawing its exemption request for AT&T's phone-to-phone IP telephony service for the July 2000 billing period. (AT&T's Partial Summ. J. Br., Statement of Undisputed Facts ¶ 60; *admitted at* Qwest's Partial Summ. J. Resp., Resp. to Undisputed Facts ¶ 60.) Specifically, Qwest stated that it "is closing this exemption per the Qwest Product Manager. This is still waiting to be ruled on by the FCC or the PUC, based on this information there is no longer a need for this exemption." (AT&T's App., Ex. A–4 at 319 [BPCA Supplement Issue Exemption Forms].) In other words, Qwest was withdrawing its exception to its release of claims for AT&T's phone-to-phone IP

telephony service. (*Id.*) For the billing periods of July 2000 through February 2004, Qwest and AT&T continued to execute BPCA supplements, but Qwest did not submit any issue exemption forms relating to AT&T's phone-to-phone IP telephony services. (AT&T's Partial Summ. J. Br., Statement of Undisputed Facts ¶ 61; *admitted at* Qwest's Partial Summ. J. Resp., Resp. to Undisputed Facts ¶ 61.)

On August 10, 2001, Qwest withdrew US West's FCC petition. (*Id.*, Statement of Undisputed Facts ¶ 20; *admitted at* Qwest's Partial Summ. J. Resp., Resp. to Undisputed Facts ¶ 20.) Thus, the FCC never ruled on US West's petition. (AT&T's Fourth Claim Br., Statement of Undisputed Facts ¶ 32; *admitted at* Qwest's Fourth Claim Resp., Resp. to Undisputed Facts ¶ 32.)

In early 2002, AT&T employees took notes of a series of their meetings regarding AT&T's phone-to-phone IP telephony services. (Qwest's Fourth Claim Resp., Statement of Additional Facts ¶¶ 24–29; *denied in pertinent part at* AT&T's Fourth Claim Reply, Resp. to Statement of Additional Facts ¶¶ 24–29.) These handwritten notes state

> do not do interstate . . .
> calling from Atlanta terminating in Fayetteville
> ILEC will see it + stop it.
> ILEC will know we're trying to avoid access charges — hard to know they can get calls through.
> They are sure AT&T would not try to bypass access.

(*Id.*, Ex. 10 at ATTHC2651000001 [handwritten notes].) The parties have not provided the context of these notes, or any verification regarding the identity of the author of these handwritten notes.

e. AT&T's FCC Petition and the FCC's Order

On October 18, 2002, AT&T filed a petition with the FCC seeking a declaration that its phone-to-phone IP telephony service was not subject to LEC's interstate access charges. (AT&T's Partial Summ. J. Br., Statement of Undisputed Facts ¶ 21; *admitted at* Qwest's Partial Summ. J. Resp., Resp. to Undisputed Facts ¶ 21.) Both parties agree that AT&T's FCC petition described its phone-to-phone IP telephony service "in remarkable detail." (*Id.*, Statement of Undisputed Facts ¶ 22; *admitted at* Qwest's Partial Summ. J. Resp., Resp. to Undisputed Facts ¶ 22.) AT&T explained in this petition that it "has terminated its phone-to-phone IP telephony services over" Qwest's PRI business lines and local interconnection service facilities. (*Id.*, Statement of Undisputed Facts ¶ 62; *admitted at* Qwest's Partial Summ. J. Resp., Resp. to Undisputed Facts ¶ 62.)

According to Qwest, when Qwest reviewed this filing it learned, for the first time, that AT&T was terminating its phone-to-phone IP telephony calls over Qwest's networks without paying Qwest access charges. (Qwest's Fourth Claim Resp., Statement of Additional Facts ¶ 34; *denied at* AT&T's Fourth Claim Reply, Resp. to Statement of Additional Facts ¶ 34.) Qwest filed its first comments with the FCC opposing AT&T's petition in December 2002, and it made additional submissions opposing AT&T's petition at various times through February 2004. (AT&T's Partial Summ. J. Br., Statement of Undisputed Facts ¶ 23; *admitted at* Qwest's Partial Summ. J. Resp., Resp. to Undisputed Facts ¶ 23.)

In January 2004, AT&T's national sales manager sent an electronic mail message to a senior manager at Qwest, stating that "in response [to your] request[] that AT&T execute a certification regarding AT&T's practices with respect to routing traffic on behalf of . . . [Qwest],

AT&T has drafted and is submitting the attached certification that reflects AT&T's routing practices." (Mot. for Leave to File Supplemental Pl.'s Resp. To Defs.' Mot. for Summ. J. On Qwest's Fourth Claim for Relief, Ex. 12 [1/5/04 e-mail from Bastian to Barish] [filed Mar. 30, 2005] [hereinafter "Qwest's Fourth Claim Supplement"].) This unsigned attached certification states that

> AT&T does not route domestic United States long distance traffic on behalf of [Qwest] in any manner that is intended to avoid payments to any terminating [LEC] to which that [t]erminating LEC would otherwise be entitled. . . . . AT&T does not and will not knowingly alter or conceal any originating calling party information in a manner that would prevent the [t]erminating LEC from assessing the appropriate terminating charges. . . . AT&T does not and will not knowingly take any action to make Qwest traffic appear to be local terminating traffic rather than long distance terminating traffic.

(Qwest's Fourth Claim Supplement, Ex. 12 [1/5/04 e-mail from Bastian to Barish].) There is no evidence whether AT&T ever signed this certification.

In February 2004, Qwest met with AT&T to discuss AT&T's practice of terminating its phone-to-phone IP telephony services without paying Qwest access charges. (Qwest's Fourth Claim Resp., Statement of Additional Facts ¶ 43; *denied at* AT&T's Fourth Claim Reply, Resp. to Statement of Additional Facts ¶ 43.) At this meeting, Qwest demanded that AT&T pay the access charges and not route phone-to-phone IP telephony traffic over Qwest's PRI business lines or local interconnection services. (*Id.*)

The FCC issued its determination on AT&T's FCC petition on April 21, 2004, disagreeing with AT&T's main contention. *FCC Order*, 19 F.C.C. Rcd. 7457. The FCC found that AT&T's phone-to-phone IP telephony service was subject to interstate access charges under

47 C.F.R. § 69.5. *Id.* The FCC, however, did not impose this rule retroactively. *Id.* at 7470–72. Rather, the FCC explained that the decision of whether this rule should be applied retroactively should be determined by "the equities" and thus "is inherently fact-specific" requiring a case-by-case analysis, an analysis best left to the courts. *Id.* at 7471–72, n.93.

f. Events After the FCC's Order

AT&T stopped providing its phone-to-phone IP telephony service in all of the states where Qwest operates in April 2004, except for Minnesota where it stopped providing this service in June 2004. (AT&T's Partial Summ. J. Br., Statement of Undisputed Facts ¶ 33; *admitted at* Qwest's Partial Summ. J. Resp., Resp. to Undisputed Facts ¶ 33.) In the critical BPCA supplement with regards to the present motions, on May 10, 2004, five days after Qwest filed its initial complaint in this case, Qwest and AT&T executed a BPCA supplement covering the billing period from February 1 to February 29, 2004, in which Qwest released all claims for access charges "for all periods prior to and including the specific billing period," without submitting an issue exemption form relating to phone-to-phone IP telephony services. (*Id.*, Statement of Undisputed Facts ¶¶ 63–64; *admitted at* Qwest's Partial Summ. J. Resp., Resp. to Undisputed Facts ¶¶ 63–64.)

In June 2004, Qwest and AT&T executed a BPCA supplement covering the billing period from March 1 to March 31, 2004, accompanied by an issue exemption form wherein Qwest "reserve[d] the right to recover any and all access charges" regarding AT&T's phone-to-phone IP telephony. (*Id.*, Statement of Undisputed Facts ¶ 65; *admitted at* Qwest's Partial Summ. J. Resp., Resp. to Undisputed Facts ¶ 65.) Subsequent BPCA supplements executed by Qwest contain this exemption. (*Id.*, Statement of Undisputed Facts ¶ 66; *admitted at* Qwest's Partial

Summ. J. Resp., Resp. to Undisputed Facts ¶ 66.) These exemptions, as written by Qwest, only apply for the period beginning on March 1, 2004. (*Id.*, Statement of Undisputed Facts ¶¶ 66–67; *admitted at* Qwest's Partial Summ. J. Resp., Resp. to Undisputed Facts ¶¶ 66–67.)

According to Qwest, to this day, it does not know which of AT&T's phone-to-phone IP telephony calls AT&T did not pay access charges. (Qwest's Fourth Claim Resp., Statement of Additional Facts ¶ 45; *denied at* AT&T's Fourth Claim Reply, Resp. to Statement of Additional Facts ¶ 45.)

*2. **Procedural History***

Qwest filed its complaint on May 5, 2004, asserting that AT&T's practice of terminating its phone-to-phone IP telephony calls on Qwest's network without paying Qwest access charges breached federal and state tariffs, unjustly enriched AT&T, and constituted fraud. (Compl. and Jury Demand [filed May 5, 2004] [hereinafter "Compl."].) On August 27, 2004, Qwest filed its first amended complaint, in which it set forth five claims for relief. (First Am. Compl.) First, Qwest asserts that AT&T breached its federal tariffs. (*Id.* ¶¶ 26–32.) Second, Qwest argues that AT&T breached its state tariffs. (*Id.* ¶¶ 33–38.) Third, Qwest contends, in the alternative, that AT&T was unjustly enriched by its actions. (*Id.* ¶¶ 39–46.) Fourth, Qwest claims that AT&T engaged in fraudulent misrepresentation and concealment. (*Id.* ¶¶ 47–58.) Fifth, Qwest avers that AT&T breached the operating agreement. (*Id.* ¶¶ 59–68.) AT&T has also asserted counterclaims against Qwest, (*see* AT&T's Am. Answer to First Am. Compl. [filed Oct. 19, 2004]), but these counterclaims are not pertinent to the pending motions.

On August 31, 2004, AT&T moved to dismiss Qwest's fourth claim for relief, fraud. (Defs.' Mot. to Dismiss the Fourth Claim for Relief in the First Am. Compl. Pursuant to Rules

12[b][6] and 9[b] [filed Aug. 31, 2004] [hereinafter "AT&T's Mot. to Dismiss"].) Related to this motion to dismiss, Qwest moved for leave to supplement its response to AT&T's motion. (Pl.'s Mot. for Leave to Supplement Its Resp. to Defs.' Mot. to Dismiss Pl.'s Fraud Claim [filed Nov. 16, 2004] [hereinafter "Qwest's Mot. to Supplement its Mot. to Dismiss Resp."].)

On January 5, 2005, AT&T filed four separate summary judgment motions. (AT&T's Partial Summ. J. Br.; Defs.' Mot. for Summ. J. on Qwest's Third Claim for Relief [filed Jan. 5, 2005 [hereinafter "AT&T's Third Claim Br."]; AT&T's Fourth Claim Br.; Defs.' Mot. for Summ. J. on Qwest's Fifth Claim for Relief [filed Jan. 5, 2005] [hereinafter "AT&T's Fifth Claim Br."].) The first summary judgment motion is for partial summary judgment on all of Qwest's claims for relief prior to March 2004 based upon Qwest's BPCA supplement release. (AT&T's Partial Summ. J. Br.) The other three motions for summary judgment address Qwest's third, fourth, and fifth claims for relief, respectively. (AT&T's Third Claim Br.; AT&T's Fourth Claim Br.; AT&T's Fifth Claim Br.) On March 30, 2005, Qwest filed a motion for leave to file a supplement to its response to AT&T's motion regarding its fourth claim for relief. (Qwest's Fourth Claim Supplement.) These motions are fully briefed.

ANALYSIS

In the analysis section of this order and memorandum of decision, I first set forth the summary judgment standard of review. Second, I address the merits of AT&T's motion for partial summary judgment on all of Qwest's claims prior to March 2004. Third, I analyze AT&T's motion for summary judgment on Qwest's third claim for relief. Fourth, I address AT&T's motion for summary judgment on Qwest's fourth claim for relief. As part of the analysis regarding this motion, I address all of the pending motions that are not motions for

summary judgment. Finally, I review the merits of AT&T's motion for summary judgment on Qwest's fifth claim for relief.

1. Standard of Review

Pursuant to Rule 56(c) of the Federal Rules of Civil Procedure, the court may grant summary judgment where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and the . . . moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c) (2004); *see Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986); *Concrete Works, Inc. v. City & County of Denver*, 36 F.3d 1513, 1517 (10th Cir. 1994). The moving party bears the initial burden of showing an absence of evidence to support the nonmoving party's case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). "Once the moving party meets this burden, the burden shifts to the nonmoving party to demonstrate a genuine issue for trial on a material matter." *Concrete Works, Inc.*, 36 F.3d at 1518 (citing *Celotex Corp.*, 477 U.S. at 325). The nonmoving party may not rest solely on the allegations in the pleadings, but must instead designate "specific facts showing that there is a genuine issue for trial." *Celotex.Corp.*, 477 U.S. at 324; *see* Fed. R. Civ. P. 56(e). "'Only disputes over facts that might affect the outcome of the suit under governing law will preclude the entry of summary judgment.'" *Sanchez v. Denver Pub. Schs.*, 164 F.3d 527, 531 (10th Cir. 1998) (quoting *Anderson*, 477 U.S. at 248). The court may consider only admissible evidence when ruling on a summary judgment motion. *See World of Sleep, Inc. v. La-Z-Boy Chair Co.*, 756 F.2d 1467, 1474 (10th Cir. 1985). The factual record must be viewed in the light most favorable to the nonmoving party. *Concrete Works, Inc.*, 36 F.3d at 1518 (citing *Applied Genetics Int'l, Inc. v. First Affiliated Sec., Inc.*, 912 F.2d 1238, 1241

[10th Cir. 1990]).

2. AT&T's Motion for Partial Summary Judgment

AT&T moves for partial summary judgment on all of Qwest's claims for relief prior to March 2004, based upon Qwest's alleged release of its claims under the BPCA and its supplements. (AT&T's Partial Summ. J. Br.) Since the operating agreement provides that Colorado law should apply to its construction, and neither party has advanced any arguments or facts to the contrary, I apply Colorado law. "A release is the relinquishment of a vested right or claim to the person against whom the claim is enforceable." *Bunnett v. Smallwood*, 793 P.2d 157, 159 (Colo. 1990). "A court is to construe a release to effectuate the manifest intention of the parties. Such construction rests on good sense and plain understanding of the words used and the acts directed to be performed." *Artery v. Allstate Ins. Co.*, 984 P.2d 1187, 1191 (Colo. App. 1999). General rules of contract interpretation and construction apply to releases. *Bunnett*, 793 P.2d at 159.

In interpreting a contract, a court shall "give effect to the intent and reasonable expectations of the parties." *Thompson v. Maryland Cas. Co.*, 84 P.3d 496, 501 (Colo. 2004). If a contract is ambiguous, i.e. when it is reasonably susceptible to more than one meaning, a court may use extrinsic evidence to assist it in ascertaining the intent of the parties. *Cheyenne Mountain Sch. Dist. No. 12 v. Thompson*, 861 P.2d 711, 715 (Colo. 1993). Perhaps the most compelling extrinsic evidence is the parties' course of conduct prior to the time the controversy arose. As the Colorado Supreme Court explained, "[o]ne of the most reliable indications of the true intent of the parties to a contract is their behavior and interpretation of the contract before a controversy arises." *Blecker v. Kofoed*, 672 P.2d 526, 528 (Colo. 1983); *see also Fox v. I-10,*

Ltd., 936 P.2d 580, 582 (Colo. App. 1996) (same); *Tucker v. Ellbogen*, 793 P.2d 592, 596 (Colo. App. 1989) ("In construing a contract, a court will follow the construction placed upon it by the parties themselves before a controversy arises. And, the conduct of the parties to a contract before any controversy arose is a reliable test of their interpretation of the instrument.") (citation omitted); 11 Richard A. Lord, *Williston on Contracts* § 32:14 (4th ed. 2004).

Qwest argues that its release is invalid because (1) the BPCA supplement releases all unknown claims, (2) the BPCA does not apply to traffic that cannot be billed, (3) AT&T did not use the billing procedures in the operating agreement so the entire agreement is inoperative as to any release, (4) AT&T committed a prior material breach, and (5) the tariff, not the agreement, sets the rate. (Qwest's Partial Summ. J. Resp.) I address each argument in turn.

a. BPCA Supplement's Release of All Unknown Claims

Qwest first argues that the it was not aware of AT&T's practices and that under the BPCA supplement, "[a]ny Access Billing liabilities not known at this time are exempted." (*Id.* at 15.) I can easily dispose of this argument on two independent grounds. First, as discussed in *Analysis* § 4.b., *infra*, Qwest was well aware of AT&T's actions for at least a year and a half when it executed the release in May 2004 that covered the billing periods through February 2004. Indeed, Qwest executed a full release regarding all past billing periods *after* it filed suit in this case. (AT&T's Partial Summ. J. Br., Statement of Undisputed Facts ¶¶ 63–64; *admitted at* Qwest's Partial Summ. J. Resp., Resp. to Undisputed Facts ¶¶ 63–64.)

Second, assuming, *arguendo*, that I were to accept Qwest's unsupported and ridiculous averment that it was unaware of AT&T's actions in May 2004 after it filed its complaint, the language upon which Qwest relies is inoperative. Qwest refers to the language in the BPCA

1992 Supplement. (AT&T's App., Ex. A–1 at 69 [09/16/92 BPCA Supplement].) The BPCA Supplements during the relevant time frame do not contain this language. (*See, e.g., id.*, Ex. A–2 at 261, 322 [01/01/01 BPCA Supplement; 5/9/04 BPCA Supplement].) As AT&T sets forth in its reply brief, this language was deleted in 1998. (AT&T's Partial Summ. J. Reply at 9–10; Defs.' Supplemental App. to Reply Brs. in Supp. of Mots. for Partial Summ. J., Ex. A at 6, 12 [filed Apr. 14, 2005].) Thus, Qwest's argument relies upon contractual language that was inoperative during the pertinent time frame.

b. BPCA's Exemption for Unbilled End User Messages

Second, Qwest argues that the BPCA does not apply to traffic that cannot be billed, and since AT&T's phone-to-phone IP telephony traffic that AT&T terminated over Qwest's PRI business line services and local interconnection services could not purportedly be billed, the BPCA and its supplement cannot cover this traffic. (Qwest's Partial Summ. J. Resp. at 15.) This argument is based upon the language in the BPCA that states that the parties "retain the right to assert claims, demands or causes of action, separate and apart from this Agreement, which may arise as a result of [] Errors or omissions in the provision of access services and/or End User billing processes which cause AT&T End User messages to be unbillable." (AT&T's App., Ex. A–2 at 259 [01/01/01 BPCA].) In order to determine the validity of Qwest's argument, I must determine the meaning of this contractual provision.

Under basic rules of contract interpretation, the phrase "[e]rrors or omissions in the provision of access services" does not stand alone, and must only be applicable when such errors and omissions "cause AT&T End User messages to be unbillable." If these two phrases are read independently, then any error or omission would be exempt from the BPCA. Thus, any

disagreement over pricing could be dubbed an error or omission, and the entire purpose and structure of the BPCA and operating agreement — to avoid billing disputes — would be rendered meaningless. *See Pub. Serv. Co. of Colorado v. Wallis & Cos.*, 986 P.2d 924, 933 (Colo. 1999) ("a court should seek to 'give effect to all provisions [of a contract] so that none will be rendered meaningless.'") (quoting *Pepcol Mfg. Co. v. Denver Union Corp.*, 687 P.2d 1310, 1313 [Colo. 1984]). Accordingly, Qwest's argument as to this point must rely upon AT&T's actions causing its end user messages not to be billed.

Qwest does not explain how AT&T's actions caused AT&T end user messages to be unbillable. (Qwest's Partial Summ. J. Resp. at 15.) An end user is a customer of an interstate telecommunications service that is not a carrier. 47 C.F.R. § 69.2(m) (2004). Since Qwest is obviously a carrier, it cannot be an end user to which the agreement refers. Qwest has set forth no evidence that AT&T did not bill its end users. Therefore, AT&T's actions do not fall within this exemption.

c. AT&T's Alleged Failure to use the Billing Procedures in the Agreements

Qwest argues that AT&T did not use the billing procedures in the operating agreement so the entire agreement is inoperative as to any release. (Qwest's Partial Summ. J. Resp. at 16–18.) Although its argument as to this point is convoluted, apparently Qwest is asserting that AT&T's phone-to-phone IP telephony service was intended to bypass access charges, and since the entire purpose of the agreement is to set forth a billing system and dispute resolution for access charges, AT&T's action fall outside of the agreement. (*Id.*)

The problem with this argument is the scope of the releases executed by the parties. The release states that Qwest

> does hereby waive, release, acquit, and forever discharge AT&T from any and all billing disputes, demands, obligations, and liabilities whatsoever that [it] has asserted or could have asserted against AT&T for access services provided to AT&T by [Qwest] for all periods prior to and including the specific billing period due for closure . . .

(AT&T's App., Ex. A–2 at 259–60 [01/01/01 BPCA].) Qwest's entire case is based upon the assumption that AT&T should have been paying Qwest for access services when AT&T placed terminated calls on Qwest's network through AT&T's phone-to-phone IP telephony. (*E.g.*, Qwest's First Am. Compl.) This release explicitly waives any claims Qwest could have asserted against AT&T for "access services." (AT&T's App., Ex. A–2 at 259–60 [01/01/01 BPCA].) Thus, Qwest's release applies to the present dispute between the parties.

The propriety of this conclusion is further illuminated by the fact that Qwest executed this release after it filed its complaint in this case. (AT&T's Partial Summ. J. Br., Statement of Undisputed Facts ¶¶ 63–64; *admitted at* Qwest's Partial Summ. J. Resp., Resp. to Undisputed Facts ¶¶ 63–64.) When it filed the complaint, Qwest knew that it had provided access services to AT&T, and AT&T had not paid Qwest for these services under the access charges regime. (*See* Compl.) Accordingly, the fact that AT&T was not billing these calls under Qwest's access charge is irrelevant to whether Qwest released AT&T for liability for its actions.

Assuming, *arguendo*, that this broad release is ambiguous, which it is not, the course of conduct by the parties further demonstrates that the BPCA was specifically meant to cover this precise type of dispute. US West, Qwest's predecessor, exempted from its release AT&T's failure to pay access charges for phone-to-phone IP telephony services from February 1999 to June 2000 in the BPCA supplement and stated that since it failed to exempt this issue earlier, it

could not collect these charges prior to February 1999. (AT&T's Partial Summ. J. Br., Statement of Undisputed Facts ¶¶ 54–59; *admitted at* Qwest's Partial Summ. J. Resp., Resp. to Undisputed Facts ¶¶ 54–59; AT&T's App., Ex. A–3 at 277 [BPCA Supplement], Ex. A–4 at 281, 283, 285, 287, 290, 293, 296, 301, 304, 307, 310, 318 [BPCA Supplement Issue Exemption Forms].) Then Qwest exempted from its release AT&T's failure to pay access charges for phone-to-phone IP telephony services starting in March 2004, but stated that since it failed to exempt this issue earlier, it could not collect these charges prior to March 2004. (*Id.*, Statement of Undisputed Facts ¶¶ 65–67; *admitted at* Qwest's Partial Summ. J. Resp., Resp. to Undisputed Facts ¶¶ 65–67.)

d. AT&T's Alleged Prior Material Breach

Next, Qwest contends that AT&T committed a prior material breach of the operating agreement, and thus, Qwest's subsequent releases were invalid. (Qwest's Partial Summ. J. Resp. at 18–22.) As a general principle of law, one party's uncured material breach of a contract will suspend the other party's duty to perform under the contract. *See In re Country World Casinos, Inc.*, 181 F.3d 1146, 1150 (10th Cir. 1999); *Converse v. Zinke*, 635 P.2d 882, 887 (Colo. 1981). This rule does not apply, however, where the non-breaching party, with knowledge of this material breach, "either performs or indicates a willingness to do so, despite the breach, or insists that the defaulting party continue to render future performance." 14 Richard A. Lord, *Williston on Contracts* § 43:15 (4th ed. 2004); *see Union Pac. R.R. Co. v. Riss Int'l Corp.*, 687 P.2d 993, 995 (Colo. App. 1984). Here, assuming that AT&T breached the operating agreement, *see Analysis* § 5, *infra*, this does not excuse Qwest's subsequent performance because Qwest was well aware of AT&T's breach and continued to execute releases. Indeed, the entire premise of

Qwest's argument — that the release it executed for consideration (being AT&T's mutual release) after it filed the complaint in this case is invalid due to AT&T's prior material breach of the operating agreement — is absurd. By executing the release with full knowledge of AT&T's actions, Qwest manifested its willingness to continue to adhere to the operating agreement's system of periodic releases despite any prior actions taken by AT&T. AT&T's prior actions that allegedly violated the operating agreement do not nullify Qwest's subsequent execution of the release. Thus, Qwest's argument as to this point fails.

e. Inconsistencies with the Tariff

Finally, Qwest contends that the release it executed is inoperative because it is not in accord with its tariffs, and its tariff rate as opposed to any contractual release mandates the payments between the parties. (Qwest's Partial Summ. J. Resp. at 22–27.) Although Qwest does not use the words "public policy," Qwest is arguing in essence that to the extent it waived any liability under Qwest's tariffs, such a waiver is unenforceable because the BPCA is void as a matter of public policy. (*Id.*) Unlike Qwest's other arguments, addressed above, this issue raises more difficult legal issues that require a detailed analysis. Qwest's contention raises a second issue, whether AT&T's actions nullified the parties' release under the operating agreement if AT&T's actions breached the tariff. It is worth noting that Qwest does not adequately raise this second issue. Nevertheless, since the importance of this issue is plain from the pleadings, I will briefly address it. After addressing this second issue, I address the first issue, which deals with whether the BPCA and its supplements are void as a matter of public policy.

1. Whether AT&T's Purported Actions Nullified the Parties' Release

The operating agreement contains a clause asserting that the terms of the tariff shall govern over any other provisions of the operating agreement. Specifically, the operating agreement states that "[i]f any provision of this Agreement conflicts with [US West] tariffs concerning access billing, the terms of the tariffs shall govern." (*Id.*, Statement of Additional Facts ¶ 22; *admitted at* AT&T's Partial Summ. J. Reply, Resp. to Additional Facts ¶ 22.) As set forth below, however, assuming that AT&T's actions of not paying Qwest access charges for AT&T's phone-to-phone IP telephony services breached Qwest's tariffs, this clause does not save Qwest. The BPCA and its supplements were executed, with mutual consideration, for years after the original operating agreement took effect, and thus represent a modification of the operating agreement. Since the BPCA and its supplements "shall constitute resolution of all payments and adjustments" between the parties, (AT&T's App., Ex. A–2 at 258 [01/01/01 BPCA]), it overrides any contrary language in the operating agreement.

Assuming, *arguendo*, that the more recent BPCAs have not modified the operating agreement, the operating agreement's clause regarding tariffs is still not operative. The BPCA provides a specific exemption for AT&T regarding "a finding of the unlawfulness, as determined by [a court or an agency such as the FCC] of any rate, charge, classification, regulation or practice (whether tariffed or otherwise), applied to access services in the billing period specified in the [BPCA] Supplement." (*Id.*) This is a specific clause that exempts certain tariff determinations. (*Id.*) Since this clause is specific, it controls over the general statement regarding tariffs in the operating agreement. *E-470 Pub. Highway Auth. v. Jagow*, 30 P.3d 798, 801 (Colo. App. 2001) (holding that "it is a basic principle of contract interpretation that a more

specific provision controls the effect of general provisions."). Thus, since the BPCA specifically exempts certain tariff violations from its release, *a fortiori*, the BPCA exemptions otherwise apply regardless of the parties' compliance with the applicable tariffs.

Moreover, even if these conflicting provisions create an ambiguity, the parties' course of conduct plainly demonstrates that the parties considered AT&T's actions (its use of Qwest's network for terminating phone-to-phone IP telephony calls without paying access charges in alleged violation of the tariff) to be an issue that must be specifically exempted under the BPCA. (AT&T's Partial Summ. J. Br., Statement of Undisputed Facts ¶¶ 54–61, 65–57; *admitted at* Qwest's Partial Summ. J. Resp., Resp. to Undisputed Facts ¶¶ 54–61, 65–67; AT&T's App., Ex. A–3 at 277 [BPCA Supplement], Ex. A–4 at 281, 283, 285, 287, 290, 293, 296, 301, 304, 307, 310, 318–19 [BPCA Supplement Issue Exemption Forms].). As discussed in the facts section of this order and memorandum of decision, (1) US West exempted AT&T's Connect 'n Save program for a time period, although noting that the BPCA did not otherwise exempt this Connect 'n Save program from its release for an earlier time period, (2) Qwest ended this exemption while waiting for the FCC and state agency rulings, and (3) Qwest reasserted an exemption to its release for phone-to-phone IP telephony in June 2004 applying to billing disputes beginning in March 2004. (*Id.*) Accordingly, the language in the operating agreement regarding the governing nature of the tariffs does not relieve Qwest of its contractual obligation to specifically exempt this issue in its BPCA supplements.

2. *Whether the Waiver's Alleged Inconsistencies with Qwest's Tariff Renders the Release Void*

Qwest vehemently maintains that the releases in the BPCA are void because they are inconsistent with the tariff. (Qwest's Partial Summ. J. Resp. at 22–27.) Like the previous issue, I will assume for the sake of this analysis that AT&T's actions, which Qwest released, were in violation of Qwest's tariff.

47 U.S.C. § 203(a) requires carriers to file tariffs with the FCC. 47 U.S.C. § 203(a) (2004).[10] These tariffs show all charges for each telephone service the carrier provides, as well as all classifications, practices, and regulations affecting such charges. *Id.*; *Fax*, 138 F.3d at 482. 47 U.S.C. § 203(c) makes it unlawful for a carrier to "extend to any person any privileges or facilities in such communication, or employ or enforce any classifications, regulations, or practices affecting such charges, except as specified in" the tariff. 47 U.S.C. § 203(c). The purpose of this statute is to prevent unreasonable and discriminatory charges. *Am. Tel. & Tel. Co. v. Cent. Office Tel., Inc.*, 524 U.S. 214, 222 (1998). In other words, the statute is violated if similarly situated customers pay different rates for the same services. *Id.* at 223.

This rule falls within the purview of the "filed-rate doctrine," which provides that the tariff controls the rate a carrier must charge its customers, and "even if a carrier intentionally misrepresents its rate and a customer relies on the misrepresentation, the carrier cannot be held to the promised rate if it conflicts with [its] published tariff." *Id.* at 222. Or, as *Black's Law Dictionary* explains, the filed-rate doctrine the "common-law rule forbidding a regulated entity, usually a common carrier, to charge a rate other than the one on file with the appropriate federal

[10]Although I refer only to the federal tariffs in this analysis, this analysis applies equally to state tariffs.

regulatory authority." *Black's Law Dictionary* 642 (7th ed. 1999). Thus, a tariff under 47 U.S.C. § 203 preempts any contractual agreement that does not comport to the filed tariff. *Am. Tel. & Tel.*, 524 U.S. at 221–26.

In light of the binding nature of its tariffs, Qwest asserts that its release in the BPCA supplements is invalid. (Qwest's Partial Summ. J. Resp. at 22–27.) AT&T, on the other hand, points to the troubling policy implications of Qwest's argument. (AT&T's Partial Summ. J. Br. at 22, 24; AT&T's Partial Summ. J. Reply at 19–20.) According to AT&T, if Qwest's argument is valid, than this case could never settle. (*Id.*) When the parties would agree to settle the case, they would execute a settlement agreement and release. (*Id.*) However, at any point in the future, Qwest could once again initiate a civil action and the action would not be barred by its release because the release would be void for potential violation of the tariff. (*Id.*) Thus, the parties would be unable to settle. (*Id.*) As AT&T describes it, therefore, this case and any case like it could never settle, and "would have to be litigated to verdict and through all available appeals . . . because no customer would ever pay to settle a case in return for a release of the carrier's claims against it if that release could not be enforced." (AT&T's Partial Summ. J. Br. at 24.)

Although not clearly enunciated by Qwest, the policy considerations are nearly as troubling if I reached AT&T's proffered conclusion, that Qwest's release is valid. If a carrier is permitted to release claims for breach of tariff in anticipation of, or after a lawsuit has been filed, then carriers can contract around any tariff simply by using judicial mechanisms. Thus, although carriers are not permitted to agree to a rate structure not in accordance with the tariff, carriers could do so simply by filing a lawsuit and then settling it for an amount that contravenes the

tariff.

As set forth below, although there is little precedent on this issue advocating either approach, I conclude that AT&T's argument is more persuasive. Judicial and public policy favors the resolution of legal disputes through settlement rather than continued litigation. *In re Integra Realty Res., Inc.*, 262 F.3d 1089, 1102 (10th Cir. 2001); *Stanspec Corp. v. Jelco, Inc.*, 464 F.2d 1184, 1187 (10th Cir. 1972). Although a settlement might conceivably violate a tariff, in light of the judicial public policy that favors resolution of legal disputes, I conclude that there must be an exception to the filed-rate doctrine for good faith settlements of legal disputes over tariffs. Otherwise, cases such as this one could never settle.

The necessity of such a rule has been recognized by the D.C. Circuit. In *Panhandle Eastern Pipe Line Co. v. FERC*, two of the parties in a lawsuit reached a settlement of their dispute over how much one of the parties could charge the other party for natural gas. *Panhandle E. Pipe Line Co. v. FERC*, 95 F.3d 62, 67 (D.C. Cir. 1996). The Federal Energy Regulatory Commission ("FERC"), however, did not approve this settlement. *Id.* Regarding FERC's decision as to this point, the D.C. Circuit explained that FERC

> declined to approve the settlement solely because — as the agency revealed in rulings it made after Columbia filed the settlement — Columbia would have fared better had it insisted that any attempt to recover the costs at issue through a direct bill would have violated the filed rate doctrine. [FERC] did so despite any waiver of the filed rate doctrine which might have resulted from Columbia's agreement to the rejected settlement. That was a startling abuse of [FERC]'s discretion to reject a settlement proposal.

Id. at 74 (citations omitted) (internal quotation marks omitted). This holding demonstrates that the D.C. Circuit believes that a settlement is permitted despite any possible implications to the

filed-rate doctrine, and any conclusion to the contrary is simply "startling." *Id.*

Likewise, other courts have reached similar conclusions in other contexts. In *Denburg v. Parker Chapin Flattau & Klimpl*, the New York Court of Appeals upheld a settlement agreement to settle a legal dispute over an impermissible forfeiture-for-competition agreement between lawyers. *Denburg v. Parker Chapin Flattau & Klimpl*, 624 N.E.2d 995, 1001–02 (N.Y. 1993). Despite the fact that the settlement agreement's effect was also to be an impermissible forfeiture-for-competition agreement, the New York Court of Appeals found that the "strong policies in favor of voluntary settlements of disputes" outweighed the harm of the settlement agreement. *Id.* Likewise, a dissenting judge on the Indiana Court of Appeals reached a similar conclusion in a case where an employee executed a release for consideration of any claim regarding an employment agreement under which the employee agreed to work for wages less than those mandated by federal and state prevailing wage laws. *Stampco Const. Co., Inc. v. Guffey*, 572 N.E.2d 510, 516–17 (Ind. App. 1991) (Buchanan, J., dissenting). In response to the majority decision to the contrary, the dissenting judge explained that there is a difference between releasing a "right to receive" a prevailing wage and releasing a "*claim* for not having *received* prevailing wages," and "[t]here is no known public policy precluding litigants from settling their claims." *Id.* (emphasis in original).

Of course, the foregoing view is not universally held among jurists. *See id.* at 513 (majority opinion). The FCC's position on this issue has been ambiguous. The FCC has permitted parties to settle cases that dealt with disputed tariffs. *See, e.g., Garin Strategic Research Group LLC v. MCI WorldCom Communications, Inc.*, 17 F.C.C. Rcd. 26150, 26150–51 (Dec. 24, 2002). Moreover, the FCC's rules regarding formal complaints, 47 C.F.R.

§§ 1.720–36, which includes complaints related to tariffs, 47 C.F.R. § 1.720(h), repeatedly discusses settlement, 47 C.F.R. §§ 1.721–22, 1.724, 1.730, 1.733, without requiring that such settlements comply with the applicable tariffs. 47 C.F.R. §§ 1.720–36 (2004). On the other hand, the FCC has specifically addressed this issue in *dicta*, explaining that despite its policy of encouraging settlement, "[t]he "filed-rate doctrine" generally bars damage awards — and thus settlement offers — that are based on common-law theories that a rate, term, or condition contrary to the filed tariff should govern in place of the filed tariff." *In the Matter of Kenneth E. Brooten, Jr.*, 12 FCC Rcd. 13343, 13351 (Sept. 4, 1997). In spite of the majority opinion in *Stampco* and the FCC's *dicta* in *Brooten*, I conclude for the reasons set forth above that the decision in *Panhandle* and the other cases cited above are more persuasive.

Any concern that carriers might use this decision to attempt to contract around a tariff by using judicial mechanisms is alleviated by two facts. First, as stated above, it is proper for the court to consider whether the parties entered into the release in good faith. Second, despite the permissibility of any settlement and release between the parties, this decision would have no impact on a decision by a third party to initiate a suit on the basis that the settlement amount is discriminatory. *See* 47 U.S.C. § 202 (2004) (it is unlawful for a common carrier to discriminate in its charges or services); 47 U.S.C. § 206 (2004) (permitting damages for persons harmed by common carrier's acts in violation of 47 U.S.C. §§ 201–31).

In the case at hand, the parties executed a valid and binding release of all claims prior to March 2004. (AT&T's Partial Summ. J. Br., Statement of Undisputed Facts ¶¶ 63–64; *admitted at* Qwest's Partial Summ. J. Resp., Resp. to Undisputed Facts ¶¶ 63–64.) The express purpose of this release was to settle disputes between the parties. (Qwest's Partial Summ. J. Resp.,

Statement of Additional Facts ¶¶ 20–21, 40; *admitted in pertinent part at* AT&T's Partial Summ. J. Reply, Resp. to Additional Facts ¶¶ 20–21, 40.) In fact, as repeatedly noted above, Qwest executed this release after it instituted legal action on the issues covered by the release. (AT&T's Partial Summ. J. Br., Statement of Undisputed Facts ¶¶ 63–64; *admitted at* Qwest's Partial Summ. J. Resp., Resp. to Undisputed Facts ¶¶ 63–64.) Qwest has not argued mistake, inadvertence, or any other possible defense to its release, other than the issues already addressed.

Moreover, there is nothing in the record that suggests that the parties entered into this release in bad faith. While Qwest argues that AT&T acted in bad faith, (Qwest's Partial Summ. J. Resp. at 19–22), the question regarding bad faith deals with whether both parties colluded to use judicial mechanisms to contract around the tariff. Here, there is no evidence that the parties jointly planned to enter an agreement in violation of Qwest's tariff by the invocation of a legal dispute in order to avoid the tariff.

For the reasons set forth above, I find that Qwest released and waived all of its claims prior to March 2004. I therefore grant AT&T's motion for partial summary judgment on all of Qwest's claims prior to March 2004.

3. AT&T's Motion for Summary Judgment on Qwest's Third Claim for Relief

AT&T moves for summary judgment on Qwest's third claim for relief, unjust enrichment, which Qwest pleads in the alternative. (AT&T's Third Claim Br.) A plaintiff proves a claim of unjust enrichment if "(1) at plaintiff's expense (2) defendant received a benefit (3) under circumstances that would make it unjust for defendant to retain the benefit without

paying." *DCB Const. Co., Inc. v. Cent. City Dev. Co.*, 965 P.2d 115, 119–20 (Colo. 1998).[11] If an express contract covers the issues in dispute, a plaintiff cannot prevail on an unjust enrichment claim. *Dudding v. Norton Frickey & Assocs.*, 11 P.3d 441, 444 (Colo. 2000); *Bedard v. Martin*, 100 P.3d 584, 591–92 (Colo. App. 2004). A tariff is considered an express contract for the purposes of an unjust enrichment claim. *Iowa Network Servs., Inc. v. Qwest Corp.*, 363 F.3d 683, 694 (8th Cir. 2004).

AT&T argues that since Qwest's tariffs exist, those tariffs preclude Qwest's alternative claim for unjust enrichment. (AT&T's Third Claim Br.) AT&T's argument puts the cart before the horse. Under the doctrine of pleading in the alternative, "a party is allowed to plead breach of contract, or if the court finds no contract was formed, to plead for quasi-contractual relief [i.e. unjust enrichment] in the alternative. Once a valid contract is found to exist, [however,] quasi-contractual relief is no longer available." *Cromeens, Holloman, Sibert, Inc v. AB Volvo*, 349 F.3d 376, 397 (7th Cir. 2003). Here, the court has yet to specifically rule whether the tariffs apply to this matter. Moreover, the court has not ruled whether any other contracts or agreements cover this dispute after February 2004. Accordingly, Qwest may still maintain its alternative claim for unjust enrichment.

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[11]I note that both parties blindly assume, without any discussion or analysis, that Colorado law applies to this claim for relief. Considering that Qwest's first amended complaint refers to AT&T's actions in fourteen different states, the propriety of the parties' blind assumption that only Colorado law applies is the subject of some doubt. Unlike Qwest's fourth claim, discussed below, where Qwest explicitly states that its claim only applies to Colorado, it would seem likely that Qwest's claim of unjust enrichment encompasses far more states than just Colorado. However, since (1) the parties have briefed this issue under Colorado law and (2) the following analysis is in accord with general legal principles, I will accept the parties' assumption that Colorado law applies to this case. I admonish the parties, however, to be clear about the applicable law in all future filings.

Both parties cite to a recent decision by another district court judge in this district concluding that a claim of unjust enrichment cannot survive summary judgment due to the existence of tariffs. (AT&T's Third Claim Br. at 11–12; Pl.'s Resp. To Defs.' Mot. for Summ. J. On Third Claim for Relief [Unjust Enrichment] at 14 [filed Feb. 28, 2005].); *Qwest Corp. v. AT&T Corp.*, Civil Action No. 03–F–2084 (CBS), Order on Pending Motions and Setting Trial Date at 15–16 (D. Colo. Nov. 23, 2004). This decision was premised upon the filed-rate doctrine, discussed above, which bars state law claims that seek a remedy that would deviate from or conflict with the terms of a filed tariff. *See Qwest Corp. v. AT&T Corp.*, Civil Action No. 03–F–2084 (CBS), Order on Pending Motions and Setting Trial Date at 15–16 (D. Colo. Nov. 23, 2004) (citing *Baldwin v. Scott County Milling Co.*, 307 U.S. 478, 485 [1939]; *A.S.I. Worldwide Communications Corp. v. Worldcom, Inc.*, 115 F. Supp. 2d 201, 209–10 [D.N.H. 2000]; *CSX Transp., Inc. v. City of Pensacola, Fla.*, 887 F. Supp. 275, 278 [N.D. Fla. 1995]). This issue — the filed-rate doctrine's impact upon Qwest's unjust enrichment claim — differs from the issue addressed by the parties — whether the existence of a tariff bars Qwest's unjust enrichment claim under general principles of quasi-contracts. Since neither of the parties have adequately addressed the issue of the filed-rate doctrine in the context of Qwest's unjust enrichment claim, I do not analyze this issue in this order and memorandum of decision.

For the foregoing reasons, AT&T's motion for summary judgment on Qwest's third claim for relief is premature. Since AT&T's argument may well be meritorious either (1) under the filed-rate doctrine, or (2) once this court has determined the applicability of the tariffs, I deny AT&T's motion as premature without prejudice to refiling.

4. AT&T's Motion for Summary Judgment on Qwest's Fourth Claim for Relief

AT&T moves for summary judgment on Qwest's fourth claim for relief, fraudulent concealment and misrepresentation. (AT&T's Fourth Claim Br.) Prior to addressing the merits of AT&T's motion, I must discuss two preliminary matters.

a. Preliminary Matters

First, there are three pending motions that are related to AT&T's motion for summary judgment on Qwest's fourth claim for relief. AT&T also moves to dismiss Qwest's fourth claim for relief on grounds similar to those set forth in AT&T's motion for summary judgment. (AT&T's Mot. to Dismiss) Since, as set forth below, Qwest's fourth claim for relief cannot survive summary judgment, I need not address AT&T's motion to dismiss and therefore deny it as moot. With regards to AT&T's motion to dismiss, Qwest filed an opposed motion for leave to supplement its response to AT&T's motion to dismiss. (Qwest's Mot. to Supplement its Mot. to Dismiss Resp.) Since I deny AT&T's motion to dismiss as moot, I likewise deny Qwest's motion for leave to supplement its response to AT&T's motion to dismiss as moot.

With regards to AT&T's motion for summary judgment, Qwest moves for leave to file a supplement to add what it terms "newly discovered evidence." (Qwest's Fourth Claim Supplement.) Qwest's motion does not include a certification that Qwest conferred or made a reasonable good-faith effort to confer with opposing counsel regarding the motion. D.C.COLO.LCivR 7.1(A) provides:

> Duty to Confer. The court will not consider any motion, other than a motion under Fed. R. Civ. P. 12 or 56, unless counsel for the moving party or a *pro se* party, before filing the motion, has conferred or made reasonable, good-faith efforts to confer with opposing counsel or a *pro se* party to resolve the disputed matter.

> The moving party shall state in the motion, or in a certificate attached to the motion, the specific efforts to comply with this rule.

"The purpose of Rule 7.1A is to require the parties to confer and to attempt to resolve a dispute before incurring the expense of filing a motion and before requiring the court to address a disputed issue." *Hoelzel v. First Select Corp.*, 214 F.R.D. 634, 635 (D. Colo. 2003). In accordance with the language of the local rule, courts in this jurisdiction routinely deny motions that fail to comply with Local Rule 7.1(A). *See, e.g., Echostar Communications Corp. v. News Corp. Ltd.*, 180 F.R.D. 391, 394 (D. Colo. 1998) ("The failure to comply with Local Rule 7.1A is sufficient alone to warrant a denial of the motion to compel"); *McCoy v. West*, 965 F. Supp. 34, 35 (D. Colo. 1997) ("[defendant] has presented no evidence of his effort to comply with [Local Rule 7.1(A)], and his motions are untenable on that basis alone"). Since Qwest failed to follow the local rules, I deny its motion to supplement. However, to remove any doubt as to the validity of my conclusions on the merits of AT&T's motion for summary judgment, I briefly recited Qwest's factual averments from its supplement in the facts section of this order and memorandum of decision, and I briefly address these facts in the analysis below.

The second preliminary matter deals with the scope of Qwest's fourth claim for relief. In its first amended complaint, Qwest asserts that AT&T committed fraud in Arizona, Colorado, Idaho, Iowa, Minnesota, Montana, Nebraska, New Mexico, North Dakota, Oregon, South Dakota, Utah, Washington, and Wyoming. (Am. Compl. ¶ 48.) However, in its response to AT&T's motion for summary judgment, Qwest repeatedly states that its claim only deals with AT&T's actions in Colorado. (Qwest's Fourth Claim Resp., Statement of Additional Facts ¶ 1; Qwest's Fourth Claim Resp. at 22, 24.) Both parties, likewise, primarily refer to Colorado law.

Accordingly, I conclude that Qwest has waived its fraud claims regarding any state other than Colorado. I therefore need only address Colorado law with regards to Qwest's fraud claim.

b. The Merits of AT&T's Motion

With these preliminary matters resolved, I now turn to the merits of AT&T's motion for summary judgment on Qwest's fourth claim for relief. Qwest avers that AT&T engaged in both fraudulent concealment and misrepresentation. (Am. Compl. ¶¶ 47–58.) Under Colorado law,

> [t]he elements of fraudulent concealment are: (1) concealment of a material fact that in equity and good conscience should be disclosed; (2) knowledge on the part of the party against whom the claim is asserted that such a fact is being concealed; (3) ignorance of that fact on the part of the one from whom the fact is concealed; (4) the intention that the concealment be acted upon; and (5) action on the concealment resulting in damages.
> The elements of fraudulent misrepresentation are: (1) a fraudulent misrepresentation of material fact; (2) the plaintiffs' reliance on the material representation; (3) the plaintiffs' right or justification in relying on the misrepresentation; and (4) reliance resulting in damages.

Nielson v. Scott, 53 P.3d 777, 779–80 (Colo. App. 2002) (citation omitted). A plaintiff's reliance on a defendant's misrepresentation or concealment must be reasonable. *Brush Creek Airport, LLC v. Avion Park, LLC*, 57 P.3d 738, 749 (Colo. App. 2002); *Balkind v. Telluride Mountain Title Co.*, 8 P.3d 581, 587 (Colo. App. 2000). Thus, fraudulent concealment and misrepresentation claims fail if the plaintiff knows of the fact that is being concealed or misrepresented, or should have known of that fact. *Nielson*, 53 P.3d at 780. As one Colorado court has described it "[i]f the circumstances surrounding a transaction would arouse a reasonable person's suspicion, then equity will not relieve a party from the consequences of inattention and negligence in failing to pursue an investigation." *Id.* at 780. Explained in

another way, "[o]ne is not justified in relying on a representation which a person of the same or similar intelligence, education or experience would recognize as false." *Dime Box Petroleum Corp. v. Louisiana Land & Exploration Co.*, 717 F. Supp. 717, 723 (D. Colo. 1989) (applying Colorado law).

For the following analysis, I will assume that AT&T made misrepresentations and attempted to conceal the specific facts of its practice of terminating its phone-to-phone IP telephony calls on Qwest's network without paying Qwest access charges. Here, taking the facts in a light most favorable to Qwest, no reasonable company could justifiably rely upon any of AT&T's alleged misrepresentations and actions of concealment. For the reasons set forth in *Analysis* § 2, *supra*, I need only look at whether fraud existed after February 2004.

As of March 2004, AT&T's FCC petition had been a matter of public record for nearly a year and a half. (AT&T's Partial Summ. J. Br., Statement of Undisputed Facts ¶¶ 21–22; *admitted at* Qwest's Partial Summ. J. Resp., Resp. to Undisputed Facts ¶¶ 21–22.) As Qwest admits, this petition set forth AT&T's phone-to-phone IP telephony service methods "in remarkable detail." (*Id.*) AT&T specifically explained in its petition that it "has terminated its phone-to-phone IP telephony services over" Qwest's PRI business lines and local interconnection service facilities. (*Id.*, Statement of Undisputed Facts ¶ 62; *admitted at* Qwest's Partial Summ. J. Resp., Resp. to Undisputed Facts ¶ 62.) Indeed, in light of AT&T's petition, Qwest filed several comments opposing this petition from December 2002 through February 2004. (*Id.*, Statement of Undisputed Facts ¶ 23; *admitted at* Qwest's Partial Summ. J. Resp., Resp. to Undisputed Facts ¶ 23.)

In light of AT&T's FCC petition and Qwest's responses thereto, even with the facts taken

in a light most favorable to Qwest, it would have been wholly unreasonable for Qwest to rely upon any misrepresentations or actions of concealment by AT&T regarding its phone-to-phone IP telephony practices. Since AT&T disclosed its practices in its FCC petition, Qwest could not feign ignorance of AT&T's actions. Indeed, Qwest itself claims that in reviewing AT&T's FCC petition, it learned that AT&T was terminating its phone-to-phone IP telephony calls over Qwest's networks without paying Qwest access charges. (Qwest's Fourth Claim Resp., Statement of Additional Facts ¶ 34; *denied at* AT&T's Fourth Claim Reply, Resp. to Statement of Additional Facts ¶ 34; *see also* Qwest's Fourth Claim Resp. at 17 ["until AT&T filed its petition in October 2002, Qwest did not know, and had no reason to believe, that AT&T was terminating long distance calls using local facilities"] [capitalization altered].)

Moreover, in February 2004, Qwest met with AT&T to discuss AT&T's practice of terminating its phone-to-phone IP telephony services without paying Qwest access charges. (Qwest's Fourth Claim Resp., Statement of Additional Facts ¶ 43; *denied at* AT&T's Fourth Claim Reply, Resp. to Statement of Additional Facts ¶ 43.) At this meeting, Qwest demanded that AT&T pay the access charges and not route such traffic over Qwest's PRI business lines and local interconnection service facilities. (*Id.*) If Qwest was demanding that AT&T change its current conduct in February 2004, then Qwest certainly cannot claim that it was unaware of AT&T's then-current conduct in March 2004 and thereafter.

Furthermore, even prior to AT&T filing its petition with the FCC, Qwest was well aware of the general practice of carriers terminating phone-to-phone IP telephony services without paying access charges. This conclusion is evident for three reasons. First, prior to its merger with US West, Qwest also had a large phone-to-phone IP telephony service and Qwest

maintained that it did not have to pay access charges for this service. (AT&T's Fourth Claim Br., Statement of Undisputed Facts ¶¶ 20, 23, 26; *admitted or deemed admitted at* Qwest's Fourth Claim Resp., Resp. to Undisputed Facts ¶¶ 20, 23, 26.) Second, Qwest's predecessor, US West, filed a petition with the FCC in 1999 requesting that the FCC rule that access charges apply to phone-to-phone IP telephony services. (AT&T's Partial Summ. J. Br., Statement of Undisputed Facts ¶ 14; *admitted at* Qwest's Partial Summ. J. Resp., Resp. to Undisputed Facts ¶ 14.) In this petition, US West explicitly identified AT&T as a carrier that was using its network to terminate such calls without paying it access fees. (*Id.*, Statement of Undisputed Facts ¶ 15; *admitted at* Qwest's Partial Summ. J. Resp., Resp. to Undisputed Facts ¶ 15.) Third, although US West exempted AT&T's then voice-to-voice IP telephony service, Connect 'n Save, from its general waiver of claims, Qwest ended this exemption in October 2000. (*Id.*, Statement of Undisputed Facts ¶¶ 54–61; *admitted at* Qwest's Partial Summ. J. Resp., Resp. to Undisputed Facts ¶¶ 54–61; AT&T's App., Ex. A–3 at 277 [BPCA Supplement], Ex. A–4 at 281, 283, 285, 287, 290, 293, 296, 301, 304, 307, 310, 318–19 [BPCA Supplement Issue Exemption Forms].) Unlike Qwest's argument that it ended this waiver as a result of AT&T's termination of its Connect 'n Save program, Qwest's contractually proffered reason for ending this exemption was that the legitimacy of this exemption "is still waiting to be ruled on by the FCC or the PUC." (AT&T's App., Ex. A–4 at 319 [BPCA Supplement Issue Exemption Forms].) Thus, Qwest was generally aware of the type of actions AT&T took even prior to October 2002 when AT&T filed its FCC petition.

I can easily dispose of Qwest's possible arguments that it was unaware of AT&T's

actions, even after AT&T filed its FCC petition.[12] Any certification by AT&T that it was not terminating its phone-to-phone IP telephony services on Qwest's network without paying access charges cannot overcome the foregoing evidence. Indeed, this purported certification was unsigned. (Qwest's Fourth Claim Supplement, Ex. 12 [1/5/04 e-mail from Bastian to Barish].) Qwest could not reasonably rely upon this unsigned January 2004 certification — and it did not, for it met with AT&T in February 2004 to address Qwest's concerns. (Qwest's Fourth Claim Resp., Statement of Additional Facts ¶ 43; *denied at* AT&T's Fourth Claim Reply, Resp. to Statement of Additional Facts ¶ 43.) Qwest's statement that, to this day, it is unsure of which AT&T's phone-to-phone IP telephony calls AT&T did not pay access charges, (*Id.*, Statement of Additional Facts ¶ 45; *denied at* AT&T's Fourth Claim Reply, Resp. to Statement of Additional Facts ¶ 45), also does not alter the conclusion that Qwest cannot state a claim for fraud. As set forth above, Qwest was well aware of AT&T's practices and the general scope of these practices, even if Qwest is unaware of the precise amount of its purported damages.

By March 2004, no business entity could reasonably or justifiably rely upon any misrepresentations of AT&T in light of the overwhelming evidence of AT&T's practices, cited above. In other words, by March 2004, the cat had long since been out of the bag regarding AT&T's phone-to-phone IP telephony practices. Accordingly, Qwest's fraud claim cannot survive summary judgment.

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[12]Indeed, many of Qwest's arguments are irrelevant, such as AT&T's handwritten notes that purportedly show AT&T's intent to defraud LECs, (Qwest's Fourth Claim Resp., Statement of Additional Facts ¶¶ 24–29; *denied in pertinent part at* AT&T's Fourth Claim Reply, Resp. to Statement of Additional Facts ¶¶ 24–29; Qwest's Fourth Claim Resp., Ex. 10 at ATTHC2651000001 [handwritten notes]), because, *inter alia*, AT&T employees wrote these notes prior to AT&T's FCC petition and Qwest's release of its claims.

5. AT&T's Motion for Summary Judgment on Qwest's Fifth Claim for Relief

AT&T moves for summary judgment on Qwest's fifth claim for relief, breach of contract. (AT&T's Fifth Claim Br.) According to Qwest, AT&T (1) breached the implied duty of good faith and fair dealing in the operating agreement, (2) breached the operating agreement's requirement to comply with all applicable laws and rules by violating FCC rules, (3) breached the operating agreement's requirement to comply with all applicable laws and rules by violating Qwest's tariffs, and (4) breached the operating agreement by distorting the billing factors. (Pl.'s Resp. To Defs.' Mot. for Summ. J. On Qwest's Fifth Claim for Relief [filed Feb. 28, 2005] [hereinafter "Qwest's Fifth Claim Resp."].) Since I can resolve this motion on the second issue, I need not address the other issues.[13]

Qwest maintains that AT&T breached the operating agreement's requirement to comply with all applicable laws and rules by violating 47 C.F.R. § 69.5(b), as found by the FCC. (Qwest's Fifth Claim Resp. at 12.) The operating agreement requires the parties to "comply with all applicable federal, state and local laws, rules, regulations, court orders and governmental agency orders." (Qwest's Partial Summ. J. Resp., Statement of Additional Facts ¶ 28; *admitted*

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[13]Nevertheless, in this footnote I briefly address Qwest's good faith argument in order to prevent having to employ future resources on such a meritless argument. Under Colorado law, every contract contains an implied duty of good faith and fair dealing. *Amoco Oil Co. v. Ervin*, 908 P.2d 493, 498 (Colo. 1995). This duty, however, only applies "when one party has discretionary authority to determine certain terms of the contract, such as quantity, price, or time." *Id.* The duty of good faith and fair dealing "will not contradict terms or conditions for which a party has bargained." *Id.* Qwest has pointed to no portion of the operating agreement that gives AT&T discretionary authority to determine certain terms of the contract. *See O'Reilly v. Physicians Mut. Ins. Co.*, 992 P.2d 644, 647 (Colo. App. 1999) (holding that trial court must "identify which discretionary term in the agreement [the defendant] allegedly abused with respect to the duty of good faith and fair dealing."). Accordingly, AT&T has not breached the covenant of good faith and fair dealing implicit in the operating agreement.

at AT&T's Partial Summ. J. Reply, Resp. to Additional Facts ¶ 28.) The FCC determined that AT&T's phone-to-phone IP telephony service is subject to 47 C.F.R. § 69.5(b). *FCC Order*, 19 F.C.C. Rcd. 7457. Since AT&T was not paying access charges to Qwest for terminating its phone-to-phone IP telephony calls prior to the FCC decision, AT&T has been violating 47 C.F.R. § 69.5(b). Because the operating agreement required AT&T to "comply with all applicable federal . . . regulations," AT&T apparently breached this provision.[14]

Although the FCC explained in its order that it would not decide whether "access charges can be collected for past periods," *FCC Order*, 19 F.C.C. Rcd. at 7471, the FCC plainly concluded that AT&T's actions did not comport with 47 C.F.R. § 69.5(b). In spite of the fact that I need not decide at the present time whether Qwest is entitled to access charges under its tariffs prior to the *FCC Order*, i.e. the retroactive effect of the *FCC Order*, AT&T may still be in breach of the operating agreement for failure to comply with the applicable federal regulations, even if it is not liable for the past access charges noted in the *FCC Order*. Accordingly, I reject AT&T's motion for summary judgment as to Qwest's fifth claim for relief as for AT&T's actions beginning in March 2004.

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[14]This conclusion is different from the conclusion that AT&T breached the *FCC Order*. Immediately following the FCC's decision, AT&T withdrew its phone-to-phone IP telephony program. (AT&T's Partial Summ. J. Br., Statement of Undisputed Facts ¶ 33; *admitted at* Qwest's Partial Summ. J. Resp., Resp. to Undisputed Facts ¶ 33.) Thus, AT&T complied with the *FCC Order*. However, in light of the fact that AT&T did not comply with 47 C.F.R. § 69.5(b) prior to the release of the *FCC Order*, as found by the FCC, AT&T may have breached the operating agreement.

6. Conclusions

Based on the foregoing it is therefore

ORDERED as follows:

1. Defendants' Motion to Dismiss the Fourth Claim for Relief (# 37) is DENIED as moot.

2. Plaintiff's Motion for Leave to Supplement Its Response (# 73) is DENIED as moot.

3. Defendants' Motion for Partial Summary Judgment on all of Plaintiff's claims prior to March 2004 (# 82) is GRANTED.

4. Defendants' Motion for Summary Judgment on Plaintiff's Third Claim for Relief (# 83) is DENIED without prejudice to refiling.

5. Defendants' Motion for Summary Judgment on Plaintiff's Fourth Claim for Relief (# 84) is GRANTED.

6. Defendants' Motion for Summary Judgment on Plaintiff's Fifth Claim for Relief (# 85) is DENIED.

7. Plaintiff's Motion for Leave to Supplement (# 108) is DENIED.

8. The court will hold a Final Pretrial Conference commencing at 9:30 o'clock a.m. on August 12, 2005, in Courtroom A1001, Alfred A. Arraj United States Courthouse, Denver, Colorado. In preparing for and participating in the conference, the parties and counsel will follow the Instructions for Preparation and Submission of Final Pretrial Order, a copy of which is

attached.

Dated this 10 day of June, 2005.

BY THE COURT:

EDWARD W. NOTTINGHAM
United States District Judge

INSTRUCTIONS FOR PREPARATION AND SUBMISSION OF FINAL PRETRIAL ORDER

(Click here to return to Table of Contents)

Counsel are directed to meet in advance of the final pretrial conference and jointly develop the contents of the proposed Final Pretrial Order which shall be presented for the court's approval ***no later than five days before the final pretrial conference***. Also, attention is directed to Fed. R. Civ. P. 16(d) ("The conference shall be attended by at least one of the attorneys who will conduct the trial for each of the parties and by any unrepresented parties.").

Listed on the following pages are matters to be included in the Final Pretrial Order. For convenience of the court and counsel, the prescribed sequence and terminology should be used in the preparation of the Final Pretrial Order. The bracketed and italicized information on the form explains what the court expects. The form for the Final Pretrial Order can be copied, printed, or downloaded from the court's web site, www.cod.uscourts.gov. The form is pages four through six of my Practice Standards — Civil posted on the web site. Click first on the "United States District Court" button and then on the "Judges' Information" button to navigate to these trial procedures. A computerized version of the form (in WordPerfect version 9) can be obtained by delivering a 3½" diskette to my secretary or courtroom deputy clerk and asking for a copy of the form.

The Final Pretrial Order shall be double-spaced in accordance with D.C.COLO.LCivR 10.1E, even though the instructions in the following format for the proposed Final Pretrial Order are single-spaced. Please note also that the attached form is customized for proceedings before me, since the magistrate judges are not involved in final pretrial conferences in cases assigned to me. Be careful to use this form, getting an electronic copy from my staff or the web site.