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July 25, 2006

Annette Taylor
Oregon Public Utility Commission
550 Capitol St., NE, Suite 215
P.O. Box 2148
Salem, OR 97308-2148

Re: UM 1232

Dear Ms. Taylor

Enclosed for filing please find an original and (5) copies of Qwest Corporation's Opposition to Petition of AT&T Communications of the Pacific Northwest, Inc., and TCG Oregon for Rehearing and Reconsideration of Order No. 06-230, along with a certificate of service.

If you have any question, please do not hesitate to give me a call.

Sincerely,

Carla

Carla M. Butler

CMB:
Enclosure
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BEFORE THE PUBLIC UTILITY COMMISSION OF OREGON

UM 1232

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<td>AT&T COMMUNICATIONS OF THE PACIFIC NORTHWEST, INC., AND TCG OREGON; TIME WARNER TELECOM OF OREGON, LLC; AND INTEGRA TELECOM OF OREGON, INC.,<br><br>Complainants,<br><br>v.<br><br>QWEST CORPORATION,<br><br>Respondent.</td>
<td>QWEST CORPORATION'S OPPOSITION TO PETITION OF AT&T COMMUNICATIONS OF THE PACIFIC NORTHWEST, INC., AND TCG OREGON FOR REHEARING AND RECONSIDERATION OF ORDER NO. 06-230</td>
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## INTRODUCTION

Qwest Corporation ("Qwest") opposes the petition for rehearing and reconsideration of Commission Order No. 06-230 of complainants AT&T Communications of the Pacific Northwest, Inc., and TCG Oregon (collectively "Complainants"). The Commission correctly determined that 47 U.S.C. § 415 of the Federal Communications Act (the "Act")[1] applies to Complainants' action alleging breach of provisions in their interconnection agreements. The Commission's jurisdiction to interpret and enforce interconnection agreements was created by the Act. Therefore, Section 415 of the Act provides the appropriate statute of limitations within which the Commission may hear "complaints against carriers for the recovery of damages not based on overcharges," particularly where, as here, the alleged violations of interconnection agreements directly implicate federal law. Complainants fail to show an *error of law* or *good cause* to warrant reconsideration. Their contentions address issues that are *not essential to the*

[1] Section 415, as amended in 1970, is originally part of the federal Communications Act of 1934. The Commission's authority derives from Congress's amendment of the Act through the Telecommunications Act of 1996, and in particular 47 U.S.C. §§ 251 and 252.

*Commission's decision*, and they misstate existing Ninth Circuit precedent in their arguments. In their petition, as in their previous pleadings, Complainants fail to explain what jurisdictional basis, other than the Telecommunications Act of 1996 (the "1996 Act"), that the Commission has for enforcing actions arising under interconnection agreements. Complainants, in fact, readily acknowledge that the Commission's authority derives from the 1996 Act. Except for the 1996 Act, no other basis exists.

Complainants have not shown an error of law in the Commission's decision or good cause for further examination of any matter essential to the decision. Accordingly, Qwest respectfully requests that the Commission should deny Complainants' petition in its entirety.

**ARGUMENT**

Pursuant to O.R.S. 756.561 and OAR 860-014-0095, the Commission may grant reconsideration or rehearing "if sufficient reason therefor is made to appear." Among other requirements, Complainants must set forth one or more grounds for rehearing or reconsideration. OAR 860-014-0095(3) gives the Commission discretion to grant a hearing if Complainants show that there is:

> (a) New evidence which is essential to the decision and which was unavailable and not reasonably discoverable before issuance of the order;
>
> (b) A change in the law or agency policy since the date the order was issued, relating to a matter essential to the decision;
>
> (c) An error of law or fact in the order which is essential to the decision; or
>
> (d) Good cause for further examination of a matter essential to the decision.

Complainants here attempt to rely on OAR 860-014-0095(3)(c) and (d) for their petition.

The Commission should deny Complainants' petition because Complainants' have shown no error in law or good cause for further examination of a matter essential to the decision to

warrant reconsideration of Commission Order No. 06-230. Most fatal to Complainants' petition is that Complainants concede that the Commission's jurisdiction to interpret and enforce interconnection agreements derives from the 1996 Act. (*See* Petition, p. 4, and fn. 2 (citing cases).) Complainants fail to comprehend that without that authority, which is limited by Section 415 of the Act, the Commission has no other basis to adjudicate disputes involving interconnection agreements. Moreover, Complainants' remaining arguments regarding the nature of interconnection agreements and their construction of the case law relating to the construction and interpretation of interconnection agreements are overly narrow or otherwise misleading. And, significantly, even if Complainants' arguments had a grain of legal merit, these issues would not be essential to the Commission's decision.

## I. Complainants admit that the Commission's authority to interpret and enforce interconnection agreements derives from the 1996 Act

As Complainants acknowledge in their petition, the Commission's jurisdiction to hear actions to enforce the terms of interconnection agreements derives, not from state contract law, but from the 1996 Act. *See id.*; *see also Pac. Bell v. Pac-West Telecomm, Inc.*, 325 F.3d 1114, 1126 (9th Cir. 2003) ("[i]t is clear from the structure of the Act, however, that the authority granted to state regulatory commissions is confined to the role described in § 252- that of arbitrating, approving, and enforcing interconnection agreements"), *see also Petition of SBC Tex. for Post-Interconnection Dispute Resolution with Tex-Link Commc'ns., Inc., under the FTA Relating to Intercarrier Comp.*, Ruling on Motion to Dismiss, 2005 WL 2834183, at 2 (Tex. P.U.C., Oct. 26, 2005) ("[e]nforcement of ICAs does not rely on state law. Rather, the authority to enforce ICAs comes from federal law") (hereinafter "*SBC Tex.*"). This structure is consistent with Congress' intent in involving states. "[W]ith the 1996 Telecommunications Act, Congress has offered the states, not federal funds, but a role as what the carriers have called a 'deputized'

federal regulator." *MCI Telecomms. Corp. v. Ill. Bell Tel. Co.*, 222 F.3d 323, 343-44 (7th Cir. 2000). Importantly, the 1996 Act limits the scope of the Commission's authority to regulate local telecommunication competition, and specifically to interpret and enforce interconnection agreements. *Pac. Bell*, 325 F.3d at 1126-27 (discussing *AT&T v. Iowa Utils.*, 525 U.S. 366, 378, and fn. 6, 385 and fn. 10 (1999)).

Because Complainants' action sought to invoke the Commission's authority over disputes involving interconnection agreements, the Commission properly looked to 47 U.S.C. § 415 to determine whether it had authority to hear Complainants' action. Section 415 provides an express two-year statute of limitations within which the Commission may exercise its authority granted by the Act and hear "complaints against carriers for the recovery of damages not based on overcharges." Once that time limit has elapsed, this Commission no longer has authority to interpret or enforce interconnection agreements.

As previously discussed in Qwest's pleadings, the Act expressly imposes a two-year statute of limitations that applies to any actions involving claims under the Act. 47 U.S.C. § 415; *see Pavlak v. Church*, 727 F.2d 1425, 1426-27 (9th Cir. 1984). Section 415 applies to proceedings in federal court, the FCC, or before a state commission. *See, e.g., id* (holding that 47 U.S.C. § 415 applies to claims filed in district court, as well as to complaints filed with the FCC); *SBC Tex.*, at 7-9 (finding that the two-year limitation applies to claims that a state commission is authorized to hear). In pertinent part, Section 415 provides:

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

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

The plain language of Section 415 reaches "all complaints against carriers for the recovery of damages not based on overcharges." This broad scope is consistent with Congress' desire to assure national uniformity in the Act's application. *See Swarthout v. Mich. Bell Tel. Co.*, 504 F.2d 748, 748 (6th Cir. 1974). To permit varying periods of limitation from state to state would contravene Congress's intent and discriminate against carriers that happen to be sued in states with more generous statutes of limitation. *See A.J. Phillips Co., v. Grand Trunk W. Ry. Co.*, 236 U.S. 662, 667 (1915).

Recognizing the breadth of Section 415, courts in the Ninth Circuit have applied Section 415 in actions involving telecommunications carriers, irrespective of whether the claims were state or federal. In *Pavlak*, the Ninth Circuit applied the two-year limitation to a plaintiff's civil rights claims against a carrier. *See Pavlak*, 727 F.2d at 1427-28. While Complainants attempt to distinguish *Pavlak* on the ground that the case involved only federal claims (*see* Petition, p. 8, fn. 3), Complainants' claim is not supported by a sensible reading of the case or other cases. In fact, *Pavlak* approvingly discussed a district court case (*Cole v. Kelley*, 438 F.Supp. 129 (C.D. Cal. 1977)) that applied Section 415 as a bar in an action against a carrier. *Pavlak*, 727 F.2d at 1427 ("*Cole* was decided properly"). In that case, the plaintiffs brought an action against a number of defendants, including Pacific Telephone, asserting constitutional and federal statutory violations, as well as a number of state law torts. As to Pacific Telephone, the *Cole* court held that the limitations period provided by Section 415(b), which at the time was one year, barred all

of the plaintiffs' claims, including the state claims: "The statute applies to civil actions brought against a federally regulated communications utility in federal court, as well as those filed with the regulatory agency." *Cole*, 438 F.Supp. 129. 145 (citing *Ward v. Northern Ohio Telephone Co.*, 251 F.Supp. 606 (N.D. Oh. 1966)).

Similarly, other state commissions and federal courts have applied Section 415 to bar actions. Particularly on point, the Texas Public Utility Commission understood that the Act granted the Commission its authority to interpret and enforce interconnection agreements and therefore had to look to Section 415 as a limitation on its jurisdiction. "Given that the authority to interpret/enforce ICAs and to award any damages comes from the FCA/FTA, the FCA's two-year limitations must apply to a claim for damages in an FTA arbitration. Thus, without that authority, the Commission lacks jurisdiction to interpret or enforce interconnection agreements." *SBC Tex.*, at 9.

This Commission found *MFS International, Inc., v. International Telcom Ltd.*, 50 F. Supp. 2d 517 (E.D.Va. 1999), informative in disposing of Complainants' action. *See* Order, p. 6 (relying also on *Marcus v. AT&T*, 138 F.3d 46, 54 (2d Cir. 1998)). In that case, the district court found that the fact that the plaintiff purported to allege state law claims did not override the sweeping language of Section 415(b) and the claims were precluded. While noting that the breach of contract and conversion claims appeared not to implicate the Act, the court adhered to long-standing precedent and the plain language of the Act to find "that such putative state law claims are in fact governed by the federal statute of limitations set out in § 415(b)." *Id.*

Although the *MFS International* court dealt with a federally-filed tariff, rather than an interconnection agreement, Complainants' strained attempts to distinguish *MFS International* and similar cases on the tenuous grounds that interconnection agreements differ from federally-

filed tariffs are simply misleading and fail as a matter of law. Not one of Complainants' cases even addresses the applicable statute of limitations or questions the applicability of the Act's statute of limitations. The Commission's reading of these cases was correct and in accord with Ninth Circuit precedent. Complainants have shown *no error in law* or established *good cause* to reconsider the Commission's decision.

## II. Complainants' misstatements of applicable Ninth Circuit law fail to show an error <u>of law or good cause</u>

In their unpersuasive attempt to convince the Commission to reconsider its decision, Complainants stake most of their petition on an insistence that interconnection agreements are not like federal tariffs and are not the equivalent of federal law. (*See* Petition, pp. 6-7.) Complainants do so notwithstanding that the Ninth Circuit's precedential language in *Pacific Bell* completely undermines their argument. The Ninth Circuit recognizes that "interconnection agreements have the binding force of law," and other courts have found no functional difference between interconnection agreements and tariffs. *Pac. Bell*, 325 F.3d at 1127; *Verizon Md, Inc. v. RCN Telecom Servs., Inc.*, 232 F.Supp.2d 539, 552, fn. 5 (D. Md. 2002) (noting that an interconnection agreement "is functionally no different from a federal tariff").

Indeed, Complainants even fail to point the Commission to this language from *Pacific Bell* and instead selectively cobble together sentences from *Pacific Bell* to assert that "it should not be surprising that the courts have held that it is not federal law, but 'the agreements themselves and state law principles' that 'govern the questions of interpretation of the contracts and enforcement of their provisions.'" (Petition, p. 6.) However, *Pacific Bell* never held that federal law does not apply. Instead, the Ninth Circuit merely pointed out that at least one court had so held, and noted that the California Commission relied neither on state nor federal law. *Pac. Bell*, 325 F.3d at 1128. In the sentences immediately preceding the quote that

Complainants take out of context, the Ninth Circuit rejected the lower court's characterization of the California Commission's action because it was inconsistent with the Commission's responsibilities under the 1996 Act: "To suggest that the CPUC could interpret an interconnection agreement without reference to the agreement at issue is inconsistent with the *CPUC's weighty responsibilities of contract interpretation under § 252*." *Pac. Bell*, 325 F.3d at 1128. (Emphasis added.) Complainants' erroneous misstatements of existing law obviously do not suffice to establish an "error of law" or good cause.

## III. Complainants' contentions concerning the nature of interconnection agreements and the applicability of state law are overly narrow and immaterial

Complainants' remaining arguments about the nature of interconnection agreements in the context of the 1996 Act and the applicability of state law contract principles display an overly simplistic and incorrect understanding of the Act and its applicability to the Commission's decision. It is, of course, true (Petition, pp. 7-8) that state law may provide the relevant principles of contract interpretation for the Commission to apply in interpreting interconnection agreements. S*ee e.g., Southwestern Bell v. Pub. Util. Comm'n of Tex.*, 208 F.3d 475, 485 (5th Cir. 2000) (stating that state law governs questions of interpretation of agreements and enforcement of provisions); *cf. Ill. Bell Tele. Co. v. Worldcom Techs., Inc.*, 179 F.3d 566, 574 (7th Cir. 2000) (en banc) (stating in dicta that "[a] decision 'interpreting' an agreement contrary to its terms creates a different kind of problem-one under the law of contracts, and therefore one for which a state forum can supply a remedy").[2] However, it does not follow that Section 415 is

[2] Notably, Complainants hinge their hopes on the Seventh Circuit decision in *Illinois Bell*, which they claim "determined that the interpretation of interconnection agreements . . . presented a question of state contract law cognizable *only in state courts*." (Petition, pp. 7-8 (emphasis added).) *Illinois Bell* is not only inconsistent with *Pacific Bell*, which entertained federal review of a state commission's order relating to an interconnection agreement and emphasized the commission's responsibility of contract interpretation under section 252, but is also contrary to numerous other circuit courts that have disagreed with the narrow notion of jurisdiction advanced by the Seventh

inapplicable, or that the Commission may assert jurisdiction pursuant to a state statute of limitations for contract actions.

In the first instance, the Commission's power derives from the 1996 Act, not state law, which Complainants do not question. Second, even if it is consistent to look to state law contract principles to interpret an interconnection agreement, the 1996 Act creates the Commission's jurisdiction to hear such an action. Congress clearly intended that Section 415 provides the applicable statute of limitations.

Complainants' reliance on *Empire Healthchoice Assurance, Inc. v. McVeigh*, 126 S. Ct. 2121 (2006), in support of their arguments is unavailing. *McVeigh* involved a construction of the Federal Employees Health Benefits Act ("FEHBA"), and is inapposite to this case in two ways.

First, contrary to how Complainants read the decision, the Supreme Court in *McVeigh* determined that "the meaning of terms in a federal health insurance contract that sets forth the details of a federal health insurance program" was *not* at issue. (Petition, p. 4.) Second, the jurisdictional statute under FEHBA was far more circumscribed than Section 415 of the Act.

Although the FEHBA authorized the Office of Personnel Management ("OPM") to contract with Blue Cross Blue Shield ("BCBSA") to provide health insurance to federal employees, the terms of the OMB-BCBSA master contract were not at issue. *See McVeigh,* 126 S. Ct. at 2126-27, and 2133-34. Rather, the issue was whether BCBSA could bring suit in federal court to recover from a beneficiary under the terms of an ordinary health insurance contract between BCBSA and the beneficiary. *Id.* at 2133-34. The Supreme Court found that the "contract-derived claim for reimbursement is not a 'creature of federal law.'" *Id.* at 2134. In contrast here, numerous courts have already recognized that interconnection agreements are

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Circuit. *See e.g., Southwestern Bell Tel. Co. v. Brooks Fiber Commc'ns of Okla., Inc.*, 235 F.3d 493 (10th Cir. 2000); *Pub. Util. Comm'n of Tex.*, 208 F.3d 475; *GTE South, Inc. v. Morrison*, 199 F.3d 733 (4th Cir.1999).

mandated by federal law and are not the product of ordinary contract negotiations. *See, e.g., Pac. Bell*, 325 F.3d at 1127; *SBC Tex.* at 4 ("ICAs, unlike wholly private contracts, involve the implementation of public policy and *always include government action*"). (Emphasis added.)

Interconnection agreements are not ordinary private contracts, and the Commission correctly recognized that the very existence of interconnection agreements is mandated by the 1996 Act. Order, p. 6 ("[t]he interconnection agreements are required under the Telecommunications Act, 47 U.S.C. § 251"); *RCN Telcom Servs., Inc.*, 232 F. Supp.2d at 552, fn. 5 ("an interconnection agreement is part and parcel of the federal regulatory scheme and bears no resemblance to an ordinary, run-of-the-mill private contract"); *SBC Tex.*, at 4 ("[a]n interconnection agreement is not an ordinary private contract"); *E.Spire Commc'ns, Inc. v. N.M. Pub. Regulation Comm'n*, 392 F.3d 1204, 1207 (10th Cir. 2004) (noting that interconnection agreements are "instrument[s] arising within the context of ongoing federal and state regulation"). Interconnection agreements must set forth the "terms and conditions. . . to fulfill the duties" mandated by 47 U.S.C. §§ 251(b) and 252(c), 47 U.S.C. §§ 251(c)(1), and "many of the 'negotiated' provisions of interconnection agreements represent nothing more than an attempt to comply with the requirements of the 1996 Act." *AT&T Commc'ns of the S. States, Inc. v. BellSouth Telecom., Inc.*, 229 F.3d 457, 465 (4th Cir. 2000). Agreements are "cabined by the obvious recognition that the parties to the agreement had to agree within the parameters fixed by the federal standards set out in 47 U.S.C. §§ 251 and 252." *BellSouth Telecom., Inc. v. MCImetro Access Transmission Servs., Inc.*, 317 F.3d 1270, 1281 (11th Cir. 2003) (Anderson, J., concurring). Complainants' insistence on the preference for private negotiation is overly simplistic and provides no reason for the Commission to reconsider its decision – especially

when, as here, not only does the Commission's jurisdiction flow from the 1996 Act, but the entire case turns on an interpretation of Section 252 of the 1996 Act as well.

While the 1996 Act prefers private negotiation, if no agreement is reached the 1996 Act provides for mediation and even compulsory arbitration, at the request of either party. Indeed, the provisions on which Complainants relied in their Amended Complaint were not the product of free and voluntary negotiation; in fact, these interconnection agreements were arbitrated, and their terms were mandated to comply with federal law. Furthermore, any agreement reached by negotiation or arbitration must be reviewed and approved by the state commission in accordance with the standards outlined in 47 U.S.C. §§ 251 and 252. Given this context, the Commission was correct to find that interconnection agreements are required by the 1996 Act.

The second key distinction in *McVeigh* on which the Supreme Court placed great weight was the fact that FEHBA's jurisdictional provision (5 U.S.C. § 8912), extended federal jurisdiction to civil actions only against the United States and that Congress had "considered jurisdictional issues in enacting FEHBA [,] . . confer[ring] jurisdiction where it found it necessary to do so." *McVeigh,* 126 S. Ct. at 2134. "Had Congress found it necessary or proper to extend federal jurisdiction further, in particular, to encompass contract-derived reimbursement claims between carriers and insured workers, it would have been easy enough to say so." *Id.* at 2134-35.

In contrast, Congress clearly considered the jurisdictional issues when enacting the 1996 Act. As discussed earlier, Congress intended that Section 415 reach "all complaints against carriers for the recovery of damages not based on overcharges," whether in federal court, before the FCC, or in front of a state commission. This broad scope is consistent with Congress' desire to assure national uniformity in the Act's application.

Moreover, the situation here is more closely analogous to the statutory scheme embodied in the Federal Tort Claims Act ("FTCA") than to the FEHBA. While the FTCA looks to state law for the applicable substantive tort law, "Congress has specifically provided a federal limitations period in 28 U.S.C. §§ 2675(a) and 2401(b), and the interpretation of that limitation is a matter of federal law." *Bailey v. United States*, 642 F.2d 344, fn.1 (9th Cir. 1981) (adding that "Appellants are mistaken in arguing that state law governs the jurisdictional question in this case"). Similarly here, Congress enacted a clear limitations period in Section 415 of the Act, and its two-year limitation period controls the Commission's jurisdiction and the timing of Complainants' action. Complainants erroneously conflate application of state law contract principles with application of jurisdictional limits. (*See e.g.,* Petition, p. 4 (asserting that "referencing federal law in an interconnection agreement does not thereby incorporate a federal statute of limitations or render the interpretation of the contract a question of federal law").)

Ninth Circuit law makes clear that interconnection agreements, like federal tariffs, have the force of law and therefore the Commission correctly relied on well-settled case law to bar Complainants' action. Furthermore, Complainants' reliance on case law intimating that state law controls the interpretation of interconnection agreements is misplaced. For these reasons, Complainants' tortured attempts to distinguish interconnection agreements from federal tariffs fail.

## CONCLUSION

In short, Complainants have shown no error in law or good cause for the Commission to reconsider Order No. 06-230. Accordingly, Qwest respectfully submits that the Commission should deny Complainants' petition in its entirety.

Dated this 25th day of July, 2006.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

## UM 1232

I hereby certify that on the 25th day of July, 2006, I served the foregoing **QWEST CORPORATION'S OPPOSITION TO PETITION OF AT&T COMMUNICATIONS OF THE PACIFIC NORTHWEST, INC., AND TCG OREGON FOR REHEARING AND RECONSIDERATION OF ORDER NO. 06-230** in the above entitled docket on the following persons via U.S. Mail, by mailing a correct copy to them in a sealed envelope, with postage prepaid, addressed to them at their regular office address shown below, and deposited in the U.S. post office at Portland, Oregon.

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DATED this 25th day of July, 2006.

**QWEST CORPORATION**

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