ORDER NO. 06-230

ENTERED 05/11/06

BEFORE THE PUBLIC UTILITY COMMISSION

OF OREGON

UM 1232

AT&T COMMUNICATIONS OF THE PACIFIC NORTHWEST, INC., and TCG OREGON, TIME WARNER TELECOM OF OREGON, LLC, and INTEGRA TELECOM OF OREGON, INC.,	)	ORDER
Complainants,	)	
v.	)	
QWEST CORPORATION,	)	
Defendant.	)	

DISPOSITION: MOTION TO DISMISS GRANTED

This case is the second part of our review of Qwest Corporation's (Qwest) failure to file certain interconnection agreements with the Commission, in violation of state and federal law. In reviewing this motion, we first discuss our investigation and resolution of docket UM 1168, then address the issues raised in this docket.

Staff Investigation and Resolution of UM 1168

On September 7, 2004, the Commission adopted Staff's recommendation to formally open docket UM 1168 to investigate allegations that Qwest had failed to file certain interconnection agreements for Commission approval. In its recommendation, Staff reported that the allegations first arose in Minnesota in 2002. *See* September 7, 2004 Public Meeting Regular Agenda, Item 3, Staff Memorandum ("Staff Report"). In response, Qwest petitioned the Federal Communications Commission (FCC) for a declaratory ruling that the contracts did not need to be filed with state commissions because they were not interconnection agreements under the statute; the FCC ruled against Qwest's interpretation of the law. *See id.* Subsequently, several other states initiated investigations against Qwest, including Oregon, which began an informal investigation in March 2002. *See id.* at 4-5. Staff speculated that, in the unfiled agreements, Qwest gave preferential treatment to some competitive local exchange carriers (CLECs) in exchange for those CLECs declining to oppose the Qwest/ U S West merger and Qwest's Section 271 application at the FCC. *See id.*

at 3-4. According to the Staff report, the issue of unfiled contracts was raised by AT&T in the Section 271 process before the FCC:

> AT&T argued that Qwest's secret agreements with competitors were evidence of Qwest discriminatory practices, and that such practices were not consistent with the requirement that Qwest irreversibly open its local service markets to competition. AT&T pointed to provisions in some agreements where the CLEC agreed not to oppose Qwest's Section 271 application in exchange for more favorable treatment.

See id.

In the course of the informal investigation, Staff obtained advice from the Attorney General that ORS 759.990 did not allow the Commission to award refunds to CLECs harmed by Qwest's failure to file contracts. A meeting was held on September 30, 2004, between Qwest, Staff, and CLECs, many of whom became intervenors, to discuss the impact of the investigation.

A prehearing conference was held October 26, 2004, and a schedule was set to allow for submission of an issues list and testimony. Time Warner Telecom of Oregon LLC, Covad Communications Company, Integra Telecom of Oregon, Inc., Rio Communications, Inc., and Universal Telecom, Inc., intervened in the proceeding. The schedule was suspended while Qwest and Staff worked out a stipulation, which was submitted on February 4, 2005. The intervenors neither supported nor opposed the stipulation, and the stipulation between Qwest and Staff was ultimately adopted. *See* Order No. 05-783.

In that order, the Commission found that Qwest violated Oregon Administrative Rule (OAR) 860-016-0020(3) in failing to file 29 agreements, including three closely related pairs of agreements. Staff determined that failure to file 13 of the agreements constituted major violations, because there was discriminatory treatment of CLECs as a result. Sixteen of the violations were considered minor, because there was no discriminatory treatment. Consequently, the parties agreed to a penalty of $50,000 for 13 agreements, and $25,000 for 16 other agreements, resulting in a final settlement of $1,050,000, which was subsequently paid pursuant to a judgment entered by Marion County Circuit Court.

The stipulation and order did not compensate for any harm that may have been done to CLECs. The Commission stated:

> This settlement does not preclude the CLECs from pursuing other litigation. The Attorney General advised Staff that, under the applicable penalty provision, ORS 759.990, the Commission does not have the authority to award reparations for injuries suffered by CLECs due to Qwest's failure to file

> the agreements. *See* Staff/3. Intervenors did not provide any testimony regarding the impact of Qwest's failure to file certain contracts or opposing the settlement.

Order No. 05-783 at 3.

Complaint

Procedural History

On January 13, 2006, AT&T Communications of the Pacific Northwest, Inc., et al. (Complainants) filed a complaint against Qwest Corporation (Qwest). Complainants assert economic injury arising from Qwest Corporation's failure to provide nondiscriminatory access to terms and provisions in interconnection agreements that Qwest unlawfully did not file with the Commission. Specifically, Complainants premise their request for relief on four bases: (1) violation of federal law, 47 USC § 251, 252; (2) unjust discrimination in rates, ORS 759.260; (3) undue preferences and prejudices, ORS 759.275; and (4) breach of contract. *See* Amended Complaint, 7-10.

On February 2, 2006, Qwest filed a motion to dismiss on four grounds: (1) the Commission does not have jurisdiction to award the relief requested by Complainants; (2) the complaint is barred by the federal statute of limitations; (3) federal law does not provide any cause of action for which Complainants may sue; and (4) the filed rate doctrine prohibits the Commission from awarding damages.

On February 17, 2006, Complainants filed a response to Qwest's motion.[1] In its response, Complainants clarify that they are not seeking reparations based on Qwest's violation of federal law, *per se*, but only to the extent that federal provisions have been incorporated into their contracts. *See* Complainants' Response, 10. Based on this clarification, we conclude that no independent violations under federal law are asserted as grounds for relief in this docket.

Legal Standard

In reviewing Qwest's motion to dismiss, "we assume the truth of all allegations, as well as any inferences that may be drawn, and view them in the light most favorable to the nonmoving party. Our review of a motion to dismiss based on the expiration of the statute of limitations, ORCP 21A(9), is limited to what appears on the face of the

[1] Qwest also filed a Reply to Complainants' Response to Motion to Dismiss (Feb 24, 2006); Complainants filed a Supplemental Authority and Request to Supplement Record (Feb 28, 2006); and Qwest filed a Response to Complainants' Notice of Supplemental Authority (Mar 3, 2006). OAR 860-013-0050(3)(d) provides for a response to a motion, but no rule provides for a third, fourth, or even a fifth round of briefing, nor did the parties provide a reason why the extra filings should be taken into account. The additional filings are not considered in this ruling.

pleading." *Dauven v. St. Vincent Hospital and Medical Center*, 130 Or App 584, 586 (1994) (citations omitted). "To survive a motion to dismiss on limitations grounds, a complaint does not have to show that the action *is* timely; it suffices if the complaint does not reveal on its face that the action is *not* timely." *Munsey v. Plumbers' Local #51*, 85 Or App 396, 399 (1987) (citing ORCP 21A(9)). With these standards in mind, we address the motion to dismiss by each remaining claim: violation of state law and breach of contract.

ORS 759.260 and ORS 759.275

First, Qwest argues that the Commission does not have the jurisdiction to award private refunds for violations of ORS 759.260 and ORS 759.275. *See* Qwest Motion to Dismiss, 3. Further, Qwest asserts that any injury to Complainants is speculative at best, and cannot be quantified, in contrast to previous Commission orders awarding damages to private parties. *See id.* at 6-7. Qwest also argues that the federal statute of limitations bars Complainants' state claims. *See id.* at 12-13.

Complainants respond that this complaint is not governed by the specific statutes in chapter 759, but the more general complaint statutes in chapter 756. *See* Complainants' Response, 6. In particular, Complainants argue that ORS 756.500(2) contemplates that the Commission may grant an order of reparation to a party to a complaint proceeding. *See id.* Complainants also cite several cases in which the Commission has awarded refunds. *See id.* at 7-9 (citing *In re Metro One*, IC 1, Order No. 00-623 (OPUC Oct 6, 2000), and *Pacific Northwest Bell v. Katz*, 116 Or App 302 (1992), *rev den* 316 Or 528 (1993)).

ORS 759.990 sets forth the Commission's jurisdiction to set penalties for certain actions by a telecommunications carrier. The statute sets out the penalties for both ORS 759.260 and 759.275, a fine of not less than one hundred dollars. *See* ORS 759.990(1), (2). To impose the fine, the Commission must make proper findings in an order; then, the Attorney General takes the order to Marion County Circuit Court to obtain a judgment against the offending carrier. *See generally* ORS 756.160(4). Where the Oregon legislature establishes a statutory right that did not exist at common law, it also establishes the exclusive remedy. *See Gilbertson v. McLean et al*, 216 Or 629, 635-36 (1959). This doctrine was confirmed by the Court of Appeals, which held that a common law remedy may remain if its purpose is to provide relief for a different sort of harm than that contemplated by the statutory remedy. *See Carsner v. Freightliner Corporation*, 69 Or App 666, 673-74, *rev den* 298 Or 334 (1984).

This case more closely resembles *Gilbertson* than *Carsner*. In this case, the legislature established a statutory right that did not exist at common law, and also set forth the remedy to any violations of that right. Specifically, the law that put into place the unjust discrimination statutes, *see* Or L 1987, ch 447, §§ 46, 49, also purposely stated the remedies for violations of those statutes, *see id.* at § 52. For this reason, the Commission does not have the jurisdiction to award the relief that Complainants seek for Qwest's alleged

violations of ORS 759.260 and 759.275.[2] Complainants' claims for damages based on violations of ORS 759.260 and 759.275 are dismissed.

Breach of Contract

Complainants contend that Qwest violated the terms of existing interconnection agreements by not offering them similar terms and conditions contained in the unfiled contracts. Complainants set forth similar provisions in four contracts to show how Qwest breached the contract. For example, Sections 36 of the AT&T/Qwest Agreement, ARB 3, and the Integra/Qwest Agreement, ARB 216, provide:

> ILEC will offer Network Elements to CLEC on an unbundled basis on rates, terms and conditions that are just, reasonable and non-discriminatory in accordance with the terms and conditions of this Agreement, the Oregon Statutes and Regulations and the requirements of Section 251 and Section 252 of the Federal Act.

Qwest argues that, to the extent violations of federal law give rise to Complainants' breach of contract claims, the federal statute of limitations of two years applies under 47 USC § 415. *See* Qwest Motion to Dismiss, 2 n 2. In support of its argument, Qwest cites *Pavlak v. Church*, 727 F2d 1425 (9th Cir 1984), in which the court held that a civil rights claim that had no statute of limitations could import the nearest applicable limit, in that case, the statute of limitations for violations of the Telecommunications Act. Because the Commission is regulating telecommunications on behalf of Congress under federal law, Qwest maintains that the federal statute of limitations should apply. *See* Qwest Motion to Dismiss, 9-10. Qwest asserts that the statute of limitations began running when the Complainants found out about the unfiled contracts in Minnesota in March 2002. *See id.* at 11.

Complainants respond that they are asserting a breach of contract, and that the interconnection agreements between them and Qwest integrated provisions of state and federal law requiring the filing of contracts and opportunity to opt in to those contracts. *See* Complainants' Response, 11. They argue that the applicable statute of limitations is found in Oregon law and provides a six-year limitation on actions "upon a contract" or "upon a liability created by statute." *See* ORS 12.080(1), (2). Even if the federal statute of limitations is found to apply, Complainants argue that the time of discovery was the date on which the protective order in the unfiled contracts docket was issued, October 25, 2004. *See* Complainants' Response, 11-12. Further, Complainants state that any statute of limitations should be tolled for the duration of the unfiled contracts case, in which they were pursuing their rights through that case. *See id.* at 12.

[2] Because private claims for refunds are not permitted under the statutory framework, there is no need to decide at this time whether the Commission may award refunds under ORS 756.500.

First, although Complainants attempt to posit their claims as breach of contract claims, the violations they assert are actually of federal law. The interconnection agreements are required under the Telecommunications Act, 47 USC § 252, and the provisions cited by Complainants directly implicate federal law. Even Complainants state, "regardless of whether the Commission finds that Complainants have brought, or could bring, an independent action for violation of Section 252(i), the Amended Complaint states a cause of action for breach of contract that incorporates Qwest's obligations under Section 252(i)." Complainants' Response, 10. These thinly veiled claims of violations of federal law fall under the federal Communications Act statute of limitations, 47 USC § 415, of two years from accrual.

Support for this characterization of Complainants' breach of contract claims can be found in federal case law, which has more often dealt with the question of whether state law breach of contract claims should be heard in federal court because they were really claims under federal law. In *Marcus v. AT&T*, 138 F3d 46, 54 (2nd Cir 1998), a federal court stated that an adjudicator must carefully examine a telecommunications claim under state law to determine whether it "actually arose under federal law," or arose under state law, although the question in that case was whether the case should be removed to federal court. *See id.* at 55. In that case, a breach of warranty claim that arose under a tariff required by the Federal Communications Act was considered a matter of federal law, and not strictly within the bounds of state law. *See id.* at 55-56. Similarly, in *MFS International, Inc. v. International Telecom Ltd.*, 50 F Supp 2d 517, 520 (ED Va 1999), the court stated that "state law claims themselves will be preempted if, on close scrutiny, they are revealed to be actions based on the MFS tariff masquerading as state law claims." In that case, the court found that the breach of contract claims were actually actions under the federally filed tariff, which arise under the federal telecommunications act, and are therefore subject to the federal statute of limitations. *See id.* at 521. Where the action "is necessarily based on [federal law] rather than on any contract," the federal statute of limitations under section 415(a) applied. *See id.* at 524.

The Telecommunications Act does not preempt all claims related to violations of its provisions. In fact, the Act provides a savings clause: "Nothing in this Act contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this Act are in addition to such remedies." 47 USC § 414. This statute has been held to permit state law actions barring fraudulent and deceptive advertisement and billing practices and to preserve state laws protecting privacy. *See Higgins v. AT&T*, 697 F Supp 220, 222-23 (ED Va 1988). In the present case, Complainants' allege Qwest violated section 252(i), thereby depriving them of the opportunity to opt into more favorable contracts. These claims squarely fall under federal law and the kinds of harms contemplated by the federal telecommunications framework, so the breach of contract claims may not be made separately from the violations of federal law and are not otherwise preserved by 47 USC § 414.[3]

[3] Under the analysis found in *Marcus*, it is unclear whether Complainants may even have a separate claim for breach of contract for the alleged violations of federal law. Qwest makes no such argument, and there is no

For these reasons, we conclude the Act's statute of limitations applies to Complainants' breach of contract claims. That provision states: "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." 47 USC § 415(b). The remaining question is when that two-year limitation began. Complainants argue that the clock should begin running from the time the Complainants had access to the unfiled contracts in Oregon, when the protective order was issued in UM 1168 on October 25, 2004. Qwest argues that the time begins to run at the time of the unfiled contracts dispute in Minnesota, in March 2002.

"The general rule is that a cause of action accrues when a plaintiff knows or has reason to know of the harm or injury that is the basis of the cause of action." *See MFS International, Inc.*, 50 F Supp 2d at 524. Qwest notes, and Complainants do not dispute, that Minnesota began its investigation in March 2002. *See* Qwest Motion to Dismiss, 11. AT&T and Time Warner were parties to the Minnesota case in 2002, and AT&T and Integra were named defendants in a similar case before the Washington Utilities and Transportation Commission in 2003. "Based on the Minnesota complaint, Oregon and many of the Qwest states soon started investigations of Qwest's secret contracts. Oregon staff began an informal investigation in March 2002." *See* Staff Report, 2. In fact, AT&T initially raised the issue in Section 271 proceedings before the FCC and the states and filed its first complaint in Iowa in February 2002. *See id.* at 4-5. Based on Complainants' awareness of unfiled contracts in other states, they had "reason to know of the harm" that provided the basis of their claims beginning in March 2002.

Complainants assert that if the clock begins to run in March 2002, then the time should be tolled while they were pursuing their rights through the Staff investigation in UM 1168. While Complainants participated in that case, they did not preserve their rights to pursue a private cause of action. Equitable tolling will only be allowed in extraordinary circumstances: "Meant to 'ensure that the plaintiff is not, by dint of circumstances beyond his control, deprived of a reasonable time in which to file suit,' equitable tolling is unwarranted where a litigant has 'failed to exercise due diligence in preserving his legal rights.'" *See Communs Vending Corp of Ariz., Inc, v. FCC*, 365 F3d 1064, 1075 (DC Cir 2004) (citations omitted) (federal court reviewing Federal Communications Commission interpretation of 47 USC § 415). That court specifically rejected the plaintiffs' industry trade association filing of a petition for a declaratory ruling as evidence that plaintiffs had exercised due diligence in preserving their rights. *See id.* at 1076.

That situation is analogous to this one, in which Time Warner Telecom of Oregon, LLC, and Integra Telecom of Oregon, Inc., were intervenors in UM 1168, the Staff investigation into Qwest's failure to file interconnection agreements for Commission approval under Section 252(a)(1) of the Telecommunications Act. In response to a suggestion by Staff, the schedule in that case was suspended pending a stipulation, but there

---

need to decide whether Complainants make the separate claim, because in this instance, it is barred by the federal statute of limitations.

was no intervenor response requesting further proceedings. *See* UM 1168, Ruling (Dec 9, 2004). A testimony schedule was later set, but no intervenor submitted testimony. *See* UM 1168, Ruling (Mar 23, 2005). Given the lack of intervenor activity in that case, and the Complainant's failure to file a placeholder complaint at that time, it cannot be fairly said that Complainants diligently pursued their claims so that the statute of limitations should be tolled. Therefore, the breach of contract claims, which are based on federal law, are barred by the statute of limitations under 47 USC § 415.

Because the Commission does not have jurisdiction over the claims raised by Complainants, either because the requested relief is not available or the claim is time barred, the motion to dismiss the complaint in its entirety is granted.

ORDER

IT IS ORDERED that the motion to dismiss the complaint is granted.

Made, entered, and effective MAY 11 2006.

Lee Beyer
Chairman

John Savage
Commissioner

Ray Baum
Commissioner

A party may request rehearing or reconsideration of this order pursuant to ORS 756.561. A request for rehearing or reconsideration must be filed with the Commission within 60 days of the date of service of this order. The request must comply with the requirements in OAR 860-014-0095. A copy of any such request must also be served on each party to the proceeding as provided by OAR 860-013-0070(2). A party may appeal this order by filing a petition for review with the Court of Appeals in compliance with ORS 183.480-183.484.