Robert C. Brown,
Qwest Services Corp.
1801 California St., Suite 4900
Denver, CO 80202
(303) 672-5839
(303) 295-5988 (fax)
robert.brown@qwest.com

Ted D. Smith (3017)
STOEL RIVES LLP
201 South Main Street, Suite 1100
Salt Lake City, Utah 84111
(801) 328-3131
(801) 578-6999 (fax)
tsmith@stoel.com

Attorneys for Qwest Corporation

BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH

AT&T CORP., a New York Corporation; AT&T COMMUNICATIONS OF THE MOUNTAIN STATES, INC., a Colorado Corporation, Claimant, vs. QWEST CORPORATION, a Colorado Corporation, Respondent.	Docket No. 04-087-73 **QWEST CORPORATION'S (1) MOTION TO COMPEL RESPONSES TO DATA REQUESTS OR, IN THE ALTERNATIVE, MOTION TO EXPAND DATA REQUESTS, (2) MOTION TO VACATE PROCEDURAL SCHEDULE, (3) MOTION FOR A DISCOVERY CONFERENCE AND ORAL ARGUMENT, AND (4) MEMORANDUM IN SUPPORT OF MOTIONS.** **(Administrative Law Judge Steven F. Goodwill)**

I. QWEST MOTIONS

Qwest Corporation ("Qwest") hereby moves that the Utah Public Service Commission ("Commission") to:

1. Enter an ordering compelling the AT&T Corp. and AT&T Communications of the Mountain States, Inc. ("AT&T Claimants") to provide

responses to data requests 7(g) through 27 of Qwest Corporation's First Set of Data Requests to AT&T Corp. and AT&T Communications of the Mountain States, Inc. ("Qwest Data Requests") dated September 22, 2004 (a copy of which is attached hereto as Exhibit A). In the alternative, Qwest moves that the Commission either (1) enter an order granting Qwest leave to propound data requests 7(g) through 27 (as set forth on Exhibit A) and ordering the AT&T Claimants to respond thereto within a reasonable time or (2) allow Qwest to seek discovery through depositions and other available means of discovery.[1]

2. Vacate the scheduled dates in this docket set forth in the Scheduling Order of September 8, 2004 in order to allow adequate discovery to be completed.

3. Schedule and notice (on an expedited basis) a conference in this matter to hear oral arguments on the foregoing motions and to allow the parties to address broader issues relating to discovery, scheduling, and other procedural matters.

In support of these motions, Qwest has filed the Affidavit of Ted D. Smith.("Smith Aff.").

II. FACTUAL BACKGROUND

This docket is a significant case, both in terms of the legal and factual issues involved and in terms of the amounts at issue. By requesting refunds back to 1998, the AT&T Claimants' Request for Agency Action ("Complaint") seeks to require Qwest to refund several million dollars to them. During the scheduling conference in this case, Qwest took the position that since a similar docket (involving states other than Utah) is currently proceeding

[1] AT&T Claimants have failed to adequately respond to data requests 2(d), 6(c), 6(i), and 7(d). Thus, Qwest further moves that the AT&T Claimants be required to respond to those requests. These issues can be addressed on oral argument.

before the Federal Communications Commission ("FCC"),[2] the factual issues that needed to be resolved through discovery in this docket could be handled in a fairly straightforward manner so that the parties could proceed with relative speed to file cross motions for summary judgment. Unfortunately, the position that the AT&T Claimants have taken on responding to the data requests propounded by Qwest now disclose that discovery issues will now take greater prominence and, unfortunately, will involve serious controversy.

During the prehearing scheduling conference, Qwest stated that it felt this matter could potentially be resolved by simultaneous motions for summary judgment, following one round of *written* discovery. The AT&T Claimants and Division of Public Utilities ("Division") agreed with that general proposition. Thus, the parties agreed to submit discovery requests to each other on or before September 22, 2004. At the conference, Qwest stated that its discovery would focus on identifying and sorting out the AT&T Claimants and other AT&T entities that may have been involved in the issues in this docket and in gaining specific information about the use and occupancy of the conduit at issue in Utah. True to its word, Qwest's written data requests focus on those general issues.

Contrary to the allegation in Claimant's Response to Qwest Corporation's First Set of Data Requests to AT&T Corp. and AT&T Communications of the Mountain States, Inc. ("AT&T's Discovery Response"), attached hereto as Exhibit B, the parties to the prehearing conference did not agree, either expressly or impliedly, to limit discovery to 25 written interrogatories. (Smith Aff. ¶¶ 4-5). Indeed, the Division of Public Utilities was clear that it could not limit itself in any manner. (*Id.*)

[2] In addition, similar cases have now been filed in Washington and Idaho.

On September 22, 2004, both the AT&T Claimants and Qwest propounded discovery requests to each other. The AT&T requests consisted of Requests for Admissions, Request for Data, and Request for Production. The Qwest requests were denoted as "Data Requests" and were submitted in the style and format in which informal data requests are typically submitted in cases before the Utah Commission (*i.e.*, where "interrogatories" and "requests for production of documents" are typically made part of the same set of requests) under the Commission's informal discovery rule. Rules of Practice and Procedure, Rule R746-100-8(A). The 27 data requests, with subparts, can be viewed as exceeding 60 separate questions. (Smith Aff. ¶ 6). However, nothing in Rule R746-100-8(A) imposes any predetermined limitation on the number of data requests that can be propounded.

On September 28, 2004, Messrs. Thompson and Oldroyd, counsel for Claimants, contacted Ted Smith, counsel for Qwest, by telephone. Mr. Thompson stated that Qwest's responses exceeded the 25 question limit in Utah Rules of Civil Procedure ("URCP") Rule 33(a),[3] and asked Mr. Smith whether Qwest would voluntarily limit the number of questions. Mr. Smith noted that AT&T recently propounded several hundred data requests to Qwest in the Triennial Review Docket (Docket No. 03-999-04), but nevertheless agreed to contact his client. (Smith Aff. ¶ 7). In the meantime, Mr. Smith consulted with other attorneys who regularly practice before the Commission and asked whether they were aware of the Commission ever having imposed the 25 question limit on data requests propounded by parties in Commission dockets. None of them could ever recall such a limitation every having been imposed by the Commission. (*Id.* ¶ 8).

[3] The formal rules of discovery may be followed pursuant to the Commission formal discovery rule found in R746-100-8(B).

On or about October 6, 2004, Mr. Smith contacted Mr. Oldroyd and informed him that Qwest believed the number and content of the data requests it had propounded to the AT&T Claimants were reasonable and that the requests were consistent with the Commission's rules and practice. He thus stated that Qwest would not voluntarily eliminate any of them. Mr. Smith then asked whether the AT&T Claimants still intended to respond to only 25 subparts because, if so, Qwest had instructed him to immediately request a discovery conference with Judge Goodwill so that the matter could be resolved prior to the date discovery responses were due (October 13). (*Id.* ¶ 9). Mr. Oldroyd informed Mr. Smith that, based on his most recent conversations with his client, it was his understanding that the AT&T Claimants intended to answer all of the questions, although he noted that they might object to some of them on other grounds. (*Id*). Mr. Smith stated that, if that were the case, Qwest would not seek an immediate discovery conference with Judge Goodwill. (*Id.*). Mr. Smith also asked Mr. Oldroyd to immediately inform him if the AT&T Claimants changed their position on that issue, and Mr. Oldroyd agreed to do so. (*Id.*).

On the basis of Mr. Oldroyd's statement of the AT&T Claimants' intentions and his assurance that he would inform Mr. Smith of anything to the contrary, Qwest did not seek a discovery conference at that time. (*Id.* ¶ 10). At no time between the October 6, 2004 conversation between Mr. Smith and Mr. Oldroyd and the emailing of the discovery responses to Qwest by the AT&T Claimants on October 13, 2004, did anyone on behalf of AT&T contact Mr. Smith to inform him that the AT&T Claimants had changed their plan and now intended to limit their responses to the first 25 subparts of Qwest's data requests. (*Id.* ¶ 11).

In their AT&T Discovery Responses (Exhibit B), the AT&T Claimants have answered some, but not all, of the first 25 subparts of Qwest's data requests, but have arbitrarily ended

their responses with data request 7(f) (the 25th subpart). The AT&T claimants refused to respond to data requests 7(g) through 27 on the ground that these requests exceed the permitted number of interrogatories under URCP 33(a).

On October 14, 2004, after receiving the AT&T Claimants' responses, Mr. Smith discussed this matter with Mr. Oldroyd, expressing Qwest's displeasure with the AT&T Claimants' failure to respond to the questions as he had been informed they would, and noting that Qwest had instructed him, in light of these events, to seek relief from the Commission. Mr. Oldroyd made no statement to him to indicate that the AT&T Claimants were willing to change their position on this issue, although he did indicate that perhaps a discovery conference would be appropriate. (Smith Aff. ¶ 12).

III. DISCOVERY AT THE COMMISSION

The purpose of discovery before Utah administrative agencies (including the Commission) is to "permit the parties to obtain *all* relevant information necessary to support their claims or defenses." Utah Code Ann. § 63-46b-7(1) (emphasis added). The Commission has had a longstanding policy of encouraging parties to keep the discovery process as informal and as flexible as possible. Thus, while formal discovery may be pursued, the Commission has adopted an informal discovery rule that allows "[i]nformational queries termed 'data requests' which have been typically used by parties practicing before the Commission." Rule R746-100-8(A). These data requests "typically include written interrogatories and requests for production." (*Id*.) There is nothing in the Commission rules to indicate that there is any limitation on the number of data requests a party may propound, other than an inference that the number of data requests must be reasonable. The goal of the rule is "simplify issues and and expedite the proceeding."

The Commission rules also allow formal discovery to be pursued under the Utah Rules of Civil Procedure ("URCP"). Rule R746-100-8(B). One of those formal rules under the URCP, Rule 33(a), is the source for the AT&T Claimants' argument that they need not respond to more than 25 questions.[4]

In this case, Qwest's discovery was consistent with the informal discovery rule. The requests are denoted as "data requests," and are a combination of interrogatories and requests for production of documents. Thus, since Qwest's discovery was clearly submitted pursuant to the informal discovery provision of the Commission Rule, there is nothing other than a reasonable limitation on the number of questions that can be propounded.

While Qwest believes its requests clearly fall within the informal discovery provision, the entire debate between "informal" and "formal" misses the most important point, which is illustrated by another provision of the Commission's rules: "In situations in which there is no provision in these rules, the Utah Rules of Civil Procedure shall govern, *unless the Commission considers them to be unworkable or inappropriate.*" Rule 746-100-1(D) (emphasis added). The point of this statement is that the URCP is not holy writ and that the Commission must take into account the fact that the Commission is not a court, that many provisions of the URCP simply do not work well in Commission proceedings, and that traditional procedures at the Commission often vary dramatically from civil litigation in the courts.

One of the critical differences between civil litigation practice and Commission practice is discovery, which is typically is done very differently at the Commission. For

[4] "Without leave of court or written stipulation, any party may serve upon any other party written interrogatories, not exceeding 25 in number including all discrete subparts . . . ." URCP 33(a).

example, depositions, while certainly not unheard of, are rare in Utah Commission dockets. Moreover, URCP 26 contains many provisions related to initial disclosures and pretrial disclosures that are not followed in Commission matters. Indeed, one of the reasons a limitation was placed on the number of interrogatories in Rule 33(a) is the fact that in civil litigation in Utah courts, parties have a burden of making significant initial disclosures under Rule 26. Those disclosures include, among other things, "a copy of, or a description by category and location of, all discoverable documents, data compilations, and tangible things in the possession, custody, and control of the party . . . ." (URCP 26(a)(1)(B)). Many of the data requests that the AT&T Claimants have refused to answer relate directly to these issues.[5] But the initial disclosures contemplated by Rule 26 are certainly not typically made in Commission dockets—and have not been made by the AT&T Claimants in this case. On the other hand, discovery at the Commission is most often done through written data requests, which are often extensive. Qwest is unaware of any time that the Commission has limited such requests to the 25 question limitation in URCP 33(a).

Qwest's description of common practice before the Commission is well illustrated by AT&T's own past actions. Indeed, AT&T's own past practice makes it ironic that the AT&T Claimants are so adamant that they cannot be required to answer more than 25 questions in this case. Late last year, in the Utah Triennial Review Docket (Docket No. 03-999-04), AT&T entities (including one of the claimants here, AT&T Communications of the Mountain

[5] For example, in data requests 13 and 14 and their subparts, Qwest requested information and documents relating to AT&T Corp and The American Telephone and Telegraph Company, their authority to operate in Utah, copies of their CLEC certificates, and their interconnection agreements with Qwest. All of this information goes directly to issues relating to their legal authority or ability to request the SGAT rates they now seek despite having previously entered into a binding 20-year contract for conduit access on different terms and conditions. Under the formal discovery rules embodied in URCP 26, the AT&T Claimants would have been required to disclose all of this information at the outset of this case.

States, Inc.) propounded three sets of discovery to Qwest (copies of which are attached as Exhibits C, D, and E). These three sets consisted of 240 separate questions; however, with subparts, they consisted of over 525 separate questions. Qwest likewise propounded discovery to AT&T that exceeded the 25 question limit of URCP 33(a). While AT&T objected to many of these requests on other grounds, it did not object on the ground that Qwest had exceed the permissible limit of the rules of formal discovery.

In the 2002 Loop Cost docket (Docket No. 01-049-85), AT&T entities (also including AT&T Communications of the Mountain States, Inc.) submitted four sets of data requests to Qwest (copies of which are attached as Exhibits F, G, H, and I) consisting of 28 questions. But with subparts those 28 questions consisted of 533 separate questions. Question 10 in AT&T's second set alone had 268 subparts, while question 8 had 61 subparts. (See Exhibit G, at 8-16).

The AT&T Claimants want it both ways. When it serves their purpose, they propound discovery to Qwest amounting to hundreds of separate questions, but they want to play by different rules when the discovery requests are directed toward them. Indeed, the AT&T Claimants seek to hide behind the URCP while at the same time ignoring the mandatory disclosure requirements of those same rules.

The law of Utah has always been clear that the rules of discovery are for the purpose of assisting the parties in securing a just and inexpensive determination of a case. In *State v. Petty*, 17 Utah 2d 382, 412 P.2d 914 (Utah 1966), the Utah described the fundamental purposes of the then-new URCP:

> A primary purpose of the new Rules of Civil Procedure was to simplify procedures and to "secure the just, speedy, and inexpensive determination of every action." One of the means of accomplishing this is to permit discovery of information which will aid in eliminating controversial matters, and in identifying, narrowing and clarifying the

> issues on which contest may prove to be necessary. *Insofar as discovery will serve this purpose it should be liberally permitted.* This is, of course, not without limitation. It must be applied within reasonable bounds consistent with the objectives just stated . . . .
>
> The idea of making a lawsuit a game of tricks by keeping information secret to surprise the opposition at a critical moment is more suited to the fictionalized drama of stories and plays than to actual trials in a court of justice.[6]

Qwest's data requests are specifically designed to "aid in eliminating controversial matters, and in identifying, narrowing and clarifying the issues on which contest may prove to be necessary." As such, the Commission, as required by the Utah Supreme Court, should liberally permit such discovery and require responses to that discovery.

Qwest is certainly not suggesting that the Commission should adopt a policy that says "anything goes" in discovery. Indeed, there are reasonable limits that can and should be placed on discovery and the Commission, like any trier-of-fact, should be diligent in assuring that discovery, including informal data requests, be confined to information calculated to lead to the discovery of admissible evidence. But, at the same time, this Commission has avoided doctrinaire rules that limit its flexibility or that fail to recognize the unique features of practice before the Commission. To that end, the Commission has adopted a flexible discovery rule that allows informality and a recognition that written data requests are the principal means of discovery. AT&T's effort to avoid discovery on the basis of the 25 question limitation in URCP 33(a) is inconsistent with the Commission's rules, with past practice at the Commission, and with AT&T's own recent practice before the Commission.

The critical question is whether the data requests Qwest has propounded and that the AT&T Claimants have refused to answer on the basis of the 25 question limitation meets the

[6] 17 Utah 2d at 386, 412 P.2d at 917 *quoting* URCP 1(a) (emphasis added).

discovery standard of being calculated to lead to the discovery of admissible evidence. They clearly do.

IV. ARGUMENT—MOTION TO COMPEL

A. The AT&T Claimants Should Not Be Allowed to Avoid Answering Data Requests 7(g) through 27 of Qwest's Data Requests On The Basis of the 25 Question Limit in URCP 33(a).

For the reasons set forth above, the AT&T Claimants' refusal to respond at all to data requests 7(g) through 27 on the basis of the 25 question limit in URCP 33(a) should be rejected by the Commission and they should be ordered to immediately respond to them.

Qwest does not intend in this memorandum to go through each of the unanswered questions. However, even a casual review of them makes it clear that they are directly related to the issues in this case. For example, in some of them, Qwest attempts to obtain information that clarify the roles of three separate AT&T corporate entities (The American Telephone and Telegraph Company, AT&T Corp, and AT&T Communications of the Mountain States, Inc.). Two of them are claimants in this docket and the other appears throughout the documents attached to the Complaint. Several of the requests ask specific questions about documents attached to the Complaint—and if a document is important enough that the AT&T Claimants attached it to their Complaint, it follows that a few questions by Qwest relating to those documents fall well within the permissible limits of discovery. Other requests examine the operations of these entities in Utah, while others attempt to determine which of these entities occupied the conduit during relevant time periods. In other requests, Qwest attempts to determine which entity certain AT&T employees were employed by at the time certain documents were created. It is hard to conceive of information more pertinent to this case. It is also hard to conceive of questions more narrowly focused on the issues in this case.

B. In the Alternative, If the Commission Changes Course and for the First Time Concludes that the 25 Question Limit in URCP 33(a) Applies, Qwest Requests Leave to File Seek Responses to Requests 7(g) Through 27 or Be Allowed to Seek Discovery Through Depositions or Other Lawful Means.

Qwest has made it clear that it believes it would be a serious mistake for the Commission to follow the 25 question limit in URCP 33(a) for the reasons set forth above. However, if the Commission concludes that the limitation should apply to matters before the Commission and that the discovery propounded by Qwest falls under the Commission's formal discovery rule, Qwest hereby requests leave to exceed the 25 question limit in this docket, specifically that it be allowed to propound Requests 7(g) through 27 to the AT&T Claimants and that they be required to respond to them.

If URCP 33(a) applies, it is clear under that rule that the court (or in this case the Commission) can grant leave to exceed that limit. Given the standard set forth in the Utah Administrative Procedures Acts that the purpose of discovery before Utah administrative agencies is to "permit the parties to obtain all relevant information necessary to support their claims or defenses,"[7] Qwest should be allowed to propound the questions that the AT&T Claimants have refused to answer. They are directly related to relevant issues in this case and, in order for Qwest to obtain the relevant information necessary to support its defense, they must be answered.

In the alternative, Qwest should be allowed to proceed by deposition or other available methods of discovery. The AT&T Claimants, in refusing to provide complete answers, appear to be operating from the premise that Qwest should be completely precluded from further discovery. Of course, that should not be countenanced and is certainly not contemplated by the URCP. The 25 question limitation of URCP 33(a) does not exist in a vacuum. While

[7] Utah Code Ann. § 63-46b-7(1).

Qwest prefers to avoid depositions in this case, if it cannot proceed with written questions, then it must be allowed the opportunity to seek the information through other discovery means, including depositions under URCP 30. In that event, Qwest would be required to notice several depositions, including depositions under URCP 30(b)(6) to seek the kind of information it seeks via the written discovery that the AT&T Claimants have refused to answer. That, in turn, will simply make discovery more complicated and expensive for the parties—but if that is the only means that Qwest has to obtain relevant, discoverable information in this case, the Commission must allow Qwest to proceed down that path.

V. ARGUMENT—MOTION TO VACATE SCHEDULE

The Scheduling Order in this docket contemplates that the parties will file cross motions for summary judgment on November 5, 2004, a date that is only three weeks away. The parties (certainly Qwest) believed this aggressive schedule could be met only if adequate answers were timely made and only if documents were freely exchanged. In other words, this schedule would only work if the parties cooperated with each other. In that regard, Qwest provided a stack of responsive document to the AT&T Claimants and to the Division. Subject to prefatory objections, Qwest answered virtually every question propounded to it. In return, the AT&T Claimants have sought to play discovery games and restrict Qwest's access to the information that Qwest needs to defend itself.

This is a multi-million dollar case and, while it may well be resolved on summary judgment, Qwest is entitled to first pursue reasonable discovery in order to prepare its defense in this case—that, of course, includes the discovery necessary to prepare a meaningful motion for summary judgment supported by affidavits. The questions that the AT&T Claimants have refused to respond to are critical to Qwest's ability to file such a motion. Without answers to

many of these questions, there will clearly be unresolved issues of material fact that will prevent the entry of summary judgment for either party.[8]

Until these issues can be resolved, it would be highly prejudicial to Qwest to require it to move forward with a motion that depends on the very discovery it is trying to obtain. Therefore, pending the resolution of the issues set forth herein, the Commission should vacate the schedule.

VI. ARGUMENT—ORAL ARGUMENT AND EXPEDITED DISCOVERY CONFERENCE

Rule R746-100-8(C)(3) states:

> At any stage of a proceeding, the Commission may, on its own motion or that of a party, convene a conference of the parties to establish times for completion of discovery, the scope, necessity for, and terms of, protective orders, and other matters related to discovery.

Given the obvious disagreement of the parties on the issues discussed herein, Qwest formally requests that the Commission set an expedited discovery conference to address the motions set forth herein and to discuss more broadly the issues of discovery and scheduling in this matter.

Qwest further requests that the Commission allow oral argument on Qwest's motions at the same time.

VII. CONCLUSION

For the foregoing reasons, the Commission should set an expedited discovery conference, should vacate the schedule in this docket, and should grant Qwest's motions as set forth herein.

---

[8] *Jackson v. Mateus*, 2003 UT 18, ¶ 6, 70 P.3d 78, 80 ("Summary judgment is appropriate where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law."). That means that the case would then need to be resolved in an evidentiary hearing, all of which will increase the cost of litigation to the parties, the Division, and the Commission itself.

RESPECTFULLY SUBMITTED: June 14, 2018.

_____

Ted D. Smith
STOEL RIVES LLP

Robert C. Brown
Qwest Services Corporation

Attorneys for Qwest Corporation

CERTIFICATE OF SERVICE

I hereby certify that the foregoing **QWEST CORPORATION'S (1) MOTION TO COMPEL RESPONSES TO DATA REQUESTS OR, IN THE ALTERNATIVE, MOTION TO EXPAND DATA REQUESTS, (2) MOTION TO VACATE PROCEDURAL SCHEDULE, (3) MOTION FOR A DISCOVERY CONFERENCE AND ORAL ARGUMENT, AND (4) MEMORANDUM IN SUPPORT OF MOTIONS.** was served upon the following by electronic mail and by United States mail, first class postage prepaid, on October 15, 2002:

Jerold G. Oldroyd
Angela W. Adams
Ballard Spahr Andrews & Ingersoll, LLP
201 South Main Street, Suite 600
Salt Lake City, UT 84111-2221

Michael Ginsberg
Assistant Attorney General
Patricia T. Schmid
500 Heber M. Wells Building
160 East 300 South
Salt Lake City, UT 84111

J. Davidson Thomas
Genevieve D. Sapir
Rita Twari
Cole, Raywid & Braverman, LLP
1919 Pennsylvania Ave., N.W.
Second Floor
Washington, D.C. 20006

Richard W. Wolters
Meredith R. Harris
AT&T Corp.
One AT&T Way
Bedminster, NJ 07921

_____