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Submitted January 26, 2005

BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH

AT&T CORP., a New York Corporation;)	Docket No. 04-087-73
AT&T COMMUNICATIONS OF THE)	
MOUNTAIN STATES, INC., a Colorado	)	CLAIMANTS' OPPOSITION TO
Corporation,	)	QWEST CORPORATION'S:
	)	(1) MOTION FOR LEAVE TO
Claimant,	)	PROPOUND ADDITIONAL
vs.	)	DATA REQUESTS,
	)	(2) MOTION TO REVISE
QWEST CORPORATION, a Colorado	)	PROCEDURAL SCHEDULE, &
Corporation,	)	(3) MOTION REQUESTING
	)	PREHEARING PROCEDURAL
Respondent.	)	CONFERENCE
	)	(Administrative Law Judge Steven F.
	)	Goodwill)

Claimants AT&T Corp. and AT&T Communications of the Mountain States, Inc. (jointly “AT&T”) by and through their attorneys, Ballard, Spahr, Andrews and Ingersoll, LLP, submit this opposition to Respondent Qwest Corporation’s Motion For Leave To Propound Additional Data Requests, Motion to Revise Procedural Schedule, and Motion Requesting Pre-Hearing Procedural Conference.

I. INTRODUCTION

AT&T opposes Qwest’s Motion on the grounds that it attempts to draw irrelevant issues into the proceedings and draw the Commission’s attention away from the simple fact that Qwest is charging AT&T unlawful conduit rental rates, far in excess of those it charges other communications companies.

To begin, Qwest provides no justification for propounding additional rounds of discovery. Qwest had all of the information it needed to ask these questions in its first round of discovery but simply chose not to. Injecting additional rounds of discovery on the eve of the parties’ filing deadlines for dispositive motions is simply a tactic to disrupt and delay this proceeding.

Similarly, Qwest has provided no legal support for its position that the Commission must hold an evidentiary hearing in this case. All precedent points to the opposite conclusion: that Summary Judgment is an appropriate and accepted method the Commission may use to reach decisions. Qwest’s attempt to impose an evidentiary hearing into this process will complicate the issues and distract the Commission from the core issue in this case: that Qwest charges AT&T more for conduit than Qwest charges other carriers providing the same services. Put simply, an evidentiary hearing will provide no further relevant information to assist the Commission in resolving this dispute. As described in further detail below, all of the factual

issues Qwest raises are either not genuinely in dispute, are not relevant to the legal issues before the Commission, or are issues of law appropriate for Summary Judgment.

Finally, to the extent the Commission grants Qwest's motion for an evidentiary hearing, it should first decide as a matter of law Qwest's affirmative defense in which it challenges the Commission's jurisdiction over the case, generally. For that reason, AT&T requests that, to the extent the Commission grants Qwest's motion, the Commission also order that prior to any hearing, sufficient time be allocated to permit briefing and resolution of the issue of the Commission's jurisdiction that Qwest raised in its Answer.

II. NO ADDITIONAL DISCOVERY IS REQUIRED

AT&T believes that Qwest's true motive in filing this Motion to Propound Additional Discovery is twofold: (1) to attempt to use the Commission to obtain discovery related to the other proceedings that it is not otherwise entitled to receive, and (2) to obfuscate the real issues in this proceeding in an effort to increase AT&T's expenses and delay AT&T's entitlement to just, reasonable, and non-discriminatory conduit rental rates.

AT&T generally opposes Qwest's Motion on the grounds that Qwest has failed to provide any factual or legal support for its claim that additional discovery is necessary. The only argument Qwest makes in favor of its Motion is that "[t]he additional questions propounded in Washington go to the heart of several issues in this case. At the same time, they were limited in scope and clearly within the discovery standard followed by this Commission."¹ This is not sufficient. The parties could potentially continue with unlimited rounds of discovery following this standard. Furthermore, Qwest's cursory explanation fails to explain the relevance of the Washington requests to the Utah proceeding. Qwest's statement that "the responses to the

¹ Motion, p. 3.

second set of data requests in Washington (Exhibit B) clearly demonstrate that there are significant issues of material disputed fact in this case” fails to explain what facts are disputed and why they are material. Although AT&T is entitled to just, reasonable and nondiscriminatory rates under both Washington and Utah state laws, the state statutes governing the two complaints are not identical.

Furthermore, no extenuating circumstances warrant granting Qwest’s Motion. Qwest has had ample time to propound discovery and has failed to show any special circumstances warranting re-opening of discovery. Qwest’s contention that the discovery process has only just revealed facts on which the parties disagree and that this justifies additional discovery is not correct. As Qwest discussed at length in its Answer, the parties have been litigating substantially similar issues in the parallel FCC proceeding as well as before other state commissions for some time. AT&T’s claims, defenses and other positions on the issues were disclosed to Qwest in those other proceedings and Qwest has known about these positions for months.

With the exception of Proposed Data Request No. 27, Qwest has made no showing that the requests are related to requests made in the first round of discovery. In addition, for all of the requests, including No. 27, Qwest has made no showing that it was unable to ask these questions in its previous round of discovery. Nothing in Qwest’s requests builds on AT&T responses to Qwest’s First Set of Interrogatories and Requests for Production of Documents or is in any way related to information that Qwest did not have available to it when it propounded its initial set of discovery. Accordingly, the Commission should deny Qwest’s Motion.

Regarding Qwest’s Proposed Data Request No. 27, that request states:

In AT&T’s supplemental responses to Qwest Data Requests 19(a), 19(b), and 19(c) AT&T states that AT&T Communications of the Mountain States, Inc. has owned and operated the facilities in the conduit at issue since the date on

which each applicable license was executed. AT&T further states that it believes this information was “a fact that Claimants believe was know [sic] by Qwest or its predecessors-in-interest at the time.” (Response to 19(a) and 19(b)). AT&T makes similar allegations in the other referenced responses.

Please state, in detail, the basis for AT&T’s belief that Qwest or its predecessors knew that the true occupant of the conduit was AT&T Communications of the Mountain States and not AT&T Corp., the actual licensee. In connection with this response, please provide all documents that support or refute this contention. Further, provide the names of all persons, whether employed by Qwest or its predecessors, who AT&T contends knew of the conduit occupancy by AT&T of the Mountain States.

Qwest was free to request this information in its initial set of interrogatories but chose not to. AT&T’s position that Qwest knew or should have known that AT&T Communications of the Mountain States, Inc. was the true occupant of the conduit should come as no surprise to Qwest. AT&T disclosed this position and its basis for its position in connection with the FCC proceeding. Qwest cannot now claim that this is new information on which it should be entitled to conduct follow-up discovery.

More importantly, this request (like the others Qwest proposes to propound) does not meet the Commission’s standard for discovery: it is not “reasonably calculated to lead to the discovery of admissible evidence.”² Qwest has failed to make any showing that this information is relevant to the parties’ claims or defenses. Regardless of which entity occupies the conduit, Qwest has an obligation under state and federal law to provide just, reasonable and nondiscriminatory rates. Qwest’s alleged failure to understand which entity occupies the conduit does not alleviate it of that legal responsibility.

² Utah R. Civ. P. 26(b). If Qwest’s Motion is granted, AT&T will present specific objections based on Rule 26(b) to each of Qwest’s Proposed Data Requests.

At most, the issue suggested in Qwest's Answer, to which this alleged question relates, is whether AT&T Corp. assigned its rights under the conduit occupancy agreement without Qwest's approval. Yet, Qwest has not stated any claim of such an "unauthorized" assignment, and even if it had, whether AT&T had breached Article 18 of the conduit agreement is not legally relevant to whether Qwest has been overcharging AT&T for conduit occupancy for years.³ AT&T has not brought a claim sounding in contract: AT&T's sole basis for relief is its entitlement to just, reasonable and non-discriminatory rates in accordance with Utah Code Ann. §§ 54-3-1, 54-4-13 and 47 U.S.C. § 224.

In addition, AT&T is concerned that Qwest is attempting to use the Commission's discovery procedures to engage in a fishing expedition designed to discover information about new or potential claims, or information relevant to claims or issues in other jurisdictions. For example, Qwest's Proposed Data Request Nos. 34 and 35 seek information on AT&T's internal accounting and bookkeeping practices. Any questions regarding who "books" the expense or other questions about how AT&T manages its corporate accounting are far beyond the permissible scope of discovery. Indeed, Qwest has failed to state how AT&T's accounting data could possibly lead to the discovery of admissible evidence, as Rule 26(b) requires. This is not a case about AT&T's accounting or cost allocation. Neither Qwest nor AT&T has made any allegations whatsoever implicating AT&T's internal accounting procedures. AT&T's entitlement to relief under Utah Code Ann. §§ 54-3-1 and 54-4-13, *et seq.* does not depend in any way on how AT&T "books" its expenses.

³ Qwest has not and could not allege any damage or injury even if such an "unauthorized" assignment – from the parent to its wholly-owned subsidiary – had occurred. Qwest has been fully, indeed excessively, compensated. There is no charge by Qwest that there has been any damage or injury to the facilities. The issue, like all of the issues raised by Qwest, is a patent "smoke screen" -- a legal and factual irrelevancy meant to hide Qwest's obvious violation of the law.

Nor can Qwest claim that this information—or any other additional information it seeks—is crucial to its understanding of Complainants’ operations. Qwest has already admitted that it directly competes with AT&T.⁴ Any additional information about the services AT&T provides or the nuances of that competitive relationship is, therefore, moot. Qwest has made it abundantly clear that it has a thorough understanding of the AT&T’s operations in Qwest’s service territory. In a complaint Qwest filed against AT&T in federal court in May 2004, Qwest identifies the services AT&T Corp. provides in the other states in Qwest’s service area. Qwest specifically alleges:

Defendant AT&T Corp. is a New York corporation with its principal place of business in Bedminster, New Jersey. AT&T provides, among other things, telecommunications services throughout the United States, including the State of Colorado. AT&T is a long-distance carrier, which means that it carries calls between local telephone exchanges, whether within one state (“intrastate”) or between states (“interstate”). In the telecommunications industry, long-distance service is known as “interexchange” service, and long-distance carriers are known as “interexchange carriers.” AT&T is a common carrier under the Communications Act of 1934.

Defendants 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. are all wholly-owned subsidiaries of AT&T Corp. These operating subsidiaries provide long-distance services on behalf of AT&T Corp. and they are common carriers under the Communications Act of 1934.⁵

Based on Qwest’s own allegations in the separate federal action, it is clear that Qwest is well aware of AT&T Corp.’s operations in Qwest’s service territory and the services provided.

⁴ Complaint, ¶ 6, p. 9; ¶ 21, p. 14.

⁵ *Qwest Corporation v. AT&T Corp.*, Case No. 04-0909, filed May 5, 2004 (D. Colo.), a true and correct copy of excerpts from which is attached as Exhibit 1.

Any further inquiry into AT&T's internal bookkeeping procedures is clearly an attempt to cause further obfuscation of the issues toward the end of delaying AT&T's entitlement to relief.

That being said, Qwest has created issues that may implicate asset allocation and accounting in another unrelated proceeding currently within the FCC's jurisdiction. AT&T is very concerned that Qwest may be attempting to use the Commission's discovery process to obtain information related to claims or defenses in that matter. AT&T strongly urges this Commission to refuse to allow Qwest to abuse the discovery process in this way and to deny the Motion for Leave to Propound Additional Discovery.

Accordingly, the Commission should deny Qwest's Motion. However, should the Commission permit Qwest to propound additional discovery, fairness dictates that AT&T should also be permitted to propound additional discovery. Although AT&T had hoped this proceeding would remain focused on the core issues in this case, Qwest clearly seeks to draw in collateral issues. To the extent that the Commission permits Qwest to do so, AT&T will need the opportunity to conduct additional discovery to prepare responses to these collateral issues.

III. QWEST'S INTERPRETATION OF THE COMMISSION'S HEARING REQUIREMENT IS FLAWED

Qwest's argument that the Commission is not empowered to render a decision on AT&T's Complaint without a formal evidentiary hearing is superficial and unsupported by law. Conspicuously absent from Qwest's Motion is any legal basis for its conclusion that the Summary Judgment Motions and Hearings on those Motions will not satisfy the Commission's statutory requirements.

Qwest's interpretation is overly literal. Nothing in the statutes under which AT&T seek relief—Utah Code Ann. §§ 54-3-1 and 54-4-13—specify that the Commission must hold a live trial-type *evidentiary* hearing with detailed live testimony from a long list of witnesses that likely

would have little or nothing to add to the record necessary for this Commission to reach a decision here. Moreover, Qwest overlooks the fact that the Commission is empowered to hold hearings on the motions.⁶ There is no reason to believe that such a hearing would not satisfy any statutory requirement to conduct a hearing. Indeed, Qwest has cited no law supporting its arbitrary distinction between an evidentiary hearing and a hearing on dispositive motions. As a result, AT&T respectfully requests that the Commission reject Qwest's claim that applicable statutes mandate an evidentiary hearing, and resolve AT&T's Complaint based on a Motion for Summary Judgment.⁷

IV. NO MATERIAL FACTS ARE IN DISPUTE

At the outset, AT&T believes that Qwest's assertion that there are genuine issues of material fact in dispute is premature. The parties have not met to discuss a statement of stipulated facts, or even to determine which facts are indeed in dispute. More important, however, AT&T believes that any issues on which the parties could possibly disagree will not affect the Commission's ability to render a decision on the question presented by AT&T's Complaint, namely, whether AT&T is and has been entitled to just, reasonable and nondiscriminatory conduit rates, which are at least equal to those Qwest charges other communications carriers.

⁶ See Utah Admin. Code § 746-100-3 ("Motions may be submitted for the Commission's decision on either written or oral argument, and the filing of affidavits in support or contravention of the motion is permitted. ***If oral argument is sought, the party seeking oral argument shall arrange a hearing date*** with the Commission's Law and Motion calendar and provide at least five days written notice to affected parties, unless the Commission determines a shorter time period is needed.") (emphasis added).

⁷ The Washington Utilities and Transportation Commission has recently rejected Qwest's identical argument in the conduit case there. In his January 21, 2005, Prehearing Conference Order; Order Setting Schedule ¶¶ 9-10, Administrative Law Judge C. Robert Wallis held that a "hearing" on summary disposition motions was sufficient to satisfy the statutory language discussing a "hearing." While the Utah and Washington statutes are not identical, Judge Wallis' ruling is clearly persuasive in this identical attempt by Qwest in Utah.

Qwest identifies three categories of facts that it asserts “are or may be in dispute.”⁸ AT&T addresses each in turn.⁹

First, Qwest alleges that the issue of “whether Qwest’s predecessor had actual knowledge of the true occupant of the conduit” is in dispute.¹⁰ This is neither a material fact nor is it genuinely in dispute. Although AT&T believes it is quite clear that Qwest has had knowledge of the true occupant of the conduit, ultimately, this issue is not relevant or material to AT&T’s legal right to the same non-discriminatory conduit rates Qwest charges other carriers.

It is irrelevant to the application of Utah Code Ann. §§ 54-3-1, 54-4-13 or 47 U.S.C. § 224 whether Qwest’s predecessor had actual knowledge of the true occupant of the conduit. Even if, as Qwest asserts, it did not know that AT&T Communications of the Mountain States, Inc. was the entity occupying the conduit, as opposed to American Telephone and Telegraph, it does not change the fact that AT&T Communications of the Mountain States, Inc., which is certified by the Commission to provide both local and interexchange service, and its parent AT&T Corp. are legally entitled to be charged only just and reasonable rates on a nondiscriminatory basis. Utah Code Ann. §§ 54-3-1 and 54-4-13; *see also* 47 U.S.C. § 224.

At most, the issue suggested in Qwest’s Answer, to which this alleged question relates, is whether AT&T Corp. assigned its rights under the conduit occupancy agreement without Qwest’s approval. Yet, Qwest has not stated any claim of such an “unauthorized” assignment, and even if it had, whether AT&T has breached Article 18 of the conduit agreement is not legally

⁸ Qwest Motion, p. 4.

⁹ Qwest has filed motions similar to this Motion in Washington and Idaho as well. However, the issues Qwest identifies as “in dispute,” are not consistent throughout the three jurisdictions.

¹⁰ Qwest Motion, p. 4.

relevant to whether Qwest has been overcharging AT&T for conduit occupancy for years.¹¹ AT&T has not brought a claim sounding in contract: AT&T's sole basis for relief is its entitlement to just, reasonable and non-discriminatory rates in accordance with Utah Code Ann. §§ 54-3-1, 54-4-13 and 47 U.S.C. § 224.

Second, Qwest alleges that the issue of "how the contract rates were arrived at" is in dispute.¹² Again, this issue is not relevant, and is thus, not a "material" fact, nor is it genuinely in dispute. Utah Code Ann. §§ 54-3-1 and 54-4-43 entitle AT&T to just, reasonable, and nondiscriminatory conduit rental rates. Qwest has admitted in its Answer that the conduit rental rate it makes available pursuant to its SGAT is a just and reasonable rate.¹³ It is irrelevant, and thus, immaterial, how the contract rates were arrived at in 1988. Since that time, the law has changed, and Qwest is required, by its contract with AT&T and otherwise, to charge AT&T no more than a just and reasonable rate on a nondiscriminatory basis.¹⁴

The issue of materiality aside, there is no dispute over facts. For example, in discovery AT&T requested information about how Qwest calculated the \$2.10 to \$2.98 per foot rates at issue in this proceeding.¹⁵ Qwest responded that it did not have any such calculations.¹⁶ Similarly, AT&T has stated in response to Qwest discovery in Washington that it also has no

¹¹ Qwest has not and could not allege any damage or injury even if such an "unauthorized" assignment – from the parent to its wholly-owned subsidiary – had occurred. Qwest has been fully, indeed excessively, compensated. There is no charge by Qwest that there has been any damage or injury to the facilities. The issue, like all of the issues raised by Qwest, is a patent "smoke screen" -- a legal and factual irrelevancy meant to hide Qwest's obvious violation of the law.

¹² Qwest Motion, p. 4.

¹³ Answer, ¶ 6, p. 8; ¶ 21, p. 12.

¹⁴ Under Article 15 of the conduit agreement, subsequent changes in law were to be adhered to by the parties. (Complaint, Exhibit 4, Art. 15).

¹⁵ See Qwest Response to AT&T's First Set of Data Requests and Request for Production of Documents, Request No. AT&T 01-011I, a true and correct copy of excerpts from which is attached hereto as Exhibit 2.

¹⁶ *Id.*

records of any calculations or formulae used to reach these rates.¹⁷ AT&T's and Qwest's discovery responses do not create a dispute of fact – they demonstrate that no dispute exists. There is no dispute that neither party has evidence of how the rates were set originally. Given that the question of how they were established is legally irrelevant, the lack of evidence by either party eliminates issues, it does not create them. Qwest is simply attempting to fabricate a controversy where none exists to obscure its refusal to address the legal issues that are legitimately in dispute.

Third, Qwest alleges that the issue of “whether AT&T Corp. is authorized to construct facilities in the right of way” is in dispute.¹⁸ This is not legally relevant to anything in this case, and is not genuinely in dispute. Nowhere in § 54-3-1 or § 54-4-13, or any of the definitional provisions related thereto, does the authority of AT&T Corp. to occupy public ways come into play.¹⁹ In addition, even if legally relevant, there is no genuine dispute regarding this fact. AT&T is somewhat unclear what exactly Qwest believes to be in dispute, as this issue has not come up in the context of this docket. That notwithstanding, AT&T's authorizations with various franchising authorities are not subject to collateral attack in this proceeding. To the extent that Qwest challenges AT&T Corp.'s right to occupy public ways, operate or conduct business under its existing authorizations, then that is a question of law appropriate for summary determination and not an evidentiary hearing.²⁰

¹⁷ See AT&T's Response to Qwest's Third Set of Data Requests, Request No. 29 (Washington), a true and correct copy of excerpts from which is attached hereto as Exhibit 3.

¹⁸ Motion, ¶ 4.

¹⁹ Indeed, it is quite clear that this justification was simply left over from Qwest's identical Washington motion, where the Washington statutes at least give Qwest some ground for asking the question.

²⁰ For example, AT&T Corp. provides interstate long distance service pursuant to a tariff filed at the FCC under the name AT&T Communications (which is an unincorporated division of AT&T Corp.). As a telecommunications service provider, AT&T Corp. has a federal right to occupy public rights-of-way pursuant to 47 U.S.C. § 224. See *City of Auburn v. Qwest Corp.*, 260 F.3d 1160, 1775 (9th Cir. 2001), cert. denied, 534 U.S. 1079 (2002).

In sum, Qwest raises issues that are not relevant or material to AT&T's request for relief, are not genuinely in dispute, and/or are actually questions of law appropriate for summary judgment. As such, AT&T requests that the Commission deny Qwest's request for an evidentiary hearing. In the alternative, AT&T is confident that the record includes sufficient undisputed facts to support its claims on the legal issues. At a minimum, the Commission should permit AT&T to file its Motion for Summary Judgment before determining whether the facts warrant an evidentiary hearing.

V. THE COMMISSION SHOULD RESOLVE THE JURISDICTIONAL ISSUES FIRST

In the event that the Commission grants Qwest's request for an evidentiary hearing, AT&T requests that the Commission first resolve the issue of the Commission's jurisdiction over this matter so that the parties and the Commission do not undertake the cost of such a hearing only to risk the Commission holding it does not have jurisdiction afterward.

Qwest alleges, as an affirmative defense, that the Commission lacks jurisdiction over AT&T's complaint.²¹ Although AT&T disagrees with Qwest's position, it is nonetheless concerned about pursuing a lengthy adjudicatory process—especially if the Commission sets this matter for evidentiary hearing—with the basic question of jurisdiction hanging over the proceeding. AT&T sees no reason to consume the Commission's and the parties' resources with a full evidentiary hearing if the Commission is going to ultimately conclude that it lacks jurisdiction over the matter. For that reason, in the event that the Commission grants Qwest's request for an evidentiary hearing, AT&T requests that the Commission set a pleading cycle for briefing of the issue of the Commission's jurisdiction (in the form of a motion for partial

²¹ Qwest Answer, ¶ 3, pp. 7-8.

summary determination on Qwest's affirmative defense) and permit sufficient time for any evidentiary hearing to take place only after the Commission resolves the jurisdictional question.

VI. CONCLUSION

Because of the disruption to the previous procedural schedule by Qwest's current motion, AT&T does agree that the current procedural schedule should be altered. Otherwise, however, for the reasons set forth above, AT&T respectfully requests that the Commission deny Qwest's Motion to Revise the Procedural Schedule and Requesting Prehearing Conference. In the alternative, in the event that the Commission grants Qwest's motion for an evidentiary hearing, AT&T requests that the Commission order the parties to submit briefing on the question of jurisdiction before any further action takes place on this docket.

RESPECTFULLY SUBMITTED this 26th day of January, 2005.

**AT&T CORP. AND AT&T COMMUNICATIONS OF
THE MOUNTAIN STATES, INC.**

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CERTIFICATE OF SERVICE

I hereby certify that on the 26th day of January, 2005, I caused a true and correct copy of the foregoing **Claimants' Opposition To Qwest's Motion For Leave To Propound Additional Data Requests, Motion to Revise Procedural Schedule, and Motion Requesting Pre-Hearing Procedural Conference** to be hand-delivered and sent by electronic mail to:

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